

**EQUAL WORKING RIGHTS FOR MENTALLY
DISABLED PEOPLE IN THE UNITED STATES, THE
UNITED KINGDOM AND AZERBAIJAN.**

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Abstract

The thesis examines the laws that provide working rights of mentally disabled people in the United States, the United Kingdom and Azerbaijan. The U.K and the U.S ensure the right to work of mentally disabled people through the implementation of anti-discrimination legislation, whereas Azerbaijan applies the quota system. The thesis aims at highlighting the problems of the Azerbaijani law since most people with mental disabilities in the state are left out of the system and remain unemployed. The disadvantages of the Azerbaijani system are identified by means of drawing comparison of the quota system applied in the country to the anti-discrimination legislation of the U.S and the U.K.

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Introduction

During the years of the Soviet ruling people with disabilities in Azerbaijan were treated as defective people and state policy towards them was mainly introduced by means of paying them monthly pensions that amounted to the sum twice less than an average salary in the country and locking them up in institutions. Non -abled people at that time could not even dream about equal working opportunities at the mainstream labor market with non disabled.¹

However, since Azerbaijan became an independent state a major change took place in the disability policy of the country. Azerbaijan ratified the Convention on the Rights of Persons with Disabilities in 2009.² The Convention provides disabled people with equal rights in all fields and the states parties to the Convention are under the obligation to implement the provisions of the Convention and ensure equality of disabled people in the country. The aim of this paper is to identify the exiting problems of the Azerbaijani legislation regulating working rights of mentally disabled people, compare it to the anti-discrimination laws of the United States and the United Kingdom and make recommendations on how the Azerbaijani legislation should be improved relying on the examples of the U.S and the U.K.

¹ V.Fefelov “There are no invalids in the USSR”, London Overseas Publications Interchange Ltd,1986 , p.9-15

http://antisoviet.narod.ru/fefelov_v_v_ssr.pdf

² UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

In the following chapters I will first explore the laws regulating working rights of disabled people in the United States and the United Kingdom. Both countries do not apply the quota system as a means of employment of disabled people since the system is based on assumption that people with disabilities are less productive than non-disabled.³ According to the quota system disabled people will be employed only if employers are obliged to hire them under the threat of punishment. Thus, in accordance with the system the employment of disabled people is realized by means of forcing employers to hire a fixed number of people with disabilities.⁴ The United States became the first country that chose another way and implemented the anti-discrimination legislation as a mechanism of ensuring working rights of disabled people.⁵ The United Kingdom was the first European state that switched from the quota system to the anti-discrimination legislation.⁶

The introduction of anti-discrimination legislation is a big achievement in the process of providing equal working rights for disabled people because it views the prejudices and stereotypes against disabled people as a main barrier for them to be involved in the mainstream labor market.

Then, I will examine the Azerbaijani law that regulates working rights of disabled people. The employment of disabled people in Azerbaijan is ensured through the implementation of the quota system according to which every enterprise has to hire a

³ Samuel R. Bagenstos, "Comparative Disability Employment Law from an American Perspective", *Comp. Labor Law and Pol'y Journal*, Vol. 24:649,2004, p.649-650

⁴ Lisa Waddington "Reassessing the employment of people with disabilities in Europe: from Quotas to Anti-Discrimination Laws", *Comparative Labor Law Journal*.62, University of Pennsylvania,1996, p.8-9

⁵ Samuel R. Bagenstos, "Comparative Disability Employment Law from an American Perspective", *Comp .Labor Law and Pol'y Journal*, Vol.24:649,2004, p.649-650

⁶ Charlotte Pearson, "Tackling Disability Discrimination in the United Kingdom: The British Disability Discrimination Act", *Washington University Journal of Law and Policy*, 2007,p.3

fixed number of disabled people.⁷ However, the system is not efficient and most disabled people in the country remain unemployed. Especially it concerns people with severe forms of mental disabilities who are discriminated not only against non- disabled but also against people with physical disabilities.

People with mental disabilities in Azerbaijan receive basic education in special schools for disabled people and after that are employed at sheltered jobs in the best case. Still, most are locked up in institutions. Those who have mild forms of mental disabilities prefer to hide the fact of their disability because of prejudices against mentally disabled people in the Azerbaijani society. Thus, this group of mentally disabled people do not benefit from the quota system as well. The involvement of people with severe forms of mental disabilities in the mainstream labor market is perceived as nonsense. Still, one should expect such attitude since there are no many examples of employment of such people in the country. Nevertheless, there is the law that is supposed to ensure the employment of people with mental disabilities. Consequently, the law existing in the country and the quota system it establishes is not a good mechanism for ensuring working rights of mentally disabled people since most of them are left out of the system.

Finally, in the last chapter I will draw a comparison of anti-discrimination legislation of the U.S and the U.K and the quota systems applied in Azerbaijan in order to identify which mechanism is more effective and whether the implementation of the anti-discrimination legislation in Azerbaijan will bring positive changes in the field of employment of mentally disabled people.

⁷ The Law of the Republic of Azerbaijan on the Prevention of Disability, Rehabilitation and Social Protection of disabled people, No.284, 25th of August, 1992

In the following I will explore the concepts of formal and substantive equality and the consequences of their application to the cases of disabled people.

Chapter 1. Equality and Disability

1.1 Equality

Debates about equality existed for many centuries since the time of Aristotle and Plato. In ancient times there was a kind of an equality, but equality of the equals. So, existence of slavery, practical lack of women rights, inferior position of disabled people, etc. were perceived as a norm. Plato in his “Republic” considers the existence of slavery as an indubitable fact.⁸ Aristotle defines a woman as an “unfinished men” claiming her deficiency in compare to a man.⁹ In ancient Greece most disabled children were killed since they were considered useless for society.¹⁰ A similar attitude was typical of ancient Indian, Chinese, and Persian societies as well. In India there were four castes: the priests (Brahmas), the warriors (Kshatriya), the merchants (Vaishya) and the serfs (Shudras). Although shudras were not considered slaves they were also deprived of their liberty; they could be sold and bought. Even if shudra was released by his owner, he would not become a free person. Members of other castes had to avoid any contact with them.¹¹

The radical changes took place with French and American Revolutions since both proclaimed equal treatment of everyone as one of the main values of newly established

⁸ Plato, “The Republic”, The Clarendon Press, (translated by [Benjamin Jowett](#)) Oxford : The Clarendon Press, 1908

⁹ Aristotle “The Politics”, Forgotten Book Press, 1885 (translated by Benjamin Jowett)

¹⁰ Barrett, J. (n.d.) "History of Discrimination Against Disabled Persons" Retrieved October 1st, 2008 from Jackie Barrett website: <http://www.jackiebarrett.ca/HistoryOfDiscrimination.htm>

¹¹ Bryan S. Turner, “Equality”, Ellis Horwood ; Tavistock Publications, Chichester : London ; New York , 1986, p.18.

http://books.google.com/books?id=28AOAAAAQAAJ&printsec=frontcover&dq=equality&source=gbs_slider_thumbnail#v=onepage&q&f=false

Republics. Later many countries followed the example of the U.S by adopting democratic Constitutions and guarantying equality to everyone under the law. At that point, democratic society was understood as the one which is free from social classes. Every person is equal because he/she is entitled to equal rights and duties as others. However, the only equal treatment did not provide real equal opportunities for all social groups. It could hardly be said that disabled people favored a lot from that policy since they needed something more than just guaranty of equal protection under the law. Since most laws were adopted by non-disabled legislators they did not care much about the interests and needs of people with disabilities. At this point I will move to the issue of formal and substantive equality.

1.2 Formal Equality

Formal equality refers to “equal treatment of similarly situated individuals”¹² or “treat similar cases similarly”.¹³ Aristotle who one of the first to formulate the concept of formal equality and interpreted it as “sameness among equals, or treating equals equally or likes alike”.¹⁴ Thus, the theory of formal equality requires equal treatment only in cases when we deal with something similar. Aristotle attributed equal treatment only to the state. According to him it is only the state that has to provide equality through its laws and decisions.¹⁵

¹² Wouter Vandenhoele “Non discrimination and equality in the view of U.N Human Rights Treaty Body”, Antwerpen-Oxford, 2005, p.34

http://books.google.com/books?id=FjrMK-1BW38C&pg=PA34&dq=concept+of+equality&hl=en&ei=teRoTIjiPMamOK-Y9LkF&sa=X&oi=book_result&ct=book_thumbnail&resnum=3&ved=0CDIQ6wEwAjkK#v=onepage&q=concept%20of%20equality&f=false

¹³ Id.

¹⁴ Aristotle, *Ethica Nichomachea*, Book V.3 1131a-1131b in Jonathan Barnes (ed.).

¹⁵ Id.

At the end of the 19th century the Supreme Court of the United States interpreted equality cases in the light of the theory of formal equality. In *Plessy v. Ferguson*¹⁶ an applicant challenged the Louisiana law which established the rule that blacks and whites had to use separate railway cars. The Court did not find violation as both races were treated separately but equal.¹⁷ It follows the explanation given by Aristotle pointing out the significance of equality only in a state-citizens relation. The state fulfilled its duty if it provided laws which treated equals equally. But society can not be forced to change its attitude. People are free in their choice to refuse to accept black people as equal members.¹⁸

Consequently, the concept of formal equality justified the existence of sex and race based discrimination. In *Bradwell v. Illinois*¹⁹ a plaintiff was denied the right to become a member of the Illinois State Bar because of her sex. She tried to challenge the decision in the court but her claim was rejected. Justice Bradley stated that “man is or should be woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits for many of the occupations of civil life ... The paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother.”²⁰

The turning point was the case of *Brown v. Board*²¹ of education in which the Supreme Court held that “separate educational facilities for black and whites are inherently unequal”²².

The concept of formal equality started to be replaced by substantive equality.

¹⁶ 163 U.S. 537 (1896)

¹⁷ Separate but equal doctrine required two races to have separate accommodation, facilities, and services. Although the doctrine provided for equal quality of those things for both races the real situation was that two races were separate but not equal. It was the blacks who remained to have an inferior position in society.

¹⁸ 163 U.S. 537 (1896)

¹⁹ 83 U.S. 130 (1871)

²⁰ *Id.*

²¹ 349 U.S. 294 (1955)

²² *Id.*

1.3 Substantive equality

“Substantive equality hints at equality of results.”²³ It requires individualistic characteristics of each case to be taken into account when deciding whether treatment is equal or not. For example, when women were given equal working rights there was a need for some affirmative actions such as providing them with special trainings, education, etc. Thus, in this situation substantial equality was focused on a historically disadvantaged position of women. Another case was the natural differences between men and women. Only women could become pregnant and give birth. Since pregnancy created difficulties at the work place preventing women from work for a certain period of time, legislators had to provide them with additional protection.

Consequently, if we apply both approaches to the concept of disability the discrimination against mentally disabled employees is justified under the theory of formal equality since according to the theory only “equals should be treated equally”.²⁴ Moreover, even if legislation provides disabled and non-disabled workers with the same working rights, disabled workers will be still in inferior position as this situation will result in “equality before the law” but not “equality in the law”.²⁵

²³ Wouter Vandenhoe "Non discrimination and equality in the view of U.N Human Rights Treaty Body", Antwerpen-Oxford, 2005, p.34,

http://books.google.com/books?id=FjrMK-1BW38C&pg=PA34&dq=concept+of+equality&hl=en&ei=teRoTIjiPMamOK-Y9LkF&sa=X&oi=book_result&ct=book_thumbnail&resnum=3&ved=0CDIQ6wEwAjkK#v=onepage&q=concept%20of%20equality&f=false

²⁴ Aristotle, *Ethica Nichomachea*, Book V.3 1131a-1131b in Jonathan Barnes (ed.).

²⁵ Wouter Vandenhoe "Non discrimination and equality in the view of U.N Human Rights Treaty Body", Antwerpen-Oxford, 2005, p.34

http://books.google.com/books?id=FjrMK-1BW38C&pg=PA34&dq=concept+of+equality&hl=en&ei=teRoTIjiPMamOK-Y9LkF&sa=X&oi=book_result&ct=book_thumbnail&resnum=3&ved=0CDIQ6wEwAjkK#v=onepage&q=concept%20of%20equality&f=false

“Equality in the law”²⁶ can be achieved with the concept of substantial equality that is primarily aimed at equality of results. Thus, in cases of mentally disabled people one can talk about equal working rights only when the employer gives a disabled employee equal opportunities by taking into account his/her specific needs and by accommodating these needs. So disabled employees have equal working rights with non-disabled only if the differences are taken into account and disabled employees are provided with “reasonable accommodation”. In further chapters I will discuss that not every disabled worker needs “reasonable accommodation” for performing the essential functions of a job. The important thing to understand here is that this accommodation will be provided if it is necessary.²⁷

In the following I will define the concept of disability. First, I will describe the situation disabled people lived in till the middle of the 20th century, the position they had in a society, attitudes toward them, the rights and duties they possessed. Then, I will explore the basic concepts of disability: impairment, disability and handicap. Finally, I will look at the models of disability and their different approaches to the phenomenon of disability.

1.4 Disability

The issue of disability has not been considered as a matter of great importance for many years. If we look at history, for example, we can see that the life of disabled people, their role, and position in society have never been treated by historians as something significant for the next generations and thus became part of a “hidden history”²⁸. Disability is “conspicuously absent in

²⁶ Id.

²⁷ Savitri W.E. Goonesekere, “The concept of substantive equality and Gender Justice in South Asia”, <http://www.unifem.org.in/PDF/The%20Concept%20of%20Substantive%20Equality%20-final%20-%2031-12-07.pdf>

²⁸ Paul T. Jaeger, Cynthia Ann Bowman, “Understanding disability: Inclusion, Access, Diversity, and Civil Rights”, Praeger Publisher, 2005, p.9

the histories we write. When historians do take the note of disability, they usually treat it merely as a personal tragedy or as an insult to be deplored and a label to be denied, rather than as a cultural construct to be questioned and explored”.²⁹

A disabled person was viewed as a defect, a mistake of nature. Aristotle supported killing imperfect babies. Martin Luther King was convinced that the best way to treat mentally disabled children is to “take the changeling child to the river and drown it”.³⁰

Before industrialization, disabled people lived with their families and could contribute to the family budget by doing some work such as baking or crafting. At that time it was the family that took care of their disabled relatives. However, since industrialization the situation has dramatically changed. Most people had to leave their homes searching for a job. During that period the workforce was mostly required at factories and no one thought about employment of and accommodating the needs of disabled people. Family members could not take care of their disabled relatives any more and disabled people’s institutionalization became a good solution in such a situation. In hospitals and other facilities for the disabled they were provided with support, treatment and other things they lacked at home. Being institutionalized, disabled people were isolated from other parts of society and were treated as second class citizens.³¹

The policy of isolation received even more support at the end of the 19th century with development of the theory of eugenics. The founder of the theory Sir Francis Galton claimed that the mechanism of natural selection developed by Darwin did not function anymore and the reason for that was support provided to weak, poor and disabled people by other members of society. The result of such a policy became the overloading of society by defective members and

²⁹ Douglas C. Bayton, “Forbidden signs: American culture and the campaign against sign language, 2001, p.52

³⁰ [Edward Shorter](#) “[The Kennedy family and the story of mental retardation](#)”, Temple University Press, 2000, p.11

³¹ Henry George Harder, Liz R. Scott, “Comprehensive Disability management”, Elsevier, 2005, p.8-9

according to Galton the only solution for such a situation could be the application of artificial selection. The process of artificial selections included positive as well as negative methods. Positive eugenics was aimed at increasing the birth rate among “worthy” individuals, those who were physically strong and had high levels of IQ. It was applied for example in America in the 90s. There was arranged the Better Baby Contests where babies were examined by jury and the one who had the least number of defects was chosen a winner and given a prize. The competition was based on assumption that most babies’ defects could be forcibly changed. For instance, protruding ears was considered a defect and it was combat by parents by tying the cloth around the head of the baby in order to prevent the growth of ears.³² Sperm bank applied nowadays in the United States that allows a mother to choose a father of her future baby based on presented characteristics can also be viewed as a form of modern positive eugenics.³³ Negative eugenics called for isolation and sterilization of defective members such as alcoholics, prostitutes and disabled people.³⁴

At the beginning of the 20th century scientists in the United States came to the conclusion that a child of two mentally disabled people most probably would be also mentally disabled. This finding became a strong argument for legitimizing in most States the prohibition of marriage between mentally disabled people.³⁵ The wide implementation of the policy of sterilization in the United States took place with the decision in *Buck v. Bell*³⁶ where the court

³² Selden, Steven. “Transforming Better Babies into Fitter Families: Archival Resources and the History of the American Eugenics Movement, 1908-1930.” *American Philosophical Society*. 149.2 (2005):p. 199-225.

³³ Plotz, David. “The Better Baby Business .” *Washington Post* 13 Mar. 2001.

³⁴ Francis Galton, [“Hereditary talent and character”](#), *Macmillan's Magazine* 12 (1865), p. 157–166 and 318–327

³⁵ U.S Eugenics policy is discussed in Edwin Black “Eugenics and the Nazis- the California connection”, *San Francisco Chronicle*, 2003. Stefan Kuhl, “The Nazi connection : Eugenics, American Racism and German National Socialism, New York: Oxford University Press, 1994

³⁶ *Buck v. Bell* 247 U.S 200, 205 (1927)

recognized the legitimacy of the Virginia law and ruled in favor of forced sterilization of people with mental disabilities.³⁷

Among European countries the leading place in sterilization policy belonged to Sweden. Sterilization was legitimized under the Sterilization Act of 1934. The Act allowed voluntary sterilization of mentally disabled patients.³⁸ Still, voluntary did not mean the presence of agreement of the patient, since most mentally disabled patients were deprived of their legal capacity and decisions were taken by their guardians.

In England, despite the high level of popularity of the theory of eugenics among rich and educated people it was never legitimized. However, there were cases of mentally disabled people's sterilization in some private institutions.³⁹

Only in the middle of the 20th century did a major change take place with the adoption of the Universal Declaration of Human Rights (UDHR) which proclaims that "all human beings are born equal and free in dignity and rights"⁴⁰. In the next chapter I will explore the role of the UDHR and other international and regional treaties in the process of elimination of discrimination against disabled people and providing them with equal rights.

1.5 Impairment, disability and handicap

"Impairment is any loss or abnormality of psychological, physiological, or anatomical structure or function.

³⁷ Id.

³⁸ Acta Pshyhiatrica Scandinavica : " The Swedish sterilization act and its application", Vol.37, 1962.

³⁹ Porter, Dorothy, "Eugenics and sterilization debate in Britain and Sweden before WWII", Scandinavian Journal of History, Vol.24, 1999.

⁴⁰ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art.1 available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>

Disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

Handicap is a disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfillment of a role that is normal, depending on age, sex, social and cultural factors, for that individual.”⁴¹

The classification was given by the World Health Organization (WHO) in 1980 and was widely criticized by the opponents of the medical model of disability since it locates the problem within the individual. Moreover, the classification emphasizes the disadvantaged position of disabled people in a society and explains this position as a consequence of disability. It says that poor disabled people are limited in their abilities and that is why they can not be involved in many activities.

However, at the end of the 20th century developed countries adopted a new policy toward equalization of opportunities for disabled people. According to that policy disabled people were recognized as equal members who suffered from discrimination because of limitations created by a society. Consequently, the WHO had to elaborate a new definition of disability which would be in conformity with the new policy. The definition was introduced in 2001 and is known as the “International Classification of Functioning Disability and Health” (ICF). The ICF consist of two parts, each with two components:

- 1) Functioning and Disability
 - a) Body functions and Structure
 - b) Activities and Participation

⁴¹ International Classification of Impairments, disabilities and Handicaps, World Health Organization, Geneva, 1980.

2) Contextual Factors

a) Environmental factors

b) Personal factors⁴²

In this classification impairment is no longer considered as the only ground of disability. The shift is made toward the concentration on activities, participation and environmental factors.

1.6 Models of Disability

Medical Model

Now I will describe several models that define the concept of disability from different approaches.

The medical model of disability began to develop with the improvement of science and medicine at the end of the 19th century. This model views disability as a problem, abnormality, a defect which has to be treated. So, the medical model concentrates on a disabled individual and his/her inability to do something. The lack of capacity to perform a certain function is considered as a consequence of the illness. An individual faces difficulties because of his/her defects and the only way to live a normal life is by treating the defect.⁴³ Thus, under the medical model of disability disabled people are sick and that is why they are temporarily not integrated in society. But as soon as they are cured, they will not have any barriers and will become equal members of society with equal opportunities. The medical model supports isolation and institutionalization of disabled people as it is in their interests to be hospitalized, being cured and finally to become like others.

⁴² International Classification of Functioning Disability and Health (ICF), May 2001.

⁴³ Stephen Moore, "Social Welfare alive", Stanley Ternes Ltd, United Kingdom, 2002, p.403

But what if a disability can not be treated? Does it mean that a disabled person will never get a chance to be integrated in society and to become a valuable human being? The model does not give any answer to this question and the only way it can be understood in my opinion is that those disabled people whose disability can not be cured can not claim equality, since it is impairment that causes limits for their equal participation in different life activities.

Societal model of disability

A new approach toward the phenomenon of disability started to develop in 1960, although the term “the social model of disability” was first used only in 1983 by a disabled lecturer Mike Oliver.⁴⁴

An active role in the movement for alternative models of disability belonged to the Union of the Physically Impaired Against Segregation (UPIAS). The UPIAS defined disability as: “The disadvantage or restrictions of activity caused by a contemporary social organization which takes nor or little account of people who have physical impairments and thus exclude them from participation in the mainstream of social activities.”⁴⁵

The social model asserts that disability “results from oppressive and unjust social structure, rather than from individual impairment.”⁴⁶ Consequently, in contrast to the medical model of disability, the societal model locates the problem within a society. It is the society that creates the difficulties and barriers for disabled people, thus preventing them from integration and equal participation in different fields. Under the social model disabled people are disabled

⁴⁴ Colin Barnes, Geof Mercer and Tom Shakespeare, “The Social Model of Disability”. In Book “Sociology: Introductory reading”, Edited by Antony Giddens and Phillip W Sutton; Policy Press,; United Kingdom, 2010;p.161

⁴⁵ Id.,p.163

⁴⁶ Norman Daniels, Susannah Rose, and Ellen Daniels Zide “ Disability, Adaptation and Inclusion” in “Disability and Disadvantage” edited by Kimberley Brownlee and Adam Cureton, Oxford University Press, New York,2009, p.89

because a society makes them so and the only way to deal with the problem is to bring some changes in a society.⁴⁷

Social Adapted Model

In my opinion both models consider the matter just from one aspect and thus fail to get the whole picture of the problem. The best solution for such a situation is to find a golden mean. This golden mean approach is addressed in the Social Adapted Model which believes that a society is the main but not the only reason of disability. Proponents of that model assert that it is wrong to believe that impairment does not impose any limitations or restrictions on a person's abilities. However, they claim that emphasis must be placed on what a disabled person can do if a society will remove the barriers rather than on what they can not do because of impairment.⁴⁸

I find this approach the most appropriate as it is not fair to blame a society for all difficulties and limitations faced by disabled people. There is no doubt that society has to do its best for providing disabled people with equal opportunities. Still, that policy can not be always realized. For example, in the field of employment it is hard to provide 100% of equal opportunities at the workplace for all disabled people, since there are people with severe forms of mental disabilities who can not perform the essential functions of different jobs and the reason is not the lack of a reasonable accommodation. Consequently, it will be wrong to require employers to hire people with severe forms of mental disabilities that can not fulfill the main duties of the position.

In the following I will explore the international instruments that deal with the rights of disabled people. First I will look at the documents of the United Nations (U.N) and after will

⁴⁷ Id.

⁴⁸ Imran Ahmad Sajid, "Models of disability", p.20

<http://www.docstoc.com/docs/19472680/Models-of-Disability-By-Imran-Ahmad-Sajid>

discuss the mechanisms of functioning of the regional human rights systems and their role in the process of protection of rights of people with disabilities.

Chapter2. International law and the rights of disabled people

Before World War II protection of human rights was an internal matter of each state and interference of another state or international community considered violation of sovereignty of the state. After WWII the situation changed since the states realized that things which happened in one state could have a great influence on other states as well. It became clear that there was need for an international body that would monitor the guarantying of human rights by state actors. Such a body became the United Nation which was established in 1945.^{49 50}

The newly established body enacted the documents with the minimum standards states had to follow and bear responsibility in cases of violation. These documents are: the United Nations Charter⁵¹, the Universal Declaration of Human Rights (UDHR)⁵², the International Covenant on Civil and Political Rights (ICCPR)⁵³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁴ presenting together the International Bill on Human Rights .⁵⁵

⁴⁹ The United Nations replaced the League of Nations which was also aimed to achieve “international peace and security”. The beginning of the World War Second proved ineffectiveness of the League since it failed to fulfill its main goal and prevent new world war.

⁵⁰ Lawrence O, Gostin, Lance Gable, “The human rights of persons with mental disabilities: a global perspectives on the application of human rights principles to mental health”, Maryland Law Review, Vol. 63, No.20, 2004, Wayne State University Law School Research Paper No. 08-31, p.22-26

⁵¹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html>

⁵² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>

⁵³ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>

⁵⁴ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>

⁵⁵ Lawrence O. Gostin , Lance Gable, “The human rights of persons with mental disabilities: a global perspectives on the application of human rights principles to mental health”, [Maryland Law Review, Vol. 63, No. 20, 2004](http://www.unhcr.org/refworld/docid/3ae6b3aa0.html) , Wayne State University Law School Research Paper No. 08-31, p.29

The UDHR, the ICCPR and the ICESCR guarantee human rights to every human being without any distinction on the basis of religion, nationality, language, race, color, sex etc. Although none of them explicitly mention mental disability as a prohibited ground for discrimination the drafters of the Declaration and the Conventions had it in mind.

Art. 23 of the UDHR, Art. 6 of the ICCPR and Art. 6 of the ICESCR provide right work; the possibility of every person freely to chose the profession he/she wants to perform and the duty of the state to create favorable conditions in which realization of the right will become real. However all three documents have a very general approach and none of them make a special reference to vulnerable groups. They do not establish special mechanisms that must be applied in cases when, for example, employee is mentally disabled. The documents do not provide disabled employees with the right to claim “reasonable accommodation”.

Other international treaties, such as conventions on the rights of women⁵⁶, children⁵⁷, racial minorities⁵⁸ and convention prohibiting torture and inhuman or degrading treatment⁵⁹ signed for protection of rights of a specific vulnerable group also refer to the rights of mentally disabled people within the group.

The Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDEW) for example, is primarily aimed at reaching equality between men and women. The term discrimination against women in art.1 “means any distinction, exclusion or

⁵⁶ Convention on Elimination of All Forms of Racial Discrimination Against Women, Dec.18, 1979, 1249 U.N.T.S .13

⁵⁷ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (hereinafter CRC)

⁵⁸ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.unhcr.org/refworld/docid/3ae6b3940.html>

⁵⁹ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>

restriction made on the basis of sex”.⁶⁰ It is obvious that mentally disabled women receive protection under the Convention. Still, problems faced by them very often differ from those faced by other members of the group. So, mentally, disabled women need their problems to be identified separately in order to get full protection and realization of their rights. Unfortunately, women with mental disabilities have an inferior position in society not just in compare to men but also in compare to non-disabled women.

The same approach is relevant to the Convention on the Rights of the Child (hereafter CRC), the Convention on the Elimination of All Forms Racial Discrimination (ICERD), the Convention against Torture and other Cruel, Inhuman and Degrading Treatment (Convention against Torture) since none of them explicitly mention and address the issue of mental disability. At the same time they are less general than the UDHR, the ICCPR and the ICESCR as they have targeted groups which they aim to protect. Being the members of the exact group which fall within the scope of the Convention people with mental disabilities in some cases receive substantial protection. For example, the Convention on the Rights of the Child states that a “mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child’s active participation in the community”⁶¹.

2.1 The Principles, the Convention No.159, the Rules

Later it became obvious that since disabled people differ from non-disabled they need their problems to be addressed separately. It was important to have treaties that would focus

⁶⁰ Convention on Elimination of All Forms of Racial Discrimination Against Women, Dec.18, 1979, 1249 U.N.T.S .13, art.1

⁶¹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, art.23. available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>

solely on the rights of disabled people; to look at the issue of human rights from the perspective of disability.

The Principles for the protection of Persons with Mental Illness⁶² enacted by the U.N in 1991 is one of the first acts which is specifically aimed at protection the rights of mentally disabled people. Although the Principles are not bounding for states they play very important role since they establish the minimum standards states have to provide for mentally disabled people. The main disadvantage of the Act is that most its articles are devoted to the issue of treatment, consent to treatment, medical care, conditions in mental health facilities, privacy of patients etc. Thus, the Principles consider people with mental disabilities mostly just as patients. Economic, social and cultural rights guaranteed by the Act are applied only to patients in mental health facilities. Reading the document, in my opinion, one gain the impression that most mentally disabled people live in hospitals and that their inferior position in society is the result of their health problems. The best thing a community can do for them is to improve the conditions of facilities they reside. It is only the principle 4 that says about the equality and prohibition of discrimination on the grounds of mental disability: “There shall be no discrimination on the grounds of mental illness.”⁶³ “Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and in other relevant instruments...”⁶⁴

⁶² MI Principles, G.A. Res.119, 1991, 45 U.N.Y.B

⁶³ MI principle 4 (4), G.A.Res.119, 1991, 45 U.N.Y.B

⁶⁴ Id.

Years 1983-1992 was announced by the U.N as a “Decade of Disabled Persons”.⁶⁵ It was a very important event for disabled people since it attracted attention of millions of people around the world to the issue of disability. Many countries brought amendments to their legislation; adopted new laws, programs in the field of disability.⁶⁶

The U.N Decade of Disabled Persons took place under the slogan “full participation and equality”.⁶⁷ During the period of the Decade the International Labor Organization enacted the Convention No.159 on Vocational Rehabilitation and Employment Service for Disabled People asserting that disabled people could never be fully integrated in society without possibility to be employed; receiving equal payment for equal work and having constant material sources. The Convention encouraged states to arrange vocational rehabilitations, trainings for disabled people both in cities and rural areas.⁶⁸

By the end of the Decade the General Assembly adopted the non- binding Standard Rules on the Equalization of Opportunities for Persons with Disabilities⁶⁹. The Rules have wider scope than the Principles since they cover all disabled people and not just people with mental disabilities.⁷⁰ Moreover they have a different approach to the issue of disability because they claim full integration of disabled people and equalization of opportunities in all spheres; they say about accessibility and “ removing of obstacles”⁷¹; integrated education and school; “ not discriminating laws and regulations in the field of employment”⁷²; arrangement awareness-

⁶⁵ Implementation of the World Programme of Action Concerning Disabled Persons, 1982, 36 U.N.Y.B.983, U.N. Doc.A/37/632

⁶⁶ Continental Plan of Action for the African Decade of Persons with Disabilities, 1999-2009, <http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf>

⁶⁷ ILO Convention No.159 on Vocational Rehabilitation and Employment of Disabled Persons

⁶⁸ Id.

⁶⁹ Standard Rules, G.A. Res.96 , 1993, 47 U.N.Y.B

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

raising programs. “States should initiate and support information campaigns concerning persons with disabilities and disability policies, conveying the message that persons with disabilities are citizens with the same rights and obligations as others, thus justifying measures to remove all obstacles to full participation.”⁷³ Thus, the document defines disability from the perspectives of the social model considering it a “shortcoming of society”⁷⁴ that creates “various obstacles for participation”⁷⁵. The implementation of the Rules has to be monitored by the Commission and the Special Rapporteur on the basis of information derived from states as well as non-governmental organizations.⁷⁶

2.2 Convention on the Rights of Persons with Disabilities

Despite the enactment of the above noted and other documents disabled people continued to face discrimination in many spheres. Thus, there was a need for a comprehensive binding treaty,⁷⁷ “a powerful tool to eradicate the obstacles faced by persons with disabilities”⁷⁸. Such a tool became the Convention on the Rights of Persons with Disabilities that was adopted by the General Assembly on 13 December 2006, and was opened for signature on 30 March 2007.⁷⁹

The purpose of the Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities”.⁸⁰ In

⁷³ Id.

⁷⁴ A/Res/48/96 of 4 March 1994, para-21

⁷⁵ Id.

⁷⁶ Standard Rules, G.A. Res.96,1993, 47 U.N.Y.B.sec.4

⁷⁷ A.Perlin, L. Michael, “Change is gonna come: The implication of United Nations Convention on the Rights of Persons with disabilities for Domestic Practice of Constitutional Mental Disability law.” 29 N. Ill. U. L. Rev. 483 (2008-2009), p.5

⁷⁸ “[Landmark UN treaty on rights of persons with disabilities enters into force](http://www.scoop.co.nz/stories/WO0805/S00048.htm)”. Scoop. 2008-05-05. Retrieved 2008-06-28. <http://www.scoop.co.nz/stories/WO0805/S00048.htm>

⁷⁹ Id.

⁸⁰ UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106 <http://www.unhcr.org/refworld/docid/45f973632.html>

contrast to the previous declarations and treaties the Convention defines discrimination against disabled people not only as “exclusion or restriction on the basis of disability”, but also “denial of reasonable accommodation”.⁸¹

The Convention provides for establishing of national and international monitoring bodies that have to oversee the implementation of the conventional rights. It is up to the government to decide who will introduce the functions of the national monitoring body. Moreover, it does not matter whether it is a single person or a collective body.⁸² However, it is very important for the body to be independent from the government and this independence can be achieved only if the body has its separate budget, free access to all facilities where the rights of disabled people can be violated and finally if there is a law which regulates the process of appointment and dismissal the authorities of the body. In that way the body will be protected from arbitrariness of the government.

The international monitoring is provided by the Committee which initially consisted of twelve experts elected by the states parties to the Convention. At the moment the number of experts increased to eighteen.⁸³ The monitoring is realized by means of periodical reports submitted by the states. The Committee considers the reports and then makes “suggestions and general recommendations”.⁸⁴ However, the Convention says nothing about the measures that have to be taken by the Committee in cases the state does not follow the suggestions and

⁸¹ Id.,art. 2

⁸² Id.art.33

⁸³ According to art.34.3 of the Convention the number of experts of the Committee will be increased to 18 after additional 60 ratification. At the moment 145 countries signed the Conventions and 45 are parties to it.

⁸⁴UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106,art.36 available at: <http://www.unhcr.org/refworld/docid/45f973632.html>

recommendations. Moreover, the reports inform the Committee only about the large scaled violations of rights of disabled people, leaving individual cases without attention.

This gap was addressed in the Optional Protocol⁸⁵ that was adopted on 13 December 2006 and entered into force on 3 May 2008. Actually, the Protocol did not add any new right which is not granted by the Convention. The main advantage of the Protocol is recognition of the competence of the Committee “to receive and consider communications from or on behalf of individuals or group of individuals...”⁸⁶ Thus it establishes a new international body where disabled people can bring claims in cases their conventional rights are violated. Still, communications can be brought only after exhaustion of all domestic remedies⁸⁷ and only by the population of those countries which became party to the Optional Protocol.⁸⁸ However, I consider this situation a transitional period and believe that the jurisdiction of the Committee “to receive and consider communications from or on behalf of”⁸⁹ disabled people will be soon applied to all states parties to the Convention and not only to those that ratified the Optional Protocol.

2.3 European system for the protection of rights of disabled people

⁸⁵Optional Protocol to the Convention on the Rights of People with Disabilities, A/ Res/61/106, of 3 May 2008.

⁸⁶Id.,art.1.1

⁸⁷ Id.,art. 2(d)

⁸⁸Id.,art.1.2

⁸⁹ UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex II, art.1

<http://www.unhcr.org/refworld/docid/4680d0982.html>

Protection of rights of disabled people is provided by regional as well as international systems. All three continents, except Asia have developed their own mechanisms of protection of human rights.⁹⁰⁹¹

In Europe the process started with creation of the Council of Europe and adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹² The initial version of the Convention provided for establishment of the Commission where every person who believes that his/her conventional right is violated could bring the claim. The jurisdiction of the Court was only applied to those states which ratified the additional Protocol. The things were changed in 1998 when the Protocol 11 came into force and the Court became the single body which was authorized to decide the cases under the Convention. Although a claim to the Court can be brought only after all domestic remedies are exhausted it is important to know that the European Court is not a court of appeal and that is why it is not bound by the previous decisions of domestic courts.⁹³ Thus, the European system in compare with the CRPD has more effective mechanism since under the ECHR every person can bring the claim to the ECtHR, whereas under the CRPD only population of the states that ratified the Optional Protocol can bring the communication to the Commission.

It is hard to argue the importance of the Convention in the process of protection of human rights. However, when it comes to mentally disabled people, the Convention does not address

⁹⁰ A.Perlin, L. Michael, "Change is gonna come: The implication of United Nations Convention on the Rights of Persons with disabilities for Domestic Practice of Constitutional Mental Disability law." 29 N. Ill. U. L. Rev. 483 (2008-2009),p.47

⁹¹ Asia has not yet developed efficient system for protection of human rights that will effectively function. See A.Perlin, L. Michael, "Change is gonna come: The implication of United Nations Convention on the Rights of Persons with disabilities for Domestic Practice of Constitutional Mental Disability law." 29 N. Ill. U. L. Rev. 483 (2008-2009),p.47

⁹² European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1953

⁹³ Lawrence O. Gostin , Lance Gable, "The human rights of persons with mental disabilities: a global perspectives on the application of human rights principles to mental health", [Maryland Law Review, Vol. 63, No. 20, 2004](#) , Wayne State University Law School Research Paper No. 08-31,p.48-49

much their specific problems. The only article that explicitly mentions people with mental disabilities says about deprivation of their rights rather than their protection: “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.”⁹⁴ The first case decided by the ECtHR concerning the rights of mentally disabled people was the Winterwerp case (1979)⁹⁵. In that case the Court establishes the minimum standards that have to be observed when mentally disabled people are detained.

The issue of discrimination is regulated by art.14 of the Convention as well as the Protocol 12. The main difference is that art. 14 deals only with discrimination of the conventional rights, whereas the Protocol prohibits any discriminatory treatment without referring to the Convention.

The Committee of Ministers and the Parliamentary Assembly adopted number of recommendations and resolutions that focus on rights of disabled people such as: the Committee of Ministers Recommendation on a Coherent Policy for People with Disabilities,⁹⁶ the Council Resolution on equal employment opportunities for people with disabilities⁹⁷, the Council Recommendation on a parking card for people with disabilities⁹⁸, etc. More recently the Council of Ministers has issued the Recommendation concerning the Human Rights and Dignity of Persons with Mental Disorders.⁹⁹ The Recommendation mostly deals with those people who suffer mental illnesses and are the patients of mental health facilities.

⁹⁴ European Convention on for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1953,art.5

⁹⁵ Winterwerp v. Netherlands, Application No.6301/73,judgment 24 October 1979,(A/33)(1979-1980)2 EHRR 387.

⁹⁶ Recommendation No.R (92) 6 of 9 April 1992 on a coherent policy for people with disabilities

⁹⁷ Resolution (1999/C 186 /02) adopted of 17 June 1999 on equal employment opportunities for people with disabilities

⁹⁸ Council Recommendation (98/37/EC) adopted of 4 June 1998 on a parking card for people with disabilities.

⁹⁹ Rec(2004) 10, adopted 22 September 2004.

2.4 American system for the protection of rights of disabled people

Human rights in the American system are protected under several treaties. One of the first regional documents dedicated to the issue of human rights was the American Declaration on Human rights that was adopted in 1948 by the Organization of American States.¹⁰⁰ The preamble of the Declaration says that “All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another”.¹⁰¹ In 1969 the American Convention on Human Rights came into force. Unfortunately, both the Declaration and the Convention have a very general approach to the issue of discrimination and none of them make any special reference to the rights of disabled people.

Still, later it became clear that problems faced by disabled people are of specific nature and should be addressed separately. It was done in 1999 when the OAS adopted the Convention on the Elimination of All Forms of Discrimination against Person with Disabilities.^{102 103} The objectives of the Convention are “to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.”¹⁰⁴ The implementation of the conventional rights has to be monitored by the Committee “composed of one representative appointed by each state party”¹⁰⁵ through periodical reports submitted by

¹⁰⁰ Organization of American States, American Declaration of the Rights and Duties of Man, 2 May 1948, available at: <http://www.unhcr.org/refworld/docid/3ae6b3710.html>

¹⁰¹ Id., preamble

¹⁰² Organization of American States, Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999, AG/RES. 1608 (XXIX-O/99), available at: <http://www.unhcr.org/refworld/docid/3de4cb7d4.html>

¹⁰³ 19 American States have signed the Convention and 18 have ratified.

¹⁰⁴ Id., art.2

¹⁰⁵ Id., art6

states. The Convention supposes progressive realization of the rights of disabled people and reports should contain the information about the positive changes which take place in this field.

2.5 African system for the protection of rights of disabled people

It took a long time until the human rights system was developed in Africa. The main reason for that was the historical background of the continent. Most countries on the continent were colonized by European empires and after gaining independence they preferred to keep their full sovereignty and solve their internal problems by themselves without any external interference. The Organization for African Unity was formed in 1963 and drafted its first charter 20 years later in 1983. The African Charter on Human and People's Rights¹⁰⁶ is the core instrument of the African human rights system. The Charter proclaims equality and non-discrimination in general terms, not referring separately to the rights of vulnerable groups.

Inspired by the U.N Decade for disabled people the OAU formed the African Rehabilitation Institute (ARI) in order to raise the awareness of the population in the region toward the issue of disability. Later, during the African Decade for disabled people the ARI played an important role giving governments advices concerning the positive changes that should be made in the policy toward disabled people.¹⁰⁷ The African Decade for disabled people took

¹⁰⁶ Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.unhcr.org/refworld/docid/3ae6b3630.html> All members of Organization of for African unity ratified the Convention.

¹⁰⁷ O. Gostin , Lance Gable, "The human rights of persons with mental disabilities: a global perspectives on the application of human rights principles to mental health", [Maryland Law Review, Vol. 63, No. 20, 2004](#) Wayne State University Law School Research Paper No. 08-31,p.54-57

place from 1999 till 2008. The goal of the Decade was the “full participation, equality and empowerment the people with disabilities in Africa”.¹⁰⁸

All above noted documents are instruments of international law and states not private persons are bound by them. Only states can be held responsible for the violation of conventional rights. It is so called “horizontal effect”. At the same time it does not mean that private parties can discriminate against disabled people and be left unpunished. The obligation of private parties to fulfill the conventional rights is established by means of domestic legislation. Moreover, pursuing the aim to provide disabled people with equal working rights the government has to do much more than the only enactment of anti-discriminatory legislation. There is in the country have to be taken different measures such as allocating financial resources, developing programs, arranging trainings for human resources, etc. in order the laws to be implemented.

¹⁰⁸ Continental Plan of Action for the African Decade of Persons with Disabilities, 1999-2009, <http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf>

Chapter3. Right to work of mentally disabled people in the United States, United Kingdom and Azerbaijan

3.1 History of the disability rights movement in the U.S

Disabled people remained one of the most vulnerable groups in American society for a long time. For example, at the beginning of the 20th century under the Mississippi law “individuals with disabilities were deemed unfit for citizenship”.¹⁰⁹ In 1925 the federal government authorized segregation of disabled people as they were “not much above the animal”.¹¹⁰ According to the law these were the parents who had to isolate their disabled child and in case they failed to fulfill that duty the state intervened and took the child from the family. As one Georgia official said: “The fact of primary importance is that a defective child will be a defective adult, and will die a defective. There is no a philosopher’s stone to turn the base metal into gold”.¹¹¹

Things started to change only after WWII when in 1948 the Congress enacted the first statute that dealt exclusively with working rights of disabled people.¹¹² Some years later, in 1964 the Civil Rights Act came into force. The Act was aimed at eliminating discrimination in many spheres of life .Title VII of the Act was devoted to the issue of discrimination at the workplace.

¹⁰⁹ Gerard Quinn, Maeve McDonagh, Cliona Kimber, “Disability Discrimination Law in the United States, Australia and Canada”, Oak Tree Press, Dublin,1993,p.16

¹¹⁰ Id.,p.17

¹¹¹ Id.,p.16

¹¹² Id.,p.19-20

The Act provided for establishing of the Equal Employment Opportunity Commission (hereafter EEOC), an independent federal agency which had to fight discrimination at the workplace. First, the EEOC made an attempt to resolve a matter by informal methods. If there was no an expected result, the EEOC brought the claim to the federal district court. Thus, the Act did not just pronounce the prohibition of discrimination but also established a real mechanism of its implementation.¹¹³

However, the Civil Rights Act did not include disability as a prohibited ground for discrimination. The main argument brought by the Congress was that the Civil Rights model could not be “automatically adaptable to the problem of discrimination against the handicapped.”¹¹⁴ Thus, the disability based discrimination according to the Congress having different measurement from the sex or race based discrimination had to be addressed by separate legislation.¹¹⁵

3.2 The Rehabilitation Act of 1973

In 1973 the U.S Congress enacted the Rehabilitation Act, the first Act in the world that extended civil rights to disabled people. The enactment of the Rehabilitation Act “marked the start of a significant shift in American disability law, from a welfare orientation to a civil rights orientation.”¹¹⁶ , “from care-taking to work-promoting, from segregation to integration”.

¹¹⁷Disabled Americans started to be treated as equal human beings that can fully participate in all social activities. As President Nixon stated the primary purpose of the Act was to “prepare

¹¹³ Id.

¹¹⁴ Id., p.20

¹¹⁵ Id.

¹¹⁶ Samuel R. Bagenstos , “Comparative Disability Employment Law from an American Perspective”, Comp .Labor Law and Pol`y Journal , Vol.24:649,2004, p.649

¹¹⁷ Id.,p.650

disabled people for a meaningful job.”¹¹⁸¹¹⁹ The Act continues to remain in force even after enacting the ADA.¹²⁰

Title IV of the Act set up the National Council on Handicapped which after the amendment of 1984 became an independent agency. The National Council had to overview the compliance of enacting laws with the policy of full integration of disabled people in the community, education, employment; assess existing legislation and make proposals about its improvements; submit periodical reports to the President and the Senate, etc.¹²¹

Section 501 of the Act talks about federal agencies and requires each “department, agency and instrumentality” to present the programs they developed for the hiring disabled people. The programs must include the detailed description of the methods that will be used and the ways these methods will address the problems faced by disabled people.¹²²

Section 503 of the Act requires employers that signed the contract with the federal government to adopt affirmative programs for hiring disabled employees.¹²³

The most important anti- discrimination provision of the law is section 504 which states that:

“No otherwise qualified handicapped ...shall , solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.”¹²⁴

¹¹⁸ Id.

¹¹⁹ Right to work is not provided by the U.S Constitution as one of the fundamental rights. However the right can be derived from the Fourteen Amendment which guarantees “equal protection of law”. There is not doubt that disabled people are also covered by this provision and have the right to be treated equally and be free from discrimination at the work place.

¹²⁰ Rehabilitation Act 1973, Pub. L. No. 93-112, 87 Stat, sec.504

¹²¹ Rehabilitation Act 1973, Pub. L. No. 93-112, 87 Stat, Title IV.

¹²² Id., sec.501

¹²³ According to the last amendment made to the law sec. 503 covers those employers who signed the contract with the federal government on the sum of 10.000\$ and more.

The initial version of the Act did not provide the mechanism for the implementation of the provision. The issue was addressed later in 1998 when the law was amended. According to the amendment each agency had to enact its own regulation and this process took place without much coordination between the agencies.¹²⁵

Despite many positive changes brought by the Rehabilitation Act in the field of employment of disabled people some important issues were still left unregulated. One of the main gaps of the Act was that most private employers were not covered by it. Thus, as it was said in the Congressional findings which were outlined in the section 2 of the ADA, discrimination on the ground of disability continued to be the reality of American society at the end of 20th century and more than 43.000.000 Americans had to suffer from such a policy.

¹²⁶The Congress had to adopt a new bill which would address all unregulated matters. It was authorized to enact such a law firstly by the Constitution which entitled the Congress to regulate inter-state commerce¹²⁷, and secondly by the Fourteen Amendment that guaranteed equality and gave the Congress power to “enforce that provision by appropriate legislation”.¹²⁸

3.3 The Americans with Disabilities Act 1990

The Americans with Disabilities Act (ADA) is the most significant legislation in the history of the United States on behalf of disabled people.¹²⁹ Signing the bill President Bush said that the purpose of the Act is “to end discrimination against individuals with disabilities and to

¹²⁴ Id.sec.504

¹²⁵ Gerard Quinn, Maeve McDonagh, Cliona Kimber, “Disability Discrimination Law in the United States, Australia and Canada”, Oak Tree Press, Dublin,1993,p.24

¹²⁶ 42 U.S.C 12101

¹²⁷ U.S Const. art.I.sec.8.cl.3

¹²⁸ U.S. Const., amend. XIV

¹²⁹ National Council on Disability , “Righting the ADA”, Oct.16, 2002, <http://www.ncd.gov/newsroom/publications/pdf/rightingtheada.pdf>

bring those individuals into the economic and social mainstream of American life.”¹³⁰ The advocates for disabled called the ADA “the most important civil rights act passed since 1964”¹³¹, the “Emancipation Proclamation for those with disabilities.” The opponents of the Act considered it a “nightmare for employers”.¹³²

Drafters of the ADA refused to introduce the quota system as a means of integrating disabled people in the mainstream labor market since the system was alien to the nature of the ADA that was aimed at guarantying civil rights for disabled people and making them equal members of society. Application of the quota system means that disabled employees “are less valuable economically and less productive, and that, if such workers are to be integrated into the (semi-)open labor market, employers need to be obliged to hire them”¹³³, whereas the ADA has an approach that ““people with disabilities are able to compete for and win jobs on their own merit, as long as they are provided with equal opportunities.”¹³⁴

When the ADA was adopted there were strong debates in the Congress concerning the group of disabled people that had to fall within the scope of the Act. These debates did not concern physically disabled people since no one had any doubt about the importance of protection of people in wheelchairs, blind and deaf. However, there was no a unique approach towards mentally disabled people. Senator Jesse Helms¹³⁵ for example suggested amending the ADA and excluding mental disabilities such as schizophrenia and manic depression from the scope of the Act. Helms had nothing against physically disabled people saying that ““If this were

¹³⁰ Michael L.Perlin, “The ADA and persons with mental disabilities. Can sanist attitude be undone?” Journal of Law and Health, Cleveland State University, 1995,p.2

¹³¹Id.

¹³² Id.

¹³³ Samuel R. Bagenstos, “Comparative Disability Employment Law from an American Perspective”, Comp. Labor Law and Pol’y Journal, Vol. 24:649,2004, p.655

¹³⁴ Id.

¹³⁵ Senator Helms had a nickname “Senator No” because he opposed the gay movements, feminism, abortion, disability rights, etc.

a bill involving people in a wheelchair or those who had been injured in the war that is one thing.”¹³⁶ Fortunately, Helms suggestion did not receive much of support in the Congress and amendments did not take place.¹³⁷

However, other amendments which excluded “gender-identity disorder, pedophilia, compulsive gambling and drug addiction” were successfully passed.¹³⁸

Neither homosexuality nor bisexuality is protected by the Act as none of them is perceived as impairment.¹³⁹ Nevertheless the Act includes those individuals who have “successfully completed a supervised rehabilitation and are no longer engaging in the illegal use of drugs”.¹⁴⁰

3.3.1 The Definition of Disability under the ADA

The American legislation prior to the enactment of the Rehabilitation Act and the ADA defined the concept of disability from the perspectives of the medical model. However, the Rehabilitation Act and the ADA took the middle position since, from one side they cover those who have the “record” of disability or are “regarded” as disabled and thus view disability from the perspectives of the social model. Such an approach reflects the recognition “that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”¹⁴¹ From another, the definition of both Acts says

¹³⁶ Michael L. Perlin, “ADA and persons with mental disabilities. Can sanist attitudes be undone?” *Journal of Law and Health*, Cleveland State University, 1995, p.7

¹³⁷ *Id.*

¹³⁸ Elizabeth F. Emens, “The Sympathetic Discriminator: Mental Illness and the ADA”, Public Law and Legal Theory Working Paper No.74, the University of Chicago, Sep.2004, p.9 <http://www.law.uchicago.edu/files/files/74-ee-mental-illness.pdf>

¹³⁹ The U.S Equal Employment Opportunity Commission, “Executive Summary: Compliance Manual Section 902, Definition of the Term “Disability”
<http://www.eeoc.gov/policy/docs/902sum.html>

¹⁴⁰ 42 USC 12114

¹⁴¹ *School Bd. of Nassau county v. Arline*, 480 U.S. 273, 284 (1987).

that “substantial limitations” are caused by impairment. Thus, it locates the problem within a disabled individual stating that disabled people are “defective” and that is why they can not be involved in the open labor market.

When drafting the ADA the National Council elaborated a wide definition of disability according to which impairment (actual or as a perceived) did not have to limit a major life activity. The same approach is applied now in Australian disability legislation which says that the only impairment alone is enough to claim disability based discrimination. Australian advocates of broad definition of disability assert that such an approach helps to avoid the situations when a disabled person can not be protected by the law because he/she is “not disabled enough to challenge the employer’s action.”¹⁴² Thus, Australian legislation concentrates on the alleged conduct of discrimination, whereas the Americans on impairment and incapacities caused by it. ¹⁴³ Nevertheless, despite the initial intention of the Drafters the broad definition of disability was adopted neither in the Rehabilitation Act nor in the ADA.

In 2008 the ADA was subject to amendments since “the Act has not achieved many of its major objectives”¹⁴⁴ because of the “problematic judicial interpretations”.¹⁴⁵ The amendments have been introduced by means of enactment of the Americans with Disabilities Act Amendments Act (hereafter ADAAA) which provides the same definition of disability but changes its interpretation.

The Act defines disability as:

¹⁴² Samuel R. Bagenstos, “Comparative Disability Employment Law from an American Perspective”, *Comp. Labor Law and Pol’y Journal*, Vol. 24:649, 2004, p.665

¹⁴³ *Id.*, p.664-666

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

–“a physical or mental impairment that substantially limits one or more major life activities of such individual;

- a record of such an impairment; or
- being regarded as having such an impairment”¹⁴⁶

Official interpretation of the ADA is mostly given by the Equal Employment Opportunity Commission (EEOC). As noted above the EEOC was established by title VII of the Civil Rights Act however, at that time the Commission did not deal with disability based discrimination since disability was not mentioned as a prohibited ground for discrimination under the Act. The disability based discrimination cases fell within the scope of the Commission with the enactment of the Rehabilitation Act. The EEOC has its mandate under the ADA as well. It is authorized to investigate the cases of discrimination at the workplace and to bring the suits on behalf of disabled people.¹⁴⁷

The EEOC regulation defines mental disorder as: “Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities”.¹⁴⁸

Prior to the enactment of the ADAAA mitigating measures had to be taken into account when deciding whether a person is disabled or not. In *Sutton v. United Airlines*¹⁴⁹ the Supreme Court held that if the Congress meant to cover by the Act disabled people with mitigating measures the number of Americans that “have one or more physical or mental disabilities” mentioned in the Congressional findings would be much larger than 43.000.000.¹⁵⁰ According to

¹⁴⁶ 42 USC 12102

¹⁴⁷ U.S Equal Employment Opportunity Commission. <http://www.eeoc.gov/>

¹⁴⁸ EEOC 29 CFR 1630.2 (h)1-2

¹⁴⁹ [Sutton v. United Air Lines, 130 F.3d 893 \(1999\)](#)

¹⁵⁰ Id.

the amendment made in 2008 none of the mitigating measures except eyeglasses and contact lenses should be taken into account when assessing whether a person is disabled or not.¹⁵¹

“Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.”¹⁵²

The definition of disability also includes those persons who have a record of disability. It means that if someone had a depression 10 years ago but does not have it any more he/she is still covered by the Act. The main idea is to prevent disabled people from discrimination on the basis of past illnesses. The Act also prohibits inquires about the previous mental condition of employee.¹⁵³

People who are “regarded as disabled”, i.e. those who are “subject to an action prohibited under the Act 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”¹⁵⁴ fall within the scope of the ADA. However, they are not entitled to “reasonable accommodation” since they are only perceived as disabled and disability does not in fact preclude them from performing the “essential functions of the job”. Still, an impairment they are perceived to have must not be transitory or minor. A transitory impairment is defined by the Act as impairment “with an actual or expected duration of 6 months or less”.¹⁵⁵

The Act does not cover disabled people who impose a “direct threat”, i.e. “significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by

¹⁵¹ ADA Amendment Act of 2008, Public Law 110-325, Sep.25. 2008, sec. 3 (3)(E)

¹⁵² EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, 915.002, 3 of March 1997, last modified on 5 March 2009

¹⁵³ 42 USC 12102

¹⁵⁴ Id.

¹⁵⁵ Id.

“reasonable accommodations.”¹⁵⁶ Unfortunately, many people tend to believe that mentally disabled people are more dangerous than others although this fact has not been proven by any statistic. That is why, in order to overcome the prejudices and stereotypes against mentally disabled people assessment about the existence of a “direct threat” must be based on “objective evidence . . . that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm”¹⁵⁷ , “not merely on generalizations about the disability.”¹⁵⁸

3.3.2 Major life activity and substantial limitation

A “major life activity” is the activity that can be performed by every person without putting much effort. ¹⁵⁹ The ADA contains a non exhausted list of “major life activities” such as : “seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”.¹⁶⁰ The concept “major life activity” also includes “major bodily functions” such as: “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” ¹⁶¹ Prior to the amendment of the ADA impairment “substantially limited major life activity” when it precluded a person from performing a “class of work” or a “broad range of work”. However, after the amendment a person is considered disabled if he/she can not fulfill a “type of work”, for instance “food service jobs, clerical jobs,

¹⁵⁶ 42 U.S.C. 12111(3)

¹⁵⁷ Michael L.Perlin, “ADA and persons with mental disabilities. Can sanist attitudes be undone?” Journal of Law and Health, Cleveland State University, 1995,p.6

¹⁵⁸ Id.p.7

¹⁵⁹ EEOC 29 CFR 1630.2 (i)an

¹⁶⁰ 42 USC 12102

¹⁶¹ 42 USC 12102

law enforcement jobs”¹⁶², or “jobs requiring repetitive bending, jobs requiring frequent or heavy lifting”.¹⁶³

Substantial limitation was interpreted by the EEOC as a “significant restriction” of ability to perform a “major life activity”.¹⁶⁴ The Congress found such an approach too strict and demanding. According to a new interpretation a person is disabled under the Act if the limitation imposed by impairment is more than minor.¹⁶⁵

3.3.3 Qualified individuals

Only those disabled people who are defined as a “qualified individual” fall within the scope of the ADA. “Qualified individuals” are those who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”¹⁶⁶

Thus, a disabled person must firstly have necessary knowledge and skills in order to be able to fulfill essential functions of a job. So, for example if someone wants to be an interpreter from English to Russian he/she must at least know both of the languages. Secondly, a disabled person must be able to perform these essential functions with or without “reasonable accommodation”. Finally, the assessment of disability has to be made at the time of employment. Thus, for instance the employer can not refuse to hire a disabled person saying that his/her illness

¹⁶² Equal Employment Opportunity Commission “ Summary of key provisions: EEOC’s notice of proposed rulemaking (NPRM) to implement the ADA amendments act of 2008 (ADAAA)

<http://www.eeoc.gov/laws/regulations/adaaa-summary.cfm>

¹⁶³ Id.

¹⁶⁴ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, 915.002, 3 of March 1997.

¹⁶⁵ EEOC Notice Concerning Americans with Disabilities Act Amendments Act of 2008

http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm

¹⁶⁶ 42 USC 12102

will progress and in the near future he/she will not be able to perform the essential functions of the job.¹⁶⁷

An important thing to know is what constitutes the essential functions of the job. According to the EEOC regulation functions are essential if "... the reason the position exists is to perform that functions".¹⁶⁸ It is not only the employer who decides what forms the essential functions of the job. In order to have objective assessment the essential functions have to be defined according to such factors as written work description; the conditions which are written in individual and collective agreements, etc.¹⁶⁹ For example, in *Overton. V. Reilly*¹⁷⁰ a plaintiff was a chemist who had severe depression. His employer required all workers to write permits and thus to be in contact with public. Overton requested to be substituted in performing this task since because of his depression he had difficulties to contact with public. The Court ruled in favor of the plaintiff as it was an arbitrary judgment of the employer to consider writing permits and being in a direct contact with public to be the essential functions of the plaintiff's job. According to the court's decision contact with people did not have such a big importance and thus Overton could be substituted in performing this function. The important thing to be taken into account is that he could fulfill the main function of the job and thus was a "qualified individual".¹⁷¹

When deciding whether an employee is "qualified" one has to see if he /she can fulfill the main task of the job. The way this task is realized; the methods that are used during the realization are not important. For example, someone has to upload the information on a

¹⁶⁷ EEOC Interpretive Guidance 29 CFR 1630.2 (m)

¹⁶⁸ *Id.*, (n) (2)i-iii

¹⁶⁹ *Id.*, 1630.2 (n)(3)i-vii

¹⁷⁰ 977 F.2d 1190 (7th Cir.1992)

¹⁷¹ *Id.*

computer. It does no matter whether this process is done with the help of the keyboard or some other equipment is used. The most important thing to consider is the final result, the uploaded information.

Finally, a disabled person is defined as “qualified” if he/she can perform the “essential functions” of the job with or without “reasonable accommodation”. Consequently, some disabled employees do not need special adjustments when others do. Thus, this is just stereotypes developed by society that all disabled people need special accommodation. Actually, many disabled people can perfectly perform their job without any special modifications and adjustments.¹⁷²

3.3.4 Reasonable accommodation

“Reasonable accommodation is a modification or adjustment to a job application process...the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position or... to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”¹⁷³

Accommodation for people with mental disabilities is usually performed in the form of flexible working hours; permission to do most job at home; relocation from one department to another; periodical encouragement; permission to have some extra days off for visiting psychiatrist etc.¹⁷⁴ The main aim pursued is to take away the barriers that prevent a mentally

¹⁷² John F. Fielder, “Mental Disabilities and the Americans with Disabilities Act: A Concise Compliance Manual for Executives” (Westport, CT: Quorum Books, 1994) ,p.11

¹⁷³ 29 C.F.R. para.1630.2 (o) (1)(i)- (iii) (1996)

¹⁷⁴ John F. Fielder, Mental Disabilities and the Americans with Disabilities Act: A Concise Compliance Manual for Executives (Westport, CT: Quorum Books, 1994), p.51-53

disabled employee from being involved in the open labor market and having equal opportunities with others.

However, sometimes it is difficult to define whether a mentally disabled person is unable or unwilling to perform a certain task; whether he/she needs flexible working hours because of depression or the illness is just an excuse for having more convenient working conditions. Psychiatrists can not say precisely what kind of consequences should be expected from a certain illness and most of them tend to consider incapability to perform a certain function to be the result of illness rather than the lack of motivation.¹⁷⁵

Still, the matter can be decided other way and mentally disabled workers can be refused to be provided “reasonable accommodation” in cases they really need it. For example, in Carozza¹⁷⁶ case a plaintiff suffered from bipolar disorder and asked the employer to change her working schedule and also to move her to another department as the supervisor in her department was too strict and demanding. The court considered the request a “fuzzy ...alteration ...designed to strip (the job) of its inherent stresses”.¹⁷⁷ What it meant is that stress is a normal thing for a working person and request to accommodate it goes beyond the requirements of the ADA. Thus, the court did not view stress as a barrier for fulfilling the job functions. Such an approach was wrong since people who suffer disorders may have difficulties to perform the essential functions of the job under the certain conditions. So, an important thing to do is the individual assessment of each and every case. The court should avoid appraisals “merely on generalizations about the disability.” It must not just consider diagnosis of a person and what consequences should be

¹⁷⁵ Eric H. Marcus, "Mental Disabilities under the Ada," Risk Management Feb. 1994,p.4

¹⁷⁶ Carozza v. Howard County, Md., 847 F. Supp.365 (D.Md.1994)

¹⁷⁷ *Id.*

expected from that diagnosis. It should go deeper and try to look at and the very nature of the problem.

3.3.5 Undue Burden and Covered entities

A disabled employee can be refused to be provided an accommodation if this accommodation is too expensive; or it requires the employer to restructure the whole work environment; or fully change work schedule etc.¹⁷⁸ For giving an objective evaluation the cost of accommodation, the numbers of employers who currently work in the facility, material resources the facility possess and many other details must be taken into account. Plus, it is the employer who has to convince the court that providing a disabled employee with “reasonable accommodation” will pose undue hardship for him/her. As the court held in *US Airways, Inc. v. Barnett*¹⁷⁹ “a plaintiff/employee...need only show that an “accommodation” seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. The defendant/employer then must show special ...circumstances demonstrating undue hardship in the particular circumstances.”¹⁸⁰

Many lawyers and scientists claim that the methods applied previously for elimination of race and sex based discrimination can not be practiced in case of disabled people since the only fighting stereotypes and prejudices is not enough. The main argument they bring is that race or sex do not have any influence on person’s capability to perform a job, when disability has.¹⁸¹

Still, it is wrong to assert that the elimination of sex and race based discrimination involves only the fighting of prejudices and stereotypes. At the very beginning, in order to provide women and minorities with equal working opportunities they had to be given special

¹⁷⁸ Equal Employment Opportunity Commission Enforcement Guidance No.915.002, October 17, 2002.

¹⁷⁹ In *US Airways, Inc. v. Barnett*, 535 U.S., 122 S. Ct. 1516 (2002)

¹⁸⁰ *Id.*

¹⁸¹ Norman Daniels, “ Mental Disabilities, Equal opportunities and the ADA”, p.4-5

<http://www.hsph.harvard.edu/benchmark/ndaniels/pdf/mentdis.pdf>

education, trainings. So, equal working rights for them were not absolutely free. However, the expenses they cost were the results of “unjust social practice as an inevitable source of inequality”.¹⁸²

The situation with disabled people can be explained the same way. If employers took into account the needs of disabled people from the moment of structuring the facility, they would not have to spend extra money later for restructuring them. When it comes to mentally disabled workers, their accommodation usually does not cost much. For some mentally disabled people “reasonable accommodation” can be introduced in the form of special trainings or education. But if this education and trainings were provided before there would not be necessity for extra expenses later.¹⁸³

Covered entities under the ADA are “employer, employment agency, labor organization, or joint labor-management committee.”¹⁸⁴ Employer means “a person engaged in an industry affecting commerce that who 15 or more employees.”¹⁸⁵

The legislator chose the minimum number of 15 employees since a facility with such a number of workers can have an influence on the inter-state commerce. The term employer under the Act does not also include “corporations wholly owned by the government”¹⁸⁶ because employment discrimination in the federal sector is regulated by the Rehabilitation Act. Indian tribes and *bona fide* private membership clubs do not fall under the definition of employer according to the ADA either.

¹⁸²Id.,p.9

¹⁸³ Id.,p.7

¹⁸⁴ 42 USC 12111 (2)

¹⁸⁵ Id.

¹⁸⁶ Id.

3.4 The Background of Disability Discrimination Legislation in the United Kingdom

Mentally disabled people in the United Kingdom, as in most other countries, had to pass a long way of humiliations and isolation before becoming recognized as equal members. Being born disabled meant being subject to discrimination for one's whole life. The most common way society treated mentally disabled people in middle ages was locking them up in hospitals or other special facilities. The first hospital for mentally disabled people, Bethlem Hospital, started to function in 1329.¹⁸⁷ Visiting Bethlem was one of the means of amusement for British aristocrats.

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The state in the United Kingdom did not care much about disabled people till the 16th century and they received support mostly from the Church. Small hospitals were functioning all over the country where disabled people could have bed and food. At that time disabled people received more care than cure.¹⁸⁹ The situation changed at the end of the 15th century when the Church in England lost most of its power and wealth. Streets were filled with poor disabled beggars. The Tudor monarchs being afraid of revolts of starving and bereaved disabled people enacted the Poor Law Act in 1601.¹⁹⁰ The Act marked "the first official intervention of the need for state intervention in the lives of disabled people"¹⁹¹ and required "each parish to take responsibility for the old and the sick, including 'idiots' and 'lunatics'".¹⁹²

¹⁸⁷ Basant K Puri, Robert A. Brown, Heather J. McKee, Ian H. Treasaden, "Mental Health Law", Oxford University Press, Great Britain, 2005, p.2

¹⁸⁸ Coolin Barner, "Disabled people in England and Discrimination: A case for anti-discrimination legislation in Great Britain". Hurts and Co. United Kingdom, 1991, p.17-18

¹⁸⁹ Id.

¹⁹⁰ Id., p.14

¹⁹¹ Id.

¹⁹² Basant K Puri, Robert A. Brown, Heather J. McKee, Ian H. Treasaden, "Mental Health Law", Oxford University Press, Great Britain, 2005, p.2

At that time mental health legislation divided mentally disabled people in two groups depending on the severity of the illness. Those who had severe learning difficulties were included in the first group and were called ‘idiots’. Other people with mental illness composed the group of ‘lunatics’. ¹⁹³Many people with disabilities were placed in institutes called workhouses. The conditions in them were very poor. Residents of workhouses had to wear uniforms and were given a very small amount of food barely enough just to survive. Most of the legislation concerning the rights of mentally disabled people from the 17th till the middle of 20th century, dealt mostly with hospitalization or other forms of isolation of ‘idiots’ or ‘lunatics’. According to the Poor Law Amendment Act of 1834 disabled people could receive a relief only within the institute. ¹⁹⁴ The only improvement in legislation for mentally disabled people at that time was the requirement for better conditions of facilities or the proper way of admitting to facility. ¹⁹⁵

The great change took place after World War Second in 1944 when the Disabled Person (Employment) Act ¹⁹⁶came into force. Initially the Act was aimed at protecting the working right of veterans. The policy of employment of disabled veterans was introduced by the state in order to reduce its welfare expenses. As Ludwig Guttman, one of the active supporters of the rehabilitation of disabled people noted “transforming a hopeless and helpless spinally paralyzed

¹⁹³ Id.

¹⁹⁴ Colin Barner, “Disabled People in Britain and Discrimination: A case for anti- discrimination legislation”, Hurts and Co., United Kingdom, 1991, p.17

¹⁹⁵ Basant K. Puri, Robert A. Brown, Heather J. McKee, Ian H. Treasaden, “Mental Health Law”, Oxford University Press, Great Britain; 2005, p.4-8

¹⁹⁶ Disabled Person (Employment) Act 1944 (c.10)

individual into a tax payer”.¹⁹⁷ Later, despite the initial aim, all disabled people were covered by the Act.

The Act introduced three methods of guarantying equality to disabled people at the workplace. Firstly, disabled people had to be provided trainings and resettlement programs. Secondly, each employer who had more than twenty employees had to hire a certain percentage of disabled employees (quota system). Finally, sheltered workshops had to be presented.¹⁹⁸ Unfortunately, none of the methods could effectively function. Government did not elaborate the mechanism of implementation of trainings; employers did not apply the quota system; sheltered employment was very unprofitable. However, despite all above noted disadvantages the Act remained in force for almost 30 years, until the Chronically Sick and Disabled Persons Act (CSDPA) was introduced in 1970.¹⁹⁹

The CSDA required local authorities to be informed of the number of disabled people that live in their area and arrange appropriate services for them.²⁰⁰ Disabled people had to be informed about these services through publications or by other means.²⁰¹ The most important innovation of the Act was the establishment of the access right of disabled people. Section 4 of the Act said that : “Any person undertaking the provision of any building or premises to which the public are to be admitted, whether on payment of otherwise, shall, in the means of access both to and within the building or premises, and in the parking facilities and sanitary conveniences to be available (if any), make provision, in so far as in the circumstances both practicable and reasonable, for the needs of members of the public visiting the building or

¹⁹⁷ Charlotte Pearson, “Tackling Disability Discrimination in the United Kingdom: The British Disability Discrimination Act”, Washington University Journal of Law and Policy, Vol.23 , 2007, p.4

¹⁹⁸ Id.,p.2-3

¹⁹⁹ Id., p.3

²⁰⁰ Chronically Sick and Disabled Persons Act, 1970, sec.1

²⁰¹ Id.

premises who are disabled”.²⁰² So every building had to be constructed in a manner that it would be physically accessible for disabled people. However the provision was not very effective since it should not be applied in cases when it was not “practicable or reasonable”.²⁰³

Both Acts were a big achievement for that time as they raised the issue of equal working rights for disabled people. Disabled people started to be treated as equal human beings who could take care of themselves if they got some additional support and help. But most of the things were just on paper and never became realized. That was one of the main reasons why new wave of anti-discrimination campaigns took place in 80s.

The proponents of equal rights for disabled people considered the phenomenon of disability from the perspectives of the social model. They were convinced that all of the barriers and limitations are caused by society which does not recognize and accommodate the different necessities of disabled people. UPIAS, Liberation Network, Voluntary Organization for Anti Discrimination, Sisters against Disability (SAD), and other disability organizations called for adoption of new comprehensive legislation which would address all of these issues.²⁰⁴

The disability rights movement in United Kingdom was also highly influenced by international events. In 1981 the first international organization controlled and run by disabled people, Disabled People’s International (DPI) was established.²⁰⁵ Another factor was a big range of disability rights campaigns in the United States. Americans struggled for a new piece of legislation that will provide effective remedies for disabled people against discrimination at the

²⁰² Id.sec.4

²⁰³ Id.

²⁰⁴ Colin Barner, “Disabled People in Britain and Discrimination: A case for anti- discrimination legislation”, Hurts and Co., United Kingdom.

²⁰⁵ Disabled People’s International is an international non- governmental organization headquartered in Canada. Organization is aimed at full inclusion of disabled people in all activities; elimination of all forms of discrimination against disabled people and providing them with equal opportunities in all fields.

work place. They reached their aim in 1990 when the Americans with Disabilities Act was adopted (ADA).

However, the process of enacting a new law was more difficult and longer in the United Kingdom than in the U.S. The U.K government adopted the medical model of disability and was absolutely against any novelty in legislation. It believed that abilities of disabled people were limited solely by impairment and there was nothing to do with environment. Every time Parliament found a new excuse for postponing the adoption of a new law. The bill was finally passed after fourteen attempts. The decisive reason was the research made by the British Council Organization for Disabled People (BCOBD). The findings of the research were published in Colin Burner's book "Disability and Discrimination in Great Britain" (1991). The book brings a lot of evidence which proves the existence of a wide range of discrimination against disabled people in all fields of life. So, by then the government could not say anymore that there is in the United Kingdom no need for a new legislation as the old one effectively provides disabled people with equal opportunities.²⁰⁶

England became the first European country to enact disability discrimination law. The Disability Discrimination Act (DDA) came into force in 1995.²⁰⁷ In 2000 the Disability Right Commission was established in order to provide disabled people with additional help and support. Before, it was a disabled person himself/ herself who had to decide when the acts of employers were discriminatory and could be challenged in the court. The Disability Rights Commission was authorized to monitor the implementation of DDA; investigate the cases of

²⁰⁶ Charlotte Pearson, "Tackling Disability Discrimination in the United Kingdom: The British Disability Discrimination Act", Washington University Journal of Law and Policy, Vol.23, 2007, p.6-7

²⁰⁷ Id.

discrimination; provide disabled employee with legal and other support.²⁰⁸ It was replaced by the Equality and Human Rights Commission in 2006 (EHRC).²⁰⁹ The EHRC had authority over the whole territory of United Kingdom except Northern Ireland where the same functions were introduced by 2 separate bodies: the Equality Commission (ECNI)²¹⁰ and the Human Rights Commission (NIHRC)²¹¹.

In 2010 the U.K Parliament enacted the Equality Act²¹² that consolidates all anti-discrimination legislation of Great Britain in one comprehensive Act. Most provisions of the Act will come in force in October of 2010.

In the following I will explore definitions of disability and discrimination under the Act, then I will discuss the disadvantages of the Act; as well as important matters it failed to address. Finally, I will look at amendments to the DDA prior to the adoption of the Equality Act 2010.

3.5 Disability Discrimination Act

3.5.1 Definition of Disability under the DDA

The Disability Discrimination Act was aimed to address the issues of discrimination “against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises”.²¹³

The Act, according to two of its authors, Lord Henley and Mr Alistair Burt, “intended to ensure full and fair access to employment opportunities for disabled people.”²¹⁴ . However, only

²⁰⁸ Disability Right Commission 1999 (c.17)

²⁰⁹ Equality Act 2006

²¹⁰ Northern England Act 1998 (c.47)

²¹¹ Id.

²¹² Equality Act 2010 (C.15)

²¹³ DDA 1995 (c.50), preamble

a limited group of disabled people met the requirements of the definitions given by the Act and falls under its protection. Thus disability based legislation did not follow the traditional way introduced in the Sex Discrimination Act and the Race Discrimination Act which prohibited any acts of discrimination on the grounds of gender and race. According to the DDA a person first has to prove that he / she falls within the definition of disability and only then claims protection.

The DDA defines disability as a “physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”.²¹⁵ Initial version of the law stated that “mental impairment includes an impairment resulting from or consisting of a mental illness only if the illness is clinically well recognized”.²¹⁶ This provision was subject to amendment in 2005 by enacting the Disability Discrimination Act 2005. The requirement that a mental illness has to be clinically well recognized in order to be considered impairment under the law was removed.²¹⁷ Moreover, mitigating or correcting measures must not been taken into account when deciding whether a person is disabled or not. The law makes the only exception for people with poor eyesight who use eyeglasses or contact lenses.²¹⁸

The Disability Discrimination Act is not in conformity with the European Union discrimination policy as it does not protect those who are treated as disabled, who are not disabled in fact. In contrast to the DDA, the EU directive²¹⁹ does cover people who are regarded as disabled. The Directive has wider scope than the DDA since it aims at fighting discrimination

²¹⁴ Robin A F COX, “ Avoiding Discrimination Against Disabled people : A Welcome new Law, But Problems ahead for Doctors Who have to Decide who is Disabled”, British Medical Journal, Vol.313, No.7069, (Nov.30 1996),p 1346

²¹⁵ DDA 1995 (c.50), sec.3

²¹⁶ DDA 1995 (c.50), schedule 1.; Caroline Gooding, “Disability Discrimination Act: From Statute to Practice”, Critical Social Policy, Nov. 2000, vol. 20 no. 4 533-549, p.534

²¹⁷ DDA 2005 (c.13)

²¹⁸ Samuel R. Bagenstost , “ Comparative Disability Employment Law from an American Perspective”, p.13 http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=samuel_bagenstos

²¹⁹ EU Directive 2000/78/EC, “Establishing a general framework for equal treatment for employment and occupation”.

on the grounds of disability, whereas the DDA provides protection only to group of disabled people who meet certain characteristics established by the Act.

Consequently, the Directive adopts the social model of disability when a person not being disabled faces limitations because of stereotypes. However, the DDA following the medical model does not provide that person with protection as he/she does not experience any limitations caused by impairment.

According to the Act a disabled person fall within the scope of the law only if his/her ability is limited by impairment for a long time, or limitation is substantial. Long term limitation is defined as the one which lasts for “at least 12 months; or is likely to last for 12 months; or likely to last for the rest of the life of the person”.²²⁰

Substantial limitation is defined as “more than minor or trivial”.²²¹ As there is no exact interpretation of the concept of substantial limitation, it is hard to measure in which cases limitation is substantial and in which it is not. The Employment Appeal Tribunal held that for deciding whether impairment has a substantial effect on a person’s ability the tribunal has to take into account both the effect of impairment with and without medications. For instance, when an employer fires an employee who has schizophrenia and does not take proper medication the tribunal has to consider his/her ability to perform a job with and without medications.²²²

The other prong of disability definition, normal day-to-day activities are the “things people do on a regular or daily basis, and examples include shopping, reading and writing,

²²⁰ DDA 1995 (c.50), sec .1(2)

²²¹ Robin A F COX, “ Avoiding Discrimination Against Disabled people : A Welcome new Law, But Problems ahead for Doctors Who have to Decide who is Disabled” , British Medical Journal, Vol.313, No.7069, (Nov.30 1996),p 1346

²²² Nick Wenbourne , “Disabled Meanings: A comparison of the definition of disability in the British Discrimination Act of 1995 and the Americans with Disabilities Act of 1999”, Hastings International and Comparative Law Review, Fall 1999,p.3

having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.”²²³ These activities have to be normal not for a particular person, or any group of people, but for most part of population. Nevertheless, being normal for general population does not mean that this activity must be carried out by many people. It can be applied mostly by one gender, as for instance, putting the make up is more relevant to women rather than men.^{224 225}

The Employment Appeal Tribunal²²⁶(EAT) in *Goodwin v. Pattern case*²²⁷ explained in which manner the affect of impairment on day-to-day activities should be interpreted. The applicant was a paranoid schizophrenic and was dismissed from his job. The Employment Tribunal held that he can not claim discrimination under the DDA as he is capable of looking after himself at home and that is why he does fall within the definition of disability provided by the Act. The EAT came to an opposite decision saying that despite the fact that the applicant could do some things, his impairment limited his capacities to perform many other things, such as answering phone calls, asking directions for public transports, etc., “the focus of attention required by the Act is on the things that the person either cannot do or can only do with difficulty, rather than on the things that the person can do.”²²⁸

²²³ Disability Discrimination (Guidance on Definition of Disability) Revocation Order 2006 No.1007

²²⁴ Id.

²²⁵ The initial version of the law contained the exhausted list of activities which were recognized by the law as normal day-to-day activities and which had to be affected by impairment.. The list includes such activities as: “mobility, manual dexterity; physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight; memory or ability to concentrate, learn or understand; perception of the risk of physical danger.” DDA 1995, s.1(4)(1)

²²⁶ Employment Tribunals are independent judicial bodies that decide the disputes between the employees and employers. The appeals from decisions of Employment Tribunals are heard by Employment Appeal Tribunal.

²²⁷ *Goodwin v. Patent Office*, ICR 302, 1999.

²²⁸ Id.

3.5.2 The Concept of Discrimination under the DDA

The DDA defines discrimination in two ways. Firstly, when the employer “a) for a reason which relates to the disabled person’s disability, treats him less favorably than he treats or would treat others to whom that reason does not or would not apply; and b) he/she can not show that the treatment in question is justified.”²²⁹ Secondly, a disabled person is subject to discriminatory treatment if the employer failed to provide him/her with “reasonable adjustment”.²³⁰

But who should a mentally disabled employee be compared to for deciding whether he/she is treated less favorably? Should a mentally disabled employee be compared to a disabled or non-disabled? It was only in 1999 when the EAT in *Clarke v. Novacold*²³¹ gave interpretation of that provision. It held that disabled people must not be treated less favorably compared to non-disabled. Prohibition of less favorable treatment is more than equal treatment.²³²

As I have already stated before, disability based discrimination is different in nature from sex or race based discrimination. When it comes to women and minorities, who have the same capacities as men, the mere equal treatment is enough for providing them with equal opportunities. However in the case of disabled people elimination of discrimination requires some additional actions. Thus, if a mentally disabled employee did not come to work for one month because he took treatment he/she should be treated the same as a non-disabled employee who did not have any sickness absence. If the law permits the employer to treat them equally in the understanding of formal equality then he/she can easily dismiss a disabled

²²⁹ DDA 1995 (c.50), sec. 5

²³⁰ Id.sec.6

²³¹ *Clark v TDG Ltd* EWCA Civ 1091 (25 March 1999)

²³² Id.

employee because of a month of absence as he/she will do the same with a non-disabled person.

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Secondly, the DDA as well as the ADA requires employers to provide disabled workers with “reasonable adjustment”. For mentally disabled people, “reasonable adjustment” is introduced in the form of “flexible working hours, allocation some of the disabled person’s duties to another person, assignment to a different place of work, allowance to be absent during working hours for rehabilitation, etc.”²³⁴

Nonetheless, this requirement is not absolute and can be subject to limitations. Deciding the issue of “reasonable adjustment” such matters as the cost of adjustment, its effectiveness, financial resources of employer and other factors have to be taken into account.²³⁵ Thus the DDA the same as the ADA tries to strike a balance between the interest of disabled employees and the interests of employers. Providing disabled workers with equal working rights it also protects employers from undue burden.

Furthermore, the employer is obliged to provide a disabled worker with “reasonable adjustment” only if he/ she is aware of disability and is asked for special adjustments by the employee. Consequently, if a mentally disabled employee needs “reasonable adjustment” he/ she should ask for it. For example, in *Ridout v. T C Group*²³⁶ an applicant had photosensitive epilepsy which was controlled by Epilim and said her employer about that before the interview. But, she did say not that because of her impairment she can not stand to bright lightning. The Applicant failed the interview and claimed discrimination under the DDA as the employer failed to make “reasonable adjustment” for her impairment. She said that she had problems during the

²³³ Caroline Gooding, “Disability Discrimination Act: From Statute to Practice”, *Critical Social Policy*, Nov. 2000, vol. 20 no. 4 533-549, p.5

²³⁴ DDA 1995 (c.50), sec.6

²³⁵ *Id.*

²³⁶ *Ridout v TC Group* [1998] IRLR 628

interview because of the lightning in the room was too bright. However, the EAT ruled in favor of the employer saying that the applicant was obliged to inform the employer about the adjustment she needed.²³⁷

3.6 Equality Act 2010

The Equality Act was passed by U.K Parliament in 2009 and most of its provisions would come in force by 1 October of 2010. The main purpose of the Act is to gather together all anti-discrimination laws of the United Kingdom in one single act since the current anti discrimination legislation is very complicated. Thus, sex based, race based and disability based discrimination will be regulated by a single Equality Act. Most provisions of the DDA are included in the Equality Act and when the latter comes in force the DDA will be replaced by it.

Still, the Act will bring significant changes in disability based regulation since it introduces a new justification test which has higher threshold. The test requires employers to show that a conduct is “proportionate means of achieving a legitimate aim”.²³⁸ Current legislation justifies a less favorable treatment when it is “material to the circumstances and substantial”. “‘Material’ means that there must be a reasonably strong connection between the reason given for the treatment and the circumstances of a particular case. ‘Substantial’ means, in the context of justification, that the reason must carry real weight and be of substance.”²³⁹

²³⁷ Id.

²³⁸ Equality Act 2010 (C.15), sec.15 and 19; Government response to the Discrimination Law Review, July 2008, para 11.22-11.28

²³⁹ Code of Practise, para. 6.3

Under the new law employers are prohibited to make inquiries about the disability of job applicant's. The exemption from that rule can be made in cases when the employer establishes whether an applicant needs "reasonable adjustment" during the interview; or whether an applicant will be able to perform the functions which are "intrinsic to the work concerned".²⁴⁰ This amendment is particularly important for mentally disabled people who do not apply for many jobs because of the requirement to fulfill of pre-employment health questionnaires.

The Act brings novelties in the concept of discrimination as well and introduces two new types of disability based discrimination. Sec. 19 states that application of "provisions, criterion or practice" that puts certain group of disabled people that share the same characteristics in a disadvantage position will represent an indirect discrimination toward them.^{241 242}

Moreover, the Act prohibits employers to treat disabled workers "unfavorably because of something arising in consequence of disability",²⁴³ for instance not allowing having disability related absence. A disabled employee does not have to be compared to a non disabled any more for deciding whether he / she is treated equally. However, the employer has to be aware of the disability of a person, other way he/ she can not be taken responsible. Employers are also free from responsibility in cases when they can show that discriminatory treatment is a "proportionate mean to a legitimate aim".²⁴⁴

²⁴⁰ Equality Act 2010 (c.15), sec.60

²⁴¹ Id.,sec.19

²⁴² These novelties were caused by EU Directive 2000/78/EC that obliges member states to introduce these changes.

²⁴³ Equality Act 2010 (c.15)

²⁴⁴ Id.,sec.15

3.7 Disability policy in Azerbaijan during the period of the USSR

There is no much information about the life of disabled people in Azerbaijan in the pre-Soviet era. We know that disabled people at that time lived with their families and made some contribution to the family budget doing some small jobs such as baking and crafting. The major change took place in 1920 when Azerbaijan was occupied by the Red Army and the Communist ideology became dominant in the country. Disabled people were called “invalid” what was a synonym to a person incapable of work. Work in the USSR was not a right but the duty of every citizen and each member of a big communist family had to make its own contribution by “socially useful activity” for the development of the country. Since most disabled people were not employed they were considered “useless for society”.²⁴⁵

The early disability legislation in the USSR was aimed at providing war veterans with additional help and support. At that time it was only the war veterans who fell within the definition of “invalid” and could benefit from disability laws. Later, all people who lost their work capacities were recognized as “invalids” and were divided in three groups according to the severity of impairment. The first group included non-abled people who could not perform any work. The second group consisted of those who may work in special conditions. Finally, people with disabilities who retained the ability to be engaged in casual or part time work belonged to

²⁴⁵ Sarah D. Philips “There are no invalids in the USSR: A missing Soviet Chapter in the new disability history”, *Disability Studies Quarterly*, Vol.29, No.3, 2009,p.7-9

the third group.²⁴⁶ However, disabled people from the second and the third groups were not involved in the mainstream labor market and worked in segregated work collectives called “artels”.²⁴⁷ This type of gradation still exists in most post Soviet Union countries including Azerbaijan.

Disabled children studied in special schools where education was introduced in the form of “pedagogy for defective, anomalous, sick children in need of correction.”²⁴⁸ Moreover, not every disabled child had a chance to study since most mentally disabled children, who were supposed to have special separate education in the West, were considered “uneducatable” in the USSR and were left out of the “special education system”.²⁴⁹

In the USSR one could hardly meet a disabled person outside although there were millions of them. The reason for this was that most disabled people were locked up in institutions away from human eyes since they did not fit the image of the most successful country. When it was suggested that the Soviet Union should participate in the first Paralympic Games the Soviet representatives answered that: “There are no invalids in the USSR”.²⁵⁰

The book with the identical name “There are no invalids in the USSR” was written by V.Fevolov in 1986 and was published in London since the author had to leave the country being pressured by KGB.²⁵¹ Disabled himself, Fevelov had to experience all the negative aspects of the soviet disability policy. As he described in his book neither buildings nor public transportation were physically accessible for people with disabilities. The amount of the social pension to the

²⁴⁶ Id.,p.13

²⁴⁷ Id., p.25

²⁴⁸ Id.,p.20

²⁴⁹ Id.

²⁵⁰ Id.,p.1

²⁵¹ V.Fefelov “There are no invalids in the USSR”, London Overseas Publications Interchange Ltd,1986 , p.5-7
http://antisoviet.narod.ru/fefelov_v_v_ssr.pdf

first “invalid” group in the 80s amounted to 30 rubles when the average salary was 177 rubles.

²⁵²Consequently, if a disabled person did not have a family to help and support him/ her the only way to survive was to go to institutions. The conditions in these facilities were terrifying but it provided a disabled person at least with some food and care. In some institutions disabled people were forced to work. “Directors seem sometimes to have regarded residents as slave labor...and tried “come what may to squeeze the last drops of their capacity to labor out of disabled people.”²⁵³

Unfortunately, a similar attitude toward disabled people is typical of modern Azerbaijani society. Disabled people remain “second class citizens” although domestic legislation prohibits any discrimination on the grounds of disability and guarantees disabled people equality in all fields. Moreover, Azerbaijan ratified the Convention on the Rights of Persons with Disabilities as well as its Optional Protocol in 2009.²⁵⁴ However, the extension of the jurisdiction of the Convention on the territory of the Republic has not brought much change in the country and an inferior position of disabled people remains the reality of Azerbaijani society.

Before starting the exploration of the law that regulates the working rights of disabled people in Azerbaijan, I will touch on the issue of education of disabled children in the country since their education has a direct influence on their working abilities. Lacking appropriate knowledge and skills non-abled people can not be involved in a labor market. So, even if legislation requires equal treatment for people with disabilities it is clear that they will not be hired since they simply can not perform the essential function of a job.

²⁵² Id.,p.9-15

²⁵³Sarah D. Philips “ There are no invalids in the USSR: A missing Soviet Chapter in the new disability history”, *Disability Studies Quarterly*, Vol.29, No.3, 2009, p.27

²⁵⁴ UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

3.8 Education of disabled children in Azerbaijan

Traditionally non-abled children in Azerbaijan were educated separately in special schools and such an approach remained the major method of teaching of disabled children in a modern educational system. Still, after the ratification of the Convention the mechanism of inclusive education has been introduced in several schools. However, it is not very successful and there are several reasons for that. First of all, the system is applied only in some schools in the capital and thus disabled children from other cities and regions have no possibility to benefit from it. Secondly, since disabled children are not educated during three summer months, when they forget most things they have learned during the year when they are back to school in September after the summer holidays. Finally, inclusive education is implemented in Azerbaijan only till the 5th grade and after that disabled children are sent back to their special schools. Thus, the introduction of the system in the country has not brought almost any improvements in the process of education of disabled children.²⁵⁵

Consequently, most disabled children not having many alternatives have to study in special schools. Separate schools stigmatize a disabled child isolating him/her from his/hers non-disabled peers. Moreover, the level of education in these schools is very low. First time I visited a boarding school for disabled children in Azerbaijan in 2007 when I went to the boarding school No.5 located in a village Saray. I was totally shocked by the picture I saw there. Disabled children were lying in beds being able neither to move nor to speak. Children were very thin although they received enough food. A friend of mine who had been visiting this boarding school for many years told me that some of these children were only blind, some deaf, some had

²⁵⁵International Informational Agency "News - Azerbaijan" "Protecting children ...on paper",20/11/08
<http://www.newsazerbaijan.ru/obsh/20081120/42588485.html>

epilepsy, etc. at the time they were brought to the school. However, after a certain period of time all of them were in the same terrifying condition. Thus, their condition was the result of the care they received in the institution. It was not the impairment that prevented the development of children but

the lack of appropriate education, physical exercises. Children could not speak and just made some strange noises since nobody talked to them during the day. They basically spent all time just in one room doing absolutely nothing. Because of the absence of any physical exercises their muscles stopped to develop, bones became very thin and they could hardly move. Unfortunately, the same situation is typical of other boarding schools for disabled children in the country.

3.9 The Law of the Republic of Azerbaijan on the Prevention of Disability, Rehabilitation and Social Protection of Disabled People

The law on the Prevention of Disability, Rehabilitation and Social Protection of Disabled people defines a disabled person as the one who is in need of social support and protection because his/her abilities are limited by impairment.²⁵⁶ Thus it recognizes the medical model of disability and links limitations and barriers faced by disabled people to impairment.

In the previous subchapters revising the U.S and the U.K disability legislation I said that a person falls within the scope of the ADA and the DDA when he/she meets certain characteristics established by the law. According to the ADA, for example, a person must have “physical or mental impairment that substantially limits one or more major life activities.”²⁵⁷ The DDA has a similar approach and it gives protection to those disabled people whose disability has a

²⁵⁶ The Law of the Republic of Azerbaijan on the Prevention of Disability, Rehabilitation and Social Protection of disabled people, No.284, 25th of August, 1992, art.2

²⁵⁷ 42 USC 12102

“substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities.”²⁵⁸ Later both Acts describe what the concept of “major life activity” or “day- to-day” activities mean and give none exhaustive lists of activities that fall within these categories. Moreover, in cases an employee claims a “reasonable accommodation” but an employer refuses to provide it since it does not consider the employee to be disabled the final decision under both Acts is taken by the court. It is the court that decides whether a person’s disability precludes him/her from performing a “class of job” and thus he/she must recognized as disabled under the law.²⁵⁹

In Azerbaijan this matter is regulated differently. The law says that a disabled person is a person with limited abilities and then it describes limited abilities as a total or partial loss of ability to move, communicate, coordinate, work, and take care of him/her.²⁶⁰ However, a disabled person can receive protection under the law only when he/she is recognized as disabled by the Medico-Social Commission which is established and controlled by the Ministry of Labor and Social Protection.²⁶¹ The Commission decides on the group a disabled person belongs to on the grounds of medico-social expertise because all disabled people in the country are divided in three groups and it is the same classification that existed during the Soviet era. The first group includes non- abled people who can not perform any work. The second group consists of those who may work in special conditions. Finally, people with disabilities who retain the ability to be

²⁵⁸ DDA 1995 (c.50), sec.3

²⁵⁹ Equal Employment Opportunity Commission “ Summary of key provisions: EEOC’s notice of proposed rulemaking (NPRM) to implement the ADA amendments act of 2008 (ADAAA)
<http://www.eeoc.gov/laws/regulations/adaaa-summary.cfm>

²⁶⁰ The Law of the Republic of Azerbaijan on the Prevention of Disability, Rehabilitation and Social Protection of disabled people, No.284, 25th of August, 1992, art.2

²⁶¹ The Act of the Cabinet of Ministers of Azerbaijan about the Medico-Social Commission, No.72, 29th of April, 2002,art.1.3

engaged in casual or part time work become members of the third group.²⁶² The decision is first taken by the local Medico-Social Commission and then sent within three days with all other relevant documents to the Central Republic Medico-Social Commission that verifies its validity.

²⁶³The decision can be challenged within one month by submitting an application to the Head of the Commission.²⁶⁴

Neither people who have the record of disability nor those who are regarded as disabled are covered by law. In contrast to the ADA and the DDA that prohibit any disability related investigations by the employer despite certain cases provided by law^{265, 266} the Medical-Social Commission in Azerbaijan has to inform the employer about the decision it took in relation to the disabled employee.²⁶⁷

Employment of disabled people in Azerbaijan is provided through the implementation of the mechanism of the quota system. The system has to be applied in all institutions, enterprises and organizations (hereafter enterprise).²⁶⁸ According to the Act of the Cabinet of the Ministers the percentage of disabled workers that have to be employed by every enterprise depends on the scale of the enterprise. Enterprises with 25 to 50 workers have to hire at least one disabled worker. If there are in the enterprise more than 50 but less than 100 employees at least 2 % of

²⁶² The Act of the Cabinet of Ministers of Azerbaijan about the Medical-Social Commission No.72, 29th of April 2009, art1.5

²⁶³ Id.,art4.11

²⁶⁴ Id.,art5.4

²⁶⁵ 42 USC 12102

²⁶⁶ Ridout v TC Group [1998] IRLR 628

²⁶⁷ The Act of the Cabinet of Ministers of Azerbaijan about the Medical-Social Commission No.72, 29th of April 2002, art4.14

²⁶⁸ The Law of the Republic of Azerbaijan on the Prevention of Disability, Rehabilitation and Social Protection of disabled people, No.284, 25th of August, 1992, art.25

them have to be disabled. Finally, enterprises with more than 100 employees must provide at least 2.5 % of workplaces for non-abled.²⁶⁹

The law establishes the following procedure of the application of the quota. The first step requires all the enterprises to submit the list of available working places and the number of employees in the enterprise to the local authorities of the General Employment Department of the Ministry of Labor and Social Protection (hereafter the district employment center) by 1st August. The district employment center based on the information presented counts the number of working places that have to be given to the disabled employees in a particular enterprise. Then, the final results are submitted to the local executive bodies and approved by 15th October latest are sent back to the enterprises.²⁷⁰ A disabled person looking for a job can refer either to the district employment center or directly apply to the enterprise. In the second case the employer has to notify the district employment center within 5 days about the application of the disabled person and about the taken decision.²⁷¹ The enterprises that do not meet the quota have to pay the fine in the amount of three average monthly salaries per month for every missing disabled employee.²⁷²

However, not all the enterprises are covered by the quota system. The system is not applied in state authorities; science and high education institutions; enterprises with less than 25 employees; prisons; military organizations; state security services; institutions controlled by the prosecution office and financed by the state budget; investigative authorities.²⁷³

²⁶⁹ The Act of the Cabinet of the Ministers of Azerbaijan No.213,22.11.2005,art.1.2

²⁷⁰ Id.

²⁷¹ The Act of the Cabinet of the Ministers of Azerbaijan No.213,22.11.2005,art.3

²⁷² The Law of the Republic of Azerbaijan on the Prevention of Disability, Rehabilitation and Social Protection of disabled people, No.284, 25th of August, 1992 art.25

²⁷³ The Act of the Cabinet of the Ministers of Azerbaijan No.213,22.11.2005,art.4

Chapter 4. Quota system v. Anti-Discrimination Laws

As I have already noted in the previous chapters, the early legislation regulating the employment rights of disabled people in most countries covered only war veterans. Later, after World War Second the situation changed and all disabled civilians as well as soldiers started to benefit from disability related laws. Disabled people were mostly provided work through the application of the quota system according to which a fixed number of work places had to be reserved for disabled employees. At the beginning the quota system was introduced as a legislative recommendation since the law did not provide any effective mechanism for its implementation. The quota system required every enterprise to hire disabled people however, the law did not establish any punishment in case the quota would not be met. Thus, employment of disabled people was considered more a social responsibility than a legal duty.²⁷⁴ The next step in the quota policy was the introduction of ineffective sanctions for enterprises that do not fulfill their obligations. For example, such an approach was applied in the U.K in 1944 by the Disabled Persons (Employment) Act (DPEA). However, the presence of ineffective sanctions did not change the situation and most disabled people remained unemployed.²⁷⁵

The most improved quota mechanism nowadays is the “levy-grant system” which is characterized by the establishment of a relatively high fine that goes to the fund for supporting the employment of disabled people. Exactly, this type of quota system is introduced in Azerbaijan. However, it does not function effectively in the country and there are several reasons for that.²⁷⁶

²⁷⁴ Lisa Waddington “ Reassessing the employment of people with disabilities in Europe: from Quotas to Anti-Discrimination Laws”, *Comparative Labor Law Journal*.62, University of Pennsylvania, 1996, p.1-6

²⁷⁵ Id.

²⁷⁶ Id.

First of all it leaves most people with severe forms of disabilities outside of the system since the law mentions only the fixed number of disabled people that have to be employed without any further specifications.²⁷⁷ Generally, it is just a small percentage of physically disabled people such as those who lack the leg or hand that benefit from the implementation of the quota system since the blind and deaf usually work on sheltered jobs and people in wheelchairs are absolutely isolated because 80 % of buildings or public transportation is not physically accessible for them.²⁷⁸ When it comes to mentally disabled people, employers refuse to hire them and such a decision is basically motivated by stereotypes and prejudices against people with mental disabilities in society. The first association of most people in the country with the concept of mental disability is dangerous and crazy people that are locked up in hospitals.²⁷⁹ The most frequent question I am asked about my thesis since I am back home is “Do you seriously believe that mentally disable people can work? How do you imagine it yourself?” Being members of this community most employers share the same unfriendly attitude toward mentally disabled people. Still, those with mild forms of mental disabilities such as depression prefer to hide the fact of their disability because of the prejudices rather than to claim their rights under the law. Thus even being employed they will not fall within the quota.²⁸⁰

Secondly, since the quota system does not specify the characteristics of the jobs that have to be performed by disabled persons, they usually end up with the most “low-paying,

²⁷⁷ Such an approach is very typical to the Azerbaijani disability legislation that treats all disabled people as one unique group without any differentiations. There is no even statistic with the information about the separate number of physically and mentally disabled people. The only statistic we have says only about the general number of disabled people in the country.

²⁷⁸ Zarina Ahmadova “The problems of Azerbaijani Disabled- the Inability of Cities”, Trend Life, December 3, 2009.

<http://ru.trend.az/life/socium/1592566.html>

²⁷⁹ Aydin Khalilov. Personal interview. 20th of September 2010

²⁸⁰ Id.

having low skill requirements”²⁸¹ jobs. Finally, a big percentage of employers are not covered by the quota system since the most of the public sector and the employers that have less than 25 employees do not have to meet the quota.²⁸²

Nevertheless, it is true that all the above noted disadvantages of the system can be eliminated if the system is subject to modifications. In case the legislator narrows down the definition of disability making it stricter as it has been done in Germany, then more people with severe forms of disabilities will be able to benefit from it.²⁸³ The law can also specify the fixed number of mentally and physically disabled people that have to be hired by the employer. Then, the inclusion of the whole public sector in the system as well as the reduction of the minimum number of 25 employers that have to be employed by the enterprise in order to be obliged to meet the quota will significantly enlarge the percentage of employers that will be covered by the law. Lastly, the establishment of a very high fine for failing to meet the quota will push employers to hire disabled people rather than to pay the fine.

However, an important thing to understand is whether a quota system in general is a good mechanism for providing disabled people with work. Should it be kept in case all above noted disadvantages are eliminated? My answer is no, since the main drawback of the system in my opinion is the strengthening of prejudices and stereotypes against disabled people. The whole system is based on the assumption that disabled people are less productive because of their impairment; that they will not be able to compete with the non- disabled in the open labor market

²⁸¹ Dal-yob Lee “Economic Crisis and the Quota System”, Asia and Pacific Journal on Disability, Vol.2, No.1, May.1999,p.3

²⁸² The Act of the Cabinet of the Ministers of Azerbaijan No.213,22.11.2005,art.4

²⁸³ Lisa Waddington “ Reassessing the employment of people with disabilities in Europe: from Quotas to Anti-Discrimination Laws”, Comparative Labor Law Journal.62, University of Pennsylvania,1996, p.7

and thus, the only possibility for them to be employed is forcing employers under the threat of punishment to hire them. Thus the system is based solely on the medical model of disability.

A much better mechanism for ensuring the right to work for disabled people is anti-discrimination legislation introduced in the U.K and the U.S I described in the previous subchapters. The anti-discrimination legislation the same as the quota system sees the importance of legal regulation of the process of employment of disabled people, but base this decision on different grounds. Following the social model of disability the anti-discrimination legislation considers prejudices and stereotypes against disabled people the main barriers for them to be involved in a labor market. Still, in contrast to the quota system it does not provide disabled people with a positive discrimination putting them in a more favorable position. The anti-discrimination laws are primarily aimed at ensuring equal working opportunities for disabled and non-disabled people, whereas the main objective of the quota system is just the employment of a certain part of disabled population. What I mean is that under the anti-discrimination legislation every disabled person is entitled to claim employment at any position if he/she is able to fulfill the main functions of the job. However, when it comes to the quota system that requires only the fixed number of disabled people to be hired by the enterprise without any further elaborations, disabled people are usually employed in the least privileged jobs. Moreover, the anti-discrimination laws of the U.S and the U.K also include people who have the record of disability or are regarded as disabled. However, such an approach is impossible under the quota system in Azerbaijan since only those recognized as disabled by the Medico- Social Commission can benefit from it.

Nevertheless, many lawyers assert that anti-discrimination legislation is more burdening to employers than the quota system because the first requires employers to provide “reasonable

accommodation” for disabled workers on its own expenses. Whereas, according to the levy quota system the fines received from employers that do not meet the quota are used for subsidizing the companies that hire people with disabilities. Thus, the anti-discrimination laws do not have the compensation mechanism applied in the quota system. Still, it is wrong to say about the absolute “equalization of the cost associated with employing the disabled in each firm.”²⁸⁴. The quota system requires each firm of the same size to employ the same fixed number of disabled people. Nonetheless, the same sized firms are heterogeneous in nature and employment of disabled workers can be easy for some and problematic for others. However, the levy they have to pay in case they fail to hire the fixed number of disabled people and the grant they receive for meeting the quota constitute the same amount. Consequently, the quota system is not as equalizing as it seems at first glance.

When it comes to the anti-discrimination legislation of the U.S and the U.K both the ADA and the DDA requiring employers to provide disabled jobseekers with a “reasonable accommodation” take into account the cost of accommodation, the numbers of employers who currently work in that facility, material resources facility possess and many other details. The employer is not obliged to make adjustments for a disabled employee if it causes “undue burden” for him/her.^{285 286}

²⁸⁴ Akira Nagae “ An evaluation of the disability employment policy with respect to the levy- quota system in Japan, WIAS Discussion Paper No.2007-001, February 22,2008 p.4
<http://www.waseda.jp/wias/achievement/dp/pdf/dp2007001.pdf>

²⁸⁵ Equal Employment Opportunity Commission Enforcement Guidance No.915.002, October 17, 2002.

²⁸⁶ DDA 1995 (c.50),sec.6(4)

Conclusion and Some Recommendations

What I have done in this thesis is to draw a comparison between the laws regulating the working rights of mentally disabled people in the United States, the United Kingdom and Azerbaijan aiming to find the methods for the improvements of the Azerbaijani legislation. I started from exploring the different interpretations of the concepts of equality and disability since the way the concept is defined has a strong effect on its later application. Considering disability as a consequence of impairment the medical model locates the difficulties faced by disabled person within the individual.²⁸⁷ Whereas the social model asserts that disability “results from oppressive and unjust social structure, rather than from individual impairment.”²⁸⁸

Then I examined the international instruments that guarantee the rights of disabled people. It was a long way of humiliation and isolation until disabled people were recognized as equal human beings with the same range of rights as non-disabled. First equality provisions for disabled people were introduced in the form of general clauses that provided unexhausted list of prohibited grounds for discrimination. Although, disability was not directly included in the list it was in the mind of drafters. Later, there were adopted documents devoted specially to the rights of people with disabilities, since it became obvious that disabled people differ from others and this difference required their problems to be addressed separately. The first Convention on the

²⁸⁷ Stephen Moore, “Social Welfare alive”, Stanley Tornes Ltd, United Kingdom, 2002,p.403

²⁸⁸ Norman Daniels, Susannah Rose, and Ellen Daniels Zide “Disability, Adaptation and Inclusion” in “Disability and Disadvantage” edited by Kimberley Brownlee and Adam Cureton, Oxford University Press, New York,2009, p.89

Rights of Persons with Disabilities was adopted in 2006.²⁸⁹ The Convention requires disabled people to be treated equally and to be provided with equal opportunities in all fields. The adoption of the Convention was a big achievement in the process of protection of the rights of disabled people. Still, the Convention as other international treaties establishes just the minimum standards disabled people have to be guaranteed in every state and it is the state that has to provide a disabled person with his/her rights by means of enacting domestic laws and enforcing them through the adoption of programs and developing a policy. However not every law is a good law and that is what I tried to show in my thesis comparing three mechanisms of regulation of working rights of disabled people.

All three countries introduced in the thesis guarantee equal working rights for people with disabilities. However, they regulate this matter differently. The United States and the United Kingdom ensure equal working opportunities for non-abled people through the application of anti-discrimination legislation,²⁹⁰ whereas Azerbaijan following the example of most European States provides disabled people with work by means of the quota system.²⁹¹ Having done the comparison of two approaches I came to the conclusion that the mechanism of the quota system existing in Azerbaijan is not an effective method for ensuring employment of disabled people. Moreover, I assert that even the further improvement of the system will not bring many changes since the main its disadvantage is that it views disability purely from the perspectives of the medical model. The quota system stigmatizes people with disabilities because it is based on the assumption that disabled people are less productive and can not compete with non disabled in the

²⁸⁹ UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

²⁹⁰ DDA 1995 (c.50), Americans with Disabilities Act of 1990 42 USC

²⁹¹ The Law of the Republic of Azerbaijan on the Prevention of Disability, Rehabilitation and Social Protection of disabled people, No.284, 25th of August, 1992

open labor market. Thus, the state has to push employers to hire disabled people under the threat of punishment. However, the anti-discrimination legislation of the U.K and the U.S regards the prejudices against disabled people as the main barrier for them to be employed.

Consequently, in my opinion Azerbaijan has to shift from the quota system to the anti-discrimination legislation. Moreover, it should adopt the comprehensive legislation such as the ADA and DDA which besides the working rights of disabled people includes the regulation of such spheres as education, transportation and accommodation of people with disabilities. Since all these fields are connected non-abled people can not be provided with equal working rights if they lack education, can not use public transportation and physically access most buildings in the country.

Another important thing to do in Azerbaijan is to raise the public awareness about the rights of people with mental disabilities in order to fight the stereotypes of crazy and dangerous people that must be locked up in hospitals. Moreover, disabled people themselves must know about their rights. Mentally disabled people do not claim their rights since no one informs them about the existence of these rights. There is in no in the country even one NGO that works in the field of employment of people with mental disabilities.²⁹²

Finally, Azerbaijani disability legislation must provide for establishment of the Commission, such as the EEOC in the U.S or EHRC in the U.K that will monitor the implementation of the disability related laws as well as investigate the cases of discrimination at the workplace on the grounds of disability and bring the claims to the court on behalf of disabled people.

²⁹² Nazir Guliyev. Personal interview 27th of September 2010

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