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What Entitlements and for Whom?
Disability, Equality and the CRPD's Right to
Access Employment for Persons with
Disabilities

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"[F]or many people with disabilities,
work is the most effective means of escaping
the vicious circle of marginalization,
poverty and social exclusion."¹

¹ Zhang, Eric Guozhong, Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China, *Syracus Journal of International Law & Commerce*, Vol. 34, 2007, p. 518.

Summary

This thesis explores the right to access employment for persons with disabilities under the UN Convention on the Rights of Persons with Disabilities. It seeks to ascertain what entitlements and for whom this right entails. Given the central conceptual role disability and equality play in the Convention, this thesis explores the prevailing models of understanding of both disability and equality. After conducting a legal analysis of the CRPD's constituency and the measures designed to safeguard and promote the realisation of the right to access employment for persons with disabilities, an interdisciplinary analysis of this text against the prevailing models of disability and equality follows. The interdisciplinary analysis proves that the CRPD does not strictly adhere to any one of the prevailing theoretical models of disability and equality. Although the CRPD has been informed by these models of disability and equality, it carries its own understanding in essence. This thesis concludes with how the CRPD's understanding of disability and equality ultimately informs the right to access employment for persons with disabilities under the CRPD regarding this right's entitlements and constituency.

Preface

As I conclude this thesis I would like to extend my heartfelt gratitude to my supervisor Anna Bruce. Without her constant encouragement, inspiration and guidance this thesis would not have been possible.

A special thanks is warranted to the Raoul Wallenberg Institute of human rights for providing a welcoming and stimulating environment for me and my fellow students to learn and grow together in. The institute's library and facilities have been a second home to all of us throughout this master's program and for that I am grateful.

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Abbreviations

CCPR	International Covenant on Civil and Political Rights
CERD	International Convention on the Elimination of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
CRC	International Convention on the Rights of the Child
CRPD	International Convention on the Rights of Persons with Disabilities
ILO	International Labour Organization
ICF	International Classification of Functioning Disability and Health
ICIDH	International Classification of Impairments, Disabilities, and Handicaps
UDHR	Universal Declaration of Human Rights
UPIAS	Union of the Physically Impaired Against Segregation
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

1 Introduction

1.1 Introduction

The importance employment has for the individual in the context of our market societies cannot be overstated. Employment is primarily a financial relationship between an employer and an employee but it is also so much more than a sheer commodity.² The right to access employment has been among the fundamental human rights since the adoption of the Universal Declaration of Human Rights and it has been elaborated in more detail under the International Covenant on Economic, Social and Cultural Rights.³ Although the existing human rights law covered persons with disabilities in its entirety, in the words of Ambassador MacKay, “[i]n theory this argument was correct, but unfortunately practice did not always follow theory”.⁴

Persons with disabilities have often found themselves excluded from the labour market as well as from other spheres of society. The numbers reported by the International Labour Organization (hereinafter ILO) highlight the urgency to tackle this issue, as this would affect “[a]pproximately 785 million women and men with disabilities [...] of working age [most of whom] do not work”.⁵ The ILO further recognizes that “[t]he denial of equal employment opportunities to people with disabilities forms one of the root causes of the poverty and exclusion of many members of this group”.⁶

The Convention on the Rights of Persons with Disabilities (hereinafter CRPD or the Convention) is the newest addition to international human rights law. It is the core human rights Convention which aspires to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities,”⁷ expressly

² The ILO in the Declaration of Philadelphia, which has become part of the Organization’s Constitution, goes further than that, stating that “*labour is not a commodity*”. International Labour Organization (ILO), Constitution of the International Labour Organisation (ILO) [hereinafter ILO Constitution, 1919], 1 April 1919, Annex part I, point (a).

³ United Nations General Assembly, Universal Declaration of Human Rights [hereinafter UDHR], 217 A (III), 10 December 1948, article 23; United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights [hereinafter CESCR], United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966, article 6.

⁴ MacKay, Don, The United Nations Convention on the Rights of Persons with Disabilities [hereinafter MacKay, 2006], Syracuse Journal of International Law & Commerce, Vol. 34, 2006, p. 323.

⁵ International Labour Organization Gender, Equality and Diversity Branch, Fact sheet – Facts on Disability, ILO, November 2015.

⁶ International Labour Office, Achieving equal employment opportunities for people with disabilities through legislation: Guidelines, 2nd ed., ILO, Geneva, 2014, p. 1.

⁷ United Nations General Assembly, Convention on the Rights of Persons with Disabilities [hereinafter CRPD], A/RES/61/106, 24 January 2007, article 1.

including the right to access employment.⁸ Its strength lies in its character as an implementation Convention, *i.e.* a Convention aiming not to establish new rights, but to “set out a code of implementation for governments”.⁹ For all these reasons, ascertaining how the CRPD has envisaged that the right to access employment is to be implemented and realised proves imperative.

Moreover, the CRPD is an international human rights convention moulded from two main conceptual evolutions, that of disability and that of equality. The former was driven by the decades-long advocacy efforts from persons with disabilities who wanted to reconceptualise the understanding of disability. The latter involved the conceptual evolution of the notion of equality in international law, namely a shift from a formal to a more substantive understanding of equality. Hence, disability and equality are the two fundamental conceptual pillars of this Convention, which inform all measures contained therein, including the ones designed to safeguard and promote the realisation of the right to access employment for persons with disabilities.

1.2 Purpose and research questions

In light of the above, the purpose of this thesis is to ascertain and understand what entitlements and for whom the Convention on the Rights of Persons with Disabilities establishes under the right to access employment. Due to the fundamental role the concepts of disability and equality have in the CRPD this endeavour would remain incomplete had a mere legal analysis of article 27 on the right to access employment been conducted. An interdisciplinary analysis of the pertinent measures proves imperative, as it would inform our understanding around who is entitled to the CRPD’s protection and around what the said protection entails. The research questions guiding this examination are:

1. What is the CRPD’s protective framework concerning the right to access employment and who is covered by this right?

This question is further broken down to:

- a. How is the CRPD’s constituency defined under CRPD article 1?
 - b. What are the specific legal obligations of the right to access employment under CRPD article 27?
2. What equality and disability understanding does this framework carry and how does it inform the question of what entitlements and for whom?

⁸ CRPD, article 27, para. 1.

⁹ MacKay, 2006, p. 327.

This question is further broken down to:

- a. What is the CRPD's approach to disability and how does this inform the CRPD's constituency and measures?
- b. What is the CRPD's approach to equality and how does this inform the pertinent measures under article 27?

1.3 Limitations

While recognizing that the ILO has pioneered in promoting and protecting worker's rights by laboriously drafting regulations, which predate the establishment of the international human rights system, this thesis focuses solely on the UN Convention on the Rights of Persons with Disabilities.¹⁰ Having an international scope means no national legislation figures in the present paper.

Mindful that the disadvantages persons with disabilities face extend to all areas and all forms of employment, this thesis focuses on *accessing* employment in the formal sector, in other words, on the time before the *formal* establishment of an employment relationship. Thus, it concentrates on the measures geared to ease and realise the transition from unemployment to employment, leaving out of the discussion rights, which presuppose an employment relationship. Consequently, this discussion will omit the right to freedom from coercion in employment, the right to freedom from unfair dismissal, issues related to advancement in employment, or any of the rights at work.¹¹ Moreover, this thesis focuses on persons with disabilities who are *currently* out of work not touching upon disability acquired during the course of employment and return-to-work or job retention programmes.¹²

It is also important to stress that this thesis only deals with the right to access the *open* labour market. This includes paid employment in a competitive setting, excluding jobs designed and intended for persons with disabilities, under conditions of 'sheltered employment'.¹³ The issue of self-employment is not visited either.¹⁴

The interrelation of the individual and collective dimension of the right to work is of the utmost importance.¹⁵ Freedom of association and

¹⁰ For a general discussion of the ILO's take on labour and persons with disabilities see O'Reilly, Arthur, *The right to decent work of persons with disabilities* [hereinafter O'Reilly, 2007], International Labour Office, Geneva, 2007.

¹¹ These rights are grounded in CRPD, article 27, paras. 1 (a), (b), (e) and 2.

¹² CRPD, article 27, para. 1 (b) and (k).

¹³ On "sheltered employment" see O'Reilly, 2007, pp. 67-71.

¹⁴ CRPD, article 27, para. 1 (f).

¹⁵ The Committee on the CESCR has recognized the interrelatedness of the different aspects of the right to work: "Articles 6, 7 and 8 of the Covenant are interdependent. The

unionising is crucial in ensuring the full realisation of all aspects of the right to work; the right to access to employment, freedom to work and labour rights.¹⁶ However, the present thesis does not touch upon the role freedom of association, provided for under article 27 (1) (c), plays in ensuring the right to access the open labour market for persons with disabilities.

It is recognised that persons with disabilities continuously face “multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status”.¹⁷ Moreover, it is acknowledged that a gender perspective is also needed since “women and girls with disabilities are often at greater risk of [...] neglect or negligent treatment, maltreatment or exploitation”.¹⁸ Despite it being imperative that these issues are tackled at an academic, theoretical, legal and practical level, they will not be part of the present study.

1.4 Methodology

This thesis aims to examine what the entitlements under the CRPD’s right to access employment are and who is entitled to them. It is noteworthy that this thesis employs a double approach. Initially, the law is analysed *de lege lata* (Chapter 3). Then the law is used to decipher the understanding of disability and equality that the CRPD embodies (Chapter 4). This understanding is then applied to revisit the legal issues of the entitlements and constituency of the right to access employment under the Convention (Chapter 5). This examination is structured as two research questions, which are further broken down to two sub-questions each. There are two methodologies used to answer these questions; standard legal analysis and interdisciplinary analysis.

The first overarching research question is formulated as “What is the CRPD’s protective framework concerning the right to access employment and who is covered by this right?” It is further broken down to two sub-questions: a. “How is the CRPD’s constituency defined under CRPD article 1?” and b. “What are the specific legal obligations of the right

characterization of work as decent presupposes that it respects the fundamental rights of the worker.” See United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Art. 6 of the Covenant) [hereinafter CESCR General Comment No. 18, 2006], E/C.12/GC/18, 6 February 2006, para. 8.

¹⁶ On the issue see: UN Human Rights Council, Thematic Study on the Work and Employment of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights [hereinafter HRC Report (2012)], A/HRC/22/25, 22nd Session, 17 December 2012, paras. 55-58.

¹⁷ CRPD, Preamble (p).

¹⁸ CRPD, Preamble (q).

to access employment under CRPD article 27?” These two questions call for a legal analysis of Article 1 and 27 of the CRPD guided by the Vienna Convention on the Law of Treaties (VCLT).¹⁹ Article 1 is chosen because it contains the definition of the Convention’s constituency. Article 27 is chosen because it contains the right to access employment and the measures to safeguard and promote its realisation. Article 31 (1) VCLT establishing the general rule of treaty interpretation provides: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Where the ordinary meaning of the wording of articles 27 and 1 taken together with pertinent preambular provisions leave something to be desired this analysis turns to what Article 32 VCLT defines as supplementary means of interpretation and more specifically to the preparatory work of the Convention.²⁰ Secondary sources of law in the form of scholarly articles and relevant literature as well as the jurisprudence and general comments of the Committee on the CRPD [hereinafter the Committee] have been used to guide the interpretation where needed.

The second overarching research question is formulated as “What equality and disability understanding does this framework carry and how does it inform the question of what entitlements and for whom?” It is further broken down to two sub-questions: a. “What is the CRPD’s approach to disability and how does this inform the CRPD’s constituency and measures?” and b. “What is the CRPD’s approach to equality and how does it inform the pertinent measures under article 27?” These two questions call for an interdisciplinary analysis on two fronts. First, the text of the CRPD on both the right to access employment and the Convention’s constituency (as analysed *de lege lata* in Chapter 3) is analysed against the three predominant disability theories, namely the medical, the social and the biopsychosocial model of disability, found in pertinent scholarly works, so as to determine the CRPD’s approach to disability (Chapter 4.1). These models are presented in a chronological order. The medical model was the predominant model of understanding disability in medical terms and was later systematised in the WHO’s manual of International Classification of

¹⁹ United Nations, Vienna Convention on the Law of Treaties [hereinafter VCLT], Treaty Series, Vol. 1155, p. 331, United Nations, 23 May 1969.

²⁰ The preparatory work of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities can be found online on the UN’s official website on Disability: Division for Social Policy and Development, available at: <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>, latest accessed 1 November 2016.

Impairments, Disabilities, and Handicaps (ICIDH).²¹ A reconceptualisation of the phenomenon of disability, framed as the “social model of disability” was developed in the mid 70s by the the Union of the Physically Impaired Against Segregation (UPIAS) in a Statement of their Aims and Policy.²² Lastly, the most recent take on disability comes again from the WHO, titled the biopsychosocial model of disability, which can be found in the manual International Classification of Functioning Disability and Health (ICF).²³ Second, the CRPD’s text on the measures designed to realise the right to access employment are analysed against the most prominent contemporary models of understanding equality according to the relevant theories contained in the pertinent corpus of international law, so as to decipher the CRPD’s approach to equality (Chapter 4.2). The models of understanding equality, found in the relevant international law corpus are formal equality and substantive equality, which has been further broken down into equality of opportunity, equality of results or outcomes and transformative equality.

The concluding chapter (Chapter 5) ties the second overarching research question together. Having established what kind of disability and equality understanding the Convention contains, the legal text is revisited to conclude the discussion of what entitlements and for whom article 27 on the right to access employment confers.

1.5 State of research

The CRPD is the latest United Nations International Human Rights instrument. As such, and given its limited scope, it has not been subject to much scrutiny especially compared to the rest of the international Conventions. What’s more, among the Convention’s 21 articles covering substantive rights,²⁴ the right to work has received low attention and the right to access employment, as part of the right to work, next to none. This thesis tries to fill the gap in international human rights law literature by providing an in-depth legal analysis of the right to access employment for

²¹ World Health Organization, International Classification of Impairments, Disabilities, and Handicaps – A Manual of Classification Relating to the Consequences of Disease [hereinafter ICIDH, 1980], World Health Organization, Geneva, 1980.

²² The social model of disability has originated in the document Aims and Policy Statement drafted by the Union of the Physically Impaired Against Segregation (UPIAS); see Union of the Physically Impaired Against Segregation (UPIAS), Aims and Policy Statement [hereinafter UPIAS, 1974], 3 December 1974. Available through the Disability Archive UK webpage at <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/UPIAS.pdf>.

²³ World Health Organization, Towards a Common Language for Functioning, Disability and Health: ICF, The International Classification of Functioning, Disability and Health [hereinafter ICF, 2001], WHO/EIP/GPE/CAS/01.3, Geneva, 2001, available on WHO’s official webpage: <http://www.who.int/classifications/icf/en/>, latest accessed 1 November 2016.

²⁴ CRPD, articles 10-30.

persons with disabilities entrenched under CRPD, article 27. Up until now, article 27 was treated as a whole, such as in the case of Harpur, O'Reilly or even the Office of the High Commissioner of Human Rights.²⁵ Others have focused on key provisions targeting the transition of persons with disabilities from unemployment to employment, a particular regional or national system and/or on a particular disability group; see e.g. Lord and Brown, Anna Lawson, Fasciglione, Liisberg.²⁶

As stated above, a pure legal analysis of the pertinent articles found in the Convention would fall short of the conceptual complexities of this Convention. Put differently, this thesis recognises the seminal conceptual role disability and equality play in the CRPD, which warrants an interdisciplinary analysis of the legal text against the most prominent models of understanding disability and equality. Hence, this thesis finds itself placed among the recently emerging field of disability studies. As of yet, there is no consensus in the pertinent literature on which understanding of disability the CRPD connotes. The majority takes a particular stance on which model of disability the CRPD reflects as a given,²⁷ while an in-depth analysis has already been conducted by Anna Bruce in her work "Which Entitlements and for Whom? The Convention on the Rights of Persons with

²⁵ Harpur, Paul, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change* [hereinafter Harpur, 2011], Valparaiso University Law Review, Vol. 45, No. 3, 2011; O'Reilly, 2007; UN Human Rights Council, Thematic Study on the Work and Employment of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights [hereinafter HRC Report, 2012], A/HRC/22/25, 22nd Session, 17 December 2012.

²⁶ Lord, J. E. and Brow, R., *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities* [hereinafter Lord and Brow, 2011], in Rioux, M., Basser L. A. and Jones, M. (Eds.) *Critical Perspectives on Human Rights and Disability Law*, Martinus Nijhoff, Boston, 2011; Lawson, Anna, *People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities* [hereinafter Lawson, 2008], *Law in Context*, Vol. 26, Issue 2, 2008; Fasciglione, Marco, *Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism* [hereinafter Fasciglione, 2015], in Della, Fina Valentina and Cera, Rachele (Eds.) *Protecting the Rights of People with Autism in the Fields of Education and Employment*, Springer International Publishing, 2015; Liisberg, Maria Ventegodt, *Disability and Employment: A Contemporary Disability Human Rights Approach Applied to Danish, Swedish and EU Law and Policy* [hereinafter Liisberg, 2011], Intersentia, Cambridge, 2011.

²⁷ See e.g. Arnardóttir, Oddný Mjöll, *A Future of Multidimensional Disadvantage Equality* [hereinafter Arnardóttir, 2009] in Arnardóttir, Oddný Mjöll and Quinn, Gerard (Eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijho, Publishers, Leiden, 2009; Traustadóttir, Rannveig, *Disability Studies, the Social Model and Legal Developments*, in Arnardóttir, Oddný Mjöll and Quinn, Gerard (Eds.) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijhoff Publishers, Leiden, 2009; Bickenbach, Jerome E., *Disability, Culture and the UN Convention* [hereinafter Bickenbach, 2009], *Disability and Rehabilitation*, Vol. 31, Issue 14, 2009, available at: <http://www.tandfonline.com/doi/full/10.1080/09638280902773729>, latest accessed 1 November 2016; Liisberg, 2011.

Disabilities and its Ideological Antecedents”.²⁸ The present thesis diverges from Bruce’s work in that it offers a focused analysis of the CRPD’s understanding of disability and equality guided by the right to access employment for persons with disabilities. Lastly, the issue of which model of equality the CRPD adheres to has also been separately dealt with.²⁹ The analysis included herein adds to this discussion.

1.6 Disposition

This thesis is organised in the following way: Chapter 2 includes the theoretical background on the theories of models of understanding equality and disability. A legal analysis of CRPD articles 1 and 27 on the Convention’s constituency and the right to access employment is carried out in Chapter 3. Chapter 4 contains an interdisciplinary analysis of the legal text against the theoretical background on models of equality and models of disability. This Chapter finds that the text of the CRPD does not reflect one particular model of disability or equality. Therefore, Chapter 5, after summarising the findings of the legal analysis of the Convention’s text, proceeds with placing the CRPD’s text on the constituency and measures under the right to access employment in the context of disability and equality, sketching how the text of the CRPD is to be understood and informed through the Convention’s understanding of disability and equality.

²⁸ Bruce, Anna, Which Entitlements and for Whom?: The Convention on the Rights of Persons with Disabilities and Its Ideological Antecedents [hereinafter Bruce, 2014], Lund University, Lund, 2014.

²⁹ See e.g. Arnardóttir, Oddný Mjöll, Non-Discrimination in International and European Law: Towards Substantive Models, *Nordisk Tidsskrift for Menneskerettigheter*, Vo. 25, No. 2, 2007.

2 Theoretical background

This Chapter elaborates on two central concepts of the CRPD, namely equality and disability. These two were selected because of their pivotal role in shaping the Convention in general and the right to access employment in particular. However, it is important to note that this Chapter does not explore the meaning of these concepts in the context of the CRPD. Rather, section 2.1 covers the prevailing models of understanding disability according to relevant scholarly works in the field of disability studies, while section 2.2 covers the models of understanding equality in the relevant international law corpus. These models of understanding will later serve as the lenses through which the text of the Convention will be analysed in order to reveal the CRPD's approach to equality and disability.

2.1 Models of disability

Disability has been used as a medical, academic, ideological, political and legal platform. The conceptualisation of disability has changed over time bringing along a shift in how society has reacted to “persons with disabilities”. According to Anna Bruce, “[t]he different meanings attributed to the term disability thus translate into very different versions of what the problem is and whom it affects and consequently *what is to be done about it, why, how, for whom and by whom?*”³⁰ The three predominant models of disability that have been developed in the field of disability studies to this day, informing policies and legislation worldwide, affecting the employment opportunities of 15% of the world's population,³¹ are the medical model of disability, the social model of disability, and the “biopsychosocial” model of disability.

2.1.1 The medical model of disability

The medical model of disability can be found in the World Health Organization's (WHO) manual of International Classification of

³⁰ Bruce, 2014, p. 13.

³¹ The ILO reports that “[a]pproximately 785 million women and men with disabilities are of working age, but the majority do not work” and that “[p]eople with disabilities are frequently excluded from education, vocational training and employment opportunities”, see International Labour Organization Gender, Equality and Diversity Branch, Fact sheet – Facts on Disability, ILO, November 2015; World Health Organization, Disability and Health Fact Sheet N. 352, Reviewed December 2015.

Impairments, Disabilities, and Handicaps (ICIDH).³² The universe of ICIDH includes three core concepts: impairment, disability and handicap. Impairment is a broad concept that covers a wide range of disease or disorder and it is defined as “any loss or abnormality of psychological, physiological, or anatomical structure or function”.³³ Disability is “any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being”.³⁴ Handicap is defined as “a disadvantage for a given individual, resulting from an impairment or a disability that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual”.³⁵ Under the ICIDH model all these three concepts are identified as problems to be addressed.³⁶ In the universe of the ICIDH society does not accept difference but expects sameness.³⁷ It is when these expectations are not met that the aforementioned problems are created. Impairment is when an organ of the body diverges from the healthy norm,³⁸ disability is when bodily functions are in dissonance with the ‘able-bodied’ norm manifesting restrictions or lack of ability in the person,³⁹ and handicap translates into curtailed opportunities of societal participation due to failure to perform what is expected in the context of specific social roles.⁴⁰

The solutions to these problems are designed in accordance with the way they are proposed to relate to each other. Using a schematic representation, ICIDH explains that the relationship among impairment, disability and handicap is that of causality, thus addressing a preceding problem is bound to have an effect on the problem designated as its result.⁴¹ Impairment is caused by a disease or disorder, disability is the direct result of impairment and handicap is the result of either impairment or disability, both of which reside within the individual. Consequently, all three are seen as matters of personal health caused by the individual’s inability to conform to the norm of a healthy able-bodied person.⁴² Accordingly, the solutions to these problems are medicalised; they include medical services to treat and

³² ICIDH, 1980.

³³ ICIDH, 1980, p. 27.

³⁴ ICIDH, 1980, p. 28.

³⁵ ICIDH, 1980, p. 29.

³⁶ Bruce, 2014, p. 32.

³⁷ Liisberg, pp. 23-24.

³⁸ ICIDH, 1980, p. 27.

³⁹ The ICIDH manual clarifies that while impairment refers to malfunctions of a specific “organ or mechanism”, disability is about shortcomings of “compound or integrated activities expected of the person or of the body as a whole, such as are represented by tasks, skills, and behaviours” ICIDH, 1980, p. 28.

⁴⁰ ICIDH, 1980, p. 29.

⁴¹ ICIDH, 1980, p. 30.

⁴² Bruce, 2014, p. 34.

rehabilitate the individual and the provision of welfare services.⁴³ This is the reason why the medical model of disability is also called the individual model, as it is the individual who has to adapt to the way society is structured.⁴⁴ This model ignores the role the environment (built or attitudinal) plays in the creation, maintenance or exacerbation of these problems.⁴⁵

2.1.2 The social model of disability

The medical model of disability authorised and made systematic what Michel Foucault would describe as a monologue of medicine about persons with disabilities,⁴⁶ whose everyday lives got to know unimaginable restrictions and interventions by all different kinds of experts trying to “fix them”.⁴⁷ In this environment, disabled academicians and activists reconceptualised disability as an academic, legal and political platform, which would open up gateways to entitlements of active involvement in the mainstream of society and put them out of the socially constructed roles of passive patients of science.⁴⁸ The main focus of the “social model of disability”⁴⁹ is to redeem impairment as the culprit of disability and shift the attention to the environmental and socioeconomic context of the

⁴³ ICIDH, 1980, p. 18.

⁴⁴ Liisberg, 2011, p. 24.

⁴⁵ Kayess, Rosemary and French, Philip, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities* [hereinafter Kayess and French, 2008], *Human Rights Law Review*, Vol. 8, No.1, 2008, p. 6.

⁴⁶ In his book, *Madness and Civilization*, Michel Foucault gave an account of the presence in and consequent absence of mental illness from the mainstream society. While his focus was on mental illness, the historic analysis he conducted about the practices the mainstream society employed against persons who deviated from the mainstream norm fits the extended world of ill-health and disability. Incarceration was followed by the advent of institutions under the auspices of medical expertise, which signified the end of a dialogue between inherently equal societal partners and the start of frantic efforts to rid the world of all that was seen as sick. Foucault, Michel, *Madness and Civilization; a History of Insanity in the Age of Reason*, Pantheon Books, New York, 1965.

⁴⁷ Pfeiffer holds that “[t]he medicalization of disability is grossly inappropriate. It gives control of the lives of people with disabilities to medical professionals (not just physicians)”. He argues further that this control over the disabled persons’ lives does not stop in medical care but covers other areas of life, such as employment. Pfeiffer, David, *The ICIDH and the Need for its Revision, Disability and Society* [hereinafter Pfeiffer, 1998], Vol. 13, No. 4, 1998, pp. 509-510; For a distilled account of the strands of criticism targeting the medical model of disability see Bruce, 2014, pp. 42-46.

⁴⁸ UPIAS, 1974; Oliver, Mike, *The Social Model Of Disability: Thirty Years On* [hereinafter Oliver, 2013], *Disability & Society*, Vol. 28, No. 7, 2013, p. 1024.

⁴⁹ Michael Oliver, resting upon the Statement by UPIAS coined the term “social model of disability” in Oliver, Michael, *A New Model of the Social Work Role in Relation to Disability*, in Campling, Jo (Ed.), *The Handicapped Person: A New Perspective for Social Workers?* [hereinafter Oliver, 1981], Radar, London, 1981, pp. 19, 28.

individual.⁵⁰ Under the social model of disability impairment is to be accepted and celebrated rather than cured.⁵¹

According to this model, disability is ‘the disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have [...] impairments and thus excludes them from the mainstream of social activities’.⁵² Disability is categorically disassociated from impairment and it is defined as the imposed exclusion of persons with impairments by the societal organisation which is designed by and for able-bodied individuals.⁵³ In contrast to the medical model, which views disability as a personal characteristic, the social model conceptualises disability as an *experience* of exclusion or oppression instead of a limitation in the function of the body or the mind. The causes as well as the solutions of the experienced disadvantage by persons with impairments are to be found within the structures of society;⁵⁴ the social structures are to be altered or adjusted in order to enable persons with disabilities to participate fully.⁵⁵ In the universe of the social model, under this “social relational”⁵⁶ definition, disability will be eliminated when society stops disabling persons with impairments, thus, impairment is to be accepted as a

⁵⁰ Bruce, 2014, p. 48.

⁵¹ See e.g. Hahn, Harlan, *Adjudication or Empowerment: Contrasting Experiences with a Social Model of Disability*, in Barton, Len, (Ed.), *Disability, Politics and the Struggle for Change*, David Fulton Publishers Ltd, London, 2001, p. 74; Hahn, Harlan, *Attitudes towards Disabilities: A Research Note on Activists with Disabilities*, *Journal of Disability Policy Studies*, Vol. 12, 2001, p. 41; Oliver, Michael, *The Politics of Disablement* (1st Ed.) [hereinafter Oliver, 1990], Macmillan Press Ltd, Basingstoke, 1990, p. 89.

⁵² Definition originating in the Union of the Physically Impaired Against Segregation (UPIAS), *Union of the Physically Impaired Against Segregation and the Disability Alliance Discuss Fundamental Principles of Disability* [hereinafter UPIAS, 1975], 22 November 1975, available through the Disability Archive UK web page at:

<http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%20principles.pdf>, latest accessed 1 November 2016; see also Thomas, Carol, *How is disability understood? An Examination of Sociological Approaches*, [hereinafter Thomas, 2004], *Disability & Society*, Vol. 19, No. 6, 2004, p. 578, citing Oliver, Michael, *Understanding Disability* [hereinafter Oliver, 1996], Macmillan Press Ltd, London, 1996, p. 22.

⁵³ Finkelstein, Vic, *The Social Model of Disability Repossessed* [Finkelstein, 2001], *Manchester Coalition of Disabled People*, 1 December 2001, p. 2; The UPIAS clearly places the causes of disability within society stating that it is an “objective fact that society causes our disablement by the way it is organised”. UPIAS, 1975, p. 19.

⁵⁴ Oliver, Michael, *The Individual and Social Models of Disability*, Paper presented at Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians on People with Established Locomotor Disabilities in Hospital, 23 July 1990, p. 2, available at <http://disability-studies.leeds.ac.uk/#les/library/Oliver-in-soc-dis.pdf>, latest accessed 1 November 2016.

⁵⁵ The UPIAS position on what it needs to be targeted reads: “The Union aims to have all segregated facilities for physically impaired people replaced by arrangements for us to participate fully in society. These arrangements must include the necessary financial, medical, technical, educational and other help required from the State to enable us to gain the maximum possible independence in daily living activities, to achieve mobility, to undertake productive work, and to live where and how we choose with full control over our lives.” UPIAS, 1974, under Aims.

⁵⁶ Thomas, 2004, p. 581.

constant and not treated or cured as the medical model suggests.⁵⁷ Carol Thomas, in an effort to find a common social understanding among the relevant literature, interprets Finkelstein's position on the social model not as meaning that living with an impairment is not challenging but that the difficulties an impairment entails are not to be seen as disability.⁵⁸ It is important to note that efforts, such as this, to expand on the social model's definition and recognise impairment's implication in the creation of disability have met nothing but consistent resistance from Finkelstein and Oliver, as the two foremost exponents of the social model of disability, who categorically see disability as only socially constructed.⁵⁹

Turning to whom these entitlements to social adjustments belong to, UPIAS defines "disabled people" as a group made up of persons "of whatever age or type of physical impairment", coming together conscious of their common "social identity".⁶⁰ Being mindful about fighting socially constructed oppression, even the identity of "a person with disability" is not imposed but freely chosen by the individual concerned. This means that persons with impairment(s) can self-identify as disabled in instances where they come across insurmountable social barriers denying them full participation in mainstream society. Moreover, the UPIAS model restricts these entitlements to persons with a present physical impairment, although there is no threshold of duration or intensity. However, this restriction on the basis of the category of impairment was later on lifted by Oliver, who accepted that the social model is also suitable to be used as a legal and ideological platform by persons with sensory or mental impairments.⁶¹

2.1.3 The biopsychosocial model of disability

The main critique of the medical model focuses on the silencing of the individual's social context as a cause of disability and handicap.⁶² The

⁵⁷ Bruce, 2014, pp. 62-63; Michael Oliver notably writes: "[d]isability as a long-term social state is not treatable medically and is certainly not curable.", in Oliver, 1996, p. 36.

⁵⁸ Thomas, 2004, p. 572.

⁵⁹ Oliver has defended this conceptual pillar of the social model of disability in 1996 and more recently, in 2013. Finkelstein has done the same in 2001; see Oliver, Michael, *Defining Impairment and Disability: Issues at Stake*, in Barnes, Colin and Mercer, Geof (Eds.), *Exploring the Divide: Illness and Disability*, The Disability Press, Leeds, 1996, p. 51; Oliver, 2013, pp. 2-3; Finkelstein, 2001, p. 3.

⁶⁰ UPIAS, 1975, p. 16.

⁶¹ Oliver, 1981, p. 30.

⁶² See e.g. Fougeyrollas, Patrick, *Documenting Environmental Factors for Preventing the Handicap Creation Process: Quebec Contributions Relating to ICIDH and Social Participation of People with Functional Differences* [hereinafter Fougeyrollas, 1995], *Disability & Rehabilitation*, Vol. 17, No. 3, 1995, p. 147; Oliver, 1990, p. 24; Hurst, Rachel, *To Revise or Not to Revise?*, *Disability & Society*, Vol. 15, No. 7, 2000, pp. 1083-1084; Pfeiffer, 1998.

social model is critiqued in its turn on that it silences impairment.⁶³ To remedy these shortcomings WHO produced an updated model, which can be found in the WHO manual titled International Classification of Functioning Disability and Health (ICF).⁶⁴ The ICF adheres to the “biopsychosocial model”, presented as a compromise between a medical and a social understanding of disability.⁶⁵

In the ICF the wording chosen is more positive than the one included in the ICIDH. Although the ICF recognises that the social environment is implicated in the creation of disability, it still classifies impairment as something that needs to be addressed. Disability is seen as restrictions in body functions, activities and social participation. It is understood as a complex phenomenon caused by the “interaction between health conditions (diseases, disorders and injuries) and contextual factors”.⁶⁶ Contextual factors include both environmental (structural, legal, attitudinal) and personal factors.⁶⁷ The problems to be addressed in the universe of the ICF are both the personal functions and the disadvantage experienced.⁶⁸ The responses planned must, therefore, target both the individual and societal structures; “both medical and social responses are appropriate to the problems associated with disability; we cannot wholly reject either kind of intervention”.⁶⁹

Being a classification of all functioning, disability and health, the ICF is guided by the principle of universality. WHO clarifies, “[a] classification of functioning and disability should be applicable to all people irrespective of health condition. Therefore, ICF is about all people. It concerns everyone’s functioning. Thus, it should not become a tool for labeling persons with disabilities as a separate group”.⁷⁰ On the one side, the ICF tries to make disability a common experience. On the other side, it still perceives disability as mostly a matter of health and therefore impairment as something ultimately unwanted, that needs to be treated, rehabilitated or cured through medical interventions.⁷¹ Due to the ICF’s medical

⁶³ See e.g. Shakespeare, Tom and Watson, Nicholas, *The Social Model of Disability: An Outdated Ideology?* [hereinafter Shakespeare and Watson, 2002], *Research in Social Science and Disability*, Vol. 2, 2002, p. 22; Crow, Liz, *Including All of Our Lives: Renewing the Social Model of Disability*, in Barnes, Colin and Mercer, Geof (Eds.) *Exploring the Divide: Illness and Disability*, The Disability Press, Leeds, 1996, p. 59.

⁶⁴ ICF, 2001.

⁶⁵ ICF, 2001, p. 9.

⁶⁶ ICF, 2001, p. 10.

⁶⁷ ICF, 2001, p. 10.

⁶⁸ Bruce, 2014, p. 99.

⁶⁹ ICF, 2001, p. 9.

⁷⁰ ICF, 2001, p. 14.

⁷¹ Bruce, 2014, p. 108-110.

implications it is sometimes rejected as a model of understanding disability by persons with disabilities themselves.⁷²

2.1.4 A universality and a minority approach to disability

A universality versus a minority approach to disability is an issue directly concerned with the model's constituency.⁷³ Anna Bruce provides, "[t]he '*minority view*' portrays persons with disabilities as a distinct grouping among human beings",⁷⁴ while "[a]n approach characterised as a '*universality view*' emphasises that everyone has the potential for all levels and modes of functioning of the body and mind and consequently for the disadvantageous effects of social responses to these".⁷⁵ The grounds for drawing the outer limits of the constituency vary. While for the ICIDH this is the level of functioning, for the UPIAS's model it is the nature of impairment and self-identification as a disabled person.⁷⁶ As it is clear from the models presented above, the first two adhere to a minority approach and only the ICF, the "biopsychosocial" approach to disability is pronounced "applicable to all people irrespective of health condition".⁷⁷ In short, if a model of disability describes "persons with disabilities" as a distinct group with common characteristics that are presented as criteria of belonging to this group, then this would signify an adherence to the minority approach to disability.

2.2 Models of Equality

The concept of equality has had a long journey with its philosophical foundations dating back to classical Greece.⁷⁸ The two predominant models of understanding equality included here are formal and substantive equality.

⁷² See e.g. Fougeyrollas, Patrick and Beauregard, Line, Disability: An Interactive Person-Environment Social Creation, in Albrecht, Gary L. et al. (Eds.) Handbook of Disability Studies, Sage Publications, London, 2001, p. 185-186.

⁷³ Bruce, 2014, p. 320.

⁷⁴ Bruce, 2014, p. 320.

⁷⁵ Bruce, 2014, p. 321, referring to Irving Kenneth Zola as the main source of the universality view, according to whose views "the fact that everyone may, or is even likely to become a 'person with disabilities' at some point in life is used to question the adequacy of the delimitation between 'person with disabilities' and others", see Zola, Irving Kenneth, Toward the Necessary Universalizing of a Disability Policy, The Milbank Quarterly, Vol. 67, Suppl. 2, 1989, p. 420.

⁷⁶ See sections 2.2.1 and 2.2.3.

⁷⁷ ICF, 2001, p. 14.

⁷⁸ Clifford, Jarlath, Equality [hereinafter Clifford, 2015], in Farrior, Stephanie (Ed.) Equality and Non-Discrimination under International Law, Vol. II, Ashgate, Dorchester, 2015, p. 4-9.

It is stressed from the outset that there is no jurisdiction adhering to one model of equality and the same goes for the international human rights law regime, where “[d]ifferent conceptions of equality underscore different human rights protections”.⁷⁹ Equality is a complex concept deeply entrenched in international human rights law.⁸⁰ It is as much of a philosophical as a legal concept and it is closely connected with concepts of governance and democracy, justice, freedom and peace.⁸¹ It can be briefly described as the moral compass for State action or, put differently, the principle underpinning society’s architecture; it paints the picture of how social goods are to be distributed, how participatory a society is to be and how human rights entitlements are to be defined and judged.⁸² It thus provides the language to understand justice, participation and inclusion in order to design a societal response to discrimination, injustice and exclusion.

The aim of this part is to describe the spectrum of approaches to equality in order to give the theoretical basis to later identify the CRPD’s approach to equality. Since the concept of equality is so central in human rights law in general and CRPD in particular, it will serve as tool to analyse the measures included in the CRPD. More specifically, it will facilitate the reader’s understanding of the measures included under article 27 of the Convention aiming to promote, protect and ensure the right to access paid employment in the open labour market for persons with disabilities.

⁷⁹ Clifford, 2015, p. 13.

⁸⁰ For an account on the principle of equality in international human rights law and practice see: Arnardóttir, Oddný Mjöll, A Future of Multidimensional Disadvantage Equality [hereinafter Arnardóttir, 2009] in Arnardóttir, Oddný Mjöll and Quinn, Gerard (Eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijho, Publishers, Leiden, 2009, pp.41-66.

⁸¹ Clifford, 2015, p. 9; CRPD, Preamble (a) reads: “Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world”.

⁸² Clifford, 2015, p. 3-4; During their intervention on draft article 7 on equality non-discrimination (final article 5, CRPD) at the Third Session, Australian NGOs ((Australian) National Association of Community Legal Centres, People with Disability Australia Incorporated, Australian Federation of Disability Organisations) held that “[e]quality is an ethical standard”, Comments, proposals and amendments submitted electronically on Article 5 – Equality and Non-Discrimination, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm> (latest accessed 1 November 2016).

2.3 Formal Equality

“Formal equality”⁸³ is the first, and admittedly simplest, model of equality otherwise referred to as the “sameness or symmetrical approach”⁸⁴ or “equality as consistent treatment”⁸⁵. Aristotle’s classical maxim “treat like cases as like”⁸⁶ is consistently presented as this model’s philosophical antecedent. The liberal ideals behind this model are those of individualism and meritocracy.⁸⁷ The society imagined under this model of equality is a society that is comprised of “self-sufficient monist entities” whose freedom and potential are curtailed by State interference.⁸⁸ In human rights law, the source of formal equality can be traced back to article 1 UDHR, which proclaims all persons free and equal in dignity and rights on the basis of their common and shared humanity.

Formal equality can be criticised on the basis that the presupposition of a “self-sufficient monist entity” overshadows a person’s humanity as a basis for entitlements. Although formal equality is designed to ignore all personal characteristics in favour of a common and shared humanity,⁸⁹ failing to differentiate between human beings in the end produces the opposite results. This approach transforms characteristics intrinsic to the creation of a self-sufficient monist entity into norms, leaving all those who do not conform to them, all those who fail the self-sufficiency test, unprotected.⁹⁰ Thus, merit, i.e. skills and abilities, becomes a *sine qua non* for equality to be enjoyed.⁹¹

⁸³ Moeckli, Daniel, *Equality and Non-Discrimination* [hereinafter Moeckli, 2015], in Fariior, Stephanie (ed.) *Equality and Non-Discrimination under International Law*, Vol. II, Ashgate, Dorchester, 2015, pp. 158-159.

⁸⁴ Arnardóttir, 2009, pp. 47-49 citing Arnardóttir, Oddný Mjöll, *Non-Discrimination in International and European Law: Towards Substantive Models*, *Nordisk Tidsskrift for Menneskerettigheter*, Vol. 25, No. 2, 2007, pp. 142-143.

⁸⁵ Clifford, 2015, p. 10-11.

⁸⁶ Aristotle, *Nicomachean Ethics*, Vol.3, 1131a10-b15.

⁸⁷ Moeckli, 2015, p. 55; Arnardóttir, 2009, p. 48.

⁸⁸ The concept of the “self-sufficient monist entity” is used by Colm O’Cinneide to signify the shift in how international human rights law views the individual’s place within society. The CRPD, by recognising an array of positive State duties turns away from the mainstream human rights based upon negative obligations by acknowledging that “not all individuals are self-sufficient, inherently autonomous agents” in O’Cinneide, Colm, *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities*, in Arnardóttir, Oddný Mjöll and Quinn, Gerard (Eds.) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 163-165.

⁸⁹ Clifford, 2015, p. 10.

⁹⁰ Arnardóttir, 2009, p. 49.

⁹¹ Moeckli, 2015, p. 55; Fredman, Sandra, *Disability Equality and the Existing Anti-Discrimination Paradigm - European Discrimination Law*, in Lawson and Gooding (Eds.) *Disability Rights in Europe: From Theory to Practice*, Hart Publishing, Oxford, 2005, p. 204.

Formal equality does not allow the State to take restorative action (i.e. ‘positive duties’ in human rights language), but only requires that it refrains from interfering with individual autonomy (i.e. negative duties).⁹² Formal equality is only concerned with how the law is applied (procedural equality) and not with the content of the law or its outcome.⁹³ The central concern is to redress random individual discriminatory behaviour and not deeply embedded social inequalities, since under this model structural disadvantage pertaining to membership in a certain group is never responsible for personal success or failure.⁹⁴

By disregarding personal characteristics, formal equality practically entrenches unequal status quo and becomes “assimilationist in character”, as the only way to be treated equally is to conform to the norm.⁹⁵ Maria Ventegodt Liisberg builds upon this analysis of Oddný Mjöll Arnardóttir and further identifies the common denominator of formal equality and the medical model of disability as:

“the belief that the social structures are a constant, and should not be changed. Any difference in opportunities for participation in society which is associated with a certain personal characteristic must therefore be overcome by disassociating the individual with that personal characteristic or by accepting that there is a difference in opportunities”.⁹⁶

2.4 Substantive Equality

Substantive equality is a response to the premise that “a non-interventionist state only functions to perpetuate a *status quo* of unequal situations”.⁹⁷ Going beyond mere procedural fairness, substantive equality can be divided into equality of opportunity, equality of results or outcomes and transformative equality, depending on the extent and aim of State intervention.

⁹² Arnardóttir, 2009, p. 48.

⁹³ Clifford, 2015, pp. 10-11; Thus, the only form of unlawful discrimination recognised under this model is direct discrimination. Arnardóttir, 2009, pp. 47-48 citing Kimber, Cliona J.M., Equality or Self-Determination, in Gearty, Conor and Tomkins, Adam (Eds.) Understanding Human Rights, Mansell Publishing, London, 1996, pp. 268-269.

⁹⁴ Kayess and French, 2008, p. 8; Moeckli, 2015, p. 55.

⁹⁵ Arnardóttir, 2009, p. 49.

⁹⁶ Liisberg, 2011, pp. 23-24; for an analysis of the different models of disability see part 2.1 above.

⁹⁷ Arnardóttir, 2009, p. 50 citing Fredman, Sandra, Reversing Discrimination, Law Quarterly Review, Vol. 113, 1997, pp. 578-579.

2.4.1 Equality of opportunity

Equality of opportunity is compatible with formal equality as it also embraces the liberal ideal of meritocracy. It accepts as a fact that competition is an integral part of social life and that merit allows for unequal distribution of social goods and it concentrates on facilitating a 'healthy' competition by equalising opportunities of persons belonging to disadvantaged groups, such as persons with disabilities. Moeckli uses a race metaphor to describe the target of State interventions under equality of opportunity.⁹⁸ In a race, equality would demand that all contestants would run by the same rules, for instance, all would start from the same starting line. With equality of opportunity in society, this translates into lifting barriers or taking positive action to provide to all persons the necessary preconditions for accessing various social goods. Looking at the context of employment, equality of opportunity would imply that the State provides training to prospect employees who lack it or incentives to groups that are underrepresented in an area of employment. Instead of everyone being treated the same (as in formal equality), personal characteristics become the basis for entitlements for State interventions at the preparatory stage.⁹⁹

At the same time, as with a race, the outcome will then depend on every individual's performance, meaning that, even with providing the same starting line, some of the competitors might not finish the race or be beat to it by other, faster runners. Moeckli writes, "[...w]hile equality of opportunity is to some extent about redressing past discrimination, it also stresses individual merit".¹⁰⁰ Accordingly, even when providing education, training or incentives for persons with disabilities, they can still not be able to win against persons without disabilities when competing in the open labour market. This is because, like formal equality, equality of opportunity ignores the fact that specific personal characteristics (such as disability, sex, race etc.) might render a person particularly vulnerable even after equalising her opportunities.

2.4.2 Equality of results

Equality of results is perceived as demanding more than equality of opportunity.¹⁰¹ It mirrors not a society built upon competition between its

⁹⁸ Moeckli, 2015, p. 55.

⁹⁹ Clifford, 2015, p. 11.

¹⁰⁰ Moeckli, 2015, p. 55.

¹⁰¹ Bruce, 2014, pp. 229-230, citing: Quinn, Gerard, Disability and Human Rights: A New Field in the United Nations, in Krause, Catarina and Scheinin, Martin (Eds.), International Protection of Human Rights: A Textbook, Åbo Academy University Institute for Human Rights, Åbo, 2009, p. 257 and Quinn, Gerard and Degener, Theresia with Bruce, Anna et al., Human Rights and Disability: The Current Use and Future Potential of United Nations

people, but a society that cares to eliminate the factual exclusion of certain groups. It is a model of equality tailored to get competitors to the finish line regardless of their running skills. Arnardóttir calls this model of equality the “substantive difference model”, under which difference is not ignored but accommodated in order to achieve *de facto* equality.¹⁰² It is concerned with both how the law is applied and the result of this application covering also instances of indirect discrimination, *i.e.* disadvantage, which results from practices, decisions, laws and regulations camouflaged as ‘neutral’.¹⁰³ Under this model the State is also expected to intervene in order to secure access in various areas of life (e.g. education, employment etc.) for persons belonging to marginalised groups.¹⁰⁴ The State interventions extend further than just removing barriers of participation to include “affirmative action” measures, quota systems and reasonable accommodation.¹⁰⁵ However, these measures are tailored-made for specific individuals and they are viewed as exceptional to the general rule of formal equality.¹⁰⁶ Therefore, a shortcoming of equality of results is the uncertainty around the question of which individuals are to be accommodated and in which areas of life.¹⁰⁷ Moreover, it sustains a reality in which the State will always be needed to mediate and compensate for society’s exclusionary structures, because it aims at ensuring individual justice, as the results are secured only for specific individuals and without challenging the norms that excluded them in the first place.

2.4.3 Transformative equality

The concept of transformative equality reflects a society built for everyone, irrespective of personal physical and mental characteristics or abilities, a society built upon respect for human diversity. It resembles equality of outcome or results in that it aims to secure the societal participation of persons who cannot secure it for themselves. However, it differs from equality of results in that transformative equality is not just a patch upon the exclusionary societal structures, but it is a sustainable measure that targets society’s architecture itself. It identifies the problematic structures, environmental or attitudinal, and it redesigns them in order to be open,

Human Rights Instruments in the Context of Disability, United Nations Publications, New York, 2002, pp. 11-12.

¹⁰² Arnardóttir, 2009, p. 50.

¹⁰³ Moeckli, 2015, p. 61; for a more detailed analysis of forms of discrimination see below, section 3.3.2.

¹⁰⁴ Moeckli, 2015, pp. 55-56.

¹⁰⁵ Moeckli, 2015, pp. 55-56; Liisberg, 2011, pp. 28-29.

¹⁰⁶ Arnardóttir, 2009, p. 50.

¹⁰⁷ Arnardóttir, 2009, p. 50.

inclusive and accessible for all individuals regardless of personal characteristics and group associations.¹⁰⁸

Eloquently, Arnardóttir names this model of equality the “substantive disadvantage model”, because it embodies the ideas of multidimensionality and structural disadvantage.¹⁰⁹ Liisberg notes that the difference between this and the substantive difference model (equality of results or outcomes) is the level of pre-emptiveness in State action to remedy for structural inequalities.¹¹⁰ Furthermore, Liisberg highlights that transformative equality does not wholly depend upon individual non-discrimination claims, “but leaves the principle initiative with policy makers and implementers, providers of goods and services, employers and others”.¹¹¹ At the same time, this model’s core characteristic is also its Achilles heel: “[f]or this model to lead to change, the good will of policy-makers and others who set out the general structures of society is required”.¹¹²

¹⁰⁸ Clifford, 2015, pp. 12-13.

¹⁰⁹ Arnardóttir, 2009, p. 54.

¹¹⁰ Liisberg, 2011, p. 51.

¹¹¹ Liisberg, 2011, p. 51.

¹¹² Liisberg, 2011, p. 51 citing Fredman, Sandra, Changing the Norm: Positive Duties in Equal Treatment Legislation, *Maastricht Journal of European and Comparative Law* Vol. 12, No. 4, 2005, p. 374.

3 The right to access employment for persons with disabilities under the CRPD: what entitlements and for whom?

This Chapter offers the law of the CRPD on the right to access paid employment in the open labour market for persons with disabilities. The first section (3.1) covers the CRPD's definition of disability and "persons with disabilities" to outline who are viewed as the protection's beneficiaries. The other two sections cover the protection *per se*. Section 3.2 includes an overview of article 27. Given the normative complexity of the right to work, this overview serves to pinpoint the measures forwarded under article 27 as conducive to safeguard and promote the realisation of the right to *access* employment for persons with disabilities. Under section 3.3, each measure is analysed and broken down to what entitlements it offers, what obligations it establishes, who should carry them out, how and when. This legal analysis will later feature in the interdisciplinary analysis against the theoretical framework as presented in Chapter 2.

3.1 Disability and persons with disabilities

Here, this thesis turns to the issue of coverage. In other words, it answers the question of who is entitled to the intricate protection described below (sections 3.2, 3.3). To this end, this part aims to draw the CRPD's definition on "disability" and "persons with disabilities" from the Convention's text. Overall, this part in conjunction with the part on the protection will be used to draw conclusions on which model of disability and which model of equality the CRPD adheres to.

3.1.1 Defining disability in the CRPD

Although the name of the CRPD, "Convention on the Rights of Persons with Disabilities", sets the scene for the importance of a definition of the concept of disability, a set definition of disability is not contained therein. The fact that the drafters decided to keep quiet on the issue of defining

disability is also reflected in the absence of such a definition under the provision titled “Definitions”.¹¹³

Kayess and French elucidate that the striking absence of such a definition is to be attributed to a general apprehension for varying reasons from all different parties negotiating the Convention during the early working group discussions.¹¹⁴ The arguments proposed by the negotiating parties against a set definition of disability had in essence to do with the scope of the CRPD’s coverage, as the rights contained therein are contingent upon the concept of disability. The arguments can be identified as: the argument of over-inclusion, of selective/limited inclusion and of imposed inclusion.¹¹⁵ State delegations were mostly afraid that a definition would create broader rights for certain impairment groups, which had not been designated as persons with disabilities before then.¹¹⁶ Contrary to the above fear of over-inclusion, some voiced their concerns that a definition would lead to selective/limited inclusion by leaving out certain groups of persons with specific impairments.¹¹⁷ Also, given the fact that the area of disability studies is still evolving and that it includes many often-contradictory approaches to the concept of disability,¹¹⁸ a set definition would impede this

¹¹³ CRPD, article 3.

¹¹⁴ Kayess and French, 2008, pp. 23-25;

¹¹⁵ Although these arguments prevailed and forged the final text of the Convention, it should be mentioned that the same ones were also used in reverse by certain non-governmental organisations. See e.g. the positions of National Association of Community Legal Centers (NACLC) and People with Disability Australia (PWDA), Comments, proposals and amendments submitted electronically on Article 2 – Definitions, Seventh Session, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm#idc> latest accessed 1 November 2016.

¹¹⁶ Kayess and French mention that these for example were “[...] persons with psychosocial disability and those with blood borne organisms causing disease (for example, persons with HIV/AIDS)). Kayess and French, 2008, p. 23.

¹¹⁷ “Many members of the Working Group emphasised that a convention should protect the rights of all persons with disabilities (i.e. all different types of disabilities) and suggested that the term “disability” should be defined broadly. Some members were of the view that no definition of ‘disability’ should be included in the convention, given the complexity of disability and the risk of limiting the ambit of the convention.” Working Group draft text, draft article 3 on Definitions, Footnote 12, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata2wgtext.htm> latest accessed 1 November 2016; Additionally, the IDC articulated the same fear during the Seventh Session: “The IDC proposes not to have a definition on “disability”. IDC does not find a definition of different kinds of disabilities meaningful. However, IDC find it meaningful to define who have the right to be protected by this Convention but not define what is a disability as such. The reason is that we need to clearly define who has the right to be covered by this Convention. If we do not have such a definition, States may defined what they find best and may exclude disability groups which should be covered and protected by this Convention.”, see Comments, proposals and amendments submitted electronically on Article 2 – Definition, Seventh Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm#idc> latest accessed 1 November 2016.

¹¹⁸ The CRPD has acknowledged this ever-evolving nature of the phenomenon of disability in paragraph (e) of the Convention.

evolution and would risk the CRPD becoming out-dated in the near future.¹¹⁹ This fear of a short-lived relevance of the CRPD is also a fear of limited inclusion of the Convention. Furthermore, coming from a strong social model perspective, it has been argued that a set definition would externally impose disability upon specific impairment groups, not allowing them to personally choose to be identified as persons with disability.¹²⁰

Regardless of the CRPD's apprehension to define disability in an internationally legally binding way, a depiction¹²¹ shines through the combined reading of article 1 and paragraph (e) of the Preamble nevertheless, as well as article 3 (c) on general principles.¹²² The Preamble "recognis[es] 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".¹²³ Article 1 adds that "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".¹²⁴ Article 3(c) calls for "[r]espect for difference and acceptance of persons with disabilities as part of human diversity and humanity".

From the above the following conclusions can be drawn with regard to what disability is according to the CRPD. In the universe of the CRPD there are three pertinent core concepts: Disability, Impairment and Social Barriers. Disability is conceptualised as a phenomenon, an *experience* of "social disadvantage" which translates into societal exclusion, or in the words of Preamble (e) lack of "full and effective participation in society on an equal basis with others". Preamble (y) clarifies further that this social disadvantage includes curtailed opportunities of societal participation

¹¹⁹ This view is depicted in India's submission during the preparatory works on CRPD article 2, "scope of the definition would continue to change over a period time; therefore, any specific definition in this convention may not serve required purpose", see Comments, proposals and amendments submitted electronically on Article 2 – Definitions, Seventh Session, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm#idc> latest accessed 1 November 2016; Kayess and French refer to the IDC's argument: "The IDC also argues that understanding of 'disability' as a social category is evolving over time, varied between societies, and that the incorporation of a definition of disability ran the risk of time-locking the CRPD", in Kayess and French 2008, p. 23.

¹²⁰ See Kayess and French referring to the International Disability Caucus, Kayess and French 2008, pp. 7, including Footnote nr. 30 and 23.

¹²¹ This is a term used by Anna Bruce. In her words: "I refer to the accounts of "disability"/"[p]ersons with disabilities" in Preamble (e) and Article 1 as 'depictions', as it was a conscious decision not to "define" these concepts, furthermore visible from the fact that they are not included under Article 2 on Definitions.", Bruce, 2014, p. 302. The same terminology will be utilized throughout this study.

¹²² The Preamble is not legally binding but it does carry interpretative weight, see VCLT, article 31.

¹²³ CRPD, Preamble (e).

¹²⁴ CRPD, article 1, para. 2.

in all areas of life, in the “civil, political, economic, social and cultural spheres”. Impairment is nowhere in the Convention defined but in layman’s terms it is the limited or absent physical, mental, intellectual or sensory functionality. Barriers are societal in nature and they are defined in general terms as attitudinal or environmental. Disability “results from the *interaction* between persons with impairments and attitudinal and environmental barriers”.¹²⁵ As a result, disability can only be experienced by persons with impairment(s), but impairment alone cannot lead to disability. The way that disability is envisaged to be eliminated is through lifting the social – attitudinal and environmental – barriers, since according to general principle (c) impairment is not to be treated or “fixed”, but respected and accepted as part of human diversity and humanity.¹²⁶

3.1.2 Persons with disabilities: article 1 CRPD

One can presume from the title “Convention on the Rights of Persons with Disabilities” that understanding who “persons with disabilities” are is precisely the issue of coverage.¹²⁷ Article 1 establishes who “persons with disabilities” are:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹²⁸

Although the CRPD deals with the concept “persons with disabilities” more straightforwardly than it does with the concept of disability, it still does not provide a hard definition *per se*. From the wording of the above-mentioned depiction, there are four criteria that revolve around impairment and one that is environmental for one to fall under the category of “persons with disabilities”. The former include: a. the nature of impairment “*physical mental, intellectual or sensory impairment*”; b. the intensity of impairment; c. the duration of impairment “*long-term*”; d. the

¹²⁵ CRPD, Preamble (e).

¹²⁶ Office of the High Commissioner of Human Rights, The Convention on the Rights of Persons with Disabilities, Training Guide [hereinafter OHCHR Training Guide, 2014], Professional Training Series No. 19, United Nations Publications, New York and Geneva, 2014, p. 17.

¹²⁷ While opposing a set definition of disability the International Disability Caucus highlighted the need for a set definition of “a person with a disability [...] to clearly define who has the right to be covered by this Convention.” Comments, proposals and amendments submitted electronically on Article 2 – Definitions, Seventh Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm#idc> latest accessed 1 November 2016.

¹²⁸ CRPD, article 1.

presence of impairment “*have [an impairment]*”. The latter includes environmental and social barriers “*various barriers*”. These criteria are analysed individually below.

3.1.3 The category of impairment

According to CRPD article 1 impairment must be “physical, mental, intellectual or sensory”. Anna Bruce notes that the categories of impairment included in the final text were narrower than the ones that were submitted for consideration during the negotiations, and uses the definition of the Chair of the Ad Hoc Committee submitted during the Seventh Session as an example.

““Disability” results from the interaction between persons with impairments, conditions or illnesses and the environmental and attitudinal barriers they face. Such impairments, conditions or illnesses may be permanent, temporary, intermittent or imputed, and include those that are physical, sensory, psychosocial, neurological, medical or intellectual.”¹²⁹

This definition includes the six categories of “physical, sensory, psychosocial, neurological, medical or intellectual” as opposed to the four “physical, mental, intellectual or sensory” included in article 1 CRPD. This difference has not been very crucial, since the Committee has readily categorised impairment according to the bodily manifestations of its symptoms, compensating for this reduction.¹³⁰

Moreover, the Chair’s definition includes “impairments, conditions or illnesses” as opposed to the restricted mention of “impairments” in the Convention. The silencing of “illness” and “condition” and the exclusive use of “impairment” raises more concerns regarding issues of the Convention’s coverage. Turning again to the Committee’s jurisprudence, it becomes evident that the term “impairment” prevailed because it conveys a level of severity. On this issue, the Committee, in its case *S.C v. Brazil*, clarified that “impairment” includes potentially *all*

¹²⁹ Bruce, 2014, p. 304, including Footnote no. 714 citing: Possible Definition of “Disability”: Discussion Text Suggested by the Chair, Seventh Session, 2006, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata2sevschair.htm>, latest accessed 1 November 2016.

¹³⁰ See United Nations Committee on the Rights of Persons with Disabilities, *H.M. v. Sweden*, [hereinafter *H.M. v. Sweden*, 2012], Communication No. 3/2011, Views adopted by the Committee at its Seventh Session, 16-27 April 2012, UN doc: CRPD/C/7/D/3/2011, 21 May 2012, front page; In paragraph 2.1 the symptoms of the syndrome are described as follows: “Ehlers-Danlos Syndrome (EDS) [...] has led to hypermobility (excessive over-flexibility of joints), severe luxations and sub-luxations (dislocation of joints), fragile and easily damaged blood vessels, weak muscles and severe chronic neuralgia. She [H.M] has not been able to walk or stand for the last eight years, and she has difficulty sitting and lying down. Her impairment has resulted in her being bedridden for the last two years, which has weakened her even further”, *H.M. v. Sweden*, 2012, para. 2.1.

conditions. The applicant in the *S.C. case* had a knee-injury. Not being diagnosed as an impairment did not discourage the Committee from ruling that an injury can be perceived as an impairment. The relevant passage reads: “The Committee considers that the difference between illness and disability is a difference of *degree* and not a difference of kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity”.¹³¹ As a result, the term “impairment” seems to carry an evaluation of the severity, chronicity and duration of the individual’s health.

3.1.4 The intensity of impairment

As was pointed out in the section above on the category of impairment, the choice of the word “impairment” instead of “condition” or “illness” in article 1 signifies an expected level of intensity or severity of the health condition. Moreover, there exists a conceptual confusion in the text of the Convention between “impairment” and “disability”.¹³² Article 2 on “discrimination on the basis of *disability*” serves as an example. Although disability is depicted as essentially the discrimination experienced by persons with impairments, *i.e.* unequal opportunities of societal participation, “disability” in this context clearly refers to “impairment”. The usage of *disability* in the place of *impairment* communicates a level of seriousness of the impairment. The use of the term “disability” implies that it does not include all “impairments” acquired, but only those that can amount to disability.

No further explanation of the term impairment is contained in the text of the Convention. Preamble (j) makes it explicit that more severe impairments “requir[ing] more intensive support” to ensure that the person is fully and effectively included in the mainstream society are covered under the term impairment. However, the lower threshold of how severe is severe enough is not set by the Convention and the Committee has given no further guidance yet.

3.1.5 The duration of impairment

To be potentially considered a person with a disability one has to have a “long-term [...] impairment”, according to article 1 CRPD. “Long-term”

¹³¹ United Nations Committee on the Rights of Persons with Disabilities, *S.C. v. Brazil*, [hereinafter *S.C. v. Brazil*, 2014], Communication No. 10/2013, Decision adopted by the Committee at its Twelfth Session, 15 September - 3 October 2014, UN doc: CRPD/C/12/D/10/2013, 28 October 2014, para. 6.3.

¹³² Kayess and French, 2008, p. 22; Anna Bruce also points out this “conceptual uncertainty” referring to the silencing of “impairment” altogether in the most part of the Convention and its replacement by the term “disability”, see Bruce, 2014, pp. 147-149.

does not mean permanent. Hence, the positive side of the “long-term” requirement is that the Convention does not restrict its application to persons who have a permanent impairment.¹³³ The question of the minimum duration of impairment that “persons with disabilities” must satisfy is however left up to the States to decide in their respective national legislation. On the negative impacts this requirement can have on the issue of coverage, Kayess and French argue that:

“article 1 does limit the application of the CRPD to persons who have ‘long-term’ impairments, which would certainly exclude those persons with short-term impairments arising from traumatic injuries and disease, and it may also exclude persons with episodic conditions (for example, mood disorders, asthma)”.¹³⁴

In the communication *S.C. v. Brazil* before the Committee, the State argues against the applicability of the Convention, for the applicant does not have a disability, since she was diagnosed “with a temporary incapacity to work” and consequently she does not satisfy the “long-term” “impairment” criterion set in article 1.¹³⁵ On the issue of whether her injury satisfies the “impairment” criterion the Committee gives a straight answer relying upon the wording of the Convention.¹³⁶ However, on the criterion of duration, or in other words, on the question of whether a temporary (*i.e.* a short-term as opposed to a long-term) impairment can create disability the answer is more indirect and it probably implies that the CRPD’s text does not cover short-term impairments for two reasons. First, the Committee relies on a different source of law to assert that the claimant is indeed a “person with disability”.¹³⁷ Second the source of law is invoked on the grounds of article 4, paragraph 4 CRPD. This means that, by invoking the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the Committee shows no intention of widening the Convention’s wording, but of asserting that “[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State”.¹³⁸

¹³³ Bruce, 2014, p. 311.

¹³⁴ Kayess and French, 2008, p. 23.

¹³⁵ *S.C. v. Brazil*, 2014, para. 4.1.

¹³⁶ See section 3.1.3.

¹³⁷ In *S.C. v. Brazil*, 2014, para. 6.3 the Committee cites the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, which defines disability as “a physical, mental or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life and which can be caused or aggravated by the economic and social environment”.

¹³⁸ CRPD, article 4, para. 4.

It should be kept in mind that article 1 CRPD is written in a non-exhaustive manner, so that the strict requirements contained in the “long-term” criterion can be softened either at an international or at a domestic level.

3.1.6 The presence of impairment

Article 1 specifically depicts persons with disabilities as “those who *have* a[n...] impairment”. The demand for a present impairment established in the wording of article 1 paragraph 2 (“persons with disabilities include those who *have* [...]”) necessarily creates “coverage tensions” for persons who *had* an impairment, *i.e.* persons with a history of impairment(s), persons with episodic impairments when these are not manifesting, persons with future impairments, *i.e.* persons who don’t currently have, but who are prone or predisposed to develop an impairment, as well as those who do not officially have an impairment but they are perceived as having one.¹³⁹ The Chair’s definition cited above would not have created the same tensions as it accepted that “[s]uch impairments, conditions or illnesses may be permanent, temporary, intermittent or imputed”.¹⁴⁰

The UN’s Training Guide on the CRPD explicitly says “The Convention does not restrict coverage to particular persons; [...] The reference to “include” in article 1 *could* therefore extend the application of the Convention to all persons with disabilities, e.g., those with short-term disabilities or persons who are perceived to be part of such groups” as the CRPD’s constituency.¹⁴¹ This interpretation is in no way legally binding, but it is used here to show the way it is formulated; inclusive but apprehensive. It is formulated in a wishful way (“*could* extend the application of the Convention to all persons with disabilities”), attesting to the extensive aspirations of the Convention, which are put to the test at the national implementation level. The Committee has yet to touch upon this issue.

One thing that is clear regarding this requirement is that the coverage of the CRPD extends only to those persons who *have* impairments. Hence, the Convention is not meant to cover instances of disability by association.¹⁴² However, the Convention does address the family

¹³⁹ Bruce, 2014, p. 311.

¹⁴⁰ See above section 3.1.3.

¹⁴¹ OHCHR Training Guide, 2014, p. 18.

¹⁴² This is, however, recognized in regional systems, such as the European Union. In the *Coleman v. Attridge Law and Steve Law* case the European Court of Human Rights expanded the personal scope of the Employment Equality Directive to cover not only employees who are personally persons with disability but also individuals who experienced direct discrimination or harassed on the grounds that someone they associated with had a disability (in the pertinent case it was a mother who cared for her disabled child). European

explicitly,¹⁴³ but only to the extent that its role is instrumental in the protection of the full and equal enjoyment of rights and freedoms for the person with disability.¹⁴⁴

3.1.7 Societal barriers

Article 1 refers to “various barriers”, which in interaction with a person’s impairment *may* hinder her/his full and equal participation in any activity in any sphere of society. Hence, for one to be perceived as a person with disability it suffices for the *various* barriers in interaction with her/his impairment to potentially (“*may*”) put the person at a disadvantage when trying to participate in the mainstream society. Anna Bruce offers: “[i]n other words, actual restricted “participation in society” does not have to be shown in order for the CRPD to be applicable, rather the impairment in question has to be perceived as ‘generally’ connected to such disadvantage in order to offer *prima facie* membership among the constituency of the CRPD”.¹⁴⁵ At the same time she clarifies “[i]t is another issue that *actual* disadvantage must be shown in order for a violation of the CRPD to be found, however this comes *after* the establishment of whether the CRPD applies to a person or not”.¹⁴⁶

On the nature of these “various barriers”, Preamble (e) classifies them as attitudinal and environmental. Both are conferred their own articles. Attitudinal barriers are dealt with in article 8 on awareness-raising, which establishes them as “stereotypes, prejudices and harmful practices” as well as lack of awareness and receptiveness of the rights of persons with disabilities.¹⁴⁷ Such a barrier is an employer’s belief that persons with mental illness are dangerous and her/his consequent hesitation to hire a person with mental illness. Environmental barriers are dealt with primarily in article 9 on accessibility. They are broken down into physical, informational and institutional barriers.¹⁴⁸ Physical barriers deny persons with impairments physical access to “buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces”.¹⁴⁹ An example would be a building without an

Court of Human Rights, Judgment of the Court, *Coleman v. Attridge Law and Steve Law*, Grand Chamber, Case C-303/06 S., 17 July 2008.

¹⁴³ CRPD, Preamble (x), articles 8, para. 1(a); and 23, para. 5.

¹⁴⁴ On this issue see also Kayess and French, 2008, pp. 25-26.

¹⁴⁵ Bruce, 2014, p. 313.

¹⁴⁶ Bruce, 2014, p. 313 including Footnote no. 751.

¹⁴⁷ CRPD, article 8, paras. 1 (a); and 2 (a) (i).

¹⁴⁸ Categorisation made by Lord, Janet E. *Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty under the CRPD* [hereinafter Lord, 2010], Presentation for the General Day of Discussion on Accessibility, CRPD Committee UN, Geneva October 7, 2010, pp. 8-9.

¹⁴⁹ CRPD, article 9, para. 1(a).

elevator that would be inaccessible to a person in a wheelchair. Informational barriers are barriers that deny persons with disabilities access to “information, communications and other services, including electronic services and emergency services”.¹⁵⁰ An example would be emergency services on the phone with complicated information that would be inaccessible to persons with intellectual impairments. Lastly, institutional barriers can be found under article 4, paragraph 1 (b) and they include “existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”. An example would be a law that explicitly prohibits persons with disabilities to own property.

3.1.8 A distilled account of the CRPD’s constituency under article 1 CRPD

Under CRPD article 1, one can find the requirements of adherence to the distinct group of the Convention’s constituency, i.e. “persons with disabilities”. To summarise briefly the above legal analysis of article 1, the requirements contained in article 1 are the following. Persons with disabilities are exclusively persons with impairments. This group includes more specifically persons who have an impairment falling under the admittedly broad categories of physical, mental, intellectual or sensory impairments. Further, the impairment must be present and it must be of certain, albeit unspecified, intensity and duration (long-term). Lastly, persons with disabilities are classified as such when various societal (environmental and attitudinal) barriers can potentially cause disadvantage concerning their equal and full participation in all aspects of life in mainstream society.

3.2 Overview of article 27

Article 27 has been praised as being “one of the most detailed provisions in the Convention”,¹⁵¹ reinforcing the notion that the right to work is instrumental for the enjoyment of all other human rights and freedoms.¹⁵² Structurally speaking, the chapeau of the article defines the right to work and sets overarching obligations covering the whole article. Paragraph 1 presents in a non-exhaustive manner (“*inter alia*”) the measures geared to “safeguard and promote the realization of the right to work”, namely “appropriate steps, including [...] legislation”. Paragraph 2 elaborates on

¹⁵⁰ CRPD, article 9, para. 1 (b).

¹⁵¹ Fasciglione, 2015, p. 146.

¹⁵² “The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity.” CESCR General Comment No. 18, 2006, para. 1.

freedom to work as freedom from slavery, servitude or any other form of coercion, which is also encapsulated in the wording “work freely chosen or accepted” contained in the article’s chapeau.

Looking more closely at the chapeau of article 27, it defines the right to work as a non-absolute “right to the *opportunity* to gain a living by work freely chosen or accepted”. Therein lies the overall goal of the article, i.e. the inclusion of persons with disabilities in the labour force. In other words, *access* is the principal aspect of the right to work featuring in article 27 CRPD. However, the protection of the right to work extends also to cover persons with disabilities already in employment and “those who acquire a disability during the course of employment”. Hence, it becomes clear that the measures contained in paragraph 1 safeguard and promote the realisation of various aspects of the right to work, extending further than the right to *access* employment.

The obligations of general application, which permeate all aspects of the right to work and all measures designed to realise them, are equality and non-discrimination (“the right of persons with disabilities to work, on an equal basis with others”), and the obligation to provide a “labour market and work environment that is open, inclusive and accessible to persons with disabilities”. As a result, article 27 is directly linked to article 3 on general principles as well as article 8 on awareness-raising and 9 on accessibility. Other articles that are pertinent to this are: article 5 and article 3 (b), read in conjunction, which establish the principle of equality and non-discrimination; article 3 (d) on the principle of respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; article 3 (e) on the principle of equality of opportunity; article 3 (c) on the principle of full and effective participation and inclusion in society; article 3 (f) on the principle of accessibility; and article 3 (g) on the principle of equality between men and women. In presenting the purpose of paragraph 1, which contains a non-exhaustive list of measures to “safeguard and promote the realisation of the right to work”, article 27 adopts the language of article 1 on the Convention’s purpose setting the tone for the sets of obligations linked to the various measures enumerated below.¹⁵³

Measures under paragraph 1, connected to the aspects of the right to work that presuppose the establishment of an employment relationship, will now be addressed. Paragraph 1 (a) introduces the State obligation to prohibit disability-based discrimination as the primary means

¹⁵³ Kayess and French accordingly hold that “[article 1] sets out three levels of obligations in relation to CRPD rights with which States must ultimately comply: to promote (foster recognition), protect (prevent interference with) and ensure (enable the realisation of) the human rights and fundamental freedoms of persons with disability”; Kayess and French, 2008, p. 26.

of realising the right to work. This prohibition covers “all matters concerning all forms of employment, including [...], continuance of employment, career advancement and safe and healthy working conditions”. Paragraph 1 (b) paints the picture of that, which is defined as “decent work”, namely work that is remunerated, respects fundamental human and labour rights and freedoms and is conducted under safe and healthy working conditions.¹⁵⁴ It reads: “Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances”. In close connection to persons with disabilities already in employment and to “those who acquire a disability during the course of employment”, paragraph 1 (k) asks of States to “[p]romote vocational and professional rehabilitation, job-retention and return-to-work programmes”. Moreover, paragraph 1 (e) necessitates States to promote “assistance in [...] maintaining and returning to employment”.

Turning to the right to *access* employment, article 27 is primarily geared towards safeguarding and promoting the realisation of this right in standard forms of employment, i.e. an employment relationship to conduct remunerated work under the direct guidelines of an employer,¹⁵⁵ and in the open labour market, i.e. access employment in a competitive setting among persons without disability,¹⁵⁶ since forms of supported employment are not once mentioned in the whole text of article 27. To this end, paragraph 1 (a) covers the State’s obligation to prohibit disability discrimination in “conditions of recruitment [and] hiring”, which slightly overlaps with the obligation to “[p]rotect the rights of persons with disabilities on an equal basis with others” under paragraph 1 (b). Paragraph 1 (d) creates an obligation for the State to take steps to “[e]nable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training”. Paragraph 1 (e) asks of States to “[p]romote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding [and] obtaining [...] employment”. Paragraph 1 (g) urges States parties to “[e]mploy persons with disabilities” in their capacity as employers. Paragraph 1 (h) expressly refers to the inclusion of persons with disabilities in the private sector and creates the obligation of States to “[p]romote the employment of persons with disabilities in the private sector through appropriate policies and

¹⁵⁴ On the issue of the right to decent work for persons with disabilities see O’Reilly, 2007.

¹⁵⁵ International Labour Organization official webpage, Labour Law: Employment Relationship, available at: http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm, latest accessed 1 November 2016.

¹⁵⁶ HRC Report, 2012, para. 16.

measures, which may include affirmative action programmes, incentives and other measures”. Paragraph 1 (i) makes an explicit mention of reasonable accommodation as a principal measure to achieve employment inclusion: States are to “[e]nsure that reasonable accommodation is provided to persons with disabilities in the workplace” without explicitly distinguishing between the public and the private sector. Paragraph 1 (j) covers the issue of work experience, which is instrumental in efforts to access competitive employment and requires States to “[p]romote the acquisition by persons with disabilities of work experience in the open labour market”. Paragraph 1 (k) covers the State obligation to “[p]romote vocational and professional rehabilitation”, a measure applicable to those who need to (re)adapt in order to (re)enter employment.

Lastly, Article 27 does not fail to recognise the collective aspect of the right to work, under paragraph 1 (c), nor the issue of self-employment under paragraph 1 (f), which requires States to “[p]romote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business”.

3.3 Measures aimed to safeguard and promote the realisation of the right to access employment in the open labour market

This part moves the focus away from article 27, and the right to work as a whole, to the narrower right to access employment in the open labour market and the measures contained therein aiming to promote, protect and ensure it. For the purposes of this analysis, these measures are systematised in the following way. Part 3.3.1 analyses the obligation of general application to provide an open, inclusive and accessible labour market. Part 3.3.2 analyses the principle of non-discrimination, which includes the obligation to “prohibit discrimination on the basis of disability with regard to [...] conditions of recruitment [and] hiring” and to “protect the rights of persons with disabilities on an equal basis with others”.¹⁵⁷ Part 3.3.3 analyses the obligation to ensure that reasonable accommodation is provided in the workplace.¹⁵⁸ Part 3.3.4 analyses the obligation under paragraph 1 (h) to provide measures of affirmative action. Part 3.3.5 analyses the obligations to provide services of assistance in finding and obtaining employment as well as placement services. Part 3.3.6 analyses the various measures that

¹⁵⁷ CRPD, article 27, para. 1 (a) and (b).

¹⁵⁸ CRPD, article 27, para. 1 (i).

target the employability of persons with disabilities, including the obligation to ensure effective access to general technical and vocational guidance programmes, vocational and continuing training, to promote the acquisition of work experience in the open labour market and vocational and professional rehabilitation.¹⁵⁹ These measures are analysed below to clarify what these obligations entail, who bears them, when and how they are to be implemented.

3.3.1 Open, inclusive and accessible labour market

Article 27, paragraph 1 specifically calls for the labour market and workplace environment to be “open, inclusive and accessible” to all persons with disabilities.¹⁶⁰ The terms ‘open, inclusive and accessible’ are interrelated and interconnected and they all primarily aim at proactively enabling the individual to participate in the open labour market. It was in the first draft of article 22 on the right to work that this conceptual uncertainty was first highlighted. On this provision the Working Group notes: “The Ad Hoc Committee may wish to consider whether to spell out the meaning of this provision in practice and the further definition of the term ‘inclusive’ in this context”.¹⁶¹ However, the fact that they have all been consistently included under this provision suggests that they do connote different subtexts.¹⁶²

An open labour market and workplace environment

An open labour market and workplace environment heralds the creation of a labour market free from attitudinal barriers that hinder persons with disabilities from entering the open labour market.¹⁶³ It is directly connected to the duty of general application on awareness-raising, article 8 of the Convention. Article 8 identifies these attitudinal barriers as lack of awareness of the rights of persons with disabilities, presence of stereotypes, prejudice and harmful practices against persons with disabilities and lack of awareness of the capabilities and contributions of persons with disabilities.¹⁶⁴

The Conventional obligations to be found in article 8 address specifically the signatory States. Under article 8, paragraph 1, States Parties

¹⁵⁹ CRPD, article 27, para. 1 (d), (j) and (k).

¹⁶⁰ Read in conjunction with CRPD, article 1.

¹⁶¹ Inclusion in society, and thus the open labour market as the economic dimension of society, is also one of the general principles laid out in CRPD, article 3 (c).

¹⁶² Both terms are included since the Working Group’s draft text of the right to work article 22 (a) available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27wgtext.htm>, latest accessed 1 November 2016.

¹⁶³ As clarified by CRPD, Preamble (e).

¹⁶⁴ CRPD, article 8, para. 1.

undertake to adopt effective and appropriate measures of immediate implementation. In particular, the State must “initiat[e] and maintain effective public awareness campaigns designed: (i) [t]o nurture receptiveness to the rights of persons with disabilities; (ii) [t]o promote positive perceptions and greater social awareness towards persons with disabilities; (iii) [t]o promote recognition of the skills, merits and abilities of persons with disabilities, and of their contribution to the workplace and the labour market”.¹⁶⁵ Paragraph 1 (b) covers a more long-term and sustainable solution involving future generations as it establishes a State duty to “[f]oster at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities”. Paragraph 1 (c) involves the media in this struggle as the State is to “encourag[e] all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention”. Paragraph 1 (d) covers an effort to instil these updated perceptions even deeper by necessitating the State to “promot[e] awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities”.

The aim is, therefore, trifold; combating stigma and stereotyping against employees with disabilities, mainstreaming the entitlements and obligations related to the right of persons with disabilities to access work and mainstreaming positive attitudes about their skills, merits, abilities and contributions to the labour market. The measures are to target society at large (“public awareness”), including persons responsible for hiring prospective employees in both the public and the private sector, since article 27 does not differentiate between the two. However, nowhere in article 27 are persons with disabilities themselves recognised as targeted by such awareness-raising and awareness-training campaigns and programmes.¹⁶⁶

An accessible labour market and workplace environment

The duty to provide accessible workplaces is expressly provided for in the chapeau of Article 27 (“open, inclusive and accessible labour market and workplace environment”) as well as article 9, paragraph 1 (a). Accessibility is, therefore, a prerequisite to the effective enjoyment of the right to access work.¹⁶⁷ The main aim of accessibility is the “identification and elimination of obstacles and barriers to accessibility”.¹⁶⁸

¹⁶⁵ See also CRPD, Preamble (m).

¹⁶⁶ See also Bruce, 2014, p. 249.

¹⁶⁷ United Nations Committee on the Rights of Persons with Disabilities, General Comment No. 2: Article 9: Accessibility [hereinafter CRPD General Comment No. 2, 2014], UN doc: CRPD/C/GC/2, 22 May 2014, para. 12.

¹⁶⁸ CRPD, article 9, para. 1.

The Human Rights Council Report offers, “the fact that a workplace is not accessible does not justify the failure to employ persons with disabilities”.¹⁶⁹

The Committee notes that an accessible labour market and workplace environment includes more than just workplaces themselves being physically accessible:

“Besides the physical accessibility of the workplace, persons with disabilities need accessible transport and support services to get to their workplaces. All information pertaining to work, advertisements of job offers, selection processes and communication at the workplace that is part of the work process must be accessible through sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication. All trade union and labour rights must also be accessible, as must training opportunities and job qualifications. For example, foreign language or computer courses for employees and trainees must be conducted in an accessible environment in accessible forms, modes, means and formats”.¹⁷⁰

The Human Rights Council also pays attention to inaccessible housing, which can deny persons with disabilities the opportunity to access employment.¹⁷¹

Accessibility translates into physical, informational and institutional accessibility.¹⁷² Paragraph 1 (a) covers physical accessibility to “[b]uildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces”. Paragraph 1 (b) covers accessibility to “[i]nformation, communications and other services, including electronic services and emergency services”.¹⁷³ Institutional accessibility stems from the overarching rule of non-discrimination. It includes the absence of discriminatory laws, regulations, customs and practices that hinder the effective and full accessibility of persons with disabilities.¹⁷⁴

Turning to what the specific obligations are and who bears them. The duty to provide an accessible workplace is proactive in nature; hence, it does not depend upon an individual claim from a person with disability/disabilities.¹⁷⁵ It befalls primarily the State, which is under an obligation of immediate implementation: “[t]o develop, promulgate and

¹⁶⁹ HRC Report, 2012, para. 26.

¹⁷⁰ CRPD General Comment No. 2, 2014, para. 41.

¹⁷¹ HRC Report, 2012, para. 26.

¹⁷² Lord, 2010, pp. 8-9.

¹⁷³ The Committee on the CRPD has provided further guidance, “[t]he other indoor and outdoor facilities, mentioned above, should include law enforcement agencies, tribunals, prisons, social institutions, areas for social interaction and recreation, cultural, religious, political and sports activities, and shopping establishments. Other services should include postal, banking, telecommunication and information services. CRPD General Comment No. 2, 2014, para. 17.

¹⁷⁴ CRPD, article 5 (2). See also CRPD General Comment No. 2, 2014, paras. 13 and 23.

¹⁷⁵ CRPD General Comment No. 2, 2014, para. 25.

monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public”,¹⁷⁶ and an obligation of progressive realisation, which “shall include the identification and elimination of obstacles and barriers to accessibility”.¹⁷⁷ In the words of the Committee, “States parties are obliged to ensure that persons with disabilities have access to the existing physical environment, transportation, information and communication and services open to the general public. However, as this obligation is to be implemented gradually, States parties should establish definite time frames and allocate adequate resources for the removal of existing barriers”.¹⁷⁸

Under paragraph 2 (b) the Convention transcends the State/private actors divide.¹⁷⁹ Therein lies the State obligation “[t]o ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities”. The Convention, therefore, obligates the State to impose minimum accessibility standards on private employers with the aim to create fully accessible workplaces in the private sector. The Committee further clarifies “[...] States parties should clearly prescribe the duties of the different authorities (including regional and local authorities) and entities (including private entities) that should be carried out in order to ensure accessibility. States parties should also prescribe effective monitoring mechanisms to ensure accessibility and monitor sanctions against anyone who fails to implement accessibility standards”.¹⁸⁰

This second-handed obligation on behalf of private employers is also facilitated by the State obligation “[t]o provide training for stakeholders on accessibility issues facing persons with disabilities”, “since a lack of accessibility is often the result of insufficient awareness and technical know-how”.¹⁸¹ The positive obligation to identify and eradicate environmental barriers on behalf of private entities in order to make facilities, including workplaces, accessible, should not be subject to a limitation on the basis of the entity’s size and economic capacity.¹⁸² On this issue the Committee also notes “[t]he obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not

¹⁷⁶ CRPD, article 9, para. 2 (a).

¹⁷⁷ CRPD, article 9, para. 1; The Committee on the CRPD provides “[b]arriers to access to existing objects, facilities, goods and services aimed at or open to the public shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility”. CRPD General Comment No. 2, 2014, para. 14.

¹⁷⁸ CRPD General Comment No. 2 (2014): paragraph 24.

¹⁷⁹ Mégret, Frédéric, *The Disabilities Convention: Towards a Holistic Concept of Rights* [hereinafter Mégret, 2008], *The International Journal of Human Rights*, Vol. 12, No.2, April 2008, p. 267; HRC Report, 2012, paras. 25-28.

¹⁸⁰ CRPD General Comment No. 2, 2014, para. 24.

¹⁸¹ CRPD General Comment No. 2, 2014, para. 19.

¹⁸² HRC Report, 2012, para. 28.

excuse the omission to do so by referring to the burden of providing access for persons with disabilities”.¹⁸³ That this provision refers generally to “stakeholders” points to the fact that training must also be provided to persons with disabilities themselves.

Institutional accessibility is to be implemented immediately.¹⁸⁴ The States Parties are obliged to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds” with regard to access in the labour market.¹⁸⁵ Persons with disabilities must be protected against discrimination based on their type of impairment and all other grounds recognised under Preamble (p).¹⁸⁶ To this end, States are to update their legislation or introduce new legislation abolishing old discriminatory practices and customs, and for a new robust legislative system to be set in place, a system that is conducive to securing freedom from unlawful discrimination for persons with disabilities.¹⁸⁷ CRPD article 5, paragraph 3 strengthens these provisions by introducing an additional State duty to “take all appropriate steps to ensure that reasonable accommodation is provided”.¹⁸⁸

An inclusive labour market and workplace environment

The term “inclusion” seems to lie in between the terms “open” and “accessible”. Full and effective participation and inclusion in the area of employment and all areas of society is a general principle of the CRPD.¹⁸⁹ Inclusion presupposes accessibility and an open labour market, because it requires an accessible, barrier-free workplace environment, physically as well as attitudinally.¹⁹⁰ The Human Rights Council in its training guide offers an interpretation of inclusion, which reads, “[i]nclusion requires an accessible, barrier-free physical and social environment. It is a two-way process that promotes the acceptance of persons with disabilities and their participation, and encourages society to open up and be accessible to

¹⁸³ CRPD General Comment No. 2, 2014, para. 25.

¹⁸⁴ CRPD, article 4, para. 1.

¹⁸⁵ CRPD, article 5, para. 2. The principle of non-discrimination is portrayed also as a concrete measure of realizing the right to access employment for persons with disabilities. Thus, it was chosen to be analysed as such in the present thesis. For a detailed account see below, section 3.3.2.

¹⁸⁶ CRPD, Preamble (p) lists unlawful grounds for discrimination in a non-exhaustive manner (“other status”): “Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status”

¹⁸⁷ CRPD, article 4, para. 1 (b).

¹⁸⁸ CRPD, article 5, para. 3; for more details on the issue of reasonable accommodation see below, section 3.3.3.

¹⁸⁹ CRPD, article 3 (c).

¹⁹⁰ Bruce, 2014, pp. 237-238.

persons with disabilities”.¹⁹¹ The responsibility to be inclusive implies a responsibility to actively include persons with disabilities. While the responsibility to be accessible mainly refers to the physical accessibility of the workplace “inclusion is not simply about physically placing persons with disabilities in the same space as persons without disabilities (for example, in the *workplace*). It is about mainstream society changing and adapting so that persons with disabilities can participate on an equal basis with others”.¹⁹²

3.3.2 Non-discrimination

The right to *access* employment in the open labour market is a right to equality of opportunity in competing for one.¹⁹³ A seminal tool in safeguarding the realisation of this right is the “prohibit[ion] [of] discrimination on the basis of disability with regard to [...] conditions of recruitment and hiring”.¹⁹⁴ Non-discrimination regarding *access* to work covers recruitment processes such as advertising, interviewing and other selection processes, hiring standards that place persons with disabilities at a disadvantage and recruitment decisions.¹⁹⁵ Article 2 reads:

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

Although this definition has been criticised for being broad and vague,¹⁹⁶ it is still put forward as the greatest contribution of the CRPD to international human rights law.¹⁹⁷ The CRPD has built upon the traditional understanding of non-discrimination, developing it further.¹⁹⁸

¹⁹¹ OHCHR Training Guide (2014): p.15.

¹⁹² OHCHR Training Guide (2014): p. 37, the guide referring to the right to education gives a classroom as an example, which in the case of the right to work would translate into a workplace.

¹⁹³ CRPD, article 27, para. 1.

¹⁹⁴ CRPD, article 27, para. 1(a).

¹⁹⁵ HRC Report, 2012, para. 22 points a-c.

¹⁹⁶ See Lawson, 2008, p. 63.

¹⁹⁷ See Kayess and French, 2008, p. 27.

¹⁹⁸ The principle of non-discrimination is a very familiar concept in international labour and human rights law, being a cross-cutting human rights principle and a fundamental labour standard. See Arnardóttir, 2009, p. 42; The right to non-discrimination is found in CDESCR, article 2, para. 2; UDHR, article 2; CCPR, article 2, para. 1; and ILO, Discrimination (Employment and Occupation) Convention No. 111, article 1.

Under the CRPD, “disability based discrimination”¹⁹⁹ is given an internationally binding definition,²⁰⁰ and the principle is broadened to cover all forms of discrimination, including denial of reasonable accommodation”.²⁰¹ In the wording, “all forms of discrimination” and “purpose or effect”, it is evident that the CRPD intended to cover both direct and indirect discrimination.²⁰² The Committee on the CRPD in the communication *S.C. v. Brazil* clarified that indirect discrimination is indeed a prohibited form of discrimination under the Convention “result[ing] from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate, but that disproportionately affects persons with disability”.²⁰³

Direct discrimination in access to employment covers instances where a person is treated less favourably than others on the ground of their impairment without the impairment being relevant to the individual’s professional performance. In other words, the person would be perfectly capable of carrying out the described tasks of the job in the same way as anyone else (able-bodied or not), despite the presence of his/her impairment. So, direct discrimination is concerned with how a recruitment decision is made or a job vacancy is advertised and it prohibits inconsistent treatment of persons who are in a comparable situation on the ground of an irrelevant characteristic they bear, such as an impairment.²⁰⁴ An example would be an advertisement for a job vacancy addressed explicitly to persons without impairment.

Although the CRPD does not contain a concrete definition of indirect discrimination, it has been dealt with quite extensively in the

¹⁹⁹ The International Human Rights Convention on the Rights of the Child (CRC) also includes disability as an unlawful ground for discrimination without, however, elaborating any further. CRC, article 2, para. 1.

²⁰⁰ CRPD along with CERD and CEDAW are the only core international human rights instruments that provide an explicit definition of discrimination: CRPD, article 2; CEDAW, article 1; CERD, article 1, para. 1.

²⁰¹ Due to the important role reasonable accommodation has for persons with disabilities in the employment context as a measure to ensure the right to access work, it has been accorded its own provision, under CRPD, article 27, para. 1 (i). This thesis also devotes a separate section on exploring this measure thoroughly, under 3.3.3.

²⁰² The first draft article on equality and non-discrimination made specific mention of indirect discrimination, however, this was not included in the final text for lack of consensus. On this discussion see Bruce, 2014, pp. 228-229, including Footnotes no. 365-368; Working Group draft text, Draft Article 7 on Equality and Non-Discrimination, para. 2 (b), including Footnote no. 24, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata5wgtext.htm>, latest accessed 1 November 2016.

²⁰³ *S.C. v. Brazil*, 2014, para. 6.4.

²⁰⁴ Waddington, Lisa and Hendriks, Aart, The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination [hereinafter Waddington and Hendriks, 2002], *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, 2002, pp. 406-407.

literature.²⁰⁵ Indirect discrimination is not concerned with the process of applying a rule or making a decision at the hiring stage nor with the employer's intentions to discriminate, but with the disadvantageous outcome such actions may have.²⁰⁶ It lurks, therefore, behind ostensibly neutral criteria, which are not inherently connected to the actual tasks of the position one applies for. Hence, in the case of disability, indirect discrimination refers to rules, decisions and intentions that would deny a person with a given impairment a job, although the said impairment could not possibly affect the employment performance of the person being indirectly discriminated. To clarify, an example of indirect discrimination would be the following: a job advertisement for a teacher's position lists a driver's license as a requirement. Due to the fact that being able to drive a car would not negate an applicant's capability to teach, this requirement constitutes indirect discrimination as it clearly leaves out persons with impairments limiting their ability to have a driver's licence, without expressly excluding this group.

Article 27, paragraph 1 (a) establishes the State duty to prohibit discrimination and paragraph 1 (b) the duty to protect the right to equality of opportunity on an equal basis. Together these duties make up the right to freedom from discrimination. According to article 4, paragraph 1 (a), this right imposes on the State the duty of immediate implementation "[t]o adopt all appropriate legislative, administrative and other measures [...]". The State is under an obligation to immediately introduce appropriate national legislation that prohibits discrimination at the recruitment and hiring stage, in both the public and private sector.²⁰⁷ That the State must regulate the conduct of private employers is evident in both article 27, which does not differentiate between the two sectors, and article 4, paragraph 1 (e), which specifically calls for the State "[t]o take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise". For the prohibition of discrimination to be effective, it must be combined with public awareness-raising campaigns targeting personnel in charge of recruitment and hiring in both the public and private sector. This obligation is one of immediate implementation.²⁰⁸

The first draft of article 5 on equality and non-discrimination contained a paragraph 3, which read "[d]iscrimination does not include a

²⁰⁵ For a thorough read on issues of equality and non-discrimination, including indirect discrimination see: Farrior, Stephanie (Ed.) *Equality and Non-Discrimination under International Law*, Vol. II, Ashgate, Dorchester, 2015.

²⁰⁶ Waddington and Hendriks, 2002, pp. 407-408.

²⁰⁷ Although the right to work is a social and economic right and thus it is subjected to progressive realisation, the duty not to discriminate is of immediate application according to CRPD, article 4 para. 2.

²⁰⁸ CRPD, article 8, para.1.

provision, criterion or practice that is objectively and demonstrably justified by the State Party by a legitimate aim and the means of achieving that aim are reasonable and necessary”.²⁰⁹ Already among the members of the Working Group there were discussions pertaining to the purpose and scope of this provision and whether it should be included in the first place.²¹⁰ During the following discussions this paragraph met strong resistance from NGOs and was consequently never included in the final text of CRPD article 5.²¹¹ The World Network of Users and Survivors of Psychiatry, argued:

“The provision could be interpreted as meaning that deprivation of human rights and fundamental freedoms of people with disabilities will not be recognized as discrimination if a State Party can justify it by a legitimate aim achieved by reasonable and necessary means. Those of us preparing this Convention know that perpetrators of discrimination have often attempted to justify deprivation of our most precious rights (such as life, liberty, mental and bodily integrity, right to vote) by devaluing the existence and humanity of people with disabilities compared with non-disabled people. To give governments a loophole like the one presented in the draft text is simply unacceptable since it will push us backwards from rights and interpretations of rights that we already have”.²¹²

However, although such a limitation was not included in the end, the Committee in its jurisprudence has clearly and unequivocally

²⁰⁹ Working Group draft text, Draft Article 7 on Equality and Non-Discrimination, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata5wgtext.htm>, latest accessed 1 November 2016.

²¹⁰ Working Group draft text, Draft Article 7 on Equality and Non-Discrimination, Note 26 reads: “This paragraph has not appeared in any of core international human rights treaties, although the concept has been developed in the jurisprudence of the treaty bodies. The Human Rights Committee has included it, for example, in its general comment on Article 26 of the International Covenant on Civil and Political Rights. The Working Group discussed three options for the consideration of the Ad Hoc Committee: a) The paragraph should not appear in the text at all; b) the paragraph should be included only as an exception to the specific prohibition on indirect discrimination, and c) the paragraph should apply to all forms of discrimination. In addition to those options, some members proposed adding the following phrase to the end of the paragraph: “...and consistent with international human rights law”” available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata5wgtext.htm>, latest accessed 1 November 2016.

²¹¹ The NGOs that categorically asked for this provision to be deleted were European Disability Forum, Japan Disability Forum, Children’s Rights Alliance for England, World Blind Union and World Network of Users and Survivors of Psychiatry, see Comments, proposals and amendments submitted electronically on Article 5 – Equality and Non-Discrimination, Third Session, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm>, latest accessed 1 November 2016.

²¹² The World Network of Users and Survivors of Psychiatry, Comments, proposals and amendments submitted electronically on Article 5 – Equality and Non-Discrimination, Third Session, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm>, latest accessed 1 November 2016.

accepted that all forms of discrimination, including denial of reasonable accommodation, are subjects to such limitation. This has long been an internationally accepted limitation of the principle of non-discrimination provided for in article 1 paragraph 2 of the ILO Discrimination (Employment and Occupation) Convention No. 111, which reads: “Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”.²¹³ This provision introduces a reality check, meaning that able bodied or not, not everyone can do any available job.

Turning to the obligation to protect the right of persons with disabilities to freedom from discrimination on an equal basis, it is important to keep in mind that when an individual has experienced discrimination (irrespective of the form of discrimination), she/he can seek legal protection.²¹⁴ Under article 27, paragraph 1 (b) and article 5, paragraph 2 the State “[...] shall [...] guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”.²¹⁵ This measure calls for States to raise awareness and promote awareness-training programmes among the judiciary to combat stereotypes and nurture receptiveness of the rights of persons with disabilities as well as raise awareness regarding indirect discrimination, which is a more “obscure” form of discrimination persons with disabilities suffer from. It also calls for the State to adjust its legislation to mean that it is not necessary for the claimant to establish a discriminatory intention.²¹⁶ A noteworthy, albeit not legally binding interpretation on this issue, has been offered by human rights and international law experts, who in their Declaration of Principles on Equality, argued for the existence of an international standard on

²¹³ International Labour Organization, Convention No. 111 (Employment and Occupation),

²¹⁴ CRPD, article 5, para. 2; See Equal Rights Trust, Declaration of Principles on Equality, available at: <http://www.equalrightstrust.org/content/declaration-principles-equality>, on Principle 18, which reads: “Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality” (latest accessed 1 November 2016).

²¹⁵ “On all grounds” refers to CRPD, Preamble (p): “Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status” and (q): Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation”. Although issues of great importance they will not feature in the present discussion. See part 1.3 on limitations above.

²¹⁶ This is implied in the wording “purpose or effect”, see Shelton, Dinah, Prohibited Discrimination in International Human Rights Law, in Farrior, Stephanie (Ed.) Equality and Non-Discrimination under International Law, Vol. II, Ashgate, Dorchester, 2015, p. 355.

enforcing the right to non-discrimination.²¹⁷ Principle 21 on evidence and proof states: “the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (*prima facie* case), it shall be for the respondent to prove that there has been no breach of the right to equality.” Lastly, this duty to protect also imposes an obligation of immediate implementation to take appropriate legislative measures to prohibit the victimisation of persons with disabilities. In other words, it should be provided for under national legislation that persons with disabilities who take legal action against their employer (State or private) should not be subjected to unfair treatment.²¹⁸

3.3.3 Reasonable accommodation

Reasonable accommodation, or otherwise known as reasonable adjustments, existed in national legislations, such as the American with Disabilities Act 1990 (USA) or the Disability Discrimination Act 1995 (UK), as a measure to promote the employment of persons with disabilities before the CRPD’s arrival.²¹⁹ The CRPD’s contribution was twofold; not only does it connect reasonable accommodation to the principle of non-discrimination but also it makes it internationally legally binding for all States parties to the Convention to adopt domestically, in a uniform way.²²⁰

Article 2 defines reasonable accommodation as “necessary and appropriate modification and adjustments 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”. Anna Bruce clarifies: “the gist of this concept is that it creates a right for an individual to demand alterations to the social context, be it the built environment, modes of

²¹⁷ Equal Rights Trust, Declaration of Principles on Equality, available at: <http://www.equalrightstrust.org/content/declaration-principles-equality>, Principle 21 (latest accessed 1 November 2016).

²¹⁸ CRPD, article 27, para. 1 (b) postulates that State Parties are to legislate in order to “[p]rotect the rights of persons with disabilities, on an equal basis with others, [...] including protection from harassment, and the redress of grievances”.

²¹⁹ Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328, 1990, available at: <https://www.ada.gov/pubs/adastatute08.pdf>, latest accessed 1 November 2016; Disability Discrimination Act 1995 (UK) http://www.legislation.gov.uk/ukpga/2005/13/pdfs/ukpga_20050013_en.pdf, latest accessed 1 November 2016.

²²⁰ See e.g. Clifford, Jarlath, The UN Disability Convention and its Impact on European Equality Law, The Equal Rights Review, Vol. 6, 2011, p. 21, available at: <http://www.corteidh.or.cr/tablas/r27132.pdf>, latest accessed 1 November 2016); Lord and Brow, 2011, p. 273.

communication or any other standard for conducting life”.²²¹ Anna Lawson offers, “[t]he presence of a reasonable accommodation demand within the CRPD’s conception of discrimination [...] makes it absolutely plain that States Parties and all other organisations responsible for services or activities relating to Convention rights must take positive steps to identify barriers which their operations create for disabled people and consider how those obstacles might reasonably be removed”.²²²

Apart from being an obligation of general application,²²³ article 27, paragraph 1 (i) clearly makes reasonable accommodation instrumental in the enjoyment of the right to access work for persons with disabilities. Article 27, 1 (i) obligates the State to “[e]nsure that reasonable accommodation is provided to persons with disabilities in the workplace”, without limiting the extent of this obligation to the public sector. The State must, therefore, provide reasonable accommodation in the public sector in its capacity as the employer and ensure that private employers do the same in the private sector. To this end, the State is under an immediate obligation to adopt, extend or update all appropriate national legislation, according to which persons with disabilities have the right to be reasonably accommodated in the workplace (be it private or public) and the employers (public or private) have a duty to provide reasonable accommodation. Also, it befalls the States to ensure that the denial of reasonable accommodation constitutes unlawful discrimination.²²⁴ Moreover, States should take all appropriate measures, including legislation, to modify or abolish laws, regulations, customs and practices that would make flexibility in employment, as a form of reasonable accommodation, impossible.²²⁵ To facilitate the implementation of the right to be accommodated in the workplace, the State is under an immediate obligation to raise awareness among (public and private) employers to inform them of the duties and entitlements connected to reasonable accommodation.²²⁶

The right to be accommodated is not absolute. Firstly, it is subject to the general “inherent job requirements” limitations. The Committee has noted that the main objective of reasonable accommodation is “to compensate for factual limitations with a view to promoting the employment of persons with disability, so that the lack of factual capacity to perform such functions can therefore not be considered as the main obstacle

²²¹ Bruce, 2014, p. 228.

²²² Lawson, 2008, pp. 66-67.

²²³ CRPD, articles 2; 5, para. 3; and 27, para. 1 (i).

²²⁴ CRPD, articles 27, para. 1 (i); 2; 5, para. 3; and 4, para. 1 (a) and (b); Kayess and French, 2008, p. 27.

²²⁵ CRPD, article 4 (1) (b); HRC Report, 2012, para. 31.

²²⁶ CRPD, articles 27 (i); and 8; Lawson, 2008, p. 65.

to the employment of a person”.²²⁷ However, professional capacity to perform the necessary tasks if/when enabled is still an inherent requirement for the legality of a demand of reasonable accommodation in the workplace. “The test of reasonableness and proportionality should therefore ensure, *inter alia*, that (i) the measures of accommodation were requested to promote the employment of a person with a disability, with the professional capacity and experience to perform the functions corresponding to the position for which he or she applied”.²²⁸

Secondly, the duty to provide reasonable accommodation is subject to the limitations of reasonableness and proportionality.²²⁹ While the Committee has noted that on this issue States enjoy a certain margin of appreciation, some common elements have been identified by the Committee²³⁰ as well as in the relevant literature. First, being an individual measure, the modification or adjustments need to be appropriate and necessary for the specific individual who requested them in the particular work environment (“necessary and appropriate modification and adjustments [...] where needed in a particular case”).²³¹ Second, although it is not necessary that the adjustments would be costly,²³² if they do impose financial expenditure on the employer, the test of proportionality is triggered, which must take into consideration possible additional state subsidies and the financial capacity of the employer.²³³ On this issue of proportionality Kayess and French hold, “[t]he terms ‘disproportionate’ and ‘undue burden’ appear to have been intended by the Ad Hoc Committee as alternatives, but have been drafted as additive, effectively creating a two element test that may allow the obligation to be evaded at the lower of either threshold (which may vary according to context).”²³⁴ The Committee has endorsed this interpretation in the communication of Jungelin vs Sweden, by being satisfied with the defence of the employer being based solely on the

²²⁷ United Nations Committee on the Rights of Persons with Disabilities, Marie-Louise Jungelin v. Sweden [hereinafter Marie-Louise v. Sweden, 2014], Communication No. 5/2011, Views adopted by the Committee at its Twelfth Session, 15 September - 3 October 2014, UN doc: CRPD/C/12/D/5/2011, 14 November 2014, appendix, joint dissenting opinion, para. 4.

²²⁸ Marie-Louise v. Sweden, 2014, para. 4.

²²⁹ CRPD, article 2: “[...] not imposing a disproportionate or undue burden”.

²³⁰ Marie-Louise v. Sweden, 2014, para. 10.5.

²³¹ CRPD, article 2.

²³² HRC Report, 2012, para. 33 including Footnote 16: “Research by the United States Department of Labor, Office of Disability Employment Policy found that 56 per cent of employers who gave information related to the cost of accommodations said that the accommodations needed by their employees were completely free of costs. See Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact”, Accommodation and Compliance Series, Updated 09/01/11”. The Job Accommodation Network’s findings are available online at: http://www.nwlincs.org/mtlincs/opi/L2A/workplace_accommodations_LowCostHighImpact.pdf (latest accessed 31 October 2016).

²³³ Lawson, 2008, pp. 64-65.

²³⁴ Kayess and French, 2008, p. 27.

argument that the modifications needed to accommodate the claimant would impose an undue burden on the employer (Social Insurance Agency).²³⁵ Third, the reasonableness and proportionality test shall depend on the potential beneficial effects of the adjustments on future or other employers with disabilities in the workplace.²³⁶

Moving to the question of how the duties under the right to be reasonably accommodated are to be implemented. Reasonable accommodation is a rebellious form of non-discrimination, which has evolved from a traditional civil and political freedom. It moves beyond negative obligations to refrain to establish positive duties on both the State as an employer and any private employer, albeit in an indirect way.²³⁷ In other words, it calls for restorative action and not merely an obligation to refrain from actively disadvantaging a person. According to international law, measures of non-discrimination are to be implemented immediately. However, due to the positive obligations reasonable accommodation entails, its immediate implementation could be questioned. As such, it would be treated as a social right, to be achieved progressively and to the maximum of the employer's resources.²³⁸ However, since measures of reasonable accommodation do not necessarily accrue financial burden,²³⁹ and "since the opposite party shall be discharged of obligations where reasonable accommodation imposes a disproportionate burden, there is no need to consider reasonable accommodation as social rights and interpret it as allowing progressive realization".²⁴⁰

The duty to provide reasonable accommodation is not a proactive measure.²⁴¹ The Committee on CRPD notes, "[t]he duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context".²⁴² Bruce makes it clear that it is the individual who triggers the measures of reasonable accommodation, while Lawson focuses on the fact that it is the employer

²³⁵ Marie-Louise v. Sweden, 2014, paras. 10.6-11.

²³⁶ This requirement has been contested, see Marie-Louise v. Sweden, 2014, including joint dissenting opinion and individual dissenting opinion.

²³⁷ Lawson, 2008, p. 64.

²³⁸ CRPD, article 4, para. 2.

²³⁹ Anna Lawson clarifies that many of the times "changes required by reasonable accommodation duties include adaptations to standard practices or procedures carrying no obvious financial cost" in Lawson, 2008, p. 64.

²⁴⁰ Japan Disability Forum, Comments, proposals and amendments submitted electronically on Article 5 – Equality and Non-Discrimination, Seventh Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata5sevscomments.htm>, latest accessed 1 November 2016.

²⁴¹ Fasciglione, 2015, p. 147.

²⁴² CRPD General Comment No. 2, 2014, para. 26.

who is responsible to design the accommodation.²⁴³ So, the duty to identify and adjust particular workplace circumstances according to the needs of the individual falls upon the employer, however, the duty is triggered only after a particular individual *demand*ed to be accommodated. These fine nuances contained in the concept of reasonable accommodation highlighted in the above definitions additionally give rise to an important issue regarding the visibility of impairment. More specifically, in cases where the impairment is obvious, the request might not be necessary to be overtly voiced, whereas in cases where the impairment is invisible (e.g. mental disorders, HIV/Aids, or other conditions that do not have physical manifestations), the job seeker must disclose the condition and demand accommodation. It is stressed once again that in both instances the employer is the one under the obligation to assess the situation and design the adjustment according to the needs expressed by the person with the impairment. Nevertheless, because of its character as an individual measure, “[t]his process [of identifying appropriate adjustments] should be interactive and participatory to be effective, and all information related to the reasonable accommodation request should be handled with confidentiality”.²⁴⁴

Lastly, this duty to ensure that reasonable accommodation is provided to persons with disabilities covers also a duty to legislate accordingly so that persons with disabilities have the opportunity to seek legal protection in light of a denial of reasonable accommodation.²⁴⁵ States are also under an obligation to ensure that persons with disabilities have equal recognition before the law and equal access to justice, so as to be equally protected against discrimination in case of denial of reasonable accommodation.²⁴⁶ As stated above, the right to be accommodated is not absolute. For this reason, effective legal protection presupposes the State obligation to train and raise awareness on issues pertaining to disability and reasonable accommodation among the judiciary, because the right to reasonable accommodation can only be sufficiently safeguarded when the employers’ defence is not meekly accepted by the competent courts.²⁴⁷ In other words, having a right that would never or rarely be recognised before the competent Courts is like having no such right at all. If revolutionary legislative efforts are not coupled with appropriate training for the judiciary

²⁴³ See the definitions above offered by Bruce and Lawson, including Footnotes nr. 221 and 222.

²⁴⁴ HRC Report, 2012, para. 34.

²⁴⁵ See Footnote nr. 227.

²⁴⁶ CRPD, articles 27, para. 1 (i); 4 (a); and 5, paras. 1 and 2.

²⁴⁷ CRPD, article 4, para. 1 (i) and article 8, paras. 1 and 2 (a) and (d), CRPD; Reasonable accommodation is not an absolute measure, but it is subjected to a defence of reasonableness and proportionality, which is further elaborated under *limitations to the principle of non-discrimination – lawful distinctions* below.

to be sensitive towards the rights of persons with disabilities, the laws will end up nothing but mere declarations of good will.

3.3.4 Measures of affirmative action

Article 5, paragraph 4 covers positive discrimination. “Specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention”. Measures of affirmative action seek to compensate for structural inequalities that non-discrimination cannot address, tilting the balance in favour of persons who experience societal exclusion, such as persons with disabilities.²⁴⁸ According to international standards, these measures are of temporary nature and are to be lifted when the structural disadvantage is addressed.²⁴⁹ With this in mind, draft article 7, paragraph 5 on equality and non-discrimination read: “[...] those measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved”. The Working Group showed apprehension regarding a time limit in relation to measures of affirmative action in the particular context of disability.²⁵⁰ During the negotiations, the European Disability Forum pointed out that while race and gender would call for temporary positive measures, disability creates needs that are permanent in nature, thus calling for measures that are not time-limited.²⁵¹ Given that the purpose of the Convention is the full and effective inclusion and participation of persons with disabilities in all areas of life, these concerns were immediately taken into account in drafting the final text of article 5, paragraph 4 CRPD free from any time-limitation.

Article 27 on work and employment specifically connects measures of affirmative action to the realisation of the right to access work for persons with disabilities. Paragraph 1 (g) covers the public sector and paragraph 1 (h) covers the private sector. The former provides the State obligation to “[e]mploy persons with disabilities in the public sector”. The latter creates the State obligation to “[p]romote the employment of persons with disabilities in the private sector through appropriate policies and

²⁴⁸ Moeckli, 2015, pp. 55-56.

²⁴⁹ International Labour Organization, *Equality at Work: Tackling the Challenges*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, ILO, Geneva, 2007, para. 225.

²⁵⁰ Working Group draft text, draft article 7 on Equality and non-discrimination, paragraph 5, Footnote 29, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata5wgtext.htm>, latest accessed 1 November 2016.

²⁵¹ European Disability Forum, Comments, amendments and proposals submitted electronically on Article 5 – Equality and Non-Discrimination, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm>, latest accessed 1 November 2016.

measures, which may include affirmative action programmes, incentives and other measures”.

Paragraph 1 (g) creates a positive obligation to take necessary steps to employ persons with disabilities in the public sector. Under draft article 22 (i) this obligation was formulated as ensuring “that persons with disabilities have equal opportunity to employment in the public sector”.²⁵² During the Sixth Session, the EU even proposed this provision to be deleted.²⁵³ However, the provision did not only become part of the final text of article 27, it also received an even stronger and categorical formulation. This, points to the fact that the will of the drafters was to place greater expectations upon the State-employer echoing the urgency of the claim of persons with disabilities to be part of the mainstream labour force. These measures are to be realised progressively, according to article 4, paragraph 2. The core immediate obligation not to discriminate in conditions of recruitment and hiring, however, remains.

The fact remains that the analogous provision addressing the private sector is not categorically formulated and it is expressly connected to incentives and policies. On the issue of policies, the State is under an immediate obligation to design and implement policies that would promote the employment of persons with disabilities in the private sector. These policies are to be reinforced by awareness-raising and awareness-training programmes, targeting the private sector.²⁵⁴ On the issue of incentives, the State obligations vary in immediacy according to the economic burden that such incentives might accrue. The Human Rights Council in its report on the work and employment of persons with disabilities stipulates that data collected through State submissions suggests that the most widely used positive measure is quotas.²⁵⁵ Other measures that have been reported by States include “subsidies, tax breaks, preference in public procurement, [...] ensuring that persons with disabilities are adequately represented; redefining the standard criterion for employment or promotion; and outreach measures targeting individuals or specific groups of persons with disabilities”.²⁵⁶

Due to the wide use of quotas as a measure of affirmative action throughout the world, this issue was discussed during the CRPD’s

²⁵² Working Group draft text, Draft article 22 on the Right to Work, point (i), available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27wgtext.htm>, latest accessed 1 November 2016.

²⁵³ European Union, Comments, proposals and amendments submitted electronically on Article 27 - Right to Work, Sixth Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27sscomments.htm>, latest accessed 1 November 2016.

²⁵⁴ CRPD, article 8, paras. 1 and 2 (a) (ii), (iii) and (d).

²⁵⁵ HRC Report, 2012, paras. 36-37.

²⁵⁶ HRC Report, 2012, para. 39.

negotiations with much discrepancy of opinion.²⁵⁷ The first draft of the article was: “encourage employers to hire persons with disabilities, such as through affirmative action programs, incentives and quotas”.²⁵⁸ Since the first draft, the Working Group noted that “[t]he Ad Hoc Committee may wish to consider the appropriateness of specifically mentioning quotas as a possible measure in this draft Article”.²⁵⁹ The comments submitted subsequently varied. Costa Rica and the ILO, among others, were proposing the explicit inclusion of quotas, whereas Japan Disability Forum, the EU and the Landmines Survivors Network proposed a broader terminology avoiding getting into the controversy surrounding quotas.²⁶⁰ Specifically, the Landmines Survivors Network submitted: “With further regard to paragraph (f) and Footnote 92, the Ad Hoc Committee may wish to consider the removal of any specific examples (e.g. quotas), and utilizing a broader term (such as “positive measures”) which could, but need not necessarily, include quotas.”²⁶¹ This quote from the Landmines Survivors Network reflects the heart of the “quota controversy” which has been eloquently depicted by Patricia Thornton of the International Labour Office:

“With the passage of time, the quota approach has become only one among a package of policy measures working simultaneously to promote employment of disabled people in the mainstream: rehabilitation, employment preparation and placement services; job-coaching and other support on the job; financial incentives to employers and to employees; grants for assistive devices and for adaptation of work and workplace; promotion of attitudinal change and voluntary activity on the part of employers; and legislation to outlaw discrimination on grounds of ill-health or disability. Within this gamut of policies, quota systems have lost their exclusive central position and are increasingly seen as potentially viable only when supported by complementary measures. Indeed, the restrictive scope of the employment obligation, limited administrative capability and inadequate sanctions can severely limit the impact of the quota policy approach and reduce its credibility”.²⁶²

²⁵⁷ Report by the Chairman, Draft Article 22 – Right to Work, Sixth Session, para. 102, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27ssrepchair.htm>

²⁵⁸ Working Group Draft Text, Draft article 22 Right to Work, point (d), available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27wgtext.htm>, latest accessed 1 November 2016.

²⁵⁹ Working Group Draft Text, Draft article 22 Right to Work, point (d), including Footnote 90, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27wgtext.htm>, latest accessed 1 November 2016.

²⁶⁰ See Comments, proposals and amendments submitted electronically on Article 27 – Right to Work, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27tscomments.htm>, latest accessed 1 November 2016.

²⁶¹ Landmines Survivors Network, Comments, proposals and amendments submitted electronically on Article 27 – Right to Work, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27tscomments.htm>, latest accessed 1 November 2016.

²⁶² Thornton, Patricia, Employment Quotas, Levies and National Rehabilitation Funds for Persons with Disabilities: Pointers for Policy and Practice, Report Prepared on Behalf of

This argument prevailed and the final text was formulated as “[p]romote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures”.²⁶³

3.3.5 Assistance and placement services

Article 27, paragraph 1 (d) and (e) stipulate that the promotion of employment opportunities for persons with disabilities is to take the form of measures to ensure effective access to placement services and assistance in finding and obtaining employment. The Committee clarified that these promotion measures need to meet a certain standard set by articles 27, paragraph 1 (d) and (e), 3 (a), (b), (c) and (e), 4, paragraph 1 (a) and (b) and article 5, paragraph 1 of the Convention.²⁶⁴ Accordingly, States are under the duty of immediate effect; to take appropriate legislative measures to provide a legally binding claim to effective access to placement services and assistance in finding and obtaining employment, while ensuring that the present legislative and customary framework does not make these rights practically unattainable.²⁶⁵ Hence, these measures are not pro-active in nature, but require the active involvement of persons with disabilities, meaning that the State needs to set up the mechanism for persons with disabilities to have effective access to assistance and placement service, but it is up to the each individual who is entitled to them to require these services.

The first standard that these services are supposed to meet is “[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons with disabilities.”²⁶⁶ This implies that the assistance and placement services are to be tailored to the particular needs and abilities of every person. Autonomy and independence are contingent upon stable employment. That is because autonomy and independence depend upon economic autonomy and independence. This requires that the particular individual characteristics and circumstances of each person are taken into account so that the

the International Labour Office, Geneva, available through Cornell University ILR School, Digital Commons, GLADNET Collection, January 1998, <http://digitalcommons.ilr.cornell.edu/gladnetcollect/84/>, latest accessed 1 November 2016, p. 9.

²⁶³ CRPD, article 27, para. 1 (h).

²⁶⁴ United Nations Committee on the Rights of Persons with Disabilities, *Liliane Gröninger v. Germany* [hereinafter *Liliane Gröninger v. Germany*, 2014], Communication No. 2/2010, Views adopted by the Committee at its 11th session, 31 March - 11 April 2014, UN doc: CRPD/C/D/2/2010, 7 July 2014, para. 6.3.

²⁶⁵ CRPD, article 4, para. 1 (a) and (b).

²⁶⁶ CRPD, article 3 (a).

placement and assistance can lead to a job that would be appropriate, i.e. would have prospects of employment stability. These measures are also to show respect for the inherent dignity of the individual by respecting his/her freedom of choice. Thus, these services are never to coerce in any way their users-persons with disabilities. These requirements raise the issue of disability-awareness and a concomitant absence of prejudice and negative preconceived notions among persons providing these services.²⁶⁷ The State is under an obligation of immediate effect “[t]o promote the training of professionals and staff working with persons with disabilities in the rights recognized under the present Convention so as to better provide the assistance and services guaranteed by those rights”.²⁶⁸

The second standard these measures are to meet is non-discrimination.²⁶⁹ The State must ensure that persons with disabilities are not discriminated against when trying to access these services, which can be state- or private-run. Discrimination must be prohibited not only when these services treat persons with disabilities unfairly compared to persons without disabilities but also when persons with certain kinds of impairments fare worse than others.

The third standard is that these measures are to facilitate this group’s “[f]ull and effective participation and inclusion in society”.²⁷⁰ This is intimately connected to the first standard, as a sustainable placement would lead to sustainable inclusion and participation in the economic sphere of society, as well as in other areas of life that are dependent on that. Moreover, this standard places inclusion requirements that need to be flexible; measures like these must respect the diversity of persons with disabilities and ensure that they are available to persons who are in need of more intensive support as well as to individuals that are more capable.²⁷¹ Neither factual limitations nor personal efforts to further improve one’s employment opportunities should be grounds for denying a person access to assistance or placement services.²⁷² In other words, these services should not be denied to persons who have made efforts to find appropriate jobs or to improve their employment opportunities on their own with the view that State’s resources should not be regarded as wasted on cases that show empowerment and signs of pro-activeness. The Convention is there for *all* persons with disabilities to utilize and in no way should those who put in personal efforts and show levels of competency be “penalised” by being denied such services.

²⁶⁷ CRPD, article 8.

²⁶⁸ CRPD, article 4, para. 1 (i).

²⁶⁹ CRPD, article 3 (b).

²⁷⁰ CRPD, article 3 (c).

²⁷¹ CRPD, Preamble (i) and (j).

²⁷² See also *Liliane Gröninger v. Germany*, 2014, paras. 6-7.

3.3.6 Measures targeting employability

Non-discrimination and affirmative action measures both address the world persons with disabilities interact with, on an individual and a societal scale respectively. Next to identifying disabling, discriminatory attitudes and social and environmental barriers as the problems denying persons with disabilities a place in the open labour market, article 27 of the Convention includes an array of rights aimed at enabling the individual to enter the open labour market by addressing her/his *employability*, adding personal flaws or shortcomings to the equation of exclusion.²⁷³ As was shown above, the professional capacity to perform what is inherently required in a particular job is absolutely necessary for a person to even be considered as a job seeker with an opportunity to get a job in the open labour market.²⁷⁴ Employability can be roughly defined as the employee's skills arsenal, skills to enable one to get a job, any job, and it includes education, practical skills and social skills.²⁷⁵ Having or developing one's employability is construed as a precondition of that person's right to access work.

The specific measures included under article 27 that target employability are the State obligation: **a.** to provide "effective access to general technical and vocational guidance programmes [...] and vocational and continuing training";²⁷⁶ **b.** to promote "vocational and professional rehabilitation";²⁷⁷ and **c.** to promote "the acquisition of work experience in the open labour market".²⁷⁸

To provide effective access to general technical and vocational guidance programmes [...] and vocational and continuing training"²⁷⁹ and to promote "vocational and professional rehabilitation" entails the immediate obligation to have effective and appropriate legislation in place for these rights to be legally binding.²⁸⁰ Also, to extend the effect of non-discrimination laws as to cover access in these facilities and programmes, explicitly providing for a right of persons with disabilities to be reasonably accommodated, in order to be enabled to take part in these activities and

²⁷³ CRPD, article 27 (1) (d), (j) and (k).

²⁷⁴ This is part of the inherent job requirements that would disregard any claim on unlawful discrimination. See sections 3.3.2 and 3.3.3.

²⁷⁵ Brewer, Laura Enhancing Youth Employability: What? Why? And How?, International Labour Office, Skills and Employability Department, ILO, Geneva, 2013, pp. 1-2.

²⁷⁶ CRPD, article 27 (1) (d).

²⁷⁷ CRPD, article 27, para. 1 (k); The ILO was the first to pay international legal attention to the relationship between employment participation and employability. Vocational Rehabilitation and Employment Convention No. 159, article 1, para. 2 reads: "For the purposes of this Convention, each Member shall consider the purpose of vocational rehabilitation as being to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society".

²⁷⁸ CRPD, article 27, para. 1 (j).

²⁷⁹ CRPD, article 27, para. 1 (d).

²⁸⁰ CRPD, articles 27, para. 1 (d), (e), (j) and (k); and 4, para. 1 (a).

programmes.²⁸¹ In cases where these services are run by private entities, the State is under an immediate obligation to set legally binding minimum standards and guidelines and to monitor and ensure that they are effectively followed and implemented.²⁸² Further, the State must take positive steps to create these opportunities or give incentives or material support to the private sector to realise that. This is a duty subjected to progressive realisation.²⁸³

The criterion of effectiveness implies that these measures include the duty on behalf of the State to design and run awareness raising campaigns on these issues as well as on the needs and rights of persons with disabilities targeting the professionals working in vocational and professional rehabilitation services, providing technical and vocational guidance services and training.²⁸⁴ The services aiming at enhancing the employability of persons with disabilities must be aligned with these needs and must be based upon the “recognition of the skills merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market”, so as to effectively afford persons with disabilities a real opportunity to compete in the open labour market.²⁸⁵

It is important to distinguish between the aims of “general technical and vocational guidance programmes [...] and vocational and continuing training” and those of “vocational and professional rehabilitation”. They both target the individual, however the former are measures of capacity building that do not concern the individual’s impairment *per se*, while the latter can involve even medical interventions that aim to “attain and maintain maximum independence [and] full physical, mental, social and vocational ability”.²⁸⁶ In other words, rehabilitation services intend to enhance or maintain the level of functionality in the body and mind of persons with disabilities.

²⁸¹ CRPD, articles 1 (d), (e), (j) and (k); 3 (b), (c); 4, para. 1 (b), (e); and 5.

²⁸² CRPD, article 4, para. 1 (a), (e) and (f) and article 9, para. 2 (a) and (b).

²⁸³ CRPD, article 4, para. 2.

²⁸⁴ CRPD, articles 27, para. 1 (d), (e), (j) and (k); 4, para. 1 (i); and 8.

²⁸⁵ CRPD, article 27, para. 1 (d), (e), (j) and (k); 3 (c); Preamble (j); 8, para. 2 (a) (iii); and Preamble (m). On this issue the Human Right Council Report notes that “[o]ften, however, such training tends to take place in separate settings and frequently addresses skills and activities that are not demanded by the labour market and guided by low expectations in terms of what persons with disabilities can do. Consequently, persons with disabilities may be trained for many years without any expectation of inclusion in the open labour market. The principal objective of providing technical and vocational training to persons with disabilities is to enhance their employability to ensure that they are competitive in the open labour market on an equal basis with others. Hence, States should ensure that persons with disabilities are provided with vocational training in inclusive settings and that the most marginalized groups, such as persons with intellectual or psychosocial disabilities, are included”, HRC Report, 2012, paras. 47-48.

²⁸⁶ CRPD, article 26, para. 1.

The general principle of freedom to make one's own choices dictates that such services be provided in the absence of any coercion.²⁸⁷ The general principle of full and effective participation and inclusion in society creates a duty on behalf of the State to ensure that such services are both open and appropriate. The former means that these services are part of the mainstream society, as in they are addressed to both persons with and without disabilities, hence, they do not act as another excuse to further segregate persons with disabilities.²⁸⁸ Such programmes and services must also meet the general accessibility criteria set by article 9. The latter entails that they are specialized, as in they are appropriately trained to address the specific needs of persons with all different kinds of impairments with the aim of imparting relevant skills that would actually increase their chances of getting in the *open* labour market.²⁸⁹

Article 27, paragraph 1 (d) and (k) read together with article 26 on habilitation and rehabilitation paragraph 1 (a) further prescribe that “these services and programmes [...] [b]egin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths”. This clearly calls for an alignment of goals for both health services and rehabilitation and vocational training guidance services and programmes with the explicit aim of full and effective participation and inclusion in society, including the open labour market, as society's economic area.²⁹⁰

The measure under article 27, paragraph 1 (j) asks of the State to “[p]romote the acquisition by persons with disabilities of work experience in the open labour market”. Work experience is a formal qualification that job seekers with impairments lack most often.²⁹¹ This provision aims at covering this personal shortcoming by promoting persons with disabilities' access to the open labour market in order to acquire this lacking experience. Paragraph 1 (j) does not differentiate between the public and the private sector nor is it explicitly linked to State measures of affirmative action. It generates the State obligation to immediately take “all

²⁸⁷ CRPD, article 3 (a).

²⁸⁸ For instance, the HRC Report pays special attention to persons with intellectual or psychosocial disabilities as a highly marginalised group. HRC Report, 2012, para. 47-48.

²⁸⁹ CRPD, article 3 (c); on this issue see also HRC Report, 2012, paras. 47-48.

²⁹⁰ CRPD, article 27, para. 1(k) read in conjunction with CRPD, articles 26, para 1 (a); and 3 (c).

²⁹¹ Blanck, Peter, Kruse, Douglas, Schwochau, Susan and Song, Chen, Calibrating the Impact of the ADA's Employment Provisions, Stanford Law & Policy Review, Vol.14, No. 2, 2003, p. 283, citing Collignon, Frederick C., The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Berkowitz, Monroe & Hill, MaryAnne (Eds.) Disability and The Labor Market: Economic Problems, Policies, and Programs, ILR Press, New York State School of Industrial and Labor Relations, Cornell University, 1989.

appropriate legislative, administrative and other measures for the implementation of this right”.²⁹²

This provision met quite the resistance during the negotiations. The Landmine Survivors Network noted:

“Former Draft Article 22(f) [final article 27, paragraph 1 (j)] has been deleted because of concerns that it was not only redundant in light of Draft Article 22(c) [final article 27, paragraph 1 (c)] (Canada), but also because of the concern that some employers have historically used work experience as a means to exploit the labour of people with disabilities. (New Zealand, Costa Rica) It has been replaced with a provision expressly requiring States to protect people with disabilities from exploitation such as slavery or forced labour [referring to article 27, paragraph 2]”.²⁹³

The fact that this provision made it to the final text of the Convention, without any further clarifications on what this right amounts to, begs the question of the standards it sets. Prohibition of discrimination shall cover such a measure, since it covers “all matters concerning all forms of employment”. Another thing that is clear is that, since “to acquire work experience” is established as a measure to realise the right to *access* work, it cannot be interpreted to mean a right to access a permanent position. Moreover, reading paragraph 1 (j) in light of the article’s chapeau, the duty to promote the acquisition of work experience in the open labour market cannot translate into an absolute entitlement to access the open labour market upon request.

3.3.7 A distilled account of the measures designed to realise the right to access employment for persons with disabilities

The right to access employment under article 27 is envisaged to be realised through the adoption and implementation of various measures. First, the States are to proactively provide a conducive environment for persons with disabilities to enter the open labour market. This environment will consist of a labour market that is “open, inclusive and accessible” to all persons with disabilities. Second, the right to access employment is envisaged to be safeguarded through the prohibition of discrimination at the stage of recruitment and hiring. Third, persons with disabilities are to be enabled to

²⁹² CRPD, article 4, para. 1 (a).

²⁹³ Landmine Survivors Network, comments, proposals and amendments submitted electronically on Article 27 – Right to Work, Fourth Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata27fcomments.htm#lsn>, latest accessed 1 November 2016.

enter a workplace by the State and private employers who shall actively lift existing attitudinal and environmental barriers to reasonably accommodate the needs of the individual and allow her/him to perform professionally. Fourth, the right to access employment for persons with disabilities is to be promoted through measures of affirmative action targeting both the public and the private sector. Fifth, measures of assistance services in finding and obtaining employment aim to ensure that persons with disabilities make the transition from unemployment to employment. Lastly, article 27 CRPD stipulates that the right to access employment for persons with disabilities is to be safeguarded, promoted and realised through employability measures, which aim to enhance the individual's skill-set, abilities and functionality in order to be better equipped to compete for a job in the open labour market.

4 Situating the CRPD among the models of disability and equality

As shown in Chapter 2, equality and disability are evolving concepts that have been reconceptualised again and again. Both are central concepts in the CRPD, but neither is defined in the text of the Convention. While it is widely maintained that the CRPD embodies a conceptual shift from a medical to a social understanding of disability and from a formal to a substantive understanding of equality,²⁹⁴ the specifics of these postulates are the subject of academic debates to this day. This feeds this thesis's presupposition that there is no one clear adherence of the CRPD to one of the models (of equality and disability) explored above. Guided by the text of the CRPD analysed in Chapter 3 this Chapter will situate the CRPD among the prevailing models of equality and disability and further sketch the CRPD's approach to equality and disability. Section 4.1 covers the CRPD's approach to disability and section 4.2 covers the CRPD's approach to equality.

4.1 The CRPD's approach to disability

As mentioned before, clarifying how disability and “persons with disabilities” are conceptualised is important for the coverage and potential of the entitlements contained in the Convention to drive change for persons with disabilities. The CRPD does not contain a set definition of disability nor a direct reference to any of the models of disability presented in part 2.2. One thing consistently mentioned in the relevant literature is that the CRPD signifies a conceptual shift away from a medical understanding to a social one.²⁹⁵ This is most evident from a quick overview of the law as analysed above, as the CRPD implicates the environment in the creation of disability as well as pivots upon the principle of “[r]espect for difference and acceptance of persons with disabilities as part of human diversity and humanity”.²⁹⁶ Since the first draft article 3 on Definitions (final article 2) the Working Group noted that “[t]here was general agreement that if a definition was included, it should be one that reflects the social model of

²⁹⁴ CRPD General Comment No. 2, 2014, para. 14.

²⁹⁵ See Bruce, 2014, p. 363.

²⁹⁶ CRPD, article 3 (d); and Preamble (e).

disability, rather than the medical model”.²⁹⁷ During the negotiations, many NGOs repeated this conviction.²⁹⁸ As a result, this analysis will not cover a comparison of the CRPD against the medical model of disability.

Turning to the CRPD’s social understanding of disability, there is great disparity pertaining to what kind of a social understanding the CRPD embodies. The different views range from a strict adherence to the social model to an adherence to the biopsychosocial model, as presented above (2.2). Discrepancy also exists on whether the CRPD takes a universal or a minority approach to disability. These are precisely the comparisons contained below. At the same time, some have taken the position the present thesis endorses, namely that the CRPD does not just reproduce an understanding of disability but it rather develops its own. Paul Harpur argues that the CRPD embodies something that elaborates upon the social model; he argues, while the CRPD “expressly embraces the social model [...] the CRPD, however, goes much farther than the social model [through] addressing the problem where persons with impairments could not fully function even if universal design were embraced”.²⁹⁹ Tom Shakespeare is similarly minded; he does see a connection between the CRPD’s model and the social model of disability but still differentiates between the two and thus, in his latest contribution to disability studies, he feels the need to clarify that “[he] reject[s] the ‘strong’ social model of disability [but he is] not rejecting the *human rights approach to disability (UN, 2006)*”.³⁰⁰ The final section of this part (4.2.4) is devoted to deciphering what the CRPD’s own approach to disability is, using the text analysed in Chapter 3 as a source.

²⁹⁷ Working Group draft text, draft article 3 on Definitions, Footnote 12, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata2wgtext.htm> latest accessed 1 November 2016

²⁹⁸ See Ontario Human Rights Commission, European Disability Forum, Japan Disability Forum, Physical Disability Council of Australia LTD. during the Third Session, see Comments, proposals and amendments submitted electronically on Article 2 Definitions, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata2tscomments.htm>, latest accessed 1 November 2016; Landmines Survivors Network, Working Meeting of NGOs for People with Disabilities from Ukraine, Russia, Belarus & Moldova, during the Fourth Session, see Comments, proposals and amendments submitted electronically on Article 2 Definitions, Fourth Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata2fsccomments.htm>, latest accessed 1 November 2016.

²⁹⁹ Harpur, 2011, p. 1278.

³⁰⁰ Italics used by the author to emphasise the terminology used in Shakespeare, Tom, *Disability Rights and Wrongs Revisited*, (Second Edition), Routledge, London and New York, 2014, p. 1.

4.1.1 Comparing the CRPD to the social model of disability

First, there are writers that profess that the CRPD reflects the social model in varying degrees. Oddný Mjöll Arnardóttir states, “[t]he CRPD [...] is expressly based on the social model of disability”.³⁰¹ Rannveig Traustadóttir holds a milder stance, “[t]he Convention articulates a stronger emphasis on social barriers [...] indicating a firmer commitment to a social understanding [of disability] which implies that many, and even most, of the difficulties experienced by disabled people are caused by social barriers”³⁰².

Where CRPD and social model converge

To begin with, the definition of disability under the social model requires a categorical distinction to be made between disability and impairment. It requires additionally that disability is seen as caused by exclusionary societal structures. Therefore, disability is not described in medical terms and it is located outside the individual. Similarly, in the universe of the CRPD, impairment is also not to be confused with disability. While impairment covers the individual’s health condition, disability connotes the *experience* of disadvantage translating into lack of full and equal participation in all spheres of society.³⁰³ Additionally, the CRPD defines disability as “result[ing] from the interaction between persons with impairments and *attitudinal and environmental barriers* [...]”.³⁰⁴

Furthermore, the social model’s conceptual pillar is acceptance of persons with disabilities. This is a premise the Convention pivots upon as well. “Respect for difference and acceptance of persons with disabilities as part of human diversity” is incorporated as the instrument’s general principle under article 3(d). As such, it informs the interpretation of all substantive articles and it sets the tone for how the purpose of the Convention is to be achieved.³⁰⁵

Moving on to the right to access employment in the open labour market for persons with disabilities, both the social model and the CRPD consider access to employment as a fundamental right that ensures the fulfilment of other rights and freedoms. The UPIAS specifically notes, “[a]ll the other situations from which physically impaired people are

³⁰¹ Arnardóttir, 2009, pp. 58-59.

³⁰² Traustadóttir, Rannveig, Disability Studies, the Social Model and Legal Developments, in Arnardóttir, Oddný Mjöll and Quinn, Gerard (Eds.) The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives, Martinus Nijhoff Publishers, Leiden, 2009, p. 16.

³⁰³ CRPD, Preamble (e) and (y).

³⁰⁴ CRPD, Preamble (e).

³⁰⁵ Lord, Janet E. and Stein, Michael Ashley, The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities, Washington Law Review, Vol. 83, 2008, p. 460.

excluded are linked, in the final analysis, with the basic exclusion from employment”.³⁰⁶ Moreover, both the social model and the CRPD advocate for full inclusion of persons with disabilities in the mainstream society, thus for employment in the open labour market and not in segregated forms of employment. This is something that the UPIAS has specifically addressed,³⁰⁷ whereas under article 27 this emanates from the absence of any mention of forms of segregated employment as a measure to realise the right to access employment for persons with disabilities. Lastly, measures of placement and assistance services are also very much in the spirit of the social model, since they try to make sure that inclusion in the open labour market is ensured. As to the target of the solutions proposed, there is significant attention paid to lifting societal barriers which directly corresponds with the central tenet of the social model of disability that demands social change to enable the participation of persons with disabilities. Under article 27, the measures target mainly the market (the environment), at a societal and an individual level; the former is to be realised through the obligation of general application to create an “open, inclusive and accessible”, while the latter translates into the individual measure of reasonable accommodation, which aims to lift environmental and/or attitudinal barriers in the workplace in order to “fit” the individual and her/his needs. In addition, the CRPD – as an international human rights instrument – expressly gives persons with disabilities legal standing as active participants in society, as opposed to picturing them as passive recipients of medical and welfare services.

On the issue of coverage, both the social model and the CRPD include a wide range of impairment categories.³⁰⁸ Most importantly, the CRPD allows for the social model’s coverage criterion of self-identification, since the CRPD is a legal instrument comprised of legal entitlements that persons with disabilities are to use themselves or in groups. More specifically, none of the measures contained under article 27 are to be imposed upon persons and access to employment *per se* is construed as the right to freely choose or accept it.

Where CRPD and social model diverge

Although the social model accepts no implication of impairment in the creation of disability, the CRPD implicitly implicates it under article 27. In sharp contrast to the social model, which denounces any intervention targeting impairment, article 27 explicitly mentions rehabilitation services as a potential solution to the restricted employment participation of persons with disabilities, accepting implicitly that impairment is causing the

³⁰⁶ UPIAS, 1975, p. 16.

³⁰⁷ UPIAS, 1974, under Aims.

³⁰⁸ See Oliver, 1981, p. 30.

disadvantage in access to employment experienced by persons with disabilities.

Furthermore, the fact that nowhere does the Convention refer to time-limited measures of affirmative action, also comes in contrast with the categorical view of disability as socially constructed. If disability is viewed as socially constructed, which is the core principle under the social model of disability, then it will cease to exist when interventions targeting these disabling social constructs are successfully completed. The acceptance that measures of affirmative action in the context of disability can be of permanent nature implies that disability can also be experienced in the absence of societal attitudinal or environmental barriers, caused by impairment-related limitations. In a similar fashion, article 27 on work and employment, by introducing the State obligation to take measures to address the employability of persons with disabilities, recognises that the individual is part of the equation in addressing disability related issues, a postulate that the social model of disability categorically denies. More specifically, these measures imply an acceptance on behalf of the Convention that the exclusion from the open labour market persons with disabilities experience is partly caused by them lacking the necessary skills and not merely by unwelcoming or exclusionary societal structures.

These assertions break the categorical divide between impairment and disability, forwarded by the social model of disability. In this respect the CRPD seems to take into consideration the main strand of criticism offered by so-called critical disability theorists, such as Shakespeare and Watson and Liz Crow, which is that “the ‘barrier free environment’ is an unsustainable myth”³⁰⁹. In a nutshell, critical disability theorists, as well as the CRPD, stress that a complete eradication of disability is not possible, as disability ought to be seen as being caused not only by debilitating attitudes and environmental barriers but by impairment itself, focusing on designing responses that seek to cover needs that are permanent in nature and located within the individual.³¹⁰ In the words of Kayess and Fench:

“While the central tenet of the social model – disability as social oppression – has not been superseded, it has been heavily nuanced and qualified by the last decade of critical disability studies, which has re-emphasised the realities of impairment as a dimension of the ontological and phenomenological experience of disability”³¹¹

³⁰⁹ Shakespeare and Watson, 2002, p. 17 citing Finkelstein, Vic, To deny or not to deny disability, Brechin et al. (Eds), *Handicap in a Social World*, Sevenoaks: Hodder and Stoughton, 1981.

³¹⁰ See Crow, Liz, *Including All of Our Lives: Renewing the Social Model of Disability*, in Barnes, Colin and Mercer, Geof (Eds.) *Exploring the Divide: Illness and Disability*, The Disability Press, Leeds, 1996.

³¹¹ Kayess and French, 2008, pp. 33-34.

One last point where the Convention diverges from the social model of disability is the issue of constituency. The social model does not set any threshold of duration or intensity of impairment as a criterion of coverage. In contrast, as discussed above, the CRPD dictates that impairment must be of certain, albeit unspecified, intensity and duration (long-term).

4.1.2 Comparing the CRPD to the biopsychosocial model of disability

Some in the literature maintain that it is the biopsychosocial model of disability, which shines through the Convention. Bickenbach, one of the authors of the ICF, claims unequivocally that the CRPD is based on “the characterisation of disability found in WHO’s ICF”.³¹²

Where CRPD and ICF converge

The ICF conceptualises the creation of disability as “[a] complex phenomenon caused by the “interaction between health conditions (diseases, disorders and injuries) and contextual factors”.³¹³ Similarly the CRPD accepts that “[...]disability results from the interaction between persons with impairments and attitudinal and environmental barriers”.³¹⁴ Both the ICF and the CRPD recognise that impairment is also implicated in the creation of disability. Preamble (e) “[r]ecogniz[es] that disability [...] results from the interaction between health conditions (diseases, disorders and injuries) and contextual factors, which *hinders* their full and effective participation in society on an equal basis with others”. Disability results from the *interaction* between impairment and the environment. It is clear that impairment is part of the disability equation and not categorically disassociated from disability. In other words, it is not seen as society’s oppression upon persons with disabilities but as the result of both personal limitations and social barriers, mirroring the ICF’s conceptualisation. The same idea emanates from the absence of a time-restriction for measures of affirmative action, since the CRPD acknowledges that, in the context of disability, needs might not be temporary, as the presence of impairment itself can be causing disadvantage.

The ICF and the CRPD also converge on what they identify as social barriers to participation. Under contextual factors the ICF identifies personal and societal factors. The ICF’s environmental contextual factors

³¹² Bickenbach, 2009, pp. 1120-1121.

³¹³ ICF, 2002, p. 10.

³¹⁴ CRPD, Preamble (e).

include structural, legal and attitudinal obstacles. Similarly, the CRPD in articles 4, paragraph 1 (b), 8 and 9 and Preamble (e) identifies societal barriers as including attitudes, physical and institutional (laws, regulations customs and practices) barriers.

In addition, both the ICF and the CRPD view employment participation as a key aspect of social participation to be addressed.³¹⁵ Concerning the solutions forwarded by the ICF “both medical and social responses are appropriate to the problems associated with disability; we cannot wholly reject either kind of intervention”.³¹⁶ The CRPD takes a similar approach as demonstrated by the right to access employment under article 27. More specifically, the measures to safeguard and promote the realization of this right include not only measures that target the environment but also the individual, which in their turn include not only measures that target the person (employability measures) but also the impairment (rehabilitation).

Lastly, the ICF highlights that “[...the ICF] should not become a tool for labelling persons with disabilities as a separate group”³¹⁷, which resonates with the CRPD’s general principle of “[r]espect for difference and acceptance of persons with disabilities as part of human diversity”.

Where CRPD and ICF diverge

The first and most blatant point of divergence between the ICF and the CRPD is the conceptualisation of disability. As already said, disability is located outside the individual, it is not seen as a personal characteristic but as the *experience* of disadvantage in full and equal societal participation. In contrast to the CRPD’s position, the ICF clearly defines disability in terms of personal health, ability and functionality.

Additionally, the ICF as a health classification still sets standards of health to be attained, promoting an image of disability as something to be treated and cured. On the contrary, the CRPD is about accepting disability as part of human diversity. Furthermore, even in the case of rehabilitation as a means of realising access to employment for persons with disabilities, article 26 on habilitation and rehabilitation is disassociated from the area of health, provided for under article 25. This means that rehabilitation does not necessarily entail medical interventions but an array of measures “based on the multidisciplinary assessment of individual needs and strengths”.

³¹⁵ Under the ICF, “Work and employment” is one of the “Major life areas” among “Activities and Participation”, see ICF, 2002, pp. 165-166.

³¹⁶ ICF, 2002, p. 9.

³¹⁷ ICF, 2002, p. 14.

Lastly, on the issue of coverage the ICF is broader than the CRPD. While the “ICF is about all people”,³¹⁸ the CRPD is only about persons with disabilities as defined under article 1 of the Convention.³¹⁹

4.1.3 A minority or a universality approach?

On whether the CRPD embraces a minority or universality approach to disability, Bickenbach³²⁰, and Maria Ventegodt Liisberg³²¹ argue for a universality approach although the former accepts a biopsychosocial and the latter a clear social model adherence of the Convention. Anna Bruce claims on the contrary, “[...]n balance the CRPD emerges as a minority rather than universality approach to disability”.³²²

Although, disability is defined as an *experience* under Preamble (e) and is viewed as part of human diversity and humanity under article 3 (d), this thesis accepts that the minority approach is the one the CRPD reflects. As provided above, “[t]he ‘*minority view*’ portrays persons with disabilities as a distinct grouping among human beings”.³²³ There are several instances that illustrate that under the CRPD persons with disabilities are seen as a distinct group. Although Preamble (e) defines disability as an experience, echoing the universal approach of the ICF, article 1 on Purpose defines that the Convention concerns “persons with disabilities”, clearly setting criteria of adherence to a distinct group.³²⁴ Additionally, article 8 paragraph 1 (a) stipulates that awareness must be raised “throughout society, including at the family level, *regarding* persons with disabilities”. Hence, “persons with disabilities” are portrayed as a particular group with specific characteristics the rest of the society is to be made aware of. Moreover, the title of the CRPD, “Convention on the Rights of Persons with Disabilities”, indicates that the entitlements contained therein do not concern the common experience of disability, but belong specifically to this clearly distinct group.

³¹⁸ ICF, 2002, p. 14.

³¹⁹ See above under section 3.1.

³²⁰ Bickenbach, 2009, p. 1121; Liisberg, 2011, p. 54.

³²¹ Liisberg, 2011, p. 54: “[...]he CRPD is based on the social model of disability and the social universality model of disability”.

³²² Bruce, 2014, p. 330.

³²³ Bruce, 2014, p. 320.

³²⁴ See Bruce, 2014, p. 327.

4.2 The CRPD's approach to equality

4.2.1 Equality in the CRPD

Singling out the concept of equality in the CRPD proves rather challenging. Judge Rodolfo E. Piza reasons: “it appears clear that the concepts of equality and non-discrimination are reciprocal, like the two faces of one same institution. Equality is the positive face of non-discrimination. Discrimination is the negative face of equality. Both are the expression of a juridical value of equality that is implicit in the very concept of law as an order of justice for the common good.”³²⁵ It is undeniable how interconnected and how central to the CRPD the concepts of equality and non-discrimination are.³²⁶ Even in the Convention, the drafters found it hard to separate them having an article titled “equality and non-discrimination”.³²⁷ However, it has been argued that in a schematic way equality is a broader notion containing both non-discrimination as well as other measures. In the words of the European Disability Forum, “[...] non-discrimination is one of the means to achieve equality, but to achieve equality needs to be complemented with other measures”.³²⁸ This position can be supported by the text of the Convention. An illustrative example is article 5 on equality and non-discrimination. Paragraph 4 specifies that measures of affirmative action are to be disassociated from the principle of non-discrimination and they are to be solely seen as a measure to achieve equality. Nonetheless, as equality and non-discrimination are used interchangeably throughout the text of the Convention, this thesis will not go into the discussion of the relationship between equality and non-discrimination.

Structurally speaking, equality is deeply embedded as the overall aim of the Convention and as the way to fully enjoy each and every

³²⁵ Inter-American Court of Human Rights, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Ser. A, No. 4, 19 January 1984.

³²⁶ Bruce, 2014, p. 226

³²⁷ CRPD, article 5; The Landmines Survivors Network also cautioned that: “[g]iven the need for the convention to clearly articulate these rights and avoid ambiguity, it may be more appropriate to elaborate them in separate articles, as has been done in other contexts”. Landmine Survivors Network, comments, proposals and amendments submitted electronically on Article 5 – Equality and Non-Discrimination, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm>, latest accessed 1 November 2016.

³²⁸ European Disability Forum comments, proposals and amendments submitted electronically on Article 5 – Equality and Non-Discrimination, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm>, latest accessed 1 November 2016.

human right and freedom enshrined therein.³²⁹ To break this down, on the one side, the Convention aims to create a society in which both persons with and without a disability alike enjoy all human rights and freedoms equally.³³⁰ On the other side, equality, and/or its negative counter-part the principle of non-discrimination, is the seminal tool the Convention uses to achieve this aim.³³¹ Article 1 sets “to promote, protect and ensure the full and *equal* enjoyment of all human rights and fundamental principles by all persons with disabilities” as the purpose of the Convention, because of the importance of the principle of equality as the foundation of freedom, justice and peace in the world. Additionally, equality is seen as a general principle underpinning the Convention;³³² an overriding rule transcending the rights entrenched under article 27;³³³ and even a right in its own accord, part and parcel of the right to work for persons with disabilities.³³⁴ In short, equality is the ultimate goal of the CRPD and the means to achieve it at the same time.³³⁵ It is without a doubt that equality is indeed the backbone of the Convention, or in the words of Arnardóttir, the “leitmotif” of the CRPD.³³⁶

What kind of equality is sought to be achieved and what kind of equality fuels the Convention’s measures? The Committee on the CRPD pronounces that there is a general shift in international human rights law from a formal to a more substantive understanding of equality.³³⁷ The difference between the various forms of substantive equality lies in the

³²⁹ The former is evident in CRPD, article 1 on the purpose of the Convention and the latter in articles 3 and 5 on general principles and equality and non-discrimination, a rule of general application as well as the substantive article 27, para. 1, on the right to work.

³³⁰ CRPD, article 1 sets “to promote, protect and ensure the full and *equal* enjoyment of all human rights and fundamental principles by all persons with disabilities” as the purpose of the Convention, because of the importance of the principle of equality as the foundation of freedom, justice and peace in the world, which is recalled in CRPD, Preamble (a).

³³¹ The Convention has been characterized as primarily a non-discrimination Convention; see Quinn, Gerard, *The United Nations Convention on the Rights of Persons with Disabilities: Towards a New International Politics of Disability* [hereinafter Quinn, 2009], *Texas Journal on Civil Liberties & Civil Rights*, Vol. 15, No. 1, 2009.

³³² CRPD, article 3 (e) and (g).

³³³ CRPD, article 5.

³³⁴ CRPD, article 27, para. 1.

³³⁵ On this, Anna Bruce adds “the concepts of “[e]quality of opportunity” and “[n]on-discrimination” in Article 3 are envisaged as adding a central dimension to the life opportunities protected under the CRPD” highlighting their structural function, in other words that these principles are envisaged as the primary tool to promote, protect and ensure the enjoyment of all human rights for persons with disabilities, including the right to work, see: Bruce, 2014, p. 226; Gerard Quinn explains that the CRPD does not establish new rights but instead, it is an operational Convention which employs non-discrimination principles in order to achieve the “full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities”, it is “a hybrid of a non-discrimination convention and one that attached a broad swath of rights [...]” Quinn, 2009, pp. 42-43; the same argument can also be found in Arnardóttir, 2009, p. 44.

³³⁶ Arnardóttir, 2009, pp. 41-66.

³³⁷ CRPD General Comment No. 2, 2014: paragraph 14: “the notion of equality in international law has also changed over the past decades, with the conceptual shift from formal equality to substantive equality having an impact on the duties of States parties.”

target, extent and aim of State intervention. In the spectrum of substantive equality, “equality of opportunity” is the lowest in pre-emptiveness and extent of State interventions. During the negotiations, there was a consistent reference to “equality of opportunity” by both NGOs and State delegations, with a strong intention to avoid any interpretation of equality as only encompassing formal equality/equality before the law.³³⁸ In the end, the term was removed from article 5, but was specifically included in article 3 on general principles. Putting this discussion into the context of employment, article 27, paragraph 1 keeps within the vocabulary of article 3 (e). By accepting the non-absolute character of the right to work, as a right to the opportunity to gain a living by work, article 27 clearly references “equality of opportunity”, but still neither of these articles nor article 5 on equality and non-discrimination define “equality of opportunity”.

In light of Clifford’s assertion that “[d]ifferent conceptions of equality underscore different human rights protections”,³³⁹ it appears difficult to fit the CPRD in one of equality’s conceptual boxes. Next, the measures enumerated under article 27 aiming at realising the right to work for persons with disabilities are analysed against the theoretical structures of equality. This analysis will highlight the CPRD’s dynamic relationship with the concept of equality, in the sense that different measures are fuelled by different understandings of equality.

4.2.2 Measures of formal equality

It is clear from article 5, paragraph 1 that the CRPD’s understanding of equality encapsulates procedural or formal equality. Under this provision “all persons are equal before and under the law”. Anna Bruce clarifies, “[t]o be equal before the law requires an even-handed application of the law. It obliges the judiciary and other authorities to honour those distinctions

³³⁸ Specific mention of “equality of opportunity” was made by both States and NGOs: during the Third Session by the ILO, Ontario Human Rights Commission, Bizchut; during the Fourth Session by Japan, Mexico, People with Disability Australia; during the Fifth Session by the European Union, see Background Documents on Article 5 - Equality and Non-Discrimination, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata5bkgrnd.htm>, latest accessed 1 November 2016; People with Disability Australia, during the Fourth Session noted: “In terms of structure, we believe the article should commence with an obligation on States to take immediate and effective measures to achieve equality of opportunity for people with disability. We are concerned that the reference to equality in paragraph 1 is to ‘equality before the law.’ That concept is dealt with under Article 9: Equal Recognition as a Person Before the Law. The relevant concept in this article is equality of opportunity”, People with Disability Australia, comments, proposals and amendments submitted electronically on Article 5 – Equality and Non-Discrimination, Fourth Session, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata5fscomments.htm#pwda>, latest accessed 1 November 2016.

³³⁹ Clifford, 2015, p. 13.

foreseen by the law and to not make any distinctions which are not foreseen by the law”.³⁴⁰

The main measure reflecting formal equality is the prohibition of direct discrimination. Discrimination must be prohibited on the grounds of the existence of impairment (article 2), the type of impairment and all forms of aggravated or multiple discrimination enumerated in a non-exhaustive manner under Preamble (p). In more detail, the State must “take all appropriate measures, including legislation, to modify or abolish existing laws, regulation, customs and practices” that directly discriminate against persons with disabilities, under article 4, paragraph 1 (b). The State must also take “all appropriate measures” to eliminate direct discrimination against persons with disabilities by private employers, under article 4, paragraph 1 (e). Under article 27, the pertinent legislation must cover conditions of recruitment and hiring in both positions to provide work experience 1 (j), as well as more permanent forms of employment 1 (a). It must also extend to cover access to general technical and vocational guidance programmes, placement services and vocational and continuing training 1 (d), assistance services in finding and obtaining employment 1 (e) and vocational and professional rehabilitation services 1 (k).

4.2.3 Measures of substantive equality of opportunity

Equality of opportunity as described above covers measures that aim to remedy any past discrimination. It is reflected in measures that try to create the conditions within the individual to equally compete for a place in the open labour market. Thus, it is the essence of this right, characterised as the right to the opportunity to access employment. The measures of the right to equality of opportunity (analysed above in section 3.2) are mirrored in the following.

First, all measures targeting the employability of persons with disabilities. These include general technical and vocational guidance programmes, vocational and continuing training, acquisition of work experience in the open labour market and vocational and professional rehabilitation services. These measures do not recognise societal structural inequalities, but situate the disadvantage within a person’s skill-set, abilities, and functionality (rehabilitation). They do not address how the competition to secure a job is carried out but they focus on the personal conditions under which persons with disabilities go into this race. As such, they remain indifferent about the results of such a competition. As has been identified in Chapter 2, this is a traditional measure reflecting “equality of opportunity”.

³⁴⁰ Bruce, 2014, p. 227.

4.2.4 Measures of substantive equality of results

Article 5 (1) goes clearly beyond formal equality when it stipulates that “all persons [...] are entitled without any discrimination to the equal protection and equal benefit of the law”. Anna Bruce interprets this as meaning, “[t]he entitlement to the equal protection of the law extends to the rationale for, the contents of and the effects of the law. It creates obligations for the legislator to use legislation as a tool in a way that does not amount to undue disadvantage for a person covered by the CRPD.”³⁴¹ According to this understanding of equality, States must also prohibit indirect discrimination. This prohibition refers to all the measures enumerated above, under 3.3.

Moreover, substantive equality of results is concerned with persons with disabilities actually accessing employment, as it is concerned with *de facto* equality. Under article 5, paragraph 4, *de facto* equality calls for measures of affirmative action. These measures are also expressly provided for under article 27, paragraph 1 (h) targeting the private sector. The corresponding obligation regarding the public sector reads more categorically “[e]mploy persons with disabilities in the public sector”. This is also a measure of affirmative action as it aims to get persons with disabilities in the labour market regardless of their competition or other skills.

Looking at the right to non-discrimination, it is expanded to include not only direct and indirect discrimination but also reasonable accommodation.³⁴² To provide reasonable accommodation is presented as instrumental in achieving and promoting equality, under article 5, paragraph 3 and the right to work, under article 27 paragraph 1 (i). As has been explored in Chapter 3, measures of reasonable accommodation entail positive duties, which aim to compensate for factual limitations and enable a person to perform professionally. Reasonable accommodation goes beyond individual competence to compete for a job on equal terms and is concerned with the conditions of this competition. To understand the extra mile this measure entails: a person with a visual impairment has the skills to work as a lawyer, but to be able to perform she needs the law office to have all laws in braille format so that she can read them. Now, equality of opportunity would already be satisfied with the fact that she has the qualifications as a lawyer, and she can read braille; her inability to enter the labour market would not point to inequality, but to a mere personal loss. Equality of results remedies this situation by expecting that the conditions are conducive for persons who can run to be able to finish the race.³⁴³ Under equality of results, the State is to ensure that she can be employed. Reasonable

³⁴¹ Bruce, 2014, p. 227.

³⁴² CRPD, articles 2; and 27, para. 1 (i).

³⁴³ Metaphor taken from section 2.4.2.

accommodation realises the goal that equality of results or outcomes sets; it provides the right to the girl in this example to ask for laws in Braille and a modified computer to allow her to access the needed information to carry out the job she is qualified for.

To this same end, article 27 unequivocally recognises that the State is under the duty to facilitate the transition of persons with disabilities into the labour market by providing placement services and assistance in finding and obtaining employment in the open labour market, reflecting a model of equality of results or outcomes.³⁴⁴

What all these measures have in common as measures of substantive equality of results is that they require an active involvement by the individual with disabilities. The result of the activation might be secured, but the activation rests nonetheless upon the individual jobseeker/employee. Therefore, for these measures to be effective they must be coupled with measures of substantive transformative equality targeting the awareness of all stakeholders. This is because both prospective employees and employers need to be aware of all such measures and their corresponding entitlements and obligations. However, as was discussed above, the obligation of awareness-raising does not explicitly target persons with disabilities themselves, weakening the effectiveness of these measures. Furthermore, public personnel who are to design and enforce these measures need to be aware of the needs of the diverse group of persons with disabilities so as to not perpetuate discrimination experienced by particular impairment groups.

4.2.5 Measures of substantive transformative equality

Lastly, article 27 imposes an obligation on both the State and the labour market (i.e. private employers) to create a conducive, open, inclusive and accessible environment for persons with disabilities informed by the duties of general application on awareness-raising and accessibility. The right to work for persons with disabilities is thus envisaged to be secured by targeting the societal structures that put persons with disabilities at a disadvantage in comparison to able-bodied job-seekers. This general obligation is a long-term goal, which is not dependent upon the individual's involvement and which aims at restructuring the environmental and relational architecture of society, reflecting the model of transformative equality. It is, as briefly discussed directly above, of the utmost importance for the effectiveness of all measures reflecting all different understandings of equality.

³⁴⁴ CRPD, article 27 para. 1 (e), (h).

From all the above, it is safe to assume that, although the wording of the Convention remains modest, i.e. “equality of opportunity”, the CRPD’s understanding of equality, according to the terminology used in the present study, extends further than “equality of opportunity” to even cover transformative equality.

5 Conclusions

5.1 The text of the Convention: access to employment, measures and coverage

This thesis has set out to examine and understand the right to access employment under article 27 CRPD in its entirety. From this, it logically follows that such an examination requires an understanding of the personal scope of the protection, *i.e.* who is entitled to it, and of the protection *per se*, *i.e.* what measures does this protection translate to, what are the entitlements and the obligations it sets. This endeavor has, therefore, started with a legal analysis of the text of the Convention, mirrored in the first research question: “What is the CRPD’s protective framework concerning the right to access employment and who is covered by this right?” Chapter 3 has covered this legal analysis of article 1 of the Convention, setting out the Convention’s personal scope, *i.e.* who “persons with disabilities” are, as well as article 27, drawing out the content of the specific measures the CRPD has envisaged as conducive to safeguard and promote the realisation of this right.

As evident from the description of the Convention’s constituency, “persons with disabilities”, the concept of disability is central in defining the constituency. However, a set definition of disability has not been included in the CRPD and the closest one can find is the legally non-binding provision (e) of the Preamble. Contrary to the concept of disability, the group of “persons with disabilities” was included in the main text of the Convention, under article 1. Although the purpose of the CRPD is to “promote, protect and ensure all human rights and fundamental freedoms for *all* persons with disabilities”, Article 1 on “persons with disabilities” sets requirements that limit this over-inclusiveness.

The requirements contained in article 1 concern firstly the category of the impairment. This requirement does not set a high threshold as the categories provided for under article 1 are quite broad, covering physical, mental, intellectual and sensory. Moreover, the Committee has shown that this requirement can be satisfied easily as the category of a health condition is judged upon the bodily manifestations of the condition’s symptoms. Secondly, persons with disabilities include only those persons who have an impairment that can amount to disability. Thirdly, the level of intensity is, according to the Committee, dependent upon the chronicity and duration of the health condition. While article 1 refers to “long-term” impairments, neither the threshold of severity nor that of long-term are explicitly set. However, persons with short-term impairments are not

expressly included under the Convention. The same goes for persons who have episodic impairments. Moreover, “persons with disabilities” are only persons with impairments, leaving outside the scope of protection family members and disability by association. This is so, because article 1 clearly calls for a present impairment. The requirement of a present impairment necessarily leaves out persons with a history of impairment (those who *had* an impairment) and persons with an imputed impairment. Lastly, persons with disabilities are classified as such when various societal (environmental, institutional and attitudinal) barriers can potentially cause disadvantage concerning their equal and full participation in all aspects of life in mainstream society. This, points to the fact that disability cannot be construed in the absence of exclusionary societal barriers.

The legal analysis conducted under Chapter 3, sections 3.2 and 3.3 focused on what the specific measures geared to safeguard and promote the realisation of the right to access employment under article 27 are. The gist of the right to access employment is inclusion and participation. To begin with, the main measure to drive this change and realise the right to access employment for persons with disabilities is the measure of general application to proactively provide a labour market and workplace environment that is open, inclusive and accessible. This measure does not depend on the activation of the individual and it translates into an obligation, which befalls both the State and the private employers, to lift any attitudinal or accessibility barriers, albeit in a due diligence manner.

Recognising that the main reason persons with disabilities are denied of their right to access employment is discriminatory attitudes, article 27 includes the prohibition of non-discrimination as a primary measure to be used at the recruitment and hiring stage. Moreover, article 27 stipulates, “States Parties recognize the right of persons with disabilities to work, on an equal basis with others”. Thus, the principle of non-discrimination is to be applied on all measures aiming at achieving the right to access employment.

Contrary to the non-absolute character of the right to work as a right to the opportunity to access employment, article 27 includes measures that ensure the inclusion of persons with disabilities in the work force. These are individual, affecting specific persons with disabilities that use them and also more collective, targeting groups of persons with disabilities. The former category covers the measure of reasonable accommodation, which aims at enabling a specific individual to perform professionally in a given workplace setting, and services of assistance in finding and obtaining employment as well as placement services. The latter category includes measures of affirmative action, which aim at a factual increase in employment participation for certain groups of persons with disabilities.

Lastly, the right to the opportunity to access employment is designed to be realised by providing persons with disabilities themselves

with the necessary education, training, work experience, and vocational and professional rehabilitation. This way, the CRPD envisages that persons with disabilities will have the necessary skills and abilities to effectively compete and enjoy their right to access employment in the open labour market.

5.2 How the constituency and measures of the right to access employment are informed by the understandings of disability and equality

For the examination of this right to be complete and in light of the central role the concepts of disability and equality have in the Convention, a second research question was necessary to cover: “What equality and disability understanding does this framework carry and how does it inform the question of what entitlements and for whom?”. In order to guide this question, two sub-questions were posed; a. “What is the CRPD’s approach to disability and how does this inform the CRPD’s constituency and measures?” and b. “What is the CRPD’s approach to equality and how does it inform the pertinent measures under article 27?” Chapter 4 has contextualized the CRPD’s text in the prevailing theories of disability and equality, as these have been explored under Chapter 2.

The interdisciplinary analysis of the Convention’s text against the theoretical background of models of disability and equality has showed that there is no one model of disability the CRPD adheres to, nor one model of equality reflected in the measures analysed. On the issue of disability, the model, which is clearly at odds with the CRPD, is the medical model of disability, while both the social and the biopsychosocial model inform the CRPD. However, the Convention goes beyond these pre-existing understandings to create its own model of disability, albeit one that is not clearly depicted. On the issue of equality, the measures contained in the Convention reflect an understanding of equality that transcends formal equality to cover all forms of substantive equality.

In its mandate, the CRPD’s approach to disability departs from a core principle of equal value of the human person irrespective of the ability to conform to socially imposed norms of behaviour and function. The CRPD is founded more specifically upon the fundamental human rights principles entrenched in the Universal Declaration of Human Rights,

namely the principle of inherent human dignity, equality, autonomy and solidarity.³⁴⁵

The closest one can get to a definition of disability in the CRPD is Preamble (e), which reads: “[r]ecognising that 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”. In the universe of the CRPD there are three core and distinct concepts; disability, impairment and social barriers. Preamble (e) firstly conceptualises disability as a phenomenon, an *experience* of disadvantage in societal participation.³⁴⁶ Disability is, therefore, located outside the individual and it is not connected to individual abilities or functionality. These are covered under impairment.

The problems that the Convention seeks to address can be found under article 1 on purpose: “[t]he purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. Accordingly, under Preamble (y), the Convention is seen as “a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries”. Hence, the main problem to be addressed is disability itself, translating into disadvantage, *i.e.* curtailed opportunities of societal participation.

The causes of disability are found in both the environment and the individual’s impairment. Both Preamble (e) and article 1 expressly state that disability, *i.e.* restricted or disadvantaged societal participation is created by the *interaction* between persons with impairment(s) and societal barriers. At a first read this means that both impairment and barriers are a precondition for disability. Under such a definition disability would be eliminated if either of these two preconditions would be eliminated, since if it is the interaction that creates disability, both interacting elements are needed for disability to be created. However, disability is expected to be eliminated when both barriers are lifted and impairment is accommodated for. This is so, as general principle (d) does not advocate for impairment to be eliminated but rather respected and accepted as part of human diversity and humanity. Moreover, the fact that specific measures of affirmative action aiming to “accelerate or achieve *de facto* equality of persons with disabilities” under article 5, paragraph 4 do not come with a time-limitation

³⁴⁵ Quinn, Gerard and Degener, Theresia, The moral authority for change: human rights values and the worldwide process of disability reform”, Chapter 1 in Human Rights and Disability, OHCHR, New York and Geneva, 2002, p. 9.

³⁴⁶ CRPD, Preamble (e) and (y).

is to be translated as an acceptance on behalf of the Convention that disability can still persist even in the absence of barriers, leaving impairment as the sole cause.³⁴⁷

The protection the CRPD's constituency is entitled to with regard to the right to access employment appears multifaceted. It includes the following measures: the provision of an open, inclusive and accessible labour market, non-discrimination, reasonable accommodation, measures of affirmative action, assistance and placement services, and employability measures. The first five of these measures target the environment, attitudes, practices, physical, informational and institutional structures, in the society at large and at the labour market and the workplace specifically, both in the public and the private sector. The measures under the Convention include both individual measures, aiming at ensuring participation of specific persons in particular settings (reasonable accommodation), and measures of general application, aiming at ensuring equal and full participation for all persons with all impairments (open, inclusive and accessible labour market, non-discrimination, affirmative action). The last measures, on employability, target the individual and they range from interventions of capacity building (skills building and continuing learning and training) otherwise understood as measures that aim to "enhance" the individual to fit the market, to medical and other types of interventions of rehabilitation that aim to mitigate or cure impairment. All measures designed under article 27 include solutions that do not add to the societal exclusion of persons with disabilities, in other words solutions that are to be realised in open settings, among persons without impairments.

As to the constituency of the CRPD, article 1 stipulates: "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by *all* persons with disabilities, and to promote respect for their inherent dignity". As mentioned above, disability is seen as the experience of social disadvantage expressed as limitations in societal participation. This is accepted to be caused by the concomitant presence of an impairment and social barriers (attitudinal or environmental in nature). This first article leads a reader to believe that there is sufficient clarity on who "persons with disabilities" are, namely persons with impairment who experience social disadvantage in the form of limited social participation due to insurmountable societal barriers. However, article 1 goes on and offers a legally binding restriction to the all-encompassing constituency of "*all* persons with disabilities". Under this second passage of Article 1 CRPD

³⁴⁷ See European Disability Forum, Comments, amendments and proposals submitted electronically on Article 5 – Equality and Non-Discrimination, Third Session, available at: <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm>, latest accessed 1 November 2016.

disability becomes contingent upon the nature, intensity, duration and presence of impairment. The gist of this contradiction is that the CRPD uses impairment as a compass and accepts that social disadvantage is expected to exist only when these thresholds are met, leaving outside the scope of protection persons who do face disadvantage because of their health conditions but do not conform to the criteria set above.

However, it is supported that the criteria contained in article 1 paragraph 2, are not exhaustive, as they are introduced by the word "*includes*".³⁴⁸ Due to the fact that, both from the preparatory work and from the final text of the Convention,³⁴⁹ it becomes clear that the will of the drafters is to end the exclusion of *all* persons with disabilities, the interpretation of the above criteria is to be made *lato sensu*. Thus, the handbook for Parliamentarians on the Convention reads: "[...] the Convention protects at least those individuals. Implicit in this indication is the understanding that States may broaden the range of persons protected to include, for example, persons with short-term disabilities". So, the open-ended depictions of "disability" and "persons with disabilities" is left upon the States' margin of appreciation to be interpreted as more inclusive rather than limited. That is to say that the CRPD is to be used as a doorway into broadening the conceptualisation of disability. At the end of the day the CRPD remains a political instrument drafted as a result of a compromise between interested parties, albeit a compromise that was reached under unprecedented conditions of inclusiveness. This adds to the confusion about the lines that the Convention draws around this blurry concept of disability, which aspires to set no boundaries but in the end it does, while leaving room for individual States to imagine the rest of the picture and draw their own path towards all-inclusiveness. Delving into the concept of equality sheds light on the dark corners of these confused limits.

The CRPD is an international human rights Convention that transcends substantive equality of opportunity to cover measures of substantive transformative equality. As such, it contains both individual claim rights and proactive obligations of general application transforming the very structures of society creating disability. This informs coverage, which can be viewed in a new way. Regarding individual claim rights, coverage under a mere legal analysis of the CRPD is limited in accordance with article 1 and 27 as has already been shown. The CRPD covers neither those who manage to be included in society despite their impairment nor those

³⁴⁸ UN Office of the High Commissioner for Human Rights, *From Exclusion to Equality: Realizing the rights of persons with disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, HR/PUB/07/6, No. 14, Geneva, 2007, p. 13.

³⁴⁹ The term "all persons with disabilities" is encountered three times, in CRPD, Preamble (j); article 1, para. 1, on the Purpose of the Convention; and article 4, para. 1, on the General Obligations, setting the inclusive tone of the Convention.

who are not included because of their personal conditions alone. In addition, the CRPD is not applicable to those who experience disadvantage because of societal barriers but they fail to satisfy the criteria of a present impairment of a certain level of intensity and duration. The CRPD's measures of general application like awareness raising and accessibility, aim at achieving substantive transformative equality. In this way, the CRPD necessarily covers all persons who experience factual disability, even the ones that do not satisfy the formal coverage criteria.

A standard legal analysis of the CRPD's text reveals efforts to limit the scope of protection and the group of beneficiaries; the right to access employment is only a right to an opportunity to access it and the group of "persons with disabilities" is limited by a swath of criteria. However, in essence, the CRPD has expanded the traditional understanding of disability and equality, which necessarily informs our understanding of the legal text. The notion of substantive transformative equality – which is reflected in the measures included – challenges the non-absolute character of the right to access employment. This understanding of equality even goes as far as informing the concept of disability itself; transformative equality provides glimpses of disability as a universal experience despite the formal personal thresholds of adherence to the group of "persons with disabilities" introduced under article 1. Under such measures, disability under the CRPD becomes a platform for universal change, despite the Convention's proven adherence to a minority approach of disability. Transformative equality is concerned with interventions that reinvent society at large. Disability thus necessarily includes any person, anytime, anywhere and an all-inclusive society is painted as the Convention's ultimate goal. This all-inclusiveness will free itself from the limitations contained within the legal structures of unlawful discrimination and disability claim-rights.

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