EQUALITY, NON-DISCRIMINATION AND REASONABLE ACCOMMODATION: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) THROUGH COMPARATIVE PERSPECTIVES

By

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CHAPTER ONE: INTRODUCTION

I. INTRODUCTION

People with disabilities are a vulnerable and marginalized group in society. They face discrimination routinely in all spheres of their social life, and their human rights are constantly ignored. My dissertation proposes that people with disabilities are entitled to enjoy and exercise their human rights and fundamental freedoms on an equal basis with others. At the international, regional, and domestic level, development of the equality and non-discrimination norms serves as an essential facilitator to ensure that people with disabilities have full and effective participation and inclusion in society.

The past few decades witnessed a paradigm shift in the conception of disability from the medical model to the social model. The medical model of disability, as the name suggested, views functional limitations of persons with disabilities as an inevitable result of their own impairments, which prevent their full participation in society. Hence, the inability of people with disabilities to enjoy rights equally is their own personal problem. In contrast, the social model perceives disability as an interaction between people's impairments and the pervasive disabling barriers in society. Put another way, how disability impacts one's ability to exercise their rights on an equal basis with others cannot be fully explained without taking into account existing discriminatory barriers in society. Therefore, according to the social model, disabilities are not merely a personal tragedy as claimed by the medical model; rather, they needed to be addressed by the whole society.

Besides the paradigm shift in the perception of disability, there is also a change in disability law and policy from a social welfare approach towards a human rights-based approach. The social welfare approach views people with disabilities as in need of sympathy, care, assistance; namely, they are perceived as objects of charity. On the other hand, the human rights-based approach views persons with disabilities as holders of rights. The equality and non-discrimination norms mandate that people with disabilities shall be provided with adequate and necessary support to enable their exercise of all human rights and fundamental freedoms on an equal basis with others.

The United Nations Convention on the Rights of Persons with Disabilities[1] (thereafter "CRPD" or the "Convention"), as the first international human rights treaty in the twenty-first century, is specifically directed at people with disabilities to protect and promote their human rights. The CRPD not only encapsulates the paradigm shift mentioned above, but also embodies a progressive vision of equality and non-discrimination whose substance significantly exceeds the mandate of existing human rights treaties. The Convention embraces a multidimensional model of equality that aims to eliminate or alleviate deep-rooted structural inequalities and barriers that perpetuate disadvantage to persons with disabilities.

The CRPD represents the culmination of a long time and collective efforts at the international level to ensure that people with disabilities can enjoy existing human rights protection equally. The equality and non-discrimination norms, in particular with the reasonable accommodation duty, are the driving force of the Convention. They run like a golden thread across the substantive provisions of the Convention and breathe new life into human rights for people with disabilities. The overall goal of the CRPD is to break down the barriers that prevent the participation and inclusion of persons with disabilities on an equal basis with others in society. As Andrea Broderick vividly described, the Convention "symbolizes a bright light at the end of a long and dark tunnel of exclusion and marginalization."[2]

This chapter provides an introduction to the whole dissertation. It proceeds as follows: Section II addresses the research objectives and questions of the dissertation. Section III discusses the methodology employed for the research project, including various approaches to treaty interpretation, comparative methodology (comparative law analysis and comparative international law), and interdisciplinary methodology on equality and disability. Then section IV explores existing research gaps and how the dissertation may contribute to filling them. Section V provides an overview of the whole structure of the dissertation. Section VI examines some research limitations and discusses how future work can be conducted. Finally, section VII concludes this chapter.

[1] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) (hereinafter CRPD or the Convention).

[2] *See* ANDREA BRODERICK, THE LONG AND WINDING ROAD TO DISABILITY EQUALITY: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 2 (2015) [hereinafter "BRODERICK, THE LONG AND WINDING ROAD"].

II. RESEARCH QUESTIONS AND OBJECTIVES

The primary question of my research project is: Whether and how, both theoretically and empirically, can the equality and non-discrimination norms in the CRPD, *inter alia* through the mandate of reasonable accommodation duty, advance the equality of people with disabilities and increase their participation and inclusion in society? The core objectives of the thesis are three-fold. The first one is to analyze the precise legal meaning of the equality and non-discrimination norms in the CRPD. This understanding is important to demonstrate how the equality and non-discrimination norms embodied by the Convention can potentially promote the equal enjoyment and exercise of all human rights and fundamental freedoms by people with disabilities and, at the same time, improve their participation and inclusion in society. The second aim of my research is to devise a framework to assess the nature and scope of the obligation to provide reasonable accommodation upon states and individuals and, hopefully, to offer some normative justification and guidance in interpreting and applying reasonable accommodation duty in specific circumstances.

Thirdly, a particular emphasis throughout this project will be on the manner in which the equality and non-discrimination norms in the CRPD have already influenced, and can potentially influence, disability equality case law and policy at the national and regional level. A crucial aim of my thesis is to present in-depth analyses of the legal and philosophical aspects of reasonable accommodation from perspectives of the interrelatedness and interaction between national, regional, and international law and to explore its implications for reconstructing the equal rights of persons with disabilities.

III. METHODOLOGY

A. Treaty Interpretation

To analyze the normative content of rights and obligations contained in the CRPD, one primary research methodology employed throughout the dissertation is treaty interpretation. Generally speaking, the provisions of human rights treaties are vague and ambiguous. Though they allow states parties flexibility in fulfilling their treaty obligations tailored to domestic context, they leave significant room for different, or even contradictory interpretations. Therefore, it is critical to adopt a sound and widely accepted methodology to interpret the CRPD so as to ensure that the interpretive result is persuasive and coherent. In this connection, the Vienna Convention on the

Law of Treaties (the Vienna Convention or VCLT)[3] serves as the primary point of reference for treaty interpretation. The VCLT contains several interpretive rules and principles which are regarded as customary international law for interpreting the substance of treaty norms. In the subsections below, the Vienna rules and various interpretive approach will be delineated. Moreover, the debate over whether the special nature of human rights treaties warrants different rules of interpretation would be explored.

1. The Vienna Convention on the Law of Treaties

The exponentially increasing number of treaties have made their interpretation significantly important. The Vienna Convention on the Law of Treaties, signed on May 23, 1969, and entered into force on January 27, 1980, was intended to facilitate this process. Its rules on interpretation (articles 31-33, hereinafter the Vienna rules) apply to treaties generally, including those made before 1980. The International Court of Justice (ICJ), which is the principal judicial organ of the United Nations, has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties.[4] Because the rules contained in the VCLT reflect customary international law, they apply to any treaty interpretation whether the states involved are parties to the Vienna Convention or not. However, it should be noted that the Vienna rules only provide a framework that is generally applicable for treaty interpretation. It does not mean that the Vienna rules could resolve all interpretation issues or lead directly to a single "correct" answer in every case. Nor should the rules be perceived as an exclusive compilation of guidance on treaty interpretation. A well-reasoned interpretation through the use of other methods and principles is also possible to the extent that it is not in conflict with the Vienna rules.

Interpretation under article 31 of the Vienna Convention is a process of progressive encirclement where the interpretation starts with (1) the ordinary meaning of the terms of a treaty, (2) in their context, and (3) in light of the treaty's object and purpose. By cycling through this three-step inquiry, one gets closer and closer to the proper interpretation. Crucially, one caveat about the general rule must be kept in mind. The VCLT does not privilege any one of these three elements of the interpretation methods. In an actual dispute or issue where interpretation requires the application of the rules, the Vienna rules are to be applied holistically, not in bits.

[3] UN Doc A/Conf 39/28; UNTS 1155, 331; UKTS 58 (1980), Cmnd 7964; ATS 1974 No. 2; 8 ILM 679.
[4] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* Judgment, ICJ Reports 53, at 70, para 48 (1991).

a. Articles 31 and 32

Article 31 and article 32 of the VCLT are the most important provisions for interpreting the CRPD. Article 31, which is entitled "the general rule of interpretation," reads:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

The section of the VCLT covering treaty interpretation opens with article 31. Common usage describes this article and the next two as "the rules of interpretation." The title of article 31 shows that the whole of the article is the general rule. The use of the singular "rule" was deliberate. The International Law Commission's (ILC) Commentary articulated a "crucible" approach to interpretation:

> The Commission... intended to indicate that the application of the means of interpretation in the article [article 31] would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 [now 31] is entitled "General rule of interpretation" in the singular, not "General rules" in the plural, because the Commission desired to emphasize

> that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.[5]

Though formulated as rules, these provisions have a more liberal character. As Humphrey M. Waldock, the International Law Commission's Special Rapporteur maintained:

> The Commission was fully conscious... of the undesirability – if not impossibility – of confining the process of interpretation within rigid rules, and the provisions... do not appear to constitute a code of rules incompatible with the required degree of flexibility... In a sense all "rules" of interpretation have the character of "guidelines" since their application in a particular case depends so much on the application of the context and the circumstances of the point to be interpreted.[6]

Article 32 of the VCLT, which embodies the supplementary means of interpretation, provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

At the outset, it appears that article 31 and article 32 of the VCLT play different roles in interpretive exercise in light of the contrast between "means" in the heading of article 32 and "rule" in article 31. Further, article 31 ostensibly lays down a prescriptive role in each of its paragraphs using the mandatory "shall." On the other hand, article 32 offers an option: "recourse may be had to supplementary means." Nonetheless, in practice, the process of treaty interpretation almost inevitably involves consulting with the preparatory work (*travaux préparatoires*) to achieve a clear meaning of treaty provisions. Just as the "crucible" approach does not see the elements of the general rule as hierarchical or sequential, the distinction between the general rule and supplementary means should not necessarily render the latter secondary or subordinate.

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[5] *See* International Law Comm'n (ILC), Yearbook of International Law Commission, vol II, 219 para. 8 (1966), *cited in* Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation, in* THE OXFORD GUIDE TO TREATIES 480 (Duncan B. Hollis ed., 2012) [hereinafter "Gardiner, *The Vienna Convention Rules*"].

[6] International Law Comm'n (ILC), Sir Humphrey M. Waldock, *Sixth Report on the Law of Treaties* vol II, 94 para. 1 (1966).

In terms of its content, article 32 has two functions. The first one is to "confirm" the meaning established by applying the general rule for treaty interpretation through supplementary means, including preparatory work (*travaux préparatoires*). The second one is to "determine" the meaning where the application of the general rule leaves the meaning ambiguous or obscure or produces a manifestly absurd or unreasonable result. Obviously, for the latter, preparatory work plays a potentially crucial role in interpretation. The circumstances in which preparatory work is determinative are rare. However, the use of preparatory work to support an interpretation resulting from the application of the general rule is more common and may assume a range of roles according to the circumstances.[7]

When preparatory work is used to "confirm" a meaning, its role is, in effect, cumulative with the application of the general rule. There may be a sliding scale to the effect that the clearer the meaning resulting from the application of the general rule, the less precision is demanded from the preparatory work. From the attention courts and tribunals give to preparatory work, it is clear that the classification of preparatory work in a separate and supplementary means of interpretation has not resulted in an undue insistence on the primacy of the text. In contrast, the supplementary category of rules appears to have produced little diminution of their interpretative effect.[8]

b. Beyond the VCLT

The Vienna rules contain the general rules and principles of treaty interpretation. There is no indication in the rules what further means are to be used. As the rules mainly concern with *what* is to be taken into account, but not *how* evaluation of the elements is to be accomplished, there is scope to look beyond the rules. For example, traditional maxims of construction of legal instruments, such as *ejusdem generis* and *expressio unius est exclusio alterius*, can be utilized when analyzing the context of a treaty. There are additional doctrines relied by tribunals, which can be said to constitute customary international law. The principle of effectiveness, or *effet utile*, which means that an interpretation should either avoid rendering treaty clauses superfluous or give a term some meaning rather than none, is particularly worth mentioning.[9] In addition, some

[7] *See* Gardiner, *The Vienna Convention Rules*, *supra* note 5, at 489; Yves le Bouthillier, *Article 32: Supplementary means of interpretation, in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 841, 846-50 (Olivier Corten & Pierre Klein eds., 2011).
[8] *See* Gardiner, *The Vienna Convention Rules*, *supra* note 5, at 501-02.
[9] *See* Jean-Marc Sorel & Valérie Boré Eveno, *Article 31: General rule of interpretation, in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 804, 831-32 (Olivier Corten & Pierre Klein eds., 2011).

specific interpretive approaches have developed within individual courts or institutions. The European Court of Human Rights (ECtHR) has provided an example for developing the evolutionary (dynamic) approach to interpretation.[10] It is important to note that those approaches are not necessarily at variance with the Vienna rules. A complete application of the general rules contained in the VCLT can lead to the conclusion that a particular approach is consistent with the Vienna rules.[11]

2. Different Approaches to Treaty Interpretation

Some of the most commonly used approaches for treaty interpretation include such as "textual," "systemic," "teleological," "historical," and "dynamic/evolutionary." [12] These approaches reflect different emphases on specific elements of Vienna rules. It should be noted that they may overlap, and it is common practice to combine various methods to determine the meaning of a particular treaty provision.[13] For the purposes of the chapter, this section lays out several general categories of interpretive approaches that are particularly important and relevant to the dissertation.

a. The Literal (Textual) Approach

Though articles 31 and 32 of the VCLT do not provide a ranking of various elements for treaty interpretation in terms of their importance, it is generally understood that the text counts more than anything else. As a result, the literal (textual) approach requires that primacy should be given to the text when interpreting a treaty. The method of literal interpretation takes the actual wording and text of the treaty as a starting point. In this connection, phrases or terms "are to be given their normal, nature, and unstrained meaning."[14] As many words have multiple meanings that cannot be determined in the abstract, a dictionary is often relied on to ascertain the meaning of a particular word. However, the meaning of a word or phrase is not solely a matter of dictionaries

[10] *See* Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties, part I*, 21 HAGUE Y.B. INT'L L. 101 (2008) and *Dynamic (Evolutive) Interpretation of Treaties, part II*, 22 HAGUE Y.B. INT'L L. 3 (2009).
[11] *See* Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605 (2010).
[12] *See* Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 450 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).
[13] *See* MARK EUGEN VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 422, para. 2 (2009).
[14] Comment made by Sir Gerald Fitzmaurice, International Law Commission Rapporteur on the Law of Treaties, *cited in* Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties, in* INTERNATIONAL LAW 198 (Malcolm D. Evans, 5th edn. 2014).

and linguistics. As George Letsas rightly notes: "textualism is an unfortunate label to the extent that it advocates strict interpretation in order to avoid recourse to extra-textual arguments."[15] The Vienna rules include a range of elements going beyond the text of the treaty. Subsequent agreements and practice, preparatory work, and material for use as other supplementary means are all but some elements for treaty interpretation not part of the text. Hence, the textual approach is not compatible with the Vienna rules to the extent that it overemphasizes the importance of text to the exclusion of other relevant elements for treaty interpretation.

The interpretation of the equality and non-discrimination norms of the CRPD can and should not be determined in the abstract. It is imperative to interpret the ordinary meaning of the Convention in the context of the treaty as a whole, as well as in the light of its object and purpose. Especially given that the right to equality and non-discrimination constitutes the centerpiece of contemporary human rights law, it is useful to consider how the CRPD builds upon preceding international human rights treaties and further develops its content. All the human rights treaties are interdependent, interrelated, and mutually reinforcing, so "rather than being separate, free-standing treaties, the treaties complement each other, with a number of principles binding them together."[16]

b. The Systemic (Contextual) Approach

Under the systemic (contextual) approach, the interpretation of any terms needs to consider their connections with other terms and provisions and the broader context of the treaty as a whole. "Context" plays two roles in treaty interpretation under the Vienna rules.[17] First, the reference to context follows immediately after the ordinary meaning of terms in the treaty. It serves as a qualifier and helps the selection of the ordinary meaning. Second, under the Vienna rules, context identifies the material that needs to be taken into account as forming context, including the whole text of the treaty, its preamble, and any annexes (article 31(2)).

[15] *See* George Letsas, *Intentionalism and the Interpretation of the ECHR*, *in* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 266 (Malgosia Fitzmaurice et al. eds., 2010).
[16] Office of the High Commissioner for Human Rights, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, at page 14, available at www.ohchr.org/Documents/Publications/FactSheet30en.pdf.
[17] *See* Gardiner, *The Vienna Convention Rules*, *supra* note 5, at 197.

In the context of the CRPD, the preamble provides a critical contextual interpretive framework to guide the interpretation and implementation of the Convention.[18] For example, paragraph (e) of the preamble of the CRPD states that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers…." [19] This illustrates that the CRPD embraces a dynamic understanding of disability that necessarily takes into account any change of the conceptualization of disability. Moreover, the provision highlights the fact that the Convention embeds a paradigm shift from the medical model to the social model of disability in international disability policy. Accordingly, the preamble serves as a critical interpretive aid to interpreting the equality and non-discrimination norms of the CRPD.

The VCLT requires attention to agreements "relating to the treaty" or made "in connection with the conclusion of the treaty."[20] The Optional Protocol to the CRPD[21] constitutes such an agreement. Article 31(3) of the VCLT provides a list of materials for interpretation beyond the immediate context of the conclusion of the treaty, including:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

In terms of subsequent practice, it is an important interpretive aid but is difficult to identify. Usually, subsequent practice means acts of states parties that include executive, legislative, judicial or other acts of the parties.[22] As for the CRPD, the CRPD Committee is tasked with implementing the Convention's purpose by examining the reports of States Parties and making Concluding Observations,[23] adopting General Comments to clarify the content of the Convention, deciding

[18] VCLT, Article 31(2).
[19] CRPD, Preamble (e).
[20] VCLT, Article 31(2)(a).
[21] Optional Protocol to the Convention on the Rights of Persons with Disabilities, opened for signature March 30, 2007, G.A. Res. 61/106 (2007).
[22] International Law Commission (ILC), Draft conclusions on subsequent agreement and subsequent practice in relation to the interpretation of treaties, conclusion 5–6, 11(3), 12(2), in Report of the International Law Commission, Seventieth Session, UN Doc A/73/10, at 12 (2018).
[23] CRPD, Articles 35-37.

individual and group communications.[24] These work products constitute a subsidiary source of interpretation. The Concluding Observations and General Comments can reflect the states' agreement concerning the Convention's interpretation. Specifically, while not legally binding, the General Comments issued by the CRPD Committee should be accorded "great weight" in the interpretation and application of the Convention's rights and obligations.[25] At a minimum, good-faith interpretation of the CRPD as consistent with the VCLT obliges States Parties to duly consider the content of General Comments, as they are the product of a treaty body established by States Parties to monitor and promote compliance with the Convention.[26]

Article 31(3)(c) opens the door that extraneous treaties, as well as rules of customary international law, should be considered in the interpretation of the CRPD, as long as they constitute "relevant rules of international law applicable in the relations between the parties." The general comments/general recommendations and concluding observations of other treaty bodies regarding equality and non-discrimination norms can also provide a subsidiary means for treaty interpretation. As Anthony Aust states, one may look at "other treaties on the same subject matter adopted either before or after the one in question which use the same or similar terms."[27] For example, General Comment No. 5 of the Committee on Economic, Social, and Cultural Rights, though predating the CRPD by more than a decade, provides some detail as to how the equality norm in other human rights treaties has been interpreted in the context of persons with disabilities. Notably, it defines "disability-based discrimination" to include denial of reasonable accommodation which is reproduced in the CRPD.

c. The Teleological (Functional) Approach

The teleological (functional) approach emphasizes the object and purpose of a treaty. Under the Vienna rules, object and purpose serve mainly as a means to finding the ordinary meaning of terms. The words "object" and "purpose" are somewhat indistinguishable in English. Therefore, "object and purpose" are commonly treated as a composite item under the Vienna rules.

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[24] Optional Protocol to the CRPD, Article 1.
[25] The International Court of Justice in the *Diallo* case stated that it accorded "great weight" to the interpretations of the ICCPR by the HRC. Its practice is important, said the Court, because that Committee "was established specifically to supervise the application of [the ICCPR]." ICJ, *Ahmadou Sadia Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (November 30, 2010, unreported), *citied in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 124-26 (Helen Keller & Geir Ulfstein eds., 2012).
[26] *See* Chapter Four, section II.B. & III.A.
[27] *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 248 (3rd edn. 2013).

Often a treaty will specify the object and purpose in the preamble. Nonetheless, in keeping with the approach of the Vienna rules, it is the whole text of a treaty that is to be taken into account when interpreting the object and purpose. In their judgments, courts and tribunals often state the treaties' object and purpose without further explaining how they are deduced.[28] However, this does not mean that the courts or tribunals can arbitrarily interpret treaty terms in the guise of resorting to the object and purpose of a treaty. The reference to object and purpose in the Vienna rules is to help shed light on the terms of a treaty used in the context, rather than introduce an alternative option for finding the meaning.

In general international law as well as in human rights law, the rule of article 31(1) of the VCLT to interpret a treaty in light of its object and purpose is of significant importance. In the context of human rights treaties, it is submitted that the object and purpose of the treaty plays a much more important role than that of the other international treaties. An interpretation following the object and purpose of a human rights treaty touches on the fundamental values enshrined in it. It is common practice to refer either to the object and purpose of a treaty as a whole, or to the object and purpose of the individual provision.[29] In addition, the teleological (functional) approach embodies the principle of effectiveness,[30] which requires that the interpretation of the terms of a treaty should be conducted in an effective and practical manner.[31] Thus, human rights treaties "should be interpreted to ensure maximum effectiveness in achieving the object and purpose of the treaty."[32]

The jurisprudence of the ECtHR provides an excellent example of an emphasis on interpretation in light of the object and purpose of the European Convention on Human Rights (ECHR). When considering the object and purpose of the provisions of the ECHR, the Court stressed on several occasions that it would "take into account relevant rules and principles of

[28] *See* Steven Ratner, *International Law Rules on Treaty Interpretation, in* THE LAW AND PRACTICE OF THE IRELAND-NORTHERN IRELAND PROTOCOL 80, 84 (Christopher McCrudden ed., 2022) (stating that" [a]s for the 'object and purpose', tribunals have significant discretion in their mode of determining it, as well as its impact on the meaning of the text).
[29] *See* Gardiner, *The Vienna Convention Rules, supra* note 5, at 214-15.
[30] *See* Başak Çalı, *Specialized Rules of Treaty Interpretation: Human Rights, in* THE OXFORD GUIDE TO TREATIES 538 (Duncan B. Hollis ed., 2020).
[31] *See* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 589 (2010).
[32] MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 74 (7th edn. 2013).

international law applicable between the parties."[33] Accordingly, it frequently referred to other international treaties to ascertain the ordinary meaning, object and purpose of a particular provision. The practice of the ECtHR demonstrates the combination of the above-mentioned systemic (contextual) approach with the teleological (functional) approach. Compared to the ECtHR, the UN human rights treaty bodies appear to follow a slightly more restricted approach to determining the object and purpose of the treaties.[34]

In regard to the CRPD, its object and purpose is highlighted in article 1 as to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[35] Two of the general principles of the CRPD contained in article 3, namely, "non-discrimination"[36] and "equality of opportunity"[37] also reflect this purpose. In addition, article 4, which sets out the general obligations of the CRPD provides that "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability."[38] The object and purpose of the Convention will inform the interpretation of the equality and non-discrimination norms in general and the reasonable accommodation duty in particular.

d. The Historical Approach

Article 32 of the VCLT permits recourse to a supplementary means of interpretation when interpreting the provisions of a treaty. The drafting history, i.e., *travaux préparatoires*, of the CRPD serves as an important aid to interpretation given that the Convention has been adopted for a short period and, therefore, there is still not much subsequent practice to accumulate. Throughout my interpretation and analysis of the equality and non-discrimination norms enshrined in the CRPD, the *travaux préparatoires* will often be consulted as it provides vital background information to the provisions and the Convention as a whole.

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[33] European Court of Human Rights, *Demir and Baykara v. Turkey*, Appl. No. 34503/97, Judgment (Grand Chamber), paras. 67 and 76 in particular (2008).
[34] *See* Birgit Schlütter, *Aspects of human rights interpretation by the UN treaty bodies*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 261 (Helen Keller & Geir Ulfstein eds., 2012) [hereinafter "Schlütter, *Aspects of human rights interpretation*"].
[35] CRPD, Article 1.
[36] CRPD, Article 3(b).
[37] CRPD, Article 3(e).
[38] CRPD, Article 4(1).

Nonetheless, the use of *travaux préparatoires* is not all without problems. The International Law Commission has asserted that "it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading so that considerable discretion has to be exercised in determining their value as an element of interpretation."[39] The concern over the availability and reliability of the *travaux préparatoires* may render them ultimately of little use for interpreting some treaties. As a result, the *travaux préparatoires*, instead of being used as an "alternative autonomous"[40] source, should be examined in the context of the text and the object and purpose of the treaty as a whole.[41]

e. Dynamic or Evolutionary Interpretation

There is no standard definition of a dynamic or evolutionary interpretation. It commonly denotes that the meaning of treaty terms may change over time. The dynamic interpretation concerns the issue of whether and to what extent certain changing factual circumstances influence the scope of application of treaty rules.[42] Eirik Bjorge indicates that "the evolutionary interpretation of treaties is not a separate method of interpretation; it is rather the result of a proper application of the usual means of interpretation."[43] This view is shared by many courts and tribunals that do not recognize the evolutionary interpretation as a separate means of interpretation, but instead resulting from application of the various rules of interpretation entailed in articles 31 and 32 of the VCLT.[44] Nonetheless, because evolutionary interpretation addresses one of the most difficult issues in treaty interpretation – problems of time factors, it is vital in treaty interpretation.

Significantly, dynamic interpretation is also closely interrelated with a systemic interpretation that considers the corresponding application of international rules and principles that have come into existence after the conclusion of a treaty. For instance, in the context of international environmental law, the ICJ held in the *Gabčíkovo-Nagymaros* case:

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[39] International Law Comm'n (ILC), *Commentary on Draft Articles*, Yearbook of the ILC, vol II, 220 para. 10 (1966).
[40] T. O. ELIAS, THE MODERN LAW OF TREATIES 80 (1974), *cited* in BRODERICK, THE LONG AND WINDING ROAD, *supra* note 2, at 13 n 41.
[41] THE OXFORD GUIDE TO TREATIES 488 (Duncan B. Hollis ed., 2012).
[42] *See* Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties, part I*, 21 HAGUE Y.B. INT'L L. 101, 102-113 (2008).
[43] *See* EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 2 (2014).
[44] International Law Comm'n (ILC), *Commentary on draft Conclusion 3 in Chapter IV of the ILC Report on the Work of its Sixty-fifth Session*, 27, para. (8) (2013).

> On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the treaty... Consequently, the treaty is not static, and is open to adapt to emerging norms of international law.[45]

Evolutionary interpretation seems particularly suitable to the vague and open-ended formulations in many human rights treaties. Specifically, the European Court of Human Rights has provided the cradle for the development of evolutionary (dynamic) interpretation in line with the concept of the ECHR as a "living instrument."[46]

In terms of the CRPD, its object and purpose, general principles (article 3), and general obligations (article 4) all support a dynamic approach to interpreting its substantive provisions. Jean Allain points out that "where the CRPD is concerned, its unique character mandates an approach which turns to the 'object and purpose' [of the Convention] as these are given voice, in part, through Article 3 which [sets out] the Convention's General Principles."[47] Accordingly, a dynamic approach that takes account of changing social realities and gives effect to the object and purpose of the Convention is most appropriate for its interpretation. Moreover, paragraph (e) of the preamble of the CRPD clearly states that disability is an "evolving concept."[48] In light of this fact, the interpretation of equality and non-discrimination norms needs to account for any change in the conceptualization of disability.

3. The Special Nature of Human Rights

a. Differences between Human Rights Treaties and other International Agreements

Treaty interpretation is a complex matter in general international law and, in particular, in international human rights law. The International Law Commission also acknowledged that "the interpretation of documents is to some extent an art, not an exact science."[49] Moreover, the unique nature of human rights leads many to argue that interpreters must pay due regard to this special nature as distinguished from the rules of general international law.

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[45] *Gabčíkovo-Nagymaros Project (Hungaryv. Slovakia)* ICJ Reports 7, para. 112 (1997).
[46] *See* Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties, part I*, 21 HAGUE Y.B. INT'L L. 101 (2008).
[47] *See* Jean Allain, *Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities*, 6, Legal Reports No. 2 Disability Action's Centre on Human Rights for People with Disabilities (2009), available at https://nanopdf.com/download/interpretation-of-the-un-convention-on-the-rights_pdf.
[48] CRPD, Preamble (e).
[49] *See* International Law Comm'n (ILC), *Report of the Commission to the General Assembly*, Yearbook of the ILC, vol II, p. 218 (1966).

Commentators raise many reasons that differentiate interpretation of human rights treaties from other international agreements. First and foremost, in contrast to the horizontal obligations between states, human rights conventions address the vertical relationship between the state and its people in terms of the duties of the state to protect individuals. By their very nature, human rights subvert the concept of state sovereignty. Furthermore, a prominent aspect of human rights is that they are often perceived as fundamental values and have universal validity and applicability.[50] A final reason advocating for special rules of interpretation for human rights treaties comes from the constant evolution in this field. Treaty monitoring bodies often refer to their human rights treaties as living instruments and argue that human rights interpretation should take account of the changing social realities. Apart from the special nature of human rights interpretation, scholars have also highlighted the high degree of abstraction and vagueness inherent in human rights norms.[51]

b. Human Rights Treaty and the VCLT

While the thesis centrally focuses on the general law on treaty interpretation enshrined in the VCLT, some references will be made to the methods of interpretation applied by the ECtHR. The ECtHR's jurisprudence brought forward a concept of treaty interpretation which remains probably the most elaborate in international human rights law, that is, most of its case-law built much on the evolutionary (dynamic) character of human rights treaties.[52]

Some scholars view the adoption of such an approach as a deviation from the Vienna rules. For instance, Detlev F. Vagts suggested that human rights treaties have "attracted a style of interpretation that has drawn away from traditional treaty reading" whereby "these courts also feel that they have tacit permission from the parties to the agreement to develop a body of jurisprudence that sacrifices fidelity to a text... in order to develop internal consistency and to keep pace with the perceived necessities of changing times."[53] An alternative way is to conceive the approach adopted by the ECtHR as the development of practices to fulfill the requirements of good faith and the

[50] *See, e.g.*, Susan C. Breau, *The Constitutionalization of the International Legal Order*, 21 LEIDEN J. INT'L L. 545 (2008); Eckart Klein, *Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy*, 41 ISR. L. REV. 477 (2008).
[51] *See* WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 38 (2019).
[52] *See* Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 150 (2008).
[53] *See* Detlev F. Vagts, *Treaty Interpretation and the New American Ways of Law Reading*, 4 EUR. J. INT'L L. 472, 499 (1993).

object and purpose for treaty interpretation. In other words, rather than representing a deviation from the VCLT, the approach ensures that states, through practical application and understanding of the Vienna rules, actively achieve the object and purpose of the treaty to protect human rights.[54]

Unlike the European Court of Human Rights, which seems more sophisticated on this topic, courts and treaty monitoring bodies have rarely explained in detail the interpretive methodology they adopt when performing their role. States parties to human rights treaties are concerned about the further development of substantive human rights by the treaty bodies. States fear that the treaty bodies, through interpretation of the respective conventions, may exceed bounds of their original consent to the treaty and consequently encroach on their sovereignty. Moreover, a dynamic interpretation may further extend states' material obligations. Those considerations raise questions about the legality and legitimacy of the rules of interpretation utilized in human rights law.[55]

However, human rights treaty may constitute a special regime that requires a slightly different emphasis in interpretation to other areas of international law. It is generally accepted that human rights treaties are different from other treaties in that their interpretation should be to some extent dynamic or evolutionary. Yet, that regime does not exist in isolation but against the backdrop of general rules of international law. That is to say, at least in the orthodox view, the special character of human rights law can only be understood through reference to existing rules and principles of international law.[56]

Thus, some scholars have challenged the special nature of human rights interpretation. For instance, the so-called special rules of human rights interpretation, such as effectiveness and dynamic interpretation, Jonas Christoffersen argues, actually fit well into the overall structure of treaty interpretation stipulated by the VCLT.[57] Thus, the difference between the interpretation of human rights treaties and that of other general international agreements, even exists, might be greatly exaggerated.

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[54] *See* John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 22 (2010).
[55] *See* Schlütter, *Aspects of human rights interpretation*, *supra* note 34, at 266.
[56] International Law Comm'n (ILC), *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, adopted at the 58th Session, ¶ 13, U.N. Doc. A/61/10 (2006).
[57] *See* Jonas Christoffersen, *Impact on General Principles of Treaty Interpretation, in* THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 43, 50 (Menno T. Kamminga & Martin Scheinin eds., 2009) [hereinafter "Christoffersen, *Impact on General Principles*"].

4. Conclusion on the Interpretation of Human Rights Treaties

The discussion above shows that some claims about the unique nature of human rights interpretation overshoot the mark. The wide range of available methods and the possibility of their combination enshrined in the rules of the Vienna Convention provide almost unlimited potential for human rights interpretation.[58] Even the so-called special methods, such as the dynamic/evolutionary treaty interpretation and the principle of effectiveness, fit well within the VCLT. Articles 31(2) and (3) of the VCLT, in particular, offer a good framework for incorporating changing circumstances in human rights interpretation where changes in social realities and conditions directly influence the applicable law.

Strictly speaking, it is misleading to characterize the Vienna rules as entailing a textual, contextual, or teleological approach. Under the Vienna rules, no matter how important the object and purpose of a specific treaty, the proper approach requires that all relevant elements are considered for any interpretive exercise. It is inaccurate to see the textual, systemic (contextual), and teleological approaches as different means of interpretation rather than various elements of a single general rule. Therefore, while it is generally agreed that the object and purpose of international human rights treaties play a more critical role than those of other types of international agreements, one should be cautious not to neglect consideration of the elements mandated by the Vienna rules or to substitute a purely general teleological approach for application of the Vienna rules.

Different courts and tribunals may interpret the same treaty provisions in divergent ways, or their interpretation might even conflict which each other. However, the Vienna rules provide a uniform set of principles that give general guidance on the path to follow to maximize the possibility of arriving at a proper interpretation. While there was no mechanical method of ascertaining meaning, the Vienna rules provide a good starting point, though no guarantee of uniform outcome. Hence, I will adhere to the Vienna rules throughout the dissertation to analyze the normative content of rights and obligations contained in the CRPD.

[58] *See* Mark Toufayan, *Human Rights Treaty Interpretation: A Postmodern Account of its Claim to "Speciality"* 2 (Center for Hum. Rts. & Global Just., Working Paper No. 2, 2005).

B. Comparative Methodology

A critical methodology employed in the dissertation is comparative law analysis. Generally speaking, comparative law analysis can be defined "as the act of comparing the law of one country to that of another."[59] The comparative methodology seeks to obtain an understanding of foreign legal systems and to draw inspirations to further reflect upon and improve one's own legal system. Comparative law analysis is a valuable tool to discern the commonalities and differences between legal systems, and it helps us understand "the substructural forces that influence the law."[60]

For the purposes of this dissertation, I will look into the jurisprudence of the United States, the European Court of Human Rights (ECtHR), the European Committee on Social Rights (ECSR), and the Court of Justice of the European Union (CJEU) to study how their equality laws work, especially in respect to the interpretation and application of reasonable accommodation. It may seem odd at first sight that I chose the United States as a case study; after all, it is not a party to the CRPD. However, in the negotiation process leading up to the adoption of the Convention, the U.S. made a significant contribution, and representatives from other counties extensively drew upon the experience of the ADA in drafting the reasonable accommodation provision.[61] In addition, before the adoption of the CRPD, the ADA serves as a template for many states in their national disability legislation and policy. Hence, the rich case law of the ADA can provide invaluable lessons on how the reasonable accommodation provision could be interpreted and applied.

Furthermore, the European Court of Human Rights has built up a remarkable reputation for human rights protection in Europe. It has been constantly referred to as the "European Constitutional Court."[62] The ECtHR has always viewed the European Convention on Human Rights (ECHR) as a "living instrument" that mandates a dynamic and flexible interpretation. The Court has emphasized that "the consensus emerging from specialized international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."[63] The CRPD represents such

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[59] Edward J. Eberle, *The Methodology of Comparative Law*, 16 ROGER WILLIAMS U. L. REV. 51, 52 (2011).
[60] *See id.* at 53-54.
[61] Though the United States did not participate as a member of the Ad Hoc Committee in drafting the Convention, it sent an observer and furnished substantial input during the Committee's proceedings. *See* G.A. Res. 61/76, U.N. Doc. A/61/PV.76, at 6 (Dec. 13, 2006) (observations of Mr. Miller (U.S.)).
[62] *See* STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 317 (2006).
[63] *Demir and Baykara v Turkey*, Application no. 34503/97, 12 November 2008, para. 85.

an emerging consensus on the international level and a change in approach to disability equality. Whether and how the ECtHR interprets the ECHR in light of the CRPD is particularly worth noting, and it illustrates the cross-fertilization of international and regional norms. Last but not least, the EU played an active role in the work of the Ad-Hoc Committee that drafted the CRPD.[64] Meanwhile, as the EU is the first and only regional integration organization to have ratified the CRPD, interesting questions arise about the use and interpretation of the CRPD by the Court of Justice of the European Union (CJEU).

1. Comparative Law Analysis and Human Rights

The use of comparative law raises complex issues, such as which issues are appropriate for comparison? Which jurisdictions are appropriate comparators? How can the views of judges in other jurisdictions that have different social, political, and legal systems be weighed against each other? And is it legitimate and democratic for courts to refer to foreign decisions without an express constitutional mandate?[65] Comparative law faces these difficulties, whereas human rights law is arguably distinctive. First and foremost, the major international human rights treaties have been widely ratified, thus constituting a shared global framework for states reference. In addition, human rights guarantees in different jurisdictions often have a broadly similar common core either through conscious borrowing or adaptation from other states.

Nonetheless, it would be too quick to conclude that the premise of universalism underpinning international human rights law should lead to a converging understanding of human rights across states. While there is a common core for most bills of rights, significant textual differences with diverse social, political, and legal contexts also result in divergent outcomes in different jurisdictions. Rather than searching for convergence, comparative law can function in terms of mutual cooperation, as Conrado Hübner Mendes described, leading to "not only mutual understanding, but also reciprocal improvement."[66] Aharon Barak, former President of the Supreme Court of Israel, explains how reciprocal improvement might work in two ways. First,

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[64] *See* Anna Lawson, *The European Union and the Convention on the Rights of Persons with Disabilities: Complexities, Challenges and Opportunities, in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 61-66 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano eds., 2017).

[65] *See* Ian Cram, *Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases*, 68 THE CAMBRIDGE L. J. 118 (2009).

[66] Conrado Hübner Mendes, *A Global Constitution of Rights: The Ethics, the Mechanics and the Geopolitics of Comparative Constitutional Law, in* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIAN AND SOUTH AFRICA 55 (Oscarand Vilhena et al. eds., 2014).

"comparative law awakens judges to the potential latent in their own legal systems." Second, "it informs judges about the successes and failures that may result from adopting a particular legal solution."[67] However, it is crucial to be cautious about the danger of wholesale transplantation, as a legal model which has flourished in one jurisdiction might not be suitable for direct transplantation in a very different legal environment.[68]

a. Lessons and Insights from Comparative Law

One critical insight from comparative law is that same or facially similar rules might serve different functions in a different domestic context, and vice versa; seemingly different legal rules and doctrines may have similar functions and produce similar outcomes.[69] Thus, functionalist scholars in comparative law emphasize the need to look beyond formal similarities and differences but for functional ones.[70] As a general matter, international law does not dictate how states implement their treaty obligations as long as the final result is consistent with the relevant rule.[71] In this sense, international law is usually concerned with the results rather than means; it insists on functional rather than formal similarities. Hence, a critical aspect of comparative law involves examining the ways in which different national, regional, and international actors fulfill their international obligation in different settings.

Notwithstanding its merits, the functional method is not without weaknesses.[72] One of the most common criticisms is that this method, focusing on functional equivalent, tends to neglect important differences in the relevant economic, social, and cultural context of various legal systems.[73] Critics of the functional method suggest that comparative law should focus on difference, divergence, and diversity rather than similarities, convergence, and globalization.[74] In

[67] Aharon Barak, *Response to the Judge as Comparatist: Comparison in Public Law*, 80 TUL. L. REV. 195 (2005).
[68] *See* Otto Kahn-Freund, *The Uses and Misuses of Comparative Law*, 37 MODERN L. REV. 1 (1974).
[69] *See* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 345, 362 (Mathias Reimann & Reinhard Zimmermann eds., 2nd edn. 2019).
[70] On the importance of functionality and functional equivalence in comparative law, *see generally* THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE 8-9 (Maurice Adams & Dirk Heirbaut eds., 2014).
[71] *See* ANTONIO CASSESE, INTERNATIONAL LAW 218 (2d edn. 2005).
[72] *See* MATTIAS SIEMS, COMPARATIVE LAW 37-39 (2014).
[73] *See* William Twining, *Globalization and the Common Law*, 6 MAASTRICHT J. EUR. & COMP. L. 217 (1999).
[74] *See* Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 681 (2002).

this way, the possibility of under-appreciating the differences in how the rule truly functions in different legal systems can significantly be minimized.

b. A Deliberative Approach to Comparative Law

In addressing the controversial issue of the value of comparative law, Sandra Fredman advocates for a deliberative approach.[75] For her, comparative law constitutes important raw materials to the deliberative process of decision-making. The deliberative approach permits judges to refer to foreign decisions based on their persuasiveness. Comparative materials are chosen for the force of legal reasoning rather than for their legal status in foreign states, as their function is deliberative but not binding. Foreign judgments can be utilized to illustrate why similarly worded human rights questions should have divergent outcomes. The deliberative approach would require good reasons for convergence as much as for divergence. Under the deliberative approach, comparative law is perceived as a valuable and sometimes essential part of judicial decision-making on human rights issues.

When faced with a difficult human rights issue, it makes sense for scholars, practitioners, and judges to investigate how other jurisdictions with similarly worded human rights protections have dealt with the problem. It is expected that there will be room for reasonable disagreement, and accordingly, "judicial decision-making in the human rights field is an ongoing process of contestation."[76] In this way, it not only enriches the quality of domestic judgments, but also enhances judicial legitimacy and accountability.[77]

2. Comparative International Law

a. Introduction

Another research methodology employed in the dissertation is comparative international law, or to be more specific, comparative international human rights law. As an emerging field that has grown in recent years, comparative international law brings together and utilizes insights and methods from comparative law and international law. The central premise of comparative international law is that different national, regional, and international actors may set forth different

[75] *See* Sandra Fredman, *Foreign Fads or Fashions: The Role of Comparativism in Human Rights Law*, 64 INT'L & COMP. L.Q. 631 (2015) [hereinafter "Fredman, *Foreign Fads or Fashions*"].
[76] *See* Fredman, *Foreign Fads or Fashions*, *supra* note 75, at 647.
[77] *See id*. at 659-60.

interpretations of the same rules. Comparative international human rights law distinguishes it from other comparative international legal scholarship as it has been argued that human rights treaties are different from other international subject areas, prompting judges to adopt a more monist approach even in jurisdictions that traditionally adopt a dualist understanding of international law.[78] The particular dimensions of human rights, argued by Christopher McCrudden, should help stimulate a more context-sensitive comparative international law scholarship.[79]

Anthea Roberts et al. offer a provisional but helpful definition of comparative international law--it "entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law."[80] For the purposes of this research project, a comparative international law approach is particularly relevant in identifying, analyzing, and explaining similarities and differences in the interpretation and application of the substantive provisions of the CRPD. For example, the duty to provide reasonable accommodation may be interpreted similarly or differently by national, regional, and international courts. Legislatures in different states may also implement their legal obligations from the Convention differently.[81] Given the decentralized nature of international law, some differences in the interpretation and application should be expected. Differences may prove helpful in spurring the evolution of international law over time as the actions and interpretations of states often shape international law.

b. Comparative International Law and Human Rights Treaties

The general character of broad provisions in international human rights treaties permits the accommodation of different interpretations of or different domestic practices related to the rule. The core idea behind such a technique is to maintain some room for international regulations without impairing domestic specificities and legal diversity. Many human rights regimes share a living instrument approach and the principle of margin of appreciation. Human rights treaties are

[78] *See* Anna Lawson & Lisa Waddington, *Interpreting the Convention on the Rights of Persons with Disabilities in Domestic Courts, in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS 466 (Lisa Waddington & Anna Lawson eds., 2018).
[79] *See* Christopher McCrudden, *Comparative International Law and Human Rights: A Value-Added Approach, in* COMPARATIVE INTERNATIONAL LAW 439 (Anthea Roberts et al., eds., 2018) [hereinafter "McCrudden, *Comparative International Law*"].
[80] *See* Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. LNT'L L. 467, 469 (2015).
[81] *See* Kevin L. Cope & Hooman Movassagh, *National Legislatures: The Foundations of Comparative International Law, in* COMPARATIVE INTERNATIONAL LAW 271 (Anthea Roberts et al., eds., 2018).

often viewed as living instruments, with interpretations evolving over time.[82] Courts and treaty bodies frequently argue that human rights treaties should address "changing social realities."[83] The ECtHR and the Inter-American Court of Human Rights (IACtHR) both adopt a living instrument approach, which holds that their conventions evolve through interpretations and must acknowledge present-day conditions.[84] In the meantime, much like the ECHR's margin of appreciation doctrine, human rights law generally grants states discretion to select the means of implementation.[85]

The first of Christopher McCrudden's trilogy of comparative international law analysis of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) illustrates the added value that the comparative international law approach brings to human rights scholarship.[86] Comparative international human rights law involves studies for similar and different interpretations of international human rights norms between jurisdictions and explores why these similarities and differences have emerged.[87] For the purposes of the dissertation, comparative international human rights approach highlights how reasonable accommodation duty enshrined in the CRPD has been understood and interpreted differently across jurisdictions, while at the same time ensuring that the broad common goal and core spirit of the reasonable accommodation provision—as a crucial tool to further the equality rights of individuals with disabilities and to improve their inclusion and participation in the community—will be realized.

C. Interdisciplinary Methodology on Equality and Disability

Apart from traditional legal doctrinal approach, the dissertation also heavily relies on jurisprudence, philosophy, psychology, and sociology in exploring different theoretical models of

[82] *See* Julian Arato, *Accounting for Difef rence in Treaty Interpretation over Time*, *in* INTERPRETATION IN INTERNATIONAL LAW 205, 206 (Andrea Bianchi et al. eds., 2015).
[83] *See* Schlütter, *Aspects of human rights interpretation*, *supra* note 34, at 265.
[84] *See* LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 62 (Rosalind Greenstein trans., 2011).
[85] *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR.J. INT'L L. 907, 909-10 (2005).
[86] *See* McCrudden, *Comparative International Law*, *supra* note 79, at 439. The second and third parts of this trilogy are Christopher McCrudden, *CEDAW in National Courts: A Case Study in Operationalizing Comparative International Law Analysis in a Human Rights Context*, *in* COMPARATIVE INTERNATIONAL LAW 459 (Anthea Roberts et al. eds., 2018), and Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties: A Comparative International Law Analysis of CEDAW*, 109 AM. J. INT'L L. 534 (2015).
[87] *See* McCrudden, *Comparative International Law*, *supra* note 79, at 439.

equality[88] and foundations of non-discrimination law,[89] as well as various conceptual models of disability.[90] Though the importance of equality and non-discrimination cannot be overemphasized, there is little agreement on its meaning and goal. Different ideas of equality can be connected to different understandings of disability and different approaches to responding to disability-related issues. Meanwhile, A foundational theory of discrimination contributes to the evaluation and justification of anti-discrimination law in complicated cases in which different protected grounds conflict with each other or when non-discrimination norm needs to be weighed against other competing values. The interdisciplinary approach on philosophy and jurisprudence helps set the backdrop and provides normative guidance to the interpretation and application of the equality and non-discrimination provision and reasonable accommodation duty in the CRPD.

Furthermore, the importance of the CRPD cannot be readily grasped without moving beyond the four corners of its text. The Convention, compared with previous international human rights treaties, embodies a more progressive vision of equality rights. The negotiation and adoption of the CRPD not only manifests the paradigm shift from the medical model to the social model of disability in international disability policy, but the Convention as a whole reflects much more than that; it is the codification of the human rights-based model of disability. The insights and

[88] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Ronald Dworkin, *What Is Equality? II. Equality of Resources*, 10 PHIL AND PUB AFFAIRS 283 (1981); Joshua Cohen, *Democratic Equality*, 99 ETHICS 727 (1989); G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989); Elizabeth Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999); NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE (2003); Linda Barclay, *Natural Deficiency or Social Oppression? The Capabilities Approach to Justice for People with Disabilities*, 9 J. MORAL PHIL. 500 (2012).

[89] *See, e.g.*, Richard Arneson, *Against Rawlsian Equality of Opportunity*, 93 PHIL STUDIES 77 (1999); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008); Sophia Moreau, *What Is Discrimination*?, 38 PHIL. & PUB. AFFAIRS 143 (2010); PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW (Deborah Hellman & Sophia Moreau eds., 2013); FOUNDATIONS OF INDIRECT DISCRIMINATION LAW (Hugh Collins & Tarunabh Khaitan eds., 2018); Sophia Moreau, *Equality and Discrimination, in* THE CAMBRIDGE COMPANION TO PHILOSOPHY OF LAW 187 (John Tasioulas ed, 2020).

[90] *See, e.g.*, Harlan Hahn, *Towards a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87, 88-9 (1985); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990); Ron Amundson, *Disability, Handicap, and the Environment*, J. SOC. PHIL. 105 (1992); Anita Silvers, *(In)equality, (Ab)normality, and the Americans with Disabilities Act*, 21 J. MED. & PHIL. 209, 214 (1996); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1996); Richard K. Scotch & Kay Schriner, *Disability as Human Variation: Implications for Policy*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 148 (1997); Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12(3) DISABILITY & SOCIETY 325 (1997); Deborah Marks, *Dimensions of Oppression: Theorising the Embodied Subject*, 14(5) DISABILITY & SOCIETY 661 (1999); David Wasserman, *Philosophical Issues in the Definition and Social Response to Disability, in* HANDBOOK OF DISABILITY STUDIES 225 (Gary L. Albrecht ed., 2001); Tom Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?, in* EXPLORING THEORIES AND EXPANDING METHODOLOGIES: WHERE WE ARE AND WHERE WE NEED TO GO, Research in Social Science and Disability Volume 2, 9 (Sharon N. Barnartt & Barbara M. Altman eds, 2001).

perspectives from philosophy and sociology provide valuable background knowledge, informing the theoretical model of disability underpinning the Convention.

IV. EXISTING RESEARCH GAPS

Ever since the adoption of the CRPD in December 2006, it has attracted a wealth of academic literature. Some scholars focus on the concept of reasonable accommodation duty and specific aspects of the equality and non-discrimination norms in the Convention.[91] Others write on specific thematic issues, such as the right to inclusive education,[92] mental health,[93] access to justice,[94] etc. Still others explore various national or regional implementation or interpretation issues of the Convention.[95] Notably, there are two extensive commentaries, which provide a comprehensive analysis of the substantive provisions of the CRPD.[96] Also, Andrea Broderick wrote a book on the equality norm of the CRPD, which offers detailed interpretation and critical

[91] *See, e.g.*, ROGER BLANPAIN & FRANK HENDRICKX, REASONABLE ACCOMMODATION IN THE MODERN WORKPLACE: POTENTIAL AND LIMITS OF THE INTEGRATIVE LOGICS OF LABOUR LAW (2016); Delia Ferri & Anna Lawson, *Reasonable Accommodation for Disabled People in Employment: A Legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway* (2016); Lisa Waddington & Andrea Broderick, *Promoting Equality and Non-Discrimination for Persons with Disabilities* (2017).

[92] *See, e.g.*, RICHARD RIESER, IMPLEMENTING INCLUSIVE EDUCATION: A COMMONWEALTH GUIDE TO IMPLEMENTING ARTICLE 24 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2d ed., 2012); Arlene Kanter, *The Right to Inclusive Education for Students with Disabilities under International Human Rights Law, in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 15 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord eds., 2019); Gauthier de Beco, *Comprehensive Legal Analysis of Article 24 of the Convention on the Rights of Persons with Disabilities, in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 58 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord eds., 2019).

[93] *See, e.g.*, PENELOPE WELLER, NEW LAW AND ETHICS IN MENTAL HEALTH ADVANCE DIRECTIVES: THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE RIGHT TO CHOOSE (2012); PIERS GOODING, A NEW ERA FOR MENTAL HEALTH LAW AND POLICY: SUPPORTED DECISION-MAKING AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2017); ANNA NILSSON, COMPULSORY MENTAL HEALTH INTERVENTIONS AND THE CRPD: MINDING EQUALITY (2020).

[94] *See, e.g.*, EILIONÓIR FLYNN, DISABLED JUSTICE?: ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2015); LINDA STEELE, DISABILITY, CRIMINAL JUSTICE AND LAW: RECONSIDERING COURT DIVERSION (2020).

[95] *See, e.g.*, THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009); CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW (Marcia H. Rioux et al. eds., 2011); DISABILITY LAW AND POLICY: AN ANALYSIS OF THE UN CONVENTION (Charles O'Mahony & Gerald Quinn eds., 2017); Lisa Waddington & Andrea Broderick, *Combatting Disability Discrimination and Realising Equality: A Comparison of the UN Convention on the Rights of Persons with Disabilities and EU Equality and Non-Discrimination Law* (2018); THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS (Lisa Waddington & Anna Lawson eds., 2018).

[96] *See* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (Giuseppe Palmisano, Valentina Della Fina & Rachele Cera eds., 2017), and THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (Ilias Bantekas, Dimitris Anastasiou & Michael Stein eds., 2018).

analysis of the CRPD's equality and non-discrimination provision according to the VCLT methodology and examines the CRPD's impact on the case-law of the ECtHR.[97]

My research project is innovative in that in addressing the theoretical, practical, and legal dimensions of equality for persons with disabilities, the dissertation brings together a wealth of comparative perspectives and interdisciplinary areas, which include jurisprudence, philosophy, psychology, sociology, and legal scholarship. On the one hand, the research work in this dissertation seeks to provide a substantive framework to determine the precise nature and scope of the legal obligations on states parties to implement the equality and non-discrimination norms, in particular the reasonable accommodation duty. On the other hand, the dissertation explores the interpretation and application of the equality right and reasonable accommodation duty through comparative viewpoints from the United States, the Council of Europe, and the European Union. The development of international standards does not take place in the abstract. Domestic reforms could significantly impact how international bodies develop their own standards. The interrelatedness and interaction between national, regional, and international law on equality and non-discrimination norms have important implications for persons with disabilities. Hence, the question of what constitutes equality in general, and reasonable accommodation in particular, for people with disabilities needs to be understood in the dynamics between national, regional, and international law.

V. STRUCTURE

The dissertation is organized as follows:

Chapter one provides an overview which includes introduction, research objectives, research methodology, the overall structure, and limitations of the project.

Chapter two traces the development of various theoretical models of equality and discusses certain potential foundations of non-discrimination norm that legal and philosophical scholars have elaborated. The discussion in this chapter takes an interdisciplinary approach to explore the theoretical foundation of the equality and non-discrimination norms in the CRPD. The concept of "inclusive equality," which embraces a substantive model of equality and further extends and elaborates on the content of equality in four crucial dimensions, provides valuable guidance on the

[97] *See* ANDREA BRODERICK, THE LONG AND WINDING ROAD TO DISABILITY EQUALITY: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2015).

interpretation and application of the substantive provisions in the CRPD. In addition, I argue for a pluralistic understanding of non-discrimination norm that extends beyond equality, liberty, and dignity to capture a complete picture of the wrong-making features of discrimination.

Chapter three reflects on different theoretical models of disability to illustrate how disability has been defined or constructed at different times and in different places. The understanding of disability, in turn, significantly influences the approaches we adopt to legislation and policy-making concerning disability issues. The negotiation and entry into force of the CRPD not only manifests the paradigm shift from the medical model to the social model of disability in international disability policy, but also further builds on the social model and incorporates the human rights model of disability. It is argued that, generally speaking, the universalist approach is a more appropriate response than the minority group approach to disability equality issues. Together, chapters two and three lay out a solid normative foundation underlying the Convention, informing the interpretation and application of the equality norm and reasonable accommodation duty in chapter four.

In chapter four the focus is on the equality and non-discrimination provision, i.e., article 5 of the CRPD, with an emphasis on the understanding and interpretation of the concept of reasonable accommodation duty. An overview of the CRPD will be outlined, followed by a detailed discussion of article 5 of the Convention. The Convention, compared with previous international human rights treaties, embodies a more progressive vision of equality rights. A central feature of the equality paradigm in the CRPD is the notion of reasonable accommodation duty, which is highly individualized and context-specific and involves a delicate balancing of interests and burdens between a person with a disability and the duty-bearer. This chapter also explores the intricacies involved in establishing and assessing the relationship between reasonable accommodation and progressive realization in implementing the Convention. The determination of reasonable accommodation provides a useful framework to ensure that the reasonableness review of economic, social, and cultural rights is framed around equality, dignity, and participation. Overall, chapter four provides the substantive framework used to critically assess comparative jurisprudence on equality and non-discrimination norms and reasonable accommodation for people with disabilities in subsequent chapters.

Chapter five examines how reasonable accommodation is interpreted and applied in the United States. The Americans with Disabilities Act (ADA) explicitly includes the concept of reasonable accommodation and serves as a model for numerous countries in their disability law and policy. Through reviewing the past few decades of academic works and case law, I would like to explore how this sheds light on our understanding of reasonable accommodation. Comparison between reasonable accommodation and other seemingly similar concepts (i.e., disparate impact and affirmative action) will also be discussed. One crucial aim of this chapter is to critically analyze how the courts decide different types of reasonable accommodations and to assess the merits of specific cases based on the framework and normative guidance proposed in previous chapters.

Chapter six contains a discussion of equality and non-discrimination norms and reasonable accommodation in the jurisprudence of the European Court of Human Rights (ECtHR), the views of the European Committee on Social Rights (ECSR), and the jurisprudence of the Court of Justice of the European Union (CJEU), respectively. In Europe, within both the Council of Europe and the European Union, the grounds of anti-discrimination norms are widening, new laws are being strengthened and actively litigated. Both the European Union and the Council of Europe have adopted important new instruments. The Council of Europe has adopted Protocol 12 that complements and expands the existing anti-discrimination provision of article 14 of the European Convention on Human Rights and the Revised European Social Charter (Revised ESC). Likewise, the European Union has enacted the Charter of Fundamental Rights (CFR) and an ambitious series of legislative measures, such as the Race Equality Directive[98] and the Employment Equality Directive.[99]

In contrast to the United States, the regional legal system of Europe would offer another valuable lens through which we can see how it provides a different interpretation and application of the equality norms and reasonable accommodation duty. The objective of chapters five and six is, through studying the interaction and interrelatedness between national, regional, and international law on equality and non-discrimination, to develop a normative understanding of

[98] Directive 2000/43, Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180/22) (Race Equality Directive or RED).
[99] Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, (2000) O.J. (L 3030/16) (Employment Equality Directive or EED).

reasonable accommodation that accommodates the diversity of approaches to the concept, while at the same time ensuring that the broad common goal and core spirit of reasonable accommodation duty will be realized.

Finally, chapter seven contains concluding remarks and a summary of the principal findings and recommendations. Future work that is worthy of further exploration will also be provided.

VI. RESEARCH LIMITATIONS

The dissertation investigates jurisprudence of the United States, the European Court of Human Rights (ECtHR), the European Committee on Social Rights (ECSR), and the Court of Justice of the European Union (CJEU) with respect to their interpretation and understanding of equality and non-discrimination norms, with a focus on the duty to provide reasonable accommodation, particularly in the context of disability rights. While this sheds important light on how domestic and regional courts approach, interpret, and analyze the equality and non-discrimination provision of the CRPD, it inevitably leads to some research limitations. Because of time constraints and confines of the dissertation, country studies within the Council of Europe and the European Union have not been carried out. As a result, wide variations may exist on the approaches to disability law and policy in the domestic jurisdictions. The broader picture provided by the ECtHR and CJEU might mask the actual degree to which the CRPD has already influenced, or is likely to potentially influence, national law and policy relating to disability equality.

Lastly, the cutoff date for this dissertation is December 2021. Hence, any subsequent developments in the relevant fields would not be covered after that date.

VII. CONCLUSION

The adoption and entry into force of the CRPD offer a bright new future to people with disabilities worldwide. Though long before the existence of the Convention, the existing international human rights treaties, theoretically speaking, acclaim the equal enjoyment of human rights by all people by virtue of their humanity, persons with disabilities have been marginalized and suffered significant disadvantage in every aspect of life. The paradigm shift embodied by the CRPD and the equality and non-discrimination norms enshrined therein, while important, would not do any good to persons with disabilities unless states parties endeavor to implement the

substantive provisions of the Convention. The dissertation hopes to facilitate this process and make the long-delayed dream of many people with disabilities — to enjoy and exercise their human rights and to fully and effectively participate and be included in society — becomes a reality.

CHAPTER TWO: THEORIES OF EQUALITY AND NON-DISCRIMINATION

I. INTRODUCTION

Equality and non-discrimination[1] constitute the centerpiece of contemporary human rights law. Nearly every country in the world has equal rights protection either in the Constitution or in the statutory provisions. Joseph Raz has argued that "the protection of many of the most cherished civil and political rights in liberal democracies is justified by the fact that they serve the common or general good."[2] The importance of the right to equality and non-discrimination may lie more in its contribution to the common good rather than to the well-beings of the rights holder. The guarantees of equality in the Constitution of many states and the statutory protection of the right to non-discrimination can be justified by their contribution to the common good in a liberal democracy. In other words, the legitimacy of the democratic institutions to govern all the people they purport to represent is compromised if the minority and vulnerable groups are excluded from participation, and their interests are not sufficiently considered.[3]

At the international level, Article 1 of the Universal Declaration of Human Rights (UDHR)[4] states that "all human beings are born free and equal in dignity and rights." Article 2 also proclaims that "everyone is entitled to all the rights and freedoms set forth in the declaration without distinction of any kind." This provision clearly illustrates the central place of equality and non-discrimination in international human rights discourse. Indeed, equality and non-discrimination are reflected in all the major international human rights instruments, and its importance leads to a scholarly discussion as to whether it should be perceived as *jus cogens*.[5] Thus, it is obvious that equality and non-discrimination lie at the heart of protecting human rights both domestically and internationally.

As evidenced by Article 7 of the UDHR, "all are equal before the law and are entitled without discrimination to equal protection of the law," the right to equality and the right to non-

[1] For purpose of this thesis, I would use non-discrimination and anti-discrimination interchangeably. There are subtle differences between the two terms. The former usually refers to the provisions of international human rights instruments; while the latter is primarily used to represent domestic legislations.
[2] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 52 (1994), *cited in* Julie C. Suk, *Quotas and Consequences, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 245 (Deborah Hellman & Sophia Moreau eds., 2013).
[3] *See* Julie Suk, *id.* at 245-46.
[4] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810 (1948).
[5] *See* WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 277-84 (1983). *See also* Hilary Charlesworch & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUN. RTS. Q. 63 (1993).

discrimination are closely linked. Many people often use the two interchangeably that it seems that non-discrimination is equivalent to equality. The truth is, however, the two terms are far from equivalent.[6] Perhaps the proximity of the two terms can be best explained through the instrumental character of non-discrimination. The prohibition of discrimination serves as a mechanism to realize the general and open-ended value of equality in a legally sensible way. The ban on unjustified differential treatment among people is one of the most obvious ways to uphold equality. So understood, non-discrimination constitutes only one of the many approaches to achieving the goal of equality, and, most importantly, it is not always sufficient or preferable.[7]

The fundamental purpose of the right to equality is to affirm equal worth and autonomy of individuals through the elimination of social oppression and structural and institutional discrimination. Though non-discrimination norm serves a critical role for the particularization and effective implementation of the right to equality, it is far from enough; the accomplishment of true equality also entails other aspects, including social welfare system to provide goods, services, and other assistance, etc. to give every individual necessary condition for self-flourishing. Hence, the right to equality is sovereign, and the right to non-discrimination is derivative. In an era when the positive protection of fundamental rights is increasingly emphasized, we need to move beyond the traditional understanding of non-discrimination to pursue positive actions to realize equality.[8]

The CRPD, as the first legally binding human rights instrument specifically directed at people with disabilities, aims to secure the full enjoyment of all human rights and fundamental freedom by disabled persons. The CRPD can significantly improve the participation and integration of individuals with disabilities in all spheres of society by putting them on an equal footing with their non-disabled counterparts. In the context of disability, the obligation to provide reasonable accommodations is widely perceived as a crucial tool to further the equal rights of individuals with disabilities and improve their inclusion and participation in the community. As our understanding of the meaning and purpose of equality as well as how it can be effectuated through the legal mandate of non-discrimination norm could provide important guidance on the interpretation and application of reasonable accommodation, it is imperative to elaborate on

[6] *See* CHARILAOS NIKOLAIDIS, THE RIGHT TO EQUALITY IN EUROPEAN HUMAN RIGHTS LAW: THE QUEST FOR SUBSTANCE IN THE JURISPRUDENCE OF THE EUROPEAN COURTS 28-29 (2015).
[7] *Id.* at 29.
[8] *See* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 178 (2008).

various theoretical models of equality and critique their strengths and weaknesses with regard to realizing the equal right of people with disabilities.

Moreover, existing anti-discrimination law covers a broader range of actions, and the exact meaning of the concept of discrimination often varies depending on the context. Another critical purpose of this chapter is to explore whether it is possible to have a unified fundamental theory of anti-discrimination norms. By examining the potential foundations of anti-discrimination law, we would be able to evaluate and justify the application of reasonable accommodation by resorting to the moral principles and concerns that constitute the foundational theory.

This chapter proceeds as follows. Section II delineates various theoretical models of equality and applies them to the context of disability to figure out whether one or more of them is more suitable and consistent with the goal of realizing equal rights for people with disabilities. The discussion herein provides crucial normative guidance to the interpretation and application of the duty of reasonable accommodation in later chapters. Section III addresses one commonly-held concern that there is an irreconcilable conflict between pursuing ideals of equality and liberty. I maintain that the conflict is not inevitable and, more importantly, the realization of true equality not only would not impede one's liberty, but actually will help to give people full and meaningful liberty to pursue their life goals.

Section IV explores the development of different forms of anti-discrimination norm, and the interaction between reasonable accommodation duty with other anti-discrimination laws is also discussed. In the light of the complexity and multifacetedness of what makes discrimination wrongful, legal and political philosophers put forward various fundamental theories of discrimination. I lay out some of their important works and show that none could capture a complete picture of our concern with discrimination. Instead, I argue for a pluralistic understanding of anti-discrimination law to comprehensively address the distinctive wrongness involved in any specific case. With regards to reasonable accommodation, this means that our interpretation and application of the term should be guided by the unique wrongness involved in particular situations. Section V concludes this chapter.

II. THEORETICAL MODELS OF EQUALITY

Notwithstanding the widespread adherence to the ideal of equality as evidenced in the Constitution and legislations of many states, it is striking that there is so little agreement on its

meaning and goal. Notably, the choice between different understandings of equality reflects not so much one of logic but rather of the values or policy judgment. Some view equality through the lens of distributive justice, others think that the goal of equality is to treat all with equal concern and respect, and still others contend that equality should aim to achieve the political goal of equal access to the decision-making process.[9] In addition, equality poses such complicated questions for people with disabilities as equal *compared to whom, to what extent, and under which circumstances*?[10]

A diverse spectrum of opinions exists as to what equality is and what society should do to incorporate and promote this value. These different ideas of equality can be connected to different understandings of disability and what society is required to do to further the equal rights of persons with disabilities.[11] The subsections below elaborate on various theoretical models of equality and how they relate to persons with disabilities.

A. Formal Equality

Formal equality, as referenced by Aristotle that "likes should be treated alike, unlikes should be treated unalike," reflects our most intuitive notion of what equality stands for. Formal equality primarily reflects a procedural understanding of what equality requires – that is, all laws should be generally applied to everyone regardless of characteristics such as race, sex, religion, national origin, etc. From this perspective, formal equality represents more the consistent application of law rather than provides us with a certain substantive understanding of equality. Hence, Peter Westen claimed that the idea of treating likes alike was vacuous because it did not specify the criteria based on which to determine who is alike in which aspect, and that "equality is entirely 'circular.'... Equality is an empty vessel with no substantive moral content of its own."[12] To achieve formal equality, every individual is viewed as an abstract universal person, deprived of personal characteristics that constitute an important social identity.[13] Accordingly, everyone is afforded equal treatment. Fundamental to the critique of formal equality is that it fails to recognize

[9] *See* SANDRA FREDMAN, DISCRIMINATION LAW 2-3 (2nd edn., 2011).
[10] *See* Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform, in* DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES 3, 7 (Mary Lou Breslin & Sylvia Yee eds., 2002).
[11] *See* Marcia Rioux & Christopher Riddle, *Values in Disability Policy and Law: Equality, in* CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 49, 52-53 (Marcia H. Rioux et al. eds., 2011).
[12] *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).
[13] *See* IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 45 (1990).

the historical and existing disadvantages suffered by those vulnerable and marginalized groups. The insistence on equal treatment to all could only serve to perpetuate or reinforce dominant values or unequal distribution of power, opportunities, and resources. The blanket prohibition on taking particular personal characteristics into account prevents measures from being adopted to undo the effects of injustice.[14]

The formal model of equality is encapsulated in the prohibition of direct discrimination and the guarantee of equal protection of the law. However, formal equality, albeit capable of addressing stigma, prejudice, stereotypes, and/or other blatant forms of discrimination, encounters many limitations, particularly in the context of disability. Creating neutrality in the playing field usually does not help people with disabilities, whose needs are complex and multifaceted and must be taken into account to carry out the equality reform agenda for disabled people.

Another problem of formal equality is that it is intensely individualistic. Although the insistence that individuals should be treated according to their merit is significant progress of equality and that it helps to eliminate prejudice or stereotypes based on one's specific characteristics, it also assumes that all aspects of group membership can be ignored. However, diverse individual identities are inevitable and worth celebrating. The problem we should address is not the diversity of characteristics but the disadvantage attached. Therefore, to prohibit the detriment connected to different personal identities, we must adjust existing norms to accommodate differences.[15]

B. Substantive Equality

Because in some situations, different treatment is required to achieve actual equality for individuals with various characteristics, many scholars have argued in favor of the concept of substantive equality. While there exists a wide range of different content and meanings of what is meant by substantive equality,[16] the commonality underlying it is the emphasis on putting individuals or groups within their specific social context to discern any detriment attached to their identities. Stood in sharp contrast with formal equality which mandates equal treatment regardless of diverse characteristics, a substantive equality analysis takes careful consideration with

[14] *See* Evadné Grant*, Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 320 (2007).
[15] *See* SANDRA FREDMAN, *supra* note 9, at 13.
[16] *See infra* notes 21-30 and accompanying texts.

individual's membership of groups which constitutes salient features of their identities in determining which kind of treatment is required to combat the disadvantage suffered by those vulnerable groups.[17]

In contrast to formal equality, substantive equality is concerned with the results flowing from a specific rule or policy and the process undertaken to achieve equality. Catharine Mackinnon argued that a substantive equality approach "changes not only the outcomes of discrimination cases but, as importantly if not more so, alters the circumstances that are identified as giving rise to equality questions in the first place."[18] In her view, the core insight of substantive equality is always a social relation of rank-ordering based on a group or categorical basis.[19]

Among egalitarians their main concern and attention can be quite diverse. Traditional egalitarians, including Ronald Dworkin,[20] Philippe Van Parijs,[21] Richard Arneson,[22] and G. A. Cohen,[23] etc., focused narrowly on the distribution of divisible, privately appropriated goods and neglected other broader agendas of political movements. As argued by Elizabeth Anderson, those egalitarians' writing "has come to be dominated by the view that the fundamental aim of equality is to compensate people for undeserved bad luck – being born with poor native endowment, bad parents, and disagreeable personalities, suffering from accidents and illness, and so forth."[24] She contended that the problems and objections encountered by these egalitarians stem from a flawed understanding of the point of equality. In her view, the proper goal of the negative and positive aim of egalitarian justice is to end social oppression and create a community in which people stand in equal relations to each other, rather than to eliminate brute luck and ensure that everyone gets what they morally deserve. Elizabeth Anderson called her theory "democratic equality," which integrates the principle of distribution and expressive demands of equal respect and concern. Democratic equality guarantees every citizen effective access to social conditions of her freedom

[17] *See* Sandra Fredman, *Providing Equality: Substantive Equality and The Positive Duty to Provide*, 21 AFR. J. ON HUM. RTS. 163, 170 (2005).
[18] *See* Catharine MacKinnon*, Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 11 (2012).
[19] *Id.*
[20] *See* Ronald Dworkin, *What Is Equality? II. Equality of Resources*, 10 PHIL AND PUB AFFAIRS 283 (1981).
[21] *See* Philippe Van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL AND PUB AFFAIR, 101 (1991).
[22] *See* Richard Arneson, *Equality and Equality of Opportunity for Welfare, in* EQUALITY: SELECTED READINGS 231 (Louis Pojman & Robert Westmoreland eds., 1997).
[23] *See* G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989).
[24] *See* Elizabeth Anderson, *What Is the Point of Equality?,* 109 ETHICS 287, 288 (1999).

at all times by appealing to the obligations of citizens in a democratic state. Unlike the "luck egalitarianism" Anderson criticized, democratic equality's principle of distribution neither dictates how people use their opportunities nor attempts to judge people's responsibility for the choices they make. Its main goal is to construct a community of equals and expect individuals to take personal responsibility in interacting with each other.[25]

1. Multi-Dimensional Substantive Equality

As argued by Sandra Fredman, substantive equality should be understood as a multi-dimensional concept, pursuing four complementary and interrelated objectives.[26] The first one is redistributive. It focuses on the disadvantaged group's lack of access to valuable resources and opportunities. Notably, disadvantage in this context is not only concerned with socio-economic disadvantage, but also extends to non-material disadvantages, including subordination and power imbalance, whether in the private or public sphere. Substantive equality is an asymmetric concept in that it emphasizes the disadvantage attached to protected grounds rather than the grounds themselves. In contrast to formal equality, which requires the removal of irrelevant classifications, substantive equality recognizes that classifications may sometimes be necessary to compensate for the disadvantage resulting from the legacy of entrenched discrimination. Therefore, classifications based on sex, race, or other protected grounds are not strictly prohibited unless they lead to detriment or disadvantage. This understanding of substantive equality incorporates the insights of indirect discrimination in that equal treatment can result in disparate impact and, therefore, violates the right to equality. Furthermore, positive action or expressly differential treatment in favor of disadvantaged groups may be necessary to further rather than breach substantive equality.

Secondly, substantive equality has a recognition dimension. It affirms the value and inherent dignity of every human being and seeks to redress stigma, stereotyping, prejudice, and violence against members of the disadvantaged group. Personal characteristics can be valued aspects of an individual's identity. The focus should not be on the difference *per se* but the detriment attached to the difference. While the individualized notion of dignity has been subjected to much criticism because of its vagueness and obliviousness of social relations, the recognition dimension draws on Nancy Fraser's conception of "recognition wrongs," which consists of

[25] *Id.* at 289.
[26] *See* SANDRA FREDMAN, *supra* note 9, at 25.

misrecognition or inequality in mutual respect and concern that people show to one another.[27] Since our identity is, at least partially, constructed by ways in which others regard us, people who suffer distributive wrongs usually also experience recognition wrongs and vice versa, though the two dimensions do not necessarily go in the same direction with each other.

Thirdly, the transformative dimension of substantive equality recognizes the value of different identities and characteristics. It acknowledges the value of human diversity and aims to accommodate differences and address systematic disadvantages. Members of the minority group should not be required to assimilate into the mainstream as a precondition for the right to equality. Accordingly, existing institutions and social structures need to be modified or adjusted to accommodate differences.

Finally, substantive equality has a participatory dimension. It aims to strengthen the voices of the underrepresented groups through political and social participation. The participatory dimension draws on John Hart Ely's insight that the goal of judicial review is to compensate for the absence of political power of groups that are permanently marginalized and therefore "to whose needs and wishes elected officials have no apparent interest in attending."[28] The state has a positive duty to ensure that those who share a protected ground have the capacity and opportunity to participate meaningfully in decisions affecting their lives, rather than imposing top-down decisions. An important aim of this dimension is to prevent segregation and social exclusion because of particular protected grounds.

The multi-dimensional understanding of equality captures various aspects underlying substantive equality that are important for those marginalized and vulnerable groups. One of the valuable aspects of the multi-dimensional understanding of substantive equality is that it provides a framework to address the interaction between different dimensions.[29] These four dimensions are complementary and intertwined so that to achieve meaningful substantive equality requires the consideration of different dimensions to compensate for the weakness of others. In this way, we can come up with a synthesis or more nuanced response in specific circumstances. For example, though welfare benefits and the social security system may help ameliorate material inequality, it

[27] *See* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE 29 (2003).
[28] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 46 (1980).
[29] *See* Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 HUM. RTS. L. REV. 273, 283 (2016).

can also reinforce stereotypes or stigmatize the recipients. Therefore, such systems need to be designed in a way that respects and advances dignity as well as redressing disadvantage. In addition, measures to redress disadvantages or reduce stigma are sometimes not enough to achieve substantive equality unless accompanied by structural change. More importantly, the understanding of substantive equality as a four-dimensional concept is "helpful in situations in which different grounds conflict with each other; and when substantive equality needs to be weighed against other economic or social goals."[30]

2. Substantive Equality for People with Disabilities

The multi-dimensional understanding of substantive equality also exemplifies how disability discrimination reflects the interaction between different dimensions.[31] People with disabilities often lack access to the basic necessities and suffer disproportionately from poverty. Therefore, discrimination on the grounds of disability, more than any other ground, requires an asymmetric approach to redress disadvantage. However, the need of persons with disabilities to have different treatment often led to a patronizing and stigmatic approach. People with disabilities have been viewed as objects of welfare, protection, or charity rather than rights holders. As a result, it is important to complement the first dimension with a commitment to affirm the dignity of people with disabilities so as to avoid stigma, prejudice, and stereotyping which constitutes the focus of the second dimension.

In regard to the third dimension, the need for structural change has proved to be particularly central to achieve substantive equality for people with disabilities. A key feature of the social model of disability is that it recognizes disability is not, as argued by the medical model, entirely constituted of personal characteristics; instead, disability partly results from the disabling effects of the social, political, and cultural environment. Therefore, the requirement of reasonable accommodation and positive action are also included within the ambit of substantive equality.[32]

Last but not least, the stereotypes of people with disabilities as being unable to decide for themselves have operated to keep them away from getting involved in decisions that directly

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[30] *See* Sandra Fredman, *Pasts and Futures: EU Equality Law, in* RESEARCH HANDBOOK ON EU LABOR LAW 392 (Alan Bogg et al. eds., 2016) [hereinafter Fredman, *Pasts and Futures*].
[31] *Id.* at 415.
[32] *See* Janet Lord & Rebecca Brown, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities, in* CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY POLICY 277 (Marcia H. Rioux et al. eds., 2011).

impact their lives. The mantra "nothing about us without us"[33] acclaimed by individuals with disabilities reflects the long history of separation and exclusion faced by disabled people. As a result, participation is one crucial aspect to fully realize the equal rights of people with disabilities. The participatory dimension of substantive equality aims to counter social exclusion and ensure full inclusion in the social life of persons with disabilities through their participation in decisions affecting them in social and political aspects.

C. Transformative Equality

The concept of transformative equality goes one step further than substantive equality by requiring existing social institutions and structures to be changed to accommodate different individual's identities. In the context of disability, it means that the built environment must be adapted, and workplace rules must be modified to accommodate the needs of people with disabilities.

Transformative equality builds on the substantive model of equality and can be seen "as a form of substantive equality with systemic and structural dimensions."[34] According to Sandra Fredman, transformative equality "requires not only the removal of barriers but also positive measures to bring about change."[35] Within a framework of transformative equality, positive measures for disabled people such as accessibility requirements and Universal Design play a central role in altering general structures that maintain or perpetuate disadvantage. Besides, under the transformative equality model, States have duties to raise awareness at all levels of society to ensure that correct understanding of people with disabilities and their capabilities are recognized to combat the deep-rooted attitudinal barriers to participation and inclusion.[36]

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[33] "Nothing About Us Without Us" (Latin: "Nihil de nobis, sine nobis") is a slogan used to communicate the idea that no policy should be decided by any representative without the full and direct participation of members of the group(s) affected by that policy. The term in its English form came into use in disability activism during the 1990s. In 1998, James Charlton used the saying as title for a book on disability rights, Nothing About Us Without Us (1998). Disability rights activist David Werner used the same title for another book, Nothing About Us Without Us: Developing Innovative Technologies For, By and With Disabled Persons, also published in 1998. *See* https://en.wikipedia.org/wiki/Nothing_About_Us_Without_Us (last visited November 22, 2021.)

[34] *See* Andrew Byrnes, *Article 1, in* THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 56 (Marsha Freeman et al. eds., 2012).

[35] *See* Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New definition of Equal Rights, in* TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 115 (Ineke Boerefijn et al. eds., 2003).

[36] *See* ANDREA BRODERICK, THE LONG AND WINDING ROAD TO DISABILITY EQUALITY: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 36-37 (2015) [hereinafter "BRODERICK, THE LONG AND

The vision of transformative equality raises certain challenges. The first one is cost: who should bear the cost, private parties or the state? And how much is required to spend to accommodate differences? Though the two questions seem analytically separate, it is worth noting that it might sometimes be misleading to argue a particular accommodation is too costly, as in the end, someone has to bear the cost. Our existing society is structured in a way that reflects the needs of dominant groups, that is, able-bodied males. Without legal intervention, the status quo requires women to bear the cost of childcare, people with disabilities assume the cost of disability, and ethnic minorities bear the cost of cultural or religious commitments. Whatever cost not falling on private parties or the state is left with those disadvantaged groups, and in some circumstances, the whole society has to bear more cost.[37] For example, disabled people who cannot enter the workforce because of the inaccessible environment have to rely on social welfare roll.

D. Inclusive Equality

In General Comment No. 6 of the CRPD,[38] the Committee affirms that inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and further extends and elaborates on the content of equality in the following four dimensions: "(a) a fair redistributive dimension to address socio-economic disadvantage; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity." The Committee concludes that the Convention is based on inclusive equality.

We can find that the concept of inclusive equality bears a high resemblance to the idea of multi-dimensional equality raised by Sandra Fredman.[39] The previous discussion regarding substantive equality for people with disabilities[40] should also be applicable under the new concept of inclusive equality. The multi-dimensional understanding of inclusive equality exemplifies how

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[37] *See* SANDRA FREDMAN, *supra* note 9, at 30-31.

[38] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 11.

[39] *See supra* notes 29-35 and accompanying texts. Sandra Fredman, *The Future of Equality in Great Britain* (Working Paper No 5, Equal Opportunities Commission, Manchester, 2002).

[40] *See supra* section II.B.2.

disability discrimination reflects the interaction between different dimensions.[41] It is interesting to see whether this new model of equality would be widely accepted in international human rights law or is more limited to the context of disability specifically. The concept of inclusive equality provides valuable guidance to our interpretation and application of the equality and non-discrimination norms of the CRPD.

E. Capabilities Approach

In addressing equality questions, one argument promotes a shift from an emphasis on rights to an emphasis on capabilities. Disadvantage can be understood as a deprivation of genuine opportunities to pursue one's own valued choices. This approach draws on the insights of the capabilities theory developed by Amatya Sen [42] and refined by Martha Nussbaum. [43] The capabilities approach distinguishes between the idea of functionings (the various states of human beings and activities that a person can undertake) and capabilities (the real opportunities to engage in certain activities). It focuses on equality of capabilities in areas of central importance to the quality of human life.[44] It recognizes that what people can achieve is influenced by economic opportunities, political liberties, social powers, the enabling conditions of health, basic education, and the encouragement and cultivation of initiatives.[45] Thus, it is crucial to consider the extent to which people are actually able to be and to do, rather than simply having the formal right to do so.[46]

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[41] *See* Fredman, *Pasts and Futures*, *supra* note 30, at 415.

[42] *See* Amatya Sen*, Development as Capability Expansion,* 19 J. OF DEVELOPMENT PLANNING 41 (1989); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

[43] *See* Martha Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997); MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000).

[44] The list of central human capabilities outlined by Nussbaum are as follows: 1.) Life; 2.) Bodily health; 3.) Bodily integrity; 4.) Senses, imagination and thought; 5.) Emotions; 6.) Practical Reason (being able to form a conception of the good and to engage in critical reflection about the planning of one's life); 7.) Affiliation (being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction, having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others.); 8.) Other Species (being able to live with concern for and in relation to animals, plants, and the world of nature); 9.) Play; and 10.) Control Over One's Environment (both political control- being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association - and material control- having property rights on an equal basis with others; having the right to seek employment on an equal basis with others). MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 78-80 (2000); MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33-34 (2011). Nussbaum also states that this list could be contested and is just a suggestion on her part which is subject to ongoing revision and rethinking. MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 108 (2011).

[45] *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 5 (1999).

[46] *See* MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 90-91 (2000).

More importantly, the capabilities approach provides a good starting point to analyze disability. Martha Nussbaum criticizes Rawl's theory of justice, which presumes all contracting agents as free, independent, with equal power and rationality.[47] Individuals with disabilities are excluded and only taken into account as an afterthought, or they are "cast as excessively needy and deficient in skills, talents and personal attributes."[48] In contrast, the capabilities approach acknowledges that people have different "conversion factors," -- that is, the abilities to convert resources into functionings. As a result, people's needs for resources vary. This not only justifies the entitlements of persons with disabilities, but also reflects the diverse needs of human beings.[49]

One critical aspect of the capabilities approach is that it incorporates the recognition of the human diversity of human beings. Amartya Sen and other scholars argued that diversity is fundamental and essential to our interest in equality.[50] According to the capabilities approach, the State has an obligation to provide the necessary support to ensure that people with disabilities can develop capabilities beyond the threshold level, just as their non-disabled counterparts.[51] Nonetheless, there is a concern that theories that attempt to identify what is necessary for human functioning or essential human needs embody some controversial conception of "good" human life, which might ignore the plurality of ideas about what is valuable for human well-being. This concern, while worth further exploring, goes beyond the scope of my dissertation. What could be said is that although the capabilities approach provides a potential list of certain capabilities which are of primary importance, it does not prioritize the relative importance of different capabilities. It is fair to say that through democratic political conversation, some overlapping consensus can be achieved on which capabilities are essential and which to prioritize.[52]

The capabilities approach, on its face, seems suitable to address the equality right of people with disabilities because it incorporates individual autonomy and the varying needs of differently situated individuals. However, some scholars criticize that it excludes persons with severe mental

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[47] *See* JOHN RAWLS, POLITICAL LIBERALISM: Expanded Edition 20, 182-86 (2011).
[48] *See* Linda Barclay, *Natural Deficiency or Social Oppression? The Capabilities Approach to Justice for People with Disabilities*, 9 J. OF MORAL PHIL. 500, 500 (2012).
[49] *See* Caroline Harnacke, *Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention*, 41 J. L. MED. & ETHICS 768, 772 (2013).
[50] *See* AMARTYA SEN, INEQUALITY RE-EXAMINED (1992).
[51] *See* Caroline Harnacke, s*upra* note 49, at 777.
[52] *See* Maureen Ramsay, *Egalitarianism, in* THE ENCYCLOPEDIA OF POLITICAL THOUGHT 7 (Michael T. Gibbons ed., 2014).

or intellectual disabilities.[53] Because the capabilities approach draws from the social contract tradition, the individual is supposed to be able to enter contract for mutual advantage. This supposition fails to accommodate some individuals with disabilities into its framework.[54] In light of these deficiencies, Michael Stein, while recognizing the potential applicability of the capabilities approach to disability context, argues that it falls short of a comprehensive framework for assessing disability rights. He suggests that amending Nussbaum's capabilities approach to develop the talents of all individuals results in a disability human rights paradigm that recognizes the dignity and worth of every person.[55] Moreover, the emphasis on choice can also be problematic since people often adapt their choices to their circumstances.[56]

F. The Objectives of the Right to Equality

After outlining various theoretical models and discussing their respective strengths and weaknesses with respect to the situations faced by people with disabilities, this section will explore two contrasting views regarding the objectives pursued by the right to equality-- that is, equality of opportunity and equality of results (outcome).

1. Equality of Opportunity

This notion of equality occupies a middle ground between formal equality and equality of results. It recognizes the weakness of formal equality in that equal treatment can perpetuate or reinforce disadvantage upon those who suffered from past and structural discrimination. On the other hand, it also argues that the focus on equality of results goes too far and fails to pay due regard to personal autonomy. According to this approach, the aim is to equalize the starting point rather than the result.[57]

However, the metaphor of the equal starting point is deceptively simple. How can we ascertain what measures are required to ensure that individuals are given truly equal opportunities? Bernard Williams distinguishes between a procedural and a substantive sense of equal

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[53] *See* Michael Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 75 (2007).
[54] *See* Chrissie Rogers, *Inclusive Education and Intellectual Disability: A Sociological Engagement with Martha Nussbaum*, 17(9) INT'L J. OF INCLUSIVE EDU. 988, 992 (2013).
[55] *See* Michael Stein, *supra* note 53, at 75.
[56] *See* SANDRA FREDMAN, *supra* note 9, at 28.
[57] *See* Daniel Moeckli, *Equality and Non-Discrimination, in* INTERNATIONAL HUMAN RIGHTS LAW 159 (Daniel Moeckli et al. eds., 2014).

opportunity.[58] Under the procedural view, equality of opportunity only requires the removal of obstacles but does not guarantee that this will lead to greater substantive fairness in the result. Take employment as an example. The removal of some non-job-related selection criteria opens up more opportunities. But the disadvantaged groups who lack the requisite qualifications are not able to take advantage of those opportunities to compete equally. In the famous words of former United States President Lyndon Johnson, it is "not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates."[59]

In contrast, a substantive view of equality of opportunity requires positive measures to be adopted to ensure that persons of different groups have a genuinely equal prospect of accessing a particular social good.[60] This may even involve challenging the existing criteria of merit to guarantee that individuals are treated based on their individual qualities.

Though equality of opportunity has become an increasingly popular understanding of equality, courts and legislatures rarely use it in the substantive sense when applying and framing their equality laws.[61] Gerard Quinn and Theresia Degener assert that "one of the main unarticulated premises of the philosophy of equality of opportunity, in general and in the context of disability, is that every human being has something to contribute to humanity and that social structures should be built inclusively with human empowerment as a key goal."[62] To ensure genuine equality of opportunity for persons with disabilities, States are required to eliminate barriers and adopt necessary and appropriate positive measures to increase their participation and inclusion in all spheres of society.

2. Equality of Results (Outcome)

The focus of equality of results (outcome) is primarily concerned with achieving a more equal distribution of benefits. The strength of this notion of equality lies in its recognition that

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[58] *See* Bernard Williams, *The Idea of Equality, in* PHILOSOPHY, POLITICS AND SOCIETY: SECOND SERIES 110 (Peter Laslett & Walter Garrison Runciman eds., 1962) and *see* Jeremy Waldron, *Indirect Discrimination, in* EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE 97 (Stephen Guest & Alan Milne eds., 1985).
[59] Lyndon Johnson, Address at Howard University (June 4, 1965), *cited in* A Thernstrom, *Voting Rights, Another Affirmative Action Mess*, 43 UCLA L. REV. 2031 n. 22 (1996).
[60] *See* Bernard Williams, *supra* note 53, at 125-26.
[61] *See* SANDRA FREDMAN, *supra* note 9, at 19.
[62] Theresia Degener & Gerard Quinn, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* 8 (2002) [hereinafter "Degener & Quinn, *Human Rights and Disability*"].

equal treatment can, in practice, reinforce inequality because of past or structural discrimination. However, upon closer examination, equality of results can be understood in at least three different ways.[63] The first puts emphasis on the impact on the individual. The goal is not so much to achieve equality of results but rather to offer a remedy for the individual. The removal of the school rule on prohibiting the wearing of religious symbols provides one such example.

The second version of equality of results focuses on the group instead of individual. It is used in a diagnostic way to demonstrate that in the absence of some discriminatory obstacles, a fair spread of members of different groups, including races, sexes, or religions, should be found in any particular environments, such as workplace, universities, city council, and congress. The absence of one group raises a presumption of discrimination which can be rebutted by showing no exclusionary criteria or obstacles exist or can be justified by other legitimate reasons.[64]

The third and strongest meaning of equality of results, probably one most people think of, requires equal outcome; namely, the members of any group in a category should reflect their proportion in the population. Under this version, the existence of underrepresentation is in and of itself discriminatory without showing of proof of exclusionary criteria or obstacle. The goal of increasing the representation of women or other minorities has been pursued in several jurisdictions through legislation, including "quotas" and other preferential treatment of the under-represented groups. Those measures are highly controversial so that some commentators often refer to them as "reverse discrimination."[65] Notably, even under this conception of equality, the focus is actually not on equality but proportionality, fairness, or balance.

Under the equal results framework, people with disabilities should be placed in the same position as their non-disabled counterparts regardless of their merits. Equality of results, as claimed by Theresia Degener and Gerard Quinn, "is generally taken to mean that each person-by virtue of her inherent worth and dignity-is entitled to a certain minimum rights (particularly economic and social rights) regardless of her contribution or capacity to contribute."[66] This stands in sharp contrast to the equal opportunities model in which States are required to provide persons with

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[63] *See* SANDRA FREDMAN, *supra* note 9, at 14-16.
[64] *Id*. at 15.
[65] *See, e.g.,* Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87 (1979); Joyce A. Hughes, *Reverse Discrimination and Higher Education Faculty*, 3 MICH. J. RACE & L. 395, 403-06 (1998); Philip L. Fetzer, *Reverse Discrimination: The Political Use of Language*, 17 T. MARSHALL L. REV. 293, 297-99 (1992).
[66] *See* Degener & Quinn, *Human Rights and Disability*, *supra* note 62, at 18.

disabilities with the necessary support to ensure that their capabilities or capacities are allowed to flourish on an equal basis with others in society. Equality of results usually requires States to accord preferential treatment to under-represented groups and adopt positive policies such as quota to achieve more equal results for disabled people.[67]

Although it seems that equality of results is a strategically straightforward goal, the focus on results might itself be misleading.[68] This is because quantifiable change does not necessarily mean qualitative change. For example, a change in the color or gender composition of the workplace, while to some extent positive, may represent a successful assimilationist policy but have nothing to do with any fundamental modification of the structures that perpetuate discrimination. There is a danger that too much focus on equality of results distracts our attention to the equally, if not even more important, duty to accommodate diversity by adapting existing norms and institutions.

Furthermore, it is not always clear which "results" are relevant. The distinction between redistribution and recognition in relation to equality illustrates this point.[69] It is tempting to focus entirely on material inequality such as jobs, resources, or wealth but neglect the prejudice, stereotypes, and stigma suffered by vulnerable and marginalized groups because recognition is difficult to measure and monitor. This explains why a focus on results might not be able to capture the full range of harms caused by inequality.

In addition, to achieve equality of results generally, though not necessarily, requires governments to allocate more resources than to remove discriminatory obstacles. As a result, equality of opportunities is often the preferred approach to effectuating the equal rights for people with disabilities.[70] Nonetheless, I think that the equal results model also has a vital role to play in increasing the participation of persons with disabilities for two reasons. First, institutional and structural changes take considerable time. A fully executed equal opportunities model, which requires the removal of all discriminatory barriers so that people with disabilities can exercise their capabilities, could not be realized quickly. Therefore, equality of results is needed to fill the gap.

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[67] *See* BRODERICK, THE LONG AND WINDING ROAD, *supra* note 36, at 40.
[68] *See* SANDRA FREDMAN, *supra* note 9, at 16.
[69] *See* Sandra Fredman, *Redistribution and Recognition: Reconciling Inequalities*, 23 SOUTH AFR. J. OF HUM. RTS. 214 (2007).
[70] This can be seen from the Americans with Disabilities Act (ADA), the primary goal of which is to offer equality of opportunities to individuals with Disabilities. *See* preamble of the ADA.

Secondly, the dichotomy between equal opportunities and equality of results is not always so obvious. For instance, to ensure that people with disabilities can enjoy equal employment opportunities, States may be required to set up training programs or to provide placements in educational institutions (both can be considered certain kind of equal results) for individuals with disabilities so that they possess the skills and qualifications necessary to compete in the workplace.[71]

III. COMPETING VALUES- EQUALITY OR LIBERTY[72]

Although the importance of equality cannot be overemphasized, it is by no means the single ultimate value longed for by human beings. Both liberty and equality are among the primary goals pursued by human beings for hundreds of years,[73] and it is often claimed that the pursuit of equality would conflict with the idea of liberty, or vice versa. Upon closer examination, however, it is clear that just like equality, liberty can also be understood in a wide variety of ways. Furthermore, the extent of conflict between equality and liberty largely depends on which conception of equality is used. Libertarians are hostile to social and economic equality because they think it would threaten market freedom and lead to coercion by the State. For Robert Nozick, the liberal egalitarian principles of Rawls and Dworkin impinge freedom because they require redistributive policies which violate the property rights of the owners and interfere with individual freedom.[74] If freedom is defined narrowly as negative liberty without external impediment, then any attempt to implement equality will conflict with it. Nonetheless, when freedom is understood more broadly to include power, resources, ability, and capacities to do something one desires, it is obvious that people are not equally free if they do not have equal access to resources and opportunities. From this perspective, equality can help support more comprehensive and effective freedom rather than pose a threat to it.[75]

There has been a strong emphasis on rational choice and autonomy in Western thought, especially since the Enlightenment. When interpreted in isolation, Liberty as a highly individualistic and privatized concept would become unrestricted use of one's capabilities with no

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[71] *See* BRODERICK, THE LONG AND WINDING ROAD, *supra* note 36, at 41.
[72] For purpose of this thesis, I would use "liberty" and "freedom" interchangeably.
[73] *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).
[74] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
[75] *See* Maureen Ramsay, *Egalitarianism, in* THE ENCYCLOPEDIA OF POLITICAL THOUGHT 7 (Michael T. Gibbons ed., 2014).

consideration of others. As long as there is more than one human being present, the liberty of each is inherently limited by the presence of others. Consequently, it is problematic to view liberty as the exclusive source of individual rights in a constitutional legal system. Liberty and equality, rather than being seen as opposed and necessarily competing interests, should provide us with different perspectives of a given issue, supplementing and informing each other. As argued by Susanne Baer, if fundamental rights are about the proper construction of our society, equality addresses the question of who is part of it, while liberty is about what everyone enjoys in the society, taking into account the liberty of others.[76]

Most egalitarians differ from libertarians in advocating a more expansive understanding of the social conditions of freedom. Private relations of domination, even those entered into by consent, are perceived as violations of individual freedom by egalitarians. Furthermore, libertarians tend to identify freedom with a formal, negative connotation, that is, the legal right to do whatever one wants without interference from others. Freedom, as so defined, overlooks the importance of having the necessary means and conditions to do what one wants. The fact is that most of the things we want to do require participation by others so that communication and interaction with other people are inevitable in social activities. One cannot do these things if others make one an outcast.[77] As a result, when interpreted as an unconditional and standing alone value, freedom can be problematic.

Different jurisdictions often exhibit divergent attitudes on the conflict between equality and liberty. For instance, courts in the United States often uphold freedom of speech, while courts outside of the United States would be more likely to strike down racist or hate speech to promote the value of equality.[78] In most cases, equality and liberty do not conflict with each other. The pursuit of liberty should be premised upon equal respect and concern to others, and equality can be promoted without unduly interfering with other people's liberty.[79] As discussed above, the understanding of equality is multifaceted and should embrace distribution as well as recognition dimension. Of course, there will be complex debates as to whether equality or liberty should

[76] *See* Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417, 449 (2009) [hereinafter "Baer, *Dignity, Liberty, Equality*"].
[77] *See* Elizabeth Anderson, *supra* note 24, at 315.
[78] *See* SANDRA FREDMAN, *supra* note 9, at 34.
[79] *See* Baer, *Dignity, Liberty, Equality*, *supra* note 76, at 449.

prevail in a specific case. However, the multi-dimensional and sophisticated understanding of equality gives us a framework to engage in such debates so as to arrive at an acceptable solution.

IV. THE NON-DISCRIMINATION NORMS

The right to non-discrimination is a relatively young legal construction. It is only post World War II that most countries enacted civil rights laws protecting individuals from discrimination in the private sectors in contexts such as employment, provision of goods and services, housing, and so on. With respect to people with disabilities, Article 2(3) of the CRPD defines "discrimination on the basis of disability" to include denial of reasonable accommodation.[80] This is critical for the participation and inclusion of disabled people and represents a significant advancement in our understanding of what constitutes discrimination. To better understand what is required by the mandate of reasonable accommodation, the subsections below trace the evolution of anti-discrimination norms and see how different forms of discrimination interact with each other. Moreover, I will explore the potential foundations of anti-discrimination law for critical evaluation and justification of non-discrimination law in specific circumstances.

A. FORMS OF DISCRIMINATION

1. Direct Discrimination (Disparate Treatment)

Direct discrimination occurs when one treats someone else unfavorably on the basis of a protected ground. It can be satisfied in a variety of ways which include:[81] 1. actions motivated by animus or hostility towards an individual because of her characteristic; 2. actions premised on an unreasonable inference about an individual's qualities on the basis of her characteristic; 3. actions reflecting an unreasonable belief about how an individual ought to behave because of her characteristic; 4. actions based on statistically correct beliefs about an individual's qualities or behavior on the basis of her characteristic.

Category 1 constitutes the paradigmatic instance of discrimination under which the actor takes adverse action against a person because of an enumerated characteristic. A central moral

[80] CRPD, Article 2(3) reads: "Discrimination on the basis of disability means…. It includes all forms of discrimination, including denial of reasonable accommodation."

[81] The classification draws from Patrick S. Shin, *Is There a Unitary Concept of Discrimination?, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 172-73 (Deborah Hellman & Sophia Moreau eds., 2013).

concern with regard to this type of discrimination is that this sort of action expresses that individuals belonging to certain groups are of less moral worth.[82] It is offensive to the idea that every person should be treated with equal respect and concern and is, therefore, objectionable under any moral theories. Category 2 and 3 fall under the concept of "stereotyping."[83] Unlike category 1, people engaging in actions belonging to category 2 and 3 do not necessarily harbor animosity and/or unequal moral respect for particular groups. As an example, people might genuinely hold strong but scientifically and socially unreasonable belief about gender roles that are not based on judgment of different moral worth between men and women (men should earn the bread while women should do the housework), but on traditionalism or for some cultural or religious reasons.

Category 4 represents the so-called "rational discrimination"[84] in which the actor uses the enumerated characteristic as a proxy for some correlated attributes, *e.g.*, discrimination based on customers' racial or sexual preferences to maximize profits. The action is perceived to be "rational"[85] because it is supported by valid statistics. In fact, it might be difficult to justify prohibitions on rational discrimination at first sight. Since first, facing overwhelming information every day in the real world, we often (even always) rely on a person's characteristics as proxies and the statistical correlations between them and other attributes to make decisions. And secondly, in many circumstances, it is just infeasible or challenging (in terms of time and money) to measure those attributes that the actor is interested in by more direct methods. Consequently, the actor (employer) might use an enumerated characteristic (sex) for hiring decisions, *e.g.*, to hire persons with more strength. So long as a statistically significant correlation exists between the characteristic and the job skills that the employer looks for, the action seems rational and could be justified.

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[82] *See* Patrick S. Shin, *The Substantive Principle of Equal Treatment*, 15 LEG. 149 (2009).

[83] Patrick S. Shin distinguish between "epistemic stereotyping" and "prescriptive stereotyping." The former involves judging the appropriateness or acceptability of an individual's behavior based on an unreasonable belief about norms of conduct that apply to that individual in virtue of membership in a group that falls under an enumerated category." The latter "entails acting on the basis of an unreasonable belief about an individual's attributes that is predicated on the individual's membership in a group that falls under an enumerated category." *See* Patrick S. Shin, *supra* note 81, at 173-74.

[84] *See, e.g.*, Michael Blake, *The Discriminating Shopper*, 43 SAN DIEGO L. REV. 1017, 1021 (2006); Samuel Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 848 (2003).

[85] To be sure, they might be rational but nevertheless unreasonable.

However, upon close examination, in many circumstances, the rationality of those actions often comes from a pattern of social injustice upon the disfavored groups in the first place. The reason why rational discrimination is morally objectionable is that it exploits the inequality underlying the enumerated characteristics.[86] Furthermore, given the history of disadvantage and subordination imposed upon people with those enumerated factors, the use of them as proxies would further perpetuate or exacerbate existing social conditions of inequality.[87]

2. Indirect Discrimination (Disparate Impact)

All types of actions discussed above relate to the actor's mental state and explain the role the enumerated characteristics play in why the action was done. In contrast, indirect discrimination (disparate impact) means facially neutral rules, laws, or practices that have a disproportionately adverse impact on a protected group unless the actor can provide some justification.[88] The uniqueness of indirect discrimination is that it focuses on the effects of actions regardless of the actor's subjective motive--even if it is benign.

The concept of indirect discrimination was shaped initially by the U.S. Supreme Court in the pioneering case of *Griggs v Duke Power*[89] in which the employer instituted seemingly neutral requirements, a high school diploma and satisfactory scores in an aptitude test, as a condition of employment or transfer. The high school diploma credential and the standardized tests have a greater adverse impact on African American workers than on whites because the former have long received inferior education in segregated schools. Moreover, the Court ruled that "neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs."[90]

The moral concern with indirect discrimination is that some rules and practices, though neutral on their face, still result in consequences that reinforce and perpetuate patterns of inequality. From the victims' perspectives, the harm and disadvantage brought about by direct or indirect discrimination do not make much difference. But to a certain extent, it is arguable that for many people, the moral wrong of indirect discrimination seems not to weigh so heavily as that of direct

[86] *See* Patrick S. Shin, *supra* note 81, at 175-76.
[87] *See* Samuel Bagenstos, *supra* note 84, at 848.
[88] Under title VII this means job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k).
[89] 401 U.S. 424 (1971).
[90] *Id*. at 432.

discrimination.[91] And in many situations, it is legitimate to use those neutral rules and practices. To accommodate competing interests, the liability of disparate impact is usually less severe, and the actor has an opportunity to offer justification to counter the discrimination claim.

3. The Difficult Divide

Although the distinction between direct and indirect discrimination is conceptually straightforward, the boundary can be obscure in some cases. For example, a rule requiring all employees to work on Fridays could be directly discriminatory against those whose religious beliefs preclude working on Fridays. On the other hand, it could also be characterized as a neutral rule that has an adverse effect on those whose religious beliefs prevent them from working on Fridays. This shows that many cases could be characterized either as direct or indirect discrimination.

The opinion of Justice McLachlan in a case decided by the Supreme Court of Canada in 1997 is instructive.[92] The case was brought by a woman firefighter who claimed that a new aerobic standard was indirectly discriminatory against women. Justice McLachlan recognized that "the conventional analysis was helpful in the interpretation of the early human rights statutes, and indeed represented a significant step forward in that it recognized for the first time the harm of an adverse effect discrimination."[93] However, it can no longer serve the purpose of human rights legislation. The difficulty in classification led Justice McLachlan to abandon the conventional bifurcated approach and decide instead in favor of a unified approach. That is, when a criterion or practice is shown prima facie discriminatory, *i.e.*, with disproportionately adverse impact on a protected group, the employers can raise justification by showing that it is rationally connected to job performance and that it is necessary to fulfill a legitimate job-related purpose.[94]

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[91] *See* Hugh Collins & Tarunabh Khaitan, *Indirect Discrimination Law: Controversies and Critical Questions, in* FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 7-9 (Hugh Collins & Tarunabh Khaitan eds., 2018).
[92] British Columbia (Public Service Employee Relations Commission) v BCGEU (1999) Carswell BC 1907 (Supreme Court of Canada).
[93] *Id.* at para 25.
[94] *Id*.

4. Denial of Reasonable Accommodation[95]

The concept of reasonable accommodation originated in the United States in the context of religion.[96] An employer is required to make reasonable accommodations to its employees' religious beliefs and observances unless it would constitute undue hardship. This concept was later incorporated into the Americans with Disabilities Act (ADA) of 1990[97] and has since become a central feature of disability discrimination law all over the world. The ADA provides in relevant part that "the term 'discriminate'... includes... not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless providing such accommodation would create an "undue hardship".[98] Moreover, in some jurisdictions, the duty of reasonable accommodation extends further beyond religion and disability. In both Canada and South Africa, an obligation to make reasonable accommodations applies to all protected characteristics.[99] This raises the more general question of whether the duty should be extended to other grounds and its relationship with direct and indirect discrimination.

Because the duty of reasonable accommodation imposes a positive duty to accommodate the needs of particular persons, some commentators argued that it is conceptually different from our understanding of anti-discrimination law.[100] They claimed that traditional anti-discrimination law only places a negative duty upon the actors to either avoid making decisions that take into account the enumerated characteristics (direct discrimination) or adopting rules or practices which have disparate impact without justification (indirect discrimination). Insofar as the duty of reasonable accommodation obligates the duty-bearer to consider particular class of individuals and to provide a sort of affirmative aid rather than prohibitions of differential treatment based on

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[95] Further discussion see Chapter Four, section II.C.4.

[96] Title VII imposes a duty on employers to provide reasonable accommodation to employees whose religious observance or practices conflict with particular work requirements. *See* 42 U.S.C. § 2000e(j). The duty of religious accommodation as applied in actual cases, however, has proved to be far weaker than the duty created by the ADA.

[97] Pub. L. No. 101-336, 104 Stat. 328 (1990).

[98] 42 U.S.C. § 12112(b)(5)(A).

[99] Canadian law prohibits discrimination based on any of the 13 grounds identified in Section 2 of the Canadian Human Rights Act (CHRA) and employers have a duty to accommodate employees to avoid such discrimination. R.S.C. 1985, c. H-6. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA, Act No. 4 of 2000) of South Africa prohibits unfair discrimination which includes failing to take steps to reasonably accommodate the needs of such persons against persons with protected grounds

[100] *See, e.g.*, Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY EMPL. & LABOR L. 1 (2000).

certain grounds, many argued that reasonable accommodation duty, by its nature, should not be classified as part of the anti-discrimination law.[101]

While it is undeniable that there exist some straightforward distinctions between the duty of reasonable accommodation and other forms of discrimination, several scholars also pointed out those differences become pretty illusory with a shift of perspective. To begin with, some scholars claimed that anti-discrimination law reflects corrective justice but that reasonable accommodation is a form of redistribution designed to shift the costs from persons with disabilities to other parties.[102] However, other types of prohibitions on discrimination also involve economic costs, including changes in hiring and promotion practices, lost customers, maternity leave, etc. Empirical studies show that most accommodations do not cost much.[103] The accommodations required by some people with disabilities may be more extensive, but this is only a difference in degree, not in kind.[104]

In addition, many people are inclined to think of reasonable accommodation as a call for preferential treatment only because they view the existing norms and practices which presuppose the absence of people with disabilities as a default baseline.[105] For example, the workplace environment and rules are always structured in a way to reflect and accommodate the needs of most non-disabled persons because individuals with disabilities are perceived to be incapable of doing jobs. Much of the accommodation now required for individuals with disabilities would not have been necessary if the built environment had been designed to include a broader range of human variation. The requirement of reasonable accommodation only serves to correct the

[101] *See, e.g.*, Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?,* 79 N.C. L. REV. 307, 314-15 (2001); Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 75 (1999); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001); Stewart J. Schwab & Steven C. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1199 (2003).

[102] *See, e.g.*, David Wasserman, *Distributive Justice* in DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 189-207 (Anita Silvers, David Wasserman & Mary B. Mahowald eds., 1998); Mark Kelman, *Defining the Antidiscrimination Norm to Defend It*, 43 SAN DIEGO L. REV. 735 (2006).

[103] *See* Peter David Blanck, *Empirical Study of Disability, Employment Policy, and the ADA*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 275, 276-78 (1999) (collecting studies finding that in most cases disability accommodations imposed no direct costs and that the costs only very rarely exceeded $1,000); Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1674-77 (2000).

[104] *See* David Wasserman, *Is Disability Discrimination Different?, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 271(Deborah Hellman & Sophia Moreau eds., 2013).

[105] *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 456-58 (2000).

historical injustice and inequality and allows people with disabilities to equally exercise their ability to become full members of society.[106]

Furthermore, one of the overarching goals of anti-discrimination law is to eliminate systematic disadvantage and subordination faced by marginalized and vulnerable groups.[107] From this perspective, one is prohibited from participating in or perpetuating the existing system of injustice when this would not entail much burden. The duty of reasonable accommodation reflects our social judgment that up to the threshold of undue hardship, individuals in certain positions, *e.g.*, employer, providers of goods and service, and landlord, should bear the cost and contribute to dismantling systematic disadvantage faced by members of marginalized groups.

Reasonable accommodation duty represents an advance to the pursuit of substantive equality. It recognizes the disadvantage faced by people with disabilities and makes it clear that equality is asymmetrical in that favorable or preferential treatment is often required to accommodate the needs of vulnerable and minority groups. The duty is individual-focused and able to cater to the varying needs of individuals, and it highlights the fact that our society and institutions are often structured to reflect the dominant norm and culture, be it racism, sexism, or able-bodism. In addition, the individual is not perceived as a homogeneous unit of a specific group, the variations among different members in the same group are explicitly recognized. Thus, reasonable accommodation is highly individual-focused and can avoid the problem of essentialism[108] that the emphasis on individual's membership triumphs the needs of that person.

B. FOUNDATION OF NON-DISCRIMINATION LAW

One of the main challenges for developing any theory of anti-discrimination law is that the term discrimination itself seems open to a wide range of usages that convey significantly different meanings. We use discrimination both in ordinary conversation and in technical legal discourse, and the two usages are not identical.[109] My focus in this section relates to the legal definition of discrimination. As mentioned previously, existing anti-discrimination law covers a broader range of actions, and the exact meaning of the concept of discrimination often varies depending on the

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[106] *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 652-66 (2001).
[107] *See* Samuel Bagenstos, *supra* note 84, at 839-45.
[108] The essentialists view human identity categories as fixed and exist transhistorically and transculturally and regard all members in a group as sharing the same interests or perspectives. *See* Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859, 1863 (1993).
[109] *See* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 5 (2008).

context. The "polymorphic"[110] nature of the term discrimination raises questions about whether a common moral concern underlies discrimination charges in different contexts. This question is important because of its normative implication. If there is a unitary concept of discrimination, then we would be able to evaluate and justify the application of the term through moral principles and concerns that constitute the foundational theory. If, on the other hand, it is infeasible to have any single unified theory of anti-discrimination law, it would mean that when interpreting and applying anti-discrimination norms, including reasonable accommodation, we must pay close attention to the distinctive wrongs involved in any specific situations and adjust our evaluation accordingly to fully effectuate the legal mandate.

Some may argue the necessity of a theory of non-discrimination. At least for treaty interpretation, they would say, the object and purpose offer enough guide to interpretation. However, the reasonable accommodation duty represents a very intriguing and complex concept that requires elaborate interpretation. Reasonable minds can disagree on which accommodations are reasonable, and thus required and what constitutes a disproportionate or undue burden. The often generally framed object and purpose of a treaty, *e.g.,* CRPD do not help us much address those intricacies in interpreting and applying the equality and non-discrimination norms, in particular the duty of reasonable accommodation. In this regard, a foundational theory of discrimination is critical for us to evaluate and justify any anti-discrimination law in complicated cases in which different protected grounds conflict with each other or the non-discrimination norm needs to be weighed against other competing values.

1. The Wrongness of Discrimination

What makes discrimination wrong is a surprisingly tricky question that has perplexed philosophers and non-philosophers alike. Different answers have been proposed, [111] but as we shall see, none of them seems satisfying.

[110] *See* Jonathan Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 350-51 (2005). ("The term 'polymorphic' is borrowed from computer science …. A 'polymorphic' operator, in computer science, is a symbol that may have different meanings depending on context"), *cited in* Patrick Shin, *supra* note 81, at 164.

[111] This draws from Kasper Lippert-Rasmussen, *Discrimination, in* INTERNATIONAL ENCYCLOPEDIA OF ETHICS 1408-10 (Hugh LaFollette ed., 2013).

First, we may think that discrimination is wrong because it is irrational. While this explains some forms of discrimination, it is evident that some wrongful discriminatory acts may be quite rational, *e.g.,* discrimination based on customers' racial or sexual preferences to maximize profits.

Second, discrimination might be wrong because it accords people adverse treatment based on characteristics they cannot control. This reflects paradigmatic discrimination cases such as racial and sex discrimination, it makes this form of differential treatment morally worse because the victims can't avoid the effects of discrimination. But we will still find discrimination objectionable even if people have choices to embrace a characteristic or not. For instance, the fact that we believe people are free to have any kind of religion or not will not affect our judgment that discrimination against certain religion is wrong.

Third, it is intuitive to think that discrimination is wrong because it increases inequality. Indeed, most forms of discrimination have been tied to considerable inequalities to the disadvantage of the victims. But discrimination could also reduce inequality,[112] *e.g.,* brutal redistribution of wealth from the rich to the poor. And even under this situation, we would still find discrimination wrong for other reasons.

Fourth, the wrongness of discrimination can also come from the mental state of the discriminator. Motivations such as aversion, hostility, or disrespect out of which the discriminator treats the discriminatee make discrimination wrong and harm the discriminatee. However, the mental state accounts seem unable to explain the wrongness of a wide range of discrimination cases, including indirect discrimination or discriminations that do not involve any objectionable mental states of the discriminator. And one may also question why the permissibility of actions should depend on the actor's mental state. As argued by Thomas Scanlon, the actor's mental state is relevant to a moral assessment of the actor's character, but is largely irrelevant to the moral assessment of the permissibility of the actor's action.[113]

Fifth, some contend that discrimination is wrong because it conveys a morally objectionable meaning.[114] In other words, the wrongness of discrimination does not depend on the mental state of the discriminator, nor on whether those subjected to discrimination are harmed or

[112] *See* Richard Arneson, *Against Rawlsian Equality of Opportunity*, 93 PHIL STUDIES 77 (1999).
[113] *See* Thomas Scanlon, *The Aims and Authority of Moral Theory*, 12 OXFORD J. OF LEGAL STUDIES 1 (1992).
[114] *See* DEBORAH HELLMAN, *supra* note 109.

not. But just like the mental state accounts, the objective meaning account could not adequately explain the wrongness of indirect discrimination or statistical discrimination. In addition, it is questionable that our objection to discrimination is only centrally about the objective meaning, not also at least about the motivations of the discriminator or the harms caused to the victims.

The sixth account of the wrongness of discrimination is the harm-based account.[115] According to this view, our focus on discrimination is the harm it causes to people. This account differs in what the relevant harm is, whether it is opportunities in general, particular kinds of resources, capabilities, deliberative freedom, or welfare. One challenge for the harm-based account is that discrimination comes in a variety of ways: sometimes it involves denial of opportunity to the victim; sometimes it causes stigmatization; still other times, it includes unequal distribution of resources or welfare among different groups of people. The harm-based account that relies on any single, specific harm may fail to capture the complexity of harms involved in different forms of discrimination. Another problem for the harm-based account is that it implies that there is nothing inherently wrong with discrimination. It seems that, in many cases, the harms brought about by discrimination are wrong for exactly the same reasons as other harmful acts such as torts. This is contrary to our intuition that there is something distinctive about the wrongness of discrimination that cannot be covered or explained by other areas of law.

Lawrence Blum proposed a different classification to point out the plurality of the distinct, wrong-making characteristics of discrimination by the following list:[116]

1. Demeaning of the individual discriminated against.
2. Subordinating or contributing to the subordination of a social group.
3. Stigmatizing or contributing to stigmatizing of an individual or group.
4. Discriminatory act which reinforces social stereotypes.
5. Discriminatory act issuing from prejudice, hatred, or antipathy against an individual or group.
6. Using unfair criteria in selecting persons for important benefits.

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[115] *See* Kasper Lippert-Rasmussen, *The Badness of Discrimination*, 9 ETHICAL THEORY & MORAL PRACTICE 167 (2006).

[116] *See* Lawrence Blum, *Racial and other Asymmetries: A Problem for the Protected Categories Framework for Anti-discrimination Thought, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 188 (Deborah Hellman & Sophia Moreau eds., 2013).

7. Discrimination impinges on the "deliberative freedom" of the discriminatee to make important life decisions without having to take account of irrelevant factors (such as race, sex, or religion).

The list contains diverse and distinct types of wrong. Demeaning represents a negative message conveyed by an act, but the target does not necessarily experience it as harm. By contrast, stigma always causes harm to the target.[117] Subordination is also distinct and reflects a state of social deprivation across several essential life domains, such as education, employment, provision of goods and services, and housing. Although both stigma and subordination have group-based character, they cause distinct harm. Stigma is a negative social value placed on the group. A group can be stigmatized without being subordinated--LGBTQ provides a good example. Conversely, it is at least conceivable that a group could be subordinated without being stigmatized if the subordination was not generally recognized.[118]

Prejudice and stereotyping also cause distinct harms from demeaning, subordination, and stigma. Both prejudice and stereotyping can occur without causing demeaning, subordination, and stigma. Moreover, prejudice is different from stereotyping in that the former is necessarily accompanied by the negative affect, while the latter may only involve an incorrect belief. The discussion above illustrates that not only do the forms of discrimination vary, but the moral wrong underlying discrimination can also instantiate one or more of these characteristics.

2. A Unified Account

As discussed above, the wrongness of discrimination involves a wide range of different aspects. Notwithstanding this, a foundational theory of discrimination is critical to evaluate and justify existing anti-discrimination law in complicated cases. It enables us to interpret and apply anti-discrimination norms, including reasonable accommodation, by resorting to the moral principle and concern that constitute the foundational theory. In searching for the foundation of anti-discrimination law, scholars present various competing ways to understand when laws or actions constitute wrongful discrimination. The most obvious or intuitive way to understand discrimination is through the value of equality.[119] That is, a law discriminates in an impermissible

[117] *See* DEBORAH HELLMAN, *supra* note 109, at 26-27.
[118] *See* Lawrence Blum, *supra* note 116, at 189.
[119] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

way when it fails to treat people as equals. Others view discrimination as involving the violation of liberty.[120] Namely, a law discriminates when it deprives some people, but not others, of certain freedom to which all are entitled. Still others think that wrongful discrimination implicates the value of dignity.[121] Accordingly, a law discriminates against someone when it fails to respect the intrinsic human worth of that individual.

The subsections below elaborate on several theoretical justifications of anti-discrimination law which scholars have resorted to. My goal is to demonstrate that the multifacetedness of discrimination frustrates any simple attempt to proffer a unified theory. In contrast, I propose that only a pluralistic account of the anti-discrimination norm can capture the complete picture of discrimination and the intricacies of legal doctrine and practicalities of regulation and enforcement.

a. Equality

According to the equality-based understanding of discrimination, a law or policy discriminates when it fails to treat people as equals. While there is disagreement about what treating people as equals requires, the common focus is on whether an individual or group is treated as equally important or worthy as others. The stress on whether a law or policy treats people as equals or with equal respect and concern implies a comparative dimension.[122] However, it should be noted that the requirement that people be treated as equals or with equal respect and concern does not mandate that people be treated the same. Laws or policies always draw distinctions among people on the basis of all sorts of traits or criteria. Some laws that treat people differently may nonetheless be legitimately justified and are necessary to treat them as equals, and some laws that treat people the same may fail to treat them as equals. In the end, the equality-based conception of discrimination focuses not on the same or differential treatment, but rather on whether people have been treated as equals and with equal respect and concern.[123]

Based on an equality understanding of discrimination, Deborah Hellman adopts an expressivist view of discrimination. According to her, the wrong of discrimination lies in that it sends a demeaning message to the victim. To constitute a demeaning action, it has to 1. express

[120] *See infra* section VI.B.2.b.
[121] *See infra* section VI.B.2.c.
[122] *See* Deborah Hellman, *Equality and Unconstitutional Discrimination, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 53 (Deborah Hellman & Sophia Moreau eds., 2013).
[123] *See* RONALD DWORKIN, *supra* note 119, at 180.

the view that the person affected has less basic moral worth than others and 2. be done by someone with power or status so that the action constitutes putting down or subordinating the person.[124]

Hellman asserts that the equality-based understanding of discrimination is essentially comparative.[125] However, such a distinction is illusory and misleading at best. It is true that in many situations one raises the claim of discrimination by pointing to the treatment received by other people. But under the equality-based approach of discrimination, the ultimate question is whether one has been treated as equals and with equal respect and concern. The comparisons are merely used as triggers to explain what treatment as an equal consists of.[126] If the equality-based understanding of discrimination is totally comparative, it would face enormous difficulty in resolving the "leveling down" problem, namely, to treat every individual as badly as others. In other words, the requirement of treating individuals with equal respect and concern should be understood as reflecting the fact that we are all equally worthy by virtue of being human. As a result, the equality-based approach of discrimination also contains an important non-comparative element.

In a similar vein, in his seminal article "Groups and the Equal Protection Clause," Owen Fiss articulated an anti-subordination principle founded on concern for social stratification. The overarching idea of the anti-subordination principle is that certain social practices, including but not limited to discrimination, should be condemned because such practices reinforce or perpetuate the subordination of certain groups. The principle was largely premised on the view that the status of groups and the welfare of individuals are inextricably linked.[127] Notably, since the anti-subordination principle is essentially group-oriented, some criticize that it will accentuate group identification and pose difficulties in determining whether an individual is a member of a recognized disadvantaged group. But as argued by Fiss, the anti-subordination principle does not create group identification; instead, it only acknowledges social realities and seeks to provide a legal principle to eradicate the injustice that arises when the group identification turns into a system of subordination.[128] In Fiss' view, the anti-subordination principle is consistent with the common

[124] *See* DEBORAH HELLMAN, *supra* note 109.
[125] *See* Deborah Hellman, *supra* note 122, at 55.
[126] *See* Sophia Moreau, *In Defense of a Liberty-based Account of Discrimination, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 74-76 (Deborah Hellman & Sophia Moreau eds., 2013).
[127] *See* Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL & PUB. AFFAIRS 107 (1976).
[128] *See* Owen Fiss, *Another Equality*, 2 Issues Legal Scholarship [i], 19-20 (2002).

proposition that protecting the welfare of individuals is the end of the Constitution because "in protecting groups we protect individuals, and often we must protect groups in order to protect individuals."[129]

For philosophers such as Elizabeth Anderson and Joshua Cohen, it is mistaken to think of equality problems in terms of distributive justice, rather than relative social standing.[130] They argued that the kind of equality worthy of pursuing is relational equality, that is, the equal standing of all members in society without the domination or marginalization of some groups. Relational equality requires more than the redistribution of resources from the privileged to the underprivileged. It also requires that everyone enjoy equal access to the basic social institutions, such as education, employment, housing, and public accommodations.[131] It is defiant to the ideal of relational equality if an individual or group is relegated to the status of second-class citizens.

While it is intuitive and appealing to many people to adopt an equality-based understanding of discrimination, some difficult questions arise from this account. For example, what does treating people as equals or with equal respect and concern require? What is it to subordinate certain social groups? When do we fail to give people equal standing and access to the basic social institutions? An exclusive equality-based understanding of discrimination may not be able to provide enough guidance for us to answer these questions. But as I argue below, a pluralistic account of discrimination grounded on equality and other complementary values is more likely to produce a satisfying roadmap.[132]

b. Liberty

Under the liberty-based conception of discrimination, a law or policy wrongfully discriminates when it infringes on the freedom or the liberty to which each individual is entitled. Although there exist various interpretations of what liberty-based understanding of discrimination means, they share some commonality, that is, the wrong of discrimination lies not in the fact that a person was treated worse than others. Instead, the problem is that the person was denied a right to which she should be entitled. Accordingly, the liberty-based approach does not view

[129] *Id.* at 20.
[130] *See* Elizabeth Anderson, *What Is the Point of Equality*?, 109 ETHICS 287 (1999); Joshua Cohen, *Democratic Equality*, 99 ETHICS 727 (1989).
[131] *See* Elizabeth Anderson, *The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians*, 36 CANADIAN J. OF PHIL. 1 (2010).
[132] See *infra* IV.B.2.d & 3.

discrimination claims as comparative. It maintains that one's claim of wrongful discrimination depends on the strength of her claim to a particular right, not on a claim to treatment equal to what others enjoy. As a result, under this view, the equality-based conception is secondary or derivative by showing that one person's enjoyment of a particular right can serve to make it clear that all should be entitled to that right.

Some legal philosophers writing on discrimination have suggested that the kind of equal treatment mandated by anti-discrimination law is best understood in terms of the value of freedom. Tarunabh Khaitan, for instance, argues that the purpose of discrimination law is to eliminate relative disadvantage between social groups so that everyone has enough of certain basic goods, such as negative freedom, an adequate range of valuable opportunities, and self-respect that are necessary for autonomy.[133]

Sophia Moreau also adopts a liberty-based understanding of discrimination in her earlier writing. For her, prohibitions on discrimination protect the "deliberative freedom"[134] to which a person is entitled to make choices and decisions about life "insulated from pressure stemming from extraneous traits."[135] In other words, Moreau views the wrong of discrimination as infringing the independent, non-comparative right to deliberate about one's life unburdened by morally extraneous traits of oneself.

Deborah Hellman argues that the equality-based account of discrimination is preferable to the liberty-based approach of discrimination for two reasons. First, she thinks that the equality-based conception "requires reliance on 'thinner' constitutional principles"[136] and thus, is more consistent with a liberal constitutional democracy to accommodate people of different views. This is because the nature of the questions posed by the equality-based understanding of discrimination most is descriptive, factual questions, *i.e.,* what was the intention of the law, what effects does the law have, what message does the law send? By contrast, the questions posed by the liberty-based approach are primarily normative. The court has to "determine what traits are relevant or not in what contexts or to what institutions?"[137] Second, the decisions made by a court in employing the liberty-based conception are sticky. Because they are decisions about normative questions, many

[133] *See* TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 117-29 (2015).
[134] *See* Sophia Moreau, *What Is Discrimination*?, 38 PHIL. & PUB. AFFAIRS 143 (2010).
[135] *See id.* at 147.
[136] *See* Deborah Hellman, *supra* note 122, at 60.
[137] *See id.* at 61.

become part of constitutional principles. This is problematic if one believes that a liberal constitutional democracy should, as far as possible, be comprised of commitments that people with diverse yet reasonable views could be expected to be able to accept.[138]

One significant problem of the liberty-based conception of discrimination is that it ignores entrenched inequality between groups by focusing on one's freedom or liberty to make choices and decisions. Namely, the fact that everyone is independently entitled to a particular right does not mean that individuals of various social groups have a relatively fair share of resources and/or opportunities. Of course, absolute and mechanic equality is and should not be a goal of anti-discrimination law. But under circumstances of severe disparity of valuable resources and opportunities, it is doubtful that people can exercise their freedom or liberty equally. As argued previously,[139] I contend that liberty and equality, rather than being seen as opposed and necessarily competing interests, should address different facets of discrimination, supplementing and informing each other.

c. Dignity

Under the dignity-based approach to discrimination, a law or policy discriminates when it fails to respect the intrinsic human worth of an individual. Dignity has deep roots in Kantian moral philosophy. Kant affirms the inherent worth of human beings and requires that everyone should be treated "never simply as a means, but always at the same time as an end."[140] Dignity is generally mentioned in all human rights instruments,[141] and many theorists refer to it as the underlying value of all human rights (including the right to equality).[142] But some scholars, including David Feldman and others, also have pointed out that the meaning of dignity is difficult to pin down.[143]

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[138] *See id.* at 60-61.
[139] *See supra* section III.
[140] For discussion of the Kantian imperative and concept of human dignity *see* Laurie WH. Ackermann, *Equality and the South African Constitution: The Role of Dignity*, 60 HEIDELBERG J OF INT'L L 537, 540-2 (2000).
[141] Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810, at 71 (1948); International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 49, UN Doc A/6316 (1966), 993 UNTS 3; International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16), at 52, UN Doc A/6316 (1966), 999 UNTS 171.
[142] *See generally*, DAVID KRETZMER AND ECKART KLEIN, THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (2002).
[143] *See* David Feldman, *Human Dignity as a Legal Value: Part 1*, PUB. L. 682, 682 (1999).

They argue that respect for human dignity, in general, is even more abstract than equality and fails to provide clearer guidance in specific cases.[144]

Certainly, there is much that makes dignity an intuitively appealing concept. Foremost, in the past, rationality has been used to deny equality rights to groups such as slaves and women as they were perceived as incapable of making rational decisions. Linking equality to dignity rather than rationality represents a significant advance as dignity is seen to be inherent in the humanity of all people. By virtue of the intrinsic worth of human beings, all people should be entitled to equal respect and concern. Secondly, dignity secures a substantive underpinning to the equality right. It avoids the problem of "leveling down" by making it impossible to argue that equality is satisfied by equally bad treatment or by removing benefits from the advantaged group instead of widely distributing benefits to all.

Thirdly, under the demand of formal equality that likes should be treated alike, there is always a need to identify a comparator to show that discrimination has occurred. Dignity is valuable in this regard to underscore the role of equality in situations in which there is no obvious comparator. This has been particularly salient in relation to sexual harassment.[145] Because sexual harassment is uniquely bound up with sex, it is sometimes difficult to answer whether the harasser would have treated the other sex in the same manner. Substantive equality supplemented with dignity can quickly deal with this issue; it simply prohibits sexual harassment because it violates equal respect and concern to all.

It is evident from above that dignity has some valuable role to play in our understanding of discrimination. However, dignity also has its difficulties. The concept is open to different interpretations, and judges sometimes use it to reach totally opposite results.[146] This is why Christopher McCrudden argues that "instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial

[144] *See* Nicolas Smith, *A Critique of Recent Approaches to Discrimination Law*, NEW ZEALAND L. REV. 499, 522 (2007).
[145] *See* SANDRA FREDMAN, *supra* note 9, at 227-28.
[146] *See* Cristopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EURO. J. INT'L L. 655 (2008).

discretion."[147] However, there is only a thin consensus as to the meaning of dignity may necessitate a continuing and engaged debate and discussion rather than denying its importance.[148]

Another potential problem of a dignity-driven approach is that founding a concept of discrimination on dignity may cause recognition of the uniqueness of individuals in their distinctiveness, which can lead to reifying differences between groups.[149] A focus on dignity creates some tension between equality, as the former values individuals' identities for their uniqueness, but the latter emphasizes the universal humanity and equality of different people.[150] Nonetheless, this tension can be avoided by understanding dignity through the concept of recognition. The inclusion of dignity in the concept of discrimination addresses basic recognition harms, including stigma and prejudice. Recognition is centrally about the mutuality of esteem. The German Constitutional Court has stressed that dignity does not connote "an isolated sovereign individual; but instead... A relationship between individual and community in the sense of a person's dependent on and commitment to the community, without infringing on a person's individual value."[151]

Dignity plays a prominent role in the jurisprudence of the South Africa Constitutional Court and German constitutional law. Notably, both countries have a rich tradition that is capable of utilizing a dignity-driven approach to equality while at the same time avoiding excessive individualism and embracing the interplay between individual and community needs.[152] The malleability of the concept of dignity is limited by focusing on context, impact, and the point of view of the affected persons. As a result, contrary to some objections, dignity not only addresses individual self-worth and personal feelings of affront but also concerns deprived material and social conditions. In addition, every person is not perceived as isolated and detached, but in the context of multiple group memberships and broader society.[153]

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[147] *Id*.
[148] *See* Paolo Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EURO. J. INT'L L. 931 (2008).
[149] *See* Lucy Vickers*, Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief*, 31(1) LEGAL STUDIES 135-58, 149 (2011), *cited in* Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age*, 212(1) NEW LEFT REVIEW 68 (1995); CHARLES TAYLOR, MULTICULTURALISM AND THE POLITICS OF RECOGNITION (1992).
[150] *See* Lucy Vickers, *supra* note 149, at 149-50.
[151] BVerfGE 4, 7, 15 (1954).
[152] *See* Evadné Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 299 (2007).
[153] *See* AILEEN MCCOLGAN, DISCRIMINATION, EQUALITY AND THE LAW 32-33 (2014).

Equal respect and concern for one's dignity is a crucial guiding principle to understanding discrimination. It helps to resolve many complex issues in applying equality and non-discrimination norms, including, but not limited to, which characteristics should be protected under anti-discrimination law? When is asymmetrical protection justified? How to deal with conflict with other values such as individual freedom and autonomy? What is a potential moral justification of anti-discrimination law?

d. Reflection on A Unified Account

The concept of discrimination serves as a bridge to connect specific legal requirements and more general principles such as equality, liberty, and dignity. At least in law, the concept of discrimination occupies the uneasy middle ground between the abstract and ultimate ideals attributable to the legal system and the more concrete and practical legal rules and doctrine. The interpretation and justification of anti-discrimination law depend, to a great extent, upon how we perceive its role in a three-level hierarchy. At the bottom, there are concrete and detailed rules and doctrines. At the top, one encounters highly abstract and general principles such as equality, liberty, or dignity (candidates for the ultimate goals of the anti-discrimination law). The concept of discrimination situates itself in the middle to facilitate conversation between the top and the bottom.[154]

Various rationales at different levels of abstraction have been offered for anti-discrimination law. As discussed above, scholars who seek to put forth theoretical justification of anti-discrimination law resort to various ideals, such as promoting equality, protecting liberty, or preserving dignity, to name those most often invoked. All these theories can be combined and contrasted in many different ways, multiplying the possible candidates for a theory of anti-discrimination law.

The entire course of development in the field of anti-discrimination law has dramatically expanded over the past half-century. It progresses from narrow prohibitions, like race and sex, to broader prohibitions against newly identified forms of oppression, including age, sexual orientation, disability, and beyond. In addition, discrimination on different grounds often admits different exceptions, which either reflect accommodation of competing interests or sometimes

[154] *See* Tarunabh Khaitan, *Prelude to a Theory of Discrimination Law, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 139 (Deborah Hellman & Sophia Moreau eds., 2013).

politically expedient compromises. The multifacetedness of discrimination and the proliferating details of existing law frustrate any simple attempt to proffer a unified explanation or justification for it.[155]

Whether we locate the foundation of anti-discrimination law upon equality, liberty, or dignity, it only captures part of what should fall under the ambit of anti-discrimination law. As discussed above, each account has its strengths and weaknesses to provide a satisfying foundational theory. Another difficulty that arises from a unified theory is that the theory cannot be too concrete to "just replicate the details of existing law, without explaining or reconciling the discrepancies and tensions within it."[156] On the other hand, the theory cannot be too abstract to leave all theoretical disputes to be resolved by fundamental goals like equality, liberty, and dignity, upon which agreement is unlikely to be easily reached.

In sum, a unified theory of anti-discrimination law, even if it might be possible, would only provide us with a skinny account of how we should interpret and justify a specific legal prohibition in a particular case. This is unsatisfying given the intricacies of legal doctrine and the practicalities of regulation and enforcement. As a result, I will turn below to a pluralistic account of the anti-discrimination norm.

3. Pluralistic Account

As Larry Alexander observed at the conclusion of his inquiry into the morality of discrimination, "what makes discrimination wrong is usually quite complex as well as culturally and historically variable."[157] Given the multifacetedness of discrimination, the expanding coverage of anti-discrimination law, and the distinctive wrongs of various discriminatory acts, any single account is incomplete and can only capture part of the whole picture. The kind of pluralistic account I proposed incorporates not only the ideals of equality, liberty, and dignity, it also embraces any potential values that may concretize the distinct moral wrongness and further our understanding of anti-discrimination norms. Put it differently, the pluralistic account is an open-ended account, and the content of which can evolve through time and space. None of the values

[155] *See* George Rutherglen, *Concrete or Abstract Conceptions of Discrimination?, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 123 (Deborah Hellman & Sophia Moreau eds., 2013).
[156] *See id*. at 125.
[157] *See* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992).

(equality, liberty, or dignity) is morally primary to others. They could offer equally good reasons, in different contexts, to combat discrimination and all capture part of the wrong-making features of acts of discrimination.[158] A pluralistic account is critical to evaluate and justify existing anti-discrimination law in complicated cases. It enables us to interpret and apply anti-discrimination norms, including reasonable accommodation, by resorting to the moral principles and concerns that constitute the foundational theory.

Some might question whether such a pluralistic account counts as a theory at all because it seems to lack internal coherence. But this is to assume that a theory must be reductive and monistic to have any explanatory power. We do not expect this assumption to be applied in other fields such as liberal theories of political justice. For a phenomenon so complex as discrimination, it would be impractical to ask for a unified account that is reducible to a single ultimate value.[159]

Furthermore, some may worry about the potential arbitrariness of a pluralistic theory of discrimination. Why should we appeal to equality, liberty, and dignity but not other values to explain the unfairness of discrimination? One response is that the kind of values invoked by philosophers to address the effects of discrimination reflects dozens of years of shared public deliberation. The sophisticated process of law-making, as well as the political and legal arguments that shape the trajectory of case law and legislation, are more than enough to ensure that our thinking about discrimination reflects many years of collective wisdom to avoid arbitrariness. For such a phenomenon as complicated and multifaceted as discrimination, it is more likely and plausible that a pluralistic theory can capture the multifarious strands of discrimination in all their tangled messiness rather than an overly simplistic theory that appeals to one ultimate single value.

V. CONCLUSION

Different theoretical models of equality place varying emphasis on which aspect should the right to equality focus and how the obligation of the state and private actors should be fulfilled to realize the equal rights of minorities and vulnerable groups. In the context of people with disabilities, the concept of "inclusive equality" as advanced by the CRPD Committee in General Comment No. 6 provides valuable guidance on interpreting and applying the substantive

[158] *See* Sophia Moreau, *Equality and Discrimination, in* THE CAMBRIDGE COMPANION TO PHILOSOPHY OF LAW 187-88 (John Tasioulas ed., 2020).
[159] *See id*. at 188.

provisions in the CRPD. It embraces a substantive model of equality and further extends and elaborates on the content of equality in four crucial dimensions, including a redistributive dimension to address socio-economic disadvantage; a recognition dimension to promote respect for dignity and worth of all human beings; a participative dimension to reaffirm the social nature of people and the recognition of humanity through inclusion in society; and an accommodating dimension to make space for difference. According to the Committee, the whole Convention, with the equality and non-discrimination norms in particular, is based on inclusive equality.

In addition, I explore whether there is a unified foundation underlying the wrongness of discrimination. For our purpose, the discussion is normatively crucial because the answer influences our evaluation and justification of the concept of reasonable accommodation. As demonstrated in this chapter, scholars present diverse theoretical justifications for anti-discrimination law by resorting to various ideals, such as promoting equality, protecting liberty, or preserving dignity. But the multifacetedness of discrimination and the proliferating details of existing law frustrate any simple attempt to provide a unified explanation or justification. Any single unified theory of anti-discrimination law could only capture part of what we believe should fall under its ambit. As a result, I am inclined to endorse a pluralistic account of the anti-discrimination norm.

Undoubtedly, the challenge in front of us is how to come forward with a plausible pluralistic account. The kind of pluralistic account I proposed incorporates not only the ideals of equality, liberty, and dignity, it also embraces any potential values that may concretize the distinct moral wrongness and further our understanding of anti-discrimination norms. Put it differently, the pluralistic account is an open-ended account, and the content of which can evolve through time and space. At a minimum, it is reasonable to argue that none of the values (equality, liberty, or dignity, and so forth) is morally primary than others. They could offer equally good reasons, in different contexts, to combat discrimination and all capture part of the wrong-making features of discrimination.

CHAPTER THREE: THEORETICAL MODELS OF AND APPROACHES TO DISABILITY

I. INTRODUCTION

In the previous chapter, I explored various theoretical models of equality and applied them to the context of disability to determine whether one or more of them is more suitable and consistent with the goal of realizing equal rights for people with disabilities. In the context of people with disabilities, the concept of "inclusive equality" as advanced by the CRPD Committee in the General Comment No. 6 provides valuable guidance on the interpretation and application of the substantive provisions contained in the CRPD. It embraces a substantive model of equality and further extends and elaborates on the content of equality in four crucial dimensions. At the same time, the development of different forms of anti-discrimination norms is further traced with a comparison of the duty of reasonable accommodation with other anti-discrimination norms. In light of the complexity and multifacetedness of what makes discrimination wrongful, I argue for a pluralistic understanding of anti-discrimination law to more comprehensively address the distinctive wrongness involved in any specific cases. With regards to reasonable accommodations, this means that our interpretation and application of the term should be guided by the unique wrongness involved in particular situations.

In this chapter, I reflect on different theoretical models of and approaches to disability to figure out the normative foundations underlying the CRPD. Various theoretical models of disability illustrate how the concept of disability has been defined or constructed at different times and in different places. The understanding of disability, in turn, significantly influences the way in which we adopt legislation and policy to further the equal rights of people with disabilities. In section II, I delineate various theoretical models of disability and explain the relationship between those models of disability and different equality norms. This paves the way for us to figure out whether one or more of them is more suitable and consistent with the goal of realizing equal rights for people with disabilities. Section III reflects upon several approaches to disability and explores how they influence our response and policy-making with respect to disability issues. Section IV concludes this chapter.

II. THEORETICAL MODELS OF DISABILITY

Marcia Rioux and Christopher Riddle point to the fact that "the meaning of equality will vary depending on the perspective of disability adopted."[1] There is an intrinsic link between the model of disability one adopted, and the subsequent approach one takes to further equality. Hence, the following discussion between conceptual models of disability and equality is essential to set the backdrop to analyzing the equality and non-discrimination provision in the CRPD.

A. The Medical Model

Traditionally disability has been defined predominately in medical terms as functional incapacity or limitations which result naturally from physical or mental impairments.[2] This model assumes that the primary problem faced by people with disabilities lies in their inability to work or otherwise participate in society and that the inability is the natural and inevitable result of their impairments.[3] As a result, a proper response is to try to "cure" or "fix" those impairments through assistance from medical professionals. Persons with disabilities are expected (even required) to follow instructions from physicians, therapists, social workers, and so on to rehabilitate and mitigate the influences of their disabilities as much as possible. Since the medical model of disability focuses the problem encountered by individuals with disabilities exclusively on its medical etiology, medical professionals assume great power and authority upon the medical decisions of disabled people and under many circumstances their influences even extend widely to other aspects of the lives of people with disabilities.

The medical model of disability has been prevalent for hundreds of years across the world. It is still widely adopted in the legislations and laws in many countries. Under this model, the role of society and government is only to provide financial support to this "deserving" group and to offer medication and rehabilitation services.[4] Most importantly, these measures are not based on any obligations or responsibilities but only come from a sense of charity or goodwill. The medical model of disability largely corresponds to formal equality, which requires similar treatment to

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[1] Marcia Rioux & Christopher Riddle, *Values in Disability Policy and Law: Equality*, *in* CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 42 (Marcia H. Rioux, Lee Ann Basser & Melinda Jones eds., 2011).
[2] *See* Harlan Hahn, *Towards a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87, 88-9 (1985) [hereinafter "Hahn, *Towards a Politics of Disability*"].
[3] *See, e.g.,* ROBERT A. SCOTT, THE MAKING OF BLIND MEN 6-8 (1969).
[4] *See, e.g.,* EDWARD BERKOWITZ & KIM MCQUAL, CREATING THE WELFARE STATE: THE POLITICAL ECONOMY OF TWENTIETH-CENTURY REFORM 12 (2nd edn. 1988).

similarly situated individuals. As disability is viewed through the lens of individual pathology and people with disabilities are perceived to be anomalous from other citizens, exclusion, separation and segregation imposed upon disabled persons are justified as a necessary means to protect the well beings of people with disabilities.

Under the medical model, society gives health professionals the authority to validate the existence of a disability and thereby to provide access to whatever social benefit available to persons with disabilities. It is up to the physicians to diagnose or categorize the cause of an impairment and to measure and document its function impact. The subjective experience of impairment or limitation is ignored unless it can be professionally validated.[5] People with disabilities are dependent on physicians not only for medical treatment, but also when and whether they need to use assistive devices.[6] Persons with disabilities are consigned to what the sociologist Talcott Parsons calls the "sick role"—that is, individuals with disabilities are exempted from normal social obligations such as working, but this exemption is socially legitimate only if they strive to become cured and, therefore, normal.[7]

The medical model of disability also has significant implications for social policy. Because a disability is seen as essentially a personal, biological attribute, the disadvantage and exclusion that accompany the disability can be explained as natural and not ascribable to any social cause.[8] As a result, people with disabilities have no legal claims to social remediation. Furthermore, the medical model justifies the labeling and stigmatizing of persons with disabilities as inferior.[9] This implicitly supports the development of social and institutional structures that exclude and devalue people with disabilities.[10]

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[5] *See* Susan Wendell, *Toward a Feminist Theory of Disability, in* FEMINIST PERSPECTIVES IN MEDICAL ETHICS 63, 72-73 (Helen Bequaert Holmes & Laura M. Purdy eds., 1992).
[6] *See* Mary Crossley, *Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 650 (1999).
[7] *See* Talcott Parsons, *Definitions of Health and Illness in the Light of American Values and Social Structure, in* PATIENTS, PHYSICIANS, AND ILLNESS (E. Gartly Jaco ed., 1979).
[8] *See* Ron Amundson, *Disability, Handicap, and the Environment*, J. SOC. PHIL. 105, 113 (1992); Anita Silvers, *(In)equality, (Ab)normality, and the Americans with Disabilities Act*, 21 J. MED. & PHIL. 209, 214 (1996).
[9] *See* Anita Silvers, *Disability Rights*, *in* 1 ENCYCLOPEDIA OF APPLIED ETHICS 785 (1998).
[10] *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Polity for People with Disabilities*, 40 UCLA L. REV. 1341, 1349-51 (1993).

B. The Social Model

1. General Theory

In light of the narrow focus of the medical model of disability on individual pathology, starting in 1970s disability advocates argue that disability is not a natural or inevitable result of physical or mental impairments, but reflects the contingent interaction between the built environment, social practices, cultural attitudes and personal characteristics. In other words, what we call "disability" is nothing but a social construction that varies considerably across time and space. The social model of disability gained momentum in the 70s, soon becoming the dominant model advanced by the disability rights movement. The fundamental premise of the social model of disability was initially developed by the Union of the Physically Impaired Against Segregation (UPIAS), a British organization advocating for the rights of people with physical disabilities. Several scholars and activists, such as Michael Oliver, Paul Hunt, Vic Finkelstein, Paul Abberley, and Colin Barnes, played a central role in developing this model for other types of disability.[11] Michael Oliver, who is widely credited as the founding father of the social model of disability, makes a sharp distinction between impairment and disability.[12] According to him, though the former is biologically determined, the latter is always shaped by external social factors, such as built environment, institutional structures, and/or assumptions about the "normal" range of human variations.[13] One paradigm example used by disability advocates is individuals with physical disabilities who rely on wheelchairs to navigate around. If buildings and public places are built with ramps and lifts rather than stairs, people who use wheelchairs would have no difficulty entering and moving around just like everyone else. Thus, what is disabling for them is not their inability to walk; instead, it comes from the fact that our architecture is based on limited images of "normal" physical functioning that creates barriers for those who do not conform to such expectations. The same analysis can also be applied to people with various kinds of disabilities in different contexts. In sum, assumptions about what people with different physical or mental

[11] *See* Paul Abberley, *Work, Utopia and Impairment, in* DISABILITY AND SOCIETY: EMERGING ISSUES AND INSIGHTS (Len Barton ed., 1996); *See* also TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS (2006).
[12] *See* MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990).
[13] *See* Richard K. Scotch & Kay Schriner, *Disability as Human Variation: Implications for Policy*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 154-157 (1997).

characteristics can and cannot do and how people perform everyday tasks constrain the opportunities of people with disabilities who must pursue alternative ways of doing.

The social model embedded a purposed conception of a disability connected to human disadvantage. While there is voluminous writing on the model and no simple restatement of the model can satisfy everyone, the model moves casual responsibility for disadvantage from physical and mental impairments of individuals to the architectural, social, and economic environment. In contrast with the medical model of disability, which focuses on the disabling impact of physical or mental impairments, the social model redirects attention to the environment surrounding an impaired individual.[14]

Akin to the sex/gender distinction, the social model contends that some impairments disadvantage only because of their interaction with particular social settings. Therefore, under this model, disability is defined as disadvantage caused by the confluence of (1) personal impairment and (2) a social setting comprising architecture, economics, politics, culture, social norms, and assumptions about ability. Because social settings change over time and place, disability should not be seen as an entailment of impairment, but at least sometimes reflects an artifact of the environment.[15] As Susan Wendell, drawing on feminist work regarding the social construction of gender, writes:

> Societies that are physically constructed and socially organized with the unacknowledged assumption that everyone is healthy, nondisabled, young but adult, shaped according to culture ideals, and are, often, male, created a great deal of disability through sheer neglect of what most people need in order to participate fully in them.[16]

The belief that disability is a social construct also means that normalcy itself is also a social construct. The category of disability requires drawing a line to differentiate "normal" ability from disability. Nonetheless, it is commonly recognized that the range of human function spreads across a wide spectrum. Therefore, ability and disability cannot be easily divided into two distinct categories. Disability scholars argue that the very concept of "normal human being" is socially constructed and socially and culturally relative. Lennard Davis claims that the concept of "normal" entered the English language only in the mid-nineteenth century in relation to the developing

[14] *See* Adam M. Samaha, *What Good Is the Social Model of Disability*, 74 U. CHI. L. REV. 1251, 1255-56 (2007).
[15] *See id*. at 1257-58.
[16] SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 39 (1996).

science of statistics, which focused on identifying a norm and the deviations from that norm.[17] But over time, the concept of "normal" carries a prescriptive force, rather than simply being descriptive of a statistical finding.[18] Recognizing that the concept of impairment and disability depends to a large extent on the perception of what is normal in specific society, philosopher Anita Silvers illustrates this relativity by pointing to how different cultures impact on who is deemed disabled: "Where autos are abundant, the blind are dysfunctional travelers while the one-legged function nearly normally; where the prevailing mode of travel is to walk, the reverse is the case."[19] Consequently, under the social model, disability is both socially constructed and culturally relative.

Apart from a distinct theoretical understanding of disability from that of the medical model, the social model also has drastically different implications for public policy. Under the medical model, the main thrust of disability policy is to cure or rehabilitate that impaired individual; on the other hand, the central theme of disability policy under the social model is to "rehabilitate" the social and physical structures and systems that impose disadvantages on persons with disabilities.[20] This may mean altering the physical environment by building ramps and curb cuts, or it may require modifying social practices or policies to allow disabled people equal participation in opportunities commonly enjoyed by non-disabled members of our society. Therefore, the social model's attribution of disability-related disadvantages to societal causes indicates that disability may be amenable to societal remedy, which requires affirmative efforts to make all aspects of social and economic life accessible.[21]

Although the social model provides powerful insight for the disability rights movement, reasonable minds disagree on the relative importance of different types of environmental factors in causing disadvantage. The model also allows for varying degrees of claims about the importance of all environmental factors compared to individual traits.[22] Some theorists make a strong claim that all disability is socially constructed and that no personal traits can be disabling without an

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[17] *See* LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY xii 24-29 (1995) [hereinafter "DAVIS, ENFORCING NORMALCY"].
[18] *See id*. at 30-31.
[19] *See* Anita Silvers, *supra* note 9, at 784.
[20] *See* Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. &WOMEN'S STUD. 104 (1994).
[21] *See* Jane West, *The Evolution of Disability Rights, in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT (Jane West ed., 1996).
[22] *See* David Wasserman, *Philosophical Issues in the Definition and Social Response to Disability, in* HANDBOOK OF DISABILITY STUDIES 225-28 (Gary L. Albrecht et al. eds, 2001).

adverse social setting.[23] In other words, the environment is portrayed as the predominant factor in causing disadvantage. Some disability scholars make less ambitious claims. They suggest that personal traits can be the cause of disadvantages. The experiences such as pain, delusion, or constant hallucinations can be ameliorated, but not eliminated by adjustment to the environment.[24] For some impairments, such as severe intellectual disability and brain injury, limitations inextricably linked to the condition and independent of external social factors may seem to result overwhelmingly in the disadvantage faced by persons with those impairments.[25] That being said, even those skeptical of the social model can accept its truth in most situations.[26]

2. Some Critiques

For all its values, the social model has attracted challenges. The critiques involve the model's scope, the ambiguity of disadvantage, and the connection between impairment and social setting. The first concern is that personal traits can be inhibiting by themselves or in addition to a disabling environment.[27] The degree of disadvantage suffered by individuals with different personal traits highly depends on the state of technology. This criticism is empirical and aims at accuracy in describing the causes of disadvantage. It is a question about whether the social model contains an acceptably broad definition of disability or there is a class of people who the model fails to address but who suffer from physical or mental traits. Even Michael Oliver, who states that "disability is wholly and exclusively social,"[28] acknowledges the limits of the social model. He concedes that "the social model is not an attempt to deal with the personal restrictions of impairment."[29] Consequently, the model gives room for a distinct field of inquiry into independently inhibiting personal traits.[30]

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[23] *See* MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 32-33, 35 (1996) [hereinafter "OLIVER, UNDERSTANDING DISABILITY"].
[24] *See* JONATHAN GLOVER, CHOOSING CHILDREN: GENES, DISABILITY AND DESIGN 6-8 (2006); Gareth Williams, *Theorizing Disability, in* HANDBOOK OF DISABILITY STUDIES 123, 135 (Gary L. Albrecht ed, 2001).
[25] *See* Philip Ferguson, *The Social Construction of Mental Retardation*, *in* PERSPECTIVES ON DISABILITY 203 (Mark Nagler ed., 2nd edn. 1993).
[26] *See* Adam M. Samaha, *supra* note 14, at 1260-62.
[27] *See* Tom Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?, in* EXPLORING THEORIES AND EXPANDING METHODOLOGIES: WHERE WE ARE AND WHERE WE NEED TO GO, Research in Social Science and Disability V. 2, 9 (Sharon N. Barnartt & Barbara M. Altman, eds, 2001).
[28] *See* OLIVER, UNDERSTANDING DISABILITY, *supra* note 23, at 35.
[29] *See id*. at 38, 41-42.
[30] *See* Adam M. Samaha, *supra* note 14, at 1262-64.

The second challenge relates to the notion of "disadvantage" or "the problem of disability." Indeed, social model adherents are interested in negative consequences produced by the combination of personal traits and social settings. While there is more than one plausible specification of disadvantage, two options are out there. Either disadvantage can be understood in absolute terms as inadequate human well-being that does not depend on how others are faring, or disadvantage can be viewed in a relative sense. The baseline for comparison could be a particular "human species norm"[31] or a similarly situated individual except for the trait in question. There is no obvious answer to which form of disadvantage we should care about most. All these sorts of choices are inevitable. The vague notion of disadvantage highlights the problem of specification and normative judgment surrounding the social model of disability. Nonetheless, these issues can be resolved without jeopardizing the central message of the social model – that is, environmental factors may contribute to various kinds of disadvantages, both in an absolute and relative sense.

The third critique focuses on the boundary between personal traits and social settings. To a certain extent, the two components of the social model are often impossible to completely separate. Physical or mental traits recognized as impairments usually become part of the social setting. Social attitudes and cultural practices also determine which kind of physical or mental traits will be viewed as impairments. Rather than being independent of each other, the two causes of disadvantage are mutually-reinforcing and constituting. Thus, Shelley Tremain contends that impairment is itself a socially ascribed characteristic. In her view, "it seems politically naïve to suggest that the term 'impairment' is value-neutral, ... as if there could ever be a description that was not also a prescription for the formulation of the object."[32] Insofar as both impairment and disability are socially constructed, the critique suggests that one premise of the social model, the distinction between impairment and disability, begins to collapse.[33] While it is true that the social model cannot fully explain every human disadvantage linked to every individual trait, the central insight is hardly for anyone to deny – that the traits of individual human beings are not always sufficient causes of disadvantage.[34] The only question left is how we can build upon its core spirit

[31] *See* Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of "Normal Species Functioning" in Disabilities Analysis*, 6 YALE J HEALTH POLICY, L, & ETHICS 221, 232-38 (2006).
[32] *See* Shelley Tremain, *On the Government of Disability*, 27 SOC THEORY & PRAC 617, 621 (2001).
[33] *See* Tom Shakespeare & Nicholas Watson, *supra* note 27, at 9.
[34] *See* Adam M. Samaha, *supra* note 14, at 1267.

and make adequate modifications to address the limits and critiques, which is important but beyond the scope of my dissertation.

Notably, Adam Samaha aptly posits that while academics intuitively make connection between the social model and social change, the model, like all social construction accounts, has essentially no policy implications.[35] Normative frameworks such as libertarian, utilitarian, egalitarians, or something else determine policy goals and institutional design to respond to disability issues. In other words, the social model only provides causal understanding to disability, but it does not necessitate any proper response of disability policy. One can accept the model's insight regarding causes of disadvantage without committing to a particular response. This cautions us not to move too quickly from assertions about social construction to the argument for social reconstruction. Recognizing the gap between causation and policy reminds us that the social model is not the end of policy discussion; a normative framework is required to set priorities, make unavoidable trade-offs, or confront cost issues.[36]

C. Relationship between the Social Model and Medical Model

The negotiation and adoption of the CRPD reflect a paradigm shift from the medical model to the social model of disability. The medical model focuses exclusively on the impairments one has and on the medication and rehabilitation techniques that can cure or alleviate these disabling effects. As a result, it ignores the competence or other skills individuals with disabilities have and leads to unnecessary segregation from mainstream society. In contrast, the social model directs our attention away from the physical or mental impairment towards the outside social environment. It reminds us that many, if not all, of the disabilities are disabling only because the attitudinal, institutional, social and cultural environment is built to accommodate the needs and preferences of the able-bodied without taking into account the existence of people with disabilities. It is fair to say that the social model constitutes the fundamental bedrock of the CRPD. The Convention emphasizes the autonomy and independence of persons with disabilities to make decisions that affect their well-being. States are mandated to construct accessible buildings, transportation, and infrastructure and provide information and communication in an accessible format to people with different kinds of disabilities. The overall aim of the CRPD is to dismantle those artificial, socially

[35] *Id.* at 1251.
[36] *Id.* at 1252-53.

constructed barriers to ensure people with disabilities equal opportunity to participate and be included in all spheres of social life.

That being said, I do not mean the medical model does not have any value. The medical model still has a vital role in our perception and understanding of disability. In situations of profound developmental or mental disabilities, it can be difficult to point out any external social forces. But with the rapid advance of medicine and technology, medication and/or rehabilitation might help alleviate those disabling effects. Of course, one should never forget that individuals with disabilities are subjects of rights holders rather than objects of cure or medical treatment. Therefore, the power to make decisions regarding one's well-being should always fall in the hands of individuals with disabilities according to their wills and preferences. This paves the way for us to proceed to the next model, the human rights-based model of disability.

D. The Human Rights-Based Model of Disability

Several scholars argue that CRPD in effect goes beyond the social model.[37] They believe the human rights-based model of disability is more appropriate to effectuate the transformative potential of the Convention.[38] As noted previously, disability was traditionally viewed from a medical perspective rather than as a human rights issue. The shift towards a rights-based approach was slow and at the international level. The human rights model of disability focuses on the autonomy and inherent dignity of individuals with disabilities to ensure key goals of equal opportunity and non-discrimination on the basis of disability. Other core principles of the human rights model entail inclusion, participation, accessibility, and respect for difference and diversity, all of which can be found in article 3 of the CRPD.[39] The human rights model of disability acknowledges and firmly embraces the interrelationship of first and second-generation human rights. It avoids the dichotomous difficulties by adopting a holistic approach to human rights protection. In addition, the human rights model, much like the Communitarian Theory, recognizes the effect of interrelationships between individuals' ability to flourish in society.[40] In the words of Belden Fields, "Human potentialities are developed within a web of cultural, economic, and social

[37] *See* Theresia Degener, *Disability in a Human Rights Context*, 5 LAWS, 35, 38 (2016).
[38] *Id*. at 53.
[39] *See* ANDREA BRODERICK, THE LONG AND WINDING ROAD TO DISABILITY EQUALITY: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 26-27 (2015) [hereinafter "BRODERICK, THE LONG AND WINDING ROAD"].
[40] *See* CHRISTINE M. KOGGEL, PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL APPROACH xi (1998).

relationships that are both facilitating and constraining."[41] To a large extent, we all depend on one another and develop in relation to each other.[42]

The human rights model of disability, just like the social model, stresses society's role in creating disabling environment and society's responsibility to rectify disability-based exclusion. Nonetheless, the social model resorts mainly to civil rights legislation and anti-discrimination law to address the discriminatory environment, social attitudes, and institutional practices that lead to separation, segregation, and exclusion of people with disabilities.[43] The human rights model, recognizing the inadequacy of exclusive civil rights and anti-discrimination law based approach, goes one step further to emphasize the importance of economic, social, and cultural rights to ensure the full equality and inclusion of persons with disabilities.[44] Moreover, one of the limitations of the social model by its critics is that it is not well disposed to accommodate disadvantages resulting directly from impairments, as opposed to those arising from socially constructed barriers.[45] The human rights model of disabilities avoids this by recognizing and accounting for different characteristics. It acknowledges that individuals with disabilities are a critical part of human diversity. Therefore, they are entitled to be included fully in society, not merely accommodated to fit in the mainstream "norm."[46] The human rights-based conceptualization of disability empowers people with disabilities, and its emphasis on participation is critical for advancing equality of the disability community. The human rights model is also closely linked to the universalist approach,[47] which perceives human characteristics as a universal component of human condition and values diversity and human difference. In sum, the human rights model of disability acknowledges how individuals with disabilities are different from their non-disabled counterparts, both in terms of their biological capacities and the socially constructed barriers that people with disabilities uniquely encounter.

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[41] BELDEN FIELDS, RETHINKING HUMAN RIGHTS FOR THE NEW MILLENNIUM 76-77 (2003).
[42] *See, e.g*., Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989).
[43] *See* Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007).
[44] *See* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 585 (2004).
[45] S*ee* Deborah Marks, *Dimensions of Oppression: Theorising the Embodied Subject*, 14(5) DISABILITY & SOCIETY 661 (1999); *See also*, Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12(3) DISABILITY & SOCIETY 325 (1997).
[46] *See* ANDREA BRODERICK, *supra* note 39, at 28.
[47] *See infra* section III. B.

Another significant aspect of the human rights model is that it is genuinely comprehensive and fully inclusive of people with various and different severity of disabilities. It emphasizes the intrinsic human worth and equal dignity of disabled persons and acknowledges their autonomy in directing their own development. From the perspective of disability advocates, one of the most significant weaknesses of the capabilities approach is the species-typical functioning levels required by the ten central capabilities,[48] as the list seems inherently flawed by able-bodied cultural bias as to what functionality must be achieved to live a "truly human" life. Therefore, under the human rights model of disability, a focus on the flourishing of individual talents rather than average overall capabilities is crucial to affirm individual differences and provide for special needs.[49]

The human rights model also highlights the importance of social participation. As mentioned above, one crucial mandate of the model is that all people have equal dignity, value, and autonomy and are worthy of self-fulfillment. Therefore, it necessitates a greater view of all persons contributing to and being present in society. It argues that society should care about the participation and inclusion of people, disabled or non-disabled, in our world. Based on the human rights model of disability, it is morally imperative to value each individual for his or her own worth and to explore ways that could develop his or her talents to benefit that individual as well as society.[50]

E. Comparison of the Human Rights Model and Social Model

The differences between the social and human rights model of disability can be classified as follows: First, whereas the social model explains disability as a social construct, the human rights model affirms the inherent human dignity of individuals with disabilities. In Theresia

[48] The ten central human capabilities outlined by Nussbaum are as follows: 1.) Life; 2.) Bodily health; 3.) Bodily integrity; 4.) Senses, imagination and thought; 5.) Emotions; 6.) Practical Reason (being able to form a conception of the good and to engage in critical reflection about the planning of one's life); 7.) Affiliation (being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction, having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others.); 8.) Other Species (being able to live with concern for and in relation to animals, plants, and the world of nature); 9.) Play; and 10.) Control Over One's Environment (both political control- being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association - and material control- having property rights on an equal basis with others; having the right to seek employment on an equal basis with others). MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 78-80 (2000).

[49] *See* Michael Ashley Stein & Penelope J.S. Stein, *supra* note 43, at 1222.

[50] *Id.* at 1223-24.

Degener's words, "the social model does not seek to provide moral principles or values as a foundation of disability policy. The CRPD, however, seeks exactly that."[51]

Second, as mentioned previously, the social model has been criticized for ignoring the experience of pain and suffering of individuals with disabilities. In contrast, the human rights model acknowledges these life circumstances and requires them to be considered when constructing social justice theories. As Marian Corker and Sally French state, the social model fails to "conceptualize mutually constituted relationship between impairment and disability which is both materially and discursively (socially) produced."[52] Article 3 of the CRPD contributes much to human rights theory, and it clarifies that impairment is not to be perceived as negative or detrimental to human dignity. In this respect, the Convention not only goes beyond the social model's premise that disability is a social construct, but more importantly, it also values impairment as part of human diversity and human dignity.

Third, because of its focus on social power relations rather than on personal emancipation, the social model has been criticized for neglecting identity politics as a valuable component of disability policy.[53] On the contrary, the human rights model provides ample room for minority and cultural identification. Identity politics means politics that values differences among individuals and allows members belonging to different groups to identify positively with features that are oppressed and disrespected in society. Illustrations of identity politics include gay pride, Black Lives Matter (BLM), feminism, and disability culture. For instance, deaf people have created their own culture, and deaf identity plays an important role in deaf studies, constituting an important aspect of disability studies.[54] The CRPD acknowledges different layers of identity within the context of disability so that children with disabilities and women with disabilities have stand-alone articles to address their distinct issues.[55] Article 7 provides that "women and girls with disabilities are subject to multiple discrimination,"[56] which constitutes the first binding intersectionality clause in the human rights treaties.

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[51] *See* Theresia Degener, *supra* note 37, at 39.
[52] *See* MARIAN CORKER & SALLY FRENCH, DISABILITY DISCOURSE 6 (1999).
[53] *See* Theresia Degener, *supra* note 37, at 44.
[54] PADDY LADD, UNDERSTANDING DEAF CULTURE (2003).
[55] CRPD, Article 6 and Article 7.
[56] *Id*. Article 7.

Last but not least, while the social model helps explain the close link between poverty and disability,[57] the human rights model offers a roadmap for change. It is now common knowledge that disability and property are mutually reinforcing.[58] It is estimated that two-thirds of the world population of people with disabilities live in developing countries. However, the acknowledgment of disability as a development issue has not resulted in its incorporation into the Millennium Development Goals. It was not until the adoption of the CRPD that disability became an issue addressed in international development policy. As the first human rights treaty to incorporate a stand-alone provision on development, Article 11 and Article 32 of the CRPD provide a robust roadmap for disability policy in international humanitarian and development cooperation. Both articles have at least three crucial aspects: "(1) a human rights-based approach to development and humanitarian aid; (2) disability mainstreaming as a leitmotif of international cooperation; and (3) the importance of DPO involvement."[59] A human rights-based approach to development means that people living in poverty are perceived as right holders who have a say in their own needs assessment and distribution of resources. Disability mainstreaming is a vital strategy to rectify discriminatory and segregational structures perpetuated by traditional disability policies. Active participation of persons with disabilities and their representative organizations ensures that development programs are well-designed to address their needs. The impact of the CRPD can be clearly seen in the 2030 Agenda, which was adopted on September 25, 2015, by the U.N. General Assembly and include the new Sustainable Development Goals.[60] Notably, the 2030 Agenda contains eleven references to persons with disabilities, whereas its predecessor, the Millennium Development Goals include none.

Undeniably, the negotiation and adoption of the CRPD manifest the paradigm shift from the medical to the social model of disability in international disability policy. Nonetheless, the Convention as a whole reflects much more than that; it is the codification of the human rights-based model of disability. The above analysis clearly attests to this fact. Rosemary Kayess and Phillip French also maintain that the enormous influence of the social model during the negotiations has come from a "populist conceptualization of the social model as a disability rights

[57] *See* OLIVER, UNDERSTANDING DISABILITY, *supra* note 23, at 12-13.
[58] World Health Organization and World Bank, *World Report on Disability*, 10-11 (2011).
[59] *See* Theresia Degener, *supra* note 37, at 47.
[60] United Nations, *Transforming our world: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/I 21 October 2015, available at: https://sustainabledevelopment.un.org/post2015/transformingourworld (last accessed on November 10, 2021).

manifesto and its tendency towards a radical social constructionists view of disability, rather than for its contemporary expression as a critical theory of disability."[61] Just like the emergency of the social model does not mean the medical model would not have any role in our understanding of disability, categorization of the CRPD as exemplifying the human rights model of disability should not lead to the total abandonment of the social model. As expressed eloquently by Theresia Degener, "like in many other human rights projects, the CRPD once planted into this world through adoption by the General Assembly took a life of its own."[62] While the origin of the Convention may be traced to the social model, one can carry it forward to reflect the human rights model of disability.

F. Relationship between Models of Equality and Models of Disability

Chapter Two discussed the various models of equality[63] and their implications for disability issues. At this point, it is appropriate to contemplate how models of equality correspond with the different models of disability. Most authors agree that formal equality corresponds to the medical model of disability. Disability is viewed as a personal characteristic that differentiates people with disabilities from their non-disabled counterparts. Physical or mental impairment represents a difference that either has to be ignored or legitimizes different, unfavorable treatment. The substantive model of equality associates with the social model of disability. Because disability is regarded as a socially constructed conception, substantive equality requires that personal differences be accommodated to avoid oppression and subordination. The human rights model of disability not only builds upon the substantive model of equality but further extends it to the terrain of transformative equality in that it provides the most concrete and comprehensive roadmap for change. Under transformative equality, the state has a more proactive role in overcoming structural, institutional barriers and eliminating discriminatory social and political practices to transform society. Since discrimination against people with disabilities takes several forms, the CRPD embraces an expansive concept of discrimination, and focuses on the group as well as individual dimensions. Taken together, the various concepts of equality and different models of disability complement each other in fulfilling the overarching goal of ensuring equality for individuals with disabilities.

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[61] Rosemary Kayess & Philipp French, *Out of Darkness into Light?,* 1 HUM. RTS. L. REV. 1, 7 (2008).
[62] *See* Theresia Degener, *supra* note 37, at 48.
[63] *See* Chapter Two, section II.

III. DIFFERENT APPROACHES TO DISABILITY

Besides the various models of disability mentioned above, policymakers and legislatures adopt multiple approaches to addressing disability issues. The main distinction between models of and approaches to disability is that the former explains how the concept of disability has been understood and defined, whereas the latter reflects how our policy and legislation respond to disability-related issues. To be clear, there is no one-on-one relationship between different models of and approaches to disability. Namely, one who subscribes to the medical model of disability does not necessarily agree with either the minority group approach, the universalist approach, or the capabilities approach; likewise, adoption of the social or human rights model would not directly lead to policy-making based on either the minority group, the universalist, or the capabilities approach.

In the following subsections, three main approaches to disability are discussed and compared with each other. I will explore how they influence our response and policy-making with respect to disability issues. This lays out a solid foundation for our understanding of the equality and non-discrimination norms in the CRPD.

A. The Minority Group Approach

The minority group approach takes its roots in the civil rights movement of the 1960s in the United States. It views persons with disabilities as a collective minority with shared experiences and political ideals.[64] This view grew out of a comparative analysis between people with disabilities and other minorities marginalized on the grounds of race, sex, or religious beliefs.[65] Just as blacks are discriminated against for their skin color, women are discriminated against for gender, people with disabilities experience discrimination and exclusion because of their disability.[66] The minority group approach to disability has, as Jerome Bickenbach notes, made significant gains through anti-discrimination laws and special accommodations.[67]

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[64] *See* Jerome Bickenbach, *Minority Rights or Universal Participation: The Politics of Disablement, in* INTERNATIONAL STUDIES IN HUMAN RIGHTS: DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE, vol. 56, 102-10 (Melinda Jones & Lee Ann Basser Marks eds., 1999) [hereinafter "Bickenbach, *Minority Rights or Universal Participation*"].
[65] *Id.* at 103.
[66] *See* Jonathan Penney, *A Constitution for the Disabled or a Disabled Constitution - Toward a New Approach to Disability for the Purposes of Section 15(1),* 1 J.L. & EQUAL. 83, 90 (2002).
[67] *See* Bickenbach, *Minority Rights or Universal Participation*, *supra* note 64, at 105.

The minority group approach builds on the understanding of disability elaborated by the social model and transforms it into political action. It argues for the eradication of exclusionary social practices and institutional structures as a matter of civil rights for persons with disabilities. Harlan Hahn sets forth three suppositions of the minority group paradigm: (1) all aspects of the environment are fundamentally shaped by public policies, (2) policies tend to reflect prevalent societal attitudes and values, and (3) the primary cause of problems for people with disabilities comes from the unfavorable attitudes of non-disabled persons.[68] Under this approach, people with disabilities face barriers to participation in society because historically they have not been viewed as part of the social norm, notwithstanding that all human beings should have civil rights to participate fully and be included in society. Thus, this approach is also called the civil rights approach to disability.

According to the minority group approach, it is vital to recognize that the rights asserted by people with disabilities are characterized as simple equality rights, rather than as a request for special benefits. Disability activists argue that the elimination of both physical and attitudinal barriers is indispensable to leveling the playing field for people with disabilities. By framing the various disadvantages faced by people with disabilities as one of civil rights, advocates of the minority group approach argue that policy choices about the remedy to be provided should be guided by "democratic principles" rather than "strict financial pragmatism."[69]

Drawing upon the civil rights movement of other disadvantaged minority groups, advocates for disability rights use the minority group approach to mobilize persons with disabilities politically. Disability theorists argue that in order to emerge from roles of inferiority, people with disabilities should define disability by and for themselves, control the usage of the term, and choose when to identify themselves as having a disability.[70] Disability advocates also employ language from other civil rights movement, decrying patterns of hierarchy and subordination based upon physical and functional differences.[71]

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[68] *See* Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAVIORAL SCIENCES AND THE LAW 41, 53 (1996).
[69] *See* Hahn, *Towards a Politics of Disability*, *supra* note 2, at 87.
[70] *See* DAVIS, ENFORCING NORMALCY, *supra* note 17.
[71] *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Polity for People with Disabilities*, 40 UCLA L. REV. 1341, 1357 (1993).

However, there are some difficulties understanding people with disabilities as a distinct minority group. First, unlike other racial, ethnic, or religious minority groups, persons with disabilities often have no or little opportunity to develop the kind of close group bind, awareness, or culture that has empowered other minority groups.[72] Moreover, individuals with disabilities are an extremely heterogeneous group comprising a wide variety of different sensory, physical, mental, or psychosocial impairments and with various severity. Disability cuts across all races, sex, religions, and sextual orientations. It can be immutable or curable, temporary or permanent. One may wonder at what common point of identity to fix disability? As a result, the experiences of disadvantage or discrimination persons with disabilities encounter are diverse with little in common. For Anita Silvers, the complex nature of disability means that treating all disabled persons as a single group identity inevitably leaves some people to "fall into the cracks."[73] She claims that:

> Homogenizing people who function differently from one another injures some even if advancing others. Collectivizing disability perspectives thus competes with acknowledging the singular ways in which people with disabilities succeed... The politics of collectivity is also categorically deleterious for people with disabilities. Not just specific political identities, but also the logic of transforming political identity into categorical group identity, result in performance norms that always will be oppressive and dismissive of (some) people with disabilities.[74]

Another limitation of the minority group approach is that in arguing for equal rights and accommodations for persons with disabilities, it fails to challenge the mainstream norms, practices, and structures. An example of this is the walkaways for persons with disabilities at the shopping malls. The walkways are usually constructed alongside the stairs to accommodate people with mobility impairments. However, a more fundamental and practical approach for structural change is to challenge the architectural norm rather than just to argue for a walkway. Under the minority group approach, biased norms and structures are seen as proper, and accommodations are required to cater to the differences of minorities. In the words of Colin Barnes:

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[72] *See* Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3 (1988).
[73] *See* Anita Silvers, *Double Consciousness, Triple Difference, in* INTERNATIONAL STUDIES IN HUMAN RIGHTS: DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE, vol. 56, 98 (Melinda Jones & Lee Ann Basser Marks eds., 1999).
[74] *Id.*

> The minority rights approach would mean that the disabled people would be accommodated within the existing political framework simply as one more special interest group... However, in order to gain even this dubiously privileged position disabled people would have to accept 'this disabled and non-disabled distinction' and the notion of 'the normalizing of society'.[75]

In addition to these obstacles to conceptualizing people with disabilities as a discrete and cohesive minority group, disabilities scholars also notice that framing the demands of people with disabilities as purely a claim to equal treatment on a level playing field may sometimes be insufficient. As discussed above, for some individuals with severe disabilities, the playing field can never truly be leveled because some of the limitations caused by their impairments are not socially created. In this regard, Anita Silvers points out the fact that even if the playing field is leveled by removing barriers and providing accommodations, only the highest functioning people with disabilities will thrive.[76] As a result, the quest for civil rights may prove a mirage to persons who are incapable of competitive functioning. These potential weaknesses put aside, the minority group approach provides the impetus for worldwide efforts to advance the rights of people with disabilities through reform on policy and legislation, particularly following the passage of the Americans with Disabilities Act (ADA).

B. The Universalist Approach

In contrast to the minority group approach, the universalist approach sees disability as a universal feature of human beings, but not as a personal trait of a particular group.[77] For universalists, a dichotomous conception of disability is implausible; instead, disability is perceived as lying on a continuum. The reality is that every individual has a unique set of abilities and limitations, coupled with a number of different physical and social environment in which each person lives. Thus, there are no intrinsic or inherent boundaries to disabilities.

While universalists agree that at some point a line must be drawn for conceptual purposes, they think that this is essentially a political distinction based on social, political, and economic processes.[78] Compared to the minority group approach, the universalist approach can avoid the following pitfalls. First, the universalists endorse a unified and deeply contextual approach to

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[75] *See* COLIN BARNES, DISABLED PEOPLE IN BRITAIN AND DISCRIMINATION: A CASE FOR ANTIDISCRIMINATION LEGISLATION 219 (1991).
[76] *See* Mary Crossley, *supra* note 6, at 664-65.
[77] *See* Bickenbach, *Minority Rights or Universal Participation*, *supra* note 64, at 112.
[78] *Id.* at 111.

disability. This allows us to examine ways in which mainstream norms and structures can be fundamentally altered. For example, the concept of Universal Design stands for a new universal architectural standard to construct a building that is accessible and usable by all people to the greatest extent possible. By challenging existing social norms, practices, and structures, the universalist approach helps broaden the concept of both ability and disability.[79]

Second, an appreciation that every human being has a unique set of abilities and limitations enables the universalists to avoid a problem of the minority group approach– that is, the tendency to formulate an all-or-nothing group identity for people with disabilities. The universalist approach encourages each person to bring up his or her own experience to a wider public interest level. The universalists argue that all people can and should identify with the issues and concerns of disability.[80] They believe that the general public forum can effectively demystify disability and generate the greatest gains for people with disabilities.

Basically, the universalist approach views disability as nothing more than a personal trait such as shorter stature, baldness, or other aspects of physical characteristics. This approach would open up the protection of disability discrimination to anyone who has an impairment and is subjected to adversely discriminatory treatment. This approach can avoid the time and effort in disputing over the existence of the plaintiff's disability. Nonetheless, there is a worry that the universalist approach would potentially lead to a flood of lawsuits as many employment disputes can be brought up as lawsuits alleging discrimination based on one's impairment.

Admittedly, any attempt to particularize the types of physical characteristics protected has to face the problem of line-drawing and inevitably creates its own border disputes. One alternative is to list specifically those physical characteristics covered as ***per se*** disabilities that a person must possess in order to claim the protection of disability discrimination. Although a list would substantially decrease disputes on the threshold issue of who is an individual with a disability, it would also hypermedicalize the inquiry, because more often than not, medical records are required to establish the disability of the plaintiff. Moreover, the use of a list would be underinclusive and less flexible than the existing approach.[81]

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[79] *Id.* at 112-13.
[80] *Id.* at 113.
[81] *See* Mary Crossley, *supra* note 6, at 714.

For disabilities scholars who support the minority group approach, a list might be much preferred because they argue that a list can best be tailored to maximally protect the truly disabled – those who have historically been subjected to political, social, and economic disadvantage because of their disabilities.[82] In deciding what should be covered on the list, various alternatives have been put forward by commentators. For example, the practice of "historical counterfactualizing" is a way of identifying what kinds of impairments lead to disadvantages owing to society's failure to take the needs of all people into consideration. As an example, Anita Silvers employs "historical counterfactualizing" to demonstrate how the environment would look different if a dominant group in a society used wheelchairs. She states that "[b]y hypothesizing what social arrangements would be in place were persons with disabilities dominant rather than suppressed, it becomes evident that systematic exclusion of the disabled is a consequence not of their natural inferiority but of their minority social status."[83] Likewise, social scientists could provide evidence of social, cultural, and economic disadvantage as well as offer testimony at congress hearings.

However, it is worth noting that drafting a list carries with it dangers of divisiveness since reasonable minds differ on whether certain conditions, such as chronic illness and age frailty, should be regarded as disabilities.[84] Last but not least, a list would also fail to protect individuals with nontraditional or marginal disabilities.

C. Debating the Two Approaches

Many scholars perceive the universalist approach as superior to the minority group approach for the following reasons: First, the universalist approach can obtain broader political support, whereas those targeted, group-focused alternatives cannot. In the judicial realm, judges and juries tend to read targeted civil rights law narrowly, but show much willingness to read and implement universalistic laws more broadly. For example, in the context of disability policy, many commentators attribute the failure of the Americans with Disabilities Act (ADA) to achieve its goals – especially in increasing the employment rate for people with disabilities – to the political,

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[82] *See* SIMI LINTON, CLAIMING DISABILITY; KNOWLEDGE AND IDENTITY 13 (1998) (discussing Carol J. Gill, *Questioning Continuum* in THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE FIRST FIFTEEN YEARS OF "THE DISABILITY RAG" 46 (Barrett Shaw ed., 1994)).
[83] *See* Anita Silvers, *Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities*, HYPATIA 48 (1995).
[84] *See* Ron Amundson, *supra* note 8.

social, and judicial backlash.[85] Because of the seemingly "special benefits" conferred by the ADA on disabled people, courts adopted a stringent interpretation of what constitutes a disability. Upon looking into American social welfare policy history, Samuel Bagenstos also argues that "broader, universalist interventions have often proven to be more politically popular than more narrowly targeted ones."[86] In advocating for flexible scheduling for all workers, Mary Anne Case similarly claims that the universalist frame "would broaden the coalition for such change and potentially reduce the possibility for zero-sum games among employees."[87]

Secondly, universalists argue that the universalist approach is a more effective policy tool to overcome limitations in reaching or enforcing group-based anti-discrimination laws. In many circumstances, it can be quite difficult, if not impossible, to disentangle discriminatory intent from other lawful motivations. Even though Congress has responded by prohibiting actions that have an unjustified disparate impact on protected groups,[88] plaintiffs still face significant obstacles in showing evidence of disparate impact.[89] The universalist approach could solve this problem by uniformly prohibiting certain actions without requiring proof of discrimination in specific cases. Furthermore, the universalist approach can help promote equality at a deeper, institutional level by attacking those deep-rooted social structures.[90] As Samuel Bagenstos argues that in the context of disability employment, the ADA failed to achieve disability equality because it does not address problems of the existing health insurance system, which prevents a larger number of individuals with disabilities from participating in the workforce.[91]

In a similar vein, scholars also argue that the universalist approach can address problems of inequality and injustice that are more far-reaching than the sorts of group-based discrimination that civil rights laws generally target. For instance, critics of affirmative action maintain that poverty rather than race is a more fundamental barrier to social mobility, and that race-based

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[85] *See, e.g.,* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003).
[86] *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 143 (2009) [hereinafter "BAGENSTOS, LAW AND THE CONTRADICTIONS"].
[87] *See* Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1768 (2001).
[88] *See* George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313 (2006).
[89] *See, e.g.,* Michael Selmi, *Was the Disparate Impact Theory a Mistake?,* 53 UCLA L. REV. 701, 734-53 (2006).
[90] *See* Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1128-55 (2009).
[91] *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 26-34 (2004).

affirmative action only serves to benefit those most advantaged racial minorities.[92] Other advocates assert that the universalist approach is superior because it vindicates rights or interests that everyone shares.[93] In the workplace context, particular universalist workplace protection is raised up because it can protect each worker's privacy and dignity.[94]

Thirdly, advocates of universalism argue that their approach is superior to targeted civil rights laws because of the messages it sends. Anti-discrimination law prohibits differential treatment of individuals because of their membership within specific groups. The group-based understanding of discrimination has the danger of essentializing stereotypes about the characteristics of members of particular groups. In the context of gender equality in the workplace, Catherine Albiston contends that Title VII's reach is unduly limited because the statute "tends to focus only on the gender side of the equation without interrogating work practices."[95] By so doing, it "reinforces institutionalized work practices that push workers, both men and women, to adopt traditional gender roles at home."[96] As a result, she argues for the superiority of the Family and Medical Leave Act (FMLA) as a universal workplace flexibility law to solve these problems. Moreover, supporters of the universalist approach also argue that targeted, group-based laws are divisive to the extent that people are defined in their membership in the particular, socially salient groups. The universalist approach, on the contrary, "stresses the interests we have in common as human beings rather than the demographic differences that drive us apart."[97]

Despite the above-mentioned strengths of the universalist approach, it would be too quick to conclude that it is always superior to a targeted, group-based approach in any circumstances. Some potential weaknesses of the universalist approach include: First, extending protection to everyone might undermine political support for the most compelling cases. For example, Jessica Clark argues powerfully that universal workplace bullying law dilutes the claims of sexual harassment by lumping those who experience sexual harassment together with those who are making cases out of some relatively minor, childish behavior.[98] Relatedly, political actors have

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[92] See Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1060 (1996).
[93] *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby),* 123 YALE L. J. 2838, 2859 (2014) [hereinafter "Bagenstos, *Universalism and Civil Rights*"].
[94] *See, e.g*., David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251 (2010).
[95] *See* Catherine Albiston, *supra* note 90, at 1155.
[96] *Id*.
[97] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 793 (2011).
[98] *See* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219,

proven to be exceptionally responsive to certain groups of beneficiaries of civil rights laws.[99] One reason is that targeted laws often achieve their goals more efficiently than the universalist approach so that the political process may reward this efficiency accordingly.[100]

Secondly, the universalist approach may not only dilute protection enjoyed by the targeted groups, but may also entrench pre-existing group-based inequality and injustice. For instance, proposal of using socio-economic status based affirmative action may alleviate economic inequality, but does not help much to promote racial equality. Deborah Malamud notes that "the past and present effects of discrimination mean that blacks and whites who appear to have the same occupation, education, or residential situation when a simple metric is used may well not occupy the same status in reality."[101]As a result, an admissions program that utilizes generic socio-economic data may give some less disadvantaged whites preferences over more disadvantaged minorities, leading to further entrenchment of racial inequality.[102] In a similar vein, Jessica Clark contends that because of society's stereotypical gendered roles, women are far more likely to take time off work to take care of family. In contrast, men often use their free time to improve their work-related skills. Therefore, the universalist protection of work/life balance will reinforce rather than undermine pre-existing gender inequality.[103] In the context of disability employment, Elizabeth Emens also argues against the universalist requirement of workplace accommodations because they may fail to take account of "disabled people and their particular needs."[104]

Thirdly, many supporters of the universalist approach argue that it would avoid the backlash that often accompanies legislation designed to benefit a particular, often stigmatized group. But this argument is based on the premise that the social and political understanding of legislation will closely track its legal form. In reality, this premise does not always hold, as pointed out by many critics of class-based affirmative action.[105]

1263-66 (2011) [hereinafter "Clarke, *Beyond Equality*"].

[99] *See* BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 86, at 5.

[100] *See* PETER H. SCHUCK & RICHARD J. ZECKHAUSER, TARGETING IN SOCIAL PROGRAMS: AVOIDING BAD BETS, REMOVING BAD APPLES (2006).

[101] *See* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1892 (1996).

[102] *Id*. at 1890-94.

[103] *See* Clarke, *Beyond Equality*, *supra* note 98, at 1274-78.

[104] *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 894 (2008).

[105] *See, e.g*., Richard H. Fallon, Jr., AFFIRMATIVE ACTION BASED ON ECONOMIC DISADVANTAGE, 43 UCLA L. REV. 1913, 1939 (1996); RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 177-79 (2013).

Finally, the messages expressed by law do not necessarily hinge on their legal form. The argument for universalism that targeted civil rights laws will send a message that group status matters, but the universalist approach will not send such a message, though plausible, does not often hold as many laws have social meanings that extend beyond such formalities.[106] Even a broad, universalist approach may reflect and transmit pervasive group-based stereotypes. This is because the public may understand the universalist approach as an indirect means of conferring benefits on particular groups. It could also come from the fact that the application and enforcement of universalist laws reflect essentializing stereotypes. In such situations, the universalist approach is no less likely than targeted one to send divisive and essentializing messages.[107]

It is undeniable that the minority group approach has had great success in the civil rights movement, including the enactment of the ADA. Nevertheless, the exclusive focus on unique group characteristics may essentialize stereotypes and divisiveness. There is a danger that seeing people through the lens of groups might essentialize a group status and regard all members in a group as sharing the same interests or perspectives. The debate between essentialism and anti-essentialism exemplifies this point well. The essentialists view human identity categories as fixed and exist transhistorically and transculturally.[108] By contrast, the anti-essentialists argue that human identities lack an essence that connects people with the same trait to form a predictable category with common interests or experiences.[109] Iris Marion Young similarly argues that groups are better understood, not as fixed categories with impermeable boundaries, but as a set of relationships between different people.[110]

Overall, I think that the universalist approach is better than the minority group approach to facilitate the accomplishment of substantive equality for persons with disabilities. From the starting point, the universalist approach perceives disability as a universal feature of human beings. It rejects the dichotomous conception of disability inherent in the minority group approach. In the meantime, it avoids the stereotypes and divisiveness of the targeted, group-focused approach to the extent that people are defined by their unique group characteristics. In addition, while the

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[106] *See* Bagenstos, *Universalism and Civil Rights*, *supra* note 86, at 2864-65.
[107] *Id*. at 2866.
[108] *See* Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859, 1863 (1993).
[109] *See* MARTHA MINOW, NOT ONLY FOR MYSELF, IDENTITY, POLITICS, AND THE LAW 57 (1997).
[110] *See* IRIS MARIA YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 171-72 (1990).

minority group approach argues for equal rights and accommodations for persons with disabilities, it fails to challenge the mainstream norms, practices, and structures. In contrast, the universalists adopt a unified and deeply contextual approach to disability which enables us to examine ways in which existing political, social, and cultural norms and structures can be fundamentally altered.

More importantly, the CRPD also reflects the universalist approach as Preamble(e) of the Convention states that "disability is an evolving concept," and Preamble(e) and Article 1 describes disability as the interaction of different kinds of impairments with various social barriers. In other words, the CRPD resonates with the universalist approach in the sense that every individual's ability lies on a continuum so that there is no fixed, static boundary between what constitutes a disability or not. While I agree with many scholars that the universalist approach is, theoretically speaking, superior to the minority group-based approach in many situations, careful attention should be paid to the strengths and weaknesses of the universalist approach in a particular context. Sometimes, to promote equality and participation of people with disabilities, an effective response requires policy and laws that target disability discrimination directly.

D. The Capabilities Approach

Following Kantian moral philosophy, the capabilities approach holds that all people are worthy of respect, autonomy, and self-fulfillment. Every person must be treated as an end in herself, rather than as a means of the ends of others.[111] It seeks to provide individuals with means through which to develop their potential. Capabilities theory offers a rich avenue for understanding what obligations states owe individuals to ensure their flourishing. Martha Nussbaum has enumerated a list of ten central capabilities that individuals require to flourish.[112] To Nussbaum, these capabilities are essential to determine whether an individual's life is "truly human" existence.[113] Under Nussbaum's capabilities scheme, states have obligations to provide sufficient resources to enable people to attain the basic threshold level of ten central capabilities.

A significant contribution of the capabilities approach recognizes that the peculiarities of human life should be considered in the formulation and execution of public policies, laws, programs, and projects. Human diversity is a critical factor in assessing social inequalities because

[111] *See* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 56 (2000).
[112] *Id*. at 78.
[113] *See* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 35, 71 (2006).

they affect how persons interact or participate in the cooperation system.[114] Showing respect for human diversity, the capabilities approach incorporates care and dependency as essential elements in establishing a truly just society.[115] As Stella C. Reicher states, "the capabilities approach leads to an understanding of equality in light of human diversity through the recognition and acceptance of differences. It helps us understand that reciprocity is not only between equal parties where benefits are equally shared but also between different parties, thereby recognizing and respecting individual differences."[116]

Although the capabilities approach provides significant potential for assessing the extent of state obligations towards ensuring equality and social justice, it also has certain apparent limitations. The most serious one is that it fails to fully recognize the humanity and equality of those who function below the ten central capabilities. The capabilities approach excludes or quantifies the inclusion of certain lower functioning individuals, such as people with severe intellectual or developmental disabilities, because under the scheme only individuals who can meet those minimum enumerated functions can live a "truly human life" that is "worthy of human dignity."[117] Apart from this, Nussbaum's capabilities approach does not adequately recognize all individual rights to full social participation and the moral imperative of developing individual talents.[118]

Nonetheless, the capabilities approach provides a good starting point to analyze disability. The capabilities approach acknowledges that people have different "conversion factors," which is the ability to convert resources into functionings. As a result, people's needs for resources vary. This not only justifies the entitlements of persons with disabilities, but also reflects the diverse needs of human beings.[119] Furthermore, according to the capabilities approach, the state has an obligation to provide the necessary support to ensure that people with disabilities, just as their non-disabled counterparts, can develop the capabilities beyond the threshold level.[120] As a result, the

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[114] *See* Stella C. Reicher, *Human Diversity and Asymmetries: A Reinterpretation of the Social Contract under the Capabilities Approach*, 14 SUR - INT'L J. ON HUM RTS. 167,171 (2011) [hereinafter "Reicher, *Human Diversity and Asymmetries*"].
[115] *See* MARTHA C. NUSSBAUM, *supra* note 113, at 100.
[116] Reicher, *Human Diversity and Asymmetries*, *supra* note 114, at 174.
[117] *Id*. at 171.
[118] *See* Michael Ashley Stein & Penelope J.S. Stein, *supra* note 43, at 1218-21.
[119] *See* Caroline Harnacke, *Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention*, 41 J. L. MED. & ETHICS 768, 772 (2013).
[120] *Id.* at 777.

capabilities approach represents another way for policymakers and legislatures to respond to disability-related issues.

IV. CONCLUSION

The meaning of equality varies depending on the perspective of disability we adopted. There is an intrinsic link between the model of disability embodied in law and policy and the subsequent approach to realizing equality adopted by that law and policy. Hence, the discussion on various conceptual models of disability and equality, as well as the explication of different approaches to addressing issues related to disability are crucial to set the backdrop to analysis of the equality and non-discrimination provision in the CRPD.

The negotiation and entry into force of the CRPD not only manifest the paradigm shift from the medical model to the social model of disability in international disability policy, but also further builds on the social model and incorporates the human rights model of disability. That being said, various models of disability help us to capture different aspects of disability, and they are not mutually exclusive. The emergence of these models represents progress in understanding and defining disability. Although the human rights model of disability is best suited and consistent with the goal of realizing equal rights for people with disabilities,[121] every model has its strengths and weaknesses so that they can complement each other.

With respect to the different approaches to addressing disability-related issues, generally speaking, the universalist approach is a more appropriate response than the minority group approach to disability equality issues. One of the obvious weaknesses of the targeted, group-based approach is that its focus on unique group characteristics may lead to essentializing stereotypes, divisiveness, separation, and isolation. Nevertheless, to promote equality and participation of people with disabilities, an effective response occasionally requires policy and laws that target disability discrimination directly. As illustrated by the subsequent chapter, the Preamble and substantive articles of the CRPD clearly reflect the universalist approach.

[121] Concluding Observations on the initial report of Argentina as approved by the Committee at its eighth session (17–28 September 2012), CRPD/C/ARG/CO/1, 8 October 2012, paras. 7–8; Concluding Observations on the initial report of China, adopted by the Committee at its eighth session (17–28 September 2012), CRPD/C/CHN/CO/1, 15 October 2012, paras. 9–10, 16, 54.

CHAPTER FOUR: THE U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) AND REASONABLE ACCOMMODATION

I. INTRODUCTION

In the previous chapter, I outlined different theoretical models of and approaches to disability to figure out the normative foundations underlying the CRPD. Various theoretical models of disability and their relationship to models of equality were discussed, and I argued that, though the negotiation and adoption of the CRPD manifest the paradigm shift from the medical to the social model of disability, the human rights model of disability is best suited and consistent with the goal of realizing equal rights for people with disabilities. Furthermore, three main approaches to disability were explored and compared with each other to see how they influence our response and policy-making with respect to disability issues. This lays out a solid foundation for the understanding of the equality and non-discrimination norms in the CRPD.

For decades, the international human rights community has ignored the issues of people with disabilities. It is worth noting that although the United Nations has adopted several specialized human rights conventions on behalf of various groups, before 2000, none specifically addressed the rights of individuals with disabilities.[1] The CRPD, as the first U.N. legal binding human rights instrument specifically directed at people with disabilities, has great potential to improve the participation and inclusion of individuals with disabilities in all spheres of society by putting them on an equal footing with their non-disabled counterparts. In the context of disability, the obligation to provide reasonable accommodation is widely perceived to be a crucial tool to further the equal rights of individuals with disabilities and to improve their inclusion and participation in the community. Under the CRPD, reasonable accommodation is embedded in the equality and non-discrimination provision, which belongs to a civil right that creates an obligation of immediate effect for states.[2] However, the CRPD also mandates that reasonable accommodation is equally required in relation to civil, political and economic, social, and cultural rights. This innovative

[1] *See* Arlene S. Kanter, *Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241, 253-54 (2003).
[2] *See* Janet E. Lord & Michael A. Stein, *Assessing Economic, Social and Cultural Rights: The Convention on the Rights of Persons with Disabilities*, *in* EQUALITY AND ECONOMIC AND SOCIAL RIGHTS 4-5 (Malcolm Langford & Eibe Reidel eds., 2010).

application of reasonable accommodation creates great potential for disability rights advocates to seek justice and equality for persons with disabilities.

In this chapter, my main focus is on article 5, the equality and non-discrimination provision of the CRPD, with particular emphasis on the understanding and interpretation of the concept of reasonable accommodation. Reasonable accommodation, along with other positive measures, is indispensable for the realization of the equality rights of persons with disabilities. The intricacies involved in establishing and assessing the relationship between reasonable accommodation and progressive realization of economic, social, and cultural rights in implementing the Convention will also be explored.

This chapter proceeds as follows. Section II provides an overview of the CRPD and explains why a disability-specific convention is significant for people with disabilities. An in-depth interpretation and analysis of the equality and non-discrimination provision of the CRPD, i.e., article 5, is offered. Specifically, various elements of the duty of reasonable accommodation will be delineated. The critical role that reasonable accommodation plays in promoting the equal rights of persons with disabilities cannot be overemphasized. However, reasonable minds disagree on which factors should be considered when assessing accommodation measures. In addition, what constitutes a disproportionate or undue burden is hotly debated. This section aims to explore these questions and, hopefully, offers certain guidance.

Section III discusses the procedural mechanisms provided by the Optional Protocol to the CRPD to deal with individual and group communications alleging violations of rights by States Parties. The case-law of the CRPD Committee on the interpretation and application of reasonable accommodation duty is still quite limited. Through analyzing the cases in which the Committee has substantively evaluated facts and arguments on the issue of reasonable accommodation, it is hoped that more guidance can be discerned.

In Section IV, I explore how the duty of reasonable accommodation affects the interpretation and application of the progressive realization of socio-economic rights contained in the CRPD. By incorporating reasonable accommodation duty, which is subject to immediate realization into socio-economic rights, the CRPD blurs the dividing line between civil and political rights, and economic, social, and cultural rights. Some criteria in assessing the measures adopted

by the state for the implementation of its obligations under the CRPD will be put forward. Section V concludes this chapter.

II. OVERVIEW OF THE CRPD

A. The Need for a Disability-Specific Treaty

Disability activists have long continued to push for the adoption of a disability-specific treaty. Italy and Sweden made such proposals in 1987 and 1989, respectively. But there was not enough support at the time. In March 2000, the first world NGO Summit on disability produced the *Beijing Declaration of Rights of People with Disabilities in the New Century*, which lends considerable support to the idea of a disability-specific convention.[3] Soon after the Summit, the U.N. General Assembly adopted a resolution establishing an Ad Hoc Committee to develop "a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, based on the holistic approach in the work done in the field of social developments, human rights, and non-discrimination."[4] Then, the Ad Hoc Committee authorized a working group to draw up a proposal.[5] On January 16, 2004, the working group issued "Draft Articles"; on August 25, 2006, the last day of its session, the Ad Hoc Committee adopted the revised Draft Articles.[6] The goal of the proposed specialized convention is to provide guidance to governments to ensure inclusion of persons with disabilities, to eliminate discriminatory attitudes and practices, and to improve equal participation of disabled people in mainstream life.

The idea of a disability-specific convention acquired broad support internationally for several reasons.[7] First, a convention on the rights of persons with disabilities helped affirm disability rights as a human rights issue within the international human rights arena.[8] Like the other

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[3] Beijing Declaration on the Rights of People with Disabilities in the New Century, adopted Mar. 12, 2000 at the World NGO Summit on Disability.

[4] Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/119b, U.N. GAOR, 56th Session, at para. 1, U.N. Doc. A/C.3/56/L67/Rev.1 (2001). *See also* G.A. Res. 56/168 of December 19, 2001.

[5] Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, Report of the Working Group to the Ad Hoc Committee, para. 1, U.N. Doc. A/AC.265/2004/WG.1 (Jan. 27, 2004).

[6] *See* Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, Draft Convention on the Rights of Persons with Disabilities and Draft Optional Protocol (2006).

[7] *See* National Council on Disability, *Understanding the Role of an International Convention on the Human Rights of People with Disabilities: An Analysis of the legal, social, and practical implications for policy makers and disability and human rights advocates in the United States*, 35-61, June 12, 2002.

[8] *See* Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of*

U.N. specialized treaties, the convention should have a positive effect on the inclusion of individuals with disabilities. Second, the convention is necessary to protect people with disabilities from mistreatment and exclusion that have been explicitly and/or implicitly allowed to continue in a variety of contexts. Only a tiny fraction of the countries in the world have enacted domestic disability laws. Many governments remain unaware of any legal obligations regarding the human rights protections of people with disabilities.[9]

Moreover, a disability convention helped raise awareness for both the disability community and society. For a long time, disability remained invisible and marginalized even among human rights organizations and NGOs. The services provided by NGOs may inadvertently perpetuate the segregation of people with disabilities when disability issues are viewed through the lens of the medical model without any input from the consumers, i.e., people with disabilities, of such services. Furthermore, a binding disability convention is necessary to attract sufficient attention and resources to address the unequal treatment and discrimination people with disabilities face.[10] For instance, the World Bank and U.S. AID provide millions of dollars in aid worldwide. Such funds could benefit the impoverished persons with disabilities in developing countries.[11]

Equally important, a disability-specific treaty would have a transformative effect. The treaty process, as well as the language itself, provide a critical mechanism to the government and NGOs to effectively monitor and report on the implementation of the convention. The disability convention represents an invaluable advocacy tool for civil society to urge for the realization of equal rights of people with disabilities from button-up.

B. General Comments of the CRPD and Interpretation Methodology

1. Interpretation Methodology

As noted in Chapter One on the methodology part of my dissertation,[12] I adhere to the interpretative criteria set out in the Vienna Convention on the Law of Treaties (VCLT) for the

United Nations Human Rights Instruments in the Context of Disability, 15-18 (2002) [hereinafter "Quinn & Degener, *Human Rights and Disability*"].

[9] *See supra* note 7, 22.

[10] *See* Eric Rosenthal & Arlene Kanter, *Foreign Policy and Disability: Legislative Strategies and Civil Rights Protections to Ensure Inclusion of People with Disabilities*, prepared for the National Council on Disability, March 2003.

[11] James Wolfensohn, Editorial, *Poor Disabled and Shut Out*, WASHINGTON POST, Dec. 3, 2002, at A25.

[12] *See* Chapter One, section III.A.

interpretation and application of the provisions of the CRPD. The VCLT contains interpretive principles and legal rules that have become customary international law for interpreting the content of international treaties generally.[13] The two most important provisions for treaty interpretation are article 31 and article 32. My main point of reference for the interpretation of the CRPD will be the text of the Convention and the VCLT. For the most part, the interpretation focuses on what the law is based on an established framework of interpretation. Only from time to time, the research involves normative elements where I suggest how the law should be interpreted and applied. Even where I offer my opinions regarding the correct meanings of the provisions of the CRPD, the interpretative criteria set out in the VCLT are strictly followed.

It is often emphasized that one aspect that sharply sets human rights treaties apart from other treaties is that the object and purpose of human rights treaties is the most important consideration for interpretation.[14] A unique feature of the CRPD is that it not only outlines its object and purpose in article 1, but also includes general principles and obligations of the Convention in articles 3 and 4, respectively. Moreover, the Convention describes disability as an "evolving concept" in the preamble (e). I think all these support that the CRPD should be interpreted in a dynamic manner to reflect the changing conceptualization of disability and the object and purpose of the Convention.

Furthermore, it has long been debated whether human rights treaties should be interpreted in a way that differs from the rules contained in the VCLT. Owing to the fundamental importance of human rights values and their evolutive character, special treatment of human rights obligations has been advocated by many commentators.[15] However, I think that this argument, while appears reasonable at first sight, is overstated. The guidance provided by the rules of interpretation in the VCLT is so broad that it can easily accommodate methods of interpretation associated with the interpretation of human rights treaties.[16]

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[13] *See* RICHARD K. GARDINER, TREATY INTERPRETATION 14-15 (2nd edn, 2015).
[14] *See* David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565 (2010).
[15] *See* Helen Keller & Leena Grover, *GENERAL Comments of the Human Rights Committee and their legitimacy, in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 418 (Helen Keller & Geir Ulfstein eds., 2012) [hereinafter "Keller & Grover, *GENERAL Comments*"].
[16] *See* Birgit Schlütter*, Aspects of human rights interpretation by the UN treaty bodies, in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 418 (Helen Keller & Geir Ulfstein eds., 2012).

2. Legal Status and Functions of the General Comments

In interpreting the various elements of the duty of reasonable accommodation, I draw heavily on sources from academic works, General Comments, Concluding Observations as well as statements and opinions issued by the CRPD Committee.[17] Specifically, I think that the General Comments issued by the CRPD Committee, while not legally binding, should be accorded "great weight" in the interpretation and application of the Convention's rights and obligations.[18] At a minimum, good-faith interpretation of the CRPD as consistent with article 31(1) of the VCLT obliges States Parties to duly consider the content of General Comments, as they are the product of a treaty body established by States Parties to monitor and promote compliance with the Convention. The content of the General Comments should be authoritative as long as it is well-reasoned and in conformity with the established interpretive methodology of international human rights treaties. In the context of ICCPR, Helen Keller and Leena Grover express that the General Comments of Human Rights Committee have three distinct functions.[19] I contend that they are also applicable to the CRPD Committee.

First of all, General Comments may contain robust legal analytical function. They enable the Committee to define the scope of the Convention's rights by developing objective standards for monitoring, clarifying their scope of application as well as setting out legal tests and factors for determining whether a violation exists. The legal analytical function of General Comments promotes compliance with the Convention by fleshing out the scope and content of vaguely articulated rights therein, thereby helping advance a common understanding of the CRPD.

Secondly, General Comments can have a policy recommendation function. Admittedly, though the Committee is empowered to define the scope of rights and obligations, the means and methods of domestic implementation are primarily left to the discretion of States Parties. The Committee uses General Comments to share best practices with States Parties, identify barriers to the implementation of the Convention, and provide information on how rights violations may be

[17] *See infra* section III.A. on mandate of the Committee.
[18] The International Court of Justice in the *Diallo* case stated that it accorded "great weight" to the interpretations of the ICCPR by the HRC. Its practice is important, said the Court, because that Committee "was established specifically to supervise the application of [the ICCPR]." ICJ, *Ahmadou Sadia Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (November 30, 2010, unreported), *citied in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 124-26 (Helen Keller & Geir Ulfstein eds., 2012).
[19] *See* Keller & Grover, *GENERAL Comments*, *supra* note 15, at 418.

prevented. Overall, the policy recommendation function of General Comments enables States Parties as well as NGOs and DPOs to determine their own plan of action on important policy issues.

Thirdly, General Comments also have a practice direction function. The Committee can indicate the information it would like States Parties to prepare in their reports. The General Comments can also be used to clarify the power of the Committee and resulting obligations of States Parties under the CRPD. Therefore, the practice direction function can assist States Parties in fulfilling their reporting obligations.

General Comments of the CRPD Committee have, as their visibility and legitimacy increase over time, the potential to exert significant influence on the domestic implementation of the Convention. Their educative function for the international community, states, and members of civil society cannot be overemphasized. In addition, the legal analytical function of General Comments provides ways of consolidating the Committee's past practice, highlighting interpretative reasoning, filling legal gaps, harmonizing substantive outcomes across treaty bodies, as well as fleshing out the concepts and content of the CRPD.

The statements of the treaty bodies help raise awareness about human rights and influence the conduct of states. The work of the treaty bodies, including Concluding Observations on state reports, Views in cases of individual complaints, and General Comments, comprise valuable parts of the international institutional machinery that holds states accountable. On the other hand, interpretation by the treaty monitoring bodies can sometimes be controversial to the extent that States characterize it as extremely expansive or quasi-legislative in nature. They may argue that such interpretation goes beyond their consent and represents an unjustified restriction of state sovereignty and democratic control. International human rights law concerns the relationship between a State and its citizens and often involves sensitive cultural and religious issues and ways of life. Since the treaty bodies have no enforcement mechanisms and their findings are not legally binding, their work products must be based on sound reasoning to garner as much support as possible. Hence, it is imperative for the treaty bodies to strike an appropriate balance between the need for effective and evolutive protection of human rights as expressed in the respective conventions and paying due regard to the subsidiary role of international supervision as well as recognizing the diversity in regions and countries.

C. Article 5 of the CRPD

One of the major advances of the CRPD is the codification of a relatively recent concept of equality, known as inclusive equality.[20] The following subsections are composed of a detailed interpretation and analysis of the equality and non-discrimination provision of the CRPD, with particular emphasis on the duty of reasonable accommodation.

Article 5 Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

1. Background

Neither international human rights law nor U.N. treaty bodies had one single definition or consistent commentary on what equality and non-discrimination mean.[21] Nonetheless, equality is "the most important principle imbuing and inspiring the concept of human rights,"[22] and achieving equality and non-discrimination is "the dominant and recurring theme of international human rights law." [23] After years of advocacy by people with disabilities, their representative organizations, and other allies, the CRPD joined a long line of human rights treaties. The "reclassification" of disability as a human rights issue[24] expands the protection and enforceability

[20] *See* Jarlath Clifford, *Equality, in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 430 (Dinah Shelton ed, 2013).
[21] *See* WOURER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES 33, 289 (2005).
[22] MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 458 (2nd edn, 1993).
[23] *See* Anne Bayefski, *The Principle of Equality or Non-Discrimination in International Law*, 11 HRLJ 1, 2 (1990).
[24] *See* Theresia Degener, *International Disability Law-A New Legal Subject on the Rise: The Interregional Experts'*

of equality for persons with disabilities. This reclassification was "inspired by the values that underpin human rights: the inestimable dignity of each and every human being... the inherent equality of all regardless of difference."[25] Given that the origin of human rights law can be traced back to the protection of minority groups, it is helpful to consider article 5 of the CRPD in a broader context.

2. Article 5(1)

States parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

The original text of the working group did not have the phrases of "equality under the law" and "equal benefit of the law." Whether this difference adds any substantive value to the rights of people with disabilities is one of the focuses of this subsection.

a. Equal before the law

The language "all persons are equal before the law" is standard usage in other U.N. human rights instruments.[26] Generally speaking, "equal before the law" is understood as formal equality, which requires the same or consistent treatment. Manfred Novak contends, in the context of article 26 of the ICCPR, that the phrase "equality before the law" "does not give rise to a claim of whatsoever nature to substantive equality but instead solely to a formal claim that existing laws be applied in the same manner to all those subject to them."[27] Hence, equality before the law concerns the application and enforcement of the law and requires the judiciary and government officials not to enforce laws arbitrarily.

Under the CRPD, the obligation to ensure "equality before the law" requires states to refrain from discriminatory acts or practices. This so-called negative obligation of respect mandates that the judiciary or law enforcement officers should not discriminate against disabled people when applying or enforcing the law. The CRPD Committee also commented that the phrase "is usually interpreted as meaning equal treatment by the judiciary or law enforcement officers,

Meeting in Hong Kong, December 13-17,1999, 18 BERKELEY J. INT'L L. 180, 199 (2000).
[25] *See* Quinn & Degener, *Human Rights and Disability*, *supra* note 8, at 1.
[26] UDHR, Article 7; ICCPR, Article 14(1) and Article 26; CERD, Article 5(a), CEDAW, Article 15.
[27] *See* MANFRED NOWAK, *supra* note 22, at 605.

thereby prohibiting law enforcement officers and administrators from discriminating against people with disabilities."[28]

The Committee expressed that formal equality helps combat negative stereotyping and prejudices.[29] Violations of equality before the law often result from a lack of awareness for the equal rights of persons with disabilities. Certain groups, for example, women or individuals with developmental or intellectual disabilities, may face unique discrimination before the law.[30] Therefore, equality before the law continues to be a very real issue for persons with disabilities, compounded at times by intersectional discrimination.

b. Equality under the law

The phrases "equality under the law" and "equal benefit of the law" do not appear in other human rights conventions. Thus, there is not much interpretative guide in international human rights law. The two guarantees were added to article 5 based on the suggestion of the Canadian delegate during the negotiations. The amendment reflects the language of Section 15(1) of the Canadian Charter of Rights and Freedoms[31] , and delegates widely supported them during the negotiation process. It is crucial to explore the values of these additional terms on the rights of persons with disabilities and whether they may shed new light on international human rights law.

At the outset, it seems that "equality under the law" and "equality before the law" both refer to formal equality. Although the two terms are often used interchangeably in practice,[32] they are different. As stated above, "equality before the law" mandates non-discriminatory application or enforcement of the law by the judiciary or law enforcement officers towards persons with disabilities. On the other hand, "equality under the law" requires that the content of the law be equal, to the extent that all groups in society are treated equally and fairly.

According to the CRPD Committee, the term was interpreted as demanding "strict respect for non-discrimination." To persons with disabilities, "equal under the law" refers to the possibility

[28] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 14.
[29] *Id.* para. 10.
[30] *See* M. Peled, G. Iarocci & D. A. Connolly, *Eyewitness Testimony and Perceived Credibility of Youth with Mild Intellectual Disability*, 48 J. INTELLECTUAL DISABILITY RES. 699 (2004).
[31] Section 15(1) of the Canadian Charter of Rights and Freedoms provides that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability."
[32] *See* William Lacy, *Equality Under and Before the Law*, 61(3) U. OF TORONTO L.J. 411, 412 (2011).

to engage in legal relationships. "Persons with disabilities have the right to be effectively protected and to positively engage. The law itself shall guarantee substantive equality for all those within a given jurisdiction."[33] "Equality under the law" means that "there should be no laws that allow for specific denial, restriction or limitation of the rights of persons with disabilities, and that disability should be mainstreamed in all legislation and policies."[34]

c. Equal protection of the law

In contrast to "equality before the law," which focuses on the application and enforcement of the law, the term "equal protection of the law" is directed at the legislature, which is bound to protect the right to equality of people with disabilities without any discrimination.[35] "Equal protection of the law" mandates that the national legislature should not adopt or maintain discriminatory laws and policies.[36] This interpretation is consistent with the way other treaty bodies interpret the same provision. In its General Comment No. 18, the Human Rights Committee, when interpreting article 26 of the ICCPR, stated that "when legislation is adopted by a State Party, it must comply with the requirement of article 26 that its content should not be discriminatory."[37]

Furthermore, "equal protection of the law" does not only impose obligations on the national legislatures to abstain from adopting or maintaining discriminatory laws and policies. From a contextual perspective, the term "equal protection of the law" also imposes positive duties on the states "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices that constitute discrimination against persons with disabilities."[38]

d. Equal benefit of the law

Finally, the phrase "equal benefit of the law," like "equality under the law," has a Canadian origin. The term "equal benefit of the law," in the Committee's opinion, is used to ensure equal opportunity for all persons with disabilities. It mandates that "States parties must eliminate barriers

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[33] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 14.
[34] *Id*.
[35] *See* MANFRED NOWAK, *supra* note 22, at 607.
[36] *See* Lord Lester of Herne Hill QC & Sarah Joseph, *Obligations of Non-Discrimination, in* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: ITS IMPACT ON UNITED KINGDOM LAW 566 (D. Harris & Sarah Joseph eds., 1995).
[37] Human Rights Committee, General Comment No. 18 (1989) on *Non-discrimination*, UN Doc HRI/GEN/1/Rev 9 (Vol I) 195, para 12.
[38] CRPD, Article 4(b).

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."[39] In practice, many human rights bodies stated that states have an "obligation to promote, guarantee, and secure equality by taking proactive steps to eliminate structural patterns of disadvantage and to further social inclusion."[40] As a result, states must take positive action, including accessibility, reasonable accommodation, and individual supports to "facilitate the enjoyment by persons with disabilities on an equal basis of the rights guaranteed under legislation."[41]

3. Article 5(2)

States parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

a. The definition of discrimination in the CRPD

According to article 2, "discrimination on the basis of disability" means:

> any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.[42]

One significant advancement made by the CRPD is that it defines denial of reasonable accommodation as a distinct form of discrimination. The inclusion of the duty to accommodate within the non-discrimination norm enables the CRPD to go further than other U.N. human rights instruments. At the same time, it significantly promotes the equality reform agenda for persons with disabilities.

The phrase "on an equal basis with others" is crucial for securing *de facto* equality for people with disabilities. There is no doubt that people with disabilities do not enjoy the same level of rights as their non-disabled peers at present. As stated explicitly in article 1 of the CRPD, the purpose of the Convention is to "promote, protect and ensure the full and equal enjoyment of all

[39] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 16.
[40] *See* Daniel Moeckli, *Equality and Non-Discrimination, in* INTERNATIONAL HUMAN RIGHTS LAW 170 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds, 2013).
[41] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 16.
[42] CRPD, Article 2.

human rights and fundamental freedoms by all persons with disabilities."[43] Moreover, article 4(1) requires States Parties "to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability."[44] States have obligations to adopt all measures, where necessary and appropriate, to afford rights to persons with disabilities on an equal basis with others. The fact that the phrase "on an equal basis with others" appears 31 times throughout the CRPD should give full effect to the principle of equality and non-discrimination and help realize the transformative potential of the Convention.[45]

b. The prohibition of disability-based discrimination

Article 5(2) of the CRPD mandates states to prohibit all discrimination on the basis of disability. Article 4(e) of the CRPD provides that states must "take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise."[46] Thus, it is the obligation of the national government to regulate both the public and private sectors of society so as to eliminate discrimination. In the context of people with disabilities, General Comment No. 5 of the Committee on Economic, Social and Cultural Rights also emphasized that states have obligations to ensure that the enjoyment of rights by people with disabilities is not hampered by private parties.[47] The recognition that the prohibition of discrimination between private individuals in the private sector imposes obligations upon states is particularly important for people with disabilities because a majority of discrimination against persons with disabilities occurred in the private sphere, and discrimination by private actors tends to be narrowly conceptualized. This highlights the importance of viewing disability as a constant part of life rather than in specific situations. Accordingly, states' obligations to prevent private parties' discrimination must be interpreted as broadly and pragmatically as possible to capture the full picture of disability discrimination.

[43] CRPD, Article 1.
[44] CRPD, Article 4(1).
[45] *See* ANDREA BRODERICK, THE LONG AND WINDING ROAD TO DISABILITY EQUALITY: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 94-5 (Intersentia, 2015) [hereinafter "BRODERICK, THE LONG AND WINDING ROAD"].
[46] CRPD, Article 4(e).
[47] Committee on Economic, Social and Cultural Rights, General Comment No.5 (1995) on *Persons with disabilities*, U.N. Doc E/1995/22, para. 11.

c. Equal and effective legal protection against discrimination

Article 5(2) of the CRPD mandates states to provide "equal and effective legal protection against discrimination." Read in conjunction with preamble (p), which expresses concern "about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,"[48] article 5(2) of the CRPD strengthens states' obligations to address multiple or intersectional discrimination against persons with disabilities. Multiple discrimination refers to the situation whereby "individuals or groups of individuals face discrimination on more than one of the prohibited grounds."[49] With respect to intersectional discrimination, the CRPD Committee expressed that all individuals have multiple layers of identities, statuses, and life circumstances. Inclusive equality provides for a new concept, which takes into account individual, structural as well as intersectional discrimination and power relations.[50] Aart Hendriks described intersectional discrimination as exemplifying "the reality which two or more protected grounds can interact concurrently, cumulatively or otherwise cross-cut to constitute a new – real or perceived – identity."[51] In addition to multiple and intersectional discrimination, article 5(2) also covers direct, indirect, denial of reasonable accommodation as well as harassment.[52]

The wording in article 5(2) of the CRPD builds upon article 26 of the ICCPR, which states that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground."[53] Manfred Nowak contends that the guarantee to ensure equal and effective protection against discrimination is "even more disputed in literature and practice than the negative prohibition of discrimination."[54] He argues that it should embody

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[48] CRPD, Preamble paragraph (p).
[49] Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009), *Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20, para. 17.
[50] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, paras. 9-11.
[51] *See* Aart Hendriks, *The UN Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law Be Modelled Accordingly?, in* EUROPEAN YEARBOOK OF DISABILITY LAW, VOLUME 2, 17 (Gerald Quinn & Lisa Waddington eds., 2010).
[52] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 18.
[53] Article 26 of the ICCPR reads: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[54] *See* MANFRED NOWAK, *supra* note 22, at 630.

"a positive obligation on States Parties to take steps to protect against discrimination."[55] To Nowak, this conclusion "follows from the wording of article 26 of the ICCPR and the logical difference between it and the mere prohibition of discrimination."[56] The adjective "effective" signifies that legislation and policy implemented by states must contribute to the prevention and elimination of discrimination. This supports the conclusion that to guarantee equal and effective legal protection against discrimination, the adoption of positive measures by states is necessary and indispensable.[57]

In addition, states are required to establish effective redress mechanisms and sanctions when people with disabilities are discriminated against. Effective remedies and sanctions could be established through civil, criminal, or administrative processes. The CRPD Committee has highlighted the urgency to adopt appropriate measures to redress cases of discrimination that go beyond financial compensation. Such examples of remedies include the requirement of a change of behavior in individuals who discriminate against people with disabilities through injunctive powers,[58] penalties,[59] and other proportionate, dissuasive sanctions.

4. Article 5(3)

In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

The concept of reasonable accommodation, though appeared in various regional fora and domestic legal framework, as well as being invoked by the Committee on Economic, Social and Cultural Rights in its General Comment No. 5, was recognized for the first time under international law as a separate and enforceable human right in the CRPD. Article 2 defines reasonable accommodation as:

> Necessary and appropriate modification and adjustment not imposing disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[60]

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[55] *Id*.
[56] *Id*.
[57] *See* Oddný Mjöll Arnardóttir, *A Future of Multidimensional Disadvantage Equality, in* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 61 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009).
[58] Concluding observations on the initial report of Austria, CRPD/C/AUT/CO/1, para. 13.
[59] Concluding observations on the initial report of El Salvador, CRPD/C/SLV/CO/1, paras. 13-16.
[60] CRPD, Article 2.

The inclusion of the duty to provide reasonable accommodation within article 5 of the equality and non-discrimination norms of the CRPD provoked grave concerns at the negotiation sessions. Delegates feared the resources implications because non-discrimination is an immediate obligation and the duty of reasonable accommodation in the Convention spreads across all rights – both civil and political, economic, social, and cultural rights. Many delegates took the view "that if the notion of reasonable accommodation were tied to the notion of non-discrimination, then it would become a Trojan horse for the enforceability of more and more slices of socio-economic rights."[61] On the other hand, many national representatives referred to General Comment No. 5 of the Committee on Economic, Social, and Cultural Rights to point out the link between the duty of reasonable accommodation and the equality and non-discrimination norms as denial of reasonable accommodation was defined as disability-based discrimination in the General Comment.[62] As Anna Lawson suggests, reasonable accommodation in the CRPD serves a "peculiar bridging role" that runs across all rights – civil, political, economic, social, and cultural – advancing in the reunification of human rights law.[63]

The importance of the reasonable accommodation duty can be discerned from the fact that while it falls within the articles of general application and, therefore, applies across the Convention, it is also specifically referenced in article 12 on access to justice,[64] article 14(2) on liberty and security, article 24 on education, as well as article 27 on employment. Notably, reasonable accommodation is closely linked to accessibility, as articulated in article 9. However, they are distinct concepts to the extent that the former is tailored to individual's needs and specific context, and the latter is group-based and must be provided even before an individual with disabilities requests it.[65]

Article 5(3) mandates that States Parties ensure the provision of reasonable accommodation, and the CRPD Committee views reasonable accommodation as "an intrinsic part of the duty of non-discrimination in the context of disability."[66] Gerard Quinn contends that article 5(3) "tips the

[61] *See* Gerald Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities, in* EUROPEAN YEARBOOK OF DISABILITY LAW: VOLUME 1, 100 (Gerald Quinn & Lisa Waddington eds., 2009).
[62] General Comment No. 5 of the UN Committee on Economic, Social and Cultural Rights provides that: "For the purposes of the Covenant, 'disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights." para. 15.
[63] *See* ANNA LAWSON, DISABILITY AND EQUALITY LAW IN BRITAIN: THE ROLE OF REASONABLE ADJUSTMENT 47 (2008).
[64] Article 12 requires "provision of procedural and age appropriate accommodations."
[65] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 24.
[66] *Id.* para. 23.

States away from deficits-oriented perspective on disability and towards one that views fragility as a universal aspect of the human condition and remediable with sufficient support."[67] The obligation to provide reasonable accommodation not only helps rebalance the burdens of disability but also reconceptualize our understanding of disability.

Furthermore, the duty to provide reasonable accommodation in the Convention is not limited to states only; it further extends to a broad array of social actors, including employers, educational institutions, health care providers, providers of goods and services, etc. These actors have obligations to reasonably adjust practices, criteria, and policies to address the needs of persons with disabilities to further their inclusion and participation in society.[68] Unlike some domestic laws that confine the duty to provide reasonable accommodation to specific areas, such as employment, education, religion, and housing, the CRPD creates a more far-reaching duty to accommodate, which spans across all human rights and social life areas.

During the negotiation, there was widespread agreement to keep the duty of reasonable accommodation in the Convention "general and flexible to ensure that it could be adapted to different sectors (e.g., employment, education, etc.) and to respect the diversity of legal traditions."[69] Reasonable accommodations must be tailored to the individual's needs in a specific setting. Due to the complexity of its causes and a wide variety of its manifestations, the same disability does not necessarily require the same accommodation. As a result, the accommodation should be able to address the individual's specific needs through a constructive dialogue between both parties.

a. Reasonable Accommodation as Part of the Equality and Non-Discrimination Norms

Traditional non-discrimination law is underpinned by the idea that protected characteristics, such as race, gender, or religion, is rarely relevant to one's qualification for education, employment, or any other valuable opportunities, that decision-makers are prohibited from taking those protected characteristics into account. Only in exceptional circumstances, the defense of *bona fide*

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[67] *See* Gerard Quinn & Anna Arstein-Kerslake, *Restoring the "Human" in "Human Rights": Personhood and Doctrinal Innovation in the UN Disability Convention, in* CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW (Conor Gearey & Costas Douzinas eds, 2012).

[68] *See* ANNA LAWSON, *supra* note 63, at 222.

[69] Footnotes to Annex I, Draft articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Article 7, available at www.un.org/esa/socdev/enable/rights/ahcwgreporta7.htm, last accessed October 16, 2021.

occupational qualification (BFOQ) would allow for different or unequal treatment, e.g., Title VII on religion, sex, or national origin.[70] On its face, disability seems quite different as for many people one's impairment does indeed negatively affect her ability in performing a task. However, the social model of disability illuminates that disability is highly socially constructed; the interaction between an individual's impairment and other physical or social environments is the root cause of one's inability to perform a particular function, job, or activity in a conventional manner. The obligation to make reasonable accommodation is normatively based on such recognition to remove the artificial, arbitrary, and unnecessary barriers that prevent persons with disabilities from enjoying equal opportunities, whether they be education, employment, or housing, that is open to other people who do not share that characteristic.

The reasonable accommodation duty represents a very intriguing and complex concept that requires elaborate interpretation. For example, what constitutes accommodation? When accommodation will be considered reasonable, and when the duty to accommodate would constitute a disproportionate or undue burden? All these questions require a highly individualized, context-specific analysis. In the employment context, this would necessarily involve questions including the nature of the impairment, the abilities and qualification of the employee, the work-related skills and activities required, the physical environment of the workplace, the financial and other resources of the employer, etc.[71]

Under the CRPD, reasonable accommodation is embedded in the equality and non-discrimination provision, which belongs to a civil right that creates an obligation of immediate effect for states.[72] However, the CRPD also mandates that reasonable accommodation is equally required in relation to civil and political, economic, social, and cultural rights. This introduces debates about whether the application of reasonable accommodation duty transforms the nature of the economic, social, and cultural (ESC) rights that traditionally only requires States to realize progressively to the maximum of available resources.[73] Anna Lawson suggests that the concepts of "reasonableness" and "undue burden" serve to introduce some notion of progressive realization into the non-discrimination calculus.[74] While the language used does allow for

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[70] 42 U.S. Code § 2000e-2.
[71] *See* Lisa Waddington, *Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?* 36 NTM|NJCM-Bull. 186, 188 (2011).
[72] *See* Janet E. Lord & Michael A. Stein, *supra* note 2.
[73] *See infra* section IV.A.1.
[74] *See* Anna Lawson, *The UN convention on the rights of persons with disabilities and European disability law: A catalyst for cohesion?, in* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 104 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009).

some temporal implications of the duty to accommodate, at a minimum, the obligation to provide reasonable accommodation imposes upon states an intermediate requirement to take steps through appropriate legislative, administrative, and other measures to realize disability rights to available resources.[75] Especially when we consider that people with disabilities for too long are excluded from participating in the mainstream and suffer the legacy of marginalization, including poverty and inaccessibility, the reasonable accommodation duty serves as a strong means to rectify those injustices. It is both morally and legally imperative to expend additional resources to help disabled people, who are among one of the most vulnerable and marginalized groups, enjoy all human rights and fundamental freedoms on an equal basis with their fellow citizens. The implementation of reasonable accommodation will be required to make comprehensively the obligations of the right to equality and non-discrimination.[76]

b. The outer limits of the duty of reasonable accommodation

(1) The concept of "reasonableness"

Confusion has arisen with regard to the concept of "reasonableness" because differing meanings can be meant by the word "reasonable." For instance, in the context of European countries, Lisa Waddington has summarized the various meanings of "reasonableness" into three categories.[77] The term "reasonable" can refer to an accommodation that does not result in excessive difficulties or costs under the EU Directive 2000/78/EC (also known as Employment Equality Directive)[78]. This is different from the defense of disproportionate burden. Under this category, accommodation can be viewed as *prima facie* "unreasonable" even before considering whether it constitutes a disproportionate burden or not. The second category perceives an accommodation as "reasonable" if it enables the disabled person to perform the necessary tasks.[79] The final category is a hybrid of the first two in which the term "reasonable" conveys both that

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[75] *See* Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1991) on *The Nature of States Parties' Obligations*, U.N. Doc. E/1991/23, annex III at 86, reprinted in Compilation of
General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), paras. 1–2.

[76] *See* Janet E. Lord & Rebecca Brown, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities, in* CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 280 (Marcia H. Rioux, Lee Ann Basser & Melinda Jones eds., 2011) [hereinafter "Lord & Brown, *The Role of Reasonable Accommodation*"].

[77] *See* Lisa Waddington, *Reasonable Accommodation, in* CASES, MATERIALS AND TEXT ON NATIONAL. SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 635 (Dagmar Schiek, Lisa Waddington & Mark Bell eds., 2007) [hereinafter "Waddington, *Reasonable Accommodation*"].

[78] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[79] *See* Lisa Waddington, *supra* note 77, at 669.

"the accommodation must be effective and that it must not impose significant inconvenience or cost on the employer or covered party."[80]

(2) The requirement of necessity and appropriate

Reasonable accommodation is defined in article 2 of the CRPD as "necessary and appropriate" adjustments and modifications. Therefore, satisfying the needs of people with disabilities requires the duty bearers to take the necessary steps to ensure that disabled persons can enjoy their human rights equally. The ordinary meaning of the term "necessary" means something which is "required, inescapable, logically unavoidable, determined or produced by the previous condition of things" and the term "appropriate" signifies "suitable or compatible."[81] Therefore, duty bearers are not required to provide every requested accommodation, but only those essential for persons with disabilities to ensure access to, and enjoyment of, the substantive rights contained in the CRPD on an equal basis with others.

(3) The requirement of "effectiveness"?

The CRPD Committee stated that reasonable should be understood as referring to its relevance, appropriateness, and effectiveness, rather than being interpreted as an exception clause or qualifier related to cost.[82] This interpretative note stands in sharp contrast to the U.S. case law, which injects cost consideration ***both*** in defining the reasonableness of an accommodation and interpreting what constitutes undue hardship. In the *Barnett* case, the U.S. Supreme Court rejected the argument that the word reasonable refers to the effectiveness of an accommodation.[83] At present I would like to put aside the discussion of the U.S. jurisprudence, which is explored in detail in a later chapter.[84] But on the issue of effectiveness, the U.S. Supreme Court had a better argument in pointing out that a measure that is not effective does not even account as an accommodation at all. Therefore, the determination of whether an accommodation is reasonable should depend on some other factors than its effectiveness.

[80] *Id*. at 670.
[81] *See* https://www.merriam-webster.com, last accessed July 08, 2019.
[82] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 25.
[83] *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).
[84] *See* Chapter Five, section XX.

(4) The dignity of persons with disabilities

The importance of the link between equality and dignity has been discussed in length in Chapter Two.[85] As elaborated therein, the recognition dimension of substantive equality aims to address stigma, stereotyping, prejudice, and violence based on protected grounds. It affirms the value and inherent dignity of every human being. Therefore, the dignity interest of persons with disabilities should form an integral part in determining how and what kind of reasonable accommodations should be provided. The CRPD Committee recognized in its General Comment No. 2 that dignity is an essential component of reasonable accommodation. It stated that "[r]easonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy, and choices of the individual into account."[86] As a result, the duty of reasonable accommodation should always take into account such factors as integrity, privacy, autonomy, and self-respect to strengthen not only the manner in which an accommodation is provided, but also the participation and inclusion of people with disabilities.[87]

c. Disproportionate or undue burden

The duty bearer is required to provide reasonable accommodation unless doing so would impose a disproportionate or undue burden. The wording of this defense was heatedly debated during the negotiation. Many delegates doubted the necessity of using qualifying language in light of what they felt was already conveyed by the term "reasonable." For example, many EU Member States interpret the world "reasonable" as a limitation to the duty of reasonable accommodation. Some claimed that the proposed term "disproportionate burden" was unclear and underdeveloped.[88] The Australian delegate elaborated on this point and argued that "[t]he term has the very real potential for subjective application and for States Parties to the Convention to set their own standards on what constitutes a disproportionate burden."[89] To strengthen protection for

[85] *See* Chapter Two, section IV.B.2.c.
[86] CRPD Committee, General Comment No. 2 (2014) on *Accessibility*, UN Doc. CRPD/C/GC/2, para. 26.
[87] *See* BRODERICK, THE LONG AND WINDING ROAD, *supra* note 45, at 163.
[88] *See*, for example, the comments of China in the Third Session of the Ad Hoc Committee, volume 4(2) May 25, 2004, available at www.un.org/esa/socdev/enable/rights/ahc3sum7.htm, last accessed October 18, 2021.
[89] Position Paper of People with Disability Australia (Incorporated) and Australian National Association of Legal Centers, Eighth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, available at www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8naclc2.doc, last accessed October 18, 2021.

people with disabilities, alternative terms of "unjustifiable hardship" or "undue hardship" were proposed as these terms are commonly used in the domestic anti-discrimination law, and extensive jurisprudence has been established for reference.[90] Unfortunately, there is scant information in the *travaux préparatoires* regarding why disproportionate or undue burden was chosen as the final text or what the term means.

(1) Margin of appreciation

The concept of "margin of appreciation" is important for determining the breadth and scope of the duty of reasonable accommodation. Though this concept has played a crucial role for the European Court of Human Rights (ECtHR), it has been rejected by other international human rights bodies such as the Human Rights Committee (HRC).[91] There is a valid concern that employing a margin of appreciation analysis might weaken or undermine reasonable accommodation, equality and non-discrimination, and the purpose of the Convention. Nonetheless, the majority opinion in *Jungelin*[92] supports such an analysis,[93] and the Committee confirms such practice in subsequent cases.[94]

As the CRPD Committee is charged with receiving individual communications, it is critical to know how much deference the Committee would accord to the state. It is still not clear how the Committee interprets margin of appreciation and what the contours of this concept entail. For example, in respect of reasonable accommodation under the CRPD, does the Committee utilize margin of appreciation in the same manner as the concept applied by the ECtHR? There may be critical conceptual differences, considering that from the outset, reasonable accommodation is a measure tailored to individual needs. In contrast, complaints raised under the ECtHR systems focus on how laws or policies of general application infringe individual rights and freedoms. It is a great regret that the Committee has not addressed the issue of margin of appreciation in its General Comment No. 6. Those cases in which the Committee has confirmed the application of this concept

[90] *Id*.
[91] Human Rights Committee, General Comment No. 34 (2011) Article 19 on *Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34, para. 16.
[92] See detailed analysis of this case in section III.C.2&3.
[93] "[W]hen assessing the reasonableness and proportionality of accommodation measures, State parties enjoy a certain margin of appreciation". CRPD Committee, *Jungelin v Sweden*, Communication No 5/2011: Views adopted by the Committee (November 14, 2014), UN Doc CRPD/C/12/D/5/2011, para. 10.5.
[94] *See* CRPD Committee, *Beasely v Australia* Communication No 11/2013: Views adopted by the Committee (May 25, 2016), UN Doc CRPD/C/15/D/l1/2013 para 8.4 and CRPD Committee, *Lockrey v Australia* Communication No 13/2013: Views adopted by the Committee (May 30, 2016), UN Doc CRPD/C/15/D/13/2013, para. 8.4.

neither provide us with clear guidance. But it is evident that certain aspects of the ECtHR's approach to margin of appreciation might conflict with the CRPD, such as the use of "consensus" as a justification for the margin[95] would likely reinforce prejudices and discriminatory stereotypes in the disability context. As a result, the Committee should be careful when it utilizes the margin of appreciation in interpreting duty of reasonable accommodation upon states to avoid erosion of rights protection under the CRPD.[96]

(2) Financial and Other Resource Considerations

Sandra Fredman observes that costs "constitute a hidden but powerful agenda behind much of equality policy and legislation."[97] Lisa Waddington also outlines that cost is one of the most important factors in determining whether the duty bearer can take advantage of the defense of disproportionate or undue burden.[98] The size of the entity is usually relevant to a determination of its ability to make the requested accommodation, as larger businesses generally have more resources than smaller ones. Therefore, the financial capability and organizational potential of the entity will play an important role. While expensive reconstruction may be reasonable for large corporations, the same accommodation could constitute a disproportionate burden for a small or medium-sized business. In addition, the nature of the entity is also an essential consideration in determining the extent of the burden. Generally speaking, it is more difficult, though not impossible, for the public entities to argue that limited resources prevent the provision of requested accommodations in comparison with the (usually small-scale) private actors.

The availability and possibility of support from other sources are also relevant for assessing cost. One should always take into account the possibility that the accommodating party could defray part or all of the cost of reasonable accommodation in the form of state subsidies or grants. The existence of such measures is crucial to determine whether the overall cost of the requested accommodation constitutes a disproportionate or undue burden on the duty bearer.

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[95] *See* Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee*, 65 ICLQ 21,46-47 (2016).
[96] *See* Jessica Lynn Corsi, *Article 5: Equality and Non-discrimination, in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 165-66 (Ilias Bantekas, Dimitris Anastasiou & Michael Stein eds. 2018).
[97] *See* Sandra Fredman, *Disability Equality and the Existing Paradigm, in* DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE 208 (Anna Lawson & C. Gooding eds., 2005).
[98] *See* Waddington, *Reasonable Accommodation*, *supra* note 77, at 731

To sum up, cost is an important factor in determining the outer limits of the duty of reasonable accommodation. All requested accommodations have to be proportionate to the resources of the accommodating entity not only in financial terms, but also in terms of human or institutional capacity. Admittedly, some accommodations, by their very nature, would be too costly to an individual entity unless funding from the state or other sources is available. Some accommodations, on the other hand, only involve cost-free alterations, such as allowing visually impaired persons to bring guide dogs into a venue. Still other accommodations, while not cost-free, are low cost. A study performed in 2009, based on a sample size of 5,000 respondents from Fortune 500 companies, illustrated that over 75% of the accommodations requested by employees with disabilities cost less than $500.[99]

(3) Non-Financial Considerations

Financial cost, though important, is not the only consideration for an entity to justify its refusal of reasonable accommodation duty. In the context of employment, various national legislations list health and safety, among others, as considerations that could establish that the requested accommodation would constitute an "undue hardship." For instance, Lisa Waddington cited the German Social Law Code on the Rehabilitation and Participation of Disabled Persons in this regard.[100] The Code takes into consideration rules on health and safety in determining whether the requested accommodation constitutes a disproportionate burden on the entity. In a similar vein, the Preparatory Works to the Finnish Non-discrimination Act also states that an "arrangement" might be unreasonable if it could "engender compliance with workplace safety legislation."[101]

d. Effects on Third-party

The impact of an accommodation may not only affect the requested individual and the duty bearer, but can also bring about potential benefits to, and/or negative impact on, persons other than the disabled person who requests the accommodation. The subsections below elaborate on the so-called "third-party benefits" and "negative impacts on third-parties" that may accompany the

[99] *See* Lisa Nishii & Susanne Bruyere, *Protecting employees with disabilities from discrimination on the job: The role of unit managers*, Workplace policies and practices minimizing disability discrimination: Implications for Psychology (2009).
[100] *See* Waddington, *Reasonable Accommodation*, *supra* note 77, at 730.
[101] Preparatory Works to the Finnish Non-Discrimination Act, HE 44/2003 (Government Proposal 44/2003) concerning Section 5 of the Act, *cited in* BRODERICK, THE LONG AND WINDING ROAD, *supra* note 45, at 174.

requested accommodation respectively to see whether and how they would influence the determination of reasonable accommodation and/or disproportionate burden.

(1) Third-party benefits

An accommodation may bring benefits not only to an individual with a disability, but also to other disabled employees with comparative disabilities, or even to employees without disabilities. From the viewpoint of the employer, Lisa Waddington points out that an accommodation "may pay for itself in the greater productivity of the worker with a disability."[102] In the context of the ADA, Elizabeth Emens also acknowledges the potential benefits of accommodations to third-parties. She asserts that "numerous accommodations – from ramps to ergonomic furniture to telecommuting initiatives – can create benefits for co-workers, both disabled and non-disabled, as well as for the growing group of employees with impairments that are not limiting enough to constitute disabilities under the ADA."[103]

Admittedly, not all accommodations bring about the so-called third-party benefits. However, in many circumstances, the potential benefits to the entity or third-parties should be seriously taken into account when determining whether the requested accommodations are required or not. Notably, very few national legislations refer to the potential benefits of the reasonable accommodation to an employer or other individuals. One of such few examples is the non-binding Belgian Guide to Reasonable Accommodations for Persons with a Disability at Work.[104] Paragraph 3.1.4 of the Guide refers to the "direct and indirect consequences" of a reasonable accommodation. The Guide acknowledges "certain accommodations may offer support for a larger group of employees and/or for external visitors."[105] The examples it offers including widening the entrance not only permits access to employees who use wheelchair, but also benefits other employees and visitors; and an adjusted telephone switchboard would serve the deaf and hard of hearing generally; and alternative formats of files in Braille or audiotape would have multilateral effects if more than one visually impaired worker is employed.[106] Therefore, the

[102] *See* Waddington, *Reasonable Accommodation*, *supra* note 77, at 727.
[103] *See* Elizabeth F. Emens, *Integrating Accommodation*, 156(4) U. OF PENN. L. REV. 839, 840 (2008).
[104] Belgian Guide to Reasonable Accommodations for Persons with a Disability at Work (March 2005) [Information taken from Waddington, *Reasonable Accommodation*, *supra* note 77].
[105] Belgian Guide to Reasonable Accommodations for Persons with a Disability at Work (March 2005), para. 3.1.4.
[106] *See* BRODERICK, THE LONG AND WINDING ROAD, *supra* note 45, at 172.

provision of reasonable accommodations may ultimately result in increased accessibility and productivity for others.

As a result, under the CRPD, benefits to third-parties should be fully considered in determining whether a particular accommodation imposes a disproportionate or undue burden on the duty bearer. Consideration of third-party benefits of the requested accommodation will increase the likelihood that a specific accommodation not be perceived as imposing a disproportionate or undue burden on the duty bearer. The main reason for this is that because of the widespread prejudice, stereotypes, and stigma towards persons with disabilities, we often tend to overemphasize the cost of an accommodation, focusing solely on the inconvenience, difficulty, and expense involved. However, as mentioned above, many accommodations have externalities beyond their specific setting. If adopting a particular accommodation measure would result in tangible and/or intangible benefits to third-parties, especially those with comparative disabilities, this would not only help the disabled individuals realize their substantive right in question, but it could also potentially improve the fulfillment of socio-economic rights of people with disabilities.

(2) **Negative Impacts on Third-Parties**

On the other hand, employees usually have negative, even visceral reactions when other co-workers are treated preferentially in the workplace. The reactions are magnified when an employee with a disability is given a special benefit or waiver from a general rule or policy. While many reasonable accommodations, including change of disabled employee's working schedule or physical accessibility of the workplace, would not negatively impact other non-disabled employees, some of the accommodations, particularly reassignment to other vacant positions, "harm" other fellow co-workers to a certain extent. This exemplifies the seemingly unresolved conflict between the interests of people with disabilities and other non-disabled individuals. To what extent should accommodations that are necessary to help people with disabilities achieve equal rights, but that have negative impacts on other "innocent third parties"[107] be considered reasonable? The issue usually cannot be resolved by resorting to the defense of disproportionate or undue burden. Because to the employer, the accommodation requested only involves the balance of interests between a disabled employee and other non-disabled employee, but has no or minimal impact

[107] *See* Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties*", 68 MO. L. REV. 863 (2003).

upon the whole business and operation. So, whether the employer is obliged to provide that accommodation requires us to consider the consequence to the disabled employee if the accommodation is not granted and the consequence to the non-disabled employee if the accommodation is granted.

In the rare circumstance that after trying all possible accommodations, the only way to allow the disabled employees to remain employed with certain employer is to prioritize their request for accommodations over other non-disabled employees, and the accommodation granted would not result in the involuntary termination of another employee,[108] the accommodation that would "harm" other non-disabled employee is required. [109] In other words, if there are any other options that could accommodate employees with disabilities while not adversely impacting the interests of other employees, that accommodation should be granted first.

The rationale behind this is the disparity in consequences. As an example, consider the respective fates of two employees – one disabled and one not – who both desire a vacant position. Reassignment to a vacant position is usually perceived as "accommodation of last resort" because it is available only when an employee with a disability cannot be reasonably accommodated in her current position. Thus, if the disabled employee is denied this accommodation, she is out of work, whereas the non-disabled employee who does not get the position still has her current job.[110] The opportunity to transfer to a more desirable position is deferred rather than lost. More importantly, once being terminated from the current job, individuals with disabilities, compared to their non-disabled counterparts, face significant barriers to finding a new one because of the widespread discrimination and inaccessibility of the workplace. Given the considerable disparity in consequences, the scale should tip in favor of employees with disabilities. Most of the accommodations that significantly affect other employees are "accommodations of last resort." In other words, the employer has considered and dismissed all other potential accommodations that would allow the disabled employee to remain in her current position. The reassignment

[108] Many scholars have suggested that termination is the workplace equivalent of "capital punishment." *See* Lorraine A. Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: 'Right Sizing' and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 277-78 (2000); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 352 (2001).

[109] *See* Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313 (2007) [hereinafter "Porter, *Reasonable Burdens*"].

[110] *See* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 987 (2004).

accommodation is the only option left; otherwise, termination will result.[111] This is troubling given the goal of reasonable accommodation is to provide persons with disabilities equal opportunity to participate in every sphere of social life, among which work is a crucial one.

Additionally, the reasonable accommodation mandate not only promotes the interests of people with disabilities, but it also furthers the interests of the employers to retain valuable employees. Equally if not more important, it promotes the interests of society by increasing the employment opportunities for qualified individuals with disabilities, thereby decreasing expenditure of public welfare roll. When it is much more workable and efficient to spread the cost of reasonable accommodation to the employers and other non-disabled employees, it appears fair and necessary to spread the cost and burden in a reasonable way to the rest of the workforce.[112]

5. Article 5(4)

Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 5(4) creates an exception to formal equality by allowing measures that give preferences to a specific group in order to achieve substantive equality. This provision, commonly called "positive action" or "affirmative action" in the U.S., referred to also as "special measures," a term used to denote provisions targeted at rectifying disadvantage attributable to past or present discriminatory laws, policies, and practices, is embedded in several international human rights treaties, such as article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Lizzie Barmes describes positive action as "designed to improve the position, in terms of the distribution of benefits or dis-benefits, of a given social group or sub-group (or of several such groups), on the basis that its members suffer systematic disadvantage in that regard."[113] The CRPD Committee confirmed that measures "entail adopting

[111] *See* Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 982-83 (2003).
[112] *See* Porter, *Reasonable Burdens*, *supra* note 109, at 361.
[113] *See* Lizzie Barmes, *Equality Law and Experimentation: The Positive Action Challenge*, 68 CAMBRIDGE L.J. 623, 623 (2009).

or maintaining certain advantages in favor of an underrepresented, or marginalized group"[114] are acceptable under the CRPD if they serve to "accelerate or achieve *de facto* equality."[115]

The qualification of such measures was debated during the drafting process. The term "special" as used in other human rights treaties was disfavored as it connotes negative meaning, which contradicts the aim of the CRPD to ensure equality of people with disabilities. The word "positive" also failed to obtain consent because it is widely perceived as too demanding to create concern for some delegates. Ultimately, the qualification of measures as "specific" was chosen since the delegates agreed that the word "specific" has a more neutral meaning.[116]

a. Justification test

The jurisprudence of CERD and CEDAW sheds light on under what circumstances specific measures can be justified and the interaction between specific measures under article 5(4) of the CRPD and special measures under other Conventions is worth exploring. To judge the legitimacy of special measures, the European Court of Human Rights (ECtHR) developed the so-called justification test in the *Belgian Linguistics case*,[117] which requires that differential treatment must 1. pursue a legitimate aim, and 2. be proportionate. In its General Comment No. 18, the Human Rights Committee confirmed that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[118] The CERD Committee affirmed the justification test in both General Recommendation No. 14 and No. 30. It expressed in General Recommendation No. 32 that "the term non-discrimination does not signify the necessity of uniform treatment ... if there is an objective and reasonable justification for differential

[114] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, para. 28.
[115] *Id*.
[116] *See* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 171 (Giuseppe Palmisano, Valentina Della Fina & Rachele Cera eds. 2017).
[117] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case*) (No. 2) (1968) 1 EHRR 252, 284, para. 13.
[118] Human Rights Committee, General Comment No. 18 (1989) on *Non-discrimination*, UN Doc HRI/GEN/1/Rev 9 (Vol 1) 195, para. 13.

treatment."[119] The CRPD Committee is likely to follow this test in its interpretation of article 5(4).[120]

In its General Recommendation No. 25, the CEDAW Committee stated that special measures should "accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field."[121] This shows potentially these measures can have a broad scope of application. Further, though such measures are usually perceived to be temporary in nature,[122] it is important to note that "[t]he duration of a temporary special measure should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time."[123] Jessica Lynn Corsi states that "this would ensure compliance with the justification test and help the specific measures taken to achieve their equality goals."[124]

A commentator points out that the CRPD appears to impose less heavy obligations on states regarding positive measures in comparison with other human rights treaties. In his view, article 5(4) of the CRPD serves only as a safeguard clause in case specific measures are adopted.[125] One of the critical responsibilities of the CRPD Committee, as suggested by Oddný Mjöll Arnardóttir, is to "construe the dividing line between the justiciable individual rights claim of denial of reasonable accommodation under the Convention and the more elusive constituency of affirmative action."[126]

Furthermore, it is important to distinguish specific measures from other measures that also aimed at eliminating discrimination and promoting participation and inclusion of persons with disabilities from specific measures. For instance, article 8 imposes on states duty to raise awareness and article 9 requires the implementation of accessibility and universal design. Both are general measures but do not fall within the concept of specific measures.

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[119] CERD Committee, General Recommendation No. 32 (2009) on *The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc CERD/C/GC/32, para. 8.
[120] *See* Jessica Lynn Corsi, *supra* note 96, at 168.
[121] CEDAW Committee, General Recommendation No, 25 (2004), UN Doc N59J38 Annex II, para. 18.
[122] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 28.
[123] CEDAW Committee, General Recommendation No, 25, para. 20.
[124] *See* Jessica Lynn Corsi, *supra* note 96, at 169.
[125] *See supra* note 116, at 171.
[126] *See* Oddný Mjöll Arnardóttir, *A Future of Multidimensional Disadvantage Equality, in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 60 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009).

b. Two types of specific measures

(1) Temporary specific measures

Specific measures, depending on the duration of adoption, can be classified into two broad categories—temporary measures and permanent measures. Starting from article 5(4) of the Convention, one would not likely say that states have an obligation to adopt specific measures. However, a dynamic or teleological way to read the CRPD much more likely leads one to conclude that there may be circumstances in which States Parties would be required to adopt specific measures. First of all, the object and purpose of the CRPD is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities." [127] The interpretation and application of every article should conform to this overarching goal. The CRPD Committee also contended that, unlike the duty of reasonable accommodation, specific measures are generally not mandatory, although it acknowledged that specific measures might be required in particular situations. Accordingly, article 5(4) must not be read in isolation but should be considered as an extension of achieving the objective and purpose of the Convention. The preamble (e) of the CRPD states that disability is "an evolving concept."[128] Therefore, the kinds of temporary specific measures that states will be required to adopt vary over time depending on the evolving definitions of disability and the context in which the disability is experienced. Temporary specific measures, such as quotas that set aside positions for persons with disabilities, are adopted to overcome the legacy of past discrimination. These measures often have a compensatory aim by which preferential treatment is granted to redress the past disadvantage suffered by people with disabilities, but which may be intended to operate only for a certain period of time.

In certain circumstances, a state may be required to take temporary specific measures in order to alleviate or eliminate structural inequalities caused by systematic or entrenched discrimination. In the context of persons with disabilities, the Committee on ESC Rights has noted that positive action is a legitimate means to eliminate past discrimination and achieve equalization of opportunities. [129] For example, when a society is prevalent with deep-rooted structural

[127] CRPD, Article 1.
[128] CRPD, Preamble (e).
[129] Committee on Economic, Social and Cultural Rights, General Comment No. 5 (1994) on *Persons with Disabilities*, U.N. Doc E/1995/22, para. 18.

discrimination and intractable bias, the necessity to adopt specific measures is reinforced so as to correct substantial inequality. According to Oliver de Schutter, structural discrimination refers to the phenomenon that "it cuts across different spheres (education, employment, housing and access to health care in particular), resulting in situation where the prohibition of discrimination in any one of these spheres or, indeed, in all of them, will not suffice to ensure effective equality."[130]

Empirical data demonstrates that specific measures, such as quotas, may in fact be necessary to achieve equality and fight discrimination. Studies show the efficacy of quotas in improving gender parity in political representation and corporate management.[131] Therefore, in some situations, the adoption of temporary specific measures should be mandatory, rather than optional upon states, to achieve full equality and participation of people with disabilities. Notwithstanding this, the national government will be accorded a "margin of appreciation" to decide which measures to adopt in any given situation to achieve the objective and purpose of the CRPD.

(2) Permanent specific measures

In contrast to temporary specific measures, permanent specific measures do not have a predetermined length and are more forward looking.[132] For example, the government may provide a travel subsidy to enable people with disabilities to get transport to improve their mobility, participation, and inclusion in society.[133] As mentioned before, the conceptualization of disability embodied in the CRPD is not solely a social construct, but it also reflects a biologically determined dimension. Permanent specific measures are sometimes necessary to address the biological element of disability. This is particularly the case with certain types of mental or intellectual disabilities, which easily lead to systematic disadvantage and exclusion from society. As the Committee on ESC Rights claimed in General Comment No. 5, "ultimate responsibility for remedying the conditions that lead to impairment and for dealing with the consequences of

[130] *See* Oliver de Schutter, *Positive Action, in* CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 793 (Dagmar Schiek, Lisa Waddington and Mark Bell eds., 2007).
[131] *See, e.g.,* ANJANI DADA, WOMEN AS LEADERS: LESSONS FROM POLITICAL QUOTAS IN INDIA (2013).
[132] *See* Oliver de Schutter, *supra* note 130, at 780-81.
[133] *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities*. HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL 66-68 (UN-DESA et al., 2007).

disability rests with governments."[134] In certain circumstances, national governments have obligations to eliminate the disadvantage associated with those impairments.

Furthermore, General Comment No. 20 of the Committee on ESC Rights also stated that "positive action measures may 'exceptionally' need to be of a permanent nature in the disability context."[135] Although it is difficult to ascertain what might constitute an exceptional case, it is not realistic to expect states to provide every disabled person with permanent specific measures whenever persons with disabilities request access to such measures as the result of a particular impairment. However, permanent specific measures may be obligatory in cases where the essence of certain human rights would become meaningless without such measures. As an example, for people with certain kinds of intellectual or developmental disabilities whose disadvantage has become deeply embedded, their right to equally participate in the political and public life would not be possible if some permanent specific measures were not put in place to support their decision-making. In this situation, the state is obliged to adopt positive action to facilitate this process to ensure that the disadvantage flowing from impairments would not impede the equal opportunities of persons with disabilities to participate in all areas of social life, whether political or others.

Based on the above interpretation and analysis of the equality and non-discrimination provision of the CRPD, the following subsection turns to the case-law of the CRPD Committee with respect to the reasonable accommodation duty. The Optional Protocol to the CRPD provides authority to the Committee to examine the reports of States Parties, adopt General Comments to clarify the content of the Convention, and deal with individual and group communications alleging violations of rights by States Parties.

III. THE OPTIONAL PROTOCOL TO THE CRPD AND COMMUNICATIONS TO THE COMMITTEE

The procedural mechanisms offered by the Optional Protocol to the CRPD provide fertile ground to fully elaborate and embrace the reasonable accommodation duty. In addition, the CRPD also offers great opportunities for regional human rights systems to reflect upon and strengthen the protection of disability

[134] Committee on Economic, Social and Cultural Rights, General Comment No. 5 (1994) on *Persons with Disabilities*, U.N. Doc E/1995/22, para. 12.
[135] Committee on Economic, Social and Cultural Rights, General Comment No. 20 on *Non-discrimination in Economic, Social and Cultural Rights* (2009), UN Doc. E/C.12/GC/20, para. 9.

rights under existing regional human rights treaties.[136] Finally, the CRPD serves as an impetus to promote domestic reform of human rights in law, policy, and practice.

A. The Mandate of the CRPD Committee

As with other existing human rights treaty monitoring bodies, the CRPD Committee is tasked with implementing the Convention by examining the reports of States Parties,[137] assessing information and shadow reports prepared by civil society,[138] adopting General Comments to clarify content of the Convention, receiving individual and group communications,[139] and transmitting a biennial report to the General Assembly.[140] These functions present rich opportunities for developing the equality and non-discrimination norms and the concept of reasonable accommodation, and expanding disability rights claims.[141] Eighteen experts serve in their individual capacity on the Committee.[142] Committee members are elected to a four-year term and are eligible once for re-election.[143] States Parties, when nominating their own nationals for Committee election, are encouraged to consult closely with and actively involve persons with disabilities[144] and to give due consideration for representation by persons with disabilities on the monitoring body.[145]

B. Optional Protocol to the CRPD

The Optional Protocol to the CRPD[146] provides a mechanism for individual and group communications and an inquiry procedure. The Committee has the authority to review individual and group communications alleging violations of the rights contained in the CRPD by States Parties. Under the Optional Protocol, communications may also be submitted by disabled people's organizations (DPOs) on behalf of aggrieved individuals. It is hoped that one day mainstream human rights advocacy groups can also actively take on disability rights claims. The admissibility of communications follows standard practice. More importantly, the Committee may, at any time after receiving a communication but before determining

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[136] *See* discussion of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) in Chapter Six.
[137] CRPD, Articles 35-37.
[138] *Id.* Article 38(b).
[139] Optional Protocol to the CRPD, Article 1.
[140] *Id.* Article 39.
[141] *See* Lord & Brown, *The Role of Reasonable Accommodation*, *supra* note 76, at 299.
[142] Optional Protocol to the CRPD, Article 34(2).
[143] *Id.* Article 34(7).
[144] *Id.* Article 4(3).
[145] *Id.* Article 34(3).
[146] Optional Protocol to the Convention on the Rights of Persons with Disabilities, opened for signature March 30, 2007, G.A. Res. 61/106 (2007).

its merits, request States Parties to adopt interim measures "to avoid possible irreparable damage" to the alleged victims.[147]

As with individual complaints to other treaty monitoring bodies, communications submitted under the Optional Protocol are confidential. States Parties notified of admissible communications are required to respond in writing with explanations within six months.[148] The Committee holds closed meetings to consider communications and transmit suggestions or recommendations to both the State Party and the claimant.[149] Even though recommendations are not legally enforceable, the Committee is empowered to craft follow-up procedures to fortify them.

C. Communications to the Committee

1. HM v. Sweden

a. Facts

H.M. v. Sweden[150] is the first communication resolved by the CRPD Committee. Ms. H.M. is a Swedish national who was house-bound and bed-ridden because of a rare disease.[151] When submitting the communication, her disability had reached the stage that the only rehabilitation feasible for her is hydrotherapy, which would be possible only if an indoor hydrotherapy pool could be constructed in her house.[152] However, the Local Housing Committee rejected H.M.'s building application because a large portion of the pool would be on land where a building was not permitted.[153] After failing in all of her appeals,[154] H.M. turned to the CRPD Committee, alleging that she was discriminated against by the State and its administrative bodies and courts. She claimed that the laws regarding planning permission constitute indirect discrimination against her.

In response, Sweden argued that construction of the hydrotherapy pool would constitute a major departure from the development plan, which was not allowed under the Planning and

[147] *Id.* Article 4(1).
[148] *Id.* Article 3.
[149] *Id.* Article 5.
[150] *H.M. v. Sweden*, Communication 3/2011, CRPD/C/7/D/3/2011 (April 19, 2012).
[151] *Id.*
[152] *Id.*
[153] *Id*. para. 2.3.
[154] *Id*. para. 2.7.

Building Act.[155] Accordingly, the laws applied to H.M. were not discriminatory and not a violation of article 5 of the CRPD.[156]

b. Committee's Opinion

The Committee noted that "a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration."[157] In other words, the Committee found that a state's failure to treat a disabled person differently when the situation warrants it constitutes discrimination as the Convention incorporates "denial of reasonable accommodation" into the definition of discrimination on the basis of disability.[158] Since the State failed to specify how the requested departure from the law would cause a "disproportionate or undue burden," the Committee found that H.M.'s right under article 25, which provides the enjoyment of the highest attainable standard of health, had been violated. The Committee further concluded that H.M.'s right under Article 5(1), 5(3), 25, and Sweden's obligations under Article 26 of the Convention, read alone and in conjunction with Article 3(b), (d) and (e), and 4(1) (d) of the CRPD, had been violated.[159]

2. Marie-Louise Jungelin v. Sweden[160]

a. Facts

Marie-Louise Jungelin is a Swedish national and has had severe sight impairment since birth. In May 2006, she applied to the Social Insurance Agency to work as an assessor/investigator of sickness benefit and sickness compensation applications. The position needs her to gather and analyze information from different sources, including handwritten documents.[161] Jungelin's application was rejected because the IT department maintained that they could not convert information in the computer system into Braille. In addition, part of the system could not be made accessible to her even with various technical aids.[162]

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[155] *Id*. para. 4.2.
[156] *Id*. para. 4.15.
[157] *Id*. para. 8.3.
[158] CRPD, Article 2(3).
[159] *HM v. Sweden*, para. 8.8.
[160] *Marie-Louise Jungelin v. Sweden*, Communication 5/2011, CRPD/C/12/D/5/2011 (October 2, 2012).
[161] *Id*. para. 2.2.
[162] *Id*. para. 2.4.

The case went to the Swedish Disability Ombudsman, who held in Jungelin's favor and provided three different proposals for support and adaptation measures to allow her to perform the tasks. The proposed measures require a personal assistant to deal with the handwritten texts, which allegedly amounted to 10 percent of all the documents.[163] The Social Insurance Agency argued that Jungelin's application was seriously considered. They claimed that all proposals were time-consuming and required a substantial financial investment. Hiring a personal assistant for the complainant, the Agency stated, would in practice mean that the Agency would have to employ two people for one person's work. Given that about 95 percent of the applications included handwritten documents, all the support and adaptation measures required by the complaint would be an unreasonable burden on the Agency.[164]

The Labor Court dismissed the Ombudsman's claims and held that the support and adaptation measures were not reasonable. The complaint alleged that the Social Insurance Agency violated her rights under Articles 5 and 27 of the CRPD.[165] She also complained that the Labor Court, in holding that the support and adaptation measures were not reasonable and proportionate, was discriminatory and failed to guarantee her equal protection of law.[166]

b. Majority Opinion

The majority opinion of the Committee held that, when assessing the reasonableness and proportionality of accommodation measures, States parties enjoy a certain margin of appreciation. It is generally for the national courts to evaluate facts and evidence in a particular case unless the evaluation was clearly arbitrary or amounted to a denial of justice.[167] In the present case, the Committee maintained that the Labor Court thoroughly and objectively assessed all evidence before concluding that the measures recommended by the Ombudsman would constitute an undue burden. As the complaint did not provide any evidence showing that the assessment was manifestly arbitrary or amounted to a denial of justice, the majority opinion found that there was no violation of the CRPD.[168]

[163] *Id*. para. 2.6.
[164] *Id*. para. 2.6.
[165] *Id*. para. 3.1.
[166] *Id*. para. 3.3.
[167] *Id*. para. 10.5.
[168] *Id*. paras. 10.6, 10.7.

Undeniably, for a concept such as reasonable accommodation that can be subject to a variety of possible meanings and arose much controversy, States parties, compared with the CRPD Committee, are better positioned to evaluate facts and evidence concerning what constitutes a reasonable accommodation and disproportionate or undue burden. Accordingly, to show respect to the exercise of domestic authority, states are accorded a certain margin of appreciation. Nonetheless, one critical purpose of the CRPD is to dismantle artificial, arbitrary, and unnecessary barriers that prevent the employment of persons with disabilities through the provision of reasonable accommodation. For a long time, due to the widespread prejudice, stereotypes, and stigma towards persons with disabilities, they have been excluded from the workplace and have to rely on social welfare rolls for subsistence. The provision of reasonable accommodation significantly increases the possibility that people with disabilities can obtain adequate and necessary support to exercise their right to work on an equal basis with others. The majority opinion seems to severely limit the possibility for persons with disabilities who require reasonable accommodations to be employed. Thus, five members of the Committee issued a dissenting opinion.[169]

c. Dissenting Opinion

First, the dissenting opinion maintained the main question was not "whether the judgment was discriminatory on the grounds that it did not assess adequately the possibility for the Social Insurance Agency to take support and adaptation measures;"[170] rather, the question was broader, as the different alternatives proposed by the Ombudsman should have been analyzed based on the criteria set forth in Article 5 of the Convention.[171] While admitting that the Committee had no power to act as "ultimate court" when considering individual communications and that States parties enjoy a certain margin of appreciation regarding the reasonableness of accommodation measures as well as the issue of undue burden in a particular case, the dissenters contended that the Committee failed to review the criteria used by the State party to determine whether there is a violation of Articles 5 and 27 of the Convention.[172]

[169] *See* Appendix Joint opinion of Committee members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (dissenting).
[170] *Id*. para. 1.
[171] *Id*.
[172] *Id*. para. 2.

According to the dissenting opinion, "reasonable accommodation must be analyzed on a case-by-case basis, and the reasonableness and proportionality of the accommodation measures proposed must be assessed in view of the context in which they are requested."[173] The dissenters contended that one of the objectives of "reasonable accommodation" is to compensate for factual limitations to promote the employment of persons with disabilities. [174] While reasonable accommodation is in principle an individualized measure, the benefit for other employees with disabilities must also be considered when assessing reasonableness and proportionality of particular measures. Crucially, the Labor Court failed to take into account the wage subsidy and assistance benefits that the candidate and potential employer could have acquired should the candidate have been employed. In contrast, the Ombudsman's options clearly considered such subsidy and assistance benefits.[175]

Based on the above, the dissenters maintained that the Labor Court severely limits the possibility for persons with disabilities who require support and adaptation measures to be employed by adopting a broad interpretation of "undue burden." The Labor Court's assessment of the requested accommodation measures resulted in a *de facto* discriminatory exclusion of the complainant from the position. Therefore, the Swedish government violates the general principles in preamble (i) and (j) as well as Articles 5 and 27 of the Convention.[176]

3. J.H. v. Australia[177]

a. facts

Ms. J.H. was summoned by the Department of the Attorney General in Perth to attend jury service in Western Australia District Court. Because she was born deaf and uses Australian Sign Language (Auslan) as her native language, she required an Auslan interpreter to enable her to perform her jury duty.[178] However, the manager of jury services at the Department of the Attorney General excused J.H. from the summons to serve as a juror under section 34G of the Juries Act 1957 of Western Australia, stating that the court was unable to provide her with a Auslan interpreter given "the overriding necessity to afford a fair trial to the accused, including the

[173] *Id*. para. 4.
[174] *Id*. para. 4.
[175] *Id*. para. 5.
[176] *Id*. para. 6.
[177] *J.H. v. Australia*, Communication No. 35/2016, CRPD/C/20/D/35/2016 (August 31, 2018).
[178] *Id*.

preservation of the secrecy of jury deliberations."[179] J.H. lodged a complaint with the state's Equal Opportunity Commission, which found that the complaint fell outside the scope of the Equal Opportunity Act.[180] Ms. J.H. also intended to lodge a complaint under the Disability Discrimination Act 1992. However, section 47 (2) of that Act prevents her from using this remedy to address her complaint.[181]

Hence, J.H. claims that the Australian government has violated article 5 (2) and (3) of the Convention by failing to provide reasonable accommodation.[182] In response, Australia contends that it had considered J.H.'s individual circumstances and enquired into her assistance requirements, and concluded that she was not able to serve effectively as a juror.[183] The decision is in accordance with section 34G (2) of the Juries Act, which establishes a legitimate differential treatment that is reasonable and proportionate.[184] The government argues that the provision of an Auslan interpreter cannot be qualified as reasonable accommodation. It contends that an interpreter presents a significant impact on the cost, complexity, and duration of the trials, while also interfering with the secrecy of jury deliberations.[185] The government considers that the hearing loop devices provided in courtrooms constitutes reasonable accommodation and that the overriding necessity in criminal proceedings to afford a fair trial must prevail over the needs of the potential juror.

b. Committee's Opinion

The Committee notes that the accommodation provided by the State party, i.e., hearing loop devices in courtrooms, would not enable J.H. to participate effectively in a jury on an equal basis with others. The Committee also observes that the government does not provide any evidence to show the estimated cost of an Auslan interpreter in the present case and fails to justify the claim that the requested accommodation constitutes a disproportionate or undue burden. In addition, the Committee notes that the provision of Auslan interpretation is a standard accommodation used by

[179] *Id*. para. 2.4.
[180] *Id*. para. 2.7.
[181] *Id*. para. 2.8.
[182] *Id*. para. 3.1.
[183] *Id*. para. 4.3.
[184] *Id*. paras. 4.6 & 4.7.
[185] *Id*. para. 4.7.

Australian deaf persons in their daily life and that the State party failed to analyze the "reasonableness" of the accommodation requested.[186]

As regards the government's argument concerning the confidentiality principle of jury deliberations, the Committee opines that the State party has not taken the necessary steps, such as requiring the Auslan interpreters to take a special oath before the court to ensure reasonable accommodation for the deaf juror without affecting the confidentiality of the jury's deliberations.[187] As a result, the Committee concludes that Australia violates article 5 (2) and (3) of the Convention as its "refusal to provide Auslan interpretation, without thoroughly assessing whether that would constitute a disproportionate or undue burden, amounts to discrimination on the basis of disability."[188]

4. Analysis of the Cases

The case-law of the CRPD Committee on the interpretation and application of reasonable accommodation is still in its infancy. At present, it is difficult to discern an established pattern on the Committee to evaluate facts and arguments that might constitute reasonable accommodation or not. However, some critical aspects of the above cases are summarized below.

In *H.M. v. Sweden*, the Swedish government apparently failed to consider its obligation under the CRPD to treat a disabled person differently when the situation warrants it, as the Convention incorporates "denial of reasonable accommodation" into the definition of discrimination on the basis of disability. Laws and policies seemingly neutral on the face might disproportionately cause significant disadvantages to people with disabilities and constitute indirect discrimination. In H.M.'s situation, the building permission is indispensable to construct an indoor hydrotherapy pool in her house, which provides the last feasible rehabilitation for her. While Sweden argued that construction of the hydrotherapy pool would constitute a major departure from the development plan and was not possible under the Planning and Building Act, it did not show how one exception that allegedly endangers the public interest could possibly make the permission unreasonable or cause disproportionate or undue burden, especially considering the urgent health needs and well-being of a disabled person. Furthermore, it failed to put forward any

[186] *J.H. v. Australia*, para. 7.5.
[187] *Id*.
[188] *Id*.

concrete evidence exemplifying the requested departure from the state's development plan would impose a "disproportionate or undue burden." In certain circumstances, the health interest and well-being of a disabled person should merit more serious consideration than the abstract and dubious public interest argument.

By contrast, *Jungelin v. Sweden* presents a much harder borderline case. First, this case happened over seventeen years ago, and advance in technology is always an important consideration in determining what constitutes a reasonable accommodation. Therefore, though the majority opinion held that the support and adaptation measures were not reasonable in this case, the situation could be quite different today. Second, the Committee only has a quasi-judicial role in determining the merits of individual communications after exhaustion of domestic remedies. It has no power to act as "ultimate court" when considering individual communications. States parties enjoy a certain margin of appreciation when the Committee assesses the reasonableness of accommodation measures and the issue of disproportionate or undue burden in a particular case. As a result, the same case, while not been considered in violation of the CRPD, could have a very different result under domestic law. Third, the nature of the entity is highly critical in determining whether the requested accommodations are mandatory or not. In the case of the public sector, it is more difficult for the state to argue that lack of resources limits its ability to provide the requested accommodation compared to the (usually small-scale) private actors.

Finally, with respect to the issue of third-party benefits, as mentioned previously,[189] under the CRPD, benefits to third-party should be fully considered in determining whether a particular accommodation imposes a disproportionate or undue burden on the duty bearer. Because of the widespread prejudice, stereotypes, and stigma towards persons with disabilities, we often tend to overemphasize the cost of an accommodation, focusing solely on the difficulty and expense involved. If adopting a particular accommodation measure can bring about tangible and/or intangible benefits to third-party, especially those with comparative disabilities, then this would not only help the disabled individuals exercise their substantive right in question, but it could also facilitate realization of the objective and purpose of the CRPD to ensure that people with disabilities can enjoy human rights and fundamental freedoms on an equal basis with others.

[189] *See supra* section II.C.4.d.(1).

Thus, the dissenting opinion in *Jungelin v. Sweden* better reflects the purpose and objective of the CRPD to remove obstacles to the employment of persons with disabilities through the provision of reasonable accommodation to compensate for the lack of factual capacity. The majority opinion, on the contrary, severely limited the possibility for persons with disabilities who require support and adaptation measures to be employed by adopting a lenient threshold for assessing the reasonableness of accommodations and issue of disproportionate or undue burden.

Notably, *J.H. v. Australia* represents the third time that whether deaf people can serve as jury members in Australia comes before the Committee.[190] In each of the three cases, the Committee has consistently held that failures by the government to provide reasonable accommodation to deaf people to enable them to perform jury duty constitutes discrimination. *J.H. v. Australia* highlights the competing interests between the provision of reasonable accommodation to allow persons with hearing impairments to serve effectively in a jury and the necessity to afford a fair trial to the accused, including the preservation of the secrecy of jury deliberations. The Australian government expressed concern about the extra costs, complexity, and duration of the trials, which also would compromise the confidentiality of the jury's deliberations. Nonetheless, apart from relying on the preliminary findings of an ongoing three-year study on deaf jurors, the government failed to offer any data to prove that the requested accommodation is disproportionate or constitutes an undue burden in the present case. It appears that the government's primary concern, rather than the added cost and delays to the trial, is that the provision of an Auslan interpreter would undermine the confidentiality of jury deliberations. It is troublesome to see Australia, instead of finding ways to reconcile the needs of deaf persons to serve as jurors and the protection of the secrecy of jury deliberations, simply rejects the requested accommodation as unreasonable and causing excessive burden. As suggested by the Committee, there are other alternatives to ensuring that the needs of the complainant were accommodated while safeguarding the secrecy of jury deliberations. In this connection, the State party can require the interpreters to take a special oath before the court.

This case demonstrates that in situations where the provision of reasonable accommodation may conflict with the interests and rights of other people, it is imperative for the State party to

[190] *See Gemma Beasley v. Australia*, communication No. 11/2013, CRPD/C/15/D/11/2013 (April 1, 2016), and *Michael Lockrey v. Australia*, communication No. 13/2013, CRPD/C/15/D/13/2013 (April 1, 2016).

strike an appropriate balance to protect both sides to the greatest extent possible. The use of Auslan interpretation is so common by Australian deaf persons in their daily life, and the opportunity to serve in a jury allows deaf people to fulfill their civic duty on an equal basis with others. The denial of an Auslan interpreter as a reasonable accommodation that is necessary to enable people who are deaf to participate effectively as jurors significantly harms the inherent worth and dignity of people with hearing impairments. In addition, the introduction of interpreters into the jury room, contrary to the long-held, normative assumptions, not only would not undermine the sanctity of jury deliberations, but would add to jury diversity, enhancing democratic legitimacy of judicial process.[191] This once again illustrates that we often only focus on the difficulty and expense of particular accommodation, but ignore that the provision of reasonable accommodation not only help people with disabilities exercise their rights equally, but also bring about tangible and/or intangible benefits to the whole society.

IV. Reasonable Accommodation and Progressive Realization

As mentioned previously, the duty of reasonable accommodation applies not only to civil and political rights, but also equally to economic, social, and cultural rights (ESC rights). By incorporating reasonable accommodation duties which are subject to immediate realization into ESC rights, the CRPD blurs the dividing line between civil and political rights, and economic, social, and cultural rights. Traditionally, human rights have been divided into two categories. Some commentators refer to civil and political rights as negative or first-generation rights, which require states to respect the rights and abstain from taking any measures that would interfere with them. Their implementation is associated with no or minimum cost implications and, therefore, those rights are considered to be effective immediately and justiciable. On the contrary, economic, social, and cultural rights are perceived as positive or second-generation rights that impose obligations upon states to secure the realization of people's entitlement to those rights. As this process usually involves the allocation of significant resources, such rights are subjected to progressive realization. Nevertheless, this traditional dichotomy of rights and the justifications underpinning that dichotomy have been long questioned and abandoned. It is now well recognized that the implementation of civil and political rights also requires significant resources on the part of states

[191] *See* Jane Richards, *An Incremental Approach to Filling Protection Gaps in Equality Rights for Persons with Disabilities*, 21 HUM. RTS. L. REV. 837, 863 (2021).

(think about how much it costs to hold up one election).[192] It is critical to recognize the interdependence, interconnectedness, and indivisibility of human rights to protect persons with disabilities.[193]

The effect of duty of reasonable accommodation on the interpretation and application of the progressive realization of ESC rights contained in the CRPD will be the focus of this section. I put forward some criteria in assessing whether the measures adopted by states are compatible with the Convention. I delineate the general contours of progressive realization and explore the interaction between the equality norm of the CRPD and progressive realization of human rights. Then discussion will turn to a proposed framework of "reasonableness review" which builds on the existing mechanisms established at the national and international level to assess measures adopted by states in fulfilling ESC rights. I will also reflect on how the duty of reasonable accommodation facilitates the realization of ESC rights in the CRPD.

A. The Progressive Realization of Human Rights

1. The Concept of "Progressive Realization"

The concept of progressive realization reflects an express acknowledgment that the full realization of economic, social, and cultural rights is not achievable immediately due to lack of resources, including financial, human, or institutional, or competing priorities, particularly in developing countries. Numerous international human rights treaties contain progressive realization clause[194] , and the CRPD is no exception. Article 4(2) of the CRPD reads:

> With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.[195]

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[192] *See* Magdalena Sepulveda Carmona, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 18 School of Human Rights Research Series, 127 (2003).
[193] *See* Gerald Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework, in* HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 70 (Theresia Degener & Yolan Koster-Dreese eds., 1995).
[194] Article 2 of the ICESCR and Article 4 of the CRC.
[195] CRPD, Article 4(2).

Similar to the notion of disproportionate or undue burden under the duty of reasonable accommodation, the concept of progressive realization implies a balancing of interests and burdens, and takes into consideration of financial, human, institutional capacities and other constraints faced by states in fulfilling certain onerous human rights obligations. However, even with regard to economic, social, and cultural rights, it is recognized by human rights law that states still have certain obligations which are achievable immediately. This defines the outer limits or boundaries of progressive realization.

2. The Immediate Duties of States in the Realization of Economic, Social and Cultural Rights

The Committee on ESC Rights, in its General Comment No. 3, emphasized that "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States Parties various obligations which are of immediate effect."[196] To prevent states from relying on progressive realization as a justification or excuse for complete inaction, international human rights law sets up some limitations to the progressive realization of human rights. Article 2(1) of the ICESCR provides the general contours of the concept of progressive realization. It reads as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[197]

Article 4(2) of the CRPD mirrors the formulation of the obligation to realize progressively economic, social, and cultural rights. Therefore, below I draw on commentary and General Comments in delineating the general contours of the concept of progressive realization of ESC rights in the CRPD.

a. The obligations to "take steps"

In its General Comment No. 3, the Committee on ESC Rights stated that progressive realization of rights imposes obligations on states to move "as expeditiously and effectively as

[196] Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990) on *the Nature of States Parties Obligations*, UN Doc. E/1991/23, para. 43.
[197] ICESCR, Article 2(1).

possible,"[198] which means that steps towards the full realization of rights must be taken within a "reasonably short time." [199] Furthermore, such steps should be "deliberate, concrete and targeted"[200] as clearly as possible to meet the obligations. The Committee contended that states should take all appropriate means, including but not limited to legislative measures, judicial or other remedies, and "administrative, financial, educational and social measures."[201] In its General Comment No. 1, the Committee expressed that the obligation to "take steps" clearly imposes obligations on states "to work out and adopt a detailed plan of action for the progressive implementation of each of the rights contained in the Covenant."[202]

In addition, states are also required to monitor the realization of socio-economic rights. The Committee, in its General Comment No. 5, contended that states have obligations "to ascertain, through regular monitoring, the nature and scope of problems existing within the State."[203] To ensure the realization of ESC rights, it is crucial for states to identify the nature of any human rights gap and set up appropriate national strategies, benchmarks, and indicators to close the gaps.[204]

b. The obligation to ensure non-discrimination

According to article 2(2) of the ICESCR, states have an immediate obligation to "guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind." The Committee confirmed the obligation of states to ensure non-discrimination in the exercise of ESC rights on many occasions.[205] For example, in its General Comment No. 13, the Committee stated that "States Parties must closely monitor education – including all relevant policies, institutions, programs, spending patterns and other practices – so as to identify and take measures to redress any *de facto* discrimination."[206] In the context of the CRPD, the provision of reasonable

[198] *Supra* note 196, para. 9.
[199] *Id*. para. 2.
[200] *Id*.
[201] *Id*. para. 7.
[202] Committee on Economic, Social and Cultural Rights, General Comment No. 1 (1989) on *Reporting by State Parties*, UN Doc. E/1989/22, para. 4.
[203] Committee on Economic, Social and Cultural Rights, General Comment No. 5 (1994) on *Persons with Disabilities*, UN Doc. E/1995/22, para. 13.
[204] *See*, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on *The Right to the Highest Attainable Standard of Health*, paras. 57 and 58.
[205] *Supra* note 196, para.1.
[206] Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999) on *the Right to Education*, UN Doc. E/C.12/1999/10, para. 37.

accommodation is perceived as an inherent part of the equality and non-discrimination norms. This not only helps to eliminate discrimination, but also injects a substantial equality dimension into the progressive realization of economic, social, and cultural rights under the Convention.

c. The obligation to devote the "maximum of available resources"

States have an obligation to utilize the maximum available resources to progressively achieve the full realization of economic, social, and cultural rights. The concept of "maximum of available resources" may seem ambiguous and not easy to assess. Nonetheless, three elements of government appropriations have been developed over time to assess what is meant for the state to realize economic, social, and cultural rights to the maximum of available resources.[207] The first concerns the sufficiency of government spending; the second is the equity of expenditure patterns; the last one is the efficiency of expenditure. These elements are important to assess the reasonableness of state's action. The phrase "maximum of its available resources" refers to both the resources existing within a state and those available through international cooperation and assistance.[208] Article 4(2) of the CRPD specifically provides for the obligation to seek assistance, where needed, through the framework of international cooperation.[209] This will be particularly important for developing countries to achieve the progressive realization of rights.

d. Minimum Core Obligation

The concept of "minimum core obligation" was first introduced by the Committee on ESC Rights in its General Comment No. 3. General Comment No. 3 established that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."[210] It also provided that if a state would like "to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[211] The minimum core stands for the basic standard to meet the survival needs of the most disadvantaged groups in society.

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[207] *See* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 82 (2008).
[208] *Supra* note 196, para. 13.
[209] CRPD, Article 4(2).
[210] *Supra* note 196, para. 10.
[211] *Id*.

While minimum core obligations may ensure those disadvantaged groups that cannot access fundamental provision to be brought above the so-called poverty line, it raises controversy in many aspects. As minimum core obligation focuses on biological needs for survival and easily leads to a hierarchy of rights, some commentators argue that it is "inconsistent with both human dignity and the holistic framework of the International Bill of human rights."[212] Because of this concern, this concept has not been accepted by many states. As an example, the South African Constitutional Court in *Grootboom* pointed out the difficulty of defining the minimum core because different groups may have varying social needs and unique economic and social history, which make it impractical infeasible for the judiciary to define what constitutes the minimum core.[213] In addition, the concept of minimum core ignores cumulative disadvantage and inequalities faced by vulnerable groups in the enjoyment of socio-economic rights, which I believe that a dignity or equality consideration would have a much more significant role to play.[214]

B. Reasonableness Review

To assess whether states have adopted adequate measures to progressively fulfill economic, social, and cultural rights, Article 8(4) of the Optional Protocol to the ICESCR contains a standard of "reasonableness review," which builds on the existing mechanisms established at the national and international level. The Article provides:

> When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

The provision was heavily influenced by the jurisprudence of the South African Constitutional Court, specifically the reasonableness test first developed in the *Grootboom*[215] case. This evidently demonstrates the interconnectedness of approaches to assessing ESC rights at the international and national level and the possibility of cross-fertilization of the various approaches.

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[212] *See, e.g.,* Gillian MacNaughton, *Beyond a Minimum Threshold: The Right to Social Equality, in* THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 282 (Lanse Minkler ed., 2013).
[213] *Government of the Republic of South Africa and Others v. Grootboom and Others* (2001) (I) SA 46 (CC), 2000 (II) BCLR 1169 (CC), paras. 32-33.
[214] *See infra* section IV.B.1&2.
[215] Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v. Grootboom and Others* (2001) (I) SA 46 (CC), 2000 (II) BCLR 1169 (CC).

In 2007 the Committee on ESC Rights adopted a guidance statement[216] to answer questions related to the standard of review and to clarify how it might consider state's obligations of realizing progressively economic, social and cultural rights. The Committee listed a number of possible factors which it would consider in assessing the reasonableness of steps taken, which include:

(a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;

(b) Whether the State Party exercised its discretion in a non-discriminatory and non-arbitrary manner;

(c) Whether the State Party's decision (not) to allocate available resources is in accordance with international human rights standards;

(d) Where several policy options are available, whether the State Party adopts the option that least restricts Covenant rights;

(e) The time frame in which the steps were taken;

(f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they are non-discriminatory, and whether they prioritized grave situations or situations of risk.[217]

The considerations set forth by the Committee in the statement to assess the adequacy or reasonableness of measures taken by states reflect the reasonableness test developed by the South African Constitutional Court. The Committee emphasized, particularly, that states have obligations to protect the most disadvantaged and marginalized groups of society. Commentators have praised clauses (b) and (d) in the statement as they restrict states' latitude on the types of measures they can adopt by highlighting non-discrimination norm and requiring the adoption of

[216] Committee on Economic, Social and Cultural Rights Statement, *An evaluation of the obligation to take steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant* (2007), U.N. Doc. E/C.12/2007/1, para. 3.
[217] *Id.* para. 8.

the least restrictive alternative.[218] Furthermore, the Committee also stressed the importance of "transparent and participatory decision-making at the national level."[219]

As the CRPD also needs to develop its own standard of review to assess the duty of reasonable accommodation, and the provision of reasonable accommodation facilitates the realization of ESC rights in the Convention, it is crucial to consider the interconnectedness and interaction of various approaches as well as the types of factors that might be employed by the CRPD Committee in assessing states' obligations.[220] Below I will elucidate some of the most important factors that should be embedded in evaluating the adequacy of measures adopted by states to ensure the fulfillment of socio-economic rights of people with disabilities to the largest extent possible.

1. Equality Factor

There is an inextricable relationship between the right to equality and non-discrimination and ESC rights. In Chapter Two, I argued that substantive equality should be understood as a multi-dimensional concept, pursuing four complementary and interrelated objectives (redistribution, recognition, transformation, and participation).[221] The CRPD Committee, in General Comment No. 6, affirms that inclusive equality is a new model of equality developed throughout the Convention.[222] Interestingly, the concept of inclusive equality, which embraces a substantive model of equality and further extends and elaborates on the content of equality, is also based on similar dimensions. People with disabilities often lack access to basic necessities, resources, and opportunities and suffer disproportionately from poverty. Therefore, discrimination on the grounds of disability, more than any other ground, requires an asymmetric approach to redress disadvantage. The application of the equality and non-discrimination norms can ensure socio-economic rights of marginalized and disadvantaged groups are realized, and the fulfillment of socio-economic rights can help to address systematic disadvantages and inequalities. The Committee on ESC Rights also

[218] *See* Brian Griffey, *The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 11(2) HUM. RTS. L. REV. 275, 322 (2011) [hereinafter "Griffey, *The "Reasonableness" Test*"].
[219] *Supra* note 216, para. 11.
[220] *See* BRODERICK, THE LONG AND WINDING ROAD, *supra* note 45, at 209.
[221] *See* Chapter Two, section II.B.
[222] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para 11.

recognized that equality and non-discrimination "are essential to the exercise and enjoyment of economic, social and cultural rights."[223]

Many of the substantive articles in the CRPD contain a hybrid form of rights – that is, they are a unique blend of equality rights and ESC rights. For example, the right to work, on the one hand, requires that persons with disabilities are not excluded from mainstream workplace and, on the other hand, mandates that people with disabilities be given training opportunities to advance in their career. Most importantly, the application of the duty of reasonable accommodation spreads a whole spectrum of civil and political and economic, social, and cultural rights. This injects an element of immediacy into the progressive realization of the ESC rights.

It is vital to factor equality consideration into the process of assessing measures taken by states to implement ESC rights. Under the CRPD, the duty of reasonable accommodation seeks to ensure equality of opportunity and *de facto* equality for people with disabilities. Although the realization of socio-economic rights for people with disabilities may require additional resources in some instances, the application of the equality norm in the disability context may not be prohibitively expensive for states. In this connection, Louise Arbour, former U.N. Commissioner on Human Rights, similarly asserted that "many aspects of economic, social and cultural rights can be respected at little or no additional expense through simple regulatory changes or through the provision of a remedy to an aggrieved individual."[224]

The particular nature of impairment and the systematic and structural disadvantages faced by persons with disabilities necessitates an equality perspective in the reasonableness test. An equality perspective helps to enrich socio-economic claims by requiring states to provide heightened justification for any alleged rights violations.[225] Integration of an equality perspective would ensure a deeper understanding of the entrenchment of rights violations and the inequalities faced by people with disabilities. Therefore, in the context of the CRPD, there is ample opportunity to develop the interaction between equality and non-discrimination norms and ESC rights

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[223] Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009) on *Non-Discrimination in Economic, Social and Cultural Rights*, para. 21.

[224] Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the third session of the Open-Ended WG OP ICESCR, available at https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6011&LangID=E (last accessed October 16, 2021).

[225] *See generally* Sandra Liebenberg & Beth Goldblatt, *The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution*, 23 S. AFR. J. OF HUM. RTS. 335, 351-352 (2007).

adjudication generally, particularly given the prominence of the duty of reasonable accommodation in the realization of the Convention's socio-economic provisions and the ingrained disadvantages experienced by people with disabilities.

2. Dignity Factor

In addition to an equality perspective, one must also take into account a dignity concern. An approach based on human dignity not only helps counteract the stigma and stereotypes of people with disabilities as lacking capabilities, but also renew the focus on the inherent worth and dignity of people with disabilities. Human dignity has served a pivotal role in the jurisprudence of the South African Constitutional Court's reasonableness test in adjudicating socio-economic claims ever since *Grootboom*. There has been some criticism of the use of human dignity as a guiding value. Some criticize the vagueness and indeterminacy of human dignity as a normative concept.[226] Some worry that the close relationship between dignity and freedom and autonomy prevents the adoption of positive, redistributive measures to remedy material inequality and disadvantage.[227] Still others criticize that the invocation of human dignity promotes an individualized, as opposed to "a group-based understanding of material advantage and disadvantage."[228]

With respect to the first critique, the concept of human dignity is open to different interpretations, and judges sometimes use it to reach totally opposite results.[229] This is why Christopher McCrudden argues that "instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion."[230] However, the fact that there is only a thin consensus on the meaning of dignity may necessitate a continuing and engaged debate and discussion rather than denying its importance.[231]

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[226] *See* DM Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFR. L.J. 398 (1999).
[227] *See* Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. OF HUM. RTS. 1, 5 (2005) [hereinafter "Liebenberg, *The Value of Human Dignity*"].
[228] *See* Cathi Albertyn & Bath Goldblatt, *Facing the Challenge of Transformation Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. OF HUM. RTS. 248, 257-258 (1998).
[229] *See* Cristopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EURO. J. INT'L L. 655 (2008).
[230] *Id*.
[231] *See* Paolo Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EURO. J. INT'L L. 931 (2008).

Moreover, another important dimension of human dignity is the equal moral worth of people, which requires treatment as an equal as opposed to equal treatment.[232] Treatment as an equal requires full recognition of the racial, gender, religion, and other differences between various groups in society. As Sandra Liebenberg emphasizes that "the quest for equal worth or dignity is not a quest for uniformity, but a quest to eliminate the disadvantages and inferior status that attach to membership of particular groups."[233] This resonates with the substantive approach to equality which requires a contextual analysis that is responsive to the different order and types of needs and real circumstances experienced by the vulnerable groups in the light of their historical, social, economic, and political conditions. Accordingly, states are required to cater for the needs of those in most dire circumstances.

The other two criticisms of human dignity are related to the extent that they are based on the contention there is some tension between dignity and equality. The former values individuals' identities for their uniqueness, whereas the latter emphasizes the universal humanity and equality of different people.[234] However, dignity can also be perceived as a relational value in the sense that we are all interconnected. Our sense of self-worth, personal development, and well-being is inextricably connected to the extent to which we are valued by others. The CRPD is built around the central tenet that people with disabilities should be provided the support necessary to develop their capabilities and potential. The core norm of human dignity, going hand in hand with an equality perspective, can provide valuable insight into the realization of socio-economic rights contained in the Convention. Human dignity, perceived as a relational value, helps us to discern the limits of individual claims on resources while taking into account of the needs and equal worth of others and available resources of the society.

People with disabilities have long been viewed as objects of welfare, protection, or charity, rather than holders of equal rights.[235] Dignity is indispensable in assessing measures states adopt to realize the socio-economic rights of people with disabilities to avoid measures that aim at addressing disadvantage inadvertently causing stigma to the beneficiaries. For example, though

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[232] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977).
[233] *See* Liebenberg, *supra* note 227, at 14.
[234] *See* Lucy Vickers, *Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief,* 31(1) LEGAL STUDIES 135-58, 149-50 (2011).
[235] *See* Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 T. JEFFERSON L. REV. 47, 59 (2015).

social security system may help ameliorate materials inequality, it can also reinforce stereotypes or stigmatize the recipients. Therefore, such systems need to be designed in a way that respects and advances dignity as well as redresses disadvantage.

3. Participatory Factor

Another critical element of reasonableness review of socio-economic rights concerns the participatory process. In this respect, Marius Pieterse and Sandra Liebenberg have called for a "more principled and systematic interpretation of the content of the various socio-economic rights, the value at stake in particular cases and the impact of the denial of access to these rights on the complainant group."[236] It is important to give adequate weight to the perspective and voice of disadvantaged groups in interpreting and applying the human rights norms to particular contexts. Under the CRPD, the element of the participatory process is even more fundamental because persons with disabilities have long been perceived as incapable of making choices and taking care of themselves. Professionals always make decisions on their behalf without ever respecting their wills or preferences. In light of this fact, article 4(3) of the CRPD mandates that persons with disabilities and their representative organizations should be consulted closely and actively involved in every aspect of the implementation of the Convention.[237] From a substantive and transformative equality perspective, states are required to make efforts to involve affected groups to an adequate degree.

The Committee, when reviewing state reports or deciding upon communications, has to ensure that the participatory mandate of the CRPD is taken seriously by states. People with disabilities are in the best position to inform other entities and states regarding the appropriateness of measures they adopt. The consultative process of exchanging views is essential to the full and effective realization of rights in compliance with the Convention. In addition, including the perspective and voice of persons with disabilities in developing and implementing laws and policies helps enhance transparency and accountability.[238] A participatory process also contributes

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[236] *See* Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882 (2004).

[237] CRPD, Article 4(3) of the Convention mandates that persons with disabilities should be consulted closely and actively involved, through their representative organizations in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities.

[238] *See* Bruce Porter, *The Reasonableness of Article 8(4) - Adjudicating Claims from the Margins*, 27(1) NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 39, 52 (2009) [hereinafter "Porter, *The Reasonableness of Article 8(4)*"].

to balancing the various interests and burdens at stake when governments make arrangements regarding priorities and trade-offs.

C. The Right to Education

To illustrate how these three factors influence the reasonableness review, I use the right to education for persons with disabilities as an example. The right to education is both an end in itself as well as a means to effectively enjoy and exercise all other human rights. It is the primary vehicle by which economically and socially marginalized groups obtain necessary life and social skills to fully participate in society.[239] For people with disabilities, the right to education is indispensable for their full and effective participation and inclusion in society on an equal basis with others.[240] Nonetheless, an overwhelming majority of persons with disabilities have little or no access to mainstream education.[241] More often than not, those who can receive education have been placed in so-called "special unit" or "special school" and segregated from their non-disabled peers.[242]

1. Inclusive Education for People with Disabilities

The adoption of the CRPD marks the first time in international human rights law that explicitly recognizes a right to inclusive education for individuals with disabilities within the mainstream system.[243] Article 24 of the CRPD imposes wide-ranging duties on States Parties to guarantee the realization of the right to inclusive education to persons with disabilities. The CRPD Committee, drawing on the recommendation of the Committee on Economic, Social and Cultural Rights, stated that the education system must comprise four interrelated features: availability, accessibility, acceptability, and adaptability to ensure people with disabilities have access to inclusive and quality education.[244]

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[239] Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999) on *The Right to Education*, UN Doc. E/C.12/1999/10, para. 1.
[240] *See* CRPD Committee, General Comment No. 4 (2016) on *the Right to Inclusive Education*, CRPD/C/GC/4, para. 10(c).
[241] *See* Report of the Special Rapporteur on the Right to Education, Vernor Munoz Villalobos, *The Right to Education of Persons with Disabilities*, UN Doc. A/HRC/4/29 (2007).
[242] *See* Arlene Kanter, *The Right to Inclusive Education for Students with Disabilities under International Human Rights Law, in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 17-21 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord eds., 2019) [hereinafter "Kanter, *The Right to Inclusive Education*"].
[243] CRPD Committee, General Comment No. 4 (2016) on *the Right to Inclusive Education*, CRPD/C/GC/4, para. 2.
[244] *See id.* para. 20.

Importantly, there is some confusion between inclusive education and integrated education.[245] An integrationist approach, e.g., segregated or special education, is primarily based on the medical model of disability. It focuses on the functional limitations of children with disabilities and requires disabled learners to adapt to fit in with the mainstream norms. As a result, integrated education can lead to isolation of persons with disabilities because it fails to meet the educational needs of all students. By contrast, inclusive education conforms to the tenets of the social model of disability because it recognizes the obstacles existing in the mainstream education system, and therefore, requires the elimination of barriers and the provision of individualized support measures to ensure that persons with disabilities enjoy full and effective participation in accessing the right to education on an equal basis with others.

Article 24 of the CRPD imposes wide-ranging duties on States Parties to ensure that individuals with disabilities are entitled to the right to inclusive education on an equal basis with others. Since lack of access to education has been recognized as a "dominant problem in the disability field,"[246] article 24(2)(a) and article 24(2)(b) of the CRPD specifically set out the right of non-discriminatory access to education for persons with disabilities.[247] In addition, to achieve inclusive education for people with disabilities, articles 24(2)(c), 24(2)(d), and 24(2)(e) require states to provide reasonable accommodations and other individualized support measures.[248] Examples of individualized support measures for people with disabilities include personal assistance, Braille, and sign language. Notably, while the provision of reasonable accommodations is an immediate duty on states, individualized support measures fall within the obligations of

[245] *See id.* para. 11.
[246] *See* Susan Peters, *Inclusive Education: An EFA Strategy for All Children*, 5 (World Bank, 2004), *cited in* BRODERICK, THE LONG AND WINDING ROAD, *supra* note 45, at 290.
[247] CRPD, Articles 24(2)(a) and 24(2)(b) read: "In realizing this right, States Parties shall ensure that:
a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;"
[248] CRPD, Articles 24(2)(c), 24(2)(d) and 24(2)(e) provide: "In realizing this right, States Parties shall ensure that:
…
c) Reasonable accommodation of the individual's requirements is provided;
d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion."

progressive realization, which can be implemented gradually based on available resources of states, so long as states have taken adequate steps with a view to achieving fully inclusive education system and providing effective education to people with disabilities.[249]

Though inclusive education is the cornerstone of article 24 of the CRPD, article 24 (3) allows for special education where necessary to cater for individuals who are blind, deaf, or deaf-blind as long as it is in an environment that maximizes academic and social development.[250] This provision is to mitigate concern of certain disabled people's organizations (DPOs)[251] and to give time for segregated schools in States Parties to transition.[252] An inclusive education system requires time and resources on the part of states to realize progressively. To expect overnight closure of special or segregated schools would only leave children with disabilities without any access to education. Thus, while the ultimate goal of article 24 of the CRPD is to ensure full inclusion of persons with disabilities in the general education system on an equal basis with others, what is required of states is a gradual shift away from special or segregated schools towards inclusive education system. This is where the three factors I mentioned above, including equality, dignity, and participation, can aid in assessing whether the steps taken by states are appropriate and adequate to ensure the progressive realization of the right to education for persons with disabilities in inclusive settings.

2. Reasonable Review of Article 24 of the CRPD

In employing the standard of reasonableness review to assess whether states have taken adequate action for the progressive realization of the right to education for people with disabilities, the equality and non-discrimination norms are critical factors in the process. Article 24 of the

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[249] *See* Gauthier De Beco, *Comprehensive Legal Analysis of Article 24 of the Convention on the Rights of Persons with Disabilities*, *in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 79-81 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord eds., 2019) [hereinafter "De Beco, *Comprehensive Legal Analysis of Article 24*"].

[250] CRPD, Article 24(3) reads: "States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:
a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development."

[251] *See* De Beco, *Comprehensive Legal Analysis of Article 24*, *supra* note 249, at 83-87.

[252] *See* Kanter, *The Right to Inclusive Education*, *supra* note 242, at 47-48.

CRPD aims to close the gap and inequality in education faced by persons with disabilities through eliminating discriminatory access and segregated education system. Accordingly, it is imperative for states to provide reasonable accommodations and individualized support measures to cater to different characteristics, needs, and abilities of disabled people to ensure that they can benefit from inclusive education on an equal basis with others. Although resource constraints may constitute a major barrier to realizing the right to education for children with disabilities, it is important to note that inclusive education is often wrongly perceived to be prohibitively expensive. Many accommodations and support measures do not require additional cost but merely involve more efficient and effective reallocation of existing resources from the special education system. Studies have shown that inclusive education can "improve the efficiency and ultimately the cost-effectiveness of the entire education system"[253] as it is less costly to implement and operate than segregated special education services.[254] Therefore, though states may incur significant financial and human resources in transforming the special education system into a fully inclusive system in the transition period, the cost-benefit over the medium to long-term is assured. In the interim, states have obligations to allocate sufficient budget to provide appropriate accommodations and supports to ensure that persons with disabilities can exercise their right to education in the mainstream on an equal basis with others.

In addition to the equality norm, the inherent dignity of persons with disabilities is a critical factor in assessing the appropriateness of measures adopted by states. The combating of prejudice, stigma and stereotypes against people with disabilities is an indispensable dimension of inclusive equality.[255] It is the obligation of states to ensure that in the process of realizing inclusive education for individuals with disabilities, they are respected as equals, and their inherent dignity has been given due consideration. As a result, reasonable accommodations and support measures should meet the wills and preferences of persons with disabilities and be provided in a manner not to cause further prejudice and stigmatization of the capabilities of disabled people. One important mechanism to accomplish this is through awareness raising among teachers and school authorities as well as the wider community.[256] In particular, the diversity of the potential and capabilities of

[253] The Salamanca Statement and Framework for Action on Special Needs Education, at page ix.
[254] *See supra* note 243, para. 37.
[255] *See* Chapter Two, section II.D.
[256] *See* De Beco, *Comprehensive Legal Analysis of Article 24*, *supra* note 249, at 88-90.

human beings should be appreciated at all levels of the education system so as to cultivate an attitude of respect for the rights of individuals with disabilities.

Article 24 of the CRPD requires states to realize the minimum core of the right to education, i.e., compulsory primary education, and prioritize basic necessities for inclusive education for people with disabilities. It is important for states to collect data and establish benchmarks and indicators to monitor the progress and effectiveness of measures taken to achieve full and effective implementation of the right to education contained in article 24. To ensure that education is effective for persons with disabilities, reasonable accommodations and generalized or individualized supports provided within the mainstream school system should be sufficient. Programs and curricula should be tailored to the needs of disabled students to enable them to participate fully and be included.

In addition to equality and dignity, the participation of people with disabilities is another critical factor in assessing measures taken by states to fulfill their obligations under article 24 of the CRPD. As mandated by article 4(3) of the Convention, states have the obligation to ensure that individuals, including children with disabilities and their representative organizations, are consulted closely and involved actively in developing and implementing legislation and policies concerning their rights.[257] The participation of persons with disabilities is of vital importance not only to improve accountability and effectiveness of policies and practices adopted by states, but it also highlights disabled learners including children with disabilities as holders of rights, and therefore, must be respected and consulted in the implementation of the right to inclusive education. Research has shown that "in most countries, neither persons with disabilities nor their relatives or representatives take part in designing specific education programs and the curriculum guidelines, or else, their participation is essentially reduced to orientation courses or to collective learning or recreational activities."[258] Thus, states should help support civil society, including DPOs and

[257] CRPD, Article 4(3) reads: "In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations."
[258] *See supra* note 241, para. 79.

NGOs "to build capacity on the right to education and how to influence effective policy and practice."[259] This can strengthen advocacy for inclusive education and, more importantly, enable individuals with disabilities to secure their own rights and support.

V. CONCLUSION

The equality and non-discrimination norms form the twin pillars of the CRPD. Compared with previous international human rights treaties, it is clear that the Convention embodies a more progressive vision of equality rights. The CRPD not only mandates the duty of reasonable accommodation, but also acknowledges that positive measures are central to disability equality. Under the CRPD, states are required to eliminate all socially constructed barriers to increase the potential for realizing *de facto* equality for persons with disabilities. The Convention endorses a holistic human rights-based model and focuses on the full realization of the equality norm. The overall scheme of the CRPD aims at enabling people with disabilities to participate and be included in every aspect of social life on an equal basis with others.

A central feature of the equality paradigm in the CRPD is the notion of the duty of reasonable accommodation. Reasonable accommodation to people with disabilities is highly individualized and context-specific and involves dedicate balancing of interests and burdens between a person with a disability and the duty-bearer. The determination of reasonable accommodation provides a valuable framework to ensure that the reasonableness review of ESC rights is also framed around equality, dignity, and participation. More importantly, the interaction between the standard of review under the ICESCR and the CRPD exemplifies the potential of valuable cross-fertilization between different regimes of international human rights norms, which can also take place in the two-way direction of the domestic and international sphere.

In addition, the CRPD acknowledges the significance of group-based disadvantage and socio-economic barriers to the attainment of social justice. So, it incorporates a detailed and robust equality and non-discrimination provision as well as an extensive range of social, economic, and cultural rights. The inclusion of both civil and political, and economic, social, and cultural rights reflects a commitment to the principle of the interdependence and interrelatedness of all human rights, a fundamental tenet of international human rights law.[260] As a result, it is imperative for us

[259] *See id.* para. 84(g).
[260] *See* The Proclamation of Tehran, Final Act of the International Conference on Human Rights, Tehran UN Doc

to consider how the values and purposes underpinning one right (for example, equality) may be relevant to the development of the jurisprudence under another right (for instance, ESC rights). One strength of reasonableness review is that it seeks to ensure that any analysis of the content of the rights at issue is determined not based on mechanic and abstract indicators, but rather with a view to the specific context of the disadvantaged group at issue.

A/CONF. 32/41 (1968), Article 13; Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna, Part I, para. 5 (1993).

Compared with the ADA, there is reason to be more optimistic about the prospect of reasonable accommodation provision under the CRPD. On the one hand, unlike the ADA, which reflects a mixture of the medical and social model in defining disability, the CRPD endorses a holistic human rights-based model that is more suitable to address disability issues. On the other hand, the Convention clearly entails a more progressive vision of equality and non-discrimination and acknowledges that positive measures are central to disability equality. I think that through close examination of the U.S. jurisprudence on reasonable accommodation, the commonality and the distinction of the two systems can be highlighted, and we can figure out the best way to eliminate all socially constructed barriers to increase the potential for realizing *de facto* equality for persons with disabilities.

CHAPTER FIVE: REASONABLE ACCOMMODATION IN THE UNITED STATES

I. INTRODUCTION

In the previous chapter, I conducted a detailed analysis of the equality and non-discrimination provision of the CRPD, with particular emphasis on the understanding and interpretation of the reasonable accommodation duty. It is submitted that the CRPD embodies, compared with other human rights treaties, a more progressive vision of equality and non-discrimination norms, as it not only embraces multiple forms of discrimination and mandates reasonable accommodation, but also acknowledges that positive measures are central to disability equality. The Convention endorses a holistic human rights-based model and focuses on the full realization of the equality norm. The overarching goal of the CRPD is to ensure people with disabilities to participate and be included in every aspect of social life on an equal basis with others.

Though the CRPD marks the first appearance of reasonable accommodation provision in the international human rights treaties, this concept has played a dominant role in national disability legislation and policy for nearly thirty years. As with most of the other international human rights treaties, the United States is not a member to the CRPD.[1] However, in the negotiation process leading up to the adoption of the Convention, the U.S. made significant contributions and representatives from other counties extensively drew upon the experience of the ADA in drafting the reasonable accommodation provision.[2] In addition, before the adoption of the CRPD, the ADA serves as a template for many states in their national disability legislation and policy. The thirty years of practice of the ADA provide us with invaluable lessons on how the reasonable accommodation provision could be interpreted and applied.

As a result, in this chapter, I intend to explore how the reasonable accommodation provision has been interpreted and applied in the past thirty years in the United States. An important aim of this chapter is to critically examine how the duty of reasonable accommodation under the ADA has been put into practice through the normative framework and criteria established in previous chapters. Through detailed and in-depth analysis of some important case law, I

[1] The United States signed the Convention on July 30, 2009 and transmitted it to the U.S. Senate for ratification on May 17, 2012 which failed by 61-38.

[2] Though the United States did not participate as a member of the Ad Hoc Committee in drafting the Convention, it sent an observer and furnished substantial input during the Committee's proceedings. *See* G.A. Res. 61/76, U.N. Doc. A/61/PV.76, at 6 (Dec. 13, 2006) (observations of Mr. Miller (U.S.)).

compare the U.S. approach to that of the CRPD and elucidate what I propose as the most appropriate interpretation for varying types of reasonable accommodation in different scenarios to enable persons with disabilities to participate in various aspects of the mainstream social life.

This chapter proceeds as follows: Section II starts with a brief introduction of the history of the ADA and how the narrow judicial construction of the definition of disability led to the 2008 Amendments Act. Then the central feature of the ADA – reasonable accommodation – will be discussed. As the Act requires an employer to provide a reasonable accommodation to an individual with a disability who can perform the essential functions of the job, *i.e.*, who is qualified, it is often necessary in every accommodation case to determine whether an individual is qualified. Then I proceed to closely critique case law on the reasonable accommodation provision. *U.S. Airways, Inc. v. Barnett*[3], is the only Supreme Court case dealing with reasonable accommodation. However, while delineating how the burdens of proof should be allocated, it did not offer much guidance to the courts for interpretation.

The case law demonstrates that trying to predict whether an accommodation is reasonable or not is often difficult. Courts do not seem to fully consider all relevant factors or adopt consistent standards for determining whether an accommodation is required or not in a specific situation, resulting in the chaos of the interpretation and application of the reasonable accommodation mandate. Based on the criteria I put forth in previous chapters to realize equality right of people with disabilities, I propose that a more unified and consistent framework that considers the multiple goals served by the reasonable accommodation mandate is needed to address the vexing reasonable accommodation issues.

Furthermore, the employer can raise undue hardship defense against the reasonable accommodation duty. In determining whether an accommodation causes undue hardship, courts often failed to consider the potential benefits of the accommodation accrued not only to the disabled employee, but also to the employer, other coworkers, and sometimes to the whole society. It is also surprising to note that, even after *Barnett*, many courts seem still to get confused about reasonable accommodation and undue hardship, treating these two distinct concepts as flip sides of the same coin.

[3] U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

Section III explores and clarifies similarities and distinctions between reasonable accommodation and two other often confusing concepts, namely, disparate impact and affirmative action. It illustrates that the reasonable accommodation obligation, disparate impact theory, and affirmative action are distinct and complementary parts of the broad equality and non-discrimination norms. Each has different functions and addresses different forms of injustice and discrimination. A better understanding of the unique value of the reasonable accommodation mandate is indispensable to secure equality rights for people with disabilities. Section IV concludes this chapter.

II. HISTORY OF THE ADA AND THE REASONABLE ACCOMMODATION

A. Brief History of the ADA

The ADA was passed in 1990 with overwhelming support in both the House and the Senate.[4] Many provisions of the ADA were modeled on its predecessor, the Rehabilitation Act of 1973, which prohibited discrimination based on disability by government and private entities that receive federal financial assistance.[5] Two features of the ADA make it distinct from existing anti-discrimination law. First, unlike Title VII of Civil Rights Act, which protects all individuals from discrimination based on race, color, sex, religion, and national origin,[6] only a narrow class of individuals who can show that they meet the definition of disability are protected under the ADA.[7] Second, the ADA not only prohibits discrimination based on disability, but it further imposes an affirmative obligation which requires the employer to provide a reasonable accommodation to an applicant or employee with a disability when an accommodation is needed for her to perform the essential functions of the job.[8]

The phrase "reasonable accommodation" first appeared in the regulations published by the Equal Employment Opportunity Commission (EEOC) to impose an obligation on employers not to discriminate on the basis of religion.[9] The regulations were codified by an amendment to Title

[4] *See* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 5 (2013).
[5] Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012).
[6] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1965) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).
[7] An individual with a "disability" is defined as someone who has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2) (2012).
[8] 42 U.S.C. §§ 12112(a), 12112(b)(5)(A) (2012).
[9] 29 C.F.R. § 1605.1 (1995).

VII that requires an employer to reasonably accommodate an employee's or prospective employee's religious observance or practice absent of undue hardship on the conduct of the employer's business.[10] However, to avoid the constitutional controversy under the Establishment Clause, the Supreme Court in the leading decision on religious discrimination under Title VII, *Trans World Airlines, Inc. v. Hardison*,[11] adopted a surprising narrow interpretation of the duty of reasonable accommodation. Undue hardship was defined in the case as anything "more than a *de minimis* cost."[12]

In the context of disability law, the term "reasonable accommodation" first appeared in regulations to the Rehabilitation Act,[13] and subsequently was codified into the statutory language of the ADA.[14] Due to the very different constitutional background against which the phrase "undue hardship" was to be interpreted, the door seems quite open for the duty of reasonable accommodation under the ADA to receive broader recognition.

Nonetheless, to many people's surprise, in a series of cases, the Supreme Court drastically narrowed the scope of the protected class under the ADA by strictly defining what it means to be an individual with a disability. For example, the Court in *Sutton v. United Air Lines* held that the ameliorative effects of mitigating measures need to be considered before deciding the existence of a disability.[15] Similarly, in *Murphy v. United Parcel Service*,[16] the Court contended that whether high blood pressure constitutes a disability under the ADA should be determined with the plaintiff taking medication in his mitigated state.[17] Finally, in *Albertson's Inc. v. Kirkingburg*,[18] the third of what has been referred to as the *Sutton* trilogy of cases, the Court reasoned that in determining whether the plaintiff's monocular vision constituted a disability, the courts should also consider how his brain can develop techniques to mitigate his vision impairment.[19]

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[10] Title VII § 701(j), 42 U.S.C. § 2000e (j).
[11] 432 U.S. 63 (1977).
[12] *Id*. at 84.
[13] Rehabilitation Act of 1973 §§ 501, 503, 504, 29 U.S.C. §§ 791, 793, 794 (1994). The regulations imposing a duty of reasonable accommodation appear in 29 C.F.R. §§ 32.13(a), 1613.704 (1995).
[14] ADA § 101(9), 42 U.S.C. § 12111(9) (1994).
[15] Sutton v. United Air Lines, Inc., 527 U.S. 471, 475, 488-89 (1999).
[16] Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).
[17] *Id*. at 521.
[18] Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
[19] *Id*. at 565-66.

The Court struck a final blow against ADA plaintiffs a few years later in *Toyota Motor Manufacturing v. Williams*.[20] The Court decided that for "manual tasks" to be considered major life activity, the tasks have to be of "central importance to most people's daily lives."[21] Moreover, the Court defined "substantially limits" as "considerable" or "to a large degree,"[22] maintaining that "[w]e therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."[23]

B. The ADA Amendments Act

Many commentators suggested that the Court's narrow construction of disability reflects a judicial backlash against the ADA.[24] Studies show that employers have prevailed over ninety-two percent of ADA cases filed in court.[25] Matthew Diller maintains that "[t]he term backlash suggests a hostility to the statute and toward those who seek to enforce it. The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resisting it."[26] In a similar vein, Nicole Porter pointed out that the failure of the ADA is attributable primarily to the fact that courts perceive the ADA's reasonable accommodation requirement as conferring special treatment to individuals with disabilities. [27] Moreover, interpretation of what constitutes reasonable accommodation is complex and confusing, so the courts avoid this issue by narrowly construing disability. As stated by Alex Long, "one of the more persuasive explanations as to why the federal courts initially make it so difficult for ADA plaintiffs to qualify as having a disability is that the courts sought to avoid having to deal with complex and messy reasonable accommodation issues."[28]

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[20] 534 U.S. 184 (2002).
[21] *Id*. at 197.
[22] *Id*. at 196.
[23] *Id*. at 198.
[24] *See, e.g*., Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1268 (2009) [hereinafter "Anderson, *Ideological Dissonance*"].
[25] *See* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITY ACT 71-84 (2005).
[26] *See* Mattew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA 64 (Linda H. Krieger ed., 2006).
[27] *See* Nicole B. Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099 (2014).
[28] *See* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 228 (2008) [hereinafter "Long, *Introducing the New*

Congress responded to the judicial backlash by amending the statute to reinvigorate the ADA to meet its original high expectations. The ADAAA was signed into law by George W. Bush on September 25, 2008, and went into effect on January 1, 2009.[29]

The ADAAA did not revise the basic definition of disability. Only the third prong – the "regarded as" prong was modified. It protects anyone from adverse treatment "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[30] Two caveats should be noted. First, unlike a person who seeks coverage under the first or second prong, an individual covered only under the third prong is not entitled to reasonable accommodation. Second, the third prong does not cover impairments that are "transitory and minor."[31] Scholars argued that, after the Amendments, the "regarded as" prong provides nearly universal coverage in the non-discrimination context, and the remaining prongs offer minority coverage in the reasonable accommodation context.[32]

To a certain degree, we are all impaired in some manner. The difference is that some, but not others, experience unfavorable treatment because of the impairments. By defining disability to include almost everyone on the continuum of impairments, the "regarded as" prong "dissolves the line between 'disabled' and 'the rest of us.'"[33] Importantly, this "regarded as" prong leads the way toward a broader conception of the social model of disability, one that is in direct opposition to the medical model enshrined in the first and second prongs, which provide protection only to the "truly disabled."[34]

With regard to the first prong, the Amendments include several rules of construction to guide the courts to properly interpret disability.[35] The Amendments make clear that Congress disagreed with the Court's "demanding standards" language in *Toyota*, and that the Act should be construed in favor of broader coverage.[36] The Amendments also mandated that Congress deferred

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and Improved Americans with Disabilities Act"].
[29] *Id*. at 217.
[30] 42 U.S.C. § 12102(3)(A) (2012).
[31] 42 U.S.C. § 12102(3)(B) (2012).
[32] *See* Kevin Barry, *Toward Universalism: What the ADA Amendments Act Can and Can't Do For Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 266 (2010).
[33] *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?,* 21 BERKELEY J. EMP. & LAB. L. 91, 158 (2000).
[34] *See* 42 U.S.C. § 12102(1)(A)-(B).
[35] *See* Anderson, *Ideological Dissonance*, *supra* note 24, at 1287.
[36] *See* Long, *Introducing the New and Improved Americans with Disabilities Act*, *supra* note 28, at 219.

to the EEOC to define "substantially limits" with the admonition that it was Congress's expectation that the "EEOC will revise that portion of its current regulations that defines the term substantially limits . . . to be consistent with this Act, including the Amendments made by this Act."[37] The ADAAA also overruled the mitigating measures rule announced in *Sutton*. It states that whether an impairment substantially limits a major life activity should be determined without regard to the ameliorative effects of mitigating measures.[38] The only exception to this rule is ordinary eyeglasses or contact lenses.[39]

Furthermore, the Amendments rejected the demanding standard of defining major life activities adopted by the Supreme Court. Congress mandated that it favors a looser standard and that major should not be interpreted strictly.[40] Apart from providing a broader non-exhaustive list, most importantly, the ADAAA defined a major life activity to include "major bodily functions," including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[41] This revision reflected Congress's disagreement with the courts' decisions that many impairments were not disabilities under the original ADA.

There is nearly a consensus that the Amendments will likely have two interrelated effects. First, it will be much easier for the plaintiffs to be considered as an individual with a disability under the ADAAA.[42] Second, given that more cases will proceed past the initial threshold, courts will often have to determine what are the essential functions of the job or whether the requested accommodation is reasonable.[43]

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[37] 42 U.S.C. § 12102(4)(B) (2012).
[38] 42 U.S.C. § 12102(4)(E)(i) (2012).
[39] 42 U.S.C. § 12102(4)(E)(ii) (2012).
[40] 42 U.S.C. § 12102(4)(A) (2012).
[41] 42 U.S.C. § 12102(2)(B) (2012).
[42] *See, e.g.*, Jeanette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 204 (2010) [hereinafter "Cox, *Crossroads and Signposts*"].
[43] *See* Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who is Disabled to Who Can Work*, 34 HAMLINE L. REV. 469, 472, 481 (2011) [hereinafter "Collins & Phillips, *Overview of Reasonable Accommodation*"]; Long, *Introducing the New and Improved Americans with Disabilities Act, supra* note 28, at 228; Ani B. Satz, *Symposium: Disability Discrimination After the ADA Amendments Act of 2008: Foreword*, 2010 UTAH L. REV. 983, 990 (2010).

C. Reasonable Accommodation Under the ADA

One distinctive feature that makes the ADA seemingly quite different from other anti-discrimination laws is the mandate of reasonable accommodation. Under the ADA, discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[44] Employers are not only prohibited from discriminating "against a qualified individual on the basis of disability,"[45] but if an employee is otherwise qualified, the employer has an obligation to provide the individual with a reasonable accommodation unless doing so would cause an undue hardship.[46] A "qualified individual" is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[47] Furthermore, reasonable accommodation is defined generally as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[48] The statute also provides a non-exhaustive list of what reasonable accommodation may include:

(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[49]

According to the EEOC regulations, once an individual with a disability requests an accommodation, the employer should initiate an "informal, interactive process" to consult with the employee to ascertain an appropriate reasonable accommodation.[50] The goal of the interactive

[44] *See* 42 U.S.C. § 12112(b)(5)(A).
[45] 42 U.S.C. § 12112(a).
[46] 42 U.S.C. § 12112(b)(5)(A).
[47] 42 U.S.C. § 12111(8).
[48] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(o).
[49] 42 U.S.C. § 12111(9).
[50] 29 C.F.R. pt. 1630 app. § 1630.2(o)(3).

process is to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[51]

The reasonable accommodation mandate requires different treatment of persons with disabilities. It is easy to assume that reasonable accommodation provides individuals with disabilities preferential treatment, resulting in unfair advantages. Given the skepticism that comes with the concept of preferential treatment, when an employer treats an employee with a disability preferentially, we often think that such treatment must be at the expense of others and, thus, is unfair to others. In fact, as the social model of disability exemplifies, impairments are disabling people solely or primarily because the built environment, social practices, and institutional structures are based on limited images of "normal" physical and mental functioning that creates barriers for those who do not conform to such expectations.[52] Therefore, reasonable accommodations aim to remove the artificial, arbitrary, and unnecessary employment-related barriers to job performance and to provide persons with disabilities with an equal opportunity to compete. Many accommodations, including modification of workplace environment, acquisition of assistive device, special training, etc., do not affect other employees. Even those accommodations that can be characterized as preferential treatment aim to level the playing field rather than give employees with disabilities unfair advantages over their nondisabled counterparts.[53] The underlying rationale of reasonable accommodation obligation is clear because "[t]he practices and policies of most employers are developed and implemented in such a way so as to take into account the physical needs and limitations of able-bodied employees."[54]

1. Essential Functions of the Job

Under the ADA, a qualified individual with a disability is entitled to reasonable accommodation.[55] The statute defines a qualified individual as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that

[51] 29 C.F.R. pt. 1630 app. § 1630.2(o)(3).
[52] *See* Chapter Three, section II.B. on discussion of the social model of disability.
[53] *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 41 (2000) [hereinafter "Diller, *Judicial Backlash*"] (arguing that "the reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of equalizing the playing field so that people with disabilities are not disadvantaged by the fact that the workplace ignores their needs").
[54] *See* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 960 (2004) [hereinafter "Ball, *Preferential Treatment*"].
[55] 42 U.S.C. § 12112(b)(5)(A).

such individual holds or desires."[56] According to the EEOC's regulations, "essential functions" means the "fundamental job duties of the employment position the individual with a disability holds or desires," but do not include "marginal functions of the position."[57] Many employers do not distinguish between job duties that are essential and job duties that are marginal. Yet, this is a critical question in virtually every ADA case because an employee with a disability needs only be able to perform the essential functions of the job, while non-essential duties can be transferred to other coworkers.

After the Amendments, commentators worried that courts would tend to focus on whether the disabled employee is qualified rather than the reasonable accommodation provision when deciding cases in the employers' favor.[58] When the court determines that a particular function is essential, it often gives a cursory analysis of whether a reasonable accommodation exists. As many cases demonstrate, while employers and courts appear more willing to view accommodations that modified the physical aspects of the workplace as reasonable, it proves much more difficult for the employee to request changes to the structural norms of the workplace – the "when" and "where" the work was performed.[59] The courts generally hold that physical presence, schedule, shift, attendance norms are essential functions of the job. From there, it is easy for the courts to jump to the conclusion that it is not reasonable to require employers to modify or eliminate these structural norms as the elimination of an essential function never constitutes a reasonable accommodation.[60]

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[56] 42 U.S.C. § 12111(8) (2012).

[57] 29 C.F.R. § 1630.2(n)(1). The EEOC, in its regulation, provides some factors to consider whether a job function is essential or not, which include: (i) the function may be essential because the reason the position exists is to perform that function; (ii) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. 29 C.F.R. § 1630.2(n)(2).
In determining which functions are essential, the regulations direct courts to look at such evidence including:
(i) The employer's judgment as to which functions are essential;
(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3).

[58] *See* Nicole B. Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 69 (2014) [hereinafter "Porter, *Backlash*"].

[59] *See* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) [hereinafter "Travis, *Recapturing*"].

[60] For a critical analysis of case law related to structural norms of the workplace, *see infra* section II.D.2.e.

2. Meaning of "Reasonable"

Although the ADA requires employers to provide reasonable accommodations to allow employees with disabilities to perform the essential functions of jobs, it does not contain a specific definition of "reasonable" in the statute or its accompanying regulations.[61] Before the ADAAA, scholars spent so much time exploring who is disabled. As a result, the articles discussing the reasonable accommodation provision are relatively few in number compared to other disability law scholarship.[62] Mark Weber, in his seminal work *Unreasonable Accommodation and Due Hardship*, puts forth a broad theory of the reasonable accommodation provision.[63] Based on the statutory language, the legislative history, and case law, he argues convincingly that reasonable accommodation and undue hardship are simply "two sides of the same coin" and that an accommodation that is reasonable necessarily would not cause undue hardship on the employer.[64]

While I am sympathetic to Weber's goal of broadly construing the reasonable accommodation obligation, I believe that the term "reasonable" sets up some limitations to an employer's obligation to provide accommodation. One of the canons of statutory interpretation prescribes that if possible, every word and every provision should be given effect. None should be ignored, and none should needlessly be given interpretation that causes it to duplicate another provision or to have no consequence.[65] Where one reading of a statute would make one or more parts of the statute redundant, and another reading would avoid the redundancy, the other reading is preferred. To say that reasonable accommodation and undue hardship are simply "two sides of the same coin" runs afoul of this canon and is often contrary to the congressional intent.

Furthermore, the defense of undue hardship focuses on the difficulty or expense that an accommodation causes to the employer, so an accommodation that constitutes undue hardship to one employer does not necessarily cause undue hardship to another. But, theoretically speaking,

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[61] *See* Cox, *Crossroads and Signposts*, *supra* note 42, at 222 (stating that "the question of what makes a requested accommodation reasonable... remains unsettled and hotly contested"). The EEOC defined reasonable accommodation as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." Interpretive Guidance on Title I of the Americans with Disability Act Introduction, 29 C.F.R. pt. 1630 app. § 1630.2(o).

[62] For a sampling of articles that do discuss the reasonable accommodation provision, *see generally* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2010) [hereinafter "Weber, *Unreasonable Accommodation*"].

[63] *Id*.

[64] *Id*. at 1124.

[65] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 174 (2012).

the determination of whether an accommodation is reasonable or not should be objective. Considerations that influence the reasonableness of an accommodation may include factors such as culture, social and economic development, the progress of technology, etc. None of the above makes the reasonableness of an accommodation varies from one employer to another. There is some consensus on when accommodations are unreasonable even though they do not cause an undue hardship to the employer. For example, employers are not required to pay for their employee's personal items, such as prosthetic limbs, wheelchairs, or eyeglasses, which the employee's use extends far beyond the workplace. Similarly, employers do not have to bump current employees out of their jobs in order to accommodate individuals with disabilities.[66] Obviously, even though some of the accommodations do not cause undue hardship to the employer, they are widely perceived as "unreasonable" and, therefore, not required by law.

Many courts are reluctant to deal with accommodation issues because the term "reasonable" is confusing and amorphous. What constitutes a reasonable accommodation is not defined in the statute or the regulations.[67] Even though the Act provides a non-exhaustive list of examples of reasonable accommodations,[68] courts generally refuse to decide that an accommodation listed in the statute will often, let alone always, be reasonable.[69]

D. The Dearth of Caselaw on the Reasonable Accommodation Provision

1. The *Barnett* Case and Reassignment

a. The Barnett Case

U.S. Airways, Inc. v. Barnett[70] is the only Supreme Court case dealing with reasonable accommodation. The plaintiff, Robert Barnett, injured his back while working in a cargo-handling position.[71] He requested U.S. Airways for an exception to the seniority system that would allow him to remain in the less physically demanding mailroom position.[72] U.S. Airways eventually

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[66] *See* EQUAL EMPLOY'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE on *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), available at http://www.eeoc.gov/policy/docs/accommodation.html [hereinafter "EEOC, ENFORCEMENT GUIDANCE"] ("The employer does not have to bump an employee from a job in order to create a vacancy ....").
[67] *See* Nicole B. Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 543-44 (2013) [hereinafter "Porter, *Martinizing Title I*"].
[68] 42 U.S.C. § 12111(9).
[69] *See* Porter, *Martinizing Title I*, *supra* note 67, at 536-37.
[70] 535 U.S. 391 (2002).
[71] *Id*. at 394.
[72] *Id*.

decided not to make an exception, and Barnett lost his job.[73] Justice Breyer, writing for the Court, first rejected the more aggressive arguments offered by both parties. In his view, the contention of the U.S. Airways that the ADA "does not require the employer to grant a request that, in violating a disability-neutral rule, would provide a preference"[74] was incorrect. He stated that that argument failed "to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal."[75] He continued that "[b]y definition, any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e*. preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach."[76] Therefore, the Court concluded that "[t]he simple fact that an accommodation would provide a 'preference'-- in the sense that it would permit the worker with a disability to violate a rule that others must obey-- cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'"[77] But Barnett's view that "the statutory words 'reasonable accommodation' mean only 'effective accommodation,' authorizing a court to consider the requested accommodation's ability to meet an individual's disability-related needs, and nothing more"[78] was incorrect as well. The Court reasoned, "in ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness. An *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations."[79]

In regards to the appropriate allocation of the burden of proof, the Court agreed with the practical way that many lower courts adopted to reconcile the phrases "reasonable accommodation" and "undue hardship."[80] An employee with a disability can establish a *prima facie* case by showing that "an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases."[81] Once the employee makes this showing, the burden shifts to the employer to establish "special

[73] *Id*.
[74] Barnett, 535 U.S. at 397.
[75] *Id*.
[76] *Id*.
[77] *Id*. at 398.
[78] *Id*. at 399.
[79] *Id*. at 400.
[80] *Id*. at 401.
[81] *Id*.

(typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[82]

The Court, by looking to the important interests a seniority system serves for employers and employees,[83] concluded that ordinarily an accommodation that would violate the rules of seniority system would not be reasonable.[84] The Court explained that any rule requiring the employer to defend its seniority system against accommodation requests on a case-by-case basis might "undermine the employees' expectations of consistent, uniform treatment."[85] But the Court did offer an opening for the plaintiffs "to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts."[86] For example, the plaintiff could show that the employer changes the seniority system so frequently that employees have reduced expectations that the system will be followed.[87] Or the plaintiff could "show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter."[88]

Justice O'Connor's concurring opinion provides a different and arguably more persuasive perspective. The focus of this case, in the eyes of Justice O'Connor, should be whether the position to which the plaintiff sought assignment was "vacant" because "[t]he ADA specifically lists 'reassignment to a vacant position' as one example of a 'reasonable accommodation.'"[89] Whether the position is "vacant" depends on if any other employee, because of the seniority system, had a legally enforceable right to it.[90] Therefore, Justice O'Connor maintained that a seniority system would trump any request for accommodation only when that system was legally enforceable.[91] Because she believed that the Court's approach would "often lead to the same outcome as the test

[82] *Id*. at 402.
[83] *Id*. at 403-405.
[84] *Id*. at 403.
[85] *Id*. at 404.
[86] *Id*. at 405.
[87] *Id*.
[88] *Id*.
[89] *See id*. at 408-409 (O'Connor, J., concurring).
[90] *Id*. at 409-410.
[91] *Id*.

[she] would have adopted,"[92] and it is "important that a majority of the Court agree on a rule when interpreting statutes," she joined the Court's opinion.[93]

Nonetheless, in fact, at least in this case, Justice O'Connor's approach would lead to a different outcome. Since the written seniority policy of U.S. Airways contains an express disclaimer of enforceability,[94] no employee likely had an enforceable right to any vacant position under this system. As a result, Barnett's request for reassignment would have been easier to be perceived as a reasonable accommodation under Justice O'Connor's test than that of the majority's opinion.[95]

Justice Scalia, joined by Justice Thomas, wrote a dissenting opinion.[96] Justice Scalia held that no accommodation to the seniority system should ever be required by the ADA because seniority systems "pose no *distinctive* obstacle to the disabled."[97] Justice Scalia believed the ADA "eliminates workplace barriers only if a disability prevents an employee from overcoming them – those barriers that would not be barriers *but for* the employee's disability."[98] Justice Scalia recognized that "seniority rules may have a harsher effect upon the disabled employee than upon his co-workers. If the disabled employee is physically capable of performing only one task in the workplace, seniority rules may be, for him, the difference between employment and unemployment."[99] Nonetheless, he insisted "that does not make the seniority system a disability-related obstacle."[100] In Justice Scalia's view, if ADA's reasonable accommodation provision was not limited to "disability-related obstacles," it would become "a standardless grab bag – leaving it to the courts to decide which workplace preferences (higher salary, longer vacations, reassignment to positions to which others are entitled) can be deemed 'reasonable' to 'make up for' the particular employee's disability."[101]

One of the articulated goals of the ADA is to move people with disabilities off of the welfare rolls into the workplace so that they become economically independent and contribute to

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[92] *Id*. at 411.
[93] *Id*.
[94] *Id*. at 410.
[95] *Id*.
[96] *Id*. at 411 (Scalia, J., dissenting).
[97] *Id*. at 412
[98] *Id*. at 413.
[99] *Id*.
[100] *Id*.
[101] *Id*. at 414.

society. The reasonable accommodation mandate requires the removal of barriers that prevent disabled people from having an equal opportunity to work. Those barriers exist because the physical environment, social institutions, and work practices are structured by a predominantly non-disabled world that does not take persons with disabilities into account. The troubling point is that the seniority system does not appear to be exclusionary barriers to persons with disabilities only. As Samuel Bagenstos states: "It excludes anyone who, for whatever reason, has less seniority than the person with whom she is competing."[102] Because accommodation to the seniority system gives preference to employees with disabilities over the more senior fellow employees, in the words of Bagenstos, it "looks like charity of a particularly troubling kind – charity in the form of a job that one employee is forced to give to another."[103] This can also explain why Justice Scalia sought to confine the accommodation requirement to cases involving "disability-related obstacles."

But on close examination, the "disability-related obstacle" principle cannot even hold in *Barnett*. Justice Scalia believed that Barnett's disability had nothing to do with the seniority system and, therefore, was not "disability-related." However, this characterization is not correct. It is Barnett's disability that made him unable to work in the cargo position and forced him to be put in the mailroom before he had accumulated enough seniority. Both Barnett's need for seniority and his lack of it are the product of his disability.[104] As a result, even if a seniority system, like many neutral rules, does not limit the amount of seniority an individual with a disability can accrue, seniority rules fail to take disabled employees' potential more frequent needs for flexibility in the application of seniority systems into account. This lack of flexibility often constitutes a disability-specific barrier to equal work opportunities.[105]

Unlike Title VII, which entails an equal treatment model of discrimination,[106] the ADA's reasonable accommodation requirement goes beyond that and further adopts a different treatment model.[107] One of the principal critical motivations for Congress to enact the ADA was to bring

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[102] *See* Samuel R. Bagenstos, *U.S. Airways v. Barnett and the Limits of Disability Accommodation, in* CIVIL RIGHTS STORIES 35 (Myriam Gilles & Risa Goluboff, eds., 2007) [hereinafter "Bagenstos, *U.S. Airways v. Barnett*"].
[103] *Id*.
[104] *See id*. at 36.
[105] *Id*. at 37.
[106] For a discussion of the equal treatment model of anti-discrimination statutes, *see generally* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971).
[107] For a discussion of how the ADA adopts a different treatment model of antidiscrimination law, *see generally* Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 516-21 (1998) [hereinafter "Miller, *Disability*

individuals with disabilities into the workplace and become productive members of society.[108] In the "Findings and Purposes" section of the ADA, Congress states that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[109] Therefore, it is clear that preferential treatment in the form of reasonable accommodation is not inimical to the ADA's purpose, but an integral part of the statutory design to enable people with disabilities to participate fully and equally in mainstream life.[110]

b. Unresolved Reassignment Issues

Reassignment involves placing an employee with a disability in a new position. It goes beyond other accommodations in that, instead of figuring out ways to enable the disabled employee to perform her current job, it directly transfers her to another different job.

It is important to note that the rights of employees with disabilities to be reassigned to a vacant position have some clearly established limitations. First, the reassignment accommodation only applies to current employees, not applicants.[111] Although the distinction between employees and applicants is not evident in the statute, the legislative history clearly shows that reassignment is not available to applicants.[112] Second, the reassignment accommodation is available only when the employee with a disability cannot be reasonably accommodated in her current position. Therefore, reassignment is referred to as "an accommodation of last resort."[113] Third, the position for reassignment must be *vacant*. A vacant position is either available when the employee requests the reassignment accommodation or one that the employer is aware will become available within a reasonable time.[114] The employer is not required to "bump" another employee to accommodate the employee with a disability.[115] Fourth, the reassignment position must be an equivalent position. The employer is not required to transfer the employee if the reassignment would constitute a

Civil Rights"]; Diller, *Judicial Backlash*, *supra* note 53, at 40-44.
[108] *See* Vikram David Amar & Alan Brownstein, *Reasonable Accommodations Under the ADA*, 5 GREEN BAG 2D 361, 368 (2002).
[109] 42 U.S.C. § 12101(8) (2003).
[110] *See* Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 971 (2003) [hereinafter "Befort, *Answers, Questions and Suggested Solutions*"].
[111] 29 C.F.R. § 1630.2(o).
[112] *See* H.R. REP. No. 101-485, pt. 2, at 56 (1990) (referring to reassignment for employees, but not applicants).
[113] Cravens v. Blue Cross & Blue Shield of Kansas City, 214 F.3d 1011, 1019 (8th Cir. 2000).
[114] *See* EEOC, ENFORCEMENT GUIDANCE, *supra* note 66.
[115] 42 U.S.C. § 12111(9)(B).

promotion.[116] Finally, the employer does not have to reassign the employee when doing so would impose an undue hardship.[117]

Even after *Barnett*, there still exist several issues concerning reassignment unresolved. For instance, the Circuits are split on whether the reassignment obligation requires the employer to merely consider the possibility of reassignment, or to actually reassign the employee to the position. In *Aka v. Washington Hospital Center*,[118] the D.C. Circuit in an en banc decision expressed the view that "the word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else."[119] The court held that the natural meaning of the word "reassign" invariably implies the need for "some active effort on the part of the employer"[120] However, the court did not delineate what is required by "active effort" for an employer to comply with its obligation.[121]

The Tenth Circuit's en banc ruling in *Smith v. Midland Brake, Inc*.[122] agreed with the D.C. Circuit but went beyond to define more precisely what "some active effort" means. The court stated that "the disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment."[123] The court reasoned that "[w]hether the disabled person is an existing employee seeking reassignment or an outside job applicant, the company cannot... discriminate against the disabled individual on the basis of his or her disability."[124] If the reassignment provision just requires consideration of the disabled employee on the same basis with others, the court found that that provision "would add nothing to the obligation not to discriminate, and would thereby be redundant."[125] Therefore, the *Smith* court held that the reassignment obligation entails not just consideration but actual reassignment as long as the disabled employee is qualified for the new position, even if other more qualified individuals desire the same position.[126]

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[116] Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1257 (11th Cir. 2001).
[117] Smith v. Midland Brake, Inc., 180 F.3d 1154, 1178 (10th Cir. 1999) (en banc).
[118] Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc).
[119] *Id*. at 1304.
[120] *Id*.
[121] *Id*. at 1305.
[122] Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (en banc).
[123] *Id*. at 1166.
[124] *Id*. at 1164.
[125] *Id*. at 1165.
[126] *Id*. at 1169-70.

One also wonders what happens when the reassignment accommodation conflicts with a well-established, non-discriminatory employer's policy. Examples of such policies include the use of competitive bidding or seniority for fulfilling new positions. Does the ADA's reassignment provision obligate employers to make exceptions to non-discriminatory transfer and assignment policies? The Tenth Circuit Court of Appeals in *Davoll v. Webb*,[127] relying heavily on *Smith*, held that a "disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment."[128] Accordingly, the city's failure to reassign the plaintiffs, regardless of an otherwise valid non-transfer policy, violated the ADA.[129] Similarly, in *Ransom v. Arizona Board of Regents*,[130] the court rejected the university's argument that employees with disabilities are entitled to reassignment "only in the same way as an employer provides for reassignment of non-disabled employees."[131] The court found that the defendant's competitive transfer policy violated the ADA because it prevents the reassignment of employees with disabilities and, therefore, "discriminates against qualified individuals with disabilities."[132]

On the contrary, the Sixth Circuit appears to agree with the Fifth, Seventh, Eighth, and Eleventh Circuits in finding that the ADA does not oblige the employer to reassign the disabled employee where the employer has a policy of awarding the transfer position to the most qualified candidate.[133] For example, the plaintiff in *Daugherty v. City of El Paso*[134] worked as a part-time city bus driver.[135] Because of insulin-dependent diabetes, he requested reassignment to another position on the city payroll.[136] The city refused as "[t]he charter gives an order of priority for filling vacancies. While employees physically incapacitated from performing their jobs are given the highest priority, full-time employees are given priority over part-time employees such as Daugherty."[137] The court contended that the city had no obligation to make an exception to its existing transfer and assignment policies.[138] It held that "we do not read the ADA as requiring

[127] 194 F.3d 1116 (10th Cir. 1999).
[128] *Id*. at 1131-32.
[129] *Id*. at 1134.
[130] 983 F. Supp. 895 (D. Ariz. 1997).
[131] *Id*. at 902.
[132] *Id*. at 903.
[133] *See* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (2007).
[134] 56 F.3d 695 (5th Cir. 1995).
[135] *Id*. at 696.
[136] *Id*. at 698.
[137] *Id*. at 699.
[138] *Id*. at 700.

affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less."[139]

Similarly, in *Elledge v. Lowe's Home Ctrs., LLC,* [140] the court sided with the Circuits that have held that the ADA is not an affirmative action statute and only requires that disabled persons be allowed to compete equally with non-disabled persons. Citing *EEOC v. Sara Lee Corp.*,[141] the court stated that "[w]hen a company operates a legitimate nondiscriminatory policy, like Lowe's policy, the employer 'must be able to treat a disabled employee as it would any other worker'…"[142] As a result, it held that "[p]laintiff should not have enjoyed a privileged status… that would contravene Lowe's nondiscriminatory hiring policy in place. He was required to adhere to Lowe's standard policy and compete on equal footing with other employees..."[143] Notably, the court in *Dalton v. Subaru-Isuzu Automotive, Inc*.[144] warned that if a blanket "no transfer" policy unduly limited the range of jobs available for employees with disabilities, it might have to yield to the reassignment obligation.[145] In 2007, the Supreme Court granted a petition for a writ of certiorari to answer this question, but the parties settled, and the case was dismissed before merits briefing.[146]

The above cases attest to the controversy of the reassignment duty, especially when the interest of other employees is at stake or the application of reassignment accommodation conflicts with a well-established, non-discriminatory employer's policy. However, the reassignment obligation arises only in the rare circumstance that an employee with a disability, after trying all possible reasonable accommodations, cannot perform the essential functions of the current position. And as mentioned earlier, there are several established limitations on the reassignment provision.[147] It is fair and reasonable to impose on employers an obligation to reassign employees with disabilities since if a qualified employee with a disability is denied a reassignment because she is not the most qualified, she would be terminated and no longer be able to work for the same

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[139] *Id*.
[140] Elledge v. Lowe's Home Ctrs., LLC, 2018 WL 6705537, *1 (W. Dist. N.C. Dec. 20, 2018).
[141] 237 F.3d 349 (4th Cir. 2001).
[142] Elledge v. Lowe's Home Ctrs., LLC, 2018 WL 6705537, *30.
[143] *Id*. at *32.
[144] 141 F.3d 667 (7th Cir. 1998).
[145] *Id*. at 679.
[146] Huber v. Wal-Mart Stores, Inc., 552 U.S. 1074, 128 S. Ct. 742, 169 L. Ed.2d 579, *cert. dismissed*, 552 U.S. 1136, 128 S. Ct. 1116, 169 L. Ed. 2d 801 (2007).
[147] *See supra* notes 111-117 and accompanying text.

employer. Employees with disabilities, once being terminated from current positions, face significant obstacles to finding a new job because of the widespread discrimination and inaccessibility of the workplace.[148] On the other hand, if a non-disabled employee is turned down for a reassignment, she still has her current job, and the opportunity to transfer to a more desirable position is deferred rather than lost. As a result, reassignment obligation is necessary to mitigate some of the disadvantages faced by individuals with disabilities that are not confronted by the able-bodied.[149]

2. Difficult Accommodation Issues

The case law demonstrates that trying to predict whether an accommodation is reasonable or not is often difficult. Many accommodations are sometimes held by some courts as reasonable, but sometimes perceived by other courts as unreasonable.[150] What is more troubling is that a close examination of the cases demonstrates that courts do not seem to fully consider all relevant factors or adopt consistent standards for determining whether an accommodation is required or not in a specific situation.

The following subsections explore, through examining court cases and EEOC rules, the chaos of the interpretation and application of the reasonable accommodation provision. Through critically examining relevant cases by the criteria I put forth in previous chapters to realize equality rights of people with disabilities, I propose that a more unified and consistent framework that considers the multiple goals served by the reasonable accommodation mandate is needed to address the vexing reasonable accommodation issues.

a. Job Restructuring

This accommodation entails making changes to an employee's current job.[151] The EEOC interpretative guidance defines job restructuring as "reallocating or redistributing nonessential or marginal job functions," which an employee with a disability cannot perform, to other workers.[152] Furthermore, the employer may also be required to make changes in the way how jobs are

[148] *See* Chapter Four, section II.C.4.d.(2).
[149] *See* Ball, *Preferential Treatment*, *supra* note 54, at 959-63.
[150] *See* Porter, *Martinizing Title I*, *supra* note 67, at 546.
[151] *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1314-15 (D.C. Cir. 1998) (en banc).
[152] 29 C.F.R. pt. 1630 app. § 1630.2(o).

customarily done, such as by authorizing modified or part-time work schedules.[153] As an employee with a disability needs to be able to perform the essential functions of a job to be qualified for the position, job restructuring accommodation only applies to nonessential duties. Also, an employer would not be required to hire another employee if there is no one else available to perform the nonessential functions because under that situation, all job duties would be considered essential.

The case *Kauffman v. Patterson Health Care VII, LLC*[154] provides a good example of what constitutes a job restructuring required by the law. The plaintiff was a hairdresser at a nursing home.[155] Her job requires her to wheel residents in wheelchairs to and from the beauty shop on Mondays and Tuesdays,[156] which took up six to twelve percent of her time.[157] After a surgery, the plaintiff was restricted by the doctor against pushing and lifting heavy weight.[158] The defendant refused to accommodate her disability and the trial court, in granting summary judgment for the employer, ruled that "wheeling patients to and from the beauty parlor is an essential part of the hairdressers' job and therefore there was no reasonable accommodation to the plaintiff's disability that would enable her to meet the employer's reasonable expectations."[159] In contrast, the Court of Appeals sensibly disagreed with the district judge and maintained that "it [pushing the wheelchairs] wasn't essential if it is so small a part that it could be reassigned to other employees at a negligible cost to the employer."[160] It also noted that "circumstances might exist when employees working in teams are able to share duties among themselves so that such sharing might be a form of reasonable accommodation."[161] Moreover, the nursing home had many orderlies whose primary duty was wheeling the residents.[162] Consequently, the Court of Appeals vacated the judgment and held that it was a fact issue for the jury.

The district court opinion unduly restricts the possibility of job restructuring as reasonable accommodations as the way it determines whether a specific function is essential to a particular job seems problematic. An essential function is a fundamental job duty of the employment position.

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[153] *Id*.
[154] 769 F.3d 958 (7th Cir. 2014).
[155] *Id*. at 959.
[156] *Id*.
[157] *Id*. at 961.
[158] *Id*. at 960.
[159] *Id*. at 961.
[160] *Id*. at 962.
[161] *Id*. at 963 (internal citations omitted).
[162] *Id*. at 964.

In this case, the primary function performed by the plaintiff consists of cutting and styling hair for the residents at the nursing home. Wheeling residents in wheelchairs to and from the beauty shop is incidental and can easily be done by other employees absent of many burdens on the employer. The rationale behind job restructuring as an important form of reasonable accommodations is that the functions of a job are arranged for the management convenience of the employer, which often constitutes artificial, arbitrary, unnecessary barriers to people with disabilities. The way how jobs are customarily done always reflects a biased, able-bodied norm that impedes the equal opportunity of persons with disabilities to enter the workplace. In determining whether a disabled individual is qualified for a position, the focus should be on her ability to perform the essential functions of the job, but not marginal duties of the position as those duties can often be easily reallocated to other employees without causing undue burden to the employer.

b. Leave of Absence

Though not explicitly listed in the statute, both the EEOC[163] and the courts[164] recognize that a leave of absence can be a type of reasonable accommodation. A leave of absence may enable an employee with a disability, through rest to heal or rehabilitate, to return to workplace. A leave of absence often imposes greater burdens on both the employers and coworkers than other types of accommodations. The employer will need to recruit and train a new employee to perform the tasks left by the disabled employee, and a leave of absence adds the uncertainty of whether and/or when the disabled employee will be able to return to work.[165] For the coworkers, a leave of absence necessitates either the assistance of another employee to perform the duties of the absent employee or temporary new hire who faces the prospect of being "bumped" upon the disabled employee's return.

An employee with a disability who requests a leave of absence as a reasonable accommodation needs to obtain a medical professional's opinion that a specified leave time is required to enable the employee to perform the job upon return. The appropriate standard is not whether the leave "is certain or even likely to be successful," but rather whether the leave could

[163] *See* EEOC, ENFORCEMENT GUIDANCE, *supra* note 66.
[164] *See, e.g.*, Cehrs v. N.E. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 783 (6th Cir. 1998); Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998).
[165] *See* Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 448 (2002).

"plausibly enable" adequate job performance.[166] When the employee establishes *prima facie* reasonableness of the requested leave, the employers can rebut this by obtaining an independent medical opinion to show that the employee, even with the leave, will not be qualified to return to work.[167]

The more difficult question is to determine whether the length of the requested leave is reasonable. In general, the courts tend to view one year as the temporal boundary in assessing the reasonableness of leave requests. For instance, the court, in *Walsh v. United Parcel Service*,[168] expressed that in reviewing the case law, it did not find any decision in which an employer was required to permit a leave of absence "for well in excess of a year."[169] Another court also stated that the courts have generally found a request for leave beyond one year unreasonable as a matter of law.[170]

In *Severson v. Heartland Woodcraft, Inc*., the 7th Circuit held that a multi-month leave of absence was beyond the scope of a reasonable accommodation under the ADA.[171] In that case, the plaintiff alleged that the employer failed to provide a reasonable accommodation—namely, a three-month leave of absence in violation of the ADA after his Family Medical Leave Act (FMLA) leave expired.[172] The EEOC supported the plaintiff and argued that "a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is (1) of a definite, time-limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential job functions when he returns."[173] However, the court countered that the EEOC's interpretation would render the length of the leave irrelevant as long as it is likely to enable the employee to do his job when he returns. This would transform the ADA "into a medical-leave statute—in effect, an open-ended extension of the FMLA."[174] The court, affirming the district court's summary judgment for the employer, contended that "the term 'reasonable accommodation' is expressly limited to those measures that will enable the employee to work. An employee who

[166] *See* Humphreyv. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001).
[167] *See* Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 601 (7th Cir. 1998).
[168] 201 F.3d 718 (6th Cir. 2000).
[169] *Id*. at 727.
[170] *See* Powers v. Polygram Holding, Inc., 40 F. Supp. 2d 195, 200 (S.D.N.Y. 1999).
[171] Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017).
[172] *Id.* at 478.
[173] *Id.* at 482.
[174] *Id.*

needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA."[175]

The *Severson* case makes one worry that under the court's reasoning, the employer would never have to provide any leave of absence for more than one month as a reasonable accommodation even if it could enable employees with disabilities to stay or return to the workplace. Though the court expressed that a brief period of leave absence—say, a couple of days or even a couple of weeks—to deal with a medical condition could be a reasonable accommodation in some circumstances, it viewed a multi-month leave of absence as ***per se*** unreasonable.[176] It is not unusual for one to be absent from work for several months to get the necessary treatment and recover from a health problem. While the employer would not be required to provide a multi-month leave of absence to the disabled employee in all circumstances, it cannot be denied that in some situations long-term (more than one month) leave of absence not only allows the employees to return to their jobs, but also would not cause much burden to the employer.

A more appropriate way to decide whether a leave of absence constitutes a reasonable accommodation in specific cases is when the employee with disabilities puts forward sufficient evidence to prove the requested leave of absence could "plausibly enable" adequate job performance, he/she establishes *prima facie* reasonableness of the requested leave. It then should turn to the employer to rebut this either by showing that the employee, even with the leave, will not be qualified to return to work or that the leave requested would cause an undue burden to the employer. The court's primary error in *Severson* lies in the fact that it precludes any possibility that a multi-month leave of absence could ever be required under the ADA. The analysis of reasonable accommodation involves a case-specific, fact-intensive assessment to remove arbitrary, artificial and unnecessary barriers that preclude individuals with disabilities who can perform the essential functions of the job from entering and/or remaining in the workplace. The ***per se*** rule significantly restricts the potential of reasonable accommodations to secure substantive (inclusive) equality for people with disabilities.

[175] *Id.* at 479 (Byrne v. Avon Prods., Inc., 328 F.3d 379, 381 (7th Cir. 2003)).
[176] *Id.* at 481.

c. Commuting-related Accommodations

A majority of the federal courts hold that requests for commuting-related accommodations are ***per se*** unreasonable.[177] In contrast, some courts maintain that under certain circumstances, an employer has a duty to accommodate the commuting-related needs of employees with disabilities and that the appropriateness of the requested accommodations needs to be determined case by case.[178] For instance, in *Wade v. General Motors Corp.*,[179] the plaintiff had vision problems, making it more difficult for him to see in the dark and preventing him from driving at night.[180] The Sixth Circuit, noting that "nothing in the ADA or the cases decided under it would put the responsibility for such transportation on the employer rather than the employee,"[181] concluded that it was on the plaintiff to find another means of transportation to and from work.[182] Yet, in another case with similar facts, the Third Circuit held that changing the employee's shift to alleviate her disability-related difficulty in getting to work can be a type of reasonable accommodation.[183] Notably, the Court, agreeing with the EEOC, further emphasized that "the ADA does not strictly limit the breadth of reasonable accommodations to address only those problems that an employee has in performing her work that arises once she arrives at the workplace."[184]

Whether the employer has an obligation to provide transportation to persons with disabilities to and from work requires more detailed consideration in specific cases. Commuting-related accommodations come in a variety of forms, including request for a transfer to an office closer to one's home,[185] an exemption from night-shift duty to accommodate one's difficulty commuting at night, or paying for a parking space near one's office because of the employee's inability to access public transportation or walk moderate distances,[186] etc. The majority view of commuting-related accommodations is significantly flawed to the extent that it is inconsistent with

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[177] *See* Stephen F. Befort, *Accommodating an Employee's Commute to Work Under the ADA: Reasonable, Preferential, or Both?,* 63 DRAKE L. REV. 739, 744 (2015) [hereinafter "Befort, *Accommodating an Employee's Commute to Work*"] (stating that "[t]he Sixth and Seventh Circuits have adopted this position, as have lower court and nonreported decisions in the Third and Eleventh Circuits.").
[178] *Id*. at 746 (stating that "the Second, Third, and Ninth Circuits have staked out a position contrary to the majority approach.").
[179] Wade v. Gen. Motors Corp., 165 F.3d 29 (6th Cir. 1998) (unpublished table decision).
[180] *Id*. at *1.
[181] *Id*. at *2.
[182] *Id*.
[183] *See* Colwell v. Rite Aid Corp., 602 F.3d 495, 504 (3d Cir. 2010).
[184] *Id*. at 505.
[185] *See* Schneider v. Cont'l Cas. Co., No. 95 C 1820, 1996 WL 944721, at *1–2 (N.D. Ill. Dec. 16, 1996).
[186] *See* Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1513–14 (2d Cir. 1995).

a basic premise of the reasonable accommodation requirement—that is, the determination of the appropriateness of a reasonable accommodation should be a highly individualized inquiry based on a case-by-case analysis. The categorical disqualification of commuting-related accommodations as inherently unreasonable "unduly restricts the multitude of potential accommodations that could enable individuals with disabilities to find and keep employment."[187] In many situations, the provision of commuting-related accommodations is essential to overcome barriers of physical environment and inaccessibility of public transportation to ensure persons with disabilities equal access to the workplace and the ability to perform their jobs. A more delicate balancing of the interests between the disabled employees and employers rather than a restrictive blanket approach would better serve the goal of promoting the employment prospect of individuals with disabilities through reasonable accommodation requirements.

d. Work from Home

Another accommodation that has caused much controversy involves an employee with a disability requesting to work from home. The EEOC stated in its enforcement guidance that "an employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship."[188] It is troubling to see that in many cases, the courts simply unthinkingly claim that working from home generally is not a reasonable accommodation without analyzing the issue in any depth.[189] To some extent, this issue should be determined by a common-sense inquiry of whether it is possible to perform the essential functions of the job at home. Obviously, employees in certain kinds of positions, including food servers, cashiers, janitors, and so on, could not perform their jobs from home. This rationale applies to any jobs that require personal contact, interaction with others, and face-to-face supervision.[190] What makes one disappointed is that in some cases, it seems at least plausible for the employee to work from home,

[187] *See* Befort, *Accommodating an Employee's Commute to Work*, *supra* note 177, at 763.
[188] EEOC, ENFORCEMENT GUIDANCE, *supra* note 66, question 34.
[189] *See, e.g.*, Mobley v. Allstate Ins. Co., 531 F.3d 539, 547-48 (7th Cir. 2008) ("[A]s a general matter, working at home is not a reasonable accommodation").
[190] *See, e.g.*, Rauen v. U.S. Tobacco Mfg. Ltd. P'ship, 319 F.3d 891, 897 (7th Cir. 2003) (stating that it was not a reasonable accommodation to allow employee to work from home because her job "requires teamwork, interaction, and coordination of the type that requires being in the work place").

but the employers and courts often mistakenly claim personal presence as one essential function of the job and take a rigid view of whether the job can be performed at home.[191]

Today many employers have voluntarily allowed employees to work at home, and some even encourage telecommuting to save office space and commuting time. Some courts seemed to have changed their views with respect to telecommuting as a reasonable accommodation. For instance, the Second Circuit, in *Nixon-Tinkelman v. New York City Department of Health & Mental Hygiene*, [192] reversed a summary judgment for the employer concerning the request for a commuting accommodation by a disabled employee.[193] The court claimed that the district court erred in asserting that "commuting falls outside the scope of [p]laintiff's job, and is thereby not within the province of an employer's obligations under the ADA."[194] In certain circumstances, the court stated, an employer may have an obligation to assist in an employee's commute. For example, the court maintained that accommodations include transferring the plaintiff back to her prior work location "or another closer location, allowing her to work from home, or providing a car or parking permit."[195]

Similarly, the Fifth Circuit, in a case where the plaintiff requested a free on-site parking space to accommodate her osteoarthritis of the knee, contended that "reasonable accommodations are not restricted to modifications that enable performance of essential job functions."[196] Under the ADA, a reasonable accommodation includes "making existing facilities used by employees readily accessible to and usable by individuals with disabilities."[197] The court interpreted this provision to cover the requested reserved on-site parking as it "would presumably have made her workplace 'readily accessible to and usable' by her."[198] Consequently, the court ruled that "reasonable accommodation need not relate to the performance of essential job functions" and that "providing reserved parking spaces may constitute reasonable accommodation under some circumstances."[199]

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[191] *See, e.g.*, Mason v. Avaya Commc'ns, 357 F.3d 1114, 1122-24 (10th Cir. 2004) (stating that working at home is unreasonable if it requires the elimination of an essential function).
[192] 434 F. App'x 17 (S.D.N.Y. 2011).
[193] *Id*. at 19-20.
[194] *Id*. at 19.
[195] *Id*. at 20.
[196] Feist v. Louisiana, 730 F.3d 450, 453 (5th Cir. 2013).
[197] 42 U.S.C. § 12111(9).
[198] *Id*. at 453.
[199] *Id*. at 453-54.

To sum up, while it may be possible to draw some subtle distinctions between which factual scenarios will lead the courts to require a work-at-home accommodation and which will not, the case law remains muddled. Ironically, the coronavirus pandemic, while causing several millions of deaths and resulting in severe social and economic disruption around the world, shows the feasibility of working from home by most people with or without disabilities. The advance of information technology makes virtual meetings and teamwork possible no matter wherever you are. Suddenly, telecommuting becomes a "new normal" rather than an exception. This has potential to significantly contribute to the employment prospect of individuals with disabilities who need work from home.

e. Accommodations to Structural Norms of the Workplace

After the Amendments of the ADA, virtually all commentators agree that many more individuals will be considered disabled under the Act.[200] Accordingly, more plaintiffs will pass the threshold inquiry of whether they have a disability and proceed to the merits of the case.[201] As Nicole Porter suggested, there is strong evidence that courts have followed the Congress mandate to interpret the term disability broadly and, therefore, many plaintiffs whose cases would have been dismissed before the Amendments are now able to survive summary judgment.[202] The same trend is also reflected in Stephen Befort's empirical work, which compared the pre-ADAAA win rate for employers with the post-ADAAA win rate for employers on the same issue.[203]

Despite that the plaintiffs fare much better on getting past the initial inquiry under the Amendments, case law exemplifies a difference in courts' attitude toward the types of accommodations the plaintiff requests. Courts seem more willing to grant accommodations that modify physical aspects of the job or require the employer to provide certain equipment and devices, but are less inclined to rule in plaintiffs' favor when the requested accommodations involve change to the schedules, hours, shifts, or attendance policy, etc. regarding when and where work is performed.[204]

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[200] *See, e.g.*, Cox, *Crossroads and Signposts*, *supra* note 42, at 202; Long, *Introducing the New and Improved Americans with Disabilities Act, supra* note 28, at 228.
[201] *See* Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, 256 N.J. LAW. 37, 40 (2009).
[202] *See* Porter, *Backlash*, *supra* note 58, at 46-47.
[203] *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013).
[204] *See* Porter, *Backlash*, *supra* note 58, at 73-79.

Many post-ADAAA cases deal with the issue whether working a particular shift was an essential function of the job. In *Kallail v. Alliant Energy Corporate Services, Inc*.,[205] the plaintiff was a resource coordinator who was required to work a rotating schedule.[206] She suffered from Type I diabetes and Peripheral Vascular Disease.[207] By the fall of 2004, she had increased difficulty managing her diabetes while working a rotating shift.[208] After a surgery, she requested a permanent eight-hour day shift schedule, which was denied.[209] The main issue in this case is whether working a rotating shift is an essential function of the plaintiff's position. If the answer is affirmative, the plaintiff would not be a qualified individual under the ADA because she is not able to perform the essential function of the job; conversely, if the answer is negative, her request to work a permanent eight-hour day shift can enable her to perform the essential function of the job. The court noted that the rotating shift was listed "as a requirement on the written job description for the position."[210] Besides, the court also found that the rotating shift had many benefits to the employer and other employees.[211] Thus, it held that it was an essential function of the job.[212]

Similarly, in *White v. Standard Insurance Co*.,[213] the plaintiff had a back injury that limited her ability to work more than four hours a day.[214] The employer presented evidence that includes a statement from the employer that hiring of plaintiff's position is always on a full-time basis, its written job description, and that the employer had to assign other employees on a rotating basis to cover the plaintiff's remaining four hours.[215] Based on the above evidence, the court held that the ability to work full-time was an essential function of the job and, therefore, the plaintiff was not a qualified individual.[216]

Sometimes the accommodation requested entails modifications of the hours an employee worked, either for fewer or more flexible hours. For example, the plaintiff in *McMillan v. City of*

[205] 691 F.3d 925 (8th Cir. 2012).
[206] *Id*. at 927.
[207] *Id*. at 928.
[208] *Id*.
[209] *Id*. at 928-929.
[210] *Id*. at 931.
[211] *Id*.
[212] *Id*. at 932.
[213] 529 F. App'x 547 (6th Cir. 2013).
[214] *Id*. at 548.
[215] *Id.* at 550.
[216] *Id.*

New York[217] had schizophrenia treated with medication.[218] The employer had a flex-time policy that allowed employees to arrive between 9:00-10:15 am. Because of the medication effect, the plaintiff often arrived late to work, sometimes after 11:00 am.[219] Though the plaintiff's tardy arrivals were either explicitly or tacitly approved for ten years, the employer finally stopped it and denied his request for a later start time since no supervisor was present after 6:00 pm.[220] The court noted that the employer already had "a policy of allowing employees to 'bank' any hours they work in excess of seven hours per day and apply banked time against late arrivals, provided that those late arrivals are approved."[221] Moreover, the court also found that there is no need to assign a supervisor past 6:00 pm as the plaintiff was often unsupervised doing home visits or working late in the past.[222] Thus, it was held that the accommodation requested by the plaintiff would not cause an undue burden.[223]

There are also several cases that discussed the role of regular attendance. In *Brown v. Honda of America*,[224] the plaintiff, suffering from depression, anxiety, and migraines, was terminated because of her excessive unexcused absences from work.[225] The plaintiff alleged the defendant violated the ADA by failing to provide a reasonable accommodation. In contrast, the defendant argued that the plaintiff was unqualified for the position "because her unexcused absences from work rendered her unable to perform the essential functions of her job."[226] The court, reasoning that "[a] business is not obligated to endure erratic, unreliable attendance by its employees," and that "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA,"[227] found that the plaintiff "is unable to demonstrate she can perform the essential functions of her Production Associate job."[228]

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[217] 711 F.3d 120 (2d Cir. 2013).
[218] *Id*. at 123.
[219] *Id*.
[220] *Id*. at 124.
[221] *Id*. at 128.
[222] *Id*.
[223] *Id*. at 128-29.
[224] Brown v. Honda of Am., No. 2:10-CV-459, 2012 WL 4061795 (S.D. Ohio Sept. 14, 2012).
[225] *Id*. at *1-2.
[226] *Id*. at *4.
[227] *Id*. at *5 (internal citations omitted).
[228] *Id*.

There are several reasoning errors in those decisions. First of all, courts often perceive the structural norms of the workplace – the "when" and "where" to work as essential to the job. Nonetheless, more often than not, the structural norms of the workplace work mainly for the convenience of the employers to regulate the employees. For some jobs, the ability to work a particular shift or to rotate may be essential to job performance; however, for many other jobs, the shift, schedule, and attendance policy are often only remotely related to the fulfillment of the essential functions of the job. As a result, courts should think carefully before quickly jumping to the conclusion that a particular shift, schedule, or attendance policy constitutes essential functions of the job, and that the plaintiff is not a qualified individual because her disability prevents her from conforming to the structural norms. The court's inquiry should focus on whether an employee with a disability, with or without reasonable accommodation, can perform the fundamental duties that were essential to the job.

In addition, employers' and courts' preference for the structural norms of the workplace seems counter-intuitive.[229] First, compared to retrofitting to make the physical environment accessible or acquisition and modification of equipment, accommodating an employee's request for change in the shift, schedule, or attendance is usually easier and cheaper.[230] Further, Congress clearly expected employers to accommodate the disabled employees by making changes to the structural norms of the workplace. The statute provides a list of possible reasonable accommodations, which explicitly include a modification to hours and schedule.[231] If the shift, schedule, and attendance policy are considered essential functions of the job, employers should not be required to modify any of those. This result is apparently contrary to the plain language of the ADA.

To sum up, the correct way to resolve cases with respect to structural norms of the workplace is: first, determining whether the structural norms are essential to job performance or not; Second, if the answer is positive, the plaintiff must be able to, with or without reasonable accommodation, abide by the structural norms, otherwise she is not qualified. On the contrary, if the answer is negative, the court should then decide whether the plaintiff's request for changes to

[229] *See* Porter, *Backlash*, *supra* note 58, at 78-79.
[230] *See* CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY & MEDICAL LEAVE ACT: RIGHTS ON LEAVE 29 (2010).
[231] 42 U.S.C. § 12111(9).

the structural norms is reasonable or not. Lastly, even when the court determines that the plaintiff's requested accommodation is reasonable, the employers can still argue it nonetheless imposes an undue hardship. This can ensure that the structural norms of the workplace would not result in arbitrary, artificial, and unnecessary barriers that impede people with disabilities' access to employment on an equal basis with others.

E. Undue Hardship Defense

An employer does not have to provide an employee with an accommodation if it can "demonstrate that the accommodation would impose an undue hardship" on its operations.[232] According to the EEOC interpretive guidance, while the undue hardship provision "takes into account of the financial realities of the particular employer...., the concept of undue hardship is not limited to financial difficulty."[233] Undue hardship refers to "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[234] The regulations make it clear that "cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business."[235]

The determination of the existence of an undue hardship requires a case-specific, fact-intensive inquiry. The interpretive guidance provides that "an accommodation that poses an undue hardship for one employer at a particular time may not impose an undue hardship for another employer, or even for the same employer at another time."[236] This echoes with the proposition by Stephen Befort and Holly Lindquist Thomas that the undue hardship defense is "a floating concept that varies with the nature and cost of the proposed accommodation, the impact of the proposed accommodation upon the operation of the facility, and the overall resources of both the facility in question and the employer in general."[237]

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[232] *See* 42 U.S.C. § 12112(b)(5)(A).
[233] 29 C.F.R. pt. 1630, app. § 1630.2(p).
[234] *Id*.
[235] 29 C.F.R. pt. 1630 app. § 1630.15(d).
[236] *Id*.
[237] *See* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27. 37 (1999).

1. Case Law on the Interpretation of Undue Hardship

Some early cases of the ADA provide some clues on how courts interpreted the undue hardship provision.[238] The first and perhaps one of the most cited ADA cases is *Vande Zande v. Wisconsin Department of Administration*.[239] This case is also known for using a cost-benefit approach to determine whether an accommodation is reasonable.[240] Judge Posner, writing for the court, reasoned:

> It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit.[241]

The way that the court defined the reasonable accommodation provision reflected its concern that it would be difficult for an employer to raise an undue hardship defense, especially when the employer is a large entity.[242] The court expressed that undue hardship should be interpreted as "in relation to the benefits of the accommodation to the disabled worker as well as to the employer's resources."[243] It further maintained that costs should be considered at two points in the reasonable accommodation analysis.[244] On the one hand, the "employee must show that the accommodation is reasonable in the sense of both efficacious and of proportional to costs."[245] On the other hand, "the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."[246]

The second case that is highly influential concerning reasonable accommodation and undue hardship is *Borkowski v. Valley Central School District*.[247] The plaintiff was a library teacher who was also responsible for teaching library skills.[248] Due to major head trauma and serious

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[238] *See* Nicole B. Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121, 134-39 (2019) [hereinafter "Porter, *A New Look*"].
[239] 44 F.3d 538 (7th Cir. 1995).
[240] *Id*. at 542.
[241] *Id*.
[242] *Id*. at 542-43.
[243] *Id*. at 543.
[244] *Id*.
[245] *Id*.
[246] *Id*.
[247] 63 F.3d 131 (2d Cir. 1995).
[248] *Id*. at 134.

neurological damage, she had trouble dealing with multiple simultaneous stimuli.[249] The school district denied her tenure because an unannounced observation of her class revealed that she "had difficulty controlling the class and…that students had talked, yelled, and whistled without being corrected."[250]

In determining whether a proposed accommodation is reasonable or not, the court contended that "'[r]easonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires an inquiry not only into the benefits of the accommodation but into its costs as well."[251] Accordingly, the court maintained that "an accommodation is only reasonable if its costs are not clearly disproportionate to the benefits it will produce."[252] In regard to the burdens of proof, the court requires the plaintiff to "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."[253] Once the plaintiff has made out this *prima facie* case, "the defendant's burden of persuading the factfinder that the plaintiff's proposed accommodation is unreasonable merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship."[254]

Furthermore, the court noted that "'undue' hardship, like 'reasonable' accommodation, is a relational term; as such, it looks not merely to the costs that the employer is asked to assume, but also to the benefits to others that will result."[255] Consequently, both the plaintiff and the defendant have to perform a cost-benefit analysis. The only difference is that while the plaintiff can meet the burden by identifying an accommodation with rough proportionality between costs and benefits, an employer must undertake a more refined analysis.[256] Nonetheless, the court cautioned that employers are not required to "analyze the costs and benefits of proposed accommodations with mathematical precision" and that "a common-sense balancing of the costs and benefits in light of the factors listed in the regulations is all that is expected."[257]

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[249] *Id*.
[250] *Id*.
[251] *Id*. at 138.
[252] *Id*.
[253] *Id*.
[254] *Id*.
[255] *Id*. at 138.
[256] *Id*. at 139.
[257] *Id*. at 140.

Notably, using a cost-benefit analysis to determine whether an accommodation is reasonable or the existence of an undue hardship is problematic. The EEOC is of the opinion that "neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship."[258] The proper role of the undue hardship defense is, according to the EEOC, not on a comparison between costs and benefits of particular accommodation, but between costs and the employer's overall resources.

In this regard, as many scholars correctly criticized,[259] the cost-benefit analysis advocated by Judge Posner failed to consider that the benefits of an accommodation do not only limit to the disabled employee, but it could also accrue to others. The exclusive focus on the cost to the employer and the benefit to the disabled employee neglects the existence of the so-called "third-party benefits."[260] Empirical study demonstrates that besides enabling an employee with a disability to perform the job, many accommodations benefit the employer and other employees as well.[261] As mentioned in the previous chapter,[262] under the CRPD, benefits to third-parties should be fully considered in determining whether a particular accommodation imposes a disproportionate or undue burden on the duty bearer. Because of the widespread prejudice, stereotypes, and stigma towards persons with disabilities, we often tend to overemphasize the cost of an accommodation, focusing solely on the inconvenience, difficulty, and expense involved. However, many accommodations have externalities beyond their specific setting. Consideration of third-party benefits will increase the likelihood that a particular accommodation is not perceived as unreasonable or imposing a disproportionate or undue burden on the duty bearer.

Furthermore, another significant weakness of the cost-benefit analysis, as reflected in *Vande Zande*, is how to determine what kinds of cost or benefit should be included in the calculus. Should we focus only on the cost and benefit that have monetary value? Or should other intangible costs and benefits also be taken into consideration? Apparently, Judge Posner believed that accommodation that removes the stigmatizing effects felt by the plaintiff is not required despite the employer could provide it at a minimum cost. In Posner's view, the accommodation, *i.e.*, lower

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[258] *See* EEOC, ENFORCEMENT GUIDANCE, *supra* note 66.
[259] *See* Cass R. Sunstein, *Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895 (2007).
[260] *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 850-59 (2008).
[261] *See* Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L REV 1671, 1675 (2000) (those benefits include "higher productivity, greater dedication, and better identification of qualified candidates for promotion," etc).
[262] *See* Chapter Four, section II.C.4.d.(1).

the sink in the kitchenette, requested by the plaintiff merely brings about intangible benefit and, therefore, cannot satisfy the cost-benefit analysis.

In fact, what kinds of costs and benefits should be included in determining the reasonableness of an accommodation primarily depends upon what goals we think the provision of reasonable accommodations should achieve. If one believes that the only goal of reasonable accommodation is to remove the arbitrary, artificial, and unnecessary barriers that preclude individuals with disabilities from entering or remaining in the workplace, then the interpretation of a reasonable accommodation may be limited to what is necessary to enable employees with disabilities to perform their jobs. This view is reflected in Judge Posner's reasoning when he stated that "the duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort."[263]

By contrast, if one thinks that there are multiple goals served by the reasonable accommodation provision to fulfill the multiple dimensions of substantive (inclusive) equality for persons with disabilities, [264] which includes making people with disabilities economically independent (a fair redistributive dimension of inclusive equality), restoring the equal status of an individual with a disability (a recognition dimension of inclusive equality), dismantling the disadvantaged and group-based subordination system (an accommodating and transformative dimension of inclusive equality), and removing the arbitrary, artificial, and unnecessary barriers that preclude individuals with disabilities from participating in all spheres of society (a participative dimension of inclusive equality), then determination of reasonable accommodation should address the interaction between different dimensions. These four dimensions are complementary and intertwined so that to achieve meaningful substantive (inclusive) equality requires the consideration of different dimensions to compensate for the weakness of others. Therefore, in addition to considering whether an accommodation can enable the disabled employees to perform their jobs, it is necessary to show respect for one's dignity as worth of equal respect and concern in the provision of reasonable accommodations.

[263] 44 F.3d 538, 546 (7th Cir. 1995).
[264] *See* Chapter Two, section II.B.1 and D.

2. Reasonable Accommodation and Undue Hardship

In the early days of the ADA, courts were often confused about the relationship between reasonable accommodation and the undue hardship defense. A number of courts treated reasonable accommodation and undue hardship as flip sides of the same coin, *i.e.*, an accommodation which is reasonable does not cause undue hardship, and an accommodation that causes an undue hardship is, by definition, unreasonable.[265] However, several courts have held that an accommodation could be reasonable and still cause an undue hardship. For these courts, questions of the reasonableness of an accommodation and its financial and administrative burdens on the employer are separate considerations.[266] Surprisingly, this confusion remains even in the court's analysis in some more recent cases.

For instance, in *Jernigan v. Bellsouth Telecommunications, LLC*,[267] the plaintiff worked as a service technician. After a back injury on the job, he was unable to lift the weight of more than 15 pounds and to climb poles.[268] Pursuant to its Human Resources policies and collective bargaining agreement, the employer refused to accommodate him after determining that his injury was permanent.[269] The plaintiff presented evidence arguing that heavy lifting and climbing are not core duties of the service technician position,[270] and that his disability can easily be accommodated through the "helper tickets" system, which was "for technicians to be dispatched upon request to assist other technicians in performing duties that were either technically or physically difficult for whatever reason for an employee to perform."[271] The plaintiff further claimed that the employer's managers "are easily able to override the computer dispatch system so as to assign service technicians jobs without heavy lifting or pole climbing tasks…. ."[272] While the employer might be able to show that the use of the manual override system would cause an undue hardship, the court stated that the employer had not yet proven as a matter of law the existence of an undue hardship. But what makes one confused is then the court turned to claim that "the purported 'unfairness' of

[265] *See, e.g.,* Borkowski v. Valley Central School District, 63 F.3d 131, 134 (2d Cir. 1995); Hall v. United States Postal Serv., 857 F.2d 1073, 1080 (6th Cir. 1988).
[266] *See, e.g.,* Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538, 542-43 (7th Cir. 1995); Barth v. Gelb, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993).
[267] 17 F. Supp. 3d 1317 (N.D. Ga. 2014).
[268] *Id*. at 1320.
[269] *Id*. at 1321.
[270] *Id*.
[271] *Id*. at 1324.
[272] *Id*. at 1321 n 2, 1324.

the accommodations entailing reassignment of a minor portion of the duties of a disabled employee where many employees are available to perform such duties does not as a matter of law mean that the accommodation is per se unreasonable."[273] This statement demonstrates that the court did not properly distinguish between the reasonable accommodation provision and the undue hardship defense. Instead of deciding whether the plaintiff established a prima facie case of reasonable accommodation claim before moving to analyze the undue hardship defense, the court tied together its analysis of the reasonable accommodation request and undue hardship.

Arguably, after the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*,[274] this confusion should have dissipated. In rejecting the plaintiff's argument that an accommodation that was effective was also reasonable, the Court stated that "demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees – say, because it will lead to... modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent."[275] Clearly, the Court's reasoning suggested that reasonable accommodation and undue hardship are two separate concepts. So, it is surprising to see that some courts, such as in the *Jernigan* case, still appear to be confounded with the reasonable accommodation provision and the undue hardship defense.

F. The Search for A Unified, Coherent Framework

While it may be possible for one to list rules with varying levels of certainty regarding which accommodations are always or sometimes unreasonable, there seems to be no consistent framework to help explain the commonality of the accommodations that are perceived as reasonable or not. Although there are some possible criteria that might be used to explain existing case law, ultimately, it turns out that none of them can provide satisfying and coherent answers to the body of chaotic case law.

Take the rule of personal items as an example. The rule is based on the distinction between job-related assistive devices which are used on the job and personal items, the use of which extend beyond the workplace. The employer is only required to accommodate the employee's request for

[273] *Id*. at 1324.
[274] 535 U.S. 391 (2002), discussed in detail in section II.D.1.a.
[275] *Id*. at 401.

the former, but not the latter.[276] But this distinction is not without problems. For cases involving transportation, many courts applied the rule and held that employers do not have to accommodate the employee's request for transportation since it is personal in nature. However, in some circumstances, it can also be argued that reasonable accommodation for transportation is job-related, especially when the nature of the job does not allow telecommuting and, thus, it is necessary for the employee to travel to and from workplace to perform essential functions of the job.[277]

Moreover, many courts adopt ***per se*** rules for determining reasonable accommodation issues, e.g., case law on long-term leave of absence and commuting-related accommodations, etc., and view certain accommodation requests as inherently unreasonable. Though the ***per se*** rules have the benefits of improving predictability and certainty on claims of reasonable accommodations, their use undermines the potential of the reasonable accommodation obligations as a critical mechanism to further the equality rights of people with disabilities. I suspect that a critical reason for this is the judiciary's concern for preferential treatment.[278] The Supreme Court expressed clearly in *Barnett* that under the ADA, the employer is required to treat an employee with a disability differently, *i.e*., preferentially, and "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal."[279] Many courts mistakenly equate preferential treatment with unfair privileges to people with disabilities and harbor a suspicious and sometimes hostile attitude to the reasonable accommodation provision.[280] They ignore that the duty of reasonable accommodation, instead of providing unfair privileges, aims at leveling the playing field for persons with disabilities. The reasonable accommodation mandate, as an integral part of the broad equality and anti-discrimination norms, seeks to remove the arbitrary, artificial, and unnecessary barriers that preclude individuals with disabilities from participating in society. Therefore, it is imperative that the courts better understand the goal of the reasonable accommodation obligations to ensure proper interpretation and application so that substantive (inclusive) equality for people with disabilities can be fully realized.

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[276] *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 70 (2009).
[277] *See* Weber, *Unreasonable Accommodation*, *supra* note 62, at 1133.
[278] *See* Nicole B. Porter, *Special Treatment Stigma after the ADA Amendments Act*, 43 PEPP. L. REV. 213 (2016).
[279] Barnett, 535 U.S. at 397.
[280] *See* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003).

Moreover, one of the most valuable aspects of the reasonable accommodation duty lies in its mandate for a case-specific and fact-intensive inquiry to meet the unique needs of individuals with disabilities. Therefore, a one-size-fits-all approach is not only infeasible but also runs afoul of the central spirit and purpose of the reasonable accommodation obligations. As discussed in prior sections, some courts' decisions on certain accommodation requests as ***per se*** unreasonable either do not offer persuasive arguments or commit reasoning errors. Generally speaking, persons with disabilities only need to show that the accommodation requested seems reasonable on its face, *i.e.*, ordinarily or in the run of cases[281] to establish a *prima facie* claim. The threshold should be kept low to prevent a biased and arbitrary view toward disabled people from unduly restricting the multitude of potential accommodations that could facilitate individuals with disabilities' enjoyment of all human rights and fundamental freedoms on an equal basis with others. Even if we recognize that some accommodations might be inherently unreasonable, the scope of which should be limited to exceptional cases. Reasonable accommodation calls for an individualized assessment that considers the particular circumstances of different individuals with a variety of disabilities with varying severity that manifest themselves differently.

The chaos of the interpretation and application of the reasonable accommodation provision under the ADA necessities a more unified and consistent framework that takes into account the multiple goals served by the duty of reasonable accommodation to address the vexing reasonable accommodation issues. The goals pursued by the reasonable accommodation mandate include making people with disabilities economically independent, *i.e.* a fair redistributive dimension of inclusive equality, showing respect for equal dignity and worth of people with disabilities, *i.e.* a recognition dimension of inclusive equality, dismantling the disadvantaged and group-based subordination system, *i.e.* an accommodating and transformative dimension of inclusive equality, and removing the arbitrary, artificial, and unnecessary barriers that preclude individuals with disabilities from participating and being included in all spheres of society, *i.e.* a participative dimension of inclusive equality. It is crucial to carefully consider all dimensions of substantive (inclusive) equality to ensure that an appropriate analysis of the reasonable accommodation claims results in the equal enjoyment of all human rights for people with disabilities.

[281] Barnett, 535 U.S. at at 401.

III. Conceptualizing and Defending the Reasonable Accommodation Mandate

Many people are suspicious of the concept of reasonable accommodation, and courts are hesitant to apply it. On its face, the duty of reasonable accommodation seems quite different from traditional anti-discrimination laws. Some commentators argue that the ADA's reasonable accommodation requirement sharply distinguishes it from other anti-discrimination laws that only prohibit an actor from intentionally treating an individual unfavorably from other similarly situated individuals because of the individual's race, color, sex, or other legally protected grounds. They assert that requiring the employer to reasonably accommodate an employee with a disability in the absence of undue hardship resembles conventional affirmative action in the sense of giving members of minority groups preferential treatment or special benefits. However, in discussing the relationship between reasonable accommodation and disparate treatment law, Samuel Bagenstos aptly argues that "the goals of anti-discrimination and accommodation requirements are parallel, for both seek to dismantle a system of group-based subordination and the patterns of occupational segregation that support that system."[282] Upon closer examination, the reasonable accommodation requirement exhibits fundamental kinship with the broad anti-discrimination project. To avoid confusion and better understand the unique value of the reasonable accommodation obligation, it is crucial to explore and clarify similarities and distinctions between reasonable accommodation and two other often confusing concepts, namely, disparate impact and affirmative action.

A. Reasonable Accommodation and Disparate Impact

1. Parallels

The Supreme Court first recognized disparate impact theory as a basis for holding an employer in violation of Title VII in *Griggs v. Duke Power Co*.[283] In this case, the Court found that an employer violated Title VII by requiring its employees either to have a high school diploma or pass a standardized general intelligence test that disproportionately disqualified a higher number of blacks from employment than the number of white applicants. Besides, the job qualification standard was not demonstrated to be significantly related to satisfactory job performance.[284] The Court contended that "[t]he Act proscribes not only overt discrimination but also practices that are

[282] *See* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003).
[283] 401 U.S. 424 (1971).
[284] *Id.* at 436.

fair in form, but discriminatory in operation."[285] Furthermore, the Court reasoned that the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[286] The fundamental similarity between reasonable accommodation and disparate impact lies in their shared goal of eliminating unjustified barriers to equal opportunity and participation.

While the origin of disparate impact theory involves an allegation of racial discrimination in violation of Title VII, much of the Court's language resonates with the rationale of reasonable accommodation. First, the *Griggs* Court identified the purpose of Title VII as:

> Achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees.... What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[287]

Clearly, the Court's understanding of Title VII's anti-discrimination mission includes not only differential treatment motivated by discriminatory intention, but also the removal of barriers to equal opportunity. The same pair of goals – elimination of intentional differential treatment and the removal of unjustified barriers to opportunity – obviously led to the enactment of the ADA.[288]

Admittedly, most of the cases using disparate impact theory address facially neutral criteria or practices regarding who to hire or promote, rather than barriers inherent in the workplace. Nonetheless, there are cases and commentary suggesting how disparate impact can be utilized to require changes to workplace environment. For instance, in *Lynch v. Freeman,*[289] the Sixth Circuit found that an employer's practice of providing only unsanitary portable toilet facilities to its employees constituted disparate impact sex discrimination.[290] The court rejected the employer's argument that disparate impact was inapplicable to working conditions and held that the equality

[285] *Id.* at 431.
[286] *Id.* at 432.
[287] *Id.* at 429-31.
[288] *See* 42 U.S.C. § 12101 (2000) (listing congressional findings and purposes).
[289] 817 F.2d 380 (6th Cir. 1987).
[290] *Id*. at 388-89.

of workplace facilities by men and women could nonetheless be discriminatory.[291] The court decided in favor of the plaintiff because the employer failed to show how the state of the toilets was justified by business necessity.[292] This decision illustrates that changes to the physical workplace or employer's policies can come from both disparate impact liability as well as reasonable accommodation claims.

Other cases also show that employers may have to modify workplace policy in order to avoid disparate impact liability. For example, in *Garcia v. Spun Steak Co*.,[293] Spanish-speaking employees challenged an employer's English-only policy.[294] The Ninth Circuit, while acknowledging that mainstream disparate impact cases involve challenges to qualification standards rather than to conditions of employment, asserted that "a disparate impact claim may be based on a challenge to a practice or policy that has a significant adverse impact on the 'terms, conditions, or privileges' of the employment of a protected group."[295] The court found that the adoption of an one-language only policy could set up barriers to equal employment opportunity for employees who were either unable or have great difficulty communicating with that language.[296] In the disability context, this decision is analogous to requiring an employer to accommodate deaf and hard of hearing employees by providing alternative modes of communication.

Another example involves the no-beard policy.[297] This policy disproportionately harms black men because the skin condition of many of them makes shaving extremely difficult or impossible. The employers adopt this policy mainly to cater to perceived customer preferences.[298] The use of disparate impact theory to strike the no-beard policy further exemplifies that the scope of its application is not limited to job selection criteria, but also to job performance requirements.[299]

As a matter of fact, individuals with disabilities are much more often and more likely than blacks or women to face facially neutral barriers to equal work opportunity and participation in

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[291] *Id*. at 387.
[292] *Id*. at 389.
[293] 998 F.2d 1480 (9th Cir. 1993).
[294] *Id*. at 1483.
[295] *Id*. at 1485-86.
[296] *Id*. at 1488.
[297] *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 653-54 (2001) [hereinafter "Jolls, *Antidiscrimination*"].
[298] *Id*. at 654.
[299] *Id*. at 669.

the form of workplace environment, job structure, or performance standard. The social model demonstrates how institutions, practices, and built environment fail to consider variations in human functions and therefore "disable" persons with physical and/or mental impairments. In other words, the disadvantage suffered by people with disabilities is not natural or inevitable, but rather reflects contingent social settings at particular times and places.[300] In this regard, reasonable accommodation enables persons with disabilities to enter and remain in the mainstream workforce when physical workplace or employer's requirement regarding job performance constitutes arbitrary, artificial, and unnecessary barriers that prevent people with disabilities from displaying their competency and talents in some unconventional way. From this perspective, the ADA's reasonable accommodation requirement, rather than representing a totally new creation different from other anti-discrimination laws, should be viewed instead as an adaptation of disparate impact theory to the particular obstacles faced by individuals with disabilities.

2. Differences

Notwithstanding the above-mentioned conceptual affinity between reasonable accommodation and disparate impact, some critical differences are worth noting. To begin with, disparate impact theory focuses on eliminating facially neutral criteria or practices that have a disproportionately adverse impact on a protected group. In other words, the application of disparate impact is largely group-based, so one's characteristic is determinative of whether she can obtain relief regardless of whether she actually suffers from an adverse impact or not. By contrast, the reasonable accommodation requirement aims at removing arbitrary, artificial, and unnecessary barriers that exclude persons with disabilities from equal opportunity to work. Though one must have a disability to be eligible for requesting an accommodation, it does not follow that every individual with a disability has a right to reasonable accommodation. The employer has an obligation to provide a reasonable accommodation only when doing so is necessary to enable the disabled applicant or employee to perform the essential functions of the job.

Moreover, with respect to the remedy provided, the most common relief granted under disparate impact liability is either to require the employer to abandon job selection criteria or to modify standards and practices to minimize adverse impact on the protected group. Because the nature of the disparate impact theory is group-focused, the remedy it provides cannot easily be

[300] *See* Chapter Three, section II.B.1.

fine-tuned to suit the special needs of individual members belonging to a particular protected group. On the contrary, reasonable accommodation requirement offers a highly individualized, fact-specific resolution to address each and every unique need of individuals with disabilities. One of the most valuable strengths of reasonable accommodation is that it is designed to adequately address the fact that persons with disabilities comprise a highly heterogenous group with a wide range of impairments and varying severity, which makes the one-size-fits-all solution infeasible. This clearly differentiates reasonable accommodation requirement from the disparate impact theory.

Understanding the similarities and differences between disparate impact theory and reasonable accommodation requirement is important for us to discern the relationships between traits covered by Title VII and disability. As Mari Matsuda notes: "disability law confronts head-on the fact of difference among human beings and the benefit gained from accommodating those differences."[301] Though it is outside the scope of the dissertation to explore the applicability of reasonable accommodation requirement to other protected characteristics, I think that Title VII categories should also, in many cases, require and receive accommodation through the operation of disparate impact liability.[302]

B. Reasonable Accommodation and Affirmative Action

1. Parallels

At the outset, some scholars suggest that the reasonable accommodation requirement resembles affirmative action programs in that it requires the employer to take into account of protected characteristics and to take affirmative steps to provide something of benefit only to members of a protected group.[303] While there is no single definition or exact contour of what affirmative action consists of, the overarching goal unifying the various legally mandated and voluntarily adopted affirmative action programs is to provide members of a historically

[301] *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1381-82 (1991).
[302] *See* Jolls, *Antidiscrimination*, *supra* note 297, at 668-69.
[303] *See* Lisa Eichhom, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 603 (2002).

disadvantaged group with some type of preferential treatment to increase their participation and representation in certain contexts, such as employment, higher education, or housing, etc.[304]

Just as critics of the ADA characterize reasonable accommodation requirement as special treatment for people with disabilities, critics of affirmative action oppose special treatment for minority groups based on race, ethnicity, or sex.[305] These criticisms reflect the belief in traditional formal equality model, which mandates that equal treatment of persons necessarily requires identical treatment. As discussed in an earlier Chapter,[306] formal equality fails to recognize the historical and existing disadvantages suffered by vulnerable and marginalized groups. The insistence on equal treatment to all could only serve to perpetuate or reinforce dominant values or unequal distribution of power, opportunities, and resources. The blanket prohibition on taking particular personal characteristics into account prevents measures from being adopted to undo the effects of injustice.[307] In this regard, reasonable accommodation requirement and affirmative action share a fundamental conceptual justification that in order to treat differently situated groups equally, you must sometimes treat them differently.[308]

2. Differences

There are significant differences that distinguish affirmative action from reasonable accommodation under the ADA. For instance, under conventional affirmative action programs for employment, employers set up targets through a statistical comparison of their workforce with the relevant labor pool. Through pre-designed criteria, practices, and policies, employers seek to increase the proportion of a historically underrepresented minority group in the workforce. An employer continues the affirmative action programs throughout the recruitment and hiring process until the numerical goals for the underrepresented group are met.[309] On the contrary, reasonable accommodation under the ADA occurs on an individualized, ad-hoc basis. An employee with a disability often starts the process by making a request for reasonable accommodation. Then the

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[304] *See* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 5 (2002) (using the term to refer to a "program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment").
[305] *See* SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW & POLICY: AN OVERVIEW AND SYNTHESIS (2002).
[306] *See* Chapter Three, section II.A.
[307] *See* Evadné Grant*, Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 320 (2007).
[308] *See* Miller, *Disability Civil Rights*, *supra* note 107, at 535.
[309] *See* Befort, *Answers, Questions and Suggested Solutions*, *supra* note 110, at 968-69.

employer and the employee engage in an interactive process to identify the essential functions of the job and the limitations and unique needs of the employee. Ultimately, both parties agree upon an appropriate accommodation.

Reasonable accommodation and affirmative action differ from each other in several critical aspects. First, affirmative action is primarily a group-based remedy for past injustice. It provides preferential treatment to all members of a historically subordinated group regardless of whether the individual at issue suffered from discrimination or not. Thus, it is possible that individuals who benefit from affirmative action are already the most privileged ones in the minority group.

Second, reasonable accommodation aims at removing arbitrary, artificial, and unnecessary barriers that preclude individuals with disabilities who can perform the essential functions of the job from entering the workplace. Nonetheless, affirmative action usually involves setting numerical goals or quotas to bring the numbers of individuals belonging to a historically disadvantaged group in balance to that of the privileged group. The former is more forward looking to level the playing field for applicants or employees with disabilities, whereas the latter is more backward looking to correct past injustice suffered by the subordinated group.

Third, unlike affirmative action, reasonable accommodation would not always lead to a zero-sum game between employees. In other words, the provision of reasonable accommodation does not cause any other employee to lose employment; in contrast, affirmative action usually reserves employment opportunities for one group at the expense of another group. This explains why affirmative action is highly controversial in many competitive contexts.

Fourth, as noted by Pamela Karlan and George Rutherglen, "accommodations are likely to involve 'relational' behavior, as opposed to the 'discrete' preferences involved in most race- and sex-based affirmative action programs."[310] Under affirmative action programs, once a particular worker is given the job, she is expected to perform the job as previously defined. By contrast, except for some reasonable accommodations that involve only one-time modification or alteration of physical environment and selection criteria, many accommodations place continuing

[310] *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 16 (1996) [hereinafter "Karlan & Rutherglen, *Reasonable Accommodation*"]. For elaborations of the contrast between discrete and relational behavior in a variety of contexts, *see generally* Charles J. Goetz & Robert E. Scott*, Principles of Relational Contracts*, 67 VA. L. RV. 1089 (1981); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1992).

responsibility on the employer that requires regular expenditures, such as the provision of reader and interpreter or continuous adjustment of work schedule. Ongoing negotiations and cooperation between the employer and the worker are critical to ensure successful accommodation in a far more interactive process than that involved in affirmative action programs.

Fifth, the failure to provide reasonable accommodation is itself a form of discrimination; on the other hand, affirmative action represents a type of remedy rather than a category of substantive liability.[311] In affirmative action cases, membership in specific disadvantaged groups is the only eligibility requirement. In reasonable accommodation cases, membership in the protected class, though necessary, is not sufficient. A disabled employee must show that the employer's practices and policies constitute barriers that keep her from performing the essential functions of the job to be eligible for a particular reasonable accommodation. In other words, the beneficiaries of reasonable accommodation are not fungible or interchangeable simply because they are members of the same protected class.[312] One of the principal criticisms of affirmative action is that it improperly assumes that membership in the protected class would subject an individual to disadvantage sufficient to merit preferential treatment. Therefore, scholars argue that affirmative action fails to account for the degree of variation within the protected class.[313] In contrast, reasonable accommodation calls for an individualized assessment that considers the particular circumstances of different individuals with a variety of disabilities with varying severity that manifest themselves differently.

Finally, the focus of reasonable accommodation cases is to determine whether the employer's *current practices and policies* constitute artificial, arbitrary, and unnecessary barriers that limit equal opportunity of individuals with disabilities to compete. But the focus of most affirmative action cases is to look at whether the *impact of past policies*, or as the Supreme Court stated, "the lingering effects of pervasive discrimination,"[314] justifies the imposition of affirmative action. The purpose of affirmative action is to remedy "pervasive, systematic, and obstinate discriminatory conduct"[315] against historically disadvantaged groups. As one court held that "[t]he

[311] *See* Ball, *Preferential Treatment*, *supra* note 54, at 973.
[312] Karlan and Rutherglen have called this type of legal entitlement a "personalized special treatment." *See* Karlan & Rutherglen, *Reasonable Accommodation*, *supra* note 310, at 14.
[313] *See, e.g.*, Lino Graglia, *"Affirmative Action": Past, Present, and Future*, 22 OHIO N.U. L. REV. 1207, 1213 (1996).
[314] Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 445 (1986) (plurality opinion).
[315] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against disadvantaged group that itself has been the victim of discrimination."[316] The Supreme Court has also explained that voluntary affirmative action does not have to remedy specific and identifiable violations of Title VII to avoid placing a disincentive on the part of the employers to address the underrepresentation of minorities.[317] One strength of reasonable accommodation is that its legitimacy builds upon *current discriminatory employment practices*, while the preferential treatment required by affirmative action can continue for years after the pervasive and systemic discriminatory conduct has ceased.[318] Such a time gap between the discrimination and the preferential treatment required to address it causes many objections to affirmative action, but it is not a concern for reasonable accommodation mandate.

C. Recognition of the Unique Value of Reasonable Accommodation

The above analysis of the relationship between the reasonable accommodation mandate and disparate impact theory as well as affirmative action demonstrates that while there appear to be some facial similarities shared by the three concepts, critical differences set them apart. On a higher conceptual level, the provision of reasonable accommodation, disparate impact theory, and affirmative action represent various mechanisms to realize the goal of substantive equality, namely, every individual can have equal opportunity and access to valuable resources (e.g., education, employment, housing, etc.) to exercise and enjoy all human rights and fundamental freedoms regardless of personal characteristics. Though they all aim at fulfilling the equality and non-discrimination norms, each has different functions and addresses various forms of injustice and discrimination.

Disparate impact theory focuses on eliminating facially neutral criteria or practices that have a disproportionately adverse impact on a protected group. Affirmative action is used to provide members of historically disadvantaged groups with certain benefits to increase their participation and representation in different contexts, such as legislature, employment, education, etc. The duty of reasonable accommodation can be viewed as an adaptation of disparate impact theory in that disparate impact liability often requires abandonment or modification of criteria,

[316] Cunico v. Pueblo Sch. Dist. No. 60, 917 F.2d 431,437 (10th Cir. 1990).
[317] *See* Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, 630 (1987).
[318] The Supreme Court has held that voluntary affirmative action plans must be temporary in nature so as not to violate Title VII. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979); Grutter v. Bollinger, 123 S. Ct. 2325, 2346 (2003).

standards, and practices for the protected groups; instead, reasonable accommodation mandate offers a highly individualized, case-specific resolution to address unique needs of individuals with disabilities. Compared to affirmative action, which tends to focus more on correcting past injustice and disadvantage suffered by the subordinated group, the provision of reasonable accommodation aims at removing arbitrary, artificial, and unnecessary barriers that impede equal opportunity of individuals with disabilities. The use of affirmative action arouses much controversy as it fails to account for the degree of variation within the protected class. Often, individuals who benefit from affirmative action are already the most privileged ones in the group. In contrast, reasonable accommodation rejects a one-size-fits-all approach and calls for an individualized assessment to level the playing field for people with disabilities.

To sum up, the reasonable accommodation obligation, disparate impact theory, and affirmative action are distinct and complementary parts of the broad equality and non-discrimination norms. It is critical to appreciate similarities and distinctions between them so that they can be adequately employed to address different forms of discrimination and inequality. The uniqueness and one of the most valuable aspects of the reasonable accommodation duty lies in its ability to recognize that persons with disabilities comprise a highly heterogeneous group with a wide range of impairments and varying severity that manifest themselves differently. Therefore, reasonable accommodation is indispensable for individuals with disabilities to secure *de facto* equality in society.

IV. CONCLUSION

The 30 years practice of the ADA provides us with invaluable lessons on how the reasonable accommodation provision could be interpreted and applied to remove artificial, arbitrary, and unnecessary barriers that keep persons with disabilities from participating in various aspects of mainstream social life. Regrettably, the full transformative potential of ADA's reasonable accommodation has fallen short of being completely realized because of courts' narrow construction of disability in the first two decades. Even after the 2008 Amendments to the ADA, the courts, sticking to the equal treatment model and fearful of giving individuals with disabilities unfair preferential treatment, unduly restrict the multitude of potential accommodations that could facilitate individuals with disabilities enjoyment of all human rights and fundamental freedoms on an equal basis with others. The case law on many critical accommodation issues illustrates that

courts often adopt ***per se*** rules that unreasonably preclude certain accommodation requests from further consideration, overly defer to the employer's judgment and perceive the structural norms of the workplace, i.e., a particular shift, schedule, or attendance policy as essential functions of the job, or appear to be confounded with the analysis of the reasonable accommodation provision and undue hardship defense. To ensure that the reasonable accommodation mandate can help bring about substantive (inclusive) equality for individuals with disabilities, a more coherent and consistent framework that considers multiple dimensions (a fair redistributive dimension, a recognition dimension, an accommodating and transformative dimension, as well as a participative dimension) to address the vexing reasonable accommodation issues is desperately needed.

Compared with the ADA, there is reason to be more optimistic about the prospect of reasonable accommodation provision under the CRPD. On the one hand, unlike the ADA, which reflects a mixture of the medical and social model in defining disability, the CRPD endorses a holistic human rights-based model that is more suitable to address disability issues. On the other hand, the Convention clearly entails a more progressive vision of equality and non-discrimination and acknowledges that positive measures are central to disability equality. I think that through close examination of the U.S. jurisprudence on reasonable accommodation, the commonality and the distinction of the two systems can be highlighted, and we can figure out the best way to eliminate all socially constructed barriers to increase the potential for realizing *de facto* equality for persons with disabilities.

CHAPTER SIX: EQUALITY AND NON-DISCRIMINATION IN COUNCIL OF EUROPE AND EUROPEAN UNION

I. INTRODUCTION

In the previous chapter, I examined how reasonable accommodation is interpreted and applied in the United States to figure out similarities and distinctions between the CRPD and the ADA in putting the duty of reasonable accommodation into practice. Through reviewing the past few decades of academic works and case law, I explored how this can shed light on our understanding of norms of equality and non-discrimination and reasonable accommodation. The focus of this chapter is on the jurisprudence of the European Court of Human Rights (ECtHR or the Court), the European Committee of Social Charter (ECSR), and the Court of Justice of the European Union (CJEU), respectively. In Europe, within both the European Union (EU) and the Council of Europe (CoE), the grounds of anti-discrimination norms are widening, new laws are being strengthened and actively litigated. Both the EU and the CoE have adopted important new instruments. Notably, the EU has enacted the Charter of Fundamental Rights (CFR) and an ambitious series of legislative measures, such as Directive 2000/43/EC (Race Equality Directive)[1] and Directive 2000/78/EC (Employment Equality Directive).[2] Likewise, the CoE has adopted Protocol No. 12 that complements and expands the existing anti-discrimination provision of article 14 of the European Convention on Human Rights (ECHR). In contrast to the United States, the jurisprudence of the ECtHR and CJEU would offer another valuable lens through which we can see how it provides a different interpretation and application of reasonable accommodation into the equality norm. One crucial aim of this chapter is, through examination of equality and non-discrimination norms and reasonable accommodation in the Europe, to develop a normative understanding of reasonable accommodation that accommodates the diversity of approaches to the concept, while at the same time ensures that the broad common goal and core spirit of reasonable accommodation will be realized.

This chapter is organized as follows: to set up the background, section II starts with a brief overview of the disability policy of the CoE. Section III provides an analysis of the jurisprudence

[1] Directive 2000/43, Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180/22) (Race Equality Directive or RED).
[2] Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, (2000) O.J. (L 3030/16) (Employment Equality Directive or EED).

of the European Court of Human Rights on equality and non-discrimination norms and reasonable accommodation. The first part discusses the European Convention of Human Rights and explores how and to what extent the CRPD exerts influence on the interpretation of equality rights for people with disabilities by the European Court of Human Rights. An analysis will be provided of the central anti-discrimination provision of the ECHR, article 14, which prohibits discrimination that impairs the equal enjoyment of rights contained in the ECHR, and Protocol No. 12, which was adopted to complement and expand the anti-discrimination provision of article 14 of the ECHR. Furthermore, this section offers a brief introduction of the ECtHR and explores the interpretive methodology it uses to elucidate the substantive content of the Convention rights. Most importantly, in the last part of this section, I examine some of the most significant decisions of the Court to date in the field of disability to figure out the development of disability rights in the ECtHR's case law in relation to the CRPD.

Apart from the ECHR, another principal human rights instrument in the CoE is the European Social Charter (ESC), which was revised in 1996. Unlike the ECHR, the ESC contains a provision explicitly related to the rights of persons with disabilities. Section IV explores the most relevant provisions of the Revised Charter and opinions of the European Committee of Social Charter concerning the rights of persons with disabilities.

With respect to the EU, section V outlines the development of disability policy in the EU and provides an overview of Directive 2000/78/EC, the main piece of EU secondary legislation that protects and promotes the rights of people with disabilities. In addition, section VI presents the jurisprudence of the Court of Justice of the European Union (CJEU). It explores the Court's attempt to provide a definition of disability in a series of judgments both before and after EU's ratification of the CRPD to discern the extent to which the CRPD has impacted the case law of the CJEU. Case law exemplifies that though the ratification of the CRPD by the EU has marked a clear shift from the medical model to the social model of disability, the CJEU may not embrace or comprehend the significance of a concept of a disability fully in line with the CRPD. Section VII concludes this chapter.

II. OUTLINE OF THE DISABILITY POLICY OF THE COUNCIL OF EUROPE

The Council of Europe began to focus on disability issues in the early 1990s, when disability policy had started on a global scale. The CoE attempted to align its own policies to the

fast-paced changes taking place worldwide, particularly at the UN level. The first comprehensive action plan was published in April 2006, eight months before the adoption of the CRPD. The Council of Europe Disability Action Plan 2006-2015[3] (the Action Plan) was intended to serve as a boilerplate for future disability policy-making within the CoE. One of the key objectives of the Action Plan was "to serve as a practical tool to develop and implement viable strategies to bring about full participation of people with disabilities in society and ultimately mainstream disability" throughout all the policy areas of the Member States.[4] Importantly, though the CRPD and the Action Plan differ in legal nature and geographical scope, both instruments cover many of the same premises and focus areas. Similar to the CRPD, the Action Plan reflects the paradigm shift to the human rights model of disability.

The CoE has adopted many non-binding recommendations and issued papers related to disability post CRPD. The influence of the CRPD can be seen quite clearly in many of these recommendations.[5] One of the most important developments happened in 2014–2015 when the CoE evaluated the implementation of the Action Plan in the Member States, in order to draw lessons from the ten-year period and to define a way forward in a new disability strategy.[6] Building on this evaluation process, the CoE adopted New Strategy on the Rights of Persons with Disabilities 2017–2023.[7] The Strategy identifies five priority areas that echo the CRPD's general principles,[8] including equality and non-discrimination; awareness-raising; accessibility; equal recognition before the law; and freedom from exploitation, violence, and abuse. To a certain extent, those priority areas mirror the European Disability Strategy 2010–2020, adopted by the European Commission within the EU context.[9] The overall goal of the Strategy is to achieve equality, dignity

[3] The Council of Europe Disability Action Plan was adopted pursuant to Committee of Ministers, Recommendation No. (2006) (5) on the Council of Europe *Disability Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006-2015*, 5 April 2006.

[4] Council of Europe *Disability Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006-2015*, p 4.

[5] *See* ANDREA BRODERICK & DELIA FERRI, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY: TEXT, CASES AND MATERIALS 417-19 (2019) [hereinafter "BRODERICK & FERRI, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY"].

[6] *See also*, CoE PA, Recommendation No. 2064 on *Equality and Inclusion for People with Disabilities*, 30 January 2015.

[7] CoE, *Human Rights: A Reality for All - Council of Europe Disability Strategy 2017-2023*, available at www.coe.int/en/web/disability/strategy-2017-2023.

[8] CRPD, Article 3.

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Disability Strategy 2010-2020: A Renewed Commitment to*

and equal opportunities for persons with disabilities in all areas of the CoE's field of action. On the whole, the Strategy provides a flexible policy instrument and framework that can be tailored to the specific national and local context.

III. JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

This section examines the way in which the European Court of Human Rights (ECtHR or the Court) developed the right to equality and non-discrimination through its jurisprudence. Traditionally, the Court interpreted article 14 of the European Convention of Human Rights (ECHR or the Convention) as a guarantee of equal treatment before the law, which is subsidiary to other substantive rights of the Convention. The primary purpose of article 14 was to increase the effective enjoyment of the rights enshrined in the Convention. However, relevant case law shows that the Court has made several significant strides towards giving substantive meaning to the non-discrimination norm in article 14. For example, the Court recognized systemic or structural disadvantage suffered by particular groups in analyzing individual cases, and it acknowledged that positive steps would sometimes be necessary to address *de facto* inequality. In the context of disability, while the Convention does not explicitly include the term reasonable accommodation, the Court recognized, either implicitly or explicitly, its importance and in several cases imposed obligations similar to the duty to provide a reasonable accommodation to realize the equal rights for persons with disabilities.

A. The European Convention of Human Rights

The European Convention of Human Rights, which was adopted in 1950 and entered into force on September 3, 1953,[10] focuses exclusively on the protection of civil and political rights, the main characteristic of which is that they emphasize the value of liberty and primarily require non-interference by the state. The protection of social, economic, and cultural rights was partially covered by the First Protocol to the Convention and involved only the protection of property and education rights.[11] The Convention took a cautious approach towards the protection of ESC rights so as to avoid interfering with the exercise of socio-economic policy by Member States.

a Barrier-Free Europe, Brussels, 15.11.2010, COM (2010) 636 final.

[10] The Convention is formally referred to as "Convention for the Protection of Human Rights and Fundamental Freedoms."

[11] Articles 1 and 2 of the Protocol respectively.

The European Convention of Human Rights was adopted during a period characterized by welfare and paternalistic approach to disability.[12] Therefore, it does not mention the rights of individuals with disabilities, nor does it contain any express reference to disability itself. Only article 5 (1) (e) of the ECHR[13] concerning the lawful detention of "persons of unsound mind" constitutes an indirect reference to psychosocial disability.

1. Article 14 of the European Convention of Human Rights

Article 14 of the Convention provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

One main feature of this article is that its application depends on whether the enjoyment of the Convention rights has been affected. In other words, it is perceived as a constituent part of the rights rather than as a separate, autonomous right.[14] Because of this limited potential, article 14 has often been described as "parasitic."[15]

Article 14 mandates that equals should be treated equally unless differential treatment is objectively justified. This formal understanding of equality can be closely linked to the negative facet of equality as it describes what the State should refrain from doing. Nonetheless, it should be noted that the Court, in its early days of jurisprudence, held that while article 14 must relate to a Convention right, it is autonomous to the extent that it does not presuppose a breach of the right at issue.[16] It is the view of the Court that discrimination claims that fall "within the ambit" of the Convention rights can trigger the application of article 14. The "ambit" of a human right was understood as a wide area in which an individual can enjoy it. The combination of the ambit of a

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[12] *See* Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Rights*, 12 THE INT'L J. OF HUM. RTS. 261 (2008).

[13] Article 5 (1) (e) of the ECHR provides that:
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty safe in the following cases and the in accordance with a procedure prescribed by law:
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

[14] This view was originally expressed by the Court in the *Belgian Linguistic Case,* Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, section I (B), para. 9.

[15] *See* Aileen McColgan, *Principles of Equality and Protection from Discrimination in International Human Rights Law*, 2 EUR. HUM. RTS. L. REV. 157, 159 (2003).

[16] *See Belgian Linguistic Case*.

Convention right and article 14 could operate to expand the reach of anti-discrimination norm far beyond the protective core of the rights enshrined in the Convention.[17]

Article 14 provides a non-exhaustive list of different grounds covered by the non-discrimination norm. The term "other status" has been interpreted widely by the Court as referring to a personal characteristic that distinguishes individuals or groups from each other.[18] For instance, the Court has broadly defined it to cover prohibited grounds ranging from nationality,[19] sexual orientation,[20] and disability[21] to former KGB employment.[22] As a result, there is practically no limitation on what may constitute a prohibited ground as long as the ground can be considered to signify a personal characteristic in a very wide sense.

2. Protocol No. 12

Protocol No. 12 to the ECHR came into force on April 1, 2005 to liberate article 14 from its parasitic status. Article 1(1) of Protocol No. 12 provides:

> The enjoyment of any right set forth by law shall be secured without discrimination on any grounds such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Unfortunately, Member States of the Council of Europe seemed not enthusiastic to sign and ratify the new Protocol.[23] The ability of the Court to adjudicate individual cases directly and its ever-growing status as the ultimate guardian of European human rights makes Member States hesitant to further extend their obligations under the Convention.[24] Especially given that in recent years the Court had offered a broad interpretation to article 14, which may reasonably discourage Member States from providing the Court more flexibility in dealing with domestic socio-economic policy with equality implications.

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[17] *See* Aaron Baker, *The Enjoyment of Rights and Freedoms: A New Conception of the "Ambit" under Article 14 ECHR*, 69 THE MODERN L. REV. 714 (2006).
[18] *See Kjeldsen, Busk Madsen and Pedersen v Denmark*, Application no. 5095/71; 5920/72; 5926/72, 7 December 1976, para. 56.
[19] *Botta v Italy*, Application no. 21439/93, 24 February 1998.
[20] *Salgueiro Da Silva Mouta v Portugal*, Application no. 33290/96, 21 December 1999.
[21] *See Glor v. Switzerland,* Application no. 13444/04, 30 April 2009.
[22] *Sidabras and Dziautas v Lithuania*, Application nos. 55480/00 and 59330/00, 27 July 2004.
[23] As of December 2021, only 20 out of the 47 Member States of the Council of Europe have signed and ratified the Protocol.
[24] *See* CHARILAOS NIKOLAIDIS, THE RIGHT TO EQUALITY IN EUROPEAN HUMAN RIGHTS LAW 23, 26 (2015) [hereinafter "NIKOLAIDIS, THE RIGHT TO EQUALITY"].

3. The Scope of Application of the ECHR and the CRPD

The CRPD and the ECHR have different scope of application, both *rationae materiae* and geographically. As a disability-specific treaty, the CRPD protects and promotes the human rights and fundamental freedoms of persons with disabilities across the full spectrum of civil and political, and economic, social,, and cultural rights. In contrast, the ECHR targets at protecting civil and political rights, with the exception of its Protocol No. 1 concerning the rights to property and education. Nonetheless, sometimes the Court appears to be willing to recognize the interdependent nature of rights, particularly in cases involving vulnerable groups.[25] In *Airey v. Ireland*,[26] the Court made it clear that "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature."[27] Therefore, the Court concluded that "the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation."[28] This recognition paves the way for persons with disabilities to invoke the ECHR to allege violations of rights with socio-economic implications.

B. The Role of the European Court of Human Rights

The European Court of Human Rights (ECtHR or the Court) has been entitled to receive applications directly from more than 800 million people residing in the Member States of the Council of Europe since the entry into force of Protocol 11 on November 1, 1998.[29] Article 34 of the ECHR enables the Court to "receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of one of the provisions of the Convention or its Protocols." The jurisdiction of the ECtHR extends "to all matters concerning the interpretation and application of the Convention and the Protocols thereto."[30] The Convention allows the Court, on finding a violation, to order the defendant government pay "just satisfaction to the injured party."[31] States that have ratified the ECHR must "abide by the final

[25] *See* Liam Thornton, *European Convention on Human Rights: A Socio-Economic Rights Charter?, in* IRELAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS : 60 YEARS AND BEYOND 227 (Suzanne Egan, Liam Thornton & Judy Walsh eds., 2014).
[26] *Airey v. Ireland*, Application no. 6289/73, 9 October 1979.
[27] *Id*. para. 26.
[28] *Id*.
[29] Previously individual petitions had to be filed with the European Commission of Human Rights, which then decide whether or not to refer the matter to the Court.
[30] ECHR, article 32.
[31] ECHR, article 41.

judgment of the Court in any case to which they are parties."[32] It is the duty of the Committee of Ministers, which is the political body of the CoE, to supervise the execution of judgments.[33] The Court has since built up a significant reputation through the process of elucidating the substantive content of the Convention rights, adjudicating whether Member States commit a violation, and granting relief to the applicants. Accordingly, it has been constantly referred to as the "European Constitutional Court."[34]

As a regional human rights court consisting of a wide array of Member States with varying legal, political, and cultural backgrounds, it is unavoidable for the ECtHR to set the minimum core level of human rights protection afforded in Europe. The mission of the Court is to draw "the margin within which States may opt for different fundamental balances between government and individuals."[35] Given the general way in which the various articles of the ECHR are formulated, as a practical matter, the Court was entrusted not only with enforcing, but also with developing common human rights norms[36] that inevitably require a certain degree of judicial creativity.

1. The Interpretative Methods of the European Court of Human Rights

The Court has always viewed the ECHR as a "living instrument" that mandates a dynamic and flexible interpretation. It has paid due regard to the development of commonly accepted standards among Member States.[37] Similarly, the human rights treaties entered into by the Member States constitute an important factor in the adjudication of individual cases. Most importantly, the Court emphasized that the ECHR:

> must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.[38]

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[32] ECHR, article 46(1).
[33] ECHR, article 46(2).
[34] *See* STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 317 (2006).
[35] *See* JOSEPH WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 102-07 (1999).
[36] *See* Danny Nicol, *Original Intent and the European Convention on Human Rights*, PUBLIC LAW, 152 (2005).
[37] *See* Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV. 57 (2005).
[38] *Demir and Baykara v Turkey*, Application no. 34503/97, 12 November 2008, para. 146.

The Court emphasized that "the consensus emerging from specialized international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."[39] The CRPD represents such an emerging consensus on the international level and a change in approach to disability equality. To give full effect to the right to equality for persons with disabilities in Europe, the Court should pay due regard to the provisions of the CRPD in its interpretation of the ECHR.

2. The Vulnerable Groups Approach

In recent cases, the ECtHR seems to increasingly recognize the historical subordination and disadvantage faced by people with disabilities. In the past, the Court has applied the notion of "vulnerability"[40] to a number of groups that suffered oppression and subordination because of race or ethnicity, sex, and sexual orientation. But the application of the "vulnerability approach"[41] to disability is a recent development. There are strengths and weaknesses to this approach. On the one hand, the notion of group vulnerability may lead to further stigmatization of individuals with disabilities.[42] It is also contrary to the CRPD, which adopts an empowering approach to disability. On the other hand, because of this concept, the Court acknowledged that disability is a suspect ground of discrimination and in cases involving discriminatory treatment of people with disabilities, applied strict standard of scrutiny to decide whether the alleged violation of the rights of persons with disabilities under the ECHR exist.

3. The Doctrine of the Margin of Appreciation

The margin of appreciation is an expression of judicial deference that the Court utilized to protect the interests of the Member States.[43] It emanates from two fundamental aspects of the Court's interpretative methodology. First, the Court held that "the machinery of protection

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[39] *Id*. para. 85.
[40] The vulnerability theory was first developed in the U.S. by Martha Fineman and Ani Satz applied it to disability. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) and Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513 (2008).
[41] *See* Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 INT'L J. CONST. L. 1056 (2013).
[42] *See* Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11 HUM. RTS. L. REV. 707 (2011).
[43] *See* YUTAKA ARAITAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 231-49 (2002).

established by the Convention is subsidiary to the national systems safeguarding human rights."[44] Second, the margin of appreciation is consistent with the understanding of the Convention as a living instrument which should be interpreted in light of the practices and consensus of Member States.[45] In practice, when a controversial issue arises where no European consensus exists, the margin of appreciation works in favor of the defending State as long as the measure in question pursues legitimate aim and the means to that aim is appropriate and necessary.

In the context of article 14, the Court has maintained that the scope of the margin "will vary according to the circumstances, the subject matter and its background."[46] The case law demonstrates that the Court is more likely to allow a wide margin of appreciation where the discrimination claim involves the Member States' socio-economic policies.[47] With respect to specific suspect grounds, such as race, nationality, and disability, the Court tends to adopt strict scrutiny to assess whether the measure has a legitimate aim and adheres to proportionality, thereby limiting the application of the margin of appreciation to ensure that those vulnerable groups which have been subjected to historical subordination and segregation can enjoy common human rights guarantee among European states.

C. Important Case Law of the European Court of Human Rights on Disability

The sections below examine the development of disability rights in the ECtHR's case law in relation to articles 2 and 3 (the right to life and the prohibition on torture, inhuman and degrading treatment, respectively); article 5 (the right to liberty and security); article 8 (the right to private and family life); and article 14 of the ECHR (the right to non-discrimination). While the case law of the Court is extensive and the sections are not intended to be exhaustive, they present some of the most significant decisions of the Court to date pertinent to disability equality rights. The sections aim to demonstrate that the Court has striven to recognize the right to substantive equality in its jurisprudence, especially during the last decade. Substantive equality mandates different treatment to achieve equality for individuals with various characteristics.[48] This right is not only perceived as instrumental to the extent that it prohibits unjustifiable differential treatment to ensure equal enjoyment of the rights, but it is also pursued as an end in itself to make sure every individual

[44] *Handyside v United Kingdom*, Application no. 5493/72, 7 December 1976, para. 48.
[45] *See* Alastair Mowbray, *supra* note 37.
[46] *Inze v Austria*, Application no. 695/79, 28 October 1987, para. 41.
[47] *Stec and others v United Kingdom*, Application nos. 65731/01 and 65900/01, 12 April 2006.
[48] *See* Chapter Two, section II. B.

can pursue their life choices without social oppression and disadvantages on the basis of their personal characteristics. Since reasonable accommodation duty plays a critical role in securing substantive equality for persons with disabilities, the discussion below focuses on the Court's case law on article 14 in general, and other substantive articles in particular, to see the extent to which the CRPD has influenced the Court to locate a *de facto* reasonable accommodation duty to persons with disabilities.

1. *De facto* Reasonable Accommodation Duty in Prison or Institutional Settings

In cases involving articles 2 and 3 of the ECHR, particularly in prison or institutional settings, the Court appears to be more willing to locate a *de facto* reasonable accommodation duty to persons with disabilities. The main reason seems to be the grave nature of the treatment and the particularly vulnerable situation involved. Through examination of these cases, one can discern the extent to which the CRPD influences the Court's understanding of the reasonable accommodation duty from an equality perspective.

Prisoners with disabilities are confronted with numerous barriers that often require reasonable accommodations to ensure their rights are protected. [49] Article 15 (1) of the CRPD, like article 3 of the ECHR, contains a prohibition on torture, cruel, inhuman, or degrading treatment or punishment. States Parties are required under article 15 (2) of the CRPD "to take all effective legislative, administrative, judicial or other measures to ensure that persons with disabilities are prevented from being subjected to torture, inhuman or degrading treatment or punishment on an equal basis with others." Moreover, article 14 (2) of the CRPD provides:

> If persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Clearly, under the CRPD, reasonable accommodation is an indispensable element of disability equality when the liberty of persons with disabilities is deprived. To assert a violation of article 3 of the ECHR, a claimant must be able to show that her suffering exceeds certain minimum

[49] *See* Manfred Nowak, *Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/63/175, 28 July 2008, para. 38 [hereinafter "Nowak, *Interim report*"].

level of severity to constitute inhuman or degrading treatment.[50] In several cases, the ECtHR found a violation of article 3 where the authority did not consider the particular needs of an individual with a disability. One of the most famous cases is *Price v. United Kingdom*.[51] The applicant, Ms. Price, was a disabled woman using a wheelchair and was placed in state custody. The Court found the detention condition to be significantly inaccessible and reasoned that this arrangement amounted to degrading treatment under article 3. Notably, the Court ruled that the State was liable because it failed to accommodate the applicant's particular needs arising from her impairment.

As *Price* was decided before the adoption of the CRPD, it is not surprising that the Court neither used the language of reasonable accommodation nor framed the rights of people with disabilities in terms of equality or non-discrimination. In addition, the reasonable accommodation duty established in *Price* was confined only to institutional settings. Since the entry into force of the CRPD, the ECtHR has continued the trend to locate a *de facto* reasonable accommodation duty under article 3 of the ECHR. While the ECtHR refers to the CRPD in some cases, in other cases it does not mention the CRPD or reasonable accommodation duty at all. The subsection below provides an analysis of case law to see whether the CRPD exerts an influence on the Court to recognize the reasonable accommodation duty as an essential part of disability rights in institutional settings.

a. The ECtHR's Case Law on Disabled Prisoners

It appears that the Court, in some of its case law, becomes increasingly cognizant of relevant provisions of the CRPD in interpreting the rights of individuals with disabilities. One important case in this regard is *Jasinskis v. Latvia*.[52] The applicant was deaf and mute who had fallen down the stairs, hit his head, and been unconscious for some time. Because the domestic authorities did not communicate appropriately with him to provide adequate medical assistance, the applicant died after being held in police custody for 14 hours. His father alleged that the Latvian police and the investigation ensued violated Article 2 and article 3 of the ECHR. The Court repeated its findings in earlier cases that "[w]here the authorities decided to place and maintain in detention of a person with disabilities, they should demonstrate special care in guaranteeing such

[50] *See* Anna Lawson, *Disability Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies*, 16 INT'L. J. HUM. RTS. 845, 851 (2012).
[51] *Price v United Kingdom*, Application no. 33394/96, 10 July 2001 (2002).
[52] *Jasinskis v Latvia*, Application no. 45744/08, 21 December 2010 (2010).

conditions as corresponding to his special needs resulting from his disability."[53] Importantly, the Court referred explicitly to the CRPD, specifically article 14 (2), which requires States to provide reasonable accommodations where persons with disabilities are deprived of their liberty. The Court also quoted the Interim Report submitted by Manfred Nowak.[54] Paragraph 54 of the Report highlighted that article 14 (2) of the CRPD imposes on States a duty to make "appropriate modifications in the procedures and physical facilities of detention centers... to ensure that persons with disabilities enjoy the same rights and fundamental freedoms as others."[55] It is reasonable to conclude that the CRPD inspired the ECtHR to read some form of reasonable accommodation duty in this case.

In reaching the judgment, the Court emphasized that "States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge."[56] As the applicant was deaf and mute, the Court reasoned that the police had a clear obligation to provide him with means to communicate his concerns, *e.g.,* a pen and a piece of paper at least.[57] Consequently, the Latvian police violated Article 2 of the ECHR. The *Jasinskis* case clearly illustrates that while the Court did not specifically use the term "reasonable accommodation" in the judgment, it read some form of accommodation into its interpretation of article 2 of the Convention. This demonstrates the potential of the ECHR to include a reasonable accommodation duty for individuals with disabilities.

In the subsequent case of *Z.H. v. Hungary,*[58] the Court took a step forward to recognize the reasonable accommodation duty towards people with disabilities under the ECHR. The applicant was a Hungarian national who was deaf and had an intellectual disability. The applicant complained of a violation of article 3 in conjunction with article 5 (2)[59] of the ECHR, alleging that he could not understand the reasons for his arrest and that his ensuing detention constituted inhuman and degrading treatment contrary to article 3.

[53] *Id*. para. 59.
[54] *See* Nowak, *Interim report*, *supra* note 49.
[55] *Id*. para. 54.
[56] *Jasinskis v Latvia*, para. 59.
[57] *Id*. para. 66.
[58] *Z.H. v Hungary*, Application no. 28973/11, 8 November 2012.
[59] Article 5(2) of the ECHR provides that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Apart from referring to the CRPD, the Court, for the first time, cited article 2 of the CRPD for the definition of reasonable accommodation. Articles 13 and 14 (2) of the CRPD were also cited by the Court. The former requires States Parties to provide "procedural and age-appropriate accommodations" to disabled people in accessing justice; the latter requires the provision of reasonable accommodations to individuals with disabilities in detention. The Court employed the vulnerable groups approach to infer a *de facto* duty to provide reasonable accommodation to persons with disabilities in the context of article 3. Accordingly, the Court stated that "[g]iven that the applicant undoubtedly belongs to a particularly vulnerable group and that as such he should have benefited from reasonable steps on the side of the authorities to prevent situations likely to result in inhuman and degrading treatment."[60]

The Court admitted that the notion of "reasonable steps" is "quite akin to that of 'reasonable accommodation' in articles 2, 13 and 14 of the CRPD."[61] More importantly, the Court not only scrutinized the argument advanced by the State quite strictly, but it also redistributed the burden of proof, requiring the government to prove that it had taken sufficient measures to prevent inhuman and degrading treatment.[62] Shifting the burden of proof in such cases is crucial for the vulnerable groups to bring structural disadvantages to light. It shows respect for the equal worth and dignity to individuals with disabilities as the main focus of the cases would be on whether the State failed to prove that they have provided reasonable accommodation, rather than how much persons with disabilities have suffered.

As regards to article 5 (2), the Court reasoned that if the unique needs of an intellectually disabled person are not adequately accommodated, he would not be able to, without the requisite information, "make effective and intelligent use of the right ensured by article 5 (4) to challenge the lawfulness of detention."[63] In the Court's view, once the police officers realized that no meaningful communication with the applicant was possible, they should have sought assistance rather than simply asked the applicant to sign the minutes of the interrogation. Therefore, the Court concluded that there was a violation of article 5 (2) of the ECHR.[64]

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[60] *Z.H. v Hungary*, para. 31.
[61] *Id*. para. 43.
[62] *Id*. para. 31.
[63] *Id*. para. 41.
[64] *Id*. para. 44.

The *Z.H.* case exemplifies that the Court has a growing awareness of the individual provisions of the CRPD concerning duty of reasonable accommodation. The Court is willing to draw explicitly on those provisions to inform its interpretation of *de facto* reasonable accommodation for the specific rights at issue under the ECHR. Nonetheless, the Court still seems reluctant to locate the reasonable accommodation duty within the general non-discrimination norm in article 14 of the Convention. In other words, the Court has yet to perceive reasonable accommodation as an essential element of disability equality, which is indispensable to rectify the disadvantages experienced by persons with disabilities.

In *Grimailovs v. Latvia*, [65] the Court also quoted the definition of reasonable accommodation from the CRPD as well as the obligation to provide reasonable accommodation to persons with disabilities in detention contained in article 14 (2). The applicant was a wheelchair user complaining that the prison facilities were unsuitable for him as there was no assistance to help him with daily activities.[66] Therefore, he had to rely on the assistance of his cellmate, "even though they had not been trained nor had the necessary qualifications to provide such assistance."[67] The Court contended that the State failed to pay due regard to the applicant's particular needs. It noted that "the help offered by the applicant's cellmate did not form part of any organized assistance by the State to ensure that the applicant was detained in conditions compatible with respect for his human dignity."[68] Accordingly, the Court stated that "[i]t cannot therefore be considered suitable or sufficient in view of the applicant's physical disability."[69] Consequently, the Court viewed the lack of organized assistance as constituting degrading treatment contrary to article 3 of the ECHR.[70]

b. The Potential Influence of the CRPD on the Interpretation of Articles 2 and 3 of the ECHR

While it is not always consistent in its case law, there is an increasing recognition by the Court that some form of reasonable accommodation is necessary to ensure equal enjoyment of rights by people with disabilities in institutional settings, *inter alia*, prisons. Nevertheless, the

[65] *Grimalovs v. Latvia*, Application no. 6087/03, 25 June 2015.
[66] *Id*. para. 121.
[67] *Id*. para. 161.
[68] *Id*.
[69] *Id*.
[70] *Id*. para. 162.

Court "appears reluctant to specify the exact duty to accommodate which States bear in the disability context."[71] In contrast to the Court's restricted case law in this regard, the ongoing development of the reasonable accommodation duty by the CRPD Committee through individual and group communications, General Comments, and Concluding Opinions on the reports of states may further influence the Court to elucidate the scope of States Parties' duty towards persons with disabilities in institutional settings under the ECHR.

2. Accessibility and Reasonable Accommodation for Persons with Disabilities

Article 8 (1) of the ECHR[72] requires States Parties to respect private and family life, home, and correspondence. The ECtHR has interpreted the constituent elements of article 8 (1) quite expansively. It developed a wide range of negative and positive obligations pertinent to article 8. In the disability context, three aspects covered by the concept of "private life" are relevant: "physical and psychological integrity," "the right to autonomy or self-determination," and "the right to establish relationships with other human beings."[73]

The Court's analysis of article 8 incorporates two factors: First is the existence of a "direct and immediate link" between the measures requested by an applicant and her private and family life; Second is the striking of a fair balance between individual's interests and general interest of society at large.[74] The Court acknowledged that States Parties have positive obligations to guarantee respect for the private life of persons with disabilities. In several cases, it connected the concept of private life with accessibility measures and reasonable accommodation. It has stated that the lack of access to public or residential buildings affects the rights of persons with disabilities in such a way as to interfere with the "right to personal development" and the "right to establish and develop relationships with other human beings and the outside world."[75] However, the Court has been criticized as inconsistent or incoherent in its approach to dealing with claims on article 8.

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[71] *See* BRODERICK & FERRI, INTERNATIONAL AND EUROPEAN, *supra* note 5, at 346.

[72] Article 8 of the ECHR provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[73] *See* Paul Bowen, *Article 8 and 'private life': the Protean Right*, ALBA Seminar, Dought Street Chambers, 6-8 (2010), available at https://adminlaw.org.uk/wp-content/uploads/ALBA-Seminar-Article-8-and-private-life.pdf.

[74] *Botta v. Italy*, Application no. 21439/93, 24 February 1998; *Zehnalova and Zehnal v. the Czech Republic*, Application no. 38621/97, 14 May 2002; *Sentges v. Netherlands*, Application no. 27677/02, 8 July 2003.

[75] *Zehnalova and Zehnal v. the Czech Republic*, para. 12.

It generally grants states a very wide margin of appreciation[76] when it comes to positive obligations. In particular, the financial aspect of claims restricted the Court's intervention in cases giving rise to positive obligations.[77]

a. General Accessibility Measures

Botta v. Italy[78] and *Zehnalova and Zehnal v. the Czech Republic*[79] were two cases concerning general accessibility measures. The applicants in both cases were physically disabled, who claimed, respectively, that their right under article 8 of the ECHR had been violated because a private beach and public buildings were not accessible to individuals with impaired ability. The claim in *Botta* was rejected because the Court found that there was no conceivable direct and immediate link between the measures the State was required to implement and the applicant's private life.[80] In this connection, the Court ruled that "the right asserted by Mr. Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope."[81]

Similarly, in *Zehnalova and Zehnal v. the Czech Republic*, the Court rejected the application of article 8 of the ECHR. In that case, the applicant complained about the inaccessibility of most public (government) buildings and buildings open to the public in her hometown. The Court emphasized that "article 8 applies only in exceptional cases where her lack of access to public buildings and buildings open to the public affects her life in such a way as to interfere with her right to personal development and her right to establish and develop relationships with other human beings and the outside world."[82] As the applicants have not offered precise details of the alleged obstacles and persuasive evidence of any interference with their private life, the Court denied the existence of such a direct and immediate link in this case.

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[76] *See* Colm O'Cinneide, *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities, in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 184 (Oddny Mjoll Arnardottir & Gerard Quinn eds., 2009).
[77] *See* Dimitris Xenos, *The Human Rights of the Vulnerable*, 13 THE INT'L J. OF HUM. RTS. 591, 604 (2009).
[78] *Botta v. Italy*, Application no. 21439/93, 24 February 1998.
[79] *Zehnalova and Zehnal v. the Czech Republic*, Application no. 38621/97, 14 May 2002.
[80] *Botta v. Italy*, para. 35.
[81] *Id.*
[82] *Zehnalova and Zehnal v. the Czech Republic*, para. 12.

b. Reasonable Accommodation Measures

The "direct and immediate link" was found to exist in *Sentges v. Netherlands*.[83] In contrast to *Botta* and *Zehnalova,* where the applicants requested the adoption of general accessibility measures, in the case of *Sentges,* the central claim was whether the State had obligations to adopt personalized accommodations tailored to the needs of the particular applicant in question.[84] In this case, the applicant suffered from Duchenne Muscular Dystrophy and was completely dependent on assistance from others for daily activities. The applicant claimed that the State did not fulfill its obligations under article 8 of the ECHR to provide him with a robotic arm, costing approximately €36,000. He asserted that the domestic authorities violated his right under article 8 of the Convention to "respect for private life and, more specifically, his right to establish and develop relationships with other human beings as well as his right to self-determination."[85] However, the Court ruled that the State had already provided the applicant some assistance (an electric wheelchair with an adapted joystick), and that further support sought by the applicant would impose a stringent financial burden. On the whole, the Court granted the State a wide margin of appreciation.

Nevertheless, the approach adopted by the Court in *Sentges* has been criticized as being inconsistent with its established jurisprudence of article 8.[86] Instead of first considering whether a direct and immediate link exists, the Court went directly to the balancing stage of its analysis, balancing the interest of the applicant with that of the society at large. Though this may not affect the outcome of the case, the kind of reasoning error is something the Court should avoid to maintain the legitimacy of its judgments.

Several judgments, adopted after the entry into force of the CRPD, focused on the violation of article 8 read in conjunction with article 14 of the ECHR. Those cases concerned reasonable accommodations rather than general accessibility measures. In *Bayrakci v. Turkey*,[87] an employee

[83] *Sentges v. Netherlands*, Application no. 27677/02, 8 July 2003.
[84] *See* Oliver de Shutter, *Reasonable Accommodation and Positive Obligations in the European Convention on Human Rights, in* DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE 53 (Anna Lawson & Caroline Gooding eds., 2005).
[85] *Sentges v. Netherlands*, para. 5.
[86] *See* Lisa Waddington, *Unravelling the Knot: Article 8, Private Life, Positive Duties and Disability: Rewriting Sentges v. the Netherlands, in* DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 341 (Eva Brems ed., 2013) [hereinafter "Waddington, *Unravelling the Knot*"].
[87] *Bayrakci v. Turkey*, Application no. 2643/09, 28 February 2013.

with a disability alleged a lack of suitable toilet facilities at his workplace. The Court ruled that the notion of private life is a broad one, and, therefore, the complaint fell within the scope of article 8. The ECtHR contended that the absence of toilets adapted to the applicant's disability at his workplace had the potential to have real and serious consequences for the applicant's daily life. The Court highlighted that the failure to install a toilet adapted to the applicant's needs may have given rise to feelings of humiliation and distress that had the potential to affect his autonomy and, therefore, the quality of his private life.[88] Although this case was declared inadmissible for failure to exhaust domestic remedies, the statements of the Court suggested that a violation of article 8 in conjunction with article 14 of the ECHR might be recognized if the complaint had not been deemed inadmissible.

In addition, the ECtHR considered the role of reasonable accommodation in the exercise of article 8 rights in *Kacper Nowakowski v. Poland*.[89] The case concerned the rights of a deaf and mute father to contact his son, who was also hearing-impaired. The applicant complained that he was discriminated against as his request to contact his son was dismissed because of his disability. Since the child's mother was able to communicate both orally and in sign language, the national court facilitated contact arrangements with her to initiate contact between the applicant and his son. Nonetheless, the Court noted that the national court "ignored the existing animosity between the parents and the frequent complaints by the applicant that the mother had attempted to obstruct contact and to marginalize his role."[90] The ECtHR referred to the specific needs of persons with disabilities in the context of an alleged violation of the right to respect for family life under article 8 read in conjunction with article 14 of the ECHR. It emphasized that "the domestic courts should have envisaged additional measures, more adapted to the specific circumstances of the case," and that "having regard to the specifics of the applicant's situation and the nature of his disability, the authorities were required to implement particular measures that took due account of the applicant's situation."[91] It is particularly noteworthy that the Court referred to article 23 (2) of the CRPD, which provides that "State Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities."

[88] *Id.* para. 26.
[89] *Kacper Nowakowski v. Poland*, Application no. 32407/13, 10 January 2017.
[90] *Id.* para. 91.
[91] *Id.* para. 93.

c. The Potential Influence of the CRPD on the Interpretation of Article 8 of the ECHR

The ECtHR has interpreted the constituent elements of article 8 (1) quite expansively. It developed a wide range of negative and positive obligations pertinent to article 8. In the disability context, three aspects are covered by article 8 (1), which include: "physical and psychological integrity," "the right to autonomy or self-determination," and "the right to establish relationships with other human beings."[92] The provision of reasonable accommodation to persons with disabilities plays an indispensable role in realizing all these aspects fully and effectively.

The Court in *Botta* and *Zehnalova and Zehnal* denied the applicants' claims because of the lack of "direct and immediate link" between the measures the State was required to implement and the applicant's private life. However, it is important to distinguish between accessibility measures and reasonable accommodation duties. While both aim to achieve *de facto* equality for persons with disabilities, the former is an ex nunc duty, whereas the latter is an ex ante duty.[93] Accessibility requirement relates to groups and must be built into systems and processes without regard to the need of a particular person with a disability; in contrast, reasonable accommodation is an individualized reactive duty that is usually applied from the moment an accommodation request is received.[94] Moreover, accessibility measures must be implemented unconditionally, but the duty of reasonable accommodation may be limited by disproportionality.[95] Because the realization of accessibility may take time, reasonable accommodation as an immediate duty "can be used as a means of ensuring accessibility for an individual with a disability in a particular situation."[96] The primary deficiency of the ECtHR's requirement of "direct and immediate link" in the two cases is that it failed to consider the possibility the State may have obligation to provide reasonable accommodation to the applicants. The interpretation and application of the equality and non-discrimination norms by the CRPD Committee can potentially provide valuable guidance for the ECtHR to include the duty of reasonable accommodation for persons with disabilities in its interpretation of article 8 of the ECHR.

Furthermore, several rights contained in the CRPD are potentially relevant to the interpretation of article 8 of the ECHR. For example, article 12 on equal recognition before the

[92] *See* Paul Bowen, *supra* note 73.
[93] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 24.
[94] *Id*. para. 24 (a) & (b).
[95] *Id*. para. 41.
[96] CRPD Committee, General Comment No. 2 (2014) on *Accessibility*, CRPD/C/GC/2, para. 26.

law, article 17 on the protection of physical and mental integrity, as well as article 19, which requires States Parties to take effective and appropriate measures to facilitate full inclusion and participation in the community, can potentially shed light on the interpretation of article 8 of the ECHR. Lisa Waddington suggests that the CRPD may lead the ECtHR to find that states "have a narrower margin of appreciation with regard to article 8, to the extent that the right protected by article 8 is also protected by the CRPD."[97] While the scope of article 8 under the ECHR may not cover the widespread claims by applicants for general accessibility measures, there is great potential for the incorporation of the reasonable accommodation duty into rights protected by article 8.

3. Article 14 of the ECHR: Discrimination on the Ground of Disability and Reasonable Accommodation

Article 14 of the ECHR[98] explicitly enumerates a list of grounds of discrimination. Notably, neither article 14 nor Protocol No. 12 to the ECHR[99] refers expressly to disability as a protected ground of discrimination. Notwithstanding this, the Court in *Glor v. Switzerland*,[100] established that disability-based discrimination falls under the ground of "other status" in article 14.

a. Disability as A Protected Ground

Shortly after the entry into force of the CRPD, the Court decided the first ground-breaking case with respect to violation of the right to non-discrimination on account of disability. The central issue in *Glor* revolved around the application of military service tax. Swiss law required the payment of the tax by all who did not carry out military service. But those who have a major disability, defined as a physical or psychosocial disability reaching a threshold of 40 percent, were exempted from the tax. The applicant, Mr. Glor, suffered from diabetes and was unsuitable for military service. He was required to pay the tax because his condition did not meet the threshold of 40 percent physical or psychosocial disability. While those who objected to military service on the grounds of conscience were allowed to do substitute civilian service instead, this was not an

[97] *See* Waddington, *Unravelling the Knot*, *supra* note 86, at 349.
[98] Article 14 of the ECHR provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
[99] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 177, 4 November 2000, in force 1 April 2005.
[100] *Glor v. Switzerland*, Application no. 13444/04, 30 April 2009.

option for persons with a minor disability. Mr. Glor alleged that the disability threshold was discriminatory and violated article 14 of the ECHR. Firstly, the Court recognized that protected grounds of discrimination in article 14 are not exhaustive and that discrimination based on disability is covered under the "other status."[101] Further, the Court appeared to have been significantly influenced by the entry into force of the CRPD and referred to the CRPD as a "European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment."[102] Significantly, because of the "need to prevent discrimination against people with disabilities and foster their full participation and integration in society,"[103] the Court adopted a heightened standard of scrutiny, ruling that "the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced."[104]

In considering whether the reasons for the differential treatment between persons with minor disabilities and conscientious objectors and between people with different level of disabilities were objective and reasonable, the Court suggested some viable alternatives, namely "activities which, although carried out within the armed forces, required less physical effort and could therefore be performed by people like the applicant."[105] The Court concluded that the Swiss authorities did not strike an appropriate balance between respect for the rights of the applicant and the protection of the interests of the community as a whole.[106] This demonstrates that the Court is willing to take into account the potential special measures that States can take to accommodate the needs of, and facilitate the rights of, persons with disabilities. The case of *Glor* illustrates the Court's implicit recognition of some form of reasonable accommodation duty within article 14 of the ECHR.

Following the wake of the *Glor* judgment, in *Alajos Kiss v. Hungary*,[107] the Court adopted a standard of strict scrutiny and the vulnerability approach in the context of mental disability.[108] This case dealt with the automatic disenfranchisement of a man who had manic depression and was under partial guardianship. Although the case was decided under article 3 of Protocol No. 1

[101] *Id.* para. 80.
[102] *Id.* para. 53.
[103] *Id.* para. 84.
[104] *Id.*
[105] *Glor v. Switzerland*, para. 94.
[106] *Id.* para. 96.
[107] *Alajos Kiss v. Hungary*, Application no. 38832/06, 20 May 2010.
[108] *Id.* paras. 42, 44.

to the ECHR,[109] not under article 14, essentially disability discrimination is a core issue. To a certain extent, the CRPD seemed to influence the Court's assessment of the case. The Court explicitly referred to articles 12 and 29 of the CRPD, which concern the rights to legal capacity and participation in political and public life. Moreover, the Court narrowed the margin of appreciation in this case, reasoning that:

> if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.[110]

In that regard, the Court stated that "the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny."[111] As a result, the Court ruled unanimously that "an indiscriminate removal of voting rights, without an individualized judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote."[112] So the blanket denial of voting rights to persons with mental disabilities violated article 3 of Protocol No. 1 to the ECHR.

Nevertheless, upon closer examination, the *Alajos Kiss* judgment appears to be more promising than it is in reality. The Court's finding is based primarily on its disapproval of a blanket ban on the voting rights of persons with disabilities, rather than the systemic disadvantage encountered by persons with disabilities in participating in political life.[113] An individualized assessment of a person's fitness to vote could, according to the Court, legitimately lead to the denial of voting right to that person.[114] However, it failed to consider that alternative measures may be required to secure the full participation of individuals with disabilities in political life. Articles 12 and 29 of the CRPD mandate support for persons with disabilities to enable their

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[109] Article 3 of Protocol 1 to the ECHR provides that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."
[110] *Alajos Kiss v. Hungary*, para. 42.
[111] *Id.* para. 44.
[112] *Id.*
[113] *See* Andrea Broderick, *Emerging Trends in the Jurisprudence of the European Court of Human Rights: The Right to Education for Persons with Disabilities, in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 435 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord eds., 2019).
[114] *Alajos Kiss v. Hungary*, para. 44.

exercise of legal capacity and participation in political life. If the Court interprets the ECHR in the light of the CRPD, it should have deliberated on the potential measures which could facilitate equal exercise of the voting right by people with disabilities. It is reasonable to suspect that the Court has not yet taken into account the standards contained in the CRPD. Besides, its approach also contravenes that of the social model of disability underpinning the CRPD because individualized assessment of a person's fitness to vote merely measures functional deficiencies but not socially constructed barriers.

In *Caamaño Valle v. Spain*[115] the Court again dealt with the issue of restrictions on the voting right of persons with mental disabilities who have been declared incapacitated by a judicial decision. The Court accepts that the measure complained of pursued a legitimate aim as it ensures that "only citizens capable of assessing the consequences of their decisions and of making conscious and judicious decisions should participate in public affairs."[116] Further, consistent with its reasoning in *Alajos Kiss*, the Court noted that the removal of the applicant's daughter's voting right was based on an individualized examination of the applicant's daughter's situation. Therefore, the Court concluded that the disenfranchisement was not disproportionate to the legitimate aim pursued.[117]

However, as noted by the dissenting Judge Lemmens, though the measure complained of pursued a legitimate aim, "it had a disproportionate effect on the applicant's daughter's right to vote."[118] In this regard, the dissenting opinion points out that a surrogate may be designated for a person with a mental or cognitive disability to vote on that person's behalf.[119] Voting is one of the essential functions of citizenship. The exclusion of people with certain disabilities from the right to vote implies that they are relegated as second-class citizens and thus, are deprived "of any possibility of influencing the political process and the chance of shaping the policies and measures that directly affected their lives."[120] Such measure perpetrated entrenched stigma against persons with intellectual and psychosocial disabilities.

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[115] *Caamaño Valle v. Spain*, Application no. 43564/17, 11 May 2021.
[116] *Id.* para. 64.
[117] *Id.* paras. 72, 73.
[118] *Caamaño Valle v. Spain*, dissenting opinion of Judge Lemmens, para. 11.
[119] *See* Martha Nussbaum, *The Capabilities of Persons with Cognitive Disabilities*, 40 (3-4) METAPHILOSOPHY, 331, 347, *cited in Caamaño Valle v. Spain*, dissenting opinion of Judge Lemmens, para. 7.
[120] *Caamaño Valle v. Spain*, para. 47.

As regards the margin of appreciation, the majority noted a lack of consensus among the States Parties to Protocol No. 1 in the sense of an unconditional right of persons with a mental disability to exercise their right to vote.[121] In this connection, it referred to a report adopted in 2014 by the European Union Fundamental Rights Agency (FRA), which specifying that only seven of the 28 EU Member States at that time guaranteed the right to vote for all persons, including those without legal capacity.[122] Nonetheless, in a later report in 2019, the FRA noted "slow but steady progress in realizing the right to vote for all."[123] The FRA found that the reforms at the national level "demonstrate a clear trend towards reducing restrictions on the right to vote of people with disabilities deprived of legal capacity."[124]

The CRPD Committee is of the opinion that persons with disabilities should not be deprived of the right to vote on the basis of any perceived or actual mental disability and that support should be provided by States Parties to enable them to exercise their legal capacity.[125] The majority, while admitting that the Convention (ECHR) should be interpreted, as far as possible, in harmony with other rules of international law, underlined that "the Court is not bound by interpretations given to similar instruments by other bodies."[126] Though that statement is correct in general, the Court's reliance on a lack of consensus as a justification for a wider margin of appreciation is troubling. The existence of a consensus or a lack of it could potentially exacerbate existing prejudices and discriminatory stereotypes for people with disabilities. Since the CRPD has been ratified by 45 of the 47 member States of the Council of Europe (except for Liechtenstein and Ukraine), if more States start to reform domestic legislation to be compatible with the CRPD, this will put pressure on the Court to interpret the ECHR to reflect developments in international disability rights law and the increasingly high standard being required for the protection of equality rights for persons with disabilities.

[121] *Id.* para. 59.
[122] *Id.* para. 27.
[123] European Union Fundamental Rights Agency, *Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States*, 3 (2019).
[124] *Id.*
[125] *See* Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) on *Article 12: Equal recognition before the law*, CRPD/C/GC/1 and *Zsolt Bujdosó and Others v. Hungary*, Communication no. 4/2011, CRPD/C/10/D/4/2011 (September 9, 2013).
[126] *Caamaño Valle v. Spain*, para. 54.

b. The Recognition of the Duty of Reasonable Accommodation under the ECHR Non-Discrimination Provision

In a series of recent cases, decided under article 14 of the ECHR in conjunction with article 2 of Protocol No. 1 concerning the right to education, the Court appears to be cognizant of the educational disadvantage encountered by individuals with disabilities. One of the most important cases in the field of non-compulsory education for persons with disabilities is *Cam v. Turkey*.[127] The applicant had visual impairment and was denied enrollment into the Turkish National Music Academy. The applicant complained that her right to education under article 2 of Protocol No. 1 and article 14 of the ECHR was violated and that the Turkey Government failed to provide students with disabilities with equal opportunities in accessing education. The Court found a violation of both articles. On the importance of positive measures, the ECtHR referred to the reasonable accommodation duty enshrined in article 2 of the CRPD[128] to ensure that students with disabilities could enjoy the right to education on a non-discriminatory basis. Significantly, the Court considered the refusal to provide reasonable accommodation to be disability-based discrimination and heavily criticized the national authorities for making no attempt to identify the applicant's specific needs and for not tailoring its music lessons to students with visual impairments.[129] It is noteworthy that the applicant had not even raised a claim of denial of reasonable accommodation. In this case, the Court apparently interpreted the ECHR in the light of the CRPD and held that persons with disabilities should be provided with reasonable accommodations, which "help to correct inequalities which are unjustified and therefore amount to discrimination."[130]

In a later case, *Enver Sahin v. Turkey*,[131] the applicant was paraplegic and was, therefore, unable to access the buildings of Firat University in Turkey. The applicant complained of a violation of his right to education under article 2 of Protocol No. 1 in conjunction with article 14 of the ECHR, alleging that he was obliged to give up his studies because the institution refused to adapt the relevant facilities upon his request. The Court affirmed that article 14 of the ECHR must be read in the light of the CRPD's reasonable accommodation duty. The Court found a violation

[127] *Cam v. Turkey*, Application no. 51500/08, 23 February 2016.
[128] *Id.* para. 65.
[129] *Id*. para. 68.
[130] *Id*. para. 65.
[131] *Enver Sahin v. Turkey*, Application no. 23065/12, 30 January 2018.

of article 14 taken in conjunction with article 2 of Protocol No. 1 to the ECHR,[132] ruling that the University should have looked for alternative solutions to enable the applicant to resume his studies under conditions as close as possible to those provided to the non-disabled students, without imposing an undue or disproportionate burden.[133]

The *Sahin* judgment reflected a strong endorsement of the right to inclusive education. Inclusive education is central to achieving high-quality education for all learners. Many millions of persons with disabilities continue to be denied the right to education; for many others, education is available only in settings where they are separated and isolated and where the education they receive is of inferior quality. Therefore, article 24 of the CRPD and General Comment No. 4 on inclusive education[134] of the CRPD Committee emphasize the importance of States' obligation to ensure the realization of the right of people with disabilities to education through an inclusive education system. Besides, it is noteworthy that in this judgment, the Court drew extensively on the provisions of the CRPD, including articles 2 and 5 on the reasonable accommodation, article 9 on accessibility, and article 20 on the right to personal mobility.

Apart from the educational context, *Guberina v. Croatia*[135] is another case in which the ECtHR referred to the CRPD's duty of reasonable accommodation. In that case, the applicant, Mr. Guberina, who was the father of a severely disabled child, requested a tax exemption on the purchase of a new property to accommodate his child's needs. According to the national legislation, tax exemptions were available to buyers who moved in order to solve housing needs when the previously owned property did not satisfy basic infrastructure requirements. In his request, Mr. Guberina argued that accessibility constituted a basic infrastructure requirement to satisfy his family's housing needs. However, the national tax authorities dismissed his request without considering the needs of his child when determining his eligibility for tax exemptions. Mr. Guberina claimed a violation of articles 8 and 14 in conjunction with Protocol No. 1 to the ECHR. The ECtHR ruled that there was a violation of non-discrimination in article 14 in conjunction with article 1 of Protocol No. 1 to the ECHR as the domestic authorities failed to recognize the particular

[132] *Id.* para. 75.
[133] *Id.* para. 72.
[134] Committee on the Rights of Persons with Disabilities, General Comment No. 4 (2016) on *Inclusive Education*, CRPD/C/GC/4.
[135] *Guberina v. Croatia*, Application no. 23682/13, 22 March 2016.

circumstances of the applicant concerning basic infrastructure and accessibility requirements.[136] Notably, in deciding the case, the Court referred extensively to CRPD provisions addressing reasonable accommodation, equality and non-discrimination, and accessibility, among others, as well as the CRPD Committee's General Comment No. 2 on Accessibility.[137] This case indicates that the Court is taking a meaningful move towards substantive equality since the Court places particular emphasis on the role that accessibility played in the lives of persons with disabilities.

The recent interpretation of article 14 of the Convention demonstrates that the ECtHR is becoming more cognizant of systemic inequality and structural disadvantage faced by vulnerable individuals and groups, *e.g.*, persons with disabilities. Influenced by the CRPD, the Court is more willing to incorporate some form of reasonable accommodation duty into its interpretation of the ECHR. This has great potential to lead the Court to correct inequalities and discrimination encountered by people with disabilities.

4. Subconclusion: *De facto* Reasonable Accommodation Duty under the ECHR

The jurisprudence of the ECtHR shows that the Court is steadily moving towards a substantive understanding of the right to equality and non-discrimination. Article 14 of the ECHR is potentially a promising avenue for the CRPD to exert influence on the Court concerning disability equality. Apart from recognizing *de facto* reasonable accommodation duty in cases related to article 2 and, in particular, article 3 of the ECHR, the Court has also recognized a duty to accommodate individuals with disabilities in other aspects. Reasonable accommodations are important to correct for factual inequalities faced by disabled people and to increase their participation and inclusion in society. Some recent case law indicates that the ECtHR has increasingly recognized the importance of the duty of reasonable accommodation in ensuring substantive equality for persons with disabilities. It remains to be seen whether the Court will further develop some form of reasonable accommodation duty under article 14 of the ECHR.

As the doctrine of "margin of appreciation" has played a crucial role in the jurisprudence of the European Court of Human Rights, there is a valid concern that this concept might weaken or undermine equality and non-discrimination norms, reasonable accommodation duty, and the object and purpose of the CRPD. For example, certain aspects of the ECtHR's approach to the

[136] *Id.* paras. 98-99.
[137] *Id.* paras. 34-35.

margin of appreciation might conflict with the CRPD, such as the use of "consensus" as a justification for the margin would likely reinforce prejudices and discriminatory stereotypes in the disability context. On the other hand, the Court perceives disability as a suspect ground and adopts strict scrutiny to assess whether the states' measures have a legitimate aim and adhere to proportionality, thereby limiting the application of the margin of appreciation to ensure that those vulnerable groups which have been subjected to historical subordination and disadvantage can enjoy equal human rights guarantee among European states. The ECtHR must be cautious when utilizing the margin of appreciation in interpreting equality rights to avoid unduly restricting the enjoyment of all human rights and fundamental freedoms of people with disabilities on an equal basis with others.

There are reasons to be optimistic about the prospect that the CRPD will influence the Court to include the duty of reasonable accommodation for persons with disabilities in the interpretation of the non-discrimination provision. On the one hand, the Court adopts an interpretative approach by which the provisions of the ECHR have to take into account existing international and European standards and practices. The entry into force of the CRPD represents a strong global consensus on the need to ensure that people with disabilities enjoy their human rights and fundamental freedoms on an equal basis with others. On the other hand, given that most Member States of the Council of Europe have ratified the CRPD, they are obliged to include the reasonable accommodation duty in their legislation. This would significantly influence the Court in its interpretation of the ECHR rights. The Court should incorporate reasonable accommodation duty into its interpretation of substantive rights and the non-discrimination provision of the ECHR to more fully and effectively ensure the equal rights protection of persons with disabilities in Europe.

IV. The European Committee of Social Rights, the European Social Charter, and the Revised Charter in Protecting the Rights of Persons with Disabilities

This section focuses on another major human rights instrument in the CoE, the European Social Charter (ECS or the Charter), which was revised in 1996. Unlike the ECHR, the ESC contains a provision related specifically to the rights of persons with disabilities. I will explore the most relevant provisions of the Revised Charter and opinions of the European Committee of Social Charter (ECSR or the Committee) concerning the rights of persons with disabilities.

A. The European Committee of Social Rights

The European Committee of Social Rights was a quasi-judicial body established by the 1961 original European Social Charter (ECS or the Charter), a document updated by a Revised Charter in 1996. The two texts differ significantly and operate in parallel as some States have ratified the original Charter but not the revised version. Unlike the ECHR, the Charter does not allow individual complaints to the Committee. A system of collective complaints was established whereby certain organizations could apply to be entered in a list of those entitled to lodge collective complaints.[138] Collective complaints may be lodged without domestic remedies being exhausted and without the claimant organization being a victim of the relevant violation. The Committee issues reports that contain conclusions about whether the State "has ensured the satisfactory application of the provision of the Charter referred to in the complaint."[139] Reports are made public and sent to the Committee of Ministers for review. In contrast to the judgment of the ECtHR, neither the ECSR nor the Committee of Ministers has the authority to order the State to take any action to give effect to the Committee of Ministers recommendation.[140]

Notably, the ECSR seems to have a "fairly strong record of looking to treaty bodies jurisprudence to guide its work."[141] In that regard, Janet Lord and Rebecca Brown refer to *Mental Disability Advocacy Center (MDAC) v. Bulgaria*,[142] in which the General Comment of the UN Committee on Economic, Social and Cultural Rights was drawn on to aid in interpreting the provisions of the Revised Charter. In its more recent decision, *Mental Disability Advocacy Center (MDAC) v. Belgium*,[143] the ECSR also mentions General Comment No. 4 (on inclusive education) of the CRPD Committee[144] in the context of international law relevant to the facts of the case at issue.[145]

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[138] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, article 1.
[139] *Id*. article 8.
[140] *Id*. article 10.
[141] *See* Janet Lord & Rebecca Brown, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities, in* CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY POLICY 292 (Marcia H. Rioux, Lee Ann Basser & Melinda Jones eds., 2011) [hereinafter "Lord & Brown, *The Role of Reasonable Accommodation*"].
[142] *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, European Committee of Social Rights, 3 June 2007.
[143] *Mental Disability Advocacy Center (MDAC) v. Belgium*, Complaint No. 109/2014, European Committee of Social Rights, 16 October 2017.
[144] Committee on the Rights of Persons with Disabilities, General Comment No. 4 (2016) on *Inclusive Education*, CRPD/C/GC/4.
[145] *See* BRODERICK & FERRI, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY, *supra* note 5, at 454.

B. The European Social Charter and the Revised Charter

The Charter was intended to be the sister of the ECHR. However, it was entirely overshadowed by its more famous sibling from both the literature and the paucity of cases.[146] Article 15 of the ESC mandates that States Parties undertake to adopt adequate measures to provide training facilities to disabled persons and to adopt measures to encourage employers to employ individuals with disabilities. The Charter was revised in 1996 to reflect changes at the international level. As an example, the Revised Charter updated the concept of disability to reflect the human rights model of disability, rather than the outdated medical model contained in the ESC. Article 15 of the Revised Charter provides for the rights of persons with disabilities to independence, social integration, and participation in the life of the community.[147]

The explanatory report to the Revised Charter describes States Parties' obligations under the new scope of article 15 as that: "Parties must aim to develop a coherent policy for people with disabilities. The provision takes a modern approach to how the protection of the disabled shall be carried out, for example by providing that guidance, education and vocational training be provided whenever possible in the framework of general schemes rather than in specialized institutions."[148] The explanatory report concludes that article 15 "not only provides the possibility, but to a large extent obliges Parties to adopt positive measures for the disabled."[149]

Nonetheless, though article 15 of the Revised Charter emphasizes social integration and participation of persons with disabilities in the community, it is less progressive than the CRPD. For instance, it provides that States Parties should arrange for sheltered employment, where open labor market participation is not possible. In certain cases, measures such as specialized placement may be required. By contrast, the CRPD mandates open labor market participation by individuals with disabilities. It emphasizes the importance of reasonable accommodation duty and accessibility measures through which the capabilities of individuals with disabilities can be realized. As a result, ECSR should pay careful attention to the CRPD in interpreting the articles of

[146] *See* Shivaun Quinlivan, *Emerging Jurisprudence on Inclusive Education under the European Social Charter (Revised), in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 448 (Gauthier de Beco, Shivaun Quinlivan & Janet E. Lord eds., 2019).
[147] *See* BRODERICK & FERRI, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY, *supra* note 5, at 451-52.
[148] European Social Charter (revised) (CETS No. 163), para. 64.
[149] *Id*.

the Revised Charter to ensure that the rights of persons with disabilities are protected in line with changing international norms.

Apart from article 15, article 10 of the Revised Charter requires States Parties to ensure the effective exercise of the right to vocational training. Article 17 contains the rights of children and young persons (including children with disabilities) to social, legal, and economic protection. Another critical article is article E of the Revised Charter,[150] which contains a cross-cutting non-discrimination norm.[151]

C. Collective Complaints

1. Pre-CRPD Collective Complaints

Prior to the adoption of the CRPD, the ECSR has dealt with two important collective complaints on the rights of children with disabilities to education. The first one is *International Association Autism Europe v. France*.[152] In the case, a significantly larger proportion of autistic children was educated in specialist schools compared to that of non-disabled children. The Committee affirmed that the basic premise "of Article 15 is one of equal citizenship for persons with disabilities."[153] Further, "[s]ecuring a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights."[154] The Committee found that a high proportion of autistic children did not receive an appropriate education because French authorities "failed to achieve sufficient progress in advancing the provision of education for persons with autism."[155] As a result, the Committee ruled that France was in breach of article 15 (1) with respect to the right of persons with disabilities to education and article 17 (1) whether alone or in combination with article E of the Revised Charter.

In *Mental Disability Advocacy Center (MDAC) v. Bulgaria*,[156] the main issue was whether a group of children with moderate, severe or profound intellectual disabilities living in institutions

[150] Article E of the Revised European Social Charter states that the enjoyment of the rights set forth in the Charter "shall be secured without discrimination on any ground such as race, color, sex, language, religion, political or other opinions, national extraction or social origin, health, association with a national minority, birth or other status."
[151] *See* BRODERICK & FERRI, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY, *supra* note 5, at 452.
[152] *International Association Autism Europe v. France*, Complaint No. 13/2002, European Committee of Social Rights, 4 November 2003.
[153] *Id*. para. 48.
[154] *Id*.
[155] *International Association Autism Europe v. France*, para. 54.
[156] *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, European Committee of Social Rights, 3 June 2008.

in Bulgaria had received no or inappropriate education. Evidence indicated that only 6.2 percent of children living in the relevant institutions had been enrolled in schools.[157] The complaint alleged that mainstream schools were not adapted to accommodate the abilities and needs of such children, and staff in those institutions provided either no or inadequate education. Also, "teacher training is inadequate and teaching materials for intellectually disabled children are either totally unavailable or unsuited to their needs."[158] The Committee found that, although the Bulgarian government adopted legislation and action plans to promote the educational right of children with disabilities living in institutions, there was a lack of effective implementation. Moreover, the Committee noted that schools and curricula in Bulgaria were not accessible for children with disabilities.[159] The lack of adequate opportunity to pursue primary education made children with disabilities unable to enter secondary education.

The two cases involve several issues that correspond to the types of concerns that the CRPD seeks to address in the context of equality and inclusion in education for children with disabilities. The two cases demonstrate a progressive trend in promoting the educational right for persons with disabilities. With the coming into force of the CRPD, the comprehensive framework for equality and non-discrimination and reasonable accommodation offers an additional tool to the European Committee of Social Rights in interpreting Charter rights with regard to individuals with disabilities.[160]

2. Post-CRPD Collective Complaints

Since the entry into force of the CRPD, two collective complaints regarding the right to education for disabled people have been submitted to the ECSR. Notably, both complaints cite the CRPD.

In *European Action of the Disabled (AEH) v. France*,[161] the complainant alleged that France violated articles 10 and 15, read in conjunction with article E of the Revised Charter as it failed to guarantee the right to education of a large proportion of children and adolescents with

[157] *Id*. para. 23.
[158] *Id*. para. 24.
[159] *Id*. para. 43.
[160] *See* Lord & Brown, *The Role of Reasonable Accommodation*, *supra* note 141, at 292.
[161] *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, European Committee of Social Rights, 12 September 2013.

autism.[162] Contrary to the requirements of domestic legislation, only a minority of children with autism had access to mainstream schooling. As children with autism move up through the education system, the number attending mainstream classes decreases significantly.[163] The complainant also argued that France, in effect, exported the "problem" of educating children with disabilities by "help[ing] to finance the schooling of children and adolescents with autism in specialized classes run by trained professionals in Belgium."[164]

The ECSR referred to the CRPD, in particular article 24, as relevant international standards. Nonetheless, it did not cite the CRPD in its opinion, nor did it utilize article 24 as an interpretive aid. The Committee reaffirmed the strong presumption in favor of mainstream education contained in article 15. In general, the Committee noted that states have a wide margin of appreciation in choosing how to implement socio-economic rights. However, article 15 (1) of the Revised Charter "does not leave States Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, as this must clearly be a mainstream school."[165] In this case, the Committee found that children and adolescents with autism were deprived of the right to be educated in regular schools and the work done in specialized institutions for children and adolescents with autism is not predominantly educational in nature. Meanwhile, because France did not allocate sufficient funds in the social budget for the education of autistic students, families have no other choice but to leave the national territory in order to educate their children with autism in a specialized school. Consequently, the Committee held that France was in breach of article 15 (1) alone and in conjunction with article E of the Revised Charter.

The ECSR has another opportunity to provide a contextualized interpretation of the provisions of the Revised Charter in light of the CRPD in *Mental Disability Advocacy Center (MDAC) v. Belgium*.[166] The MDAC alleged that "the Flemish Community of Belgium denies access to mainstream education to disabled children, in particular to children with intellectual disabilities and fails to provide the necessary accommodation to ensure such inclusion, in violation

[162] *Id*. paras. 32-35.
[163] *Id*. para. 39.
[164] *European Action of the Disabled (AEH) v. France*, para. 46.
[165] *Id*. para. 78.
[166] *Mental Disability Advocacy Center (MDAC) v. Belgium*, Complaint No. 109/2014, European Committee of Social Rights, 16 October 2017.

of Articles 15 (1), 17 (1) and 17 (2) taken alone and Article E read in conjunction with each of these provisions of the Revised Charter."[167] Furthermore, the MDAC maintained that "the Flemish authorities have failed to establish a reasonable timeframe, measure progress and provide funding for full inclusion of children with disabilities into regular education, contrary to the obligations Belgium has undertaken in accordance with the CRPD."[168]

The Committee found that in this case, the eligibility requirements of children with disabilities for admission to mainstream education are based on the notion of integration rather than inclusion. Whereas integration requires pupils to fit the mainstream system, inclusion is about the child's right to participate in mainstream school and the school's obligation to consider the child's best interests and educational needs.[169] Besides, the Committee noted that "there is a difference of treatment of children with severe disabilities who are treated in a less favorable way."[170] As under the current Flemish education system there are serious and numerous restrictions to the right to inclusive education of children with disabilities, the Committee held unanimously that there was a violation of articles 15 (1) and 17 (2) of the Revised Charter. It is particularly noteworthy that the ECSR cited article 24 of the CRPD, the Concluding Observations of the CRPD Committee on the Initial Report of Belgium, as well as General Comment No. 4 (on inclusive education) of the CRPD Committee as relevant international law. This demonstrates the filtering of international development into the Council of Europe and shows that the CRPD is exerting positive influence on the interpretation and application of Charter rights with respect to persons with disabilities.[171]

D. Subconclusion: The Potential Influence of the CRPD on the Interpretation of the European Social Charter and the Revised Charter

Since the entry into force of the CRPD, the claimants and the European Committee on Social Rights increasingly invoke its provisions and the work products by the CRPD Committee as the basis for arguments in support of the rights of individuals with disabilities. As the ECSR is known for a "fairly strong record of looking to treaty bodies jurisprudence to guide its work,"[172]

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[167] *Id*. para. 2.
[168] *Id*. para. 51.
[169] *Mental Disability Advocacy Center (MDAC) v. Belgium*, para. 66.
[170] *Id*. para. 68.
[171] *See* BRODERICK & FERRI, INTERNATIONAL AND EUROPEAN, *supra* note 5, at 457.
[172] *See* Lord & Brown, *The Role of Reasonable Accommodation*, *supra* note 141, at 292.

the CRPD has great potential to exert significant influence on how the Committee interprets the socio-economic rights of persons with disabilities under the articles of the Revised Charter. In many respects, the CRPD embodies a more progressive vision of equality and non-discrimination and reasonable accommodation for disabled people's rights. As a result, the ECSR should use the CRPD as a critical source in interpreting the Revised Charter's rights to ensure that the rights of persons with disabilities are protected in line with changing international norms.

V. OVERVIEW OF EU ANTI-DISCRIMINATION LAW AND DISABILITY POLICY IN THE EU

The European Union has developed a significant and constantly evolving body of disability law and policy in the last thirty years. The most recent milestone in this process of development is the ratification of the CRPD by the EU. The sections below aim to examine the current legal and policy framework the EU adopted on disability and to explore the extent to which EU's ratification of the CRPD exerts influences on the EU legal order through discussion of the case law of the Court of Justice of the European Union (CJEU).

A. Disability Policy in the EU

For most of the history of the EU, the founding Treaties contained no explicit reference to disability, and accordingly, no disability-specific competence existed.[173] Although some legal instruments and soft law initiatives occasionally mentioned disability and people with disabilities, there was no attempt to develop a broad disability policy or strategy until recently. The earliest EU actions on disability dated back to the 1970s. Their primary goal is to assist Member States in providing services to persons with disabilities.[174] These initiatives mainly took the form of non-binding instruments or action programs to foster the exchange of information between Member States. Their scope was confined to the areas of employment and vocational training.

The breakthrough occurred with the Amsterdam Treaty, which included, for the first time, explicit mention of disability.[175] Article 19 of the TFEU, which is a significant article in the context

[173] For the evolution of the EC/EU's competences with regard to disability and the development of the EC/EU's disability policy, see Lisa Waddington, *From Rome to Nice in a Wheelchair, The Development of a European Disability Policy*, Lecture given in a shortened form on accepting the position of European Disability Forum Extraordinary Chair in European Disability Law at Maastricht University on 1 April 2005 (2006).

[174] *See* Lisa Waddington & Matthew Diller, *Tensions and Coherence in Disability Policy: The Uneasy Relationship between Social Welfare and Civil Rights Model of Disability in American, European and International Employment Law, in* DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES 241-80 (Mary Lou Breslin & Silvia Yee eds., 2002).

[175] *See* Lisa Waddington, *Equal to the Task: Re-Examining EU Equality Law in Light of the United Nations Convention*

of general non-discrimination norm, provides the EU with the competence to take action to combat discrimination on a number of enumerated grounds, including disability. Article 95 EC (now article 114 TFEU) provides that EU institutions must take account of the needs of persons with disabilities in drawing up measures. Most importantly, the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive)[176] marked the first legislative intervention designed to address discrimination on the ground of disability.

The Lisbon Treaty brought about some further significant changes in relation to disability. Rather than relying on disability-specific measures, article 10 of the TFEU contains a mainstreaming provision, which provides that "[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on... disability." This article has been called "the most significant commitment to promoting equality outside the framework of the rights-based model."[177] Mainstreaming approach requires that all activities take into account disability-related needs. Before a policy is implemented, its impact on persons with disabilities should be carefully assessed. Further, the Lisbon Treaty made the EU Charter of Fundamental Rights (CFR or the Charter) part of primary EU law.[178] While the CFR does not extend the competencies of the Union, commentators pointed out that the Charter will breathe new life into the EU by focusing on the rights of individuals with regard to all EU policies.[179] The EU and its Member States are obliged to comply with the Charter in all activities when they are implementing EU law. The Charter specifically addresses the rights of people with disabilities in several articles. Article 21 (1) includes an all-embracing prohibition on discrimination. Article 26 recognizes and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.

on the Rights of Persons with Disabilities, 4 EUR. Y.B. DISABILITY L. 169, 178 (2013) [hereinafter "Waddington, *Equal to the Task*"].

[176] Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, (2000) O.J. (L 3030/16) (Employment Equality Directive or EED).

[177] *See* DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW: TEXT AND MATERIALS 618 (4th edn. 2019).

[178] Article 6(1) of the TEU.

[179] *See* Francesca Ferraro & Jesús Carmona, *Fundamental Rights in the European Union: The Role of the Charter after the Lisbon Treaty*, 3 (2015).

A crucial development occurred in December 2010 when the EU ratified the CRPD.[180] The conclusion of the CRPD was made possible pursuant to article 44 of the CRPD, which allows regional integration organizations to accede to the Convention. The EU is the first and only regional organization to have ratified the CRPD, and the CRPD is the first and still the only human rights treaty concluded by the EU. The EU played an active role in the work of the Ad-Hoc Committee that drafted the CRPD.[181] The CRPD now becomes part of the EU's legal framework, and it has acquired a sub-constitutional status, namely, it is situated below the Treaties and the Charter and above EU secondary legislation.[182] Hence, the provisions of EU secondary law must, as far as possible, be interpreted in a manner that is consistent with the CRPD. If the wording of EU secondary legislation is open to more than one interpretation, preference should be given to the interpretation which renders the provisions of EU secondary law conformant with the Convention.

Following the ratification of the CRPD, the EU has adopted some initiatives to implement the CRPD into EU law and policy. In March 2021, the European Commission adopted Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030.[183] The Strategy builds on the results of the previous European Disability Strategy 2010-2020, which paved the way to a barrier-free Europe and to empower persons with disabilities so they can enjoy their rights and participate fully in society and economy. The Strategy aims to improve the lives of persons with disabilities in the coming decade in the EU and beyond.[184] It serves as the framework for EU actions and for the implementation of the CRPD.

In regard to EU secondary law, as will be discussed later, the Employment Equality Directive remains the main piece of legislation that protects and promotes the rights of people with disabilities. EU has so far failed to adopt an updated directive proposed by the Commission in 2008 – the Council Directive Implementing the Principle of Equal Treatment between Persons

[180] Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 No. L23/35.
[181] *See* Anna Lawson, *The European Union and the Convention on the Rights of Persons with Disabilities: Complexities, Challenges and Opportunities, in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 61-66 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano eds., 2017).
[182] Case C-61/94, *Commission v. Germany*, EU:C:1996:313.
[183] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030*, Brussels, 3.3.2021 – COM (2021) 101 final.
[184] *Id*. at 5.

Irrespective of Religion or Belief, Disability, Age or Sexual Orientation.[185] This proposal aims to extend the material scope of the prohibition of discrimination to the fields of education, social protection (including healthcare and social security), social advantages, and access to goods and services (including housing). For the first time, the envisaged directive also attempted to introduce a specific provision on multiple discrimination and to extend the prohibition of discrimination to transport. This proposal, if adopted, "complements pre-existing EU non-discrimination legislation"[186] and serves to bring the content of EU non-discrimination law somewhat closer to the requirements set out in the CRPD. Nonetheless, as pointed out by Silvia Favalli and Delia Ferri, "its approval and entry into force should not be expected too soon."[187]

B. Directive 2000/78/EC (Employment Equality Directive)

The purpose of the Directive, as set out in article 1, is to "lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation." Building on pre-existing EU gender equality law, the Directive further develops a set of legal tools tailored to the protected grounds. The Employment Equality Directive remains the main piece of legislation that protects and promotes the rights of people with disabilities.

1. Forms of Discrimination in the EU Anti-Discrimination Law

The Employment Equality Directive prohibits four types of discrimination, including direct and indirect discrimination, harassment, and instruction to discriminate. The dividing line between direct and indirect discrimination remains central in the Court's analysis, leaving harassment and instruction to discriminate in a more obscure role. The stark distinction in the EU law between possible defenses for direct vis-a-vis indirect discrimination has elicited much debate and

[185] Commission of the European Communities, Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, COM(2008) 426 final; Commission staff working document accompanying the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Summary of the impact assessment (COM(2008) 426 final), SEC(2008) 2180.
[186] *See* Lisa Waddington & Andrea Broderick, *Disability Law and Reasonable Accommodation Beyond Employment: A Legal Analysis of the Situation in EU Member States*, 7 (2016) [hereinafter "Waddington & Broderick, *Disability Law and Reasonable Accommodation*"].
[187] *See* Silvia Favalli & Delia Ferri, *Defining Disability in the European Union Non-discrimination Legislation: Judicial Activism and Legislative Restraints*, 22 EUR. PUB. L. 541, 548 (2016) [hereinafter "Favalli & Ferri, *Defining Disability*"].

highlights a considerable gray zone in this regard.[188] As pointed out by many scholars, in cases of systemic discrimination, where ingrained stigma and prejudice persist in society, this gray zone is particularly acute. In terms of indirect discrimination, one may also wonder whether neutral rules are really neutral when deep-rooted prejudice causes disparate impact over decades. The situation of the Roma people is a paradigmatic example of victims of systemic discrimination.[189] This demonstrates the necessity for a more nuanced, holistic approach when assessing particular instances of discrimination as constituting direct or indirect discrimination.[190]

The Directive does not define what is meant by an instruction to discriminate. According to the EU Agency for Fundamental Rights (FRA), the prohibition should cover situations where there is an express preference or an encouragement to treat individuals less favorable due to one of the protected grounds.[191] The Court has not yet clarified whether discrimination based on perceived disability falls within the scope of discrimination on the basis of disability, a form of discrimination that is deemed to be covered under the CRPD.[192] An important feature of the Directive is the inclusion of harassment as a form of discrimination. Harassment is understood as conduct related to the grounds covered by the Directive that has the effect or purpose "of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."[193] The prohibition of harassment adds further weight to a substantive understanding of equality. The case of *S. Coleman v. Attridge Law and Steve Law*[194] exemplifies this.

Ms. Coleman, mother and primary carer of a disabled boy, was forced to quit her job because of her employer's attitude toward the problems arising from the disability of her child. The Court noted that this case involved both article 2 (2) (a) (direct discrimination) and article 2 (3)

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[188] *See* MARJOLEIN J. BUSSTRA, THE IMPLICATIONS OF THE RACIAL EQUALITY DIRECTIVE FOR MINORITY PROTECTION WITHIN THE EUROPEAN UNION 148-156 (2010).

[189] The Romani people are widely known in English by the exonym Gypsies (or Gipsies), which is considered by many Romani people to be pejorative due to its connotations of illegality and irregularity as well as its historical use as a racial slur. In Europe, Romani people are associated with poverty, and are accused of high rates of crime and behaviors that are perceived by the rest of the population as being antisocial or inappropriate. Partly for this reason, discrimination against the Romani people has continued to the present day, although efforts are being made to address them. *See* https://en.wikipedia.org/wiki/Romani_people#Persecutions.

[190] *See* Uladzislau Belavusau & Kristin Henrard, *Impact of the 2000 Equality Directives on EU Anti-Discrimination Law: Achievements and Pitfalls, in* EU ANTI-DISCRIMINATION LAW BEYOND GENDER 24 (Uladzislau Belavusau & Kristin Henrard ed., 2019) [hereinafter "Belavusau & Henrard, *Impact of the 2000 Equality Directives*"].

[191] European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law*, 67 (2011).

[192] *See* Delia Ferri & Aisling De Paor, *Regulating Genetic Discrimination in the European Union: Pushing the EU into Unchartered Territory or Ushering in A New Genomic Era*? 17 EUR. J. OF L. REF. 30 (2015).

[193] Article 2 (3) of Directive 2000/78/EC.

[194] Case C-303/06, *S. Coleman v Attridge Law and Steve Law*, EU:C:2008:415.

(harassment) of the Directive because the Directive "applies not to a particular category of persons but by reference to the grounds mentioned."[195]

Crucially, the values of dignity and autonomy are critical guiding factors in this case to determine what is required by equality and anti-discrimination norm. For people with disabilities, their dignity and autonomy are equally hampered when persons associated with them are subjected to discriminatory treatment.[196] As a result, the Court held that discrimination and harassment with regard to disability are not limited only to individuals who have disabilities, but could also arise "by association."

2. Positive Action

The Employment Equality Directive also put a new spotlight on the "positive action." Positive action has always been controversial as it implies preferential treatment for certain groups or individuals.[197] At first sight, it seems that positive action conflicts with the principle of equal treatment, but actually positive action aligns with the reinvigorated focus on substantive equality.[198] The difficult question, however, is to what extent positive action is allowed to correct for the inequality suffered by certain groups.

Primary anti-discrimination Directives all contain a similar provision which indicates that the principle of equal treatment shall not prevent a Member State from taking specific measures "to prevent or compensate for disadvantages linked to [the grounds covered by the Directives]."[199] Although the CJEU has been very restrictive towards positive action in its case law on gender equality,[200] it gradually softened its position. The Court focused not so much on whether positive action has a legitimate aim, but rather on whether it is proportionate. This shift towards a more open proportionality analysis helps the Court in later cases to further define the exact parameters of what is permissible and to what extent.[201]

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[195] *Id.* para. 38.
[196] *See* the AG's opinion in *Coleman*, paras. 12-13.
[197] *See* discussion in Chapter Five, section III.B.
[198] *See* Kristin Henrard, *Boosting Positive Action: the Asymmetrical Approach towards Non-discrimination and Special Minority Rights*, HEIDELBERG J. OF INT'L L. 379, 388-389 (2011).
[199] Art 3 of Equal Treatment Directive, Art 5 of Race Equality Directive, Art 7 of Employment Equality Directive and Art 6 of Directive 2004/113.
[200] *See* Case C-409/95, *Hellmut Marschall v. Land Nordrhein – Westfalen,* EU:C:1997:533; Case C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist,* EU:C:2000:367.
[201] *See* Case C-319/03, *Serge Briheche v. Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice,* EU:C:2004:574.

In terms of the Employment Equality Directive, article 7 provides that:

> 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in article 1.
>
> 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 7 of the Directive specifically addresses issues of positive action. According to article 7 (1), Member States are free to adopt positive action measures as long as their goals are to ensure equality in practice and aim at preventing or compensating for disadvantages linked to any of the grounds referred to in article 1. Article 7 (2) addresses the scope of positive action measures in regard to persons with disabilities. From the wording of the article, it can be seen that the scope of positive action measures for individuals with disabilities is broader than that is applicable under article 7 (1). As a result of this provision, it is likely that quota laws on the employment of people with disabilities, which are commonly used in the EU Member States, are compatible with the Directive.

The CJEU discussed the relationship between reasonable accommodation and positive action measures in *Commission v. Italy*.[202] The central issue was whether Italy had fulfilled its obligation to transpose article 5 (reasonable accommodation) of the Directive. The Commission alleged that Italy failed to fully transpose article 5 of the Directive because it did not require all employers to provide reasonable accommodation for persons with disabilities. Italy defended its failure to impose reasonable accommodation duty on all employers on the ground of proportionality.[203] It criticized the Commission:

> for drawing an excessively literal interpretation of article 5 of Directive 2000/78... which is more radical and more extensive than could result from merely a reading of the terms of that article as well as from a reasonable and proportionate approach.[204]

[202] Case C-312/11 *Commission v. Italy*, EU:C:2013:446.
[203] *Id.* para. 44.
[204] *Id.* para. 54.

Notwithstanding that Italy has adopted several public aid and incentive measures to promote the employment of persons with disabilities, the Court held that it failed to impose the reasonable accommodation duty on employers with fewer than fifteen employees as required by the Directive.[205] Therefore, Italy did not fully transpose article 5 of the Directive in this respect.

3. Duty of Reasonable Accommodation

The Employment Equality Directive was the first piece of EU law to entail the duty of reasonable accommodation, yet only in relation to the ground of disability. The obligation to provide reasonable accommodations on the ground of disability is based on the recognition that the interaction between an individual's impairment and physical or social environment, on occasions, can lead to one's inability to perform a particular function, job or activity in the conventional manner. Reasonable accommodation aims at providing equal opportunities by removing barriers which prevent persons with disabilities from full participation in society.[206] Reasonable accommodations are not privileges but are meant to engage in a reasonable adaptation to counteract the rigidity of certain rules or their uniform application, which does not pay due regard to specific personal characteristics.[207] As Pierre Bosset and Marie-Claire Foblets aptly argue, "the main idea underlying reasonable accommodation is that democratic states must allow everyone to participate fully in society on an equal footing as far as possible."[208]

The duty to provide reasonable accommodation is not absolute. As expressed in the adjective "reasonable," proportionality analysis provides intrinsic demarcations for the duty. The right to reasonable accommodation stops when undue or disproportionate burden arises on the duty bearer. Relevant factors inherent in the proportionality considerations include the cost of the accommodation, potential sources of outside funding, the size of the entity, the duration and scope of the accommodation, and so on.[209] While this may seem straightforward in principle, identifying relevant factors and their relative weight often cause much debate.

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[205] *Commission v. Italy*, para. 62.
[206] *See* Chapter Two section IV.A.4.
[207] *See* GÉRARD BOUCHARD & CHARLES TAYLOR, BUILDING THE FUTURE: A TIME FOR RECONCILIATION 68 (2008).
[208] *See* Pierre Bosset & Marie-Claire Foblets, *Accommodating Diversity in Québec and Europe: Different Legal Concepts, Similar Results?, in* INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY 37 (2009) [hereinafter "Bosset & Foblets, *Accommodating Diversity in Québec and Europe*"].
[209] *Id.* at 49-53.

Under the Employment Equality Directive, Member States have a legal obligation to provide reasonable accommodations to persons with disabilities. In principle, this is a reactive duty, meaning that an employer is only obliged to make an accommodation once it becomes aware that an individual with a disability is in need. An employer is not required to provide accommodations if doing so would amount to a disproportionate burden.

Recital 20 of the Directive provides some guidance on what constitutes a reasonable accommodation. It provides:

> Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

The CJEU, in *HK Danmark*,[210] noted that the list of accommodation measures in recital 20 of the Directive was not exhaustive,[211] and that both the Directive and the CRPD "envisage not only material but also organizational measures."[212] In light of this, the Court found that the concept of reasonable accommodation "must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers."[213]

In regard to disproportionate burden, recital 21 of the Directive refers to some factors that should be taken into account in determining its existence. These are "the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance."[214] In *HK Danmark*, the Court ruled that the existence of a disproportionate burden was a matter for the national court to assess in light of the guidance given in recital 21 of the Directive.[215]

Though the Directive requires employers to provide reasonable accommodations to persons with disabilities, unlike the CRPD, it does not specify that a failure of provision is a form

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[210] Joined Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, EU:C:2013:222.
[211] *HK Danmark*, para. 56.
[212] *Id.* para. 55.
[213] *Id.* para. 54.
[214] *Id.* para. 60.
[215] *Id.* para. 61.

of discrimination. National law in many EU Member States adopts this approach, although this is not the case across the board.[216] Article 2 of the CRPD clearly states that denial of reasonable accommodation amounts to discrimination. One may argue that this distinction is relatively unimportant; what matters is that the legislation establishes a clear obligation to provide reasonable accommodations, not how a breach of the duty is labeled. Nonetheless, there can be some significant consequences of identifying an action as discrimination rather than as some other form of a prohibited act.

First of all, identifying a failure to provide reasonable accommodation as discrimination may increase awareness of the duty to accommodate, as well as foster the recognition among both persons with disabilities and employers of the seriousness of non-conformance with that duty. Secondly, the Directive provides for a partial reversal of the burden of proof—that is, the victims of discrimination only need to offer evidence to establish a *prima facie* case of discrimination, then the burden shifts to the respondent to show that there have been no discriminatory acts—with regard to direct and indirect discrimination, but reasonable accommodation is not mentioned in this context. The classification of a dental of reasonable accommodations as discrimination, either as a sub-category of direct or indirect discrimination or as a *sui generis* form, can alleviate the plaintiff's burden to prove the existence of discrimination. Thirdly, judges may feel empowered or inclined to award more far-reaching sanctions and remedies in cases of discrimination than in cases of other wrongs.[217]

4. Burden of Proof

Article 10 (1) of the Employment Equality Directive provides that:

> 1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

[216] *See* Delia Ferri &Anna Lawson, *Reasonable accommodation for disabled people in employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway*, 84-85 (2016).
[217] *See* Waddington, *Equal to the Task*, *supra* note 175, at 190.

To alleviate the burden on the applicant to prove the occurrence of direct or indirect discrimination, paragraph 1 of article 10 of the Directive provides for a partial reversal of the burden of proof. In other words, in terms of burden of proof, the victims of discrimination only need to raise evidence to establish a *prima facie* case of discrimination, then the burden shifts to the respondent to show that there has been no breach of the right to equal treatment.

VI. JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union (CJEU or the Court),[218] which is the highest judicial institution of the EU, is responsible for the interpretation of EU law and for reviewing the legality of EU acts. A national court can request the CJEU to interpret a provision of EU law or to rule on the validity of such a provision by bringing a reference for a preliminary ruling. The section below explores the extent to which the EU's ratification of the CRPD exerts influence on the case law of the Court of Justice of the European Union.

A. The Relevance of the CRPD to the Court of Justice of the European Union in the Interpretation of EU Law

The CJEU has held as early as 1974 that international agreements concluded by the EU "form an integral part of the Community [now Union] legal system."[219] The Court has established a hierarchy of norms within the EU legal order, whereby international agreements concluded by the EU are inferior to primary law (The Treaties, including the Protocols, the EU Charter of Fundamental Rights and the ECHR) but superior to secondary law (regulations, directives, decisions).[220] Given this hierarchy, the CJEU is obliged to interpret secondary EU law in consistent with the agreement concluded by the EU to the extent possible. In *Commission v. Germany*,[221] the Court ruled that "the primacy of international agreements concluded by the Community over the provisions of secondary Community legislations means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements."[222] The Court reiterated this obligation in *Bettati v. Safety Hi-Tech*,[223] in which it held that "it is settled law that

[218] The CJEU consists of the Court of Justice, the General Court and the Civil Service Tribunal. This Chapter focuses on the jurisprudence of the Court of Justice.
[219] Case 181/73 *Haegeman v. Belgium*, EU:C:1974:41, para 5.
[220] For a recent restatement of this principle, *see* Case C-366/10 *Air Transport Association of America and Others*, EU:C:2011:864, para 50.
[221] Case C-61/94 *Commission v. Germany*, EU:C:1996:313.
[222] *Commission v. Germany*, para. 52.
[223] Case C-341/95 *Bettati v. Safety Hi-Tech*, EU:C:1998:353.

Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community."[224]

Although the EU has become a party to the CRPD, it is only bound by the Convention to the extent of its competences. As the CRPD involves concurrent jurisdictions of both the EU and its Member States, the full and effective realization of the obligations under the Convention requires the cooperation and coordination between the EU and its Member States. Specifically, the division of the respective competence of the EU and its Member States concerning individual provisions of the CRPD falls under one of three scenarios – namely, the EU has exclusive competence, the Member States have exclusive competence, or the EU and Member States share the competence. Furthermore, the EU can support and supplement the action of Member States. Where the EU's competence to act is not exclusive, the Member States are free to act individually, collectively or jointly with the EU to fulfill obligations under the CRPD.[225]

B. Cases of CJEU on the Definition of Disability

The Employment Equality Directive does not contain any definition of disability. This has created a large measure of uncertainty with respect to the personal scope of the Directive. Therefore, the majority of the preliminary references to the CJEU concerning the Directive focus on the concept of disability and the question of who falls within the protected ground. The Court has clearly stated that the concept of disability must be "given an autonomous and uniform interpretation," and that it is not possible to refer to the laws of the Member States in order to define that concept.[226] The subsection explores the Court's attempt to provide such an interpretation in a series of judgments both before and after EU's ratification of the CRPD to discern the extent to which the CRPD has impacted the case law of the CJEU.

[224] *Bettati v. Safety Hi-Tech*, para. 20.
[225] *See* Lisa Waddington, *The European Union, in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS 136 (Lisa Waddington & Anna Lawson eds., 2018) [hereinafter "Waddington, *The European Union*"].
[226] Case C-13/05, *Sonia Chacon Navas v Eurest Cowctividades* SA, EU:C:2006:456, para. 42.

1. Pre-CRPD Ratification

The first case to reach the CJEU with regard to the definition of disability was the case of *Chacón Navas*[227] in 2006. The case concerned a woman, Ms. Chacón Navas, who as a result of illness, had been unable to work for a considerable length of time and was dismissed. The applicant challenged that the dismissal violated the Employment Equality Directive. The national court stayed the proceedings and asked the Court whether the Directive covers a worker who has been dismissed because she is sick.[228]

In response, the Court noted that disability is not defined by the Directive and that the concept of disability must be "given an autonomous and uniform interpretation."[229] It defined disability in the Directive as "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."[230] The Court emphasized that the limitation has to last for a long time to qualify as a disability.[231] The construction of disability adopted by the Court was based on the medical model rather than the social model of disability.[232] Moreover, the Court contended that disability and sickness are two different concepts and the latter was not covered by the Directive[233] as the EU legislature had deliberately used the term disability and not sickness.[234]

As the *Chacón Navas* case came out immediately preceding the adoption of the CRPD, the decision of the CJEU has been put under great scrutiny and received much criticism. During that period, advocates urge a paradigm shift from the outdated medical model to the social model or human rights model of disability on the international level. Regrettably, it appeared that the Court failed to take any account of the progress taking place on the international level regarding the evolving definition of disability.

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[227] Case C-13/05, *Sonia Chacon Navas v Eurest Cowctividades* SA, EU:C:2006:456.
[228] *Id*. para. 25 (1).
[229] *Id*. para. 42.
[230] *Id*. para. 43.
[231] *Id*. para. 45.
[232] *See* Waddington, *Equal to the Task*, *supra* note 175, at 169.
[233] *Sonia Chacon Navas v Eurest Cowctividades*, para. 46.
[234] *Id.* para. 44.

2. Post-CRPD Ratification

a. Definition of Disability

HK Danmark[235] was the first opportunity for the CJEU to review its definition of disability in light of the EU's conclusion of the CRPD. Both applicants were dismissed following sick leaves for over four months. Ms. Ring suffered from back pain that could not be treated and Ms. Skouboe Werge was assessed as having a loss of working capacity of 65%.[236] The trade union represented both applicants alleged that both applicants had disabilities and their employers were required to provide them with accommodation. The dismissals constituted discrimination contrary to the Employment Equality Directive.[237] In response, the employers argued that both workers were not protected by the Directive since "the only incapacity that affects them is that they are not able to work full-time."[238]

The domestic court referred several questions concerning the meaning of disability to the Court. To begin with, the Danish court asked whether a person who could not or could only to a limited extent carry out his work because of physical, mental, or psychological impairments, where it was probable that it would last for a long time, was covered by the Directive. Second, the court asked whether a condition caused by either by a medically diagnosed incurable illness or by a temporary illness was covered by the concept of disability under the Directive. Finally, the court inquired whether a person with a permanent reduction in working capacity who was unable to work full-time could be considered disabled for the purpose of the Directive.[239]

The CJEU stated that "the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements."[240] The CRPD forms "an integral part of the European Union legal order"[241] since the EU concluded it. As a result, the Employment

[235] Joined Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, EU:C:2013:222.
[236] *HK Danmark*, paras. 15, 22.
[237] *Id.* para. 23.
[238] *Id.* para. 24.
[239] *HK Danmark*, para. 26 (1) & (2).
[240] *Id.* para. 29.
[241] *HK Danmark*, para. 30.

Equality Directive must be interpreted "in a manner consistent with the Convention."[242] The Court recalled that the *Chacón Navas* judgment was decided before the EU concluded the CRPD.[243] Then the Court proceeded to refer to paragraph (e) of the preamble and article 1 of the CRPD, which elaborate on the concept of disability. In light of the CRPD, the CJEU reconsidered its definition of disability in the earlier case law and reconceptualized disability as:

> a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.[244]

This definition mirrors the definition contained in article 1 of the CRPD and conforms to the central tenet of the social model of disability that disability is a product of the restrictions that society imposes on the disabled. It is the interaction of the impairments with the various barriers, not of the impairments *per se*, that causes limitations and obstacles to persons with disabilities. Therefore, an illness whether it is curable or incurable can be covered by the concept of disability within the meaning of Directive.[245]

Furthermore, the Court contended that a disability must be understood as a hindrance to the exercise of a professional activity.[246] The Court rejected the defendant's submissions and stressed that "a disability does not necessarily imply complete exclusion from work or professional life."[247] The objective of the Directive, the Court stated, "aims in particular to enable a person with a disability to have access to or participate in employment."[248] As a result, a person with a disability who was only able to work part-time could be covered by the Directive.[249]

The Court was also required to consider whether, in this case, a reduction in working hours may constitute one of the accommodation measures referred to by article 5 of the Directive. At the outset, the Court stated that article 5 obliges the employer to take appropriate measures to accommodate a person with a disability. It ruled that the Directive and the CRPD "envisage not

[242] *Id.* para. 32.
[243] *Id.* para. 37.
[244] *Id.* para. 38.
[245] *Id.* para. 41.
[246] *HK Danmark*, para. 44.
[247] *Id.* para. 43.
[248] *Id.* para. 44.
[249] *Id.* para. 44.

only material but also organizational measures, … it cannot be ruled out that a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of that directive."[250] In particular, the Court emphasized that accommodation measures "must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers."[251] Lastly, the CJEU left it to the national court to assess whether a reduction in working hours represents a disproportionate burden on the employers.[252]

Another issue in the case of *HK Denmark* was whether the termination of employment of persons with disabilities on a shortened notice period constitutes disability discrimination. Though the rule of shortened notice period applied to both the disabled and non-disabled persons, it cannot be denied that workers with disabilities are more likely exposed to the risk of application of the rule. Accordingly, the rule could amount to indirect discrimination.[253] Nonetheless, the Court accepted the justification put forward by the government, namely that the rule aimed to increase the participation of people with disabilities in the workplace. If employers know that they could terminate workers with disabilities with a shortened notice period, they would be more willing to recruit persons with disabilities. The Court left it to the national court to decide whether the measure was necessary to achieve the goal, and whether a reasonable balance was struck between employers and workers.

Yet, even if the aim pursued by the government with the shortened notice period sounds legitimate, the measure used significantly harms the rights of persons with disabilities and therefore went beyond what is necessary. It is no secret that people with disabilities face greater difficulties re-entering the labor market than others because of attitudinal, environmental, and social barriers. Even if the said rule of shortened notice period does induce employers to recruit more disabled workers at the beginning, it negatively impacts far more employees with disabilities. In the end, the measure may bring about more harm than good to the working rights of persons with disabilities.

[250] *Id.* para. 55.
[251] *Id.* para. 54.
[252] *Id.* para. 59.
[253] *Id.* para. 76.

Moreover, in several cases, the Court's view on what constitutes disability raises some concern. For example, in *Z v. A Government Department*,[254] the applicant was a woman who had no uterus.[255] Her condition made her unqualified for paid leave equivalent to maternity or adoption leave following the birth of her genetic child via a surrogacy arrangement.[256] The Court stressed the importance of interpreting the Directive in a manner consistent with the CRPD,[257] and repeated its definition of disability set out in *HK Danmark*.[258] The Court recognized that the applicant lacked uterus and could not give birth. Notwithstanding, it stated:

> it is not disputed that such a condition constitutes a limitation which results in particular from physical, mental or psychological impairments, or that it is of a long-term nature. In particular, it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her.[259]

The Court, recalling its definition of disability, contended that "the concept of disability within the meaning of the Directive presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers."[260] The Court found that "the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment."[261] Consequently, the court held that Ms. Z's condition did not make it difficult or impossible to enjoy her professional life.[262]

In this case, the Court seemed to regress to the medical model of disability rather than the social model of disability it developed in *HK Danmark.* The Court acknowledged that Ms. Z suffered from impairment and ruled that she did not have a disability under the Employment Equality Directive[263] since her condition did not affect her ability to work. From a purely

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[254] Case C-363/12, *Z. v. A Government Department and the Board of Management of a Community School*, EU:C:2014:159.
[255] *Z v. A Government Department*, para. 35.
[256] *Id.* para. 39.
[257] *Id.* para. 75.
[258] *Id.* para. 76.
[259] *Z v. A Government Department*, para. 79.
[260] *Id.* para. 80.
[261] *Id.* para. 81.
[262] *Id.*
[263] *Z v. A Government Department*, para. 82.

medical perspective, it may be said that Ms. Z's impairment had no impact on her physical capability to work. Nonetheless, the Court failed to contemplate how her impairment influenced her access to employment-related benefits.

In contrast to the Court's ruling, the limitation (ineligibility for maternity or adoption leave) Ms. Z faced was indeed the result of her impairment (inability to conceive naturally) in interaction with various barriers, which include the absence of a statutory regime providing for paid leave following the birth of her child through surrogacy. This directly affects Ms. Z's employment condition and, consequently, she should have been regarded as disabled under the Directive. Such a barrier also constitutes indirect discrimination since it disproportionately affected someone in Ms. Z's position who was unable to bear a child naturally. Article 3 (1) (c) of the Directive prohibits disability discrimination with regard to "employment and working conditions, including dismissals and pay." This is precisely what Ms. Z claimed and covered by the material scope of the Directive.

Similarly, in *Kaltoft v. Municipality Billund*,[264] the issue was whether a dismissal because of obesity amounts to disability discrimination. The applicant, weighing over 150 kgs, was a childminder for approximately 15 years before discharge.[265] The parties disputed whether Mr. Kaltoft was dismissed because of his obesity.[266] The employer argued that the reason for Mr. Kaltoft's dismissal was a decline in the number of children in the Municipality of Billund.[267] The Court noted that "no provision of the TEU or TFEU prohibits discrimination on the grounds of obesity."[268] In particular, the Employment Equality Directive does not mention obesity as a ground for discrimination. Therefore, the Court stated that "the scope of the Directive should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof."[269]

In regard to the definition of disability, the Court, apart from repeating its definition set out in *HK Danmark*, provided some further clarification to the concept. The Court ruled that the definition of disability did not depend on either the origin of the disability or the extent to which

[264] Case C-354/13, *Kaltoft v. Municipality Billund*, EU:C:2014:2463.
[265] *Kaltoft*, para. 17.
[266] *Id.* para. 24.
[267] *Id.* para. 25.
[268] *Id.* para. 33.
[269] *Kaltoft*, para. 36 (internal citation omitted).

the person may or may not have contributed to the onset of the disability.[270] This demonstrates a broad understanding of the concept of disability.

In determining whether obesity could be deemed a disability protected by the Directive, the Court observed that obesity does not necessarily entail the existence of a limitation. Obesity that does not cause a limitation which results from an impairment and which in interaction with various barriers hinders the participation in professional life would not in itself constitute a disability.[271] Nonetheless, if obesity leads to such a limitation, it would be viewed as a disability.[272] As an example, the Court contended that if an obese worker had difficulty carrying out his work or felt discomfort at work due to reduced mobility or medical conditions related to obesity.[273] In short, the Court held that obesity can be covered by the concept of disability under Employment Equality Directive where "it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers."[274]

Notably, the examples of hindrances given by the Court all concerned *physical limitations* directly resulting from obesity. However, Mr. Kaltoft claimed that his obesity did not limit his ability to carry out the job. If this is true, and he was, nevertheless, dismissed because of obesity, then he clearly faced a barrier, which is prejudice and stereotyping of his employer. More often than not, persons with disabilities face such barriers – in the form of discrimination produced by negative attitudes and false assumptions about one's ability. This is one of the central issues that the CRPD, to which the EU is a party, is designed to address.[275]

As exemplified in *Z v. A Government Department,* the Court's approach toward disability discrimination emphasizes limitations resulting from impairments. The Court's definition of disability fails to cover an individual who is "disabled" by false assumptions and prejudice rather than *physical limitations*. Accordingly, individuals who face discriminatory attitudes,

[270] *Id.* paras. 55-56.
[271] *Id.* para. 58.
[272] *Id.* para. 59.
[273] *Id.* para. 60.
[274] *Kaltoft*, para. 59.
[275] Article 8(1)(b) of the CRPD provides that "States Parties to undertake to adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities."

disadvantageous rules or practices but experience no limitation would be excluded from protection. The manner in which the Court defines disability may lead to the unfortunate result that persons who have no physical or mental impairment or whose impairment does not hamper their ability to work are not protected from disability discrimination by the Employment Equality Directive.[276]

A close examination of the two cases, *Z v. A Government Department* and *Kaltoft*, reveals that the Court may not embrace or fully comprehend the concept of disability based on the social model underlying the CRPD. *Z v. A Government Department* failed to appreciate the significance of the role that environmental or socially constructed barriers play in disabling people. And the Court's approach to disability in *Kaltoft* may exclude individuals who do not have a limitation directly resulting from their impairments, but who nevertheless experienced disability discrimination based on false assumptions about their abilities, from protection under the Directive. In order to fully protect individuals from disability discrimination, it is imperative for the Court to consider how attitudinal, social and institutional barriers contribute to disabling individuals.[277] The Directive should be interpreted as providing protection to those who are wrongly assumed or perceived to have disabilities and experience discrimination thereof.

b. Genuine and Determining Occupational Requirement and Reasonable Accommodation

In *XX v Tartu Vangla*,[278] a prison officer in Estonia was dismissed after employment for almost 15 years because a new regulation requires that prison officers meet a minimum standard of sound perception without the assistance of a hearing aid. The Supreme Court of Estonia referred the case to the CJEU, asking whether article 2(2) and article 4(1) of the Employment Equality Directive preclude national law which provides that impaired hearing below the prescribed standard imposes an absolute bar to the continued employment of a prison officer and that the use of corrective aids was not allowed.[279] Firstly, the CJEU recognized that the regulation at issue establishes a difference of treatment based on disability within the meaning of article 2(2)(a) of the Directive.[280] Then the Court proceeded to determine whether such a difference of treatment

[276] *See* Lisa Waddington, *Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law*, 22 MAASTRICHT J. EUR. & COMP. L. 576, 588-589 (2015) [hereinafter "Waddington, *Saying All the Right Things*"].
[277] *See* Chapter Three, section II.B.1.
[278] Case C-795/19, *XX v Tartu Vangla*, EU:C:2021:606.
[279] *Id.* para. 24.
[280] *Id.* paras. 28, 29, 30.

can be justified under article 4(1) of the Directive, which provides that a difference of treatment based on a characteristic related to any of the grounds (religion or belief, disability, age or sexual orientation) referred to in article 1 is not to constitute discrimination where such a characteristic constitutes a 'genuine and determining occupational requirement,' provided that the objective is legitimate and the requirement is proportionate.[281]

The Court reiterated that "the possession of particular physical capacities may be regarded as a 'genuine and determining occupational requirement,' within the meaning of Article 4(1) of Directive 2000/78, for the purposes of employment in certain professions, such as firefighter or police officer."[282] The regulation at issue seeks to preserve the safety of persons and public order by ensuring that prison officers' level of auditory acuity is sufficient to communicate by telephone and to hear the sound of an alarm and radio messages. The Court, acknowledging that the regulation pursues legitimate objectives, emphasized that it is necessary to examine whether that requirement laid down in article 4 of that regulation is appropriate for attaining those objectives and ensure that it does not go beyond what is necessary to attain them.[283]

To determine whether the requirement is appropriate, the Court maintained that "legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner."[284] In this connection, the regulation precludes the use of a hearing aid in assessing the level of auditory acuity of the prison officer, but allows the use of corrective devices such as contact lenses or spectacles in assessing visual acuity. The Court, therefore, expressed doubts on the government's argument that the use, loss or deterioration of a hearing aid may hinder the performance of a prison officer's duties and create risks for him or her to a greater extent than the wearing, loss or deterioration of contact lenses or spectacles, particularly in the situations of physical confrontation which that officer may encounter.[285]

Furthermore, with respect to reasonable accommodation, the Court noted that article 5 of the Directive requires employers to take appropriate measures to enable a person with a disability

[281] *Id.* para. 31.
[282] *Id.* para. 40.
[283] *Id.* para. 42.
[284] *Id.* para. 44.
[285] *Id.* para. 45.

to have access to, participate in, or advance in employment unless such measures would impose a disproportionate burden. Particularly, it referred to the CRPD, "the provisions of which may be relied on for the purposes of interpreting the provisions of the Directive, so that the latter must, as far as possible, be interpreted in a manner consistent with the Convention."[286] In the present case, the prison officer had hearing impairment since his childhood and had been employed for more than 14 years to the satisfaction of his superiors. The Court noted, "the regulation does not allow for an individual assessment of his ability to perform the essential functions of that occupation,"[287] nor does it "take into account the fact that a hearing impairment may be corrected by means of hearing aids which can be miniaturized, sit inside the ear or be placed under headgear."[288] In addition, the Estonian government failed to show that some measures, "such as use of a hearing aid, exemption from the obligation of performing tasks requiring the prison officer to meet the minimum standards of sound perception prescribed, or assignment to a post which does not require those standards to be reached," would impose a disproportionate burden.[289] As a result, the Court concluded that the regulation "appears to have imposed a requirement which goes beyond what is necessary to attain the objectives pursued by that regulation, which it is for the referring court to ascertain."[290]

In regard to the answer to the question referred by the Supreme Court of Estonia, the CJEU, in the light of the foregoing, ruled that:

> Article 2(2)(a), Article 4(1) and Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation which imposes an absolute bar to the continued employment of a prison officer whose auditory acuity does not meet the minimum standards of sound perception prescribed by that legislation, without allowing it to be ascertained whether that officer is capable of fulfilling those duties, where appropriate after the adoption of reasonable accommodation measures for the purposes of Article 5 of that directive.[291]

Notably, in this case the Court rightly noted that though article 4(1) of the directive provides that a difference of treatment may be justified by a genuine and determining

[286] *Id.* para. 49.
[287] *Id.* para. 46.
[288] *Id.* para. 47.
[289] *Id.* para. 51.
[290] *Id.* para. 52.
[291] *Id.* para. 54.

occupational requirement, the provision needs to be interpreted strictly,[292] especially taking into account the existence of reasonable accommodations. Further, the CJEU has recognized the importance of reasonable accommodations in "combating discrimination on grounds of disability," and therefore, maintained that "the concept of 'reasonable accommodation' should be understood broadly as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers."[293] Overall, this judgment has important implications for the interpretation and application of reasonable accommodations to ensure substantive equality for persons with disabilities in future cases.

3. Subconclusion: Long Way to Go

Although the CJEU has clarified many aspects of the definition of disability under the Employment Equality Directive, several issues remain open. The complex definition of disability under the case law could become a source of litigation, potentially creating obstacles for persons with disabilities to enforce their rights. A rigid analysis of the various components of the definition of disability can constitute a *de facto* standing requirement for litigants and hinder their access to justice. To avoid this, the definition of disability established in *HK Danmark* should be read broadly, with a view to respecting the object and purpose of the CRPD, which aims to guarantee equal enjoyment of all human rights and fundamental freedoms to persons with disabilities. Meanwhile, such an approach also has the benefit of shifting legal analysis from assessing who has disabilities to what accommodation measures can reasonably be provided.[294] As an example, the realization of disability rights was significantly delayed for nearly twenty years because of the narrow construction of disability by U.S. courts. It was not until the ADA Amendment Act of 2008 that more attention has shifted from whether the plaintiff has a disability to what job functions are essential and/or whether the requested accommodation is reasonable. This provides a crucial lesson for the CJEU. Further, the CRPD resonates with the universalist approach, which advocates an understanding of disability as a universal feature of human beings.[295] Put differently, every

[292] *Id.* para. 33.
[293] *Id.* para. 48.
[294] See Pekka Pohjankoski, *Breaking Down Barriers? The Judicial Interpretation of 'Disability' and 'Reasonable Accommodation' in EU Anti-Discrimination Law, in* EU ANTI-DISCRIMINATION LAW BEYOND GENDER 332 (Uladzislau Belavusau & Kristin Henrard ed., 2019).
[295] *See* Jerome Bickenbach, *Minority Rights or Universal Participation: The Politics of Disablement, in* INTERNATIONAL STUDIES IN HUMAN RIGHTS: DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE, vol. 56, 112 (Melinda

individual's ability lies on a continuum so that there is no fixed, static boundary between what constitutes a disability or not.[296] As a result, the CJEU should avoid imposing demanding requirements upon litigants to meet a rigid definition of disability.

On the whole, it seems that the ratification of the CRPD by the EU has marked a significant turning point in the case law of the CJEU. Under the influence of the CRPD, the jurisprudence of the CJEU has witnessed a clear shift from the medical model to the social model of disability. The Court has managed to define the concept of disability in the Employment Equality Directive in line with the CRPD. Nonetheless, the Court's case law on disability encompasses a mixed approach with regard to the CRPD's social model. On the one hand, the Court used the disability as an "umbrella term," encompassing a large variety of different health conditions. On the other hand, the restricted scope *ratione materiae* of the Directive falls short of the comprehensive social model notion of disability underpinning the CRPD. As a result, this inevitably leads the Court to narrow its definition of disability to make it fit within the scope of the Directive, as it appears in the cases of *Z v. A Government Department* and *Kaltoft*.[297] Although the Court in *XX v Tartu Vangla* provides a promising judgment to ensure the provision of reasonable accommodation, the Court' definition of disability could undermine its efforts to realize substantive equality for persons with disabilities since what constitutes disability is a prerequisite question before the analysis of reasonable accommodation. The CJEU's definition of disability overemphasizes the physical limitations caused by impairments. It seems that the Court is still struggling to recognize and apply the social model in its definition of disability.[298]

VII. CONCLUSION

The case law demonstrates that the European Court of Human Rights has a quite different approach and focus to disability issues compared to that of the Court of Justice of the European Union. In the context of disability, the ECtHR seems to provide a more promising venue for the vindication of disability rights than the CJEU. There are two possible reasons to explain the difference. First, this may be because of different functions of human rights in the political and

Jones & Lee Ann Basser Marks eds., 1999).
[296] *See* Chapter Three, section III.B.
[297] *See* Favalli & Ferri, *Defining Disability*, *supra* note 187, at 557-58.
[298] *See* Lisa Waddington, Case note on C-354/13 CJEU 18 December 2014 (*Kaltoft*), EUR. HUM. RTS. Cases No. 222537, para. 11 (2015).

legal systems within which the Courts operate.[299] The ECtHR is essentially a "court of human rights," primarily interested in the relationship between the individual and the state. In contrast, the role of the CJEU is to interpret the treaties establishing the EU and maintain a system of economic and (to some extent) political governance, which even with the addition of the Charter of Fundamental Rights, is not primarily about human rights.[300] Second, it may be attributable to the fact that the CRPD involves concurrent jurisdictions of both the EU and its Member States. The division of the respective competence restricts the ability of the CJEU to realize the obligations fully and effectively under the CRPD. Cooperation and coordination between the EU and its Member States are required to facilitate the implementation of the Convention. On the other hand, there is more room for the ECtHR to adopt a dynamic and flexible approach in its interpretation of the ECHR.

It appears that the European Court of Human Rights is more cognizant of the discriminatory barriers faced by persons with disabilities in their everyday lives. The CRPD provides a basis for the ECtHR to adopt a heightened standard of scrutiny and to narrow down the margin of appreciation enjoyed by States in its judgments concerning disability. The recent interpretation of article 14 of the ECHR demonstrates that the ECtHR has recognized the historical and structural disadvantage and become increasingly aware of the needs of marginalized groups and individuals. Influenced by the CRPD, the ECtHR is more willing to incorporate some form of reasonable accommodation duty into its interpretation of the ECHR. This has great potential to lead the Court to correct many factual inequalities encountered by persons with disabilities.

Nevertheless, the ECtHR is not consistent in its legal reasoning with respect to the use of the CRPD. As an example, the Court in *Alajos Kiss*, while ruling against the blanket ban of the rights of people with disabilities and indiscriminate differential treatment in the context of voting rights, did not consider that the substantive disadvantages experienced by individuals with mental or intellectual disabilities could potentially give rise to support measures to enable them to

[299] *See* Christopher McCrudden, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, 15 CAMBRIDGE Y.B. EUR. LEGAL STUD. 383, 406 (2012-2013) [hereinafter "McCrudden, *Using Comparative Reasoning*"].

[300] Lorenzo Zucca, *Monism and Fundamental Rights, in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 337 (Julie Dickson & Pavlos Eleftheriadis eds, 2012) ("The Court of Justice is in the business of dealing with issues of social economic and political governance. This has a major consequence in terms of fundamental rights: the Court of Justice has to constantly struggle to find the best balance between the preservation of economic freedoms and the protection of other values"), *cited in* McCrudden, *Using Comparative Reasoning*, supra note 299, at 407 n. 123.

participate in public life. Significantly, to ensure the equal enjoyment of human rights for people with disabilities, the interpretation of article 14 cannot go without a certain level of accommodations. For example, the *Glor* case demonstrates that the Court may be willing to incorporate, implicitly at least, the duty of reasonable accommodation into its non-discrimination analysis.

With regard to the European Union, the obligation on the CJEU to interpret the EU law in general, and the Employment Equality Directive in particular, in a manner compatible with the CRPD as far as possible, has led the Court to develop a new definition of disability. The initial definition set out in *Chacón Navas* was very much based on the medical model of disability. In its more recent case law, the CJEU has abandoned that and essentially overruled *Chacón Navas*. The Court's case law "has been largely boosted" by the EU accession to the CRPD, which "has become a clear point of reference in the reasoning of the European judges."[301] The new definition closely follows the wording of article 1 of the CRPD. However, in the cases of *Z v. A Government Department* and *Kaltoft,* the Court failed to embrace or fully comprehend the concept of disability based on the social model underlying the CRPD. *Z v. A Government Department* reveals that the Court neglected to appreciate the significance of the role that environmental or socially constructed barriers play in disabling people. And the Court's approach to disability in *Kaltoft* overly focuses on *physical limitations* directly resulting from obesity and, therefore, excludes individuals who do not have a limitation directly resulting from their impairment, but who nevertheless experienced disability discrimination based on false assumptions about their abilities, from protection under the Directive. Compared to the CRPD, which uses participation in society as a reference point for determining whether an individual experiences a limitation, the Court's more restricted definition of disability creates obstacles for persons with disabilities to enforce their rights and enjoy all human rights and fundamental freedoms on an equal basis with others. To sum up, while "the Convention has had a tangible influence on its [the Court's] case law concerning the definition of disability, the Court has not yet developed a definition which is fully in line with the CRPD."[302]

[301] *See* Delia Ferri & Silvia Favalli, *Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?*, 23 EUR. J. HEALTH L. 5, 8 (2016).
[302] *See* Waddington, *The European Union*, *supra* note 225, at 150.

CHAPTER SEVEN: CONCLUSION

I. INTRODUCTION

It has been fourteen years since the entry into force of the CRPD. While the Convention represents a crucial step in the international community to recognize the urgency of providing equal and effective human rights protection to persons with disabilities, its implementation requires states' commitment and full comprehension of their obligations under the CRPD. As the first international human rights treaty in the twenty-first century, the CRPD embodies a progressive vision of equality and non-discrimination whose substance significantly exceeds the mandate of existing human rights treaties. The equality and non-discrimination norms, in particular with the reasonable accommodation duty, are the driving force of the Convention and run like a golden thread across the substantive provisions of the Convention and breathe new life into human rights for people with disabilities. The primary inquiry of this dissertation is: Whether and how, both theoretically and empirically, can the equality and non-discrimination norms in the CRPD, *inter alia* through the mandate of reasonable accommodation duty, advance the equality of people with disabilities and increase their participation and inclusion in society?

The dissertation adopts a multidisciplinary approach to exploring the theoretical, practical, and legal dimensions of equality for persons with disabilities. On the one hand, the research project discusses the theoretical model of equality and conceptual models of disability underpinning the CRPD. On the other hand, the dissertation analyzes the precise legal meaning of the equality and non-discrimination provision in the CRPD to provide a substantive framework to determine the precise nature and scope of the legal obligations on States parties. Furthermore, the dissertation explores the interpretation and application of the equality right and reasonable accommodation duty through comparative viewpoints from the United States, the Council of Europe, and the European Union. A crucial aim of my thesis is to present in-depth analyses of the legal and philosophical aspects of reasonable accommodation from perspectives of the interrelatedness and interaction between national, regional, and international law and to explore its implications for reconstructing the equal rights of persons with disabilities.

II. SUMMARY OF FINDINGS

A. Theoretical Model of Equality in the CRPD

With respect to the theoretical model of equality embraced by the Convention, the dissertation delineates various theoretical models of equality and applies them to the context of disability to determine whether one or more of them is more suitable and consistent with the goal of realizing equal rights for people with disabilities. Notably, the CRPD is premised upon the concept of "inclusive equality" as advanced by the CRPD Committee in General Comment No. 6. The Convention embraces a substantive model of equality and further extends and elaborates on the content of equality in four crucial dimensions, including a redistributive dimension to address socio-economic disadvantage; a recognition dimension to combat stigma, stereotyping, prejudice, and violence and to recognize the dignity of human beings and their intersectionality; a participative dimension to reaffirm the social nature of people and the recognition of humanity through inclusion in society; and an accommodating dimension to make space for difference.[1] These four dimensions are complementary and intertwined so that achieving meaningful substantive equality requires the consideration of different dimensions to compensate for the weakness of others.

The multi-dimensional understanding of equality exemplifies how disability discrimination reflects the interaction between different dimensions.[2] For instance, though welfare benefits and social security system may help ameliorate material inequality, it can also reinforce stereotypes or stigmatize the recipients. Therefore, it is important to complement the first dimension with a commitment to respect and advance the dignity of people with disabilities. In addition, measures to redress disadvantages or reduce stigma are sometimes not enough to achieve substantive equality unless accompanied by structural change. One of the valuable aspects of the multi-dimensional understanding of equality is that it provides a framework to address the interaction between different dimensions.[3] In this way, we can come up with a more nuanced response in specific circumstances.

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[1] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 11.
[2] *See* Sandra Fredman, *Pasts and Futures: EU Equality Law, in* RESEARCH HANDBOOK ON EU LABOR LAW 415 (Alan Bogg et al. eds., 2016)
[3] *See* Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 HUM. RTS. L. REV. 273, 283 (2016).

B. The Social Model and Human Rights Model of Disability and the Universalist Approach

In addition, the dissertation reflects on different theoretical models of and approaches to disability to explore the normative foundations underlying the CRPD. Various theoretical models of disability illustrate how the concept of disability has been defined or constructed at different times and in different places. The understanding of disability, in turn, significantly influences the way in which we adopt legislation and policy to further the equal rights of people with disabilities. The negotiation and adoption of the CRPD reflect a paradigm shift from the medical model to the social model of disability. The medical model of disability views functional limitations of persons with disabilities as an inevitable result of their own impairments, which prevent their full participation in society. Hence, the inability of people with disabilities to enjoy rights equally is their personal problem. It ignores the competence or other skills individuals with disabilities have and leads to unnecessary segregation and exclusion from mainstream society. In contrast, the social model perceives disability as an interaction between one's impairments and the pervasive disabling barriers in society. It reminds us that many, if not all, of the disabilities are disabling only because the attitudinal, institutional, social and cultural environment is built to accommodate the needs and preferences of the non-disabled without taking into account the existence of people with disabilities. Therefore, according to the social model, disabilities are not merely a personal tragedy as claimed by the medical model; rather, they needed to be addressed by the whole society.

Undeniably, the social model constitutes the fundamental bedrock of the Convention. Nonetheless, it is fair to say that the Convention reflects much more than that; it further builds on the social model and incorporates the human rights model of disability.[4] The human rights model of disability focuses on the autonomy and inherent dignity of individuals with disabilities to ensure key goals of equal opportunity and non-discrimination. It acknowledges that individuals with disabilities are a critical part of human diversity. The human rights-based conceptualization of disability empowers people with disabilities, and its emphasis on participation is critical for advancing equality of the disability community.

Furthermore, the CRPD clearly reflects the universalist approach to addressing disability-related issues. From the starting point, the universalist approach perceives disability as a universal

[4] *See* Theresia Degener, *Disability in a Human Rights Context*, 5 LAWS, 35, 38 (2016).

feature of human beings, but not as a personal trait of a particular group.[5] It rejects the dichotomous conception of disability inherent in the minority group approach. Thus, it avoids the stereotypes and divisiveness of the targeted, group-focused approach. Moreover, while the minority group approach argues for equal rights and accommodations for persons with disabilities, it fails to challenge the mainstream norms, practices, and structures. In contrast, the universalists adopt a unified and deeply contextual approach to disability which enables us to examine ways in which existing political, social, and cultural norms and structures can be fundamentally altered. The Preamble(e) of the CRPD states that "disability is an evolving concept," and Preamble(e) and Article 1 describe disability as the interaction of different kinds of impairments with various social barriers. The Convention resonates with the universalist approach in the sense that every individual's ability lies on a continuum so that there are no intrinsic or inherent boundaries to disabilities.

C. Reasonable Accommodation duty and ESC Rights

The dissertation offers an in-depth interpretation and analysis of the equality and non-discrimination provision of the CRPD, i.e., article 5, with particular emphasis on the duty of reasonable accommodation. The Convention incorporates a detailed and robust equality and non-discrimination provision to increase the potential for realizing *de facto* equality for persons with disabilities. A central feature of the equality paradigm in the CRPD is the notion of the duty of reasonable accommodation. Reasonable accommodation is "an intrinsic part of the duty of non-discrimination in the context of disability."[6] Reasonable accommodation to people with disabilities is highly individualized, context-specific and involves delicate balancing of interests and burdens between a person with a disability and the duty bearer. My research delineates various elements and factors in assessing the reasonable accommodation duty. The dissertation argues that there is an intrinsic link between equality and dignity. The recognition dimension of equality requires us to combat stigma, stereotyping, prejudice, and violence and to recognize the dignity of human beings and their intersectionality. In the words of the CRPD Committee, "[r]easonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality

[5] *See* Jerome Bickenbach, *Minority Rights or Universal Participation: The Politics of Disablement, in* INTERNATIONAL STUDIES IN HUMAN RIGHTS: DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE, vol. 56, 112 (Melinda Jones & Lee Ann Basser Marks eds., 1999)

[6] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 23.

is assured, taking the dignity, autonomy, and choices of the individual into account."[7] Thus, the dignity interest of persons with disabilities should form an integral part in determining how and what kind of reasonable accommodations should be provided.

Cost is an important factor in determining whether the requested accommodation is reasonable, or the duty bearer can take advantage of the defense of disproportionate or undue burden. All requested accommodations have to be proportionate to the resources of the accommodating entity not only in financial terms, but also in terms of human or institutional capacity. Generally speaking, it is more difficult, though not impossible, for the public entities and large businesses to argue that limited resources prevent the provision of requested accommodations in comparison with other small-scale private actors.

Notably, some accommodations may not only affect the requesting individual and the duty bearer, but can also bring about potential benefits to, and/or negative impact on, other people. The dissertation argues that the so-called "third-party benefits" should be fully considered in determining whether a particular accommodation constitutes a disproportionate or undue burden. The main reason is that because of the widespread prejudice, stereotypes, and stigma towards persons with disabilities, people often tend to overemphasize the cost of an accommodation, focusing exclusively on the inconvenience, difficulty, and expense involved. The consideration of third-party benefits of an accommodation will increase the likelihood that a specific accommodation would not be perceived as imposing a disproportionate or undue burden on the duty bearer. Many accommodations have externalities beyond their specific setting. The provision of reasonable accommodations to one disabled individual may bring tangible and/or intangible benefits to those with comparative disabilities, and may ultimately result in increased accessibility and productivity for other people and even the whole society.

On the other hand, some accommodations may negatively impact other non-disabled individuals. The dissertation maintains that in the rare circumstance that after trying all possible accommodations, the only way to allow the disabled employees to remain employed with a certain employer is to prioritize their request for accommodations, and the accommodation granted would not result in the involuntary termination of other employees, the accommodation that would

[7] CRPD Committee, General Comment No. 2 (2014) on *Accessibility*, UN Doc. CRPD/C/GC/2, para. 26.

adversely impact the interests of other employees should be required.[8] The rationale behind this is the disparity in consequences. If a particular accommodation is not provided, the disabled employee is out of work, whereas the non-disabled employee who may be "harmed" by such accommodation still can perform her job.[9] More importantly, once being terminated from the current job, individuals with disabilities, compared to their non-disabled counterparts, face significant barriers to finding a new one because of the widespread discrimination and inaccessibility of the workplace. Given the considerable disparity in consequences, the scale should tip in favor of employees with disabilities. It is fair and reasonable to spread the cost and burden of reasonable accommodations to the employer and other non-disabled employees when a specific accommodation is necessary for people with disabilities to enter or remain in the workplace. Because reasonable accommodation not only provides persons with disabilities equal opportunity to employment, but it also furthers the interests of the employers to retain valuable employees, as well as promotes the interests of society by increasing economic independence of individuals with disabilities, thereby decreasing expenditure of public welfare roll.

Moreover, under the CRPD reasonable accommodation is embedded in the equality and non-discrimination provision, which belongs to a civil right that creates an obligation of immediate effect for states. However, the CRPD also mandates that reasonable accommodation is equally required in relation to civil and political, economic, social, and cultural rights. The CRPD acknowledges the significance of group-based disadvantage and socio-economic barriers to the attainment of social justice. So, it incorporates a detailed and robust equality and non-discrimination provision as well as an extensive range of social, economic, and cultural rights. The dissertation explores the interaction between reasonable accommodation duty and progressive realization of ESC rights contained in the CRPD and proposes a framework of "reasonableness review" which builds on the existing mechanisms established at the national and international level to assess whether the measures adopted by states are compatible with the Convention. The determination of reasonable accommodation provides a valuable framework to ensure that the reasonableness review of ESC rights is framed around equality, dignity, and participation.

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[8] *See* Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313 (2007).

[9] *See* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 987 (2004).

D. Reasonable Accommodation in the United States

As the term "reasonable accommodation" was first applied to disability in the United States in regulations to the Rehabilitation Act,[10] and subsequently codified into the statutory language of the Americans with Disabilities Act (ADA),[11] the dissertation investigates how the reasonable accommodation provision has been interpreted and applied in the past thirty years in the United States. I compare the U.S. approach to that of the CRPD and critically examine how the courts decide different types of reasonable accommodations through the normative framework and criteria proposed in the dissertation. It is shown that the full transformative potential of ADA's reasonable accommodation provision has fallen short of being completely realized because of courts' narrow construction of disability in the first two decades. Even after the 2008 Amendments to the ADA (ADAAA), the courts, sticking to the equal treatment model and fearful of giving persons with disabilities unfair preferential treatment, unduly restrict the multitude of potential accommodations that could facilitate individuals with disabilities' enjoyment of all human rights and fundamental freedoms on an equal basis with others.

The case law on many critical reasonable accommodation issues illustrates that the courts often adopt ***per se*** rules, e.g., on long-term leave of absence and commuting-related accommodations, etc., that unreasonably preclude certain accommodation requests from further consideration, overly defer to the employer's judgment and perceive the structural norms of the workplace, i.e., a particular shift, schedule, or attendance policy as essential functions of the job, or appear to be confounded with the analysis of the reasonable accommodation provision and undue hardship defense. The dissertation argues that the chaos of the interpretation and application of the reasonable accommodation provision under the ADA necessities a more unified and consistent framework that considers multiple dimensions, i.e., a fair redistributive dimension, a recognition dimension, an accommodating and transformative dimension, as well as a participative dimension are needed to ensure that the reasonable accommodation mandate can help bring about substantive (inclusive) equality for persons with disabilities.

[10] Rehabilitation Act of 1973 §§ 501, 503, 504, 29 U.S.C. §§ 791, 793, 794 (1994). The regulations imposing a duty of reasonable accommodation appear in 29 C.F.R. §§ 32.13(a), 1613.704 (1995).
[11] ADA § 101(9), 42 U.S.C. § 12111(9) (1994).

E. Disability Equality in Europe

Lastly, the dissertation looks into the jurisprudence of the European Court of Human Rights (ECtHR), the European Committee on Social Rights (ECSR), and the Court of Justice of the European Union (CJEU) to study how their equality laws work, especially in respect to the interpretation and application of reasonable accommodation. The case law demonstrates that the European Court of Human Rights has a quite different approach and focus to disability issues compared to that of the Court of Justice of the European Union. In the context of disability, the ECtHR seems to provide a more promising avenue for the vindication of disability rights than the CJEU. The CRPD provides a basis for the ECtHR to adopt a heightened standard of scrutiny and to narrow down the margin of appreciation enjoyed by states in their judgments concerning disability.[12] Some recent case law indicates that the ECtHR has increasingly recognized the importance of the duty of reasonable accommodation in ensuring substantive equality for persons with disabilities.[13] The recent interpretation of article 14 of the ECHR demonstrates that the ECtHR has recognized the historical and structural disadvantage and become increasingly aware of the needs of marginalized groups and individuals.[14] Influenced by the CRPD, the ECtHR is more willing to incorporate some form of reasonable accommodation duty into its interpretation of substantive rights and the non-discrimination provision of the ECHR.[15]

With regard to the European Union, the ratification of the CRPD by the EU has marked a significant turning point in the case law of the CJEU. Under the influence of the CRPD, the jurisprudence of the CJEU has witnessed a clear shift from the medical model to the social model of disability. Nonetheless, the Court's case law on disability encompasses a mixed approach: While the Court used disability as an "umbrella term" to encompass a large variety of different health conditions, the restricted scope *ratione materiae* of EU's Employment Equality Directive falls short of the comprehensive social model notion of disability underpinning the CRPD. Compared to the CRPD, which uses participation in society as a reference point for determining whether an individual experiences a limitation, the Court's more restricted definition of disability creates obstacles for persons with disabilities to enforce their rights and enjoy all human rights and

[12] *See* Chapter Six, section III.B.2&3.
[13] *See* Chapter Six, section III.C.
[14] *See* Chapter Six, section III.C.3.
[15] *See* Chapter Six, section III.C.4.

fundamental freedoms on an equal basis with others. It seems that the Court is still struggling to recognize and apply the social model in its definition of disability.[16]

F. The Importance of a Proper Understanding of Disability Equality

The equality and non-discrimination norms are the driving force of the CRPD. Throughout this dissertation, it has been shown that the CRPD embodies a progressive vision of equality and non-discrimination whose substance significantly exceeds prior human rights treaties. The equality and non-discrimination norms contained in the CRPD play a pivotal role in securing the fulfillment of the substantive rights and obligations of the Convention, promoting effective and full participation and inclusion of people with disabilities in society. A central feature of the equality paradigm in the CRPD is the reasonable accommodation duty, which constitutes "an intrinsic part of the immediately applicable duty of non-discrimination in the context of disability."[17] As Anna Lawson suggests, reasonable accommodation in the CRPD serves a "peculiar bridging role" that runs across all rights – civil, political, economic, social, and cultural – advancing in the reunification of human rights law.[18] It is a critical tool to remove the arbitrary, artificial, and unnecessary barriers that preclude persons with disabilities from exercising and enjoying their rights on an equal basis with others.

Unfortunately, many people are suspicious of the concept of reasonable accommodation, and courts are hesitant to apply it. In their views, reasonable accommodation seems quite different from traditional anti-discrimination laws that only prohibit an actor from intentionally treating an individual unfavorably from other similarly situated individuals because of the individual's race, color, sex, or other legally protected grounds. They assert that requiring others to reasonably accommodate a person with a disability in the absence of undue hardship resembles conventional affirmative action in the sense of giving members of minority groups preferential treatment or special benefits. Because of such misunderstanding of the function and goal of reasonable accommodation requirement, the potential and value of it cannot be fully utilized to realize substantive (inclusive) equality for people with disabilities.

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[16] *See* Chapter Six, section VI.B.
[17] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 23.
[18] *See* ANNA LAWSON, DISABILITY AND EQUALITY LAW IN BRITAIN: THE ROLE OF REASONABLE ADJUSTMENT 47 (2008).

In fact, the reasonable accommodation mandate, instead of providing unfair privileges, aims at leveling the playing field for persons with disabilities and providing them equal opportunity to exercise and enjoy all human rights and fundamental freedoms.[19] The social model of disability illuminates that disability is not, as many perceive, exclusively about functional incapacity or limitation which results naturally or inevitably from physical or mental impairments; instead, the concept of disability is highly socially constructed and, therefore, varies considerably across time and space.[20] The interaction between an individual's impairment and other physical or social environments is the ***root cause*** of one's inability to perform a particular function or activity in a conventional manner. The obligation to make reasonable accommodation is normatively based on such recognition to remove the artificial, arbitrary, and unnecessary barriers that prevent persons with disabilities from enjoying equal opportunities, whether they be education, employment, transportation or housing, etc., that are open to other non-disabled people.

Upon closer examination, the reasonable accommodation requirement exhibits fundamental kinship with the broad anti-discrimination project. In discussing the relationship between reasonable accommodation and disparate treatment law, Samuel Bagenstos aptly argues that "the goals of anti-discrimination and accommodation requirements are parallel, for both seek to dismantle a system of group-based subordination and the patterns of occupational segregation that support that system."[21] On a higher conceptual level, reasonable accommodation duty and other measures such as disparate impact theory and affirmative action (positive action or specific measure) represent various mechanisms to realize the goal of substantive (inclusive) equality so that every individual can have equal opportunity and access to valuable resources to exercise and enjoy all human rights and fundamental freedoms. Though they all aim at fulfilling the equality and non-discrimination norms, each has different functions and addresses various forms of injustice and discrimination. It is critical to appreciate similarities and distinctions between them so that each can be adequately employed to address different forms of discrimination and inequality. The uniqueness and one of the most valuable aspects of the reasonable accommodation duty lies in its ability to recognize that persons with disabilities comprise a highly heterogeneous

[19] *See* Janet E. Lord & Rebecca Brown, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities, in* CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 280 (Marcia H. Rioux, Lee Ann Basser & Melinda Jones eds., 2011)
[20] *See* MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990).
[21] *See* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003).

group with a wide range of impairments and varying severity that manifest themselves differently. [22] Therefore, reasonable accommodation is indispensable for individuals with disabilities to secure ***de facto*** equality in society.

To foster a proper understanding of the reasonable accommodation requirement and promote its realization, states should ensure that national legislations and policies incorporate this mandate. Furthermore, in light of the complexity of the concept of reasonable accommodation, concrete and specific enforcement rules or guidance should be issued to provide clarity to the public regarding the rights and responsibilities of duty bearers and individuals with disabilities. This can also help to reduce the resistance (or even hostility) of the judiciary, avoiding the courts from taking an unnecessarily rigid and strict approach to restrict the scope of reasonable accommodation claims. More important, the CRPD calls for states to adopt measures to raise awareness about persons with disabilities throughout society; to foster respect for the rights and dignity of persons with disabilities; to combat stereotypes, prejudices and harmful practices, including those based on sex and age, in all areas of life; and to promote awareness of the capabilities and contributions of persons with disabilities.[23] The importance of transforming the society from viewing disabled people as "different others" who are in need of charity and welfare to "equal human beings" whose impairments may affect them to function or conduct activities in a customary way, but given necessary and appropriate modification and adjustments who can also demonstrate their capabilities and contributions cannot be overemphasized. This may seem general but fundamental and critical to bring about changes in attitudes and behavior of the public which constitutes preconditions for persons with disabilities to exercise and enjoy human rights equally and to fully and effectively participate and be included in society.

III. RECOMMENDATION

A. Recommendations for States

Ratification of the CRPD is only the first step for states. To ensure that the Convention has real impact on the lives of people with disabilities, States parties must endeavor to implement the substantive provisions of the Convention. National laws and policies need to be reviewed to bring them into conformity with the CRPD. States should enact or amend equality act and/or non-

[22] *See* Chapter Five, section III.C.
[23] CRPD, Article 8(1).

discrimination law to provide protection against disability-based discrimination which includes different forms of discrimination[24] (direct, indirect and discrimination by association), multiple discrimination,[25] and intersectional discrimination.[26] Discrimination on the basis of disability should be prohibited in all laws concerning the substantive rights of persons with disabilities, including such areas of education, employment, housing, transportation, election and so on. Most importantly, in accordance with the Convention, states need to ensure that denial of reasonable accommodation is defined as a form of discrimination in their domestic laws.

Notably, many states still approach disability through the lens of an individual and medical model. The CRPD represents a paradigm shift to the social model or the human rights model of disability.[27] The medical model reduces people with disabilities to their impairments; it fails to acknowledge persons with disabilities as full subjects of rights and as rights holders. The Convention recognizes that disability is a social construct and is one of several layers of human identity.[28] Hence, one's impairments must not be taken as a legitimate ground for restricting or denying rights. It is imperative for governments to incorporate this new conceptualization of disability into their national laws and policies to comply with the CRPD.

The Convention also calls for states to adopt specific measures (also called positive action or affirmative action) to accelerate or achieve ***de facto*** equality of persons with disabilities.[29] Though specific measures are generally not mandatory, in certain circumstances, governments may be required to take temporary specific measures in order to alleviate or eliminate structural inequalities caused by systematic or entrenched discrimination.[30] For example, when a society is prevalent with deep-rooted structural discrimination and intractable bias, the necessity to adopt specific measures is reinforced so as to correct substantial inequality and achieve equalization of opportunities. In a similar vein, specific measures are sometimes obligatory in cases where the essence of certain human rights would become meaningless without such measures. This is particularly the case with some mental or intellectual disabilities, which easily lead to systematic disadvantage and exclusion from society. Their right to equally participate in the political and

[24] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 18.
[25] *Id.* para. 19.
[26] *Id.*
[27] *See* Theresia Degener, *Disability in a Human Rights Context*, 5 LAWS, 35, 38 (2016).
[28] CRPD, Preamble (e), (i), (p) and Article 1(2).
[29] CRPD, Article 5(4).
[30] *See* Chapter Four, section II.C.5.b.(1).

public life would be possible only if some permanent specific measures were put in place to support their decision-making. In this situation, the state is obliged to adopt positive measures to facilitate this process to ensure that the disadvantage flowing from impairments would not impede the equal opportunities of persons with disabilities to participate in all areas of social life.

In addition, states should carefully consider the impact on the equality rights of people with disabilities before adopting new actions, policies, and strategies. To fulfill their obligations under the CRPD, governments must set up fixed timelines to identify and remove existing barriers which prevent people with disabilities from enjoying and exercising rights on an equal basis with others. Sufficient resources, including human, financial as well as others, should be allocated to ensure the implementation of each and every substantive rights and obligations contained in the Convention. At the very least, states are required to adopt all necessary measures to give effect to the minimum core of the rights to ensure that the basic needs and capabilities of persons with disabilities who are in most dire circumstances are catered for first and foremost.[31] Admittedly, different countries face different constraints in fulfilling their treaty obligations, particularly when it comes to the realization of economic, social, and cultural rights for disabled groups. Governments will have to make policy choices with respect to priority setting in accordance with their national contexts. Nevertheless, the CRPD incorporates an additional equality dimension into the progressive realization of its socio-economic provisions through reasonable accommodation duty. As a result, it is critical for states to pay close attention to the equality and non-discrimination norms in assessing whether they have taken adequate measures to implement the rights and obligations contained in the Convention.[32] In that regard, states must set up appropriate indicators and benchmarks to effectively monitor the progress of the rights of persons with disabilities.

Meanwhile, the dissertation suggests that a reasonableness review, which embraces equality, dignity and participation, helps ensure that national authorities adopt appropriate steps to progressively realize the socio-economic rights of people with disabilities. The application of the equality and non-discrimination norms can ensure socio-economic rights of the marginalized and disadvantaged groups are realized, and the fulfillment of socio-economic rights can help to address

[31] Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990) on *the Nature of States Parties Obligations*, UN Doc. E/1991/23, para. 10.
[32] *See* Sandra Liebenberg & Beth Goldblatt, *The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution*, 23 S. AFR. J. OF HUM. RTS. 335, 351-352 (2007).

systematic disadvantages and inequalities. More importantly, persons with disabilities have long been perceived as incapable of making choices by and for themselves. Professionals and experts always make decisions on their behalf without ever respecting their wills or preferences. It is crucial to give adequate weight to the perspective and voice of the disabled community. As required by the Convention, persons with disabilities and their representative organizations should play a central role in the development of legal and policy reforms.[33] The consultative process of exchanging views is essential to the full and effective realization of rights in compliance with the CRPD. In addition, including the perspective and voice of persons with disabilities in developing and implementing laws and policies helps enhance transparency and accountability.[34] A participatory process also contributes to balancing the various interests and burdens at stake when governments make arrangements regarding priorities and trade-offs.

B. Recommendations for the Courts

From the case study of the different jurisdictions, it is shown that some problems in the courts' understandings and reasonings of disability rights may hinder the realization of the equality and non-discrimination norms in the CRPD. First of all, it is important for the judges to understand that the social model of disability constitutes the fundamental bedrock of the CRPD. The social model directs our attention away from the physical or mental impairments towards the outside social environment. It reminds us that many, if not all, of the disabilities are disabling only because the social, institutional, and cultural environment is built to accommodate the needs and preferences of the non-disabled without taking into account the existence of people with disabilities. It is unfortunate to see that many courts still stick to the medical model of disability, overly focusing on the diagnosis and severity of the physical or mental impairments of the plaintiffs. A rigid analysis of the various components of the definition of disability creates great obstacles for persons with disabilities to enforce their rights and hinder their access to justice. Article 1 of the CRPD provides that "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." The

[33] CRPD Committee, General Comment No. 6 (2018) on *Equality and Non-discrimination*, CRPD/C/GC/6, para. 2; CRPD, Article 4(3).
[34] *See* Bruce Porter, *The Reasonableness of Article 8(4) - Adjudicating Claims from the Margins*, 27(1) NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 39, 52 (2009).

courts should recognize the interaction between one's impairment and those socially constructed barriers and avoid imposing demanding requirements upon litigants to meet a rigid definition of disability. Such an approach also has the benefit of shifting legal analysis from assessing who has disabilities to what accommodation measures should be provided.[35]

Secondly, a proper interpretation and application of reasonable accommodation duty by the courts is crucial for the realization of substantive (inclusive) equality for people with disabilities. The reasonable accommodation mandate, as an integral part of the broad equality and non-discrimination norms, seeks to remove the arbitrary, artificial, and unnecessary barriers that preclude individuals with disabilities from participating and being included in society. Duty of reasonable accommodation, instead of providing unfair privileges, aims at leveling the playing field for persons with disabilities. However, many judges, either because of unfamiliarity with the concept, or mistakenly equate preferential treatment to people with disabilities with unfair privileges, harbor a suspicious (even hostile) attitude to the reasonable accommodation provision and unduly restrict its scope. One of the most valuable aspects of the reasonable accommodation duty lies in its mandate for a case-specific and fact-intensive inquiry. An adequate analysis of reasonable accommodation duty necessitates an individualized assessment that considers the particular circumstances of different individuals with a wide array of disabilities with varying severity that manifest themselves differently. Therefore, a one-size-fits-all approach is not only infeasible but also runs afoul of the central spirit and purpose of the reasonable accommodation obligations. Generally speaking, persons with disabilities only need to show that the accommodation requested seems reasonable on its face to establish a *prima facie* claim. The threshold should be kept low to avoid unnecessarily restricting the multitude of potential accommodations. Then the burden shifts to the duty bearer to demonstrate either the accommodation measure is unreasonable or it causes a disproportionate or undue burden in specific cases.

Moreover, the courts should recognize that the CRPD embraces a multi-dimensional understanding of inclusive equality. Thus, it is imperative to adopt a more unified and consistent framework that takes into account the multiple goals served by the duty of reasonable

[35] See Pekka Pohjankoski, *Breaking Down Barriers? The Judicial Interpretation of 'Disability' and 'Reasonable Accommodation' in EU Anti-Discrimination Law, in* EU ANTI-DISCRIMINATION LAW BEYOND GENDER 332 (Uladzislau Belavusau & Kristin Henrard ed., 2019).

accommodation to address the complexities of reasonable accommodation issues. The goals pursued by the reasonable accommodation mandate include making people with disabilities economically independent, *i.e.* a fair redistributive dimension of inclusive equality, showing respect for equal dignity and worth of people with disabilities, *i.e.* a recognition dimension of inclusive equality, dismantling the disadvantaged and group-based subordination system, *i.e.* an accommodating and transformative dimension of inclusive equality, and removing the arbitrary, artificial, and unnecessary barriers that preclude individuals with disabilities from participating and being included in all spheres of society, *i.e.* a participative dimension of inclusive equality. It is crucial to carefully consider these four complementary and intertwined dimensions to ensure that an appropriate analysis of the reasonable accommodation claims facilitates individuals with disabilities' enjoyment of all human rights and fundamental freedoms on an equal basis with others.[36]

C. Recommendations for Civil Society Organizations

Importantly, unlike any of previous human rights treaties, persons with disabilities and their representative organizations played a decisive role in the negotiation, development and drafting of the CRPD. They use lived experiences to provide input and educate government officials to formulae the first ever legally binding disability-specific Convention. The CRPD provides great potential for civil society organizations as an advocacy tool. Although it is estimated that people with disabilities constitute 15 percent of the world's population, disability remains largely invisible as a human rights issue. The Convention increases the visibility of the situation of persons with disabilities and affirms disability rights as a human rights issue within the international human rights arena.[37] The CRPD innovates the standard approach taken in previous human rights treaties. It represents the most advanced international human rights instrument on the rights of persons with disabilities in terms of scope and depth. As such, it is particularly important for civil society organizations, organizations of persons with disabilities in particular,[38]

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[36] *See* Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 HUM. RTS. L. REV. 273, 283 (2016).

[37] *See* Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 15-18 (2002).

[38] On the difference between civil society organization and organizations of persons with disabilities, *see* CRPD Committee, General Comment No. 7 (2018) on the *participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, CRPD/C/GC/7, para. 14.

to utilize the provisions on awareness-raising, participating in national implementation and monitoring to facilitate mobilization and effective realization of the rights of persons with disabilities.[39]

Notably, attitudinal barriers are at the center of the cause of mistreatment and exclusion of people with disabilities. Awareness-raising plays a fundamental role in fostering proper understanding of disability and mobilizing communities to bring about changes in attitudes and behavior. Policy and legislation alone, while important, are not sufficient to combat disability-based discrimination if the underlying attitudes, values, and beliefs that are at the root of human rights violations have not been tackled. Understanding and portraying the diversity of persons with disabilities is crucial in designing an awareness-raising program to change attitudes towards such persons.[40] It is imperative that civil society organizations advocate through public campaigns, training and education sessions to raise awareness about persons with disabilities throughout society, to foster respect for the rights and dignity of persons with disabilities, and to promote awareness of the capabilities and contributions of persons with disabilities.[41] Additionally, people with disabilities should be empowered to become aware of their rights and how to exercise and invoke them when such rights are infringed under the CRPD.

Civil society organizations also have a crucial role in the implementation and monitoring of the Convention. The participatory process and the involvement of persons with disabilities, through their representative organizations, are at the heart of the CRPD.[42] Under articles 4 (3) and 33 (3) of the Convention, States parties are required to "closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations" "[i]n the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities," and to ensure involvement and full participation of civil society, in particular persons with disabilities and their representative organizations, in the monitoring process. Because of their lived experiences and knowledge of the rights to be implemented,

[39] CRPD, Article 8 on awareness-raising and Article 33 on national implementation and monitoring.
[40] Office of the United Nations High Commissioner for Human Rights (OHCHR), *Awareness-raising under article 8 of the Convention on the Rights of Persons with Disabilities*, para. 51 (2020).
[41] CRPD, Article 8(1).
[42] CRPD Committee, General Comment No. 7 (2018) on the *participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, CRPD/C/GC/7, para. 1.

meaningful consultation with and active involvement of persons with disabilities bring about positive impact on decision-making processes and ensures good governance and accountability.

The promotion of advocacy by and empowerment of persons with disabilities are key components of their participation in public affairs. Civil society organizations and states should support persons with disabilities to develop the competencies, knowledge and skills required to independently advocate for their enjoyment of human rights on an equal basis with others, and for full and effective participation in society. In this regard, the CRPD represents an invaluable advocacy tool for people with disabilities and their representative organizations to promote the realization of equal rights of persons with disabilities and increase their participation and inclusion in society from button-up.

D. Recommendations for Future Research

For the sake of time and space, the dissertation is only able to investigate jurisprudence of the United States, the European Court of Human Rights (ECtHR), the European Committee on Social Rights (ECSR), and the Court of Justice of the European Union (CJEU) with respect to their understanding and interpretation of equality and non-discrimination norms, with a focus on the duty to provide reasonable accommodation, particularly in the context of disability rights. While this sheds important light on how the equality and non-discrimination provision of the CRPD was approached and interpreted by regional systems, it inevitably leads to some research limitations: Country studies within the Council of Europe and the European Union have not been carried out. As a result, wide variations may exist on the approaches to disability law and policy in the domestic jurisdictions. The broader picture provided by the ECtHR and CJEU might mask the actual degree to which the CRPD has already influenced, or is likely to potentially influence, national law and policy relating to disability equality. Future study can, through examination of the equality and non-discrimination norms and reasonable accommodation duty in various European countries and other national and regional jurisprudence (Inter-American Court of Human Rights or African Court on Human and Peoples' Rights), supplement this to help further develop a normative understanding of reasonable accommodation that accommodates the diversity of approaches to the concept, while at the same time ensures that the broad common goal and core spirit of reasonable accommodation can be realized.

Furthermore, reasonable accommodation duty not only falls within the articles of general application and, therefore, applies across the CRPD, it is also specifically referenced in article 12 on access to justice,[43] article 14(2) on liberty and security, article 24 on education, as well as article 27 on employment. The nature and scope of reasonable accommodation may vary in the context of exercising civil and political rights or with respect to achieving economic, social and cultural rights. The intricacy of the way in which reasonable accommodation should be interpreted and applied to facilitate the implementation of different substantive rights for persons with disabilities is an important issue worth further exploring.

Additionally, the duty to provide reasonable accommodation in the Convention is not limited to states only; it further extends to a broad array of private actors, including employers, educational institutions, health care providers, providers of goods and services, etc. These actors have obligations to reasonably adjust practices, criteria and policies to address the needs of persons with disabilities to further their inclusion and participation in society.[44] Unlike some domestic laws that confine the duty to provide reasonable accommodation to specific areas, such as employment, education, religion, or housing, the CRPD creates a more far-reaching duty to accommodate, which spans across all human rights and social life areas. What states need to do to amend national laws and policies to fulfill their obligations under the Convention, as well as strengthen the provision of reasonable accommodation between private parties to ensure substantive (inclusive) equality for people with disabilities is another critical area that merits future research.

IV. CONCLUDING REMARKS

The CRPD represents the evolution of the human rights of persons with disabilities at the international level in recent decades. As the most comprehensive legal framework for the protection of the rights of people with disabilities, the Convention and its Optional Protocol received immediate and wide support from the international community.[45] Their adoption has been welcomed as evidence of a concrete commitment to a truly inclusive and universal human rights

[43] Article 12 requires "provision of procedural and age appropriate accommodations."
[44] *See* ANNA LAWSON, DISABILITY AND EQUALITY LAW IN BRITAIN: THE ROLE OF REASONABLE ADJUSTMENT 222 (2008).
[45] The Convention and its Optional Protocol were opened for signature on 30 March 2007. Eighty-one states and the European Union signed on that day – the most opening signatures for any UN human rights treaty – and the Convention entered into force on 3 May 2008. *See* Report of the Secretary-General as to the Status of the Convention on the Rights of Persons with Disabilities and the Optional Protocol, 14 August 2007, A/62/230, at para. 4.

framework. Throughout this dissertation, it is argued that the equality and non-discrimination norms contained in the CRPD are extremely progressive and play a pivotal role in securing the fulfillment of the substantive rights and obligations of the Convention, promoting full and effective participation and inclusion of people with disabilities. States should carefully consider equality matters in reforming legislations and policies to eradicate existing barriers that impede the exercise and enjoyment of human rights by individuals with disabilities. Effective implementation of the CRPD requires states to mainstream disability rights in law and policy making, allocate sufficient financial and other resources, establish fixed time frame, and set up adequate indicators and benchmarks for monitoring. A reasonableness review based on equality, dignity, and participation of persons with disabilities should be used to ensure that states take appropriate measures to progressively realize the economic, social, and cultural rights of people with disabilities. The spirit and substantive rights of the Convention much be translated into practical actions and strategies to effect real change in the everyday lives of persons with disabilities.

The importance of the CRPD is aptly reflected by the U.N. High Commissioner for Human Rights, Michelle Bachelet, who affirmed that "The Convention on the Rights of Persons with Disabilities is not only an instrument for persons with disabilities. Its principles and provisions benefit the entirety of the human family because it strengthens our responses against exclusion, and segregation and indeed, like the Sustainable Development Goals, it illustrates that reaching the furthest behind first is the key to leaving no one behind."[46] It is hoped that the potential of the CRPD will come to fruition to ensure the long-delayed dream of many people with disabilities — to enjoy and exercise their human rights equally and to fully and effectively participate and be included in society — becomes a reality.

[46] At https://www.ohchr.org/en/disabilities/about-human-rights-persons-disabilities (last accessed April 18th, 2022).

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