

‘REASONABLE ACCOMMODATION’ AND ‘DISABILITY’

**IN COMPARISON WITH THE REGULATIONS OF THE
UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES,
THE AMERICANS WITH DISABILITIES ACT,
AND
THE EUROPEAN UNION’S REGULATION**

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Abstract

‘Reasonable accommodation’ and ‘disability’ are key phrases in this critical analysis of the United Nations Convention on the Rights of People with Disabilities, the Americans with Disabilities Act and the European Union’s regulation in connection with the labour market. As cornerstones of the disability law, following the principle of the ‘social model’ and ‘substantive equality’, reaching equality, they face numerous challenges: according to the current system, to claim ‘reasonable accommodation’, the employee needs to be qualified as disabled, the limiting barriers should be removed, unless it means undue burden for the employer. Meanwhile its aim to ensure equality and the possibility for the full enjoyment and participation as employee, this system of ‘reasonable accommodation’ has its own checks: firstly, it requires to be in the “category” of disabled; secondly, the necessary adjustment is up to the employer, whether it is reasonable or not. Through selected cases, it seems that it is a very precarious field for the most dependent people. My aim is, based on the analytical and critical interpretation of the different systems, to suggest a solution without these checks, creating real equality without labeling.

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Introduction

People with disabilities constitute the largest minority in the world's population and their numbers are continuously growing.¹ People with disabilities are protected explicitly through the United Nation Convention on the Rights of People with Disabilities² (hereinafter CRPD), which entered into force by ratifying twenty State Parties³ on 3rd May 2008. This is the first human rights convention about disability, and it was signed with the largest number of States on the first day open for ratification,⁴ and currently it is ratified by more than one hundred and fifty States around the world.⁵ Its Optional Protocol⁶ gives the possibility for an individual to complain⁷ before the CRPD Committee, which needs additional ratification. Interestingly, the European Union, as a "sui generis entity"⁸ signed both the CRPD⁹

¹ UN enable!, 'Some Facts about Persons with Disabilities' (un.org 2006) <<http://www.un.org/disabilities/default.asp?id=18>> accessed 24 March 2015

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, available at: <http://www.refworld.org/docid/45f973632.html> accessed 24 March 2015. (CRPD).

³ According to the CRPD Article 45 'Entry into force'.

⁴ UN enable!, 'Convention on the Rights of Persons with Disabilities' <<http://www.un.org/disabilities/default.asp?id=18>> accessed 24 March 2015.

⁵ The number of signatures are 159 regarding the CRPD and 92 regarding the Optional Protocol. 153 States have ratified the CRPD, and 85 the Optional Protocol. Available at: <<http://www.un.org/disabilities/latest.asp?id=169>> accessed 24 March 2015. Signature expresses intention, but only the ratification has legally binding force.

⁶ UN General Assembly, Convention on the Rights of Persons with Disabilities, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, available at <<http://www.un-documents.net/a61r106.htm>> accessed 24 March 2015. (Optional Protocol).

⁷ Optional Protocol Article 1.

⁸ Hans J. Lietzmann, 'European Constitutional Politics and Contingency. The European Union as a 'sui generis' political entity' In *Parliament and Europe. Rhetorical and Conceptual Studies on Their Contemporary Connections* (Baden-Baden, Nomos 2011) 95-109

⁹ CRPD's signature date: 30 March 2007, Optional Protocol's signature date: 23 December 2010. available at < <http://www.un.org/disabilities/countries.asp?navid=12&pid=166#E>> accessed 24 March 2015.

and its Optional Protocol,¹⁰ which is the “first time that the EU become a party to an international human rights treaty”¹¹, has been ratified by the EU, and gives a level for interpretation the cases before the Court of Justice of the European Union (hereinafter CJEU). However, although the CRPD has a common interest for people with disabilities for all over the world, the United States of America still has not ratified it.¹² Nevertheless, there is a strong protection of people with disabilities, especially from the Americans with Disabilities Act of 1990,¹³ which was an example for the CRPD.

In my work I analyze the concept of disability and reasonable accommodation in the three different and correlated systems. Based on my personal experience in the United States of America, I met a seemingly well functioning system and I was curious what is under the surface, compared to the European Union and under the umbrella of the CRPD. My presumption was that the American system is more effective, as an example of international regulation, unlike the European one. Regarding the European Union and the CRPD, I had the possibility to know the European ‘citadel’¹⁴ of disability law and policy, with its leader, the prominent professor, Gerard Quinn and

¹⁰ Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities HL L 23., 2010.1.27. 35-61.

¹¹ European Commission, ‘EU ratifies UN Convention on disability rights’ IP/11/4 (Press Release, Brussels, 5 January 2010) available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 24 March 2015.

¹² See more: Oliver Lewis, ‘Why should the United States ratify the UN Convention on the Rights of Persons with Disabilities?’ (mdac.info/oliver talks 2013) available at: <<http://www.mdac.info/en/olivertalks/2013/09/03/why-should-united-states-ratify-un-convention-rights-persons-disabilities>> accessed 24 March 2015.

¹³ Americans With Disabilities Act of 1990. Public Law 101-336. § 1. 108th Congress, 2nd session (July 26, 1990). Amended by ADA Amendments Act of 2008. 42 USCA § 12101. (Referring as ADA, except if I want to emphasize the difference, I will indicate it by the date or with the proper abbreviation).

¹⁴ Center for Disability Law and Policy, National University of Galway, Ireland.

his team. Their yearbooks about disability¹⁵ are a significant source of European law and the CRPD. Regarding ‘reasonable accommodation’, I was motivated mostly by the idea of Anna Lawson and Elisabeth Emerson, creating a global and critical picture about the relation of disability and reasonable accommodation. However, it is a fast, evolving field, and I wanted to react to these progresses.

In the first chapter I focus on the basic principle of equal treatment and the new model of disability with the new form of equality, as a starting point of change. In the second part my aim is to give a brief summary of the other international documents to emphasize the importance of the CRPD, as a complex protection of people with disabilities.

In the third and the fourth chapter I compare the legal solutions of the UN, the USA and the EU, focusing on the labor market. I will introduce the case *Ms. Marie-Louise Jungelin vs. Sweden*¹⁶ from the CRPD Committee related to the reasonable accommodation (III.1.); with the two main cases of the US Supreme Court, such as *Sutton v. United Airlines Inc.*¹⁷ and *Toyota Motors Mfg., Ky., Inc. v. Williams* (III.2.).¹⁸ I draw the evolution of the CJEU cases from the medical to the social approach, from the case of *Chacon Navas*¹⁹ and *Coleman*²⁰, to *Ring&Werge*²¹ and *Kaltoft*²² (III.3.).

¹⁵ Its details and used sources are contained in the ‘Annotated Bibliography’.

¹⁶ *Ms. Marie-Louise Jungelin vs. Sweden* No. CRPD/C/12/D/5/2011 (CRPD Committee, 14 November 2014)

¹⁷ *Sutton v. United Airlines Inc.* 527 U.S. 471. (1999)

¹⁸ *Toyota Motors Mfg., Ky., Inc. v. Williams* 534 U.S. 184, 122 S.Ct. 681 (2002)

¹⁹ Case C-13/05 *Chacon Navas v Eurest Colectividades SA* [2006] OJ C 69. (Navas).

²⁰ Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603. (Coleman)

In the fourth chapter following the structure, after the CRPD's frame (IV.1.) I am going to introduce the solution of the ADA (IV.2.) and the CJEU's point of view through its cases, beginning with *Ring&Werge*, then analyzing further questions raised by *Kaltoft* and *Ms. Z.*²³ (IV.3.). In the fifth chapter my purpose is to connect 'disability' and 'reasonable accommodation' and identify problems and possible solutions, in connection to equality.

My presumption is that if some kind of modification, which is understood to be reasonable, is an answer to 'disability', we cannot reach equality. First of all, because people cannot be "disabled enough"²⁴ to be under the scope of legal protection, or, they are "disabled enough", but there is no kind of accommodation to make them "equal" on the labor market. Secondly, the excuse of "reasonable" – with or without detailed process – is mainly the territory of the employer and with its "good intention". Even though the approach has been changed, focusing on the barriers created by the society, which should be removed, people with disabilities are still dependent on their "qualification to be disabled" and the "good intention" of the employer.

²¹ Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennztigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboue Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* [2013] OJ C 156/08. (Ring&Werge, HK Danmark)

²² Case C-354/13 FOA acting behalf of *Karlsten Kaltoft v KL* [2014] ECLI:EU:C:2014:2463. (Kaltoft)

²³ Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014] ECLI: EU:C:2014:159 (*Ms. Z.*)

²⁴ This happened under the ADA of 1990, interpreted by the US Supreme Court before the Amendment. See more: Disability Rights Education and Defense Fund, 'Too Disabled or Not Disabled Enough' available at: < http://dredf.org/publications/mayerson_2.html > accessed 24 March 2015

Chapter 1 – Theoretical Basis

In this chapter, I build a stable theoretical basis of the concept of disability and reasonable accommodation with the interpretation of the different theories. My aim is to emphasize the unique attributes of people with disabilities, due to the difficulties of a proper definition of disability; moreover to introduce the different approaches and models for the current regulation.

Principle of equal treatment and diverse groups of people with disabilities

People with disabilities itself is a very diverse group, with special characteristics; therefore application of the principle of equal treatment has difficulties. It requires “comparable situations to be treated equally and non-comparable situations not to be treated identically”.²⁵ However, these characteristics cause a unique situation, for instance finding a comparator: in this case disability cannot be considered.

Unlike many protected characteristics, disability may develop during life’s course, without consciousness, without the control of the person; due to this, it can potentially affect everyone. In relation to the different grounds, the most recent ground beside ‘disability’ is the ‘age’, and if we accept a hierarchical order²⁶ these are on the lowest

²⁵ Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford University Press 2012) 130

²⁶ See more: Helen Meenan, *Equality Law in an Enlarged European Union. Understanding the Article 13*. (Cambridge University Press 2007) 342 It is argued e.g. by Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002) 211

level, after race and ethnic origin, sex, and religion or belief.²⁷ It can be temporary, latent or intermittent, visible or “obvious”, and a result of misunderstanding. These conditions determine the difficulties defining disability, moreover to create a “same” treatment, because they are differently situated, and they may require different accommodations, adjustments.²⁸ In the contemporary disability approach, equal treatment needs the tool, for instance of the reasonable accommodation, to create a real equal treatment,²⁹ where there are equal opportunities. This new approach focuses, on the one hand, on the results, on the substantive equality, on the other hand, the disability is not an individual problem, but a social problem.

Formal and substantive equality

In connection to create equality for disabled, there are two main models: formal equality and substantive equality. This differentiation is significant regarding reasonable accommodation, as an answer to disability.

Formal equality leaves a non-disabled norm in place as the standard, which others must reach and follow the Aristotelian “treat like cases as like”³⁰ and equality appears in the treatment. There is apparent neutrality, which masks normative criteria and

²⁷ The EU non-discriminatory directives create a hierarchy, but it is similar in the USA as well. Howard argues that this is only an outcome of political discussion in the EU. See more: Erica Howard, ‘The Case for a Considered Hierarchy of Discrimination Grounds in the EU Law’ [2007] *Maastricht Journal of European and Comparative Law* 13. 4. 445-470

²⁸ Based on the class and the Power Point Presentation of Lucy-Ann Buckley. 02 March 2015, Galway.

²⁹ Gerard Quinn-Lisa Waddington-Eilionoir Flynn (ed.) *European Yearbook of Disability Law* (4th, Antwerp Intersentia 2013) 190

³⁰ Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23 (exact reference found: Stanford Encyclopedia of Philosophy, <<http://plato.stanford.edu/entries/equality>> accessed 24 March 2015)

benefits are conditional on either not having a disability or being able to compensate for the disability sufficiently to “pass for normal”, similarly to the effective assimilationist. Parity can be claimed only for those who are similarly situated, however, people with disabilities are considered differently situated. It aims to eliminate irrelevant, prejudicial concerns and it emphasized the additional cost for people of disabilities. It focuses on the process; it does not care about the results, as long as the process is fair; it does not recognize the disadvantaged group or the social subordination, and it emphasizes the motive, not the effect, because it neither realizes reasonable accommodation nor other barriers. It only requires same treatment.

In substantive equality, genuine differences may justify special treatment to achieve fairness, due to this reasonable accommodation has an important role, but differential treatment could equally be invidious. Unfortunately, it still leaves lack of disability in places as the standard for comparison, but it respects difference. It is broader in scope than formal equality; it looks at effects and results of practices as well and including indirect discrimination.³¹

Medical and social model

The other important background is the medical and social model of disability. According to the medical model of disability the individual with disability is a problem, who should be adapted to the circumstances and if it is not possible, isolation in an institution or just to be at home seems to be the solution. This person is

³¹ Ruth Colker, *When is Separate Unequal? A Disability Perspective* (Cambridge University Press 2009) 41

a subject of “pity”³², and charity. The *impairment* is in the focus, which should be cured and normalized, instead of the needs. “Impairment is the functional limitation within the individual caused by physical, mental or sensory impairment. Disability is the loss of limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers.”³³ People with disabilities are stigmatized, and their situation is regarded as a “personal tragedy”,³⁴ they seem to be “less than whole”³⁵, dependent on the productive able-bodied.³⁶ This model creates a cycle of dependency and exclusion, where disability is solely a medical “problem”.

In contrast to this, in the social (barriers) model,³⁷ or in “*social-contextual approaches*”,³⁸ discrimination is socially created and problems are located in societal and environmental barriers, which exclude or marginalize the person with disability. It is not people with disabilities, who should be cured, but the society and the barriers.³⁹ There can be six major barriers distinguished to social inclusion: architectural, attitudinal, educational, occupational, legal and personal;⁴⁰ which create

³² Elizabeth F. Emens, ‘Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act’ [2012] 60 American Journal of Comparative Law 205 101

³³ Colin Barnes, *Disabled People in Britain and Discrimination* (London Hurst and Co. 1991)

³⁴ Colin Barnes and Geof Mercer, *Disability* (Key Concepts 2003) 2

³⁵ Dartington 1981 In Len Barton, *Overcoming Disabling Barriers: 18 Years of Disability and Society* (Routledge, 2006) 25

³⁶ Safilios-Rothschild 1970 In Colin Barnes and Geof Mercer, *Disability Policy*, 2003. p. 12.

³⁷ Finkelstein 1993. Referred in Michael Bury-Jonathan Gabe *Sociology of Health and Illness: A Reader* (Longon Routledge 2003) 286

³⁸ According to Tom Shakespeare, there is not only one social model, because all nation gives their own response. In Tom Shakespeare, *Disability Rights and Wrongs* (London Rutledge 1999) 28 I agree, nevertheless to make the comparison easier, I focus on the key difference with the key terms.

³⁹ Richard Rieser, ‘Disability Equality – Medical and Social Model’ <http://www.worldofinclusion.com/medical_social_model.htm> accessed 08 February 2015

⁴⁰ Frank Bowe, *Handicapping America: Barriers to Disabled People* (Harper Collins 1978)

an oppressed minority group.⁴¹ The aim is to integrate those with disabilities into society by recognizing that changes are required by society.

In my opinion, these models cannot be clearly separated, because first of all, in the medical model, medical conditions are the grounds for disabled and to face barriers, a condition is required to get reasonable accommodation. Secondly, the social model should be an answer by society to reach equality, but even if differentiation is important, they have to be applied hand in hand.

Similarly to Fredman's differentiation, there are overlapping aims of equality. Fredman distinguishes four dimensions. First is the *redistributive dimension*, which breaks cycle of disadvantage associated with particular groups, and may legitimately include positive action. Second, the *recognition dimension* wants to promote respect for dignity and worth because of common humanity. Thirdly, the *transformative dimension* would like to accommodate difference and to achieve structural change and finally, the *participative dimension* wants to facilitate full participation in society, socially and politically, or in the community, in general.⁴²

In the subject of my work, the new "disability human rights approach"⁴³ means the frame which is expressed in the paradigm shift to the social model, which means a "proactive, substantive diversity equality model", the anchor of the analyzed

⁴¹ Dimitris Anastasiou and James M. Kauffmann, 'The Social Model of Disability' [2013] *Journal of Medicine and Philosophy* 38. 442

⁴² Sandra Fredman, *Discrimination Law* (2nd Ed., Oxford University Press 2011) 25

⁴³ Maria Ventegodt Liisberg, 'Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective' In Weddington-Quinn-Flynn [2013] Cited above. 146-147.

legislation. These approaches and models help us to understand the different values and worries of disability, where reasonable accommodation might be a reply, in practice based on the disability in the field of employment and occupation. In this narrow scope it helps to create equal circumstances for people with disabilities, on an individual basis, not applied to the formal equality, but the substantive equality, reflected on the social model of disability, but based on the medical one, because it is obligation only if the person is disabled.

In the next chapter, I am going to interpret the international frame of the ground of disability protection, based on these theories and different approaches, with the innovative approach to international regulation of the CRPD.

Chapter 2 – From Invisibility to International Regulation

The CRPD is the first human rights treaty of the twenty-first century, dedicated directly to people with disabilities with legally enforceable rights to re-conceptualize disability as a human rights issue and moving more concrete results after that.⁴⁴ Additionally, this is the first treaty, which the EU acceded,⁴⁵ and its effect is especially significant: it gives a general background to the EU cases with its value and aims. Moreover, in the analysis of the cases by the advocate general, the connection of other international documents and decisions is used to get a clearer and more effective judgment.

In this chapter I am going to introduce the unique CPRD, referring to the other legal documents, which are quoted to interpret in the cases before the CJEU,⁴⁶ such as European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR)⁴⁷, European Social Charter (Revised) (hereinafter ESCR)⁴⁸ and Charter of Fundamental Rights of the European Union (hereinafter Charter)⁴⁹ in a

⁴⁴ Michael Ashley Stein and Janet E. Lord, 'Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential' [2009] 32 Human Rights Quarterly 689, 18

⁴⁵ See more: Alexander Hoefmans, 'The EU Disability Framework under Construction: New Perspectives through Fundamental Rights Policy and EU Accession to the CRPD' In Waddington, Lisa-Quinn, Gerard-Flynn, Eilionoir, *European Yearbook of Disability Law* (3rd, Antwerp Insertia 2012) 35-58

⁴⁶ See for instance HK Danmark AG Opinion FN 18. referred to *Glor v. Switzerland* [ECHR] App. no. 13444/04.

⁴⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR)

⁴⁸ Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163 (ESCR)

⁴⁹ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 (Charter)

nutshell.⁵⁰ The importance of the CRPD is that with it people with disabilities become visible, identifiable, not only through general human rights law.⁵¹

International conventions and protection of disability

The CRPD is a convention to protect people with disabilities, “to promote (...) and ensure the full and equal enjoyment of all human rights and fundamental freedoms”⁵². It recalls other UN covenants⁵³ as well, which indirectly can protect people with disabilities under their “open-ended list”, by the prong of the “other status”. However, only the Convention on the Rights of the Child has an expressed provision to recognize the “rights of children with disabilities”.⁵⁴

A more general protection is expressed in the ESCR,⁵⁵ which – as the first human rights treaty – expressly mentions the concept of disability. Originally it was understood according to the medical model, the protection was about “physically or mentally disabled persons” and their “vocational training, rehabilitation and social

⁵⁰ See more: European Commission, Commission Staff Working Document ‘Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union’ SWD(2014) 182 final Brussels, 5.6.2014.

⁵¹ Anna Lawson, *Disability and Equality Law in Britain* (Hart Publishing 2008) 18

⁵² CRPD Article 1.

⁵³ International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, In CRPD Preamble d)

⁵⁴ Convention on the Rights of the Child (CRC) Article 23 (1).

⁵⁵ The ESC from 1961 had not a substantive provision about people with disabilities, only the EU Committee of the Social Rights could fulfill this aim.

resettlement”. This was revised according to the social model in 1996 with the goal of a full integration:⁵⁶

The right of persons with disabilities to *independence, social integration and participation in the life of the community*

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

to *take the necessary measures* to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;

to *promote their access to employment* through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to *adjust the working conditions* to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services;

to *promote their full social integration and participation* in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.⁵⁷

ESCR wished to create a standard of the Contracting States *in the field of economic and social rights*, where employment has a key role.⁵⁸ In contrast to the ECHR, which means protection *in the field of civil and political rights*, through its general ban in the prohibition of discrimination⁵⁹, which fails to refer directly to “disability”. This was completed by Protocol No. 12,⁶⁰ which contains an “independent right to nondiscrimination not limited to the rights and freedoms set forth in the ECHR” and

⁵⁶ In the European Social Charter Article 15 was only about “the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement”.

⁵⁷ ESCR Article 15 “The right of persons with disabilities to independence, social integration and participation in the life of the community”.

⁵⁸ Colm O’Cinneide, ‘Extracting Protection for the Rights of Persons with Disabilities’ In Arnardóttir, Oddny Mjöll-Quinn, Gerard (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, Leiden 2008) 172

⁵⁹ ECHR Article 14. ‘Prohibition of discrimination’.

⁶⁰ Entered into force on 1 April 2005.

this protection is extended by the case law⁶¹ of the European Court of Human Rights.⁶²

In the case of *Glor v. Switzerland*⁶³ - which was referred to in CJEU cases as well – the ECtHR found violation of the prohibition of discrimination⁶⁴ on the basis of disability for the first time, moreover they referred to the CRPD and the concept of “reasonable accommodation” for the first time. In the case of *Z.H. v. Hungary*,⁶⁵ the ECtHR found violation of the prohibition of inhuman and degrading treatment⁶⁶ and the right to liberty and security,⁶⁷ and they referred to the CRPD’s articles regarding the lack of appropriate steps to ensure “reasonable accommodation” to access, for instance to the lawyer, because he was deaf and mute. These cases are good examples of the co-work of the different courts, and the way of interpretation of the concept of disability and reasonable accommodation.

Both the ESCR and the ECHR were based on the shock of World War II.⁶⁸ Similarly to these two, at the international level the Universal Declaration of Human Rights,

⁶¹ My work is focusing to the EU and USA cases, but there are important cases of the ECtHR, for instance *Price v. the United Kingdom* App. No. 33394/96 (ECtHR 10. July 2001); *Alajos Kiss v. Hungary* App. No. 38832/06 (ECtHR 20. May 2010); *R.P. and others v. the United Kingdom* App. No. 38245/08 (ECtHR 09. November 2012) – referring to the CRPD, Short summary reachable: Press Unit of ECtHR: ‘Persons with disabilities and the European Convention on Human Rights’ (echr.coe.int 2015 February) <http://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf> accessed 24 March 2015

⁶² David P. Forsythe, *Encyclopedia of Human Rights* (Oxford University Press 2003) 40

⁶³ *Glor v Switzerland* App. No. 13444/04 (ECtHR, 30 April 2009)

⁶⁴ ECHR Article 14.

⁶⁵ *Z.H. v Hungary* App. No. 28973/11 (ECtHR, 08 November 2012)

⁶⁶ ECHR Article 3.

⁶⁷ ECHR Article 5 § 2.

⁶⁸ The Council of Europe In Weddington-Quinn-Flynn [2012] Cited above. 287

later divided into the International Covenant on Civil and Political Rights (ICCPR)⁶⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁰ meant the universal protection. ICCPR's and ICESCR's rights are protected together in the CRPD.

These rights are expressly reachable for the EU from the Lisbon Treaty,⁷¹ plus Article 12 and Protocol 14 of the ECHR⁷² also express, that EU “may accede to the Convention”, due to EU being bound by its provisions, as well. The protection of the ECHR is wider than the EU's law, however, its concept of discrimination is weaker than that of the EU.⁷³

In the cases before the Court of the European Union, Advocate General refers to the cases of the ECtHR,⁷⁴ and the American legislation,⁷⁵ plus to the European Charter of Fundamental Rights (hereinafter Charter). The Charter is now, after the Lisbon Treaty, on the same level as the founding treaties⁷⁶ and means more expressed protection for people with disabilities as well, with expressed protection of the disability:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other

⁶⁹ UN General Assembly: Resolution 2200 A (XXI) of 16 December 1966 on the International Covenant of Civil and Political Rights.

⁷⁰ Committee on Economic, Social and Cultural Rights, General Comment 5 – Persons with Disabilities, (1994), UN Doc. E/95/22, para 6.

⁷¹ European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01 Article 6. (2). (Treaty of Lisbon)

⁷² Kaltoft refers to these in his case. Kaltoft AG Opinion para 18.

⁷³ Annick Masselot, ‘The State of Gender Equality Law in the European Union’ [2007] European Law Journal 13, 2 157

⁷⁴ Kaltoft AG Opinion p. 14., HK Danmark AG Opinion FN 18.

⁷⁵ Kaltoft AG Opinion p. 52, HK Danmark AG Opinion p. 34.

⁷⁶ Klaus-Dieter Borchardt, *The ABC of the European Union law* (European Union 2010) 28

opinion, membership of a national minority, property, birth, *disability*, age or sexual orientation shall be prohibited.⁷⁷

This general protection in some cases has had horizontal direct effect between two private parties⁷⁸, however, it cannot be understood as a general ban of all discriminatory treatment⁷⁹ and it cannot change the “extent of powers” and regarding employment and occupation of the Framework Directive,⁸⁰ or the other non-discriminatory directives.

In this brief “outline” I wanted to prepare the CRPD, as a complex disability human rights treaty, and briefly interpret the different, referred tools of the courts and their connection. In the following, I am going to analyze the key concepts, ‘disability’ and ‘reasonable accommodation’ in the different legal systems.

⁷⁷ Charter Article 21 1. ‘Non-discrimination’.

⁷⁸ Case C-144/04 *Werner Mangold v Rudiger Helm* [2005] ECR I-09981; Case C-555/07 *Seda Kucukdevici v Swedex GmbH&Co. KG*. [2010] I-365 referred in Kaltoft AG Opinion p. 26.

⁷⁹ Kaltoft AG Opinion p. 24.

⁸⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 02/12/2000 16-22. (Framework Directive)

Chapter 3 – The Concept of Disability

The term ‘disability’ cannot be defined properly and restrictively. The concept is always in motion and in progression, reflecting the challenges of society. Consequently I would like to avoid using seemingly cleared up approaches. However, it is unquestionable whether the examined legal acts are based on a new model of equality,⁸¹ when people with disabilities are not subjects, passive participants; however, they are objects, active actors. This means substantive equality – instead of formal equality – with it needs to have some kind of *positive duties*.⁸² The CRPD’s approach is based on the “social model” of disability, instead of the “medical model” of disability and this paradigm shift is the most important basis of the new model, approach to disability and the related regulations. It emphasizes that the problem of disability is not only of the impairment of the functions and its effect on individuals, but in the relationship.⁸³ In this chapter my purpose is to present the concept of disability in the CRPD, in the ADA and in the EU, with the background of the new model of equality.

⁸¹ Liisberg describes as the contemporary disability human rights approach. Liisberg, Maria Ventegodt [2013] Cited above 146-147

⁸² Sandra Fredman, *Human Rights Transformed – Positive Rights and Positive Duties* (Oxford University Press 2008) 178

⁸³ Hunt: 1966a 146 referred In Barnes, Colin ‘The Social Model of Disability: Valuable or Irrelevant’ <<http://www.mcgill.ca/files/osd/TheSocialModelofDisability.pdf>> accessed 24 March 2015

3.1. The UN Convention on the Rights of Persons with Disabilities

With the „groundbreaking”⁸⁴ international frame of disability law, with the complexity⁸⁵ of the CRPD civil, political and economic, plus social and cultural rights are protected in the same document. The CRPD ensures a compass, a direct referral point for people with disabilities to litigate. The previously mentioned international conventions and legal documents have similar goals,⁸⁶ but directly regarding people with disabilities their articles were not perfect, however with the complexity of the CRPD these rights are “indivisible, interrelated and interconnected”.⁸⁷

The CRPD does not define the term of disability in a closed way; instead it gives an exemplificative listing of those who are included as persons with disabilities. In the light of the social model of disability, the CRPD specifies⁸⁸ people with disabilities as those:

who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁸⁹

In harmony with the whole purpose of CRPD, the definition focuses on the barriers constructed by the environment, therefore these should be eliminated:

⁸⁴ Oliver Lewis ‘The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities’ In McSherry Bernadette-Weller, Penelope (ed.) *Rethinking Rights-Based Mental Health Laws* (Bloomsbury Publishing 2010) 98

⁸⁵ Jean Allain ‘Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities’ (2nd, Disability Action’s Centre on Human Rights for People with Disabilities 2009) Legal Reports 17

⁸⁶ Plus, it has so-called “proactive rights”, like awareness raising (Article 8), accessibility (Article 9). See In David P. [2003] Cited above. 30

⁸⁷ UN General Assembly, ‘Vienna Declaration and Programme of Action’ (12 July 1993) A/CONF.157/23 para 5. See more: para 63. ‘The rights of the disabled person’.

⁸⁸ It is not the definition of disability.

⁸⁹ CRPD Article 1. ‘Purpose’.

disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.⁹⁰

If it arises from the society it can be removed by it, as well. This paradigm shift is the basis of the new source, new approach in the field of disability and it is enrooted in the American regulation and has an overreaching effect: people with disabilities have equal rights with others and need to have an equal chance to be a part of the society, on all levels of the life: regarding for instance work and employment,⁹¹ education,⁹² cultural,⁹³ public and political life.⁹⁴ Discrimination is a “violation of the inherent dignity and worth of the human person”,⁹⁵ which means

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, *including denial of reasonable accommodation*.⁹⁶

State Parties shall take appropriate steps to eliminate discrimination by all kinds of entity – regardless of whether it is private or public;⁹⁷ and it has to prohibit all discrimination.⁹⁸

All in all, CRPD gives a frame to disability, and the failure of reasonable accommodation means discrimination, based on disability. Only the recognition of

⁹⁰ CRPD Preamble e).

⁹¹ CRPD Article 27. ‘Work and employment’.

⁹² CRPD Article 24. ‘Education’.

⁹³ CRPD Article 30. ‘Participation in cultural life, recreation, leisure and sport’.

⁹⁴ CRPD Article 29. ‘Participation in political and public life’.

⁹⁵ CRPD Preamble h).

⁹⁶ CRPD Article 2. ‘Definitions’.

⁹⁷ CRPD Article 4. ‘General obligations’.

⁹⁸ CRPD Article 4. ‘Equality and non-discrimination’.

disability creates a formal equality, which is ineffective; however with the duty of reasonable accommodation substantive equality has been achieved. In the forthcoming sections, I am going to present the regulation of the ADA, and the European Union.

3.2. The Regulation of Americans with Disabilities Act

In this chapter I introduce the differences in the concept of disability created by the amendments of the Americans with Disabilities Act of 1990 (ADA)⁹⁹, focusing on the question of its scope and the prong of “regarded as disabled”, substantial limitation and of “major life activity”.¹⁰⁰ Additionally, I illustrate the evolution of the concept of disability as affected by the cases of the Supreme Court.

The Americans with Disabilities Act of 1990 was enacted¹⁰¹ to provide a “clear and comprehensive prohibition of discrimination on the basis of disability”.¹⁰² This protection is similar to the Civil Rights Act of 1964.¹⁰³ moreover, it requires reasonable accommodation from employers. It prohibits discrimination with inclusion of the failure to accommodate in employment, public accommodation, and government services. Additionally, it is based on the Rehabilitation Act of 1973 and other earlier laws.¹⁰⁴

According to the ADA, people are considered disabled, in three cases, if they have “a physical or mental impairment that substantially limits one or more of the major life activity of an individual”.¹⁰⁵¹⁰⁶ Additionally, people are considered disabled if there is

⁹⁹ Americans With Disabilities Act of 1990. Public Law 101-336. § 1. 108th Congress, 2nd session (July 26, 1990). Amended by ADA Amendments Act of 2008. 42 USCA § 12101. (ADA).

¹⁰⁰ ADA 42 U.S.C. § 12102(2).

¹⁰¹ It was signed into law on July 26, 1990.

¹⁰² ADA preamble.

¹⁰³ Civil Rights Act of 1964 Pub. L. 88-352., 78. Stat. 241.

¹⁰⁴ Chai Feldblum ‘Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?’ [2000] Berkeley Journal of Employment and Labor Law 21, 91-165

¹⁰⁵ Even an asymptomatic HIV infection can be considered as a disability. *Bragdon v. Abbott* 524 U.S. 624 (1998), which was referred by the HK Danmark AG Opinion p. 34.

“a record of such an impairment or being regarded as having such an impairment”.¹⁰⁷

According to ADA in these circumstances there is an appropriate ground to bring a claim.¹⁰⁸

However, the Supreme Court narrowed this definition especially in the case of *Sutton v. United Air Lines, Inc.*¹⁰⁹ and in the *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*¹¹⁰, due to many people with different kinds of sicknesses, for example diabetes, epilepsy, cancer, and artificial limbs, who were excluded, “not disabled enough”.¹¹¹ To extend the scope of the definition of disability, the Congress amended the ADA in 2008 (ADAAA).¹¹² The ADAAA’s aim is to carry out the ADA’s objectives “by reinstating a broad scope of protection”.¹¹³ It is going to provide a new definition of “substantially limits” that should be interpreted consistently with the findings and purposes of the ADAAA and an extended possibility of “major life activities”.

¹⁰⁶ 42 U.S.C. § 12112(a).

¹⁰⁷ 42 U.S.C. § 12102(2).

¹⁰⁸ This was based on the Rehabilitation Act of 1973, Section 504. (Pub. L. No. 93-112), which prohibited discrimination on the basis of disability by employers who received federal funds.

¹⁰⁹ *Sutton v. United Airlines Inc.* 527 U.S. 471. (1999)

¹¹⁰ *Toyota Motors Mfg., Ky., Inc. v. Williams* 534 U.S. 184. (2002)

¹¹¹ E. F. Emens [2012] Cited above. 101, 123

¹¹² Americans with Disabilities Amendments Act of 2008, Became effective on January 1, 2009. Pub. L. No. 110-325, 122 Stat. 3553 (2008) Codified at 42 U.S.C. § 12101 et seq. (ADAAA)

¹¹³ 42 U.S.C. § 12101(b)(1).

Sutton v. United Airlines

In *Sutton v. United Airlines*¹¹⁴ the Supreme Court narrowed the group of people covered by ADA, and excluded those who with medication or devices could well function. In this case the two plaintiffs have eyesight problems, which was correctible with eyeglasses, but not good enough to fulfill the requirements to become air pilot at United Airlines, due to their application was refused. They suited the company, that they are disabled under the ADA of 1990, because they are limited in their “major life activity” and they can be “regarded as disabled”, due to there is discrimination against them. By contrast the court decided, that they are not in the protected category, because this impairment can be mitigated by wearing eyeglasses, moreover, their “major life activities” are not “substantially limited”. Additionally, not only the possibility of the limitation needs to be examined, but the present situation of the individual. According to this condition, they were not substantially limited in their major life activities; they could not only become “global air pilot”.

By contrast, the ADAAA does not need to determine whether the individual is impaired substantially in a major life activity. It is enough to show that the action against the individual is prohibited by the ADA, but transitory – where the impairment with an actual or expected duration of six months or less – and minor impairments are excluded, moreover reasonable accommodation is not a duty in this category.

¹¹⁴ *Sutton v. United Airlines Inc.* 527 U.S. 471. (1999)

Toyota Motor Mfg. of Kentucky v. Williams

In *Toyota Motor Mfg. of Kentucky v. Williams*¹¹⁵ under ADA the Supreme Court expected a high demanding standard, where impairment “substantially limits” a “major life activity” if it “prevents or severally restricts the individual” from performing the activity. In this case Ms. Williams did exhausting physical work for Toyota Motors Mfg. of Kentucky. After a while she faced serious medical conditions due to her work, with pain in her arms. Later on she was dismissed and she stated that there was not reasonable accommodation applied. District court agreed that the company failed fulfill the duty of reasonable accommodation, however, the Supreme Court disagreed and approved, that “major life activity” was not substantially limited, only in relation with the work.

The Supreme Court restricted the definition of disability in more ways: first from the point of the individual; second from the part of “substantially limit”; third from the point of the “major life activities” and the “regarded as” prong.

ADAAA defined with an exemplificative list of “major life activities”. It distinguishes a generally definition, which contains for example seeing, hearing, eating, sleeping, walking, standing, learning, concentrating; and operation of “major bodily functions”, such as the immune system, normal cell growth and the endocrine system.

¹¹⁵ *Toyota Motors Mfg., Ky., Inc. v. Williams* 534 U.S. 184, 198. (2002).

Under the scope of ADA, some courts interpreted the major life activities more restrictively: to be disabled, the court examined whether more than one major life activity is limited. ADAAA has clarified, that an impairment that “substantially limits” a major life activity need not also limit other major life activities in order to be considered a disability, and episodic conditions, or intermittent impairments, such as epilepsy or post-traumatic stress disorder are under the same category.

With the prong of “regarded as having such an impairment”, the ADAAA is consistent with the social model of disability, but structurally it moves away from it¹¹⁶ by adding the following: “being regarded as having such an impairment, if the individual establishes that he has been subjected to an action prohibited under the ADA 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.”¹¹⁷

¹¹⁶ E. F. Emens [2012] Cited above.

¹¹⁷ 42 U.S.C. § 12102 (1) (C).

3.3. The Legislation of the European Union – Evolution of the Cases under the Framework Directive

European Union regulates disability among the other non-discrimination grounds, but only in the field of “employment and occupation” in its Framework Directive, since 2000. This gives a frame of other kind of discriminatory bases beside the race, narrowly tailored to the employment and occupation. Previously the founding treaties did not contain explicit reference to disability.¹¹⁸

The alteration started with the 13 Article¹¹⁹ of the Treaty of Amsterdam of 1997. Previously, the European Community focused on the market-cooperation, not on the human rights. The Treaty of Amsterdam opened the door to protect the different grounds of discrimination and the two new anti-discrimination directives were adopted. The Race Directive¹²⁰ combats discrimination on the grounds of racial or ethnic origin under the principle of equal treatment.¹²¹ Meanwhile the Framework Directive’s material scope focuses on the field of employment and occupation, the Race Directive and the later adopted Sex Directive¹²² beside it, prohibits the discrimination in the field of “social benefits, health, education and access to goods

¹¹⁸ See: Lisa Waddington, *From Rome to Nice in a Wheelchair, The Development of a European Disability Policy* (European Law Publishing 2006)

¹¹⁹ Article 19 TFEU.

¹²⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180, 19/07/2000 (Racial Directive)

¹²¹ Ellis-Watson [2012] Cited above. 478

¹²² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 204/23, 26/07/2006 (Sex Directive)

and services.”¹²³ This differentiation in the material scopes reflects a hierarchy of the different grounds, where „race or ethnic origin” is on the top.¹²⁴

Beside this secondary source, the Lisbon Treaty, which came into force in 2009, introduced other grounds of disability. Article 10 of the TFEU contains a “mainstreaming provision”,¹²⁵ which provides that in “defining and implementing its policies and activities, the Union shall aim to combat discrimination based on [...] disability”.¹²⁶

Moreover it changed the status of the EU Charter of Fundamental Rights,¹²⁷ because it has the same legal value as the Treaties, and the EU is obliged to comply with the Charter in all activities, as are the Member States when they are implementing EU law.¹²⁸ However, these regulations not provide a general prohibition on all forms of discrimination – that includes for instance obesity –, even the Article 21 of the Charter is open-ended¹²⁹ in that it prohibits “discrimination based on any grounds such as[...]”.¹³⁰

The purpose of the Framework Directive is to lay down a

¹²³ Richard Whittle, ‘The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective’ [2002] *European Law Review* 27, 3 303-326

¹²⁴ Howard [2007] Cited above. 445

¹²⁵ Waddington [2006] Cited above. 178

¹²⁶ TFEU Article 10.

¹²⁷ TEU Article

¹²⁸ Charter addresses disability in Article 21. and Article 26.

¹²⁹ Kaltoft AG Opinion p. 14-27.

¹³⁰ Charter Article 21.

general framework of the elimination of discrimination on the grounds of religion or belief, disability, age or sexual orientation regarding employment and occupation under the principle of equal treatment.¹³¹

It prohibits both direct and indirect discrimination, as well as harassment and instruction to discriminate.¹³² Direct discrimination is considered to occur where “one person is treated less favorably than another is, has been or would be treated in a comparable situation.” Indirect discrimination is considered to occur where “an apparently neutral provision, criterion or practice would put persons with a particular ground of discrimination at a particular disadvantage as compared with other persons, unless in special circumstances.”¹³³ Its scope is limited of the areas of competence conferred on the Community and it shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to employment and working conditions.¹³⁴

Chacon Navas case

The Framework Directive does not include a proper definition of disability, due to this is analyzed on a case-by-case basis by the CJEU. The first case that dealt with the term of disability was the *Sonia Chacón Navas v Eurest Colectividades SA* case¹³⁵ six years after the Directive.

¹³¹ Framework Directive Article 2.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Framework Directive Art. 3 (1) (c).

¹³⁵ Case C-13/05 Chacon Navas v Eurest Colectividades SA [2006] OJ C 69, ECR I-6467 (Navas case)

In the *Navas* case a woman employee was dismissed based on her sickness and the CJEU had to find whether „sickness” is included in the Framework Directive under the term of disability.¹³⁶ According to the CJEU disability needs to have an autonomous and uniform interpretation in harmony with the purpose of the Framework Directive everywhere in the Community.¹³⁷

„Sickness” needs to be differentiated from disability, because these could not be treated as being the same.¹³⁸ By using the concept of disability¹³⁹ the legislature deliberately chose a term, which differs from sickness. They pointed out, sickness should be in a long period of time to undermine the professional life¹⁴⁰, and it cannot be regarded as a ground in addition to the Framework Directive. In this decision the key to disability was its duration, and they still distinguished sickness and disability on medical grounds, following the medical model of disability, what was overruled with the *Ring&Werge* decision¹⁴¹ in 2013.

Ring&Werge case

In the *Ring&Werge* joined cases, two women were dismissed on the basis of their long-lasting back pains. The Court made its landmark decision from two perspectives.

¹³⁶ *Navas* para 75.

¹³⁷ *Navas* para 39-42.

¹³⁸ *Navas* para 44.

¹³⁹ Framework Directive Art. 1.

¹⁴⁰ *Navas* para 45.

¹⁴¹ Joined Cases C-335/11 and C-337/11 HK Danmark, acting on behalf of Jette Ring v Dansk almennztigt Boligselskab and HK Danmark, acting on behalf of Lone Skoubou Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S [2013] OJ C 156/08. (HK Danmark).

On the one hand, from the point of the disability, on the other hand, regarding reasonable accommodation.¹⁴²

Following the ratification by the European Union of the CRPD in 2010, seven years after *Navas*, the CJEU held that the concept of disability within the meaning of the Framework Directive had to be understood as referring to the limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.¹⁴³

From the aspect of disability, they found, due to the prospect of the two women, who were suffering from a long-lasting pain that caused barriers in their professional life because of they were dismissed, that their sickness is disability, and it is protected under the Framework Directive. In contrast to *Navas*, where sickness as such¹⁴⁴ does not fall within the scope of the protection of the Framework Directive, the directive not need to be interpreted strictly¹⁴⁵, thus sickness can be a cause of impairment and the impairment resulting from sickness. A permanent limitation resulting from sickness, which hinders participation in professional life,¹⁴⁶ is also covered by the protection of the Framework Directive.¹⁴⁷

¹⁴² Later analyzed.

¹⁴³ *HK Danmark* para 37-39. referred in Z. para 76.

¹⁴⁴ *Navas* para 57.

¹⁴⁵ *Coleman* para 46.

¹⁴⁶ In *HK Danmark* AG Opinion p. 34. they referred to the *Bragdon v. Abbott* case, where an asymptomatic HIV infection was considered as a disability, protected under the ADA 524 U.S. 624 (1998).

¹⁴⁷ *HK Danmark* AG Opinion p. 33.

The new voice of the Court reflects to the CRPD's social model and it is harmonized with it, in *HK Danmark* for the purposes of the existence of disability in the CRPD and the directive, the impairment must be long term, long in time¹⁴⁸ to be under the scope. It is important because it focuses on the elimination of the barriers and on the reasonable accommodation. The later explained reasonable accommodation builds a bridge between the disability and the equal participation in daily activities. Usually limitation resulting from an incurable illness is regarded as lasting for a long time. However, even an illness, which is in principle curable, may take so long to be completely cured that the limitation lasts for a long time. Moreover, even an illness, which is basically curable, may leave behind a long-term limitation.¹⁴⁹

Kaltoft case

This path was followed in the *Kaltoft* case¹⁵⁰ with a very broad interpretation of the concept of disability. According to the Court's decision,¹⁵¹ obesity counts as disability if barriers results from overweight. In the general frame of the Framework Directive for equal treatment in employment and occupation, obesity constitutes a disability, where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments, which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.¹⁵²

¹⁴⁸ *HK Danmark* AG Opinion p. 35.

¹⁴⁹ *HK Danmark* AG Opinion p. 36.

¹⁵⁰ Case C-354/13 FOA acting behalf of Karlsten Kartoft v KL [2014] ECLI:EU:C:2014:2463 (*Kaltoft*)

¹⁵¹ *Kaltoft* para 65.

¹⁵² The national court has to determine whether these conditions are met.

However, the CJEU did not analyze the role of reasonable accommodation, in connection with the broader term of disability would be necessary. I think, with the new direction, such as obesity as a disability if it causes limitations from the *Kaltoft* case, we are going to face a very broad definition of disability. My point of view is another kind of approach: I would like to emphasize the importance of the reasonable accommodation as a tool of the elimination of the barriers, constructed by the employer in the modern approach of disability.

Coleman case

In an earlier case of the CJEU, the court extended the concept of disability in a vertical direction. In the case of *Coleman*, a mother of a child with disability was dismissed. The CJEU must clarify, whether the Framework Directive is applicable only to employee who is herself disabled or with an extended scope, based on the relationship, when the employee is treated less favorably by reason of the disability of her child. The Court decided, that for the purpose of the Framework Directive, for the principle of equal treatment disability needs to be interpreted broadly.

Through the case law of the Court my purpose was to present the evolution of the concept of disability under the Framework Directive. Notwithstanding, the Framework Directive gives only a frame for protection of people in disability in the field of employment and occupation without a proper definition of disability; with the cases it expresses an evolving concept in harmony with the CRPD. The *Navas*, *HK Danmark* and *Kaltoft* broadened its meaning on a horizontal level, reflecting the social model of disability, where the barriers are created by the society and

Framework Directive protects person with long-term sickness, serious overweight, if the person based on the circumstances has suffer from disadvantages in the full and effective participation in the employment and occupation. Beside the horizontal relations, the Court extended the vertical connections in *Coleman* and protected not only the person with disability, but also the mother, who cares with her child with disability. It raises further questions, first, whether this protection of the carer of a person with disability is extended to all relation; second, whether it has an age-limit of the person and the carer relation, similarly to several national law.

Chapter 4 – The Concept of Reasonable Accommodation

The concept of reasonable accommodation does not have a “common understanding”.

¹⁵³ This expression is used in the CRPD, in most of the national legislations,¹⁵⁴ and in the Framework Directive as well. Some countries use different terms, like “adjustment” in the United Kingdom, “step” in Finland, “appropriate measure” in Ireland and France, but these differentiations do not have essential importance.

The solution of reasonable accommodation enroots in the fight against the discrimination of the protected ground of religion and belief in the USA.¹⁵⁵ It was expanded to the group of people with disabilities as well, firstly only in the public sector and later with the ADA of 1990 to the private sector. In contrast to it, in the European Union reasonable accommodation is a duty only based on the disability and only related to employment and occupation.

The term of reasonable accommodation has two parts: first of all, the basis is some kind of accommodation, adjustment; secondly, this accommodation should be reasonable, as a quality of it. In harmony with these two elements, I would like to distinguish between two sides: the side of the employer and the side of the employee. Employer has the duty to provide accommodation for the employee; meanwhile, it does not mean undue hardship, a disproportionate burden. On the other hand, employee requests a reasonable accommodation based on his/her disability

¹⁵³ Lisa Waddington ‘When it is Reasonable for Europeans to be Confused: Understanding When a Disability Accommodation is “Reasonable” from a Comparative Perspective’ [2008] 29 Comparative Labor Law and Policy 3 318

¹⁵⁴ E.g. Lithuania, Greece and Belgium.

¹⁵⁵ Lawson [2008] Cited above. 5

individually, and this adjustment should be appropriate.¹⁵⁶ From the point of the employee, “accommodation” is more powerful than “reasonableness”, because it means a seemingly strict duty of the employer, in an individual relation to him/her. Due to the diverse nature of disability, there cannot be any list of accommodations, only a general frame. However, “reasonable” means justification for the employer, if the appropriate measure would be a disproportionate burden. In my opinion, this attribute is the weak point of this concept, with the challenge of legislators and the courts to interpret it.

Similarly to my differentiation, in most of the cases there is a two-steps process: as the first step, the identification, whether there is a need for reasonable accommodation of the individual. As the second step, if so, employer has a duty of it, and this obligation need to be fulfilled in an efficient way, till it does not mean disproportionate burden.¹⁵⁷

Under this chapter, based on the concept of reasonable accommodation, I am going to analyze the regulation of the international level of the CRPD, based on the ADA and its harmony with the Framework Directive. Additionally, at the interpretation of reasonable accommodation, the courts have extremely significant role: not only on the level of the U.S., but also in the European Union, based on the requirement of the individual’s condition of disability.

¹⁵⁶ In contrast to it, in the U.S. this was refused in *Vande Zande v Wisconsin Dep't of Administration* 44 F.3d 538 7th Cir. (1995) and *U.S. Airways, Inc. v Barnett* 535 U.S. 391, 122 S.Ct. 1516 U.S. (2002). See more later.

¹⁵⁷ Waddington [2008] Cited above. 333

In the first part, the focus is on the CRPD, and I would like to emphasize the connection of the reasonable accommodation to the other protected grounds, which are not included in the Framework Directive. In the second part, the ADA's solutions and challenges are in the bottom of the examination, with the relevant cases, which are in connection with the EU's regulation and cases. This EU-line is expressed in the third part of this chapter, with the interpretation of the general definition of reasonable accommodation.

4.1. Reasonable Accommodation under the CRPD

Reasonable accommodation is used in the broadest way in the CRPD: it means

necessary and appropriate modification and adjustment
not imposing a disproportionate or undue burden,
where needed in a particular case, to ensure to persons with disabilities
the enjoyment or exercise on an equal basis with others of all human
rights and fundamental freedoms.¹⁵⁸

Its denial means „discrimination on the basis of disability”,¹⁵⁹ in connection with the political, economic, social, cultural, civil or another fields.¹⁶⁰ Through this definition, there is expressed its comprehensive nature, emerged the different kind of rights.

This obligation is perhaps the most fundamental instrumental element of the CRPD¹⁶¹, and the rejection of reasonable accommodation is discrimination. Avoiding this discrimination, State Parties of the CPRD shall promote equality, eliminate discrimination, and take appropriate step.¹⁶² In contrast to the ADA and the Framework Directive of the EU, where reasonable accommodation focuses on employment and occupation, additionally it is required in connection with education¹⁶³ and access to justice¹⁶⁴, too.

Additionally, the CRPD emphasizes the elaborated provision of reasonable accommodation in the workplace and at employment with the strictest way: State

¹⁵⁸ CRPD Article 2. ‘Definitions’ para 4.

¹⁵⁹ CRPD Article 5. ‘Equality and non-discrimination’ point 2.

¹⁶⁰ CRPD Article 2. ‘Definitions’ para 3.

¹⁶¹ Rosemary Kayess and Philip French ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ [2008] 8 Human Rights Law Review 1 11

¹⁶² CRPD Article 5. point 3.

¹⁶³ CRPD Article 24. ‘Education’.

¹⁶⁴ CRPD Article 14. ‘Liberty and security of the person’.

Parties must ensure it.¹⁶⁵ Reasonable accommodation is not the same as affirmative action. It is „not a temporarily allowed exceptions to the rule of equal treatment, but it is the part of the general obligation of non-discrimination and equal treatment”.¹⁶⁶ Affirmative action programs are tools to promote the employment of persons with disabilities.¹⁶⁷ There is a clear cut between affirmative action programs and reasonable accommodation. However, I think reasonable accommodation is a form of affirmative action to ensure equal treatment and equality.

To enforce the CRPD, CRPD Committee – if the State Party ratified the Optional Protocol – has the right to examine individual complaints.¹⁶⁸ CRPD Committee has more cases related somehow to reasonable accommodation,¹⁶⁹ but in connection with employment is only the case of *Ms. Marie-Louise Jungelin vs. Sweden*¹⁷⁰.

Ms. Marie-Louise has severe sight impairment; due to she could not attend to the recruitment procedure like others. Plus she could not fulfill her task based on the lack of the appropriate modification and adjustment to the workplace by her employer and the failure determination of adjustment possibilities by the domestic labour court. She alleged the violation of Article 5, ‘Equality and non-discrimination’ and Article 27, ‘Work and employment’. The CRPD Committee found there was no violation of her

¹⁶⁵ CRPD Article 27. ‘Work and employment’.

¹⁶⁶ Jenny E. Goldschmidt ‘Reasonable accommodation in EU equality law in a broader perspective’ [2007] ERA Forum 8 46.

¹⁶⁷ CRPD Article 27.

¹⁶⁸ CRPD Optional Protocol to the Convention on the Rights of Persons with Disabilities. (GA Resolution A/RES/61/106)

¹⁶⁹ *Mr X v Argentina* No. CRPD/C/11/D/8/2012 (CRPD Committee 2014), *Zsolt Bujdosó and five others v Hungary* No. CRPD/C/10/D/4/2011 (CRPD Committee 2013), *H.M. v Sweden* No. CRPD/C/7/D/3/2011 (CRPD Committee 2012)

¹⁷⁰ *Ms. Marie-Louise Jungelin vs. Sweden* No. CRPD/C/12/D/5/2011 (CRPD Committee, 14 November 2014) (Ms. Jungelin)

rights, but the joint dissenting opinion and a partially concurred with the joint dissenting opinion disagreed. The dissenting opinion highlighted, that the Swedish court did not take into consideration the further effects of the employment: they should bear in mind not only the beneficial side of the employee, but also the effects to the colleges, in compliance with Article 5, 9 ('Accessibility') and 27 of the CRPD. The joint dissenters asserted that the Swedish court did not measure the possibilities of reasonable accommodation correctly, and they avoid using the proportionality and the reasonableness test.

The State party, Sweden supported the argument regarding "reasonable", that their national legislation¹⁷¹ is consistent with the CRPD and the Framework Directive, moreover they refer to the jurisprudence of the ECtHR:¹⁷² State party has wider margin of appreciation, better position to decide¹⁷³ especially in cases relation with economic issues.¹⁷⁴

The expenses of the adaptation and support would be not reasonable for the employer, to create an equal situation of a person without Ms. Jungelin's disability.¹⁷⁵ This conclusion based on a four-step analyzation according to the national law. Firstly, the kind of cost can be acceptable for the employer. Secondly, the chance of the application, and its possible impact on the person with disability. Thirdly, the chance of the application in the workplace. Fourthly, the effect of the modification to the person with disability's ability related to the job and finally, the duration of the

¹⁷¹ 1999 Act on the Prohibition of Discrimination in Working Life on Grounds of Disability, Sweden.

¹⁷² *Handyside v the United Kingdom* App. no. 5493/72 (ECtHR, 7 December 1976) para 48.

¹⁷³ Ms. Jungelin, State party's observations on the merits. Point 8.9-8.10.

¹⁷⁴ Ibid. 8.11.

¹⁷⁵ Ibid. 8.18.

employment.¹⁷⁶ Based on these conditions, they concluded that the accommodation would have been too “complicated and time-consuming.”¹⁷⁷

In contrast, the CRPD Committee recalls that State Parties have to prohibit discrimination in all employment-related matters to promote equality and to ensure the provision of reasonable accommodation.¹⁷⁸ However, they agreed with the State party, that they can enjoy wide margin of appreciation unless it is arbitrary.¹⁷⁹ But in this case, on the one hand the CRPD Committee accepted the examination of the national court, on the other hand, there was not enough evidence from Ms. Jungelin to prove arbitrary or not appropriate decision, due to there was not violation of the CRPD.

With the dissenting opinion the question was made wider, focusing on the criteria of reasonable accommodation as set forth in the UN CPRD, not only with the examination of the national regulation and they emphasized, that even reasonable accommodation is an individual measure, it has far reaching effects and benefits for other employees as well, in harmony with the provisions and the aim of the CRPD.

Although another kind of employment is not explicitly mentioned in the CRPD, the protection is applicable for all types of employment, such as sheltered, supported and

¹⁷⁶ Ibid. 8.5.

¹⁷⁷ Ms. Jungelin, Appendix Joint opinion of Committee members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (dissenting) Point 4.

¹⁷⁸ Ibid. Consideration on the merits. 10.4.

¹⁷⁹ Ibid. 10.6.

self-employment¹⁸⁰ to “promote the employment of persons with disabilities”¹⁸¹ “on an equal basis with others”¹⁸², as a form of positive duties.

Ms. Jungelin's case is the first one before the CRPD Committee in relation to reasonable accommodation and employment, where the majority refused the violation of the CRPD, regarding different circumstances. First of all, the case happened¹⁸³ before the signature and the ratification¹⁸⁴ of the CRPD by Sweden,¹⁸⁵ however, the end of the case Sweden has been a part of it. Secondly, as a member of the majority emphasized,¹⁸⁶ they have to consider the technological possibilities from that year, and not the time of the decision by the CRPD Committee. Nevertheless, I still agree with the dissenting opinions, and I think, this body should be more radical to promote equality and take into consideration all kind of effects their decision.

In this part my aim was to introduce the interpretation of reasonable accommodation by the CRPD Committee. In the case of *Ms. Jungelin v. Sweden* they dealt directly with the relation of the reasonable accommodation and employment. The CRPD's purposes are far-reaching, but still only the direct costs and benefits are measured, not the overall effects of the employment. In the next section I am going to present the situation of reasonable accommodation in the USA.

¹⁸⁰ Anna Lawson ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?’ [2007] 34 Syracuse Journal International Law and Commerce 605

¹⁸¹ CRPD Article 27 ‘Work and employment’ 1. (h).

¹⁸² CRPD Article 27 ‘Work and employment’ 1.

¹⁸³ August 2006 and it become final when the Government denied the author’s appeal on 30 August 2007. ‘State party’s observations on the admissibility’ See 4.4. Entered into force: 15 December 2008. <<http://www.un.org/disabilities/countries.asp?id=166>> accessed 24 March 2015

¹⁸⁴ Convention’s and Optional Protocol’s signature date: 30 March 2007.

¹⁸⁵ Ms. Jungelin, State party’s observations on the admissibility 4.3.

¹⁸⁶ Interview with Laszlo Lovaszy, member of the CRPD Committee from Hungary. <<http://www.jogiforum.hu/interju/134>> accessed 24 March 2015

4.2. Americans with Disabilities Act's Reasonable Accommodation

Reasonable accommodation has its deepest roots in the United States of America,¹⁸⁷ regarding religion and belief, and this protection has been extended to the sector of disability in the ADA 1990. Originally the Rehabilitation Act of 1973 contained a provision for reasonable accommodation.¹⁸⁸ It is defined as a change to the work environment or process to be ensured for a “known” “qualified individual with disabilities” equal employment opportunity, accessible facilities, modified work schedule, and equipment.¹⁸⁹ If this means “undue burden” for the employer, it does not count as reasonable, and the employer is not obliged. ADA’s goal was not only the establishment of an equal treatment, but also it wanted to create an equal opportunity through the requirement of reasonable accommodation.¹⁹⁰

According to the ADA, both private and public employers with more than fifteen employees are under the scope, in all periods of employment, from the application process to job training. The enforcement power is different in most of the part of the ADA.¹⁹¹ If an (intended) employee feels that s/he suffered discrimination, s/he can go to the U.S. Equal Employment Opportunity Commission (hereinafter EEOC) or a

¹⁸⁷ It is role model of other countries as well, in Europe for Great Britain with the highest success and for the CRPD.

¹⁸⁸ Rehabilitation Act of 1973 Pub.L. No. 93-112., Section 504.

¹⁸⁹ Marilyn J. Field and Alan M. Jette, *The Future of Disability in America* (Washington, D.C. The National Academies Press 2007) 455

¹⁹⁰ Arlene B. Mayerson and Silvia Yee ‘The ADA and Models of Equality’ [2001] 62 Ohio State Law Journal 291

¹⁹¹ J. W. Parry, ‘Study Finds Employers Win Most ADA Title 1. Judicial and Administrative Complaints’ [1998] 22 Mental and Physical Disability Law Reporter 403-407 In Fieldnad Jette [2007] Cited above. 455

human right agency, and later they can file lawsuit, but only if they get a “right-to-sue letter”.¹⁹²

Reasonable accommodation means:

making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹⁹³

ADA contains a detailed description regarding reasonable accommodation and its forms, if the employer misses it, they discriminate against the person with disability, unless they can “demonstrate that the accommodation would impose an *undue hardship*”¹⁹⁴ on the operation of the business of such covered entity”.¹⁹⁵

The prong of “undue hardship” means a “significant difficulty or expense in the light” of the four factors:¹⁹⁶

- (i) the nature and cost of the accommodation needed (...);
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation;
the number of persons employed at such facility;
the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity;
the overall size of the business of a covered entity with respect to the number of its employees;
the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity;

¹⁹² Ibid. 466.

¹⁹³ ADA Sec. 12111. ‘Definitions’ (9).

¹⁹⁴ Under the Framework Directive “disproportionate burden” is used.

¹⁹⁵ ADA Sec. 12111. ‘Discrimination’ (5) (A).

¹⁹⁶ ADA Sec. 12111. ‘Definitions’ (10) (A).

the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.¹⁹⁷

Employers must assess its cost on a case-by-case basis in two-steps. First of all, the person with disability needs to inform the employer about this condition and the requirement for reasonable accommodation in an “informal interactive process”.¹⁹⁸ I would like to add that people “regarded as disabled”¹⁹⁹ cannot claim reasonable accommodation. This first step does not require any professional, formal presentation, and basically the employer cannot ask about the disability unless it has a “safety issue” or a direct effect on the work task. As a second step employer measures its “reasonableness”, whether it does not cost “undue hardship”. During the accommodation, employer should consider its impact on the colleges as well: “other employees having to work harder or longer is not required under the ADA”,²⁰⁰ to fulfill the requirement of equal treatment. Originally, this does not mean a cost-benefit analysis; moreover, during the legislation of the ADA the House of Representatives wanted to avoid this approach.²⁰¹ Despite this tension, it is used by the courts, and in the significant *Vande Zande v. Wisconsin Dep't of Administration*²⁰² Judge Posner refused²⁰³ the accommodation of kitchen facilities or the changing of working environment, based on an unbalanced effect: even if the modification were not very costly, it would not have enough benefits.

¹⁹⁷ ADA Sec. 12111. ‘Definitions’ (10) (B).

¹⁹⁸ 29 C.F.R §1630.2(o)(3).

¹⁹⁹ 42 USCA 12102 Sec. 3. ADA (3) “Regarded as having such an impairment.”

²⁰⁰ *Turco v. Hoechst Celanese Corporation* 101 F.3d 1094. (1996)

²⁰¹ See e.g. 136 Cong. Rec. H2475 (1990), In point The U.S. Equal Employment Opportunity Commission, ‘Notice Nr. 915.002’ (eeoc.gov 17 October 2002) 121. <http://www.eeoc.gov/policy/docs/accommodation.html#N_115_> accessed at 24 March 2015

²⁰² *Vande Zande v. Wisconsin Dep't of Administration* 44 F.3d 538 7th Cir. (1995).

²⁰³ His decision is examined in: Cass R. Sunstein, ‘Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms’ [2007] University of Chicago Public Law and Legal Theory Working Paper Nr. 149.

Employer and court have to assess individually all cases, where and in the decision the EEOC's provisions and guidance mean the compass²⁰⁴ in very close relation to the determination of disability. Based on the person's disability, the accommodation is based on the needs, highly individualized and it should be effective. However, "reasonable" does not mean "effective", but the world of "accommodation" conveys the need for effectiveness and ineffective "modification" or "adjustment" will not accommodate a disabled individual's limitations."²⁰⁵

From the point of the burden of proof, a claimant needs to present direct evidence in relation to the alleged discrimination. S/he has to demonstrate her/his disability or s/he is "otherwise qualified", and the employer did not fulfill the duty of accommodation regarding the "essential" job requirement or with a proposed reasonable accommodation. Answering, the employer must show "that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer".²⁰⁶ If the employee cannot present direct evidence, s/he can prove a discrimination claim under that ADA through indirect evidence, but in this case the so-called McDonnell-test is applied. It means that employee must present that s/he is disabled, belongs to this protected class, and s/he fulfills all requirement of the job, but s/he was rejected, and the position remained open. Then the burden shifts to the employer, who has to

²⁰⁴ In this work I cannot describe its details, but it is available under the homepage of the EEOC (www.eeoc.gov).

²⁰⁵ *U.S. Airways, Inc. v Barnett* 535 U.S. 391, 122 S.Ct. 1516 U.S. (2002).

²⁰⁶ *Monette v Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir.1996) (Monette) In *Day v National Elec. Contractors Association* F.Supp.3d, 2015 WL 1222391 S.D.Ohio, 18 March 2015

explain its reason. After this explanation, the applicant can react to it. During this test, the claimant has always the “last word”.²⁰⁷

The ADA and the case-law has a well-developed, detailed and always evolving interpretation of disability and reasonable accommodation, which supports the Court of Justice of the European Union’s in several decisions.²⁰⁸ In the next section I introduce the evolution of the decisions of the CJEU, reflecting the CRPD’s social model, and referring to the US cases by the Advocate-General opinion.

²⁰⁷ *Hedrick v W. Reserve Care Sys.*, 355 F.3d 444, 453 (6th Cir.2004) In *Monette*, 90 F.3d. at 1186–87 and *Walsh v United Parcel Serv.*, 201 F.3d 718, 724–25 (6th Cir.2000)

²⁰⁸ CJEU referred to the ADA in the case of *HK Danmark* AG Opinion p. 34. and *Kaltoft* AG Opinion p. 52.

4.3. The Evolution of the Reasonable Accommodation in the cases of the EU

Reasonable accommodation is defined in the Framework Directive, in harmony with the CRPD, significantly affected by the ADA.²⁰⁹ According to the Framework Directive, reasonable accommodation for disabled persons means the following:

In order to guarantee compliance with the *principle of equal treatment* in relation to persons with disabilities, reasonable accommodation shall be provided.

This means that employers shall take *appropriate measures*, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a *disproportionate burden* on the employer.

This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.²¹⁰

Moreover, these measures should be

effective and practical to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.²¹¹

To determine whether the measures in question give rise to a *disproportionate burden*, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.²¹²

However, there is not a requirement of the “requirement, promotion, maintenance in the employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable

²⁰⁹ Waddington [2008] Cited above. 320

²¹⁰ Framework Directive Article 5 ‘Reasonable accommodation for disabled persons’. Emphasis added by the author.

²¹¹ Ibid. Recital 20.

²¹² Ibid. Recital 21.

accommodation for people with disabilities.”²¹³ In European Union law, reasonable accommodation has a meaning only in connection to disability and only in the field of employment and occupation, albeit the legislators wanted to protect the different grounds in one directive,²¹⁴ instead of a “patchwork”.²¹⁵

Ring & Werge case

The Court of Justice of the European Union has started to elaborate the concept of reasonable accommodation, based on the requirement of the “concept of people with disability”. Reasonable accommodation was first mentioned and discussed in *Ring and Werge*, whether reduced working hours might be reasonable accommodation.²¹⁶

According to the Advocate General²¹⁷ the proper adaptation in working time is covered by the provision of reasonable accommodation of the Framework Directive, even classically “patterns of working time” does not relate to working hours, but it cannot be ruled out.²¹⁸

Reasonable accommodation aims, on the one hand, to provide appropriate steps to equal treatment, on the other hand to ensure the participation of people with

²¹³ Ibid. Recital 17.

²¹⁴ The European Union: Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (2008) In Gerard Quinn-Lisa Waddington European Yearbook of Disability Law. (1st, Antwerp Intersentia 2009) 162

²¹⁵ Aisling de Paor, ‘US and EU Perspectives on Genetic Discrimination in Employment and Insurance: Striking a Balance in a Battlefield of Competing Rights’ In Quinn-Waddington -Flynn [2013] Cited above. 119

²¹⁶ 3. question of the Preliminary Ruling.

²¹⁷ Case of Kaltoft, Opinion of AG Jääskinen [2014] ECLI:EU:C:2014:2106 (Kaltoft AG Opinion)

²¹⁸ Kaltoft AG Opinion p. 52.

disabilities in employment.²¹⁹ The Framework Directive does not contain enumeration; due to it cannot be interpreted restrictively, but the national court has the right to assess whether that accommodation is a disproportionate burden on the employer.

In the case of Ring, after her dismissal, she was employed at another company, which fulfilled its duty to reasonable accommodation with installation of an adjustable-height desk.²²⁰ In this case the court expanded and interpreted the possibilities of reasonable accommodation, regarding the provision of the Framework Directive. Unlikely, it does not examine the effectiveness and practicality of the provision; it is just emphasized as an essential element of reasonable accommodation.²²¹

Kaltoft case

In the case of Kaltoft, instead of raising of awareness regarding reasonable accommodation, the Court focused on its requirement to be disabled, or facing barriers. I think, as an answer to the limitation, and a tool for the elimination of barriers, reasonable accommodation is the most important.

In Kaltoft “reasonableness” is highlighted to be the frame of the accommodation²²² and that the employer is not obliged to “maintain in employment an individual who is not competent to perform the essential functions of the post concerned”.²²³

²¹⁹ Ibid. p. 48.

²²⁰ *Kaltoft* p. 18.

²²¹ Framework Directive Article 5.

²²² *Kaltoft* AG Opinion p. 59.

²²³ Ibid p. 40.

Z. case

In the case of *Z.*,²²⁴ the Court went deeper in the analyzation of reasonable accommodation. Ms. *Z.* got a genetic baby through surrogacy, because she was unable to support a pregnancy, due to she might be under the Framework Directive and get the duty of reasonable accommodation. Based on this presumed right, she claimed grant paid leave of absence.

Reasonable accommodation strikes a “balance between the interests of the person with disability and that of the employer”²²⁵ and it cannot be defined restrictively; moreover it is to be interpreted broadly.²²⁶ These measures can be “both organizational measures and measures intended to adapt premises to the needs of the persons with a disability.”²²⁷ Reasonable accommodation is highly individualized, reflected the different needs of the persons by the employer.

The Advocate General emphasis, that reasonable accommodation even if it is costly does not constitute disproportionate burden automatically: “financial and other costs entailed by such a measure, the scale and financial resources of the undertaking”²²⁸ matters. On the one hand, unpaid leave cannot be regarded as reasonable accommodation, which helps for the employee to continue the work, on the other

²²⁴ Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014] ECLI:EU:C:2014:159 (*Z.*).

²²⁵ Case of *Z.*, Opinion of AG Wahl [2013] ECLI:EU:C:2013:604, para 100. (*Z.* AG Opinion)

²²⁶ *Z.* AG Opinion 101. p., referred to Case C-312/11 *Commission v Italy* [2013] ECR I-0000, para 58., *HK Danmark* p. 56. and *HK Danmark* AG Opinion p. 54-57.

²²⁷ *Z.* AG Opinion p.102. with reference to CRPD Article 2.

²²⁸ Framework Directive Recital 21.

hand, paid leave cannot be interpreted similarly²²⁹, even though the obligation may “interfere with the liberty of the employer to conduct his business, and entail a financial burden”.²³⁰

Advocate General in Z. raised the question, whether if the working hours are reduced, the salary is reduced as well, caused disadvantage for the persons with disability.²³¹ Meanwhile, the grant of paid leave would be only beneficial for the employee and would not reach the aim of the accommodation, as a tool of reintegration to the labour market, because it would not ensure the return of the employee to the work and participate in the professional life.²³² Additionally, this grant of paid leave would increase the possibility of similar cases or the unlimited length of the situation, by contrast to the aim of reasonable accommodation. Plus, this grant is not an appropriate measure to ensure the ability of Ms. Z.’s work.

The Court finally did not consider any discrimination under the EU law; due to there was not a duty of reasonable accommodation. This interpretation somehow a step back of the extended definition of the disability-related cases, and to avoid the reflection of the lack of legislation regarding surrogacy, the Court preferred not to protect Ms. Z., neither as a woman,²³³ nor as a disabled in the labour market.²³⁴

²²⁹ Z. AG Opinion p. 103.

²³⁰ Ibid. p. 106.

²³¹ Ibid. p. 107.

²³² Ibid. p. 108.

²³³ Under the Sex Directive.

²³⁴ Under the Framework Directive.

Nevertheless, it clarified the relation of the CRPD and the Framework Directive:²³⁵ it should be interpreted, as far as possible, in consistent with the UN CPRD, but the validity of the Framework Directive cannot be assessed in the light of it, because its provisions are “unconditional and sufficiently precise, therefore it does not have a direct effect in the European Union law.”²³⁶

The concept of reasonable accommodation is interpreted by the Court of Justice of the European Union, and it was pointed out meaningfully in the *Ring & Werge*. On the level of the European Union, there is no place to have a so detailed system, like in the USA, because the national courts have the power to decide, and the national legislation has discretion regarding what is “reasonable” or what means “undue hardship”. In contrast to the USA’s aim to create equal opportunity, the EU’s aim is to provide equal treatment, which is moderate, respecting the authority of the Member States.

In the last chapter, my purpose is to highlight the nexus of the concept of reasonable accommodation and disability, and emphasize of its weak points, based on the previous parts, regarding disability and reasonable accommodation in the different legal systems.

²³⁵ Ferri, Delia ‘The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective’ In Gerard Quinn-Lisa Waddington European Yearbook of Disability (2nd, Antwerp Intertia 2010) 62

²³⁶ Z. Judgement Operative Part and para 89.

Chapter 5 – Nexus between Reasonable Accommodation and Disability

Disability and reasonable accommodation are according to the current regulation hand in hand: to get reasonable accommodation person need to be “labeled” disabled. In the previous chapters we could get a brief picture about the legislation and related cases, focusing on employment and occupation, where reasonable accommodation is some kind of positive duties within the disability equality law, even required by substantive equality²³⁷.

Reasonable accommodation is a form of *positive, or affirmative action*.²³⁸ It is highly individualized, based on the need of the person with disability, focusing on the removal of existing barriers and on the positive outcomes. Meanwhile, positive action is more general, proactive and it tries to redress previous disadvantage. However, reasonable accommodation has two barriers: first of all, it needs a “diagnosis”, a decision about disability; secondly it needs to be reasonable, somehow economic efficiency.

To be disabled to require reasonable accommodation is problematic, as we could see from the cases of the CRPD Committee, the USA Supreme Court, and the CJEU. However, I can see in this “evolving concept”²³⁹ a very broad interpretation,

²³⁷ Formal equality does not deal with reasonable accommodation; ‘anti-subordination model’ goes further.

²³⁸ Affirmative action was originally for racial minorities. In: Rosemary Hunter, *Indirect Discrimination in the Workplace* (The Federation Press 2008) 80

²³⁹ CRPD Preamble (e).

especially in the *Kaltoft*. The CJEU focused on the limitations and barriers based on the disability, but instead of reasonable accommodation as an answer, they extended the scope of disability to be under the protection of the Framework Directive.

The CRPD Committee faced with the possibility to apply the CRPD's obligations and the duty of reasonable accommodation, but in the case of *Ms. Marie-Louise Jungelin vs. Sweden* the Committee withhold the extended and long-lasting interpretation of their decision. Somehow I can understand it, regarding the circumstances, like the case started before the ratification of the CRPD and in a less developed environment, in 10 years ago; however I still believe, it would have at least a symbolical meaning.

I truly believe, as I wanted to emphasize with the title of this work: reasonable accommodation should be the first, a self-acting right, not the requirement of disability. It should be a more general reply for the need of the people, for the people with disabilities, because it has "unmeant purpose".²⁴⁰ Additionally, this different approach could help to avoid the question of comparator, which is difficult at disability, because people with disabilities constitute a very diverse group. A comparator is a person, similarly situated, without the disability to determine whether there happened discrimination²⁴¹. From the other side, to create equality and equal opportunity, reasonable accommodation is a connection between the hypothetical, or existing,²⁴² similarly situated person, who is fully able to work. It creates a bridge by

²⁴⁰ Emens [2012] Cited above. 114

²⁴¹ *Handbook on European Non-Discrimination Law* (European Union Agency for Fundamental Rights Vienna 2011) 23

²⁴² Interestingly, the Swedish law, the 1999 Act on the Prohibition of Discrimination in Working Life on Grounds of Disability contains the possibility of the hypothetical comparator as well. See. *Ms. Marie-Louise Jungelin vs. Sweden* p. 9. para 8.4.

the special modification to ensure the “enjoyment or exercise on an equal basis with others”.²⁴³

Reasonable accommodation promotes substantive equality, where the equality of result matters; however, I think it is not enough: it should be applied more universal. Reasonable accommodation should not be tied to particular cases, similarly to the concept of “universal design”. I would not like to mix the definitions, I just want to emphasize, that it means a

design of products, environments, programs and services to be *usable by all people*, to the greatest extent possible, without the need for adaptation or specialized design.

“Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.²⁴⁴

“Universal design” is a tool of accessibility,²⁴⁵ can be a form of reasonable accommodation, and in my point of view, it has that special, general perspective, which should be followed. Instead of the highly individualized cases, requirement of some kind of modification should be based on an automatic act, to avoid stigmatization, in connection of the special situation, such as employment. This universal approach would not focus on the disability; it would focus on the personal needs to reach a more substantive equality. I assume, on the one hand, this way of approach can guarantee that nobody can fall out from the scope of a law, nobody can be not “disabled enough”, not “mother enough”, not “women enough”; on the other

²⁴³ CRPD Article 2. ‘Definitions’ para 4.

²⁴⁴ CRPD Article 2. ‘Definitions’ para 5. Emphasis added by the author.

²⁴⁵ ‘Accessibility’ is guaranteed by CRPD Article 9.

hand, it can solve the difficulties of the situations of the “nodes”,²⁴⁶ multiple discriminations.²⁴⁷ Additionally, in a long run it would have a real effect, to eliminate the limiting barriers in a wider scope, not only regarding people with disabilities and not only in the field of employment and occupation.

²⁴⁶ Gerard Quinn ‘Disability discrimination law in the European Union’ In Helen Meenan (ed.) *Equality Law In an Enlarged European Union* (Cambridge University Press 2010) 275; Dagmar Schiek and Anna Lawson, *European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination* (Burlington, VT: Ashgate Pub. 2011) 18

²⁴⁷ I would like to highlight, that CRPD knows the multiple discrimination, see e.g. Article 3. ‘General principles’, Article 6. ‘Women with disabilities’, Article 7. ‘Children with disabilities’.

Conclusion

My purpose with this work has different layers. First of all, I wanted to unfold the connections between the UN Convention on the Rights of People with Disabilities, the Americans with Disabilities Act and the European Union's regulation. How they affected each other and what the common grounds, challenges, and the differences are, based on the different (legal) environment. Accordingly, in the first chapter I emphasized the importance of the paradigm shift to the social model from the medical model and the purpose of substantive equality, which are reflected in the concept of disability and reasonable accommodation.

As the first international complex disability human rights treaty, the CRPD has its unquestionable importance among international and national documents, which are presented in a nutshell in the second chapter. It is the first human rights document directly dedicated to people with disabilities, inspired by human rights movements and the ADA as well. This nexus is unquestionable from the side of the CRPD, but not vice versa. Americans are proud of their “first” groundbreaking federal law regarding people with disabilities, which is regarded as a “golden standard”,²⁴⁸ forgetting its weaknesses, therefore it is very unlikely that the USA is going to ratify the CRPD. Regarding the European Union, the situation is different, because it signed the CRPD as a “regional integration organization”²⁴⁹, so it forms an integral part of

²⁴⁸ U.S. Department of State, ‘The Disabilities Treaty: Opening the World to Americans with Disabilities’, available at < <http://www.state.gov/j/drl/sadr/disabilitiestreaty/index.htm>> accessed 24 March 2015.

²⁴⁹ In the meaning of Article 44, ‘Regional integration organizations’ of the CRPD.

the EU's legal order²⁵⁰ and the EU law needs to be interpreted in accordance²⁵¹ with it, like in the cases of the EU interpreted by Advocate Generals. They referred not only to the CRPD, as an international treaty, but also to the ADA's cases and the related ECtHR cases to support their point of view. It is a very important legal action, referring not only to the European-related systems, but also learning from the American experience.

In the two main substantive chapters, I analyzed the concept of disability in the third, and reasonable accommodation in the fourth chapter. Nevertheless, my purpose was not to have disability as a precondition to reach reasonable accommodation, I followed this structure because of the current law. The CRPD's disability concept expresses its evolving nature, and gives an international and open protection for people with disabilities in the State Parties, which ratified it. In contrast, the ADA, as a federal law in the USA, has a more precise definition. This precision was the catch-22 before the amendment, because the Supreme Court restricted the scope of "disability" in its decisions, as a result of which many people stayed unprotected. By the amendment, this protection was extended, and the focus is on the "impairment, a record of such an impairment, or regarded as having such an impairment which *substantially limits* one or more *major life activities*". The CJEU's interpretation follows this direction, as we could see clearly in *Kaltoft*. The focus is on the limitations, experienced in the workplace, because under the EU's Framework,

²⁵⁰ *HK Danmark* para 30, *Glatzel* para 98.

²⁵¹ However, the Court stated that the CRPD's provisions are not unconditional and sufficiently precise with regard to its content to the revision of the EU law. The limits of the EU competences are expressed by the principle of conferral, and which are not conferred to the EU by the Treaties, remain with the Member States. [Art. 5. TEU (1)] To coordinate the conduct between the EU institutions in relation to the CRPD, there has been set out the Code of Conduct (2010/C 340/08.).

Directive disability is protected in connection with “employment and occupation”,²⁵² in contrast to the CRPD’s and the ADA’s broader scope. In this third chapter I presented the evolution of the concept of disability in the USA (III.2.) and in the EU (III.3.), to arrange the ground of the concept of “reasonable accommodation”.

“Reasonable accommodation” bears its own boundaries in itself. Firstly, to claim it, people need to be “qualified as disabled”. Secondly, the special adjustment should be in the frame of “reasonable”, regarding the special circumstances of the employer, which prong is a perfect excuse to avoid this duty legally. On the one hand, in a narrow interpretation, I can see the direct business interest to avoid (the supposed) additional costs, as it was in the UN CPRD’s Committee’s decision, and in lot of cases of the US Supreme Court. On the other hand, with a broader interpretation, there is a visible common interest, most importantly the personal one from the status of the person with disability, as was highlighted in the dissenting opinion of the CRPD’s Committee (IV.1.). The regulation in the US is well coordinated with details under the control of the Equal Employment Opportunity Commission, which seems to be effective, but the dependent situation of employees with disabilities is still significant, with a stronger awareness of the right to accommodation (IV.2.). With the ratification of the CRPD, the European Union and the previously created Framework Directive has taken essential steps, but in most of the cases the Member States have their own competence. Nevertheless, it supports the obligation to reasonable accommodation and this phrase has been already interpreted in *Ring&Werge*, to give

a standard for the Member States. (IV.4.)²⁵³ In the fourth chapter, I demonstrated the importance of reasonable accommodation, as a tool of the substantive equality, which eliminates the barriers regarding the social model of disability.

Finally, in the fifth chapter I tied the two concepts and I raised my idea: that reasonable accommodation should be an automatic reply for a claim, not based on the requirement to be “qualified as disabled”, because this “stigma” is very problematic. First of all, it seems to become too broad in its evolution, and especially in connection with people, who can still play a role in the labour market with some kind of adjustment. If they are able to work with adjustment, but they need to be “qualified as disabled”, where and who are people with disabilities? Secondly, if reasonable accommodation would be unrestricted to the protected ground of the disabled,²⁵⁴ considering the multiple discriminatory cases and the continuum of disability, especially with connection to age, it could have a more universal approach. In this last chapter, I linked this universal approach to the concept of ‘universal design’ used by the CRPD, because my aim expressed the wish for its applicability for all people, regardless of any kind of attributions. Thirdly, as I wanted to express with the order in the title: the right to have the tool to be equal should not depend on the characterization. This precondition itself creates inequality. Moreover, considering the challenges of our age, such as the decreasing people, more employees are needed in the labour market, where an automatic adjustment would be considered as a preventive action, or as a health protector tool for people, who are needed, in the long run with all of their benefits.

²⁵³ Article 267 TFEU.

²⁵⁴ There is reasonable accommodation regarding faith and belief in the US.

All in all, this thesis clarifies the connections between the different legislators' actions regarding people with disabilities, focusing on the CRPD, the EU regulation and the ADA in the field of employment, because in our profit-oriented society, people with disabilities are not an object of "pity" and charity, they want to participate in the labour market and want live a "worthwhile life" to reach the stage of "personal fulfillment".²⁵⁵

²⁵⁵ Stephen W Hawking, 'Foreword' In WHO World Report on Disability 9. available at < available at < <http://www.state.gov/j/drl/sadr/disabilitiestreaty/index.htm>> accessed 24 March 2015.

Bibliography

Books

Aristotle, *Nicomachean Ethics* V.3. 1131a10-b15; Politics, III.9.1280 a8-15, III. 12. 1282b18-23 (exact reference found: Stanford Encyclopedia of Philosophy, <<http://plato.stanford.edu/entries/equality>> accessed 24 March 2015)

Barton, Len *Overcoming Disabling Barriers: 18 Years of Disability and Society* (1st, Routledge 2006) 25

Barnes, Colin and Mercer, Geoffrey *Disability* (Key Concepts Polity Press 2003) 12

Barnes, Colin 'The Social Model of Disability: Valuable or Irrelevant' <<http://www.mcgill.ca/files/osd/TheSocialModelofDisability.pdf>> accessed 24 March 2015

Barnes, Colin *Disabled People in Britain and Discrimination* (London: Hurst and Co. 1991)

Bell, Mark *Anti-Discrimination Law and the European Union* (Oxford University Press 2002) 211.

Borchardt, Klaus-Dieter, *The ABC of the European Union law* (European Union 2010) 28

Bowe *Handicapping America: Barriers to Disabled People* (Harper Collins 1978)

Bury, Michael and Gabe, Jonathan, *Sociology of Health and Illness: A Reader* (London Routledge 2003) 286

Colker, Ruth, *When is Separate Unequal? A Disability Perspective* (Cambridge University Press 2009) 41

Ellis, Evelyn and Watson, Philippa, *EU Anti-Discrimination Law* (Oxford University Press 2012) 130

Ferri, Delia 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective' In Gerard Quinn-Lisa Waddington *European Yearbook of Disability* (2nd, Antwerp Insertia 2010) 62

Field, Marilyn J. and Jette, Alan M., *The Future of Disability in America* (Washington, D.C. The National Academies Press 2007) 455

Forsythe, David P., *Encyclopedia of Human Rights* (1st, Oxford University Press 2003) 30

Fredman, Sandra, *Discrimination Law* (2nd Ed., Oxford University Press 2011) 25

Fredman, Sandra, *Human Rights Transformed – Positive Rights and Positive Duties* (Oxford University Press 2008) 178

Handbook on European Non-Discrimination Law (European Union Agency for Fundamental Rights. Vienna 2011) 23

Hawking, Stephan W., 'Foreword' In WHO World Report on Disability 9. available at < <http://www.state.gov/j/drl/sadr/disabilitiestreaty/index.htm>> accessed 24 March 2015

Hoefmans, Alexander, 'The EU Disability Framework under Construction: New Perspectives through Fundamental Rights Policy and EU Accession to the CRPD' In Waddington, Lisa-Quinn, Gerard- Flynn, Eilionoir, *European Yearbook of Disability Law* (3rd, Antwerp Insertia 2012) 35-58

Hunter, Rosemary, *Indirect Discrimination in the Workplace* (The Federation Press 2008) 80

Lawson, Anna, *Disability and Equality Law in Britain* (Hart Publishing 2008) 18

Lewis, Oliver 'The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities' In McSherry Bernadette and Weller, Penelope (ed.) *Rethinking Rights-Based Mental Health Laws* (Bloomsbury Publishing 2010) 98

Lietzmann, Hans J., 'European Constitutional Politics and Contingency. The European Union as a 'sui generis' political entity.' In *Parliament and Europe. Rhetorical and Conceptual Studies on Their Contemporary Connections* (Baden-Baden, Nomos 2011) 95-10

Liisberg, Maria Ventegodt, 'Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective' In Waddington, Lisa-Quinn, Gerard-Flynn, Eilionoir (ed.) *European Yearbook of Disability Law* (4th, Intersentia 2013) 146-147

Meenan, Helen, *Equality Law in an Enlarged European Union. Understanding the Article 13*. (Cambridge University Press 2007) 342

Mjöll Arnardóttir, O. and Quinn, Gerard (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, Leiden, 2008)

O'Cinneide, Colm 'Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities' In Arnardóttir, Oddny Mjöll.-Quinn, Gerard (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, Leiden, 2008) 172

UN enable!, ‘Some Facts about Persons with Disabilities’ (un.org 2006)
<<http://www.un.org/disabilities/default.asp?id=18>> accessed 24 March 2015

de Paor, Aisling ‘US and EU Perspectives on Genetic Discrimination in Employment and Insurance: Striking a Balance in a Battlefield of Competing Rights’ In Quinn, Gerard-Waddington, Lisa-Flynn, Eilionoir (ed.) *European Yearbook of Disability Law* (4th, Antwerp Intersentia 2013) 119

Quinn, Gerard-Waddington, Lisa-Flynn, Eilionoir (ed.) *European Yearbook of Disability Law* (4th, Antwerp Intersentia 2013) 119, 190, 146-147

Quinn, Gerard and Waddington, Lisa (ed.) *European Yearbook of Disability Law*. (3rd Antwerp Intersentia 2012) 190

Quinn, Gerard ‘Disability discrimination law in the European Union’ In Meenan, Helen (ed.) *Equality Law in an Enlarged European Union* (Cambridge University Press 2010) 275

Rieser, Richard, ‘Disability Equality – Medical and Social Model’ Accessed at: http://www.worldofinclusion.com/medical_social_model.htm (At 08.02.2015)

Schiek, Dagmar and Lawson, Anna (ed.), *European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination* (Burlington, VT: Ashgate Pub. 2011) 18.

Shakespeare, Tom, *Disability Rights and Wrongs* (London Rutledge 1999) 28

Waddington, Lisa, *From Rome to Nice in a Wheelchair, The Development of a European Disability Policy* (European Law Publishing 2006) 178

Journals

Allain, Jean ‘Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities’ (2nd, Disability Action’s Centre on Human Rights for People with Disabilities 2009) Legal reports 17

Anastasiou, Dimitris – Kauffmann, James M., ‘The Social Model of Disability’ [2013] *Journal of Medicine and Philosophy* 38 442

Emens, Elizabeth F. ‘Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act’ [2012] 60 *American Journal Comparative Law* 205 101, 105, 114, 123

Feldblum, Chai ‘Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?’ [2000] *Berkeley Journal of Employment and Labor Law* 21 91-165

Goldschmidt, Jenny E. Reasonable accommodation in EU equality law in a broader perspective [2007] *ERA Forum* 8 46.

Howard, Erica The Case for a Considered Hierarchy of Discrimination Grounds in the EU Law. [2007] 13 Maastricht Journal of European and Comparative Law 4 445-470

Kayess, Rosemary-French, Philip ‘Out of Darkness and Into Light? Introducing the Convention on the Rights of Persons with Disabilities’ [2008] 8 Human Rights Law Review 1 11

Lawson, Anna ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?’ [2007] 34 Syracuse Journal International Law and Commerce 605

Mayerson, Arlene B. – Yee, Silvia ‘The ADA and Models of Equality’ [2001] 62 Ohio State Law Journal 291

Masselot, Annick, ‘The State of Gender Equality Law in the European Union’ [2007] 13 European Law Journal 2 157

Parry, J. W. Study Finds Employers Win Most ADA Title 1. Judicial and Administrative Complaints. Mental and Physical Disability Law Reporter 22. p; 403-407. [1998] In Field, Marilyn J.-Jette, Alan M. *The Future of Disability in America* (Washington, D.C. The National Academies Press 2007) 455

Stein, Michael Ashley-Lord, Janet E, ‘Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential’ [2009] 32 Human Rights Quarterly 689, 18

Sunstein, Cass R., ‘Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms’ [2007] University of Chicago Public Law and Legal Theory Working Paper Nr. 149

Waddington, Lisa ‘When it is Reasonable for Europeans to be Confused: Understanding When a Disability Accommodation is “Reasonable” from a Comparative Perspective’ [2008] 29 Comparative Labor Law and Policy 3 318, 320, 333

Whittle, Richard ‘The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective’ [2002] 27 European Law Review 3 303-326

Legal sources

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

CRPD Optional Protocol to the Convention on the Rights of Persons with Disabilities. (GA Resolution A/RES/61/106)

UN General Assembly, 'Vienna Declaration and Programme of Action' (12 July 1993) A/CONF.157/23 para 5.

UN General Assembly: Resolution 2200 A (XXI) of 16 December 1966 on the International Covenant of Civil and Political Rights.

Committee on Economic, Social and Cultural Rights, General Comment 5 – Persons with Disabilities, (1994), UN Doc. E/95/22, para 6.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR)

European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01 Article 6. (2). (Treaty of Lisbon)

European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 (Charter)

Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities HL L 23., 2010.1.27. p. 35-61.

European Commission, Commission Staff Working Document 'Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union' SWD(2014) 182 final Brussels, 5.6.2014.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180, 19/07/2000 (Racial Directive)

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303 , 02/12/2000 p. 16-22. (Framework Directive)

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 204/23, 26/07/2006 (Sex Directive)

Civil Rights Act of 1964 Pub. L. 88-352., 78. Stat. 241.

Rehabilitation Act of 1973 Pub.L. No. 93-112., Section 504.

Americans with Disabilities Amendments Act of 2008, P.L. 110-325. Became effective on January 1, 2009. Pub. L. No. 110-325, 122 Stat. 3553 (2008) Codified at 42 U.S.C. § 12101 et seq (ADA)

Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, Codified at 42 U.S.C. § 12101 et seq. (ADAA)

1999 Act on the Prohibition of Discrimination in Working Life on Grounds of Disability, Sweden.

Other sources

Disability Rights Education and Defense Fund, ‘Too Disabled or Not Disabled Enough’ available at: < http://dredf.org/publications/mayerson_2.html> accessed 24 March 2015.

European Commission, ‘EU ratifies UN Convention on disability rights’ IP/11/4 (Press Release, Brussels, 5 January 2010) available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 24 March 2015.

Interview with Laszlo Lovaszy, member of the CRPD Committee from Hungary. <<http://www.jogiforum.hu/interju/134>> accessed 24 March 2015

Lewis, ‘Why should the United States ratify the UN Convention on the Rights of Persons with Disabilities?’ (mdac.info/oliver talks 2013) available at: < <http://www.mdac.info/en/olivertalks/2013/09/03/why-should-united-states-ratify-un-convention-rights-persons-disabilities>> accessed 24 March 2015.

Power Point Presentation of Lucy-Ann Buckley. 02 March 2015, Galway.

Press Unit of ECtHR: ‘Persons with disabilities and the European Convention on Human Rights’ (echr.coe.int 2015 February) <http://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf> accessed 24 March 2015

Rieser, Richard ‘Disability Equality – Medical and Social Model’ <http://www.worldofinclusion.com/medical_social_model.htm> accessed 08 February 2015

U.S. Equal Employment Opportunity Commission, ‘Notice Nr. 915.002’ (eeoc.gov 17 October 2002) 121. <http://www.eeoc.gov/policy/docs/accommodation.html#N_115_> accessed at 24 March 2015

U.S. Department of State, ‘The Disabilities Treaty: Opening the World to Americans with Disabilities’, available at < <http://www.state.gov/j/drl/sadr/disabilitiestreaty/index.htm>> accessed 24 March 2015.

Cases

CRPD

Ms. Marie-Louise Jungelin vs. Sweden No. CRPD/C/12/D/5/2011 (CRPD Committee, 14 November 2014)

Mr X v Argentina No. CRPD/C/11/D/8/2012 (CRPD Committee 2014)

Zsolt Bujdosó and five others v Hungary No. CRPD/C/10/D/4/2011 (CRPD Committee 2013)

H.M. v Sweden No. CRPD/C/7/D/3/2011 (CRPD Committee 2012)

ECtHR

R.P. and others v. the United Kingdom App. No. 38245/08 (ECtHR 09. November 2012)

Z.H. v Hungary App. No. 28973/11 (ECtHR, 8 November 2012)

Alajos Kiss v. Hungary App. No. 38832/06 (ECtHR 20. May 2010)

Glor v Switzerland App. No. 13444/04 (ECtHR, 30 April 2009)

Price v. the United Kingdom App. No. 33394/96 (ECtHR 10. July 2001)

Handyside v the United Kingdom App. no. 5493/72 (ECtHR, 7 December 1976) para 48.

US

Day v National Elec. Contractors Association F.Supp.3d, 2015 WL 1222391 S.D.Ohio, 18 March 2015

Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 453 (6th Cir.2004) In *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir.1996). In *Day v. National Elec. Contractors Association* F.Supp.3d, 2015 WL 1222391 S.D.Ohio, 18 March 2015

U.S. Airways, Inc. v Barnett 535 U.S. 391, 122 S.Ct. 1516 U.S. (2002)

Toyota Motors Mfg., Ky., Inc. v Williams 534 U.S. 184, 122 S.Ct. 681 (2002)

Albertson's Inc. v Krinkinburg, 527 U.S. 555 (1999)

Sutton v United Airlines Inc. 527 U.S. 471. (1999)

Bragdon v Abbott 524 U.S. 624 (1998)

Turco v Hoechst Celanese Corporation 101 F.3d 1094. (1996)

Vande Zande v Wisconsin Dep't of Administration 44 F.3d 538 7th Cir. (1995)

Court of Justice of the European Union

Case C-354/13 FOA acting behalf of *Karlsten Kaltoft v KL* [2014]
ECLI:EU:C:2014:2463. (Kaltoft)

Case of Kaltoft, Opinion of AG Jääskinen [2014] ECLI:EU:C:2014:2106
(Kaltoft AG Opinion)

Case C-363/12 Z. v A Government department and The Board of management of a
community school [2014] ECLI:EU:C:2014:159 (Z.)

Case of Z., Opinion of AG Kokott [2013] ECLI:EU:C:2013:604 (Z. AG
Opinion)

Joined Cases C-335/11 and C-337/11 HK Danmark, acting on behalf of Jette *Ring v
Dansk almennztigt Boligselskab* and HK Danmark, acting on behalf of Lone
Skouboe *Werge v Dansk Arbejdsgiverforening*, acting on behalf of Pro Display A/S
[2013] OJ C 156/08 (Ring&Werge, HK Danmark)

Case of HK Danmark, Opinion of AG Wahl [2012] ECLI:EU:C:2012:775
(HK Danmark AG Opinion)

Case C-555/07 *Seda Kucukdevici v Swedex GmbH&Co. KG.* [2010] I-365

Case C-303/06 *Coleman v Attridge Law and Steve Law*, [2008] ECR I-5603 (Coleman)

Case C-13/05 *Chacon Navas v Eurest Colectividades SA* [2006] OJ C 69 (Navas)

Case C-144/04 *Werner Mangold v Rudiger Helm* [2005] ECR I-09981

Annotated Bibliography*

*Selected works from the Bibliography

European Yearbook of Disability from 2009 to 2014

Quinn, Gerard-Waddington, Lisa (1st Volume, Antwerp: Intersentia 2009):

Hvinden, Bjorn: Redistributive and Regulatory Disability Provisions: Incompatibility or Synergy? 5-28

Keywords: poverty, employment, gender, redistribution, economic and social rights of persons with disabilities

Quinn, Gerard: A Short Guide to the United Nations Convention on the Rights of the Persons with Disabilities 89-114

Keywords: disability as a subject of human rights, rights-based approach (detailed description and analyzation of the CRPD)

Trömel, Stefan: A Personal Perspective on the Drafting History of the United Convention on the Rights of Persons with Disabilities 115-136

Keywords: comprehensive v anti-discrimination convention, new rights or different rights?

The Council of Europe and its cases 207-229

Quinn, Gerard-Waddington, Lisa (2nd Volume, 2010):

Hendriks, Aart: The UN Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law Be Modelled Accordingly? 7-28

Keywords: CRPD's special approach

Stein, Michael Ashley-Lord, Janet E.-Stein, Penelope J.S.: The Law and Politics of US Participation in the UN Convention on the Rights of Persons with Disabilities 29-46.

Keywords: American disability law

Delia Ferri, The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective 47-72

Keywords: general overview of CRPD, the relation of CRPD and EU (*before the ratification by the EU*)

Plus: Literature Review

Waddington, Lisa-Quinn, Gerard- Flynn, Eilionoir (3rd Volume, 2012)

Priestley, Mark: Disability Policies and the Open Method of Coordination 7-34

Keywords: mainstreaming, OMC

Hoefmans, Alexander: The EU Disability Framework under Construction: New Perspectives through Fundamental Rights Policy and EU Accession to the CRPD 35-58.

Keywords: expanding fundamental rights framework, the impact of the CRPD on the EU Framework Directive, human rights perspective

Entry into force of the Lisbon Treaty 138-140

Waddington, Lisa-Quinn, Gerard- Flynn, Eilionoir (4th Volume, 2013)

Paor, Aisling de: US and EU Perspectives on Genetic Discrimination in Employment and Insurance: Striking a Balance in a Battlefield of Competing Rights 99-144

Keywords: insurance industry, EU Charter of Fundamental Rights, Non-Discrimination in the EU, privacy

Liisberg, Maria Ventegodt: Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective 145-168

Keywords: models of disability, accessible labour market, flexicurity

Waddington, Lisa: Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities 169-200

Keywords: reasonable accommodation, prohibition of discrimination

Waddington, Lisa-Quinn, Gerard- Flynn, Eilionoir (5th Volume, 2014)

In focus: legal capacity

In Arnardóttir, Oddny Mjöll-Quinn, Gerard (eds.), The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives (Martinus Nijhoff Publishers, Leiden, 2008)

Rannveig Traustadóttir: Disability Studies, the Social Model and Legal Developments

Stein, Michael Ashley-Lord, Janet E.: Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities

Koch, Ida Elisabeth: From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities

Lawson, Anna: The United Nations Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?

Waddington, Lisa: Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community

Flóvenz, Brynhildur G.: The Implementation of the UN Convention and the Development of Economic and Social Rights as Human Rights