

The Convention on the Rights of Persons with Disabilities From Ideological Conception to Enforcement: A Critical Appraisal

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ABSTRACT

The Convention on the Rights of Persons with Disabilities (CRPD) has been hailed as a paradigm shift to protect the human rights of persons with disabilities. It has been implemented for 8 years. This thesis investigates whether the CRPD is an advance in the protection of human rights of persons with disabilities. It does so by examining the normative rules under, and the actual implementation of, the CRPD by States Parties, and by examining the work of the CRPD Committee. The thesis yields the theoretical and normative insights that the CRPD possesses inherent merits and values for creating platforms for positive changes for advancing the human rights of persons with disabilities. It does so by selectively adopting the most reasonable aspects of theoretical understandings of disability, equality and discrimination. Normatively, it prioritises transforming the legal concepts and normative rules into concrete results in which persons with disabilities are able to exercise their legal capacity while being protected from institutionalisation and involuntary medical treatment in a barrier-free environment. A related conclusion is that the implementation of the theoretical concepts and selected normative rights depends upon the national legal framework and good intentions of States Parties. It also concludes that the CRPD Committee did not face any difficulty in determining violations and holding States Parties liable for not fulfilling their treaty obligations. The thesis therefore concludes that the CRPD has in practice to some extent protected the human rights of persons with disabilities. The CRPD may not solve all the problems that persons with disabilities are facing, but it can contribute to protecting their human rights if properly implemented and with the participation of all stakeholders including persons with disabilities in the implementation and monitoring processes.

DECLARATION

I certify that the work in this thesis, entitled ‘The Convention on the Rights of Persons with Disabilities: From Ideological Conception to Enforcement – A Critical Appraisal’, has not previously been submitted for a degree, nor submitted as part of the requirements for a degree, to any university or institution other than Macquarie University.

I certify that the thesis is an original piece of research that has been written by me, and that any help and assistance that I have received in my research and in the preparation of the thesis itself has been appropriately acknowledged.

I certify that all information sources and literature used are indicated in the thesis.

The empirical research presented in this thesis was approved by the Macquarie University Human Research Ethics Committee, reference number 5201300394

Duong Thi Thu Huong (42655498)

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ABBREVIATIONS

ATMs	Automatic Teller Machines
AusDDA	Australian Disability Discrimination Act
BC	Before Christ
BRL	Brazil Real (Currency Unit)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
CAT Committee	Committee Torture and Other Cruel, Inhuman or Degrading Treatment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
DPI	Disabled Peoples' International
DPOs	Disabled Persons Organisations, or Organisations of Persons with Disabilities
EU	European Union
EUR	Euro (European Monetary Unit)

HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESCR Committee	Committee on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ICIDH	International Classification of Impairment, Disability and Handicap
IDC	International Disability Caucus
IQ	Intelligence Quotient
MDGs	Millennium Development Goals
NGOs	Non-governmental Organisations
NHRIs	National Human Rights Institutions
OHCHR	The Office of the United Nations High Commissioner for Human Rights
UK	United Kingdom
UKDDA	UK Disability Discrimination Act
UN	United Nations
US	United States
USADA	Americans with Disabilities Act
WHO	World Health Organisation
WPA	World Program of Action concerning Disabled Persons

CHAPTER I: INTRODUCTION

1.1. Background Information

Fifteen percent of the world's population, that is, about one billion people, live with disabilities.¹ Of these, 80% live in developing countries, and over 40%, i.e., in excess of 400 million people with disabilities, live below the poverty line.² There is a causal relation between having a disability and suffering inequality, discrimination and the denial of human rights, especially very basic rights such as the rights to life, education and employment.

Persons with disabilities are often denied the right to life. It is estimated that the mortality rate of children with disabilities is as high as 80% in countries where the general under-five mortality rate is below 20%, but more alarmingly, 'in some cases it seems as if children with disabilities are being weeded out',³ under the misconception that persons with disabilities have lives not worth living.⁴ Persons with disabilities are also widely considered to be unable to have a family and to be good parents,⁵ resulting in coercive sterilisation being commonplace – thus a survey in India revealed that 6% of women with disabilities had been forcibly sterilised.⁶

Persons with disabilities are denied the right to education because they are thought incapable of learning. So instead of having equal opportunities within the general education system, they are subjected to a special, segregated education. As a consequence of this, the global literacy rate for adults with disabilities is as low as 3%, and only 1% for women with disabilities,⁷ in comparison with 84% and 87% worldwide, respectively, for adults and women without disabilities.⁸ Only 2% per cent of children with disabilities in developing

¹ World Health Organisation and the World Bank, 'World Report on Disability 2011' (World Health Organisation and the World Bank, 2011), 29.

² Ibid.

³ United Nations, *Factsheet on Persons with Disabilities* United Nations Enable <<http://www.un.org/disabilities/default.asp?navid=34&pid=18>>.

⁴ Janet E. Lord et al (eds), *Human Rights. Yes! Action and Advocacy on the Rights of Persons with Disabilities*, Human Rights Education Series (Human Rights Resource Center, University of Minnesota, 2007).

⁵ United Nations, above n 3.

⁶ Ibid.

⁷ Ibid.

⁸ UNESCO, 'Education for All Global Monitoring Report 2010 — Reaching the Marginalized' (Oxford University Press, 2010),

countries attend schools,⁹ as compared with 86% of the net global primary enrolment for all children.¹⁰

Persons with disabilities are denied the right to work, usually being the first to be refused and the last to be considered for employment. This discrimination on the grounds of disability, coupled with limited education and opportunities for vocational training, and inaccessible job services and workplaces, leads to the unemployment rate among them being as high as 80% in some countries.¹¹ All of this places them in a vicious circle of disability, denial and deprivation of their human rights, and social exclusion.

Notwithstanding making up a large population, and their critical circumstances, persons with disabilities were not explicitly a target group for protection under previous human rights treaties in the United Nations (UN) system.¹² Protection would have to be sought in the form of ‘other status’ which requires double interpretation, i.e., a person with a disability would have to appeal to an implicit universal provision such as ‘other status’, or possess a separately protected characteristic such as race or gender, in addition to their disability.¹³ For instance, a woman with a disability could not bring her case to any human rights treaty committee based on her disability status alone, and instead would have to claim her rights protection on the ground of racial or sex discrimination.¹⁴ These treaties have therefore generally been underused in advancing the rights of persons with disabilities.¹⁵

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⁹ UNESCO, *Education for All, Knowledge Sharing – Flagship Initiatives, Education and Disability* (2001) <http://www.unesco.org/education/efa/know_sharing/flagship_initiatives/disability_last_version.shtml>.

¹⁰ UNESCO, above n 8, 62.

¹¹ United Nations, above n 3.

¹² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (‘CERD’); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘CAT’); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CRC’); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

¹³ Michael Ashley Stein and Janet E. Lord, ‘Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities’ in Oddny Mjoll Arnadottir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 17, 19.

¹⁴ Michael Ashley Stein, ‘Disability Human Rights’ (2007) 95 *California Law Review* 75, 76.

¹⁵ Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002), 2.

To solve this problem, legally non-binding instruments such as the World Programme of Action Concerning Disabled Persons,¹⁶ or the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities,¹⁷ were developed in an attempt to protect the human rights of persons with disabilities. However, the UN General Assembly itself had to explicitly admit that these legally non-binding principles and policy guidelines did not suffice to promote full and effective participation by, and opportunities for, persons with disabilities.¹⁸ Furthermore, persons with disabilities could find themselves legally disadvantaged in comparison with other vulnerable groups such as minorities, women and children who have for a long time been protected by specific human rights treaties.¹⁹

These facts and legal deficiencies led in 2006 to the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) and an Optional Protocol.²⁰ The adoption of the CRPD resulted from a long struggle in which the understanding of the concept of disability has evolved from a medical conception to a social model of disability, and then transformed into a human rights-based approach to disability. This has been a significant achievement for the world's disability movement, which for a long time has advocated for a legally binding instrument to protect the human rights of persons with disabilities. The CRPD, comprising a Preamble and fifty articles, and its Optional Protocol of eighteen articles, was adopted on the 13th December 2006, and came into force on the 3rd May 2008. At the time of completing this thesis, the CRPD encompasses 166 States Parties, and its Optional Protocol has 89 States Parties.²¹

¹⁶ *The World Programme of Action concerning Disabled Persons*, UN Res 37/51, UN GAOR, 37th sess, 51th plen mgt, UN Doc A/37/51 (3 December 1982) ('WPA').

¹⁷ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48/96, UN GAOR, 48th sess, 85th plen mgt, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993) ('Standard Rules').

¹⁸ *Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, GA RES/56/168, UN GAOR, 88th sess, UN Doc A/RES/56/168 (19 December 2001).

¹⁹ CERD; CEDAW; CRC.

²⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, Doc.A/61/611 (entered into force 3 May 2008) ('CRPD Optional Protocol').

²¹ United Nations, *Multilateral Treaties Deposited with the Secretary-General — Status of Treaties — Chapter IV Human Rights 15. Convention on the Rights of Persons with Disabilities* (15 August 2016) United Nations Treaty Collection <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf>>; United Nations, *Multilateral Treaties Deposited with the Secretary-General — Status of Treaties — Chapter IV Human Rights 15.a Optional Protocol to the Convention on the Rights of Persons with Disabilities* (15 August 2016) United Nations Treaty Collection <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15-a.en.pdf>>.

After more than 8 years since coming into force, an obvious question to ask is how far the CRPD has safeguarded the human rights of persons with disabilities. In this thesis I examine the theoretical and normative assumptions on which the CRPD is built and compare these with the enforcement of the CRPD. In addition, I examine how the CRPD Committee has performed in this process, and in what role.

1.2. Rationale for the Research

The causal link between having a disability and inequality, discrimination and the denial of human rights for persons with disabilities is not only a reason for the adoption of the CRPD, but also an enriching and multifaceted topic for scholarly discussion. While disability, equality and inequality, and discrimination serve as a theoretical framework for disability discourse, the CRPD has been the subject of a great deal of discussion by legal scholars since its adoption. In addition, because each human rights treaty has attached to it a human rights treaty committee for monitoring its implementation, there should be an examination and analysis of the CRPD Committee's functioning in comparison with other human rights treaty committees. An analysis of the theoretical concepts of disability, equality and discrimination used by the CRPD will therefore provide an answer to the question whether, and if so, how, the CRPD conceptually advances the human rights of persons with disabilities. A further analysis of the CRPD Committee's work will help establish whether, and if so, how, these human rights are implemented.

The starting point for understanding the human rights of persons with disabilities is the understanding of the concepts of disability, equality and discrimination, given that these three concepts form a theoretical framework for this understanding. In the discussion below I wish to draw the connections between these concepts, and for that purpose I will briefly introduce the relevant issues required for understanding the complexities of these concepts. Following this, I provide a brief enumeration of relevant issues with respect to the CRPD literature.

In disability discourse, the medical, social and socio-political models of, and human rights-based approach to, disability, are paradigm developments for addressing the issue of disability and conducting disability research. Some scholars and institutions working on disability have vehemently rejected the medical model of disability because of its long-term negative impacts on persons with disabilities. They have then promoted the social model and human rights-based approach to improving the social status of persons with disabilities. However, there are questions that have never been addressed by contemporary scholarship. One must question whether the complete rejection of the medical model of disability and the adoption of the social, and socio-political models of, and human rights-based approach to disability is the best choice for ensuring substantive equality for, and tackling discrimination against, all persons with disabilities. Will a combination of these four models better achieve a compromise solution, or is there perhaps another option best suited for realising the human rights of persons with disabilities?

Unlike feminist studies, disability scholars have rarely been bothered with what kind of equality, that is, whether it is equality as sameness, or equality as difference, or a concept beyond the debate on sameness and difference, that is best suited to the context of disability. Theoretical discussions abound on whether the right to equality requires that everyone should have the same rights, or whether different sections of the population should have different rights. Human diversity is incontestable, and persons with disabilities are different in very particular ways and should not be compared with those without disabilities, because there is no comparator for persons with disabilities. This means that disability should not be compared with ability, but instead, legal norms should recognise their difference.²² The question therefore is what the relevant difference is for persons with disabilities?

Similarly, disability scholars have not yet paid enough attention to how best to understand the concept of discrimination in disability discourse, in order to identify the connection

²² Theresia Degener, 'Law of Disability Rights: International Disability Law – A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong December 13–17, 1999' (2000) 18 *Berkeley Journal of International Law* 180, 182–3; The International Centre for the Legal Protection of Human Rights, *Non-Discrimination in International Law: A Handbook for Practitioners* (INTERIGHTS, 2011 ed, 2011), 104.

between discrimination and equality, and then promote an antidiscrimination ideology and legislation to protect persons with disabilities.

In terms of the scholarship on human rights regarding persons with disabilities, there is substantial scholarship available on the CRPD, under which all human rights of persons with disabilities are defined. Some discussions consist of simple expressions of support for the adoption of the CRPD.²³ Others provide an examination of the historical perspective of international human rights law and disability so as to provide an understanding of the need for a disability-specific convention.²⁴ Still others critically go over the text of the CRPD and its potential contribution to realising the human rights of persons with disabilities.²⁵ There has also been extensive discussion on the theoretical issues of disability, equality and discrimination with a view to better understanding the CRPD.²⁶ There are detailed analyses of particular articles or issues under the CRPD, such as offering an appropriate understanding of legal capacity,²⁷ recommending one decision-making model for persons with disabilities against another,²⁸ or strongly criticising the application of involuntary medical treatment to persons with disabilities.²⁹

Other discussions concern the role of the CRPD in specific countries in relation to particular issues such as inclusive employment for persons with disabilities,³⁰ the situation of

²³ Don MacKay, 'United Nations Convention on the Rights of Persons with Disabilities' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 323; Ronald McCallum, 'The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections' (Paper presented at the Disability, Discrimination and Human Rights: Recent National and International Developments, Belfast, Northern Ireland, United Kingdom, 20 February 2010).

²⁴ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1; Anna Lawson, 'United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 563.

²⁵ Kayess and French, above n 24; Lawson, above n 24.

²⁶ Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Development' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 3; Oddný Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality?' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 41.

²⁷ Amita Dhand, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 429.

²⁸ Nandini Devia, Jerome Bickenbach and Gerold Stuckia, 'Moving towards Substituted or Supported Decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities' (2011) 5(4) *ALTER – European Journal of Disability Research* 249; Megan Flynn, 'Olmstead Plans Revisited: Lessons Learned from the U.N. Convention on the Rights of Persons with Disabilities' (2010) 28(2) *Law and Inequality: A Journal of Theory and Practice* 407.

²⁹ Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Psychiatric Interventions' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 405.

³⁰ Eric G. Zhang, 'Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 517.

persons with hearing impairments,³¹ inclusive education,³² and the analysis of the legislative commitments of a State Party.³³ Most discussions focus on the same concern, that is, whether the CRPD can help to improve the situation of persons with disabilities in those countries. However, improving the lives of persons with disabilities requires a firm understanding of and a commitment to the theoretical implications of adopting one or another concept of disability, equality or discrimination. This thesis makes a contribution in this respect.

There is also discussion on implementation and monitoring mechanisms of disability strategies or action plans worldwide.³⁴ Such discussion has explored the connection between the implementation of the CRPD and national policy and legal development.³⁵ However, in this literature there is generally no investigation of State reports to the CRPD Committee, and thus of the actual implementation of the CRPD reported to the CRPD Committee.

With regard to scholarship on human rights treaty committees, a substantial body of scholarship has accumulated, reflecting the proliferation of these committees under the UN human rights system, which now number ten committees in total, including the CRPD Committee.³⁶ This branch of scholarship critically examines the work of, and the difficulties faced by, human rights treaty committees in considering States' reports, fact-finding and individual communications, as well as issues of jurisprudence, and points out areas for improvement.³⁷ The issues in relation to human rights treaty committees are primarily

³¹ Michael Schwartz, 'Deafness in Vietnam: Will the United Nations Convention on the Rights of Persons with Disabilities Make a Difference' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 483.

³² Vanessa Torres Hernandez, 'Making Good on the Promise of International Law: The Convention on the Rights of Persons with Disabilities and Inclusive Education in China and India' (2008) 17(2) *Pacific Rim Law & Policy Journal* 497.

³³ Sarah Fraser Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?' (2011) 40(4) *Industrial Law Journal* 428.

³⁴ Eilíonóir Flynn, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press, 2011).

³⁵ Ibid.

³⁶ Office of the United Nations High Commissioner for Human Rights, *Human Rights Bodies* (15 August 2016) Office of the United Nations High Commissioner for Human Rights <<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>>: Human Rights Committee (ICCPR); Committee on Economic, Social and Cultural Rights (ICESCR); Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); Committee against Torture (CAT); Subcommittee on Prevention of Torture (SPT); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Enforced Disappearances (CED).

³⁷ William F. Felice, 'The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights' (2002) 24(1) *Human Rights Quarterly* 205; Tobias Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty' (2009) 31(3) *Human Rights Quarterly* 777; Nigel Rodley, 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementarity or Competition?' (2003) 25(4) *Human Rights Quarterly* 882; Phillip Alston, 'Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights' (1987) 9(3) *Human Rights Quarterly* 332; Andrew Byrnes,

addressed from a social science rather than a legal perspective.³⁸ Two of the best-known works on human rights treaty bodies³⁹ critically analyse the work of different treaty bodies and support an institutional reform plan on a merger of all existing human rights treaty committees,⁴⁰ with a view to ensuring better implementation of human rights treaties and providing easy access to the treaty system for rights-holders.⁴¹

However, neither of these works covers the CRPD Committee. Recently, two commentators have outlined the CRPD Committee's future opportunities and challenges, including a brief identification of the substantive issues that the CRPD Committee will have to address in the course of its work.⁴² However, an actual investigation of its work has not yet been conducted.

An aspect of the scholarship on human rights treaties that is not easily detectable is that there is a clear separation of the study of normative rules and institutional aspects; the studies either discuss the normative rules or institutional aspects, but not both together.

This brief literature review detects several unanswered questions on the theoretical framework for understanding the human rights of persons with disabilities in relation to equality and discrimination as mentioned in the early part of this section. It also reveals that an evaluation on the implementation of the CRPD in protecting the human rights of persons

'Other Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination against Women, The' (1989) 14 *Yale Journal of International Law* 1; Rachel Johnstone, 'Feminist Influences on the United Nations Human Rights Treaty Bodies' (2006) 28(1) *Human Rights Quarterly* 148; Michael K. Addo, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' (2010) 32(3) *Human Rights Quarterly* 601; Michael O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (Sweet & Maxwell, 1996).

³⁸ Kelly, above n 37; Felice, above n 37.

³⁹ Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000); Anne Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International, 2000).

⁴⁰ Andrew Clapham, 'UN Human Rights Reporting Procedures: An NGO Perspective' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 175, 195–8; Bayefsky, above n 39, 329–30.

⁴¹ *Integrated and Coordinated Implementation of and Follow-up to the Outcomes of the Major United Nations Conferences and Summits in the Economic, Social and Related Fields Follow-up to the Outcome of the Millennium Summit in Larger Freedom: Towards Development, Security And Human Rights for All – Report of the Secretary-General Addendum Letter Dated 26 May 2005 from the Secretary-General to the President of the General Assembly*, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005/Add.3 (26 May 2005) annex ('*Plan of Action Submitted by the United Nations High Commissioner for Human Rights*') [99].

⁴² Ida Elisabeth Koch, 'From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities' in Oddny Mjoll Arnadottir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 67; Gerard Quinn, 'Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behavior?' in Oddny Mjoll Arnadottir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 215.

with disabilities has not been undertaken and that there has been very little literature on the work of the CRPD Committee.

The review also shows that there has been a lack of any comprehensive study of State reports. A comprehensive study of State reports could serve as a source for judging whether and how the CRPD has been contributing to improving the lives of persons with disabilities. And there has been absolutely no scholarly discussion on the individual communications of the CRPD Optional Protocol. This thesis represents my effort to address these identified gaps. I articulate my research questions more specifically in the next section.

The adoption of the CRPD was not achieved smoothly and without any disagreements. Many concerns around the new CRPD ran counter to each other. A prominent concern was that the CRPD, as a new thematic convention on disability, might highlight the differences of persons with disabilities and thus increase their marginalisation and perpetuate discrimination against them.⁴³ In contrast, there was also a concern that if, without the CRPD, further marginalisation and discrimination might be avoided, nevertheless the existing marginalisation and discrimination would not be removed.⁴⁴ It is obvious that the adoption of the CRPD and the CRPD itself are not a magical solution to all the problems facing persons with disabilities. The only evidential outcome of the existence of the CRPD at this stage is its significance as a normative statement that persons with disabilities are entitled to the same human rights as everyone else.

On the positive side, there is a prospect that the new CRPD would underpin the UN's existing human rights system,⁴⁵ by codifying many existing norms, principles, standards, and guidelines on disability scattered across several UN documents.⁴⁶ The hope is that in this way it will address disability issues more effectively.

⁴³ United Nations, 'Report of the United Nations Consultative Expert Group Meeting on International Norms and Standards Relating to Disability' (Boalt Hall School of Law, University of California at Berkeley and the World Institute on Disability, 8-12 December 1998) <<http://www.un.org/esa/socdev/enable/disberk0.htm>>; Gerard Quinn and Theresia Degener, 'Expanding the System: The Debate about a Disability-specific Convention' in Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002) 293, 297.

⁴⁴ Quinn and Degener, above n 43, 297.

⁴⁵ Ibid.

⁴⁶ United Nations, above n 43.

1.3. Research Questions

The central question of the thesis therefore is to explore whether the CRPD has a potential to enhance realisation and protection of the human rights of persons with disabilities. This question possesses at least four different components, namely, those relating to the theoretical framework, normative rules, monitoring mechanism and actual implementation of the CRPD. Each of these components will be addressed through several sub-questions.

The first component comprises a theoretical framework for formulating the human rights of persons with disabilities. The understanding of disability is a starting point for any legal intervention in dealing with disability issues. Equality should be available for all without distinction of any kind, and discrimination on the ground of disability is a violation of the inherent dignity and worth of persons with disabilities.⁴⁷ This component will therefore define this theoretical framework by addressing three sub-questions on disability, equality and discrimination. These are:

- (1) how the concept of disability is understood in both disability discourse and disability legal discourse so as to ascertain which model of disability would be best suited to the situation of persons with disabilities;
- (2) whether treating persons with disabilities the same as those without disabilities, or treating them differently, would ensure for them equality in law in the context of disability; and
- (3) how the concept of discrimination should be understood and applied in law in the context of disability.

In order to answer these questions, it is important to go back to the original understanding of those concepts. Theoretical research in legal research is designed to work on the disability, equality and discrimination discourses, and doctrinal research should analyse the concepts of disability and discrimination under municipal disability legislative laws.

⁴⁷ CRPD Preamble para (h).

The second component relates to the human rights of persons with disabilities, which are clearly defined under the CRPD. This component consists of two aspects, theoretical and normative. It is believed that there are always theoretical underpinnings for the formation of any human rights treaty. For example, the formation of the CERD originated from the notion ‘any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous and that there is no justification for racial discrimination, in theory or in practice’.⁴⁸ In the case of the CRPD the relevant human rights that must form its theoretical foundations are disability, equality and discrimination. The theoretical underpinnings of the CRPD will be examined using doctrinal research – a concept that will shortly be clarified – with a view to analysing the CRPD’s normative principles and provisions to answer the following research sub-question:

- (4) whether the CRPD is conceptually an advance over other UN human rights treaties for protecting the human rights of persons with disabilities.

This sub-question aims at ascertaining whether the CRPD has made a conceptual advance in redefining disability as a result of both individual functional limitations, and social and structural factors; and whether the CRPD has departed from the usual concept of equality and non-discrimination as same treatment for everyone.

Normatively, the CRPD not only reaffirms the human rights of persons with disabilities by solemnly re-recognising their rights to life, liberty and security, along with their rights to liberty of movement, to marry and found a family, to education, and so on.⁴⁹ It also extends those rights to the unique situation of person with disabilities.⁵⁰ Such an extension of the traditional rights to the context of disability includes, *inter alia*, legal capacity, deinstitutionalisation, freedom from forced medical treatment, and accessibility. Hence the sub-question to address for this normative aspect is:

⁴⁸ CERD Preamble.

⁴⁹ Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30(2) *Human Rights Quarterly* 494, 499.

⁵⁰ *Ibid.*

- (5) whether the CRPD normatively possesses inherent merits and values for creating platforms for positive changes in the advancement of the human rights of persons with disabilities.

Doctrinal research is designed to deal with the sub-questions of this second component.

Like all other human rights treaties, the CRPD establishes a mechanism to monitor its implementation. Article 34 establishes a committee on the rights of persons with disabilities (the CRPD Committee) tasked with the examination of States Parties' periodic reports, conduct of inquiry, and the consideration of individual communications at the international level.⁵¹ Article 33 requires States Parties to establish an independent framework such as a national human rights institution (NHRI) to monitor the implementation of the CRPD at the national level.⁵² It also requires the involvement of organisations of persons with disabilities (DPOs) in this monitoring task. As such, it is necessary to examine the roles and functions of this mechanism. Hence the sub-question for the third component is the following:

- (6) whether the CRPD monitoring mechanism has any distinctive aspects in comparison with other human rights treaty committees for protecting the human rights of persons with disabilities.

Doctrinal research is designed to analyse the roles and functions of the CRPD Committee established under the CRPD. Non-doctrinal research, including observation and study of secondary sources, is designed to analyse those of NHRIs and DPOs and other information on the CRPD Committee.

Finally, all the analysis of theoretical, normative and institutional rules of the CRPD mentioned above serves as a background context for appraising the actual implementation of the CRPD. This implementation refers to compliance with substantive treaty obligations outlined under the CRPD by States Parties to the CRPD, and procedural obligations such as State report submissions by States Parties to the CRPD Committee. The process of implementation can be evaluated by investigating State reports, and the work of the CRPD

⁵¹ CRPD art 34.

⁵² Ibid art 33(2)(3).

Committee in examining State reports, and considering individual communications, with the purpose of addressing the following research sub-questions:

- (7) how States Parties have incorporated the CRPD's norms and provisions into their national legislation regarding State reports, how they are implementing these newly amended or adopted legislation on disability, and how the CRPD Committee has responded to this incorporation and implementation;
- (8) how the CRPD's norms and provisions have been transformed into quasi-judicial judgements by the CRPD Committee regarding the individual communications.

Questions (7) and (8) aim to define to what extent the CRPD normatively protects the human rights of persons with disabilities. Non-doctrinal research, including interviewing and a study of secondary sources, is designed to address these two sub-questions.⁵³

The findings regarding the above research sub-questions will enable me to answer my central research question of whether the CRPD offers an actual advancement in the protection of human rights of persons with disabilities. They will also allow me to draw out the implications of my research for the discipline and to make recommendations for future research with practical and policy implications.

1.4. Research Methodology

In order to address the above research question and sub-questions, a combination of research methods has been utilised. The methodology mainly combines theoretical, doctrinal, and non-doctrinal research, each method being necessary to address different aspects of the research question and sub-questions. I further explain the significance of each research method below.

Theoretical Research in the Context of Legal Research

Theoretical research in the context of legal research refers to 'research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined

⁵³ For more detail on this method and how I utilise this method to address these two sub-questions, please see the discussion on non-doctrinal research in Section 1.4.

effects of a range of rules and procedures that touch on a particular area of activity'.⁵⁴ In this thesis, theoretical research is designed to analyse the concepts of disability, equality, and discrimination. This is necessary because these concepts form a theoretical framework for understanding the human rights of persons with disabilities. Their analysis will inform the discussion throughout remaining sections of this thesis. The theoretical discussion includes a brief historical analysis of the development of these concepts, a consideration of their various forms, and an analysis of their general legal underpinnings in the disability context.

Doctrinal Research

Doctrinal research refers to research that 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.⁵⁵ The primary sources for doctrinal analysis are legislation and case law.⁵⁶ Specifically, doctrinal research involves the analysis of substantive law rules, legal doctrines and concepts, and judicial judgements.⁵⁷ In other words, doctrinal research asks the question: What is in the law?⁵⁸ It also aims to study legal institutions.⁵⁹ Doctrinal research also requires a literature review, that is, 'a critical analysis of the existing research literature, theoretical and empirical', relating to the research topic. The literature review thus informs us of 'what is known and not known' about the topic.⁶⁰

As such, in this thesis doctrinal research is designed to analyse municipal disability laws with regard to the definitions of disability and regulations on discrimination, to examine how those definitions and regulations reflect the general understanding of the concepts of disability and discrimination in law and in the context of disability.

⁵⁴ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 101.

⁵⁵ Ibid.

⁵⁶ Ibid 113; Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: Teaching Material* (2009), 72; Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2009) 28, 29.

⁵⁷ Hutchinson and Duncan, above n 54, 113; Vibhute and Aynalem, above n 56, 72; Chynoweth, above n 56, 29.

⁵⁸ Chynoweth, above n 56, 29; Vibhute and Aynalem, above n 56, 71.

⁵⁹ Vibhute and Aynalem, above n 56, 73.

⁶⁰ Hutchinson and Duncan, above n 54, 113.

Doctrinal research is also designed to analyse the normative rules under the CRPD as an international human rights treaty governing the issues of disability, to identify the CRPD's ideological framework. Specifically, it can be used to analyse to what extent the CRPD has adopted the models of, and human rights-based approach to, disability. It can also be used to analyse the concepts of equality and discrimination as legal principles under the CRPD. In addition, it is designed to analyse selected normative provisions under the CRPD with regard to legal capacity, deinstitutionalisation, freedom from forced medical treatment, and accessibility.

It is also designed to study the structure of the CRPD Committee as defined under the CRPD, in order to identify any distinctive features in terms of structure, composition, or normative approaches of the CRPD Committee, as compared with other human rights committees.

Non-doctrinal Legal Research

Legal research includes research methodologies used in other disciplines, including hermeneutic, argumentative, empirical, explanatory, axiomatic, logical and normative techniques,⁶¹ and in legal research anything that is not 'doctrinal' can be classified as non-doctrinal research.⁶²

Non-doctrinal legal research refers to the investigation through empirical data of how law and legal institutions affect human attitudes and what impact they have on society.⁶³ Such an investigation looks into social dimensions of law in relation to (1) legislative processes, including the study on the roles of proposed law, and the forces in society shaping a particular set of laws or legal norms; (2) the implementation of the law, including the possible presence of gaps in normative rules affecting the actual implementation of the law, and the roles of

⁶¹ Ibid 113.

⁶² Ibid 114.

⁶³ Vibhute and Aynalem, above n 56, 87–8.

legal institutions in this implementation; and (3) the impact of the law in changing people's attitudes and behaviour, including that of the intended beneficiaries.⁶⁴

Interviews, observation and the study of secondary sources are ways of collecting empirical data for non-doctrinal legal research.⁶⁵ The methods of interview and observation are known as empirical research.⁶⁶ In this thesis these two methods aim to collect relevant data for addressing practical aspects of the research question and sub-questions. As such, the empirical research in this thesis is designed to investigate the actual work of the CRPD Committee. These two methods – of interview and observation – are instances of qualitative research, and help to understand and interpret phenomena by studying empirical materials such as personal experience, introspection, and so on.⁶⁷ It should be noted here that I did not focus on statistical information, because I am more interested in collecting information not available elsewhere in print, in order to support my analysis. The study of secondary sources is also designed to collect empirical information on the implementation of the CRPD with regards to State reports and the work of the CRPD Committee.

Interviewing

Interviewing refers to face-to-face interaction to collect information through a set of pre-determined questions.⁶⁸ Other forms of communication such as fax or email are also included under interviewing.⁶⁹ Interview questions can be in semi-structured, open-ended and unstructured forms. Interviews with semi-structured or open-ended questions are designed to obtain comparable responses, including convergent and divergent opinions, from several interviewees responding to the same questions.⁷⁰ These questions, despite being predetermined, are flexible and modifiable even at the time of interviewing.⁷¹

⁶⁴ Ibid.

⁶⁵ Ibid 90.

⁶⁶ Ibid 71; Hutchinson and Duncan, above n 54, 114.

⁶⁷ Norman K. Denzin and Yvonna S. Lincoln, 'Introduction: The Discipline and Practice of Qualitative Research' in Norman K. Denzin and Yvonna S. Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, Inc., 2nd ed, 2000) 1, 3–4.

⁶⁸ Vibhute and Aynalem, above n 56, 90.

⁶⁹ Ibid 268.

⁷⁰ Gina Wisker, *The Postgraduate Research Handbook*, Palgrave Research Skills (Palgrave Macmillan, 2nd ed, 2008), 194–5.

⁷¹ Vibhute and Aynalem, above n 56, 268.

In this thesis the interviews took the form of semi-structured/open-ended interviewing to collect data and information that reflected insider experience and opinions, and, in the case of interviewees who were members of the CRPD Committee, self-evaluations of their own work. Such information is not available in print.

Face-to-face interviews with members of the CRPD Committee were conducted in Geneva in April 2014, where the CRPD Committee's working sessions take place. Semi-structured interviews through email or Skype chat were conducted with members who were not available for face-to-face interviews.⁷²

The interview questions were designed so as to best reflect the interviewees' insider experience and opinions, and evaluation of their own work on the basis of introspection and analysis. The questions were also designed to bring out distinctions in normative approaches and practices developed by different human rights treaty committees, and suggestion on possible reform options to best uphold the CRPD's principles and norms.⁷³

Observation

Observation is a method of collecting data and information by systematically observing or studying other existing records of a phenomenon, and the behaviour of respondents or institutions that are the focus of the research.⁷⁴ Observation includes formal or informal modes. Informal approaches are less structured and allow the observer considerable freedom in the gathering and recording of information,⁷⁵ including note taking and other informal modes of information gathering.⁷⁶ Formal approaches impose a large amount of structure and direction on what is to be observed.⁷⁷ Five methods of observation are participant observation, complete participant, participant as observer, marginal participant, and observer as

⁷² For the list of the interviewees, please see Appendix II of this thesis.

⁷³ For the list of the interviewing questions, please see Appendix IV of this thesis.

⁷⁴ Vibhute and Aynalem, above n 56, 90.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

participant. Because observation methods are not an important part of this thesis they will not be discussed here.⁷⁸

For the purposes of this thesis, an informal observation of working sessions of the CRPD Committee was carried out to establish how its working methods are conducted in practice. I took notes to gather information needed for this thesis. This assisted me in recognising any differences in working methods as outlined in papers as distinct from those carried out in practice. This also helped me to capture what the CRPD Committee actually does during its working sessions, rather than what the CRPD Committee Secretariat's reports claim they do.

The Study of Secondary Sources

This method refers to the examination of published or unpublished documents (such as Census Reports, Reports of Governmental and/or Non-Governmental Agencies, and appropriate literature in the sociology of law) as an 'indirect' method of information gathering.⁷⁹ In this thesis, this method was used to study State reports, documents resulting from the work of the CRPD Committee, and statistical records from reports and related materials available online.

With regard to State reports, the method is ideal for investigating how the CRPD is being implemented in States Parties reported under State reports submitted to the CRPD Committee. At the time of writing there were 93 States reports regarding the implementation of the CRPD.

The method is also well suited to analysing the documents resulting from the work of the CRPD Committee, including its Rules of Procedures, Working Methods, State report guidelines, lists of issues, concluding observations in response to State reports, general comments, and judgements after examining an individual communication.

⁷⁸ For more detail on these five methods of observation see Vibhute and Aynalem at *ibid* 179–80.

⁷⁹ *Ibid*.

The method is also appropriate for studying statistical records from reports and related materials available on the websites of the UN Treaty Collection,⁸⁰ in particular, the OHCHR,⁸¹ the DPI,⁸² and the NHRI Coordinating body.⁸³ It yielded information on the number of countries which are States Parties to a given human rights treaty, such as the CRPD. It also made it possible to ascertain comparable statistics on processing time in considering numbers of submitted State reports and individual communications, the number of cases among those submitted which are declared inadmissible and those which are accepted for consideration by the CRPD Committee, and the number and nature of individual communications to the CRPD Committee. In addition, it is designed to collect information on actual DPOs and NHRIs when discussing the CRPD monitoring mechanism. It is important to note here that I did not focus on statistical information; instead, I was more interested in collecting information not available elsewhere in a formally codified form in order to support my analysis.⁸⁴

1.5. Outline of the Thesis

In this chapter I have discussed the relevant background information for the thesis and discussed the rationale of the thesis, my research questions, and my research methodology. The next eight chapters are organised as follows:

Chapter II deals with research sub-question (1) in order to ascertain how the concept of disability is understood in both disability discourse and disability legal discourse, with the main focus being on how this concept is understood in disability law.

Chapter III addresses research sub-question (2). It argues that both the concepts of equality as sameness and equality as difference are fundamental ideological foundations for

⁸⁰ United Nations Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General – Chapter IV: Human Rights* (15 August 2016) United Nations Treaty Collection <<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>>.

⁸¹ Office of the United Nations High Commissioner for Human Rights, *Office of the United Nations High Commissioner for Human Rights* (15 August 2016) <<http://www.ohchr.org/EN/Pages/Home.aspx>>.

⁸² *Disabled People's International* (15 August 2016) <<http://www.dpi.org/>>.

⁸³ The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights* (15 August 2016) The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights <<http://nhri.ohchr.org/EN/Pages/default.aspx>>.

⁸⁴ For the list of DPOs as DPI Full Members, and list of National Human Rights Institutions, please see Appendixes V and VI, respectively, of this thesis.

establishing the human rights of persons with disabilities. These two concepts are both within the liberal tradition and can be used concurrently, though their level of application in the context of disability is different.

Chapter IV deals with research sub-question (3), ascertaining how discrimination is understood, including the ideological foundations of the definitions of different types of discrimination, and explains why the notion of discrimination is so important to the overall argument of the thesis and for promoting antidiscrimination ideology and legislation to protect persons with disabilities. The analysis of these first three chapters establishes a theoretical background showing the connections between disability, equality and discrimination, which then provides a basis for investigating how these concepts have been incorporated into the CRPD's principles and provisions as its ideological framework.

Chapter V works on research sub-questions (4) and (5). It investigates the extent to which the CRPD incorporates the concepts of equality, discrimination and disability as its theoretical framework. A brief discussion on the semi-relational model known as the ethics of care, on which the CRPD is also based is included. It also discusses selected normative rules under the CRPD with regard to legal capacity, deinstitutionalisation, freedom from forced medical treatment, and accessibility. This normative analysis presents evidence that the CRPD theoretically and normatively possesses inherent merits and values for creating platforms for positive changes in advancing the human rights of persons with disabilities.

Chapter VI addresses research sub-question (6), discussing the roles and functions of the mechanism for monitoring the implementation of the CRPD, where this mechanism includes the CRPD Committee, DPOs and NHRIs. It argues that the monitoring mechanism is distinctive and effective in contributing to the protection of the human rights of persons with disabilities.

Chapter VII deals with research sub-question (7). By investigating State reports on the implementation of the CRPD and the CRPD Committee's work on examining States reports,

it demonstrates how the CRPD's principles and provisions are being implemented by the States Parties.

Chapter VIII works on research sub-question (8). It examines how the CRPD's inherent merits and values have been transformed into quasi-judicial judgements by the CRPD Committee, by investigating its views on individual communications. The discussion in Chapters VII and VIII assists in evaluating whether the CRPD succeeds, in practice, in protecting the human rights of persons with disabilities. Most importantly, this analysis contributes to answering the central research question of whether the CRPD is designed to advance the human rights of persons with disabilities.

Finally, Chapter IX addresses the central question of the thesis by concluding whether the CRPD does actually advance the protection of human rights of persons with disabilities.

CHAPTER II: DISABILITY – FROM DISCOURSE TO NORMATIVE UNDERSTANDING

2.1. Introductory Remarks

In the discourse on disability, scholars generally agree, often from the viewpoint of philosophical and political considerations, that there should be a model, or theory, or whatever it might be named, for understanding disability. However, the core issue is that whatever the various resulting models or theories of disability look like, all remain divergent. Based on the reasons for their research, each school of thought offers a very different understanding of disability, while often refusing to acknowledge those of others.

This discourse on disability has in many ways greatly influenced legal developments on disability, especially regarding the understanding of disability from a biological viewpoint, on the one hand, and as a socially constructed concept, on the other. It must be investigated whether municipal and international laws reflect similar concerns on disability issues.

This chapter will ascertain how the concept of disability is understood in both disability discourse and disability legal discourse, with the main focus being on how the concept is understood in disability legislation. The analysis will establish a theoretical background on disability, which will then enable an investigation into how the concept of disability, together with those of equality and discrimination, has been incorporated into the CRPD's principles and provisions as its ideological framework – something which will be discussed in Chapter V. This analysis will also serve as the contextual background for the discussion in Chapters VII and VIII, on the implementation of the CRPD.

The discussion in this chapter is divided into five sections. Section 2.1 introduces the issues of the chapter. Section 2.2 discusses the three main models of disability, namely, the medical, social and minority rights models. Each of these uses different ways of understanding disability, and the discussion also extends to other ways of understanding disability. Section 2.3 discusses how disability has been made into a human rights issue, and

offers an analysis of the human rights approach to disability. This discussion will help establish a background context for Sub-section 2.4.2 dealing with disability in international human rights law.

Section 2.4 discusses how disability is defined under municipal law, relating the discussion to the three models of disability discussed in Section 2.2. The section will also discuss how disability has been incorporated into legally binding international human rights treaties, and will sketch the development of legally non-binding international human rights law on disability chronologically, and in relation to the different models of and approach to disability. This discussion will enable me to make a determination regarding my preferred model of disability, and this in turn will assist me in analysing how the CRPD uses the concept of disability. This will be the focus of Chapter V, so the present section will serve to provide the necessary theoretical context for Chapter V. Section 2.5 will draw some conclusions for the chapter, in particular, that a selective combination of the medical, social, and minority civil rights models, along with a human rights-based approach, is the preferred model for dealing with the issue of disability.

2.2. Understanding Disability

In this section I will discuss the three main models of disability – the medical, social and minority rights models – which I name the biological condition, the social construction, and the socio-political construction, respectively. Each of these models uses different ways of understanding disability, and the discussion will also extend to some other ways of understanding disability. The section starts with a discussion of the concepts of impairment, disability, and handicap, in order to help establish the correct context for understanding disability.

2.2.1. Crucial Terminology

The three terms – impairment, disability and handicap – have been used at various times to refer to persons with some form of bodily difference. In 1980 the World Health Organization (WHO) pointed out a causal link between these terms in its publication, *International Classification of Impairments, Disabilities and Handicaps* (ICIDH).⁸⁵ According to this publication, the order of these terms should be exact: impairment, disability and then handicap.⁸⁶ Impairment, as the first term in this causal link order, refers to an exclusively biological condition of an individual such as deafness, blindness, or immobility resulting from polio.⁸⁷ Disability is an unavoidable consequence of being impaired.⁸⁸ Handicap is a disadvantage resulting from having an impairment or disability (or both), and an individual with this disadvantage could fail to meet the expectations or norms established by able-bodied members of the group or society to which that individual belongs.⁸⁹

This way of understanding these terms has long been criticised for exclusively focusing on the individual functional limitations, and stressing that disability is an individual problem, while ignoring any social and structural factors as possible causes of the disability.⁹⁰ This leads to medical and administrative solutions to cure or rehabilitate persons with disabilities,⁹¹ instead of supporting them to integrate into all aspects of life.

Mindful of that limitation, the WHO's later document, *International Classification of Functioning, Disability and Health* (ICF) of 2001,⁹² views disability as a phenomenon arising

⁸⁵ World Health Organisation, 'International Classification of Impairments, Disabilities, and Handicaps' (World Health Organisation, 1980), 11, 47, 143, 183: *impairment* refers to any loss or abnormality of psychological, physiological, or anatomical structure or function; *disability* refers to 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; and *handicap* refers to a disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, social and cultural factors) for that individual.

⁸⁶ Ibid.

⁸⁷ Ibid. 14. Impairments concerned with abnormalities of body structure and appearance and with organ or system function) resulting from any cause; in principle, impairments represent disturbances at the organ level.

⁸⁸ Ibid. Disabilities reflecting the consequences of impairment in terms of functional performance and activity by the individual; disabilities thus represent disturbances at the level of the person.

⁸⁹ Ibid. Handicaps are concerned with the disadvantages experienced by the individual as a result of impairments and disabilities; handicaps thus reflect interaction with and adaptation to the individual's surroundings.

⁹⁰ Mike Oliver, 'Defining Impairment and Disability: Issues at Stake' in Colin Barnes and Geoff Mercer (eds), *Exploring the divide: Illness and disability* (The Disability Press, 1996) 29, 30.

⁹¹ Hisayo Katsui, *Towards Equality — Creation of the Disability Movement in Central Asia* (University of Helsinki, 2005), 12.

⁹² World Health Organisation, 'International Classification of Functioning, Disability and Health' (World Health Organisation, 2001). The ICF is WHO's framework for measuring health and disability at both individual and population levels. The ICF was officially endorsed by all 191 WHO Member States in the Fifty-fourth World Health Assembly on 22 May 2001 by the

from a complex interaction of body functions, structures and activities, and participation, as well as environmental and personal factors, yet it still classifies disability under health-related domains.⁹³ The ICF abandons the term ‘handicap’ and declares that it has moved away from considering disability as a consequence of disease.⁹⁴ It also claims to use a combination approach, by considering disability to be a result of both biological functional limitations and social and structural factors.⁹⁵

There are a number of difficulties with this combination approach. Generally, the ICF stresses external factors that create disabilities, and also stresses the participation of persons with disabilities in society. However, it is apparent that it fails to draw a connection between impairment and participation, and it leaves open the possibility that various factors such as bodily functions or contextual considerations might be the possible causes of social exclusion.⁹⁶ The fundamental problem of the ICF’s definition of disability is that it considers persons without disabilities as the standard and persons with disabilities as a deviation from this normative standard.⁹⁷ The root cause of this problem is that the WHO is in every aspect a medical organisation; it is therefore not surprising that its definitions of disability are medically oriented and focused on individual impairment.

From the perspective of persons with disabilities themselves, Disabled Peoples’ International (the DPI),⁹⁸ along with many other major international non-governmental organisations (NGOs), has traditionally recommended that its member organisations temporarily utilise the ICF’s definition until they can work out a commonly agreed definition of disability,⁹⁹ while noting the ICF definition’s contentious medical aspects.

There has therefore been no development of an agreed definition of disability. Even if there was a common definition, such a definition could only explain the status of having a

Resolution WHA 54.21.

⁹³ Ibid.

⁹⁴ Ibid 4.

⁹⁵ Ibid 20.

⁹⁶ Theresia Degener, 'The Definition of Disability in German and Foreign Discrimination Law' (2006) 26(2) (Spring 2006) *Disability Studies Quarterly* 5.

⁹⁷ World Health Organisation, above n 92, 213.

⁹⁸ Disabled Peoples' International (DPI) is a network of national DPOs, established to promote human rights of persons with disabilities through full participation, equalization of opportunity and development. Website: <http://www.dpi.org/>.

⁹⁹ DPI Position Paper on the Definition of Disability available at: <http://v1.dpi.org/lang-en/resources/details.php?page=74>.

disability, not the nature of the disability. Because of this limitation, the terminology of a model of disability has been used. A model is used to clarify and organise a set of practices and tools for testing or deconstructing theories.¹⁰⁰ A model is always based on multiple theories and refers to the function and structure of a phenomenon.¹⁰¹ In the disability discourse, a model of disability refers to a particular ideological and theoretical construction, which seeks to explain the disability phenomenon and then inform any policies, legislation and affirmative action in dealing with disability. Against this background, I will now move on to discussing different models of disability.

2.2.2. Models of Disability

2.2.2.1. Disability as a Biological Condition – the Medical Model of Disability

The medical model of disability views disability as a problem or an illness that needs to be solved or cured, where the focus is on individual functional limitation. This model emphasises three elements, (i) that a disability is to be cured, (ii) that there should be compensation for a disability that cannot be cured, and (iii) that preventive methods should be made available to wipe out the disability, e.g., prenatal screening and selective abortion.¹⁰² From this reading, it is clear that the medical model of disability insists that disability is a biological condition, and disability is intrinsically harmful,¹⁰³ wrong, and miserable.¹⁰⁴

This understanding of the medical model of disability originates from the Utilitarian school of thought and from deviance theory. Utilitarians believe in maximising happiness by making the most use of available but scarce resources. This is in order to make the correct choice in a situation where the interests of other people have been considered, thus ensuring equal consideration of interests. This approach will be discussed in more detail in subsection 3.2.1.3 of Chapter III on equality.

¹⁰⁰ Susan Gabel and Susan Peters, 'Presage of a Paradigm Shift? Beyond the Social Model of Disability toward Resistance Theories of Disability' (2004) 19(6) *Disability & Society* 585, 588.

¹⁰¹ Ibid.

¹⁰² Torbjörn Tännsjö, 'Utilitarianism, Disability, and Society' in Christopher D. Ralston and Justin Ho (eds), *Philosophical Reflections on Disability* (Springer, 2010) vol 104, 91.

¹⁰³ John Harris, 'One Principle and Three Fallacies of Disability Studies' (2001) 27(6) *Journal of Medical Ethics* 383.

¹⁰⁴ Laura M. Purdy, 'Too Late to Matter? Preventing the Birth of Infants at Risk for Adult-Onset Disease or Disability' in Christopher D. Ralston and Justin Ho (eds), *Philosophical Reflections on Disability* (Springer, 2010) vol 104, 109, 117.

Utilitarians classify disability into four categories, namely, mere, simple, problematic and tragic disabilities.¹⁰⁵ A mere disability manifests in the form of a lack of capacity for doing the things that persons without disabilities are perfectly capable of doing, while not preventing persons with such a disability from enjoying happiness.¹⁰⁶ A simple disability is a state of blindness and deafness and/or mental retardation which prevents a person with such a disability from enjoying happiness.¹⁰⁷ However, both of the above two types of disability can be cured. The third type – problematic disability – is one that cannot be cured, and ‘robs the disabled individuals of some happiness that is available to people without problematic disabilities’, but which can be compensated for.¹⁰⁸ Finally, a tragic disability is the most severe, so severe that no medical cure or compensation can currently offer a solution. It is therefore contended that persons with a tragic disability have a life not worth living, because they don’t have any chance of experiencing ‘positive happiness’.¹⁰⁹ Because of this, utilitarians conclude that it is not worth allocating scarce resources to persons with tragic disabilities.¹¹⁰ Their solution is ‘physician assisted suicide and euthanasia’.¹¹¹

Utilitarians are of the view that disability should be eradicated and that a population with disabilities should be downsized either by avoidance of conception or by prenatal screening.¹¹² They argue for a super race (as in Nazi ideology) because, according to them, only healthy foetuses deserve to be born. Unhealthy foetuses, or those at risk of a disease in the future because of their genetic makeup, should be removed from the population.¹¹³ If born, they would create new life through procreation, thus resulting in another miserable circle of life passing to the next generation.¹¹⁴ Utilitarians further argue that even though new treatment methods could conceivably be invented to cure disability, it is better to eradicate

¹⁰⁵ Tännsjö, above n 102, 93–6.

¹⁰⁶ Ibid 93.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 95.

¹⁰⁹ Ibid 93–6.

¹¹⁰ Ibid 98–100.

¹¹¹ Ibid 102.

¹¹² Purdy, above n 104, 109.

¹¹³ Ibid.

¹¹⁴ Ibid.

diseases and disability by prenatal screening,¹¹⁵ because doing so also eradicates a population deemed bad for society,¹¹⁶ and could create a disability-free society with less poverty and greater longevity.¹¹⁷

That this view is problematic is, I believe, an understatement. Apart from its Nazi-like undertones, this way of promoting the existence of healthy foetuses cannot guarantee a disability-free world, since those not born with disabilities can acquire disability at any time of their life as result of accidents, nutrition-related causes or the attitudes and behaviour of other human beings.

The second source of the medical model of disability is deviance theory. Deviance theory is a tool used to understand human actions and behaviour considered socially unacceptable by the standard norms of the majority in a given group.¹¹⁸ Deviance theory can be used to assess any behaviour, attributes, or conditions that evoke a collective negative response from a majority group.¹¹⁹ Generally, the theory refers to two types of deviation, one described as demographic deviation and the other as biological deviation. Demographic deviance concerns differences based on age, sex, national origin, economic class, education and religious or other grounds.¹²⁰ Biological deviance is far more complicated, being based on natural or biological differences between human beings such as skin colour, height, and body shape.¹²¹

In the disability context, deviance theory considers disability as a deviation (sometimes referred to as a 'negative difference') from physical features of the able-bodied majority in a society.¹²² In addition, deviance theory classifies disability as a biological deviance resulting in physical impairments. Those physical impairments may stem from a disease or injury which damages the biological structure and causes loss or immobilisation of a part of the

¹¹⁵ Ibid 118.

¹¹⁶ Ibid.

¹¹⁷ Ibid 117.

¹¹⁸ Charles R. Tittle, *Control Balance: Toward a General Theory of Deviance* (Westview Press Boulder, CO, 1995), 124; Alex Heckert and Druann Maria Heckert, 'A New Typology of Deviance: Integrating Normative and Reactivist Definitions of Deviance' (2002) 23(5) *Deviant Behavior* 449, 451–2.

¹¹⁹ Tittle, above n 118, 124; Heckert and Heckert, above n 118, 451–2.

¹²⁰ Edwin M. Lemert, *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behavior* (McGraw-Hill Book Company, INC., 1st ed, 1951), 30.

¹²¹ Ibid 28–9.

¹²² Joan Susman, 'Disability, Stigma and Deviance' (1994) 38(1) *Social Science & Medicine* 15, 15.

body, or causes sensory defects such as loss of hearing ability or vision.¹²³ Because of such physical impairments, persons with disabilities may invoke a collective negative response from society, in which they are subjected to stereotyping and their disability is stigmatised.¹²⁴ The stigmatised persons are considered inhuman, inferior, sick-minded, untrustworthy and harmful to able-bodied persons.¹²⁵ There is a presumption that persons with disabilities should be ashamed of themselves, encouraging them to self-hatred and self-derogation, and to blame themselves for being disabled.¹²⁶

From the above discussion it is obvious that utilitarian thought concentrates on the biological conditions which create disability while the deviance theory is used more as an excuse, explaining the negative treatment of society toward persons with disabilities. Both of these understandings of the medical model of disability have a number of problems. Thus the medical model considers persons with disabilities incapable of performing certain social functions because of their medical conditions, which reduce or impair various life activities.¹²⁷ Medical interventions such as rehabilitation services provided by health professionals are offered as the answer. Children with disabilities receive segregated or special education instead of mainstream education. Persons of working age with disabilities receive disability welfare benefits rather than gainful employment. They are in effect being institutionalised rather than being given the chance to decide how to lead their lives. By extension, persons with disabilities are wrongfully deprived of their self-autonomy to lead their own lives, and of the right to assert their inherent human rights and freedoms on an equal basis with persons without disabilities. Persons with disabilities, therefore, are systemically excluded from the society.

These understandings and explanations of disability have changed over recent years due to significant developments in disability discourse, especially in the 1990s. These developments

¹²³ Lemert, above n 120, 30.

¹²⁴ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall (Englewood Cliffs, N.J), 1963), 132.

¹²⁵ Ibid 132–7.

¹²⁶ Ibid 133.

¹²⁷ Colin Barnes and Geof Mercer, *Exploring Disability — A Sociological Introduction* (Polity Press, 2nd ed, 2010), 15–6; Michael Oliver, *Understanding Disability: From Theory to Practice* (Macmillan Press Ltd, 1996), 32; Traustadóttir, above n 26, 5; Janet E. Lord, 'Disability Rights and Human Rights Mainstream: Reluctant Gate-Crashers?' in Clifford Bob (ed), *International Struggle for New Human Rights* (University of Pennsylvania Press, 2009) 83, 84.

advocated a shift from understanding disability as a biological condition to understanding it as a socially constructed concept, as will be discussed in the following subsections.

2.2.2.2. Disability as a Social Construction – the Social Model of Disability

In contrast to the medical model, the social model of disability maintains that it is society itself rather than individual functional limitations that plays the central role in creating disability, through its oppressive and discriminating social and institutional arrangements.¹²⁸ More specifically, it is the inaccessibility of facilities, and discriminatory social services, that bar persons with disabilities from general education, employment, public places, healthcare services, etc. In addition, it claims that it is attitudinal stigma and stereotyping that exclude persons with disabilities from integrating into the society. The social model of disability therefore stresses that it is society that needs to be ‘fixed’ rather than persons with impairments. This ‘fixing’ can be done through creating accessible facilities and social services and changing social attitudes toward persons with disabilities.

It is necessary to point out that the social model of disability contains several important elements.¹²⁹ It distinguishes between the impairments that people have, and any disability resulting from the social oppression they experience.¹³⁰ It stresses that personal functional impairment does not create disability, only society does.¹³¹ It further stresses that disability has ‘nothing to do with the body’ and that ‘impairment is in fact nothing less than a description of the physical body’.¹³² Moreover, it claims that persons with disabilities are oppressed by the society in which they live.¹³³ Hence persons with disabilities are an oppressed group, especially because of marginalisation and cultural imperialism.¹³⁴

¹²⁸ Oliver, above n 127, 32–3.

¹²⁹ Ibid 32; Union of the Physically Impaired Against Segregation, 'Fundamental Principles of Disability' (1976).

¹³⁰ Tom Shakespeare and Nicholas Watson, 'The Social Model of Disability: An Outdated Ideology?' in Barbara Altman and Sharon Barnartt (eds), *Exploring Theories and Expanding Methodologies: Where We Are and Where We Need to Go* (JAI - An Imprint of Elsevier Science, 2002) 9, 10.

¹³¹ Oliver, above n 127, 32.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990), 64.

Because persons with disabilities are an oppressed group, it is worth considering the terms ‘oppression’ and ‘oppressed group’ as they function within the scope of this thesis. The contemporary term ‘oppression’ should be understood as a structural concept,¹³⁵ in addition to its traditional meaning as referring to the cruel exercise of power by a ruling group over the rest of the population.¹³⁶ Oppression is a structural concept when it refers to systematic disadvantages, inequalities and injustices that some groups of people suffer in a society as a result of the deep-rooted discriminatory norms and practices imposed by economic, political, and cultural institutions and other players.¹³⁷ Structural oppression is not necessarily a result of any cruelty or choices or policies applied by ruling groups. It therefore cannot be eliminated simply by the removal of the ruling group.¹³⁸ Oppression can be understood in terms of exploitation, marginalisation, powerlessness, cultural imperialism, and violence.¹³⁹ Accordingly, any group of people which suffers from any of these five forms of oppression is considered an oppressed group.¹⁴⁰ In other words, an oppressed group is one whose members suffer systematic disadvantage and injustice in this structural sense.

Returning to the discussion of the social model of disability, it is claimed that this model represents a paradigm shift in the study of disability. There is a shift from a medical model which considers persons with disabilities to be a target group of charity, and one in need of rehabilitation in order to adapt within society so that they can be considered persons – people who, although possessing disabilities, count as equal members of the society. It has also been used as a political strategy in guiding persons with disabilities to advocate and demand that social and structural barriers are removed by legislative, administrative and other measures. Specifically, such strategies can include the promotion of positive attitudes and perceptions towards persons with disabilities, including the provision of reasonable accommodation. This strategy of change also includes amendments to and/or the abolition of existing legislation that constitute discrimination against persons with disabilities.

¹³⁵ Ibid 41.

¹³⁶ Ibid 40.

¹³⁷ Ibid 41.

¹³⁸ Ibid.

¹³⁹ Ibid 40.

¹⁴⁰ Ibid 64.

This model has, however, been criticised for many reasons. First and foremost, the social model has been criticised for completely rejecting individual impairment and in blaming society for creating disability. The rationale for this criticism is that personal impairment and society together create disability.¹⁴¹ It is argued that impairment is an ‘unavoidable ordeal of human beings’, and that people are all temporarily able-bodied, acquiring impairment at some point in their lives.¹⁴² In addition, this criticism questions whether, if all the barriers to transport, housing, education, employment or politics created by society were someday removed, there would be no disability, and impairment would only be the concern of those individuals with an impairment.¹⁴³ The answer is negative; hence the effort of trying to break the definitional link between impairment and disability is a fundamental flaw.¹⁴⁴

Another criticism of this model is that it makes a very clear-cut distinction between impairment and disability. Some of the drawbacks of this separation of impairment and disability are that, eventually, if the social model continued to utterly ignore impairment of the body, there would be a risk of leaving the impaired body entirely in the hands of the medical interpretation,¹⁴⁵ when the medical interpretation of disability is in fact a taboo subject under the social model of disability. Moreover, because of this way of disassociating impairment and disability, there would be no basis for identifying discrimination on the grounds of disability.¹⁴⁶

A further criticism is that this social model completely silences the personal experience of pain and limitation.¹⁴⁷ Activists with disabilities would only be able to voice the pain and sufferings they experience as a result of their personal impairments behind closed doors.¹⁴⁸ They have broken their silence only since their organisations have increasingly criticised the

¹⁴¹ Shakespeare and Watson, above n 130; Liz Crow, 'Including All of Our Lives: Renewing the Social Model of Disability' in Colin Barnes and Geof Mercer (eds), *Exploring the Divide* (The Disability Press, 1996) 55; Jill C. Humphrey, 'Researching Disability Politics, Or, Some problems with the Social Model in Practice' (2000) 15(1) *Disability & Society* 63.

¹⁴² Shakespeare and Watson, above n 130, 24–5.

¹⁴³ Crow, above n 141, 66.

¹⁴⁴ Shakespeare and Watson, above n 130, 24–5.

¹⁴⁵ Bill Hughes and Kevin Paterson, 'The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment' (1997) 12(3) *Disability & Society* 325, 332–3.

¹⁴⁶ Crow, above n 141.

¹⁴⁷ Ibid 58.

¹⁴⁸ Shakespeare and Watson, above n 130, 12.

medical model, allowing them publicly to recount their personal experiences of being discriminated against and stigmatised.¹⁴⁹

The social model is additionally criticised for only reflecting the ideology of a small group of eager and healthy activists with disabilities.¹⁵⁰ The disability community itself is in fact not inclusive. Persons with disabilities are introspective, and it is difficult for those without disabilities to join the disability community. Persons with disabilities tend not to form groups across different types of disability but will form groups comprised only of persons with their type of disability. For example, persons with visual impairments will have their group of blind persons, but not include persons with other types of disability. Furthermore, disability identity is in fact a matter of personal choice. Some who have disabilities choose to identify themselves simply as such, while others do not want to affiliate with those with impairments because socialising with those others makes them feel uncomfortable. It is therefore doubtful whether the social model of disability represents the viewpoint of, or is known to and derives support from, all persons with disabilities.¹⁵¹

Proponents of the social model have been criticised for wholeheartedly endorsing the social model without properly testing its conceptual aspects.¹⁵² The social model presents an over-simplified version of disability in terms of which disability results only from social barriers – a model according to which the restrictions of activity that persons with impairments face are solely the creation of society and in no part the creation of the persons with impairments themselves.

In response to this criticism, Mike Oliver, one of the prominent pioneers of this model, has counter-argued that the social model reflects the collective experience of disablement, and that the social model is not a theory.¹⁵³ Instead it is a practical tool which can help bring real

¹⁴⁹ Barnes and Mercer, above n 127, 29; Michael Oliver, 'The Social Model in Action: if I Had a Hammer' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press, 2004) 18, 6.

¹⁵⁰ Purdy, above n 104, 112; Shakespeare and Watson, above n 130, 20–1.

¹⁵¹ Purdy, above n 104, 112; Shakespeare and Watson, above n 130, 20–1.

¹⁵² Carol Thomas, 'How is Disability Understood? An Examination of Sociological Approaches' (2004) 19(6) (2004/10/01) *Disability & Society* 569, 589.

¹⁵³ Oliver, above n 127, 29.

change to the lives of persons with disabilities if properly implemented.¹⁵⁴ He further contends that instead of spending too much time discussing what the social model really looks like, the model should be put into practice to create social and political change that improves the social status of persons with disabilities.¹⁵⁵ With regard to the criticism that the model separates impairment and disability, Oliver has argued that due to the widely varying forms of bodily functional limitation, it is much more difficult to collectivise experiences of impairment than to synthesise the experience of disability.¹⁵⁶ He argues that the life experience of being impaired has guided persons with disabilities, while ‘single impairment organisations have failed to provide an adequate basis for collective self-organisation amongst disabled people in the past’.¹⁵⁷

Introduced in the 1970s in the UK by activists with disabilities, the social model of disability has become the ideological foundation for the UK disability movement as well as for those in other parts of the world, except the US. This is because in the US there is a preferred model known as the minority civil rights model of disability. This will be discussed in the next sub-subsection.

2.2.2.3. Disability as a Socio-Political Construction – the Minority Civil Rights Model of Disability

Introduced in the US in the late 1960s, the minority civil rights model of disability was considered a paradigm shift from understanding disability as a biological condition to seeing it as a socio-political construction. In order to understand this model, it is important to understand which group it is that is deemed a minority. A ‘minority’ refers to any group smaller than half of the population of a society, hence acquiring subordinate status due to history and cultural differences.¹⁵⁸ Their share of the primary social goods is restricted and they are not considered to be members of the society by the majority, according to its

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 30.

¹⁵⁶ Ibid 50.

¹⁵⁷ Ibid.

¹⁵⁸ Richard A. Schermerhorn, 'Toward a General Theory of Minority Groups' (1964) 25(3) *Phylon* 238, 246.

standards.¹⁵⁹ Because of this restriction and exclusion, the minority becomes a very close group and usually adopts a confrontational attitude while interacting with other groups.¹⁶⁰ It is obvious that the term 'minority' in this sense refers to power relationships between or among groups.¹⁶¹ This power relationship relates to the control over economic, political, and social domains by the majority, and words such as 'exploitation', 'domination', 'oppression' and 'discrimination' are used when it comes to the treatment of the minority by the majority with regard to these three domains.¹⁶² Accordingly, any group of people that suffers from ill treatment can be classified as a minority group.¹⁶³ Persons with disabilities frequently suffer inhumane and degrading treatment; hence they are a minority group.¹⁶⁴

The minority civil rights model of disability views disability as the result of both social and political construction.¹⁶⁵ Social construction in this sense is shaped by external factors, including built environments, cultural attitudes and social behaviours, while political construction is made up of institutional rules and procedures, and the practices of private entities and public organisations.¹⁶⁶ The socio-political model recognises the existence of biological differences, but locates the meaning of these differences, and the individual's experience of these differences, in society's stigmatising attitudes and biased structures rather than in the individual with biological differences.¹⁶⁷ In other words, the minority civil rights model of disability holds that it is the society's prejudice and stereotypes have created disability, because society systematically disadvantages or disables persons with disabilities by stigmatising their impairment.¹⁶⁸ Most significantly, the socio-political model does not

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Barton Meyers, 'Minority Group: An Ideological Formulation' (1984) 32(1 - Thematic Issue on Minorities and Social Movements) *Social Problems by University of California Press* 1, 8.

¹⁶² Ibid.

¹⁶³ Ibid 7.

¹⁶⁴ Gerard Quinn and Theresia Degener, 'The Application of Moral Authority: The Shift to the Human Rights Perspective on Disability through United Nations 'Soft' Law' in Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002) 29, 35.

¹⁶⁵ Richard K. Scotch, 'Models of Disability and the Americans with Disabilities Act' (2000) 21 *Berkeley Journal of Employment & Labor Law* 213, 214.

¹⁶⁶ Ibid.

¹⁶⁷ Paula E. Berg, 'Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law' (1999) 18(1) *Yale Law & Policy Review* 1, 9.

¹⁶⁸ Kevin Barry, 'Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights' (2010) 31(2) *Berkeley Journal of Employment and Labor Law* 203, 214.

seek to cure the individual functional differences through medical treatment, rehabilitation, or adaptation.¹⁶⁹ Instead, it seeks to transform stigmatising attitudes, biased social structures, and inaccessible built environments so as to accommodate the differences of persons with disabilities.¹⁷⁰

This model considers that persons with disabilities experience disability because they are members of an oppressed minority group subject to unfair discrimination,¹⁷¹ resulting in their being denied equal rights on the ground of disability, while their economic, political, and social opportunities are hindered by discriminatory external factors and the institutional rules, procedures and practices of private and public organisations, rather than by their personal impairments.¹⁷² This minority civil rights model therefore seeks to protect the civil rights to political, economic, and social participation of persons with disabilities by eliminating unfair discrimination through awareness raising, advocacy and legal measures.¹⁷³

In comparison with the social model of disability, the minority group model does not reject personal impairment, and it holds a view that personal impairment, along with social and political factors, to some extent contributes to creating disability. In addition, it does not separate the impairments that people have from disabilities resulting from the social oppression they experience.

Supporters of this model argue that this new understanding of disability contributes to redefining disability in a positive way in comparison to all other models.¹⁷⁴ However, critics contend that this model is flawed at the very outset in terms of its ideological foundation because it is exclusively based on formal equality, or equality as sameness, treating like persons alike and aiming at equal result rather than equal opportunity.¹⁷⁵ In terms of legislative

¹⁶⁹ Berg, above n 167, 9.

¹⁷⁰ Ibid 10.

¹⁷¹ Scotch, above n 165.

¹⁷² Ibid; Andrew I. Batavia and Kay Schriener, 'The Americans with Disabilities Act as Engine of Social Change: Models of Disability and the Potential of a Civil Rights Approach' (2001) 29(4) *Policy Studies Journal* 690; Stephanie Brzuzy, 'Deconstructing Disability: The Impact of Definition' (1996) 1(1) *Journal of Poverty* 81, 88–9.

¹⁷³ Scotch, above n 165, 214; Scot Danforth, 'A Pragmatic Evaluation of Three Models of Disability in Special Education' (2001) 13(4) *Journal of Developmental and Physical Disabilities* 343, 350.

¹⁷⁴ Brzuzy, above n 172, 88–9.

¹⁷⁵ Michael Stein and Penelope Stein, 'Beyond Disability Civil Rights' (2007) 58 *Hastings Law Journal* 1203, 1209–10.

application, critics further contend that this model does not clearly assist in defining what constitutes a person with disability and what discriminatory treatment is.¹⁷⁶

The minority civil rights model of disability, together with the medical and social models of disability, is now considered to be one of the three main and most widely known models of disability. Yet there remain other ways of understanding disability, which I will discuss in the next subsection.

2.2.3. Disability as Something Other Than the Above Conceptions of Disability

The medical, social models and minority group models of disability are the more common ways of conceptualising disability, but not everybody agrees with these three models and some scholars have offered alternative definitions of disability. These alternatives include a theory of practical wisdom, a theory of enhancement, a resistance theory of disability, and a bio-social model of disability. The following discussion will help introduce these alternatives but will also argue that these alternatives are either too radical or in some other way unsuitable, and that the three main models are rightly viewed as the standard ways of understanding disability.

The first alternative is a theory of practical wisdom. This theory emphasises individual choice in how people respond to their own disabilities based on their individual circumstances.¹⁷⁷ Specifically, it advocates a response to disability based on a person's self-determination, internal strength, resilience, and strong will to overcome their disability, knowing that only he himself or she herself can change the course of being disabled.¹⁷⁸ Further factors are the feelings of self-pity, anger and despair that arise when a person with a disability reacts to his/her own disability.¹⁷⁹ The thought behind this theory is that the debate over whether disability is a biological condition or a social construction does not make sense in the context of individual flourishing because a biological condition or social construction is

¹⁷⁶ Scotch, above n 165, 217.

¹⁷⁷ Garret Merriam, 'Rehabilitating Aristotle: A Virtue Ethics Approach to Disability and Human Flourishing' in Christopher D. Ralston and Justin Ho (eds), *Philosophical Reflections on Disability* (Springer, 2010) vol 104, 133, 136.

¹⁷⁸ Ibid 139.

¹⁷⁹ Ibid.

not the primary indication of whether an individual is disabled.¹⁸⁰ Flourishing refers to a person's circumstances – to whether they are living well or poorly.¹⁸¹ Judging whether an individual with disability is flourishing must be determined on a case by case basis.¹⁸² An individual with a disability can be flourishing using his or her practical wisdom to decide how to lead their life, such as being positive, resilient and strong-willed instead of complaining about their disability and blaming somebody else for it.¹⁸³ According to this theory, whether someone is disabled or not is for person with the disability to decide for themselves. I disagree, and argue that the suggestion that the ultimate choice as to how to respond to a disability is a matter of personal decision fails to take into account how external factors – how society is built, how it advantages able-bodied persons, and how it views disability – profoundly affect persons with disabilities. Indeed, external factors such as inaccessible built environments contribute to creating disability. This theory is a backward step and shares some aspects of the medical model of disability, in particular, that persons with disabilities are themselves responsible for being disabled.

A second approach is a theory of enhancement. This theory considers disability as a disease and defines it as a physical or mental condition of harm that any rational person would choose to avoid.¹⁸⁴ The theory contends that people in this physical or mental condition of harm are worse off than they could have been, and that if they were relieved of the disability they would necessarily be better off.¹⁸⁵ The view therefore advocates that everything possible should be done to get rid of their disability – a process called enhancement. Enhancement in this sense refers to anything that 'makes a change or a difference for the better'.¹⁸⁶ It also considers that everybody has an obligation to do what they can to raise those with a disability to the level of someone with a normal healthy life.¹⁸⁷ It should be emphasised that the theory

¹⁸⁰ Ibid 136–7.

¹⁸¹ Ibid 135.

¹⁸² Ibid.

¹⁸³ Ibid 139.

¹⁸⁴ Muireann Quigley and John Harris, 'To Fail to Enhance is to Disable' in Christopher D. Ralston and Justin Ho (eds), *Philosophical Reflections on Disability* (Springer, 2010) vol 104, 123 124; Harris, above n 103, 384.

¹⁸⁵ Quigley and Harris, above n 184, 129.

¹⁸⁶ Ibid 126.

¹⁸⁷ Ibid 123.

of enhancement is radical and has a lot in common with the extreme version of the medical model of disability, i.e., it views disability as something shameful and sees disability as something that must be cured.

The third alternative approach is the resistance theory of disability. This theory attempts by analysis to identify an element of resistance in other theories and perspectives on disability. According to the resistance theory, this element of resistance is rarely explicitly expressed by the authors of alternative theories.¹⁸⁸ The main characteristic of this theory is that it is contextually flexible and comparative,¹⁸⁹ while at the same time being both predictable and unpredictable.¹⁹⁰ The resistance theory is validated by ‘norms of behaviour, perceptions of oppression, available cultural options, and legal and political climates’ that differ from one scenario to the other.¹⁹¹ In the disability context, this theory allows disability studies to acknowledge the importance of all forms of both individual and collective resistance by both scholars and persons with disabilities.¹⁹² Specifically, the form of this resistance includes resistance to the social oppression suffered by persons with disabilities; thus it interprets the struggle of persons with disabilities to the social oppression as a form of resistance.¹⁹³ This includes resistance to the extreme aspects of the medical model of disability, as well as the extreme aspects of the social model, such as the complete rejection of impairment and insistence on blaming society for creating disability.¹⁹⁴ The weakness of this resistance model is that it leaves several questions unanswered regarding the way it is conceived in different contexts – in particular, the way it deals with problems facing persons with disabilities, and with ideological divergence in shaping an appropriate social model of disability, and more generally, how it is applied in practical reality.¹⁹⁵

A more moderate alternative is a pluralist approach – a combination of the medical and social models of disability. Many scholars have called for a more substantial account of

¹⁸⁸ Gabel and Peters, above n 100, 585.

¹⁸⁹ Ibid 596.

¹⁹⁰ Ibid 594.

¹⁹¹ Ibid 596.

¹⁹² Ibid 598.

¹⁹³ Ibid 592.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid 598.

impairment to be incorporated in developing a model of disability.¹⁹⁶ Instead of claiming that disability is entirely socially constructed and amounts to a form of social oppression, as suggested by the social model, this view sees disability as caused both by personal impairment and social exclusion and discrimination.¹⁹⁷ In addition, it considers that social exclusion and discrimination are out of all proportion to the personal functional limitations to which they are a response, thus amounting to social oppression.¹⁹⁸ This suggestion is a compromise, and to some extent helps to moderate the dichotomy between the medical and social models of disability. However, it does not give any further detail as to how these models are to be combined – whether they should simply be combined in all aspects or whether there should be a combination of selected positive aspects from each model.

These alternative conceptions of disability are only suggestions and have never become a model of disability, nor have they ever come to be known outside academic circles. They have not been adopted in practice because they are either too radical, or otherwise unsuitable, or contain features which overlap with those of the three main models of disability, thus the three models remain the standard ways of understanding disability. Therefore, the conceptions of disability associated with the medical, social and socio-political models will be the conceptions that mainly feature in the discussion which follows, and they will be referred to by name so as to be clearly identified.

In the next section I will discuss disability from the human rights perspective, which, in contrast to these alternative ways of understanding disability, is widely known to, and positively viewed by, the international community as a means of dealing with disability issues.

¹⁹⁶ Thomas, above n 152, 579; Simon J. Williams, 'Is Anybody There? Critical Realism, Chronic Illness and the Disability Debate' (1999) 21(6) *Sociology of Health & Illness* 797; Michael Bury, 'The Sociology of Chronic Illness: A Review of Research and Prospects' (1991) 13(4) *Sociology of Health & Illness* 451; Hughes and Paterson, above n 145, ; Shakespeare and Watson, above n 130, 24–5.

¹⁹⁷ Shakespeare and Watson, above n 130, 24–5.

¹⁹⁸ Ibid.

2.3. Disability as a Human Rights Issue

So far in this chapter I have only discussed disability from the philosophical and political perspectives. But in order to deal with disability issues, the philosophical and political conceptions of disability have to be translated into legal concepts. A prerequisite of making disability a legal concept is to acknowledge disability as a human rights issue, hence a subject for legal intervention. In this section I will therefore discuss how disability is to be made a human rights issue. This will be followed by an analysis of the human rights approach to disability.

2.3.1. Disability as a Human Rights Issue

At the national level, before the introduction of the social and minority civil rights models, in North America and most European countries, the issue of disability had been considered as a subject of law but dealt with in social security, welfare, or health guardianship legislation.¹⁹⁹ With the introduction and then development of these two models of disability, disability had been reclassified as a human rights issue.²⁰⁰ Accordingly, law reform processes, shifting from welfare law towards civil rights law have taken place worldwide in order to provide equal opportunities for persons with disabilities and eliminate segregation, institutionalisation and exclusion on the ground of disability.²⁰¹ The US and Canada were the first countries to adopt comprehensive antidiscrimination laws such as the Americans with Disabilities Act in the 1990s, followed by more than twenty countries.²⁰² Disability rights movements at both national and international levels were major driving forces behind this legal development which had been considered as a landmark in the later recognition of human rights of persons with disabilities.²⁰³

At the international level, because of the lack of a legally binding instrument to protect the human right of persons with disabilities, the UN adopted a numbers of resolutions during the

¹⁹⁹ Theresia Degener, 'International Disability Law – A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999' (2000) 18(1) *Berkeley Journal of International Law* 180, 180.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid* 183–4.

²⁰³ *Ibid* 184.

1950s and 1970s primarily dealing with rehabilitation and prevention of disability, but not on a human rights perspective for persons with disabilities.²⁰⁴ During the 1980s and 1990s, the human rights feature in dealing with disability issues was more obvious, reflecting in the adoption of the World Programme of Action concerning Disabled Persons (WPA), and Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules).²⁰⁵

As a result, the notion that disability is a human rights issue has been finally confirmed, and that disability constitutes the fundamental elements for a right to be identified, including a rights-holder, a duty-bearer and full substance in the disability context, has been so obvious. This means that an individual with disabilities is a rights-holder, simply because a person with disabilities is a human being. As such, any person with a disability is entitled to all the classical liberty rights and fundamental freedoms on an equal basis with others. A correlative duty-bearer of this right-holder is a state that holds responsibilities for *respecting* these rights and freedoms, i.e., refraining from interference with an individual's possession of these rights and freedoms. This state is also responsible for *protecting* individuals from interference with and violation of these rights and freedoms by a third party, especially on the basis of a disability, and for *fulfilling* its obligations with regard to economic, social and cultural rights, which include provision of reasonable accommodation. In terms of the substance of the rights and freedoms, these are all well prescribed in the core international human right instruments, which all imply that persons with disabilities are already included under the words 'other status'.

It is important to note that the human rights of persons with disabilities are sometimes referred to as group or collective rights. Indeed, such rights do have a collective dimension, as many individuals simultaneously possess disabilities. It is worth pointing out that the rights of persons with disabilities encompass some additional elements that go beyond traditional rights, such as accessibility and living in a community, but it remains very clear that these are

²⁰⁴ Detailed discussion on this topic is presented in Subsection 2.4.2 on Development of International Disability Rights Law of this chapter of this thesis.

²⁰⁵ Detailed discussion on these two instruments is presented in Sub-subsection 2.4.2.2 of this chapter of this thesis.

for the enjoyment of every individual with a disability. Therefore, the human rights of persons with disabilities are individual human rights, which include some new collective dimension, to be discussed in Chapter V on the CRPD.²⁰⁶

2.3.2. The Human Rights-based Approach to Disability

Since disability is confirmed as a human right issue, a human rights-based approach has to be applied to disability issues. The United Nations has described the human rights-based approach as ‘a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights’.²⁰⁷ International human rights standards in this sense refer to the United Nations’ international human rights treaties, which include fundamental principles of universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, and accountability and the rule of law.²⁰⁸

The human rights-based approach encompasses several important aspects. Conceptually, it ‘seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress’.²⁰⁹ For practical implementation of human rights, it identifies people as rights-holders and their entitlements, and designates states as corresponding duty-bearers along with their obligations.²¹⁰ In addition, it places individuals as the subject of its ultimate protection, especially those from disadvantaged groups, and views them as central to all decisions affecting them.²¹¹ The human rights-based approach ‘works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their

²⁰⁶ In Section 2.4 of this chapter, I will discuss in detail this legal development, reflecting disability emerging then being confirmed as a human rights issue at both national and international levels.

²⁰⁷ United Nations, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (United Nations, 2006), 15.

²⁰⁸ Ibid 16.

²⁰⁹ Ibid.

²¹⁰ Ibid 15.

²¹¹ Ibid 16.

obligations',²¹² through facilitating participation of the general public and especially disadvantaged population into policy and legislative development processes.²¹³ It locates the main problem outside the person and in the society.²¹⁴ Last but not least, the human rights-based approach assists in monitoring States in fulfilling their treaty obligations through public and independent assessments.²¹⁵

In the disability context, the human rights-based approach claims persons with disabilities as rights-holders and subjects of international human rights law on an equal basis with persons without disabilities.²¹⁶ It recognises disability as a part of human diversity,²¹⁷ as well as the diversity among persons with disabilities.²¹⁸ In addition, it places responsibility on societies and governments for ensuring that political, legal, social, and physical environments support the realisation of the human rights of persons with disabilities. Any limitations imposed on persons with disabilities by the social and physical environment are regarded as violations of their basic human rights. For example, failure to provide reasonable accommodation for persons with disabilities will be deemed discrimination against them.²¹⁹ Moreover, the human rights-based approach works to empower persons with disabilities with the right to claim their human rights on an equal basis with others and to monitor the fulfilment of State commitment to tackle inequality and discrimination against persons with disabilities.

However, this approach does show limitations in the disability context partly because it is based on international human rights standards. The first limitation is that the rights of persons with disabilities can be neglected, because under all previous international human right treaties, disability falls under the label 'other status'. Secondly, under general human rights treaties such as the ICCPR and ICESCR, there is a lack of responsiveness by States and civil

²¹² Ibid 15–6.

²¹³ Ibid 17.

²¹⁴ Gerard Quinn and Theresia Degener, 'The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform' in Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002) 13, 14.

²¹⁵ Quinn and Degener, above n 214, 18.

²¹⁶ Lord et al, above n 4, 19; Landmine Survivors Network, 'A Human Rights-Based Approach to Disability — The Legal Framework for Survivor Assistance in 24 States Parties' (Study, Landmine Survivors Network, 2007), 6.

²¹⁷ *CRPD* Preamble para (c).

²¹⁸ Ibid Preamble para (i).

²¹⁹ Ibid art 2.

society to the different forms disability can take,²²⁰ because those conventions are formulated in terms of formal equality or equality as sameness.²²¹

But the human rights-based approach, despite its weakness, surpasses the social model of disability, which only focuses on removing the barriers that prevent persons with disabilities from enjoying their human rights, by changing the structural discrimination that puts persons with disabilities into disadvantaged situations. In this thesis, therefore, this approach has been selected as a conceptual tool for reconciling the divergences between the medical and social models of disability and helping persons with disabilities to realise their human rights.

Following this analysis of the various models of disability, I now examine legislation.

2.4. Disability in Law

Disability discourse has greatly influenced legal developments in many ways, especially the transition from understanding disability as a biological condition to seeing it as a socially constructed concept. In countries using disability as a biological condition in their disability law, their definitions of disabilities consider persons with disabilities as a target of help and charity. In countries using disability as a socially constructed concept, their definitions of disabilities consider persons with disabilities as full citizens entitled to the protection of their human rights. Having settled on a definition of disability, and the confirmation of disability as a human right issue, my next step is to investigate whether municipal and international laws reflect similar concerns regarding disability issues.

In Subsection 2.4.1 I will identify how disability is defined under municipal legislation in relation to the three main models of disability. Here I am referring specifically to national disability legislation in Germany, Australia and the US with regard to the background and the model of disability that each definition represents. This will assist in establishing a clear understanding of how disability is defined under municipal law in relation to the three main models of disability. In Subsection 2.4.2, I will discuss how international disability rights law

²²⁰ Quinn and Degener, above n 214, 14.

²²¹ For full understanding formal equality or equality as sameness, please see the next chapter on Equality.

is developed. This will help establish a clear understanding of the development of international disability law with regard to different models of disability in different periods of development, and identify a preferred model of disability in international human rights law for dealing with disability. This will form the basis for the comprehensive analysis of disability under the CRPD in Chapter V.

2.4.1. Disability in Municipal Law

In this subsection I will discuss how disability is defined under municipal law in relation to the three main models of disability. This will be undertaken by analysing the definitions of disability in the national disability laws of Germany, Australia and the US. These acts are three of the very first national disability laws, serving as role models for other countries and, most importantly, representing the understanding of the models of disability as discussed in Subsection 2.2.2 of this chapter.

2.4.1.1. German Disability Law and the Medical Model of Disability

Germany has been chosen for this analysis because it is one of the welfare states in Europe²²² that views disability according to a caring model rather than a social model, and because its definition of disability represents a typical medical model of disability.

According to German disability law, a disability is understood as a biological condition with individual functional limitations, such as limits on physical functions, mental capacities or psychological health.²²³ Furthermore, German disability law does not mention any external factors that create disability, nor does it place any responsibility on the government or society

²²² Gerard Quinn and Eilíonóir Flynn, 'Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability' (2012) 60(1) *American Journal of Comparative Law* 23, 24.

²²³ Degener, above n 96, pt 3. According to Germany's definition of disability: An individual is disabled if his or her body function, intellectual ability, or mental health deviate from the typical state of an individual of the same age, with a high probability of the deviation lasting longer than six months, and thus his or her participation in societal life is restricted. He or she is endangered to become handicapped if the restriction is expected; Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Germany*, UN Doc CRPD/C/DEU/1 (7 May 2013) [15] ('*Germany Initial State Report*').

for removing all obstacles that prevent persons with disabilities from exercising their rights and freedoms and participating fully in society.²²⁴

Most disappointingly, Germany, as an industrialised country in every sense, considers disability as a deviation from the standard functional conditions of the able-bodied.²²⁵ This deviation factor means that the definition returns to the WHO's ICIDH, and deviation in this sense implies that social or external factors do not create disability.²²⁶ This deviation approach also means treating disability as a condition that inheres in the person rather than society.²²⁷ As discussed in Sub-subsection 2.2.2.1 on the medical model of disability, viewing persons with disabilities as deviance brings to mind a collective negative response towards them, involving stigmatisation and stereotyping. Viewing disability as deviance contributes to the negative treatment of persons with disabilities by German society. It is therefore concluded that this definition clearly and emphatically represents the medical model of disability by focusing on the idea of disability as deviance.²²⁸

2.4.1.2. The Australian Disability Discrimination Act and the Social Model of Disability

The definition of disability in the Australian Disability Discrimination Act (AusDDA) was developed to assist Australia's local governments to change their understanding of disability as a medical condition to that of a social construction.²²⁹ The following discussion is based on the latest complied version of the AusDDA as of July 2016.

The AusDDA's definition of disability is very broad with regard to coverage, the time element of disability, and the avoidance of separating the ideas of impairment and disability.

²³⁰ In terms of coverage, the AusDDA incorporates a wide range of target populations,

²²⁴ Degener, above n 96, pt 3; *Germany Initial State Report*, UN Doc CRPD/C/DEU/1, [15].

²²⁵ Fiona Geist, Bernd Petermann and Volker Widhammer, 'Disability Law in Germany' (2002) 24 *Comparative Labour Law & Policy Journal* 563, 577.

²²⁶ Ibid.

²²⁷ Samuel R Bagenstos, 'Comparative Disability Employment Law from an American Perspective' (2002) 24 *Comparative Labor Law & Policy Journal* 649, 660.

²²⁸ Degener, above n 96, pt 3(c).

²²⁹ Lee Ann Basser and Melinda Jones, 'The Disability Discrimination Act 1992 (Cth): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26 *Melbourne University Law Review* 254, 260–3.

²³⁰ According to the AusDDA, disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or

including those who are not traditionally considered as persons with a disability – for example persons with HIV/AIDS – by prescribing that those with ‘the presence in the body of organisms causing disease or illness’ should be included.²³¹ With respect to the time element of disability, the definition includes past, present, future or imputed disability.²³² With this wording, the definition does not require any assessment of when the disability develops, but instead it focuses on whether a person has been discriminated against on the basis of their actual or perceived disability.²³³ In terms of the non-separation of impairment and disability, the underlying implication of this is that people should not be excluded from the protection of the AusDDA due to a dispute about the nature of their impairment.²³⁴ This non-separation further empowers people with disabilities because they do not have to prove that they have biological differences when they assert their equality rights.²³⁵

The AusDDA definition is said to embrace the social model of disability because it views disability as the result of the interaction between a person with an impairment and their environment.²³⁶ This is despite the fact that the definition encompasses the medical meaning of terms such as ‘mental’, ‘physical’, ‘emotional’, ‘disease’, ‘illness’, ‘learning difficulties’, and ‘total (or partial) loss of a bodily function’. It has been contended that an impairment-related definition of disability need not be one reflecting the medical model of disability,

-
- (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person's body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future (including because of a genetic predisposition to that disability); or
 - (k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

Disability Discrimination Act 1992 (Cth) pt 1 s 4(1), as amended by *Disability Discrimination and Other Human Rights Legislation Amendment Act (No 70)* 2009 (Cth) sch 2 items 5 – 6.

²³¹ *Ibid* s 4 (1)(c); Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 19 *Melbourne University Law Review* 211, 222; Basser and Jones, above n 229, 263.

²³² *AusDDA Compiled July 2016* pt 1 s 4(1)(h)(i)(j)(k).

²³³ Glenn Patmore, 'The Disability Discrimination Act (Australia): Time for Change' (2003) 24(4) *Comparative Labor Law & Policy Journal* 533, 541.

²³⁴ *Ibid*; Basser and Jones, above n 229, 26.

²³⁵ Patmore, above n 233, 541; Basser and Jones, above n 229, 263.

²³⁶ Jennifer Hamilton, 'Disability and Discrimination in the Context of Disability Discrimination Legislation: The UK and Australian Acts Compared' (2000) 4(3) *International Journal of Discrimination and the Law* 203, 213–5.

because ‘disability-based discrimination always connects to a present, past, future or assumed impairment’.²³⁷ The AusDDA definition includes present, past, future or assumed impairment, so on this reasoning it does not reflect the medical model of disability.

However, it is contended that the AusDDA definition employs both the medical and social models of disability, with greater support for the social construction of disability which conceives disability as the result of the interaction between the person with the impairment and their environment.²³⁸

I however suggest that the definition is strongly inclined to view disability as a biological condition, with its focus on the medical meaning of terms, as described above, and with its use of phrases such as ‘loss or malfunction of the body’. It furthermore takes persons without disabilities as the norm and standard in relation to which persons with disabilities are contrasted.²³⁹ And again, like the medical model, the definition does not separate impairment and disability in the way the social model of disability does. Hence I conclude that the definition does not entirely reflect the social model of disability.

2.4.1.3. The Americans with Disabilities Act and the Minority Civil Rights Model of Disability

The Americans with Disabilities Act (USADA) was enacted as result of advocacy by US disability rights activists to ensure that persons with disabilities are treated as full citizens, and hence entitled to participate equally in society, including the right to work, instead of being treated as a target group of help and charity and being exempted from the obligation to work.²⁴⁰ For them, the USADA represented a symbolic victory for application of both the social model of disability and civil rights protection for people with disabilities.²⁴¹ The USADA, with requirements of antidiscrimination and reasonable accommodation for people with disabilities, broadly applies to all aspects of life including public and private

²³⁷ Degener, above n 96, part 3(c).

²³⁸ Hamilton, above n 236, 213–5.

²³⁹ *AusDDA Compiled July 2016* pt 1 s 4(1)(f).

²⁴⁰ Kathleen Beegle and Wendy A. Stock, 'The Labor Market Effects of Disability Discrimination Laws' (2003) 38(4) *Journal of Human Resources* 806, 806; Bagenstos, above n 227, 649.

²⁴¹ Bagenstos, above n 227, 649–50; Barry, above n 168, 221.

employment, government operations, and the sale of retail goods and services. I will examine how much the USADA's definition of disability reflects the minority civil rights model of disability, as discussed.

The USADA's definition of disability is very broad with respect to coverage.²⁴² This definition offers protection for a wide range of target populations, including those who currently have impairments, those who once had them by record, and those who are perceived as having them by being regarded as persons with a disability.²⁴³ In other words, the USADA,

²⁴² According to the USADA, definition of disability is as following:

- (1) Disability. The term "disability" means, with respect to an individual
 - (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment (as described in paragraph (3)).
- (2) Major Life Activities
 - (A) In general.
For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - (B) Major bodily functions.
For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- (3) Regarded as having such an impairment. For purposes of paragraph (1)(C):
 - (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
 - (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.
- (4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
 - (A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.
 - (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
 - (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
 - (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
 - (E)
 - (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as
 - (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
 - (II) use of assistive technology;
 - (III) reasonable accommodations or auxiliary aids or services; or
 - (IV) learned behavioral or adaptive neurological modifications.
 - (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
 - (iii) As used in this subparagraph
 - (I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
 - (II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

Americans with Disabilities Act of 1990, 42 USC § 12102(1) (2009).

²⁴³ *Ibid.*

unlike other US civil rights laws that explicitly protect individual from discrimination based on a prohibited class, extends its protection to those with a past, present, or perceived physical or mental impairment who may invoke it.²⁴⁴ A past, present, or perceived physical or mental impairment in this sense should be the one that ‘substantially limits one or more major life activities’.²⁴⁵ Major life activities include physical body movements such as walking, or eating, and bodily function such as digestion.²⁴⁶ The actual disability is clearly defined in the subsections (1)(A) and (1)(B).²⁴⁷ The perceived impairment ‘regarded as having such a disability’ is very broad because it focuses on the limitations imposed by society’s treatment of impairments rather than the functional impairments themselves.²⁴⁸ A person who is treated unequally on the ground of his or her impairment as defined under the USADA is disabled. This regulation extends its protection to all persons with disabilities not just those who are stigmatised by their impairments.²⁴⁹

This broad coverage of the USADA is a result of the amendment of the original version of the USADA of 1990, known as a corrective legislation, which sought to overturn the narrow interpretation of the definition of disability under the original version by the US Supreme Court in its three well-known judgements in 1999.²⁵⁰ These three cases are *Sutton v United Airlines*,²⁵¹ *Murphy v United Postal Service Inc.*,²⁵² and *Albertson's, Inc. v Kirkingburg*.²⁵³ Specifically, in these three judgements, the Court held that people who successfully mitigate the functional limitations that caused their impairments through the use of medication, prosthetics, hearing aids, auxiliary devices, diet and exercise, or any other treatment, were not ‘disabled’ under the USADA.²⁵⁴ It was sarcastically commented that according to these

²⁴⁴ Barry, above n 168, 223.

²⁴⁵ USADA § 12102(1) (2009).

²⁴⁶ Ibid § 12102(2) (2009).

²⁴⁷ Ibid § 12102(1)(A)(B) (2009).

²⁴⁸ Barry, above n 168, 221–227.

²⁴⁹ Ibid 221–227.

²⁵⁰ ADA Amendments Act of 2008, 42 USCA § 12101; Tom Harkin, ‘The ADA Restoration Act of 2007: Why Is It Necessary?’ (2008) 32(2) *Mental and Physical Disability Law Reporter* published by American Bar Association 159.

²⁵¹ *Sutton v United Airlines*, 527 US 471.

²⁵² *Murphy v United Postal Service Inc.*, 527 US 516.

²⁵³ *Albertson's, Inc. v Kirkingburg*, 527 US 555.

²⁵⁴ Barry, above n 168, 244.

judgements, the better a person could manage his or her impairment condition, the less likely that person would be protected from discrimination.²⁵⁵

More specifically, in *Sutton v United Airlines*, twin sisters had very severe short-sighted condition, but with corrective measures of eyeglasses, both could function identically to individuals without similar impairments.²⁵⁶ They applied for a job as commercial airline pilots at United Airlines, but were rejected because they did not meet the minimum vision requirement.²⁵⁷ In this case, the Court held that the twin sisters, who didn't claim they had actual disability under subsection (1)(A) or (1)(B) or perceived disability under subsection (1)(C) of the original USADA, were not disabled because they could mitigate the impact of their visual impairments with eyeglasses and, therefore, were not substantially limited in any major life activity.²⁵⁸ In *Murphy v United Postal Service Inc.*, Mr Murphy was fired from his job as a mechanic to drive commercial motor vehicles because of his very high blood pressure,²⁵⁹ which was not suitable for driving commercial motor vehicles.²⁶⁰ The Court held that Mr Murphy was not 'disabled' under the original USADA because he could control his high blood pressure with medication therefore, was not substantially limited in any major life activity.²⁶¹ In *Albertson's, Inc. v Kirkingburg*, Mr Kirkingburg with monocular vision in one eye was fired from his job as a truck driver because he did not meet the basic vision standards after his monocular vision was worsened as a result of an accident.²⁶² The Court held that Mr Kirkingburg was not 'disabled' because he could compensate for his weakened vision in one eye by making subconscious adjustments in his other eye and, therefore, was not substantially limited in any major life activity.²⁶³

The common proposition of these holdings is that anyone whose either actual or perceived impairment could be corrected or mitigated by appliances, medication or assistive devices

²⁵⁵ Ibid 244.

²⁵⁶ *Sutton* 527 US 471, 475.

²⁵⁷ Ibid 476.

²⁵⁸ Ibid 494.

²⁵⁹ *Murphy* 527 US 516, 518.

²⁶⁰ Ibid 519.

²⁶¹ Ibid 525.

²⁶² *Kirkingburg* 527 US 555, 559–60.

²⁶³ Ibid 565.

was not disabled under the original USADA, therefore, they were not eligible for a discrimination protection claim under it. These decisions by the US Supreme Court have been highly criticised for imposing additional considerations such as the availability of corrective measures, and setting high standards for the degree of impairment.²⁶⁴ In addition, these decisions contradicted ‘the reasoning of two congressional committees, eight circuit courts, and three agencies, were disastrous for would-be plaintiffs, creating an unintended and tragic paradox under [the original US]ADA’.²⁶⁵ Therefore, there was a need for corrective legislation.

The amended USADA has broadened the definition of disability under the original USADA in terms of the scope of protection as discussed above by adding a qualifying phrase to the subsection (1)(C) on the perceived disability yet largely leaving the definition as it was under the original version. This is considered a significant improvement because it is easier for a complainant with a perceived disability to claim disability discrimination whether or not the impairment limits or is perceived to limit a major life activity.²⁶⁶

This definition was developed under the influence of the minority civil rights model of disability, a social-political model, and therefore reflects this model. First of all, the definition recognises the existence of biological impairments that substantially limit one or more major life activities of an individual.²⁶⁷ In addition, the term ‘regarded as’ in the provision on ‘being regarded as having such an impairment’ implies that even when a mental or physical condition is not itself substantially limiting, cultural attitudes and social behaviours such as bias and stereotyping can cause the individual to be perceived as having a disability.²⁶⁸ If a person is perceived to have an impairment with a substantially limiting effect to his or her major life activities, this impairment is stigmatised by the norm, and the person is subject to

²⁶⁴ Bruce Arnold et al, 'It Just Doesn't ADD up: ADHD/ADD, the Workplace and Discrimination' (2010) 34 *Melbourne University Law Review* 359, 375.

²⁶⁵ Barry, above n 168, 244.

²⁶⁶ Elizabeth F. Emens, 'Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act' (2012) 60(1) *The American Journal of Comparative Law* 205, 215.

²⁶⁷ USADA s 3(A).

²⁶⁸ Berg, above n 167, 12; Bagenstos, above n 227, 658.

systematic disadvantage, then this person is ‘disabled’.²⁶⁹ In other words, the USADA is protecting those whose impairments are stigmatised.²⁷⁰ Most importantly, the ADA does not seek to cure individual functional differences through medical treatment, rehabilitation, or adaptation. Instead, it seeks to protect the civil rights to political, economic, and social participation of Americans with disabilities by eliminating unfair discrimination through awareness raising, advocacy and legal measures in all aspects of life,²⁷¹ something that can be recognised throughout its provisions.

This definition has been criticised, however, for continuing to embrace the medical model of disability, resulting in undesirable consequences. It is based on the understanding that it is individual impairments, rather than external factors such as an inaccessible built environment, that limit major life activities. The actual disability, furthermore, is the guide to a past or perceived disability. Another objection is that the law sends the message that the problem of disability is best fixed by treating the individual with a disability rather than reforming societal institutions.²⁷² By requiring disability claimants to prove that they are truly limited in performing important societal tasks before they may obtain the law’s protection, the model is disempowering.²⁷³ Another criticism is that when the definition states that ‘an individual with a physical or mental impairment that substantially limits one or more major life activities, or an individual with a record of such an impairment’, that individual is actually disabled within the meaning of the law.²⁷⁴ As a result, a large percentage of the USADA’s judicial decisions are exclusively concerned with whether or not claimants are ‘disabled’ within the meaning of the law.²⁷⁵

This brief analysis of the three national disability acts has mapped out how the concept of disability is being transformed into concrete legal rules under national laws. The discussion indicates that these three pieces of legislation do represent an understanding of the three

²⁶⁹ Barry, above n 168, 221–227.

²⁷⁰ *Ibid* 223.

²⁷¹ *USADA*.

²⁷² Bagenstos, above n 227, 659.

²⁷³ *Ibid*.

²⁷⁴ Berg, above n 167, 11.

²⁷⁵ *Ibid* 2.

models of disability, with the German legislation representing the medical model of disability, the Australian AusDDA representing the social model, and the USADA representing the minority civil rights model – even though there has been criticism of their weaknesses, and in particular, that the AusDDA and USADA do not purely reflect the models of disability that they are mandated to represent. In fact, these two acts employ a combination of the model of disability they represent and the medical model of disability.

2.4.2. Development of International Disability Rights Law

In this subsection I will discuss how international disability rights law has developed over three periods of time – namely the 1970s, the 1980s to the 1990s, and the post-1990s period. The discussion will track the disability dimension in legally binding international human rights law and introduce the development of legally non-binding instruments on disability in relation to different models of and approaches to disability. The discussion will assist in the identification of a preferred model of disability in international human rights law for dealing with disability – one that will form the basis for the comprehensive analysis of disability under the CRPD in Chapter V.

2.4.2.1. The Medical Model of Disability and Legally Binding and Non-Binding International Human Rights Instruments

Legally Binding International Human Rights Instruments

During the 1970s, when the social model of disability was introduced, claiming that society was responsible for creating disability rather than personal impairment, no disability dimension in international human rights law was as yet visible. At this time, therefore, the inclusion of any disability features into international human rights law was almost unthinkable – notwithstanding the fact that there existed a huge number of persons with disabilities, and that their situation was critical. Persons with disabilities were not explicitly a target group under the legally binding instruments of international human rights protection

adopted during this time,²⁷⁶ namely, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Persons with disabilities were generally assumed to be a target group of protection under those conventions, but only implicitly, and interpreted under the form of other status. This implicitness required a double interpretation.²⁷⁷ That is, a person with a disability would have to appeal to an implicit universal provision such as ‘other status’, or possess a separately protected characteristic such as race or gender in addition to their disability.²⁷⁸ For instance, a woman with a disability could not bring her individual communication to these human rights treaty committees based on her disability status alone, but would have to claim her rights protection on the ground of racial or sex discrimination.²⁷⁹ As States Parties’ reports on implementing those conventions are not required to mention the protection of persons with disabilities, these instruments were generally under used in advancing the rights of persons with disabilities.

Specifically, neither substantive provisions nor General Recommendations and Comments under the CERD refer to the disability dimension. Therefore it was a concern that if a person with a disability was a member of, let us say, a targeted minority group, insufficient attention would be paid to his/her human rights as a person with a disability.²⁸⁰ Even though no disability dimension was included into the ICCPR, the Human Rights Committee (the HRC) of the ICCPR included disability in its General Comments through words,²⁸¹ belonging to the

²⁷⁶ CERD; ICCPR; ICESCR; CEDAW; CAT; CRC; CMW.

²⁷⁷ Stein and Lord, above n 13, 19.

²⁷⁸ Ibid.

²⁷⁹ Stein, above n 14, 76.

²⁸⁰ Joshua Castellino, 'Disability and Racial Discrimination: The International Convention on the Elimination of All Forms of Racial Discrimination' in Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002) 229, 230–3.

²⁸¹ Human Rights Committee, *General Comment No. 8: Article 9 (Right of Liberty and Security of Person)*, 16th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (30 June 1982); Theresia Degener, 'Disability and Freedom: The International Covenant on Civil and Political Rights' in Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002) 53; HRC *General Comment No. 8*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) ('HRC General comment No. 8'); Human Rights Committee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the*

medical model such as ‘mental illness’,²⁸² ‘mental incapacity’,²⁸³ or ‘persons not capable of giving valid consent’.²⁸⁴ The only explicit interpretation pertaining to disability was added in the electoral process;²⁸⁵ however, this General Comment failed to give detailed guidance on reasonable accommodation such as accessible polling stations, voting materials in Braille or sign language interpretation for persons with different types of impairment. Though the HRC rarely included persons with disabilities when interpreting the ICCPR, it did actually deal with individual complaints from persons with disabilities. For example, in *Francis v. Jamaica*, the HRC held Jamaica responsible for failing to take the deteriorating mental health condition of the detainee sentenced to death into account, with necessary steps to improve his psychiatric illness, amounting to a violation of the victim’s human rights under Articles 7 and 10 (1) of the ICCPR.²⁸⁶

More positively, though the ICESCR does not include disability dimension in its provisions, the ICESCR Committee did include the disability dimension in a whole range of issues, from non-discrimination to almost all the provisions under its interpretative statements.²⁸⁷ Concretely, the ICESCR Committee tailored a general comment on persons with disabilities.²⁸⁸ This general comment has been hailed as an amplification of States parties’ obligations under the ICESCR in the context of disability, and more importantly, its overall philosophy was about equality and the active participation of persons with disabilities in society.²⁸⁹ Ideologically, the ICESCR Committee later explicitly stated that they had adopted the understanding of disability according to the social model of disability defined

Spouses, 39th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (27 July 1990) (‘HRC General comment No. 19’); Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992) (‘HRC General comment No. 20’); Human Rights Committee, *General comment No. 25: Participation in Public Affairs and the Right to Vote*, 57th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (12 July 1996) (‘HRC General Comment No. 25’).

²⁸² *HRC General Comment No. 8*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) [1].

²⁸³ *HRC General Comment No. 19*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) [4].

²⁸⁴ *HRC General Comment No. 20*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) [7].

²⁸⁵ *HRC General Comment No. 25*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) [10]–[20].

²⁸⁶ Human Rights Committee, *Views: Communication No. 606/1994*, 44th sess, UN Doc CCPR/C/54/D/606/1994 (25 July 1995) (‘*Francis v Jamaica*’).

²⁸⁷ *Human Rights Instruments Volume I — Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies — Note by the Secretariat*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008) 1–171.

²⁸⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with Disabilities*, 11th sess, 38th mgt, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (25 November 1994) (‘*ICESCR Committee General Comment No. 5*’).

²⁸⁹ Anna Bruce, Gerard Quinn and Padraic Kenna, ‘Disability and Social Justice: the International Covenant on Economic, Social and Cultural Rights’ in Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002) 79, 84.

under the Standard Rules and World Programme of Action in their general comments,²⁹⁰ something that will be discussed in the next subsection. I argue from this explicit statement that the ICESCR Committee had construed disability as a biological condition even though there are some socially constructed aspects in this understanding.

This discussion has identified that, during the 1970s, disability was not considered a human rights issue. Even if disability was dealt with in these legally binding documents, it was primarily addressed through social security and preventive health policy, not on a human rights perspective.²⁹¹ This is because the social model of disability was at the very beginning of its development. It is therefore not surprising that persons with disabilities were almost outside the bounds of protection under these legally binding instruments. Consequently, legally non-binding documents on disability were adopted mainly with a view to raising awareness about the human rights of persons with disabilities – something I will discuss in the next section.

Legally Non-Binding Instruments on Disability

Due to the lack of a legally binding instrument to protect the human right of persons with disabilities, the General Assembly and the UN Economic and Social Council adopted a series of resolutions during the 1950s and 1960s dealing with rehabilitation and prevention of disability.²⁹² During the 1970s, because the social model of disability was in the process of development and only present in disability discourse, legal developments regarding disability were still strongly influenced by the medical model of disability. In compensation for the omission of disability from legally binding human rights instruments, several legally non-binding disability instruments were adopted. They included the Declaration on the Rights of

²⁹⁰ ICESCR Committee General Comment No. 5, UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 3; Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No. 18: Disabled Women*, 10th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. II) (30 January 1991) 330 ('CEDAW Committee General Recommendation No. 18').

²⁹¹ Degener, above n 22, 187.

²⁹² Maria Rita Saulle, *The Disabled Persons and the International Organizations* (International Documentation Ent., 1981), (providing a catalogue of these resolutions) cited in Michael Ashley Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75, 88; and also cited in Gerard Quinn and Theresia Degener, 'The Application of Moral Authority: The Shift to the Human Rights Perspective on Disability through United Nations 'Soft' Law' in Gerard Quinn et al (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, New York and Geneva, 2002) 29, 30.

Mentally Retarded Persons,²⁹³ the Declaration on the Rights of Disabled Persons,²⁹⁴ and Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.²⁹⁵

These were important signals for raising awareness on the subject of the human rights of persons with disabilities; yet, they all reflected the medical model of disability. Specifically, these legally non-binding disability documents campaigned for persons with disabilities as a target of help and placed stress heavily on individual impairments and caring rather than on claiming their human rights. For example, the Declaration on the Rights of Mentally Retarded Persons called for the appointment of legal guardians for persons with intellectual impairments based on the severity of their disability,²⁹⁶ which meant that persons with disabilities under this Declaration were assumed to be incapable of making decisions on the matters related to their own lives. Another declaration, the Declaration on the Rights of Disabled Persons, claimed that disability was a biological condition, and placed no responsibility on society for recognising the human rights of persons with disabilities.²⁹⁷ Again, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care focused on the forced institutionalisation of persons with disabilities to mental health facilities.²⁹⁸ Since the social model of disability was in the process of evolving, its applicability and practicality was not tested. Hence it is completely understandable that this very early legal development on disability was based on the medical model of disability.

²⁹³ *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI), UN GAOR, 2027th plen mtg, Supp No 26, UN Doc A/8429 (20 December 1971) (*'Declaration on the Rights of Mentally Retarded Persons 1971'*). The Declaration states that such persons enjoy the same human rights as all other human beings. It then itemizes rights that are of special importance to them (including education, training and rehabilitation). The resolution is conscious of the need to protect the interests of such persons and to appoint a qualified guardian where necessary.

²⁹⁴ *Declaration on the Rights of Disabled Persons*, GA Res 3447(XXX), UN GAOR, 30th sess, 2433rd plen mtg, Supp No 34, UN Doc A/10034 (9 December 1975) (*'Declaration on the Rights of Disabled Persons 1975'*). The Declaration asserts that persons with disabilities have the same civil and political rights as other human beings (para 4). Furthermore, such persons are "entitled to the measures designed to enable them to become as self-reliant as possible" (para 5). The Declaration identifies a number of economic and social rights that are of obvious importance for the development of capacities and social integration (para 6). Other noteworthy passages refer to the right of disabled persons to have their special needs taken into consideration at all stages of economic and social planning (para 8), the right to protection against exploitation and treatment of an abusive or degrading nature (para 10) and the right of organisations of persons with disabilities to be "usefully consulted in all matters regarding the rights of disabled persons" (para 12).

²⁹⁵ *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, GA Res 46/119, UN GAOR, 75th plen mgt, UN Doc A/RES/46/119 (17 December 1991) (*'Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991'*).

²⁹⁶ *Declaration on the Rights of Mentally Retarded Persons 1971*, UN Doc A/8429, [5]–[7].

²⁹⁷ *Declaration on the Rights of Disabled Persons 1975*, UN Doc A/10034, [1].

²⁹⁸ *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991*, UN Doc A/RES/46/119.

2.4.2.2. The Social Model of Disability and Legally Binding and Non-Binding International Human Rights Instruments

Legally Binding International Human Rights Instruments

During the 1980s to the 1990s, when the social model of disability was at the peak of its development, the disability dimension of international human rights law was comparatively more visible. However, if a disability dimension was incorporated or even mentioned in the convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), or the Convention on the Rights of the Child (CRC) during this time, the conception of disability was still largely medical-based. Again, persons with disabilities were generally assumed to be a target group of protection under the CEDAW and CAT, but interpreted under the heading of some other status. The CRC does however include disability.

Specifically, the substantive provisions of the CEDAW did not mention women with disabilities, though the CEDAW Committee took the disability dimension into consideration when adopting their General Recommendations in relation to women with disabilities.²⁹⁹ It recognised that women with disabilities often experienced double discrimination: the same oppression experienced by women everywhere, compounded by discrimination based on disability. Ideologically, the CEDAW Committees explicitly stated in their general comments that they would adopt the understanding of disability in accordance with the Standard Rules and World Programme of Action.³⁰⁰

The CRC had an article on children with mental and physical disabilities.³⁰¹ This article required States Parties to undertake a number of obligations to ensure that children with disabilities received special care in relation to their special needs.³⁰² By this, it is contended

²⁹⁹ CEDAW Committee General Recommendation No. 18, UN Doc HRI/GEN/1/Rev.9 (Vol. II), [330].

³⁰⁰ ICESCR Committee General Comment No. 5, UN Doc HRI/GEN/1/Rev.9 (Vol. I), [3]; CEDAW Committee General Recommendation No. 18, UN Doc HRI/GEN/1/Rev.9 (Vol. II), 330.

³⁰¹ CRC art 23.

³⁰² Ibid art 23.3.

that this article stems exclusively from the extreme version of the medical model of disability because it considers that children with disabilities have special needs resulting from their disabilities which require special care to deal with rather than children's normal needs.³⁰³ However, the CRC Committee did not get caught in the contentious issues of understanding disability in order to explain it. Instead, it went beyond the issues by confirming that it would apply the construction of disability based on the draft CRPD when it was working on the general comments on the rights of children with disabilities.³⁰⁴ In addition, it urged States Parties to undertake policy and practical measures to combat discrimination against children with disabilities on the ground of disabilities.³⁰⁵ It also recommended that any measures undertaken by States Parties should ensure 'dignity, promote self reliance, facilitate active participation in the community, and maximise inclusion children with disabilities in society.'³⁰⁶

Legally Non-Binding Instruments on Disability

With the strong stance adopted by the social model of disability in disability discourse during the 1980s and 1990s, legal developments regarding disability in the form of legally non-binding instruments slowly began to reflect this social model. The most influential documents were the World Programme of Action concerning Disabled Persons (WPA), and Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules). These two instruments have since been hailed as an 'irreversible shift' from the 'caring' to the 'rights' model in dealing with disability.³⁰⁷ The following paragraphs will briefly examine how close these documents are to the much desired social model at that time of legal development.

³⁰³ Kayess and French, above n 24, 12–3.

³⁰⁴ Committee on the Rights of the Child, *General Comment No. 9: The Rights of Children with Disabilities*, 43rd sess, UN Doc HRI/GEN/1/Rev.9 (Vol. II) (11–29 September 2006) [7] ('*CRC Committee General Comment No. 9*').

³⁰⁵ *Ibid* [9]–[10].

³⁰⁶ *Ibid* [11].

³⁰⁷ Quinn and Degener, above n 164, 30.

The WPA³⁰⁸ was formulated in the year 1981 – the year proclaimed as the International Year of Disabled Persons – and was considered to be a global strategy in the field of disability. The WPA is evidence of a visible but slow shift towards the social model.³⁰⁹ It states that the equalisation of opportunities is its guiding philosophy for the achievement of full participation of persons with disabilities in all aspects of social and economic life. Equalisation of opportunities in this sense refers to how disability issues should be dealt with, namely, that they should not be treated in isolation but instead dealt with within the context of the usual community services.³¹⁰ Specifically, the WPA argued for accessible and integrated services for persons with disabilities in terms of the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, and cultural and social life.³¹¹ In addition, it placed the responsibility for ensuring the availability of these accessible and integrated services for persons with disabilities on the governments, along with intergovernmental organisations such as UN agencies concerned with legislative development and implementation.³¹²

This was a very slow shift from the medical model to the social model, however. It was slow because it only encompassed the few aspects of the social model mentioned above. In fact, it still bore most of the marks of the medical model. The WPA still contended that individual functional limitations created disability,³¹³ and that disability needed to be cured and corrected through medical attention and rehabilitation.³¹⁴ The WPA did not separate impairment and disability, nor did it reject personal impairment. With these manifestations of the medical model at the time when the social model was in its heyday, the WPA could not maintain its status as a progressive view, despite once being hailed as an ‘irreversible shift’

³⁰⁸ WPA, UN Doc A/37/51.

³⁰⁹ The WPA comprises three parts, including an analysis of principles, concepts and definitions relating to disability; an overview of the situation regarding persons with disabilities worldwide at that time; and recommendations for action at the national, regional and international levels, at paras 1-36, 37-81, and 82-200, respectively.

³¹⁰ WPA, UN Doc A/37/51, [12].

³¹¹ Ibid.

³¹² Ibid [164]–[165].

³¹³ Ibid [6].

³¹⁴ Ibid.

from a 'caring' to a 'rights' model. It was soon replaced by a document which reflects more features of the social model – the Standard Rules.

The Standard Rules,³¹⁵ despite having been developed against the backdrop of the WPA, distinguished itself from the WPA by explicitly recognising the core international human rights instruments as its antecedents,³¹⁶ and reflecting the paradigm shift toward the social model of, and the human rights-based approach to, disability. The Standard Rules explicitly recognised that disability was an interaction between personal impairment and environment factors.³¹⁷ The instrument placed the responsibility on society and governments to remove the obstacles that prevent persons with disabilities from exercising their rights and freedoms and participating fully in society.³¹⁸

Specifically, the Standard Rules combined an understanding of disability based on medical considerations with an understanding based on social models of disability.³¹⁹ That is to say, it held that disability is a result of both personal impairment and external factors, and that it is necessary to address both individual needs such as rehabilitation and provision of assistive devices, and to remove all social barriers standing in the way of full participation of persons with disabilities in society.³²⁰ Furthermore, it still held that individual functional limitations create disability,³²¹ and that disability needs to be cured and corrected through medical prevention and rehabilitation.³²² Under the Standard Rules, medical intervention and rehabilitation were a pre-condition for equal participation.³²³ The Standard Rules document focused more on caring rather than on social or rights aspects. For example, Rule 8 required income provision to persons with disabilities who had temporarily lost or suffered a reduction in their income, or had been denied employment opportunities.³²⁴

³¹⁵ *Standard Rules*, UN Doc A/RES/48/96.

³¹⁶ *Ibid* [6]–[13].

³¹⁷ *Ibid* [18].

³¹⁸ *Ibid* [15].

³¹⁹ Bengt Lindqvist, 'Standard Rules in the Disability Field. A New United Nations' Instrument' in Theresia Degener and Yolán Koster-Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Martinus Nijhoff Publishers, 1995) vol 40, 63, 64–6.

³²⁰ *Standard Rules*, UN Doc A/RES/48/96 [21].

³²¹ *Ibid* [17].

³²² *Ibid*.

³²³ *Ibid* Rules 2–3.

³²⁴ *Ibid* Rule 8.

In addition, the Standard Rules document was built on the assumption of the incapacity of persons with disabilities. Hence those with disabilities who ‘cannot be made fit for’ the open labour market would have access to sheltered employment,³²⁵ though it should also be pointed out that the solution of sheltered employment was considered a preparation for the persons in question to obtain employment in the open labour market.³²⁶ Sheltered employment was not the preferred choice because those in sheltered employment might be exposed to the risk of degrading treatment, labour exploitation and segregation from their community, and in some cases sheltered employment might amount to discrimination or in some cases even forced labour.³²⁷

This discussion of the Standard Rules has shown that this document defined disability as a combination of the medical and social models of disability and a human rights-based approach to disability. This instrument was probably the main set of rules guiding UN actions in the disability field until the CRPD came into force. In conclusion, although the WPA and the Standard Rules were not legally binding, it is suggested that their provisions reflected customary international law norms and may have been important sources for the interpretation of a more general treaty.³²⁸ In particular, the Standard Rules surpassed the expectation of gaining the status of customary international rules,³²⁹ inasmuch as many aspects of the Standard Rules became codified into the CRPD.

2.4.2.3. The Emergence of a Legally Binding International Disability Rights Instrument

After the 1990s, when the ‘paradigm shift’ role of the social model of disability was being carefully scrutinised and criticised in disability discourse (in the ways I have detailed above), discussions and other activities advocated the adoption of a legally binding international

³²⁵ *R99 Vocational Rehabilitation (Disabled) Recommendation*, ILO, 38th ILC sess, ILO Doc R099 (22 June 1995) (*‘ILO R99 Vocational Rehabilitation Recommendation’*). In brief, sheltered employment for persons with disabilities is arrangements for training and employment developed under ensured or supported conditions for those with disabilities who ‘cannot be made fit for’ open labour market.

³²⁶ *Standard Rules*, UN Doc A/RES/48/96, Rule 7 [7].

³²⁷ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Note by the Secretary-General*, 60th sess, Provisional Agenda Item 73 (b), UN Doc A/60/266 (17 August 2005).

³²⁸ United Nations, above n 43.

³²⁹ *Standard Rules*, UN Doc A/RES/48/96 Rule 15 [14].

human rights instrument on disability applicable to a human rights-based approach. The General Assembly itself had to recognise explicitly that these legally non-binding documents were not in themselves sufficient to promote full and effective participation by, and opportunities for, persons with disabilities.³³⁰ Furthermore, persons with disabilities ‘find themselves in legal disadvantage’ compared with other vulnerable groups such as ethnicities, women, and children, who are protected by the CERD, CEDAW and CRC, respectively.³³¹ This led to the adoption of the CRPD, which will be analysed in detail in Chapter V.

2.5. Concluding Remarks

In this chapter it has been shown that each discussed model of disability has its potentials and limitations. I have therefore argued that for any model of disability to be workable in practice, and to benefit persons with disabilities, it should be able to balance their needs with the availability of social resources, with a view to protecting their human rights and fundamental freedoms. A combination of the medical, social, and minority civil rights models, and a human rights-based approach is, I contend, the answer for the situation of persons with disabilities. However, such a combination does not necessarily mean a total sum of everything under these models and approach. The combination would need to be made from a selection of elements from each model and applied on a case by case basis, and legal development would need to be left open to the possibility of applying a combination of all four models or the selective application of one or more models.

My justification for this representation of the situation is based on the fact that both personal impairments and social factors create disability. It is a fact that the medical model has in many ways taken control of the lives of persons with disabilities, as mentioned in the analysis above, yet it is undeniable that the right medical intervention, as prescribed by the medical model, does improve the circumstances of persons with disabilities. Thanks to this

³³⁰ *Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, UN Res 56/168, UN GAOR, 56th sess, 88th plen mgt, Agenda Item 119 (b), UN Doc A/RES/56/168 (19 December 2001), Preamble para 7 (*‘UN GA Resolution 56/168’*).

³³¹ CERD; CEDAW; CRC.

right medical intervention, many persons with disabilities have had their disabilities improved, not in the sense of a medical cure, as in the extreme version of the medical model originating from the utilitarian and deviance theories of disability, but, for example, by becoming able to walk by being provided with appropriate assistive devices. But it is nevertheless the social model that brings life changing opportunities for persons with disabilities, through inclusive education, employment, transportation and other means. However, the social model also has a negative aspect for those unable to take these opportunities, as it completely ignores their personal impairment. For example, a child with learning difficulties cannot accompany his or her friends with normal IQ indicators to an inclusive school even though the chance for them to take a math lesson is exactly the same. In this situation, an inclusive education, as prescribed by the social model and a human rights approach, will not work, and a special education, as prescribed by the medical model, is still needed until the child can catch up with his or her peers without learning difficulties resulting from his or her disability.

A further reason for supporting this view is that in examining the three national disability laws, as I have done above, it is hard to find a national legislation that reflects a single model of disability. In every instance there is a combination of two or three models of disability. I therefore conclude that a combination of all four understandings is the preferred choice for persons with disabilities.

In the next chapter I will discuss the concept of equality in order to provide a more complete understanding of the ideological framework for formulating the CRPD. The concept of disability, together with those of equality and discrimination, has collectively informed the ideological framework for the CRPD, and these chapters will enable me to analyse its principles in Chapter V.

CHAPTER III: EQUALITY – FROM POLITICAL UNDERSTANDING TO NORMATIVE INTERPRETATION IN THE CONTEXT OF DISABILITY

3.1. Introductory Remarks

Conceptualising disability is important in the process of creating a non-discriminatory society for persons with disabilities. The necessary second step in this process is to determine what constitutes non-discrimination, and that in turn requires a clear understanding of the concept of equality. My thesis develops a combined model of disability, which reflects both personal impairment and external factors, so I need to address the question of what form of equality should be a preferred one in the context of disability. Would treating persons with disabilities in the same way as those without disabilities, or treating them differently, ensure equality for them?

Equality exists in different forms, as a political ideal and as a legal concept. Equality as a political ideal is construed differently by different schools of thought such as liberalism, utilitarianism, libertarianism, and prioritarianism. Equality as a legal concept is also explained differently by different scholars. Generally, legal equality includes equality before the law and substantive equality in law. Equality before the law construes equality as sameness, hence requiring the same treatment for people who are the same, and is associated with the concepts of equal treatment, special treatment, and preferential treatment. Substantive equality in law construes equality as difference, requiring different treatment for those who are not the same, and is associated with equality of opportunity, affirmative action, and different treatment.

In this chapter I will argue that both the concepts of equality as sameness and equality as difference are fundamental ideological foundations for establishing the human rights of persons with disabilities. This is because persons with disabilities, just like any other members of the society, are entitled to equality even though persons with disabilities are, due to their disability, different in particular ways from persons without disabilities. These two

concepts are both within the liberal conception and can be used concurrently, though their level of application in the context of disability is different. The following analysis will provide the background for the investigation, in Chapter V, of how these liberal ideas of equality have been incorporated into the CRPD's principles and provisions as its ideological framework. This analysis will also serve as the contextual background for the discussion, in Chapters VII and VIII, of the CRPD's implementation.

The present chapter is divided into five sections. Section 3.1 is the introduction. Section 3.2 explores the concept of equality as an abstract concept, discusses objections to this concept, and articulates my position. It then discusses equality as a political ideal within different schools of thought such as utilitarianism, libertarianism, prioritarianism and others. The aim is to identify the relative strengths and weakness of these schools of thoughts and to relate this analysis to the central idea of acknowledging the kind of 'difference' implied by disability. The analysis will be utilised to develop arguments showing how the liberal concept of equality can be modified to acknowledge the specific experiences of disability.

Section 3.3 explores the meaning of equality in the legal context. It first discusses equality before the law, which informs the concept of equality as sameness, which in turn is associated, as I have mentioned, with the concepts of equal treatment, special treatment, and preferential treatment. It then investigates the substantive component of equality in the law with an analysis of equality of opportunity, affirmative action, and equality as difference in law. This discussion will help in developing a subsequent argument about the way disability ought to be understood in the context of legal equality.

Section 3.4 discusses the concept of equality in the disability context. It contends that equality as sameness has little provision for supporting persons with disabilities so as to integrate them into the society. While there are alternative suggestions for resolving the debate on equality as sameness and equality as difference, I conclude that in the disability context, equality as difference is an effective instrument, and that the most important issue for further analysis is how best to accommodate the differences of persons with disabilities.

Section 3.5 ends the chapter with the conclusion that equality as difference provides a fundamental ideological foundation for establishing and realising the human rights of persons with disabilities.

3.2. Understanding Equality

I need to stress that equality is a contentious concept, interpreted in many ways. Some scholars even contend that equality as a concept does not exist. In this section I will discuss the conceptual meaning of equality, specifically focusing on the ideal of equality as developed in the liberal tradition. I will then introduce some voices against equality, but will argue that their objections are not sound, especially in the disability context. I will then discuss some alternatives developed by scholars from different schools of thought, this being necessary for me to substantiate my argument that non-discrimination for persons with disabilities requires a more complex understanding of equality.

3.2.1. What Is Equality?

3.2.1.1. Equality – Conceptual Definitions

Equality as an idea has been used and defined since ancient times. As early as the 5th century BC, Confucianism claimed that human beings are born equal.³³² It was also claimed that although human beings are born biologically equal, reality sets them apart due to their family and social circumstances, and the effort they themselves make in order to ‘attain a certain level of intellectual and moral development’.³³³

Later, in the West in the 4th century BC, Aristotle defined equality as an ‘intermediate between the two unequals’.³³⁴ He explained that there must be an intermediate between any two things, and that equality between two people therefore implies a proportionality between four terms, namely, the two persons concerned and their relative shares (equally shared or

³³² A. T. Nuyen, 'Confucianism and the Idea of Equality' (2001) 11(2) (2001/07/01) *Asian Philosophy: An International Journal of the Philosophical Traditions of the East* 61, 64.

³³³ Ibid 70.

³³⁴ Aristotle, 'Justice as Equality' in Louis P. Pojman and Robert Westmoreland (eds), *Equality: Selected Readings* (Oxford University Press, 1997) 17, 20.

divided into two) of a certain good.³³⁵ For Aristotle, justice is equated with equality, so injustice or inequality will prevail when ‘either equals have and are awarded unequal shares, or unequals, i.e. those who are not equal, equal shares’, therefore to be just is to be equal, and to be unjust means to be unequal.³³⁶ In general, Aristotle’s two principles are that things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.³³⁷ This ideal of equality is often referred to as equality as justice.

The modern understanding of equality is primarily derived from liberal philosophy. It breaks away from ancient philosophy and claims that all human beings are created equal. The political philosophy of liberalism contends that all human beings are equal. A prominent proponent of equality is Bernard Williams, who takes this view.³³⁸ Williams presents a very elegant and subtle argument to defend equality and counter the arguments of those opposed to it. According to Williams, it is not invalid to assert that all men are equal because all men are human beings and as such share common and indisputable characteristics; in Williams’ own words, they have a ‘common humanity’.³³⁹ This consists essentially in the capacity to feel both physical and emotional pain; the capacity to love others, feel loved by others, enjoy happiness, love brings, and be shattered by sorrow, or love; and the desire for self-respect – by which Williams means ‘a certain human desire to be identified with what one is doing, to be able to realise purposes of one’s own, and not to be the instrument of another’s will unless one has willingly accepted such a role’.³⁴⁰ Williams asserts that self-respect in this sense is more often than not ‘neglected by political and social arrangements’.³⁴¹

To Williams, all men are equal because we should see individuals from the human point of view.³⁴² That is, if a person tries to achieve something (e.g., invent a machine), even if this

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537, 543.

³³⁸ Bernard Williams, 'The Idea of Equality' in Louis P. Pojman and Robert Westmoreland (eds), *Equality: Selected Readings* (Oxford University Press, 1997 ed, 1962) 91.

³³⁹ Ibid 92.

³⁴⁰ Ibid 92–3.

³⁴¹ Ibid.

³⁴² Ibid 94–5.

person is not successful, he or she should not be seen as a failure, but instead, their effort should be valued and respected for the attempt to achieve this objective.³⁴³ And to Williams, equality exists because every man as a human being is ‘potentially conscious of their situation’. In some cases this is very subtle, for example, persons with intellectual disabilities are and capable of understanding the labels affixed to them by society.³⁴⁴ Williams calls this capability ‘reflective consciousness’ and argues that this form of consciousness may be recognised or denied by society, but that an equal society should create possibilities that enable everyone to be able to see themselves as something more than just the subject of a label.³⁴⁵ That is, the basic value of equality is that it allows everyone to fulfil their own potential without being obstructed by societal structures. This idea of equality is translated into rules of distributive justice in many theories.

Among the proponents of such a theory, and one of the most influential contemporary liberal thinkers on equality, is John Rawls. In his book *A Theory of Justice*, the concept of equality is developed on the basis of interdependent factors presented in his principles of justice.³⁴⁶ First and foremost, and in an unchangeable order of priority,³⁴⁷ it is a presumption that each person has equal rights, liberties and opportunities, income and wealth, and values of self-respect,³⁴⁸ which Rawls regards as the chief primary social goods.³⁴⁹ Rawls emphasises that the value of self-respect or self-esteem encompasses two aspects, these being a sense of one’s own value of their own good and a worthy life plan and confidence in fulfilling this life plan.³⁵⁰ Rawls distinguishes these chief primary social goods from other primary social goods, namely, ‘health, vigour, intelligence and imagination’, which are decided by nature and described by Rawls as natural goods.³⁵¹

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid 96.

³⁴⁶ John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, Revised ed, 1999), 86–93.

³⁴⁷ Ibid 214.

³⁴⁸ Ibid 53.

³⁴⁹ Ibid 54.

³⁵⁰ Ibid 386.

³⁵¹ Ibid.

Secondly, Rawls says that the basic structure of the society, by which he means its political structure and social and economic arrangements, is responsible for the equal distribution of these chief primary social goods.³⁵² If there is unequal distribution, this system should ensure that the least advantaged in the society will be the primary beneficiaries.³⁵³ In other words, inequality is permissible if it benefits the worst-off. The least fortunate should in turn accept that those who are fortunate in having a greater share of natural goods can provide assets for the mutual benefit of the whole society.³⁵⁴ However, according to Rawls, inequality is not permissible if it increases the disparities between the better-off and the worst-off.³⁵⁵ He argues that ‘it is incorrect that individuals with greater natural endowments and the superior character that has made their development possible have a right to a cooperative scheme that enables them to obtain even further benefits in ways that do not contribute to the advantages of others’.³⁵⁶ Most importantly, equality should be measured not only by economic efficiency and social welfare but also by whether each individual has a secure sense of his or her own worth.³⁵⁷

Rawls’s construal of equality has generated extensive debates among contemporary philosophers,³⁵⁸ with many arguing against equality – something I will shortly discuss further. However, it cannot be denied that Rawls’s discussion of equality is one of the ideological foundations of the contemporary view of equality.³⁵⁹

3.2.1.2. *Against Equality*

Some have contended that equality is either a false presumption or simply does not exist. It is said to be a false assumption because it discusses human circumstances out of context.³⁶⁰

³⁵² Ibid 53.

³⁵³ Ibid 87.

³⁵⁴ Ibid 92.

³⁵⁵ Ibid 89.

³⁵⁶ Ibid.

³⁵⁷ Ibid 87.

³⁵⁸ For example Robert Nozick, *Anarchy, State and Utopia* (Basic Books Inc., 1974); Ronald Dworkin, 'What is Equality? Part 1: Equality of Welfare' (1981) 10(3) *Philosophy & Public Affairs* 185; Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10(4) *Philosophy & Public Affairs* 283.

³⁵⁹ Jonathan Wolff, 'Equality: The Recent History of an Idea' (2007) 4(1) *Journal of Moral Philosophy* 125, 125.

³⁶⁰ John Charvet, 'The Idea of Equality as a Substantive Principle of Society' in William Letwin (ed), *Against Equality: Readings on Economic and Social Policy* (The Macmillan Press LTD, 1983) 106, 112.

Human beings are always dependent on varying natural capacities such as talents, personal feelings, emotions and interests, in order to achieve their chosen goals and to feel a sense of their own worth, and it is contended that advocates of the importance of equality ignore some or all of these factors.³⁶¹ Furthermore, no two babies are born identical.³⁶² It follows that equality ensured by legal assumption set forth under municipal and international law cannot create equality among human beings who are unequal in terms of physical or bodily features.³⁶³ It is also claimed that equality, if it exists, would destroy human diversity, which is always a necessary part of human history.³⁶⁴ It is further suggested that the imposition of equality could dilute national identities through imposing so-called unified standards and make all people identical.³⁶⁵

For others, there is no need to understand the meaning of equality, because equality does not exist at all. This, it is claimed, is because members of human society are subject to restrictions such as moral and legal rules, and have limited capacities in virtue of living in a strongly interrelated and interdependent society.³⁶⁶ In addition, human beings are very much dependent on natural capabilities such as talents, strength and life skills including sense of self-worth and confidence in the natural, so there is hardly any existence of equality.³⁶⁷ If equality exists it exists only in an imaginary world in which there is no social relation between and among members of the society.³⁶⁸

I, however, argue that equality is not a false presumption, because it is possible to discuss human conditions within the context of all human beings. This is to say, natural capacities are only one element of the many required to help human beings achieve their chosen goals. Other factors, such as social, economic, geographical and political conditions, also play important parts in helping people to live well. For example, consider two boys, one living in

³⁶¹ Robert Nisbet, 'The Pursuit of Equality' (1974) 35 *The Public Interest* 103, 143.

³⁶² Antony Flew, 'The Procrustean Ideal: Libertarians v. Egalitarians' in William Letwin (ed), *Against Equality: Readings on Economic and Social Policy* (The Macmillan Press LTD, 1983) 148, 148.

³⁶³ Robert Nisbet, 'The Pursuit of Equality' in William Letwin (ed), *Against Equality: Readings on Economic and Social Policy* (The Macmillan Press LTD, 1983) 124, 140.

³⁶⁴ Ibid 125.

³⁶⁵ Ibid.

³⁶⁶ Charvet, above n 360, 114–23.

³⁶⁷ Nisbet, above n 363, 142–3.

³⁶⁸ Charvet, above n 360.

Western Europe and one in a remote village in Africa, who have similar natural capacities for working with computers, and who both dream of becoming computer programmers. The one from Africa may never become a computer programmer if he comes from a family with little food and if he has to work for many hours each day carrying water to support his family. This would allow little time for study. On the other hand, the boy from Europe may have easy access to computers and new technologies and may be able to realise his dreams without any difficulty. Equality ensured by legal assumption under national and international law would help bring water to the African boy's village and free him up for more constructive forms of work, thus giving him a chance to achieve his ambition of becoming a computer programmer. In this case, natural capacities are not the only factor necessary for helping this African boy to achieve his goals; other factors clearly play a part. Furthermore, the natural capacities referred to in this argument are natural goods, making them different from the chief primary social goods defined and discussed in Rawls' theory of equality. Equality is therefore not a false presumption and does exist.

3.2.1.3. Equality as a Political Ideal

The above discussion of the origins of the concept of equality makes it evident that for most thinkers, disagreements are about particular kinds of equality rather than about equality as such. I will therefore go on to examine the vexed issue of 'equality of what?', and look at answers offered by various authors.

Utilitarians such as Peter Singer argue that Rawls's ideal of equality is valid only on paper, because, in reality, human beings face a variety of situations in which they have to make choices, sometimes even on matters of life and death.³⁶⁹ Therefore, in Singer's opinion, in these situations the principle of equal consideration of interests provides the most workable conception of equality. This principle holds that when a situation arises in which we have to weigh the competing interests of different people, we will consider the maximum use of available resource in order to make the right choice – one that ensures that everyone's

³⁶⁹ Peter Singer, *Practical Ethics* (Cambridge University Press, 2nd ed, 1982), 18–9.

interests are equally served.³⁷⁰ This principle has nothing to do with equal treatment, because it ‘prohibits making our readiness to consider the interests of others depend on their abilities or other characteristics, apart from the characteristic of having interests’.³⁷¹ For utilitarians, the central issue is how great the resulting benefits should be.³⁷² For them, racial inequality is permissible not because of the benefits of the worst off, but because it is natural that some ethnic groups are biologically more intellectually capable than others.³⁷³ They also claim that happiness is their ‘ultimate end, and so consider the happiness of any one individual as equally important as the happiness of any other’.³⁷⁴ They believe that ‘utility is a legitimate value’.³⁷⁵ For utilitarians, persons count equally (everyone counts for one, no one for more than one),³⁷⁶ but their theory does not require that we treat individuals equally or that happiness be distributed equally.³⁷⁷ I argue that the drawback of utilitarian thought is that it undermines the importance of individuals, and only takes people’s interests into consideration, without paying attention to abilities or other characteristics. This, in the context of disability, leads to ignoring the differences of persons with disabilities resulting from their disabilities.

The second significant school of thought on equality is that of the libertarians,³⁷⁸ the most well-known of them being Robert Nozick. They hold that negative individual rights such as property rights are absolute. Hence violation of those absolute rights is impermissible even for the benefit of the poorer majority in a population.³⁷⁹ Libertarians contend that any government tax system targeting wealthy citizens so as to provide a livelihood, healthcare and other social

³⁷⁰ Ibid 18–9.

³⁷¹ Ibid 22.

³⁷² Derek Parfit, ‘Equality and Priority’ (1997) 10(3) *Ratio* 202, 202–3.

³⁷³ Singer, above n 369, 18–9.

³⁷⁴ Lansing Pollock, ‘Moral Equality’ (2001) 15(3) *Public Affairs Quarterly* 241, 214–5.

³⁷⁵ Thomas Nagel, ‘Equality’ in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (Palgrave Macmillan, 2002) 60, 78.

³⁷⁶ Ibid 66.

³⁷⁷ Pollock, above n 374, 214–5.

³⁷⁸ Nozick, above n 358, 232. Libertarians are those who support a set of related political philosophies that uphold liberty as the highest political end, emphasising the primacy of individual liberty, political freedom, and voluntary association, opposing to tax collection. They dismiss the existence of economic and social rights such as the rights to health, education or work. Libertarians advocate a society with a greatly reduced state or no state at all.

³⁷⁹ Ibid.

services for the less fortunate is morally illegitimate.³⁸⁰ Moreover, this forced redistribution of income can only achieve ‘equality of material condition’.³⁸¹ As a result, they advocate minimising the role of the state, or even argue for having no state at all by transferring power from the coercive state to voluntary associations of free individuals.³⁸² Libertarians criticise Rawls for his commitment to socialist ideals because Rawls integrates an economic redistribution component undertaken by the state into his idea of equality.³⁸³ To libertarians equality is an empty notion whose proponents cannot prove its existence or relevance.³⁸⁴ In my view, the most significant contribution of this school of thought is that it makes a clear distinction between negative rights – namely political and civil rights – and positive rights – namely social, economic and cultural rights. In fact, it is more accurate to say that for libertarians, social, economic and cultural rights do not exist at all. Furthermore, they are opposed to any positive intervention by the state to support the disadvantaged in the society. I argue that their view on equality is invalid especially in the disability context. My discussion in Chapter V on the CRPD will demonstrate that all rights, both negative and positive, are interdependent and interrelated, especially in the disability context, and that affirmative action is needed to realise both negative and positive rights.

In contrast to Rawls’s approach of giving priority to the worst-off, based on the level of the disparities between them and the better-off, other theorists introduce prioritarianism, a principle for transferring resources from the better-off to the worse-off based on the urgency of the latter’s claims, rather than on the level of the disparities between them.³⁸⁵ The central idea of prioritarianism is to ensure two key aspects of resource transfer, namely, how great the resulting benefits would be and how well-off the beneficiaries would be.³⁸⁶ It is claimed that this new priority approach benefits everyone in society without creating any new hardships or

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Ibid 26–35; David Friedman, ‘Libertarianism’ in Steven Durlauf and Lawrence Blume (eds), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan, 2nd ed, 2008)

³⁸³ Samuel Scheffler, ‘Natural Rights, Equality, and the Minimal State’ (1976) 6(1) *Canadian Journal of Philosophy* 59, 59.

³⁸⁴ Nozick, above n 358, 233.

³⁸⁵ T. M. Scanlon, ‘The Diversity of Objections to Inequality’ in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (Palgrave Macmillan, 2002) 41, 42.

³⁸⁶ Parfit, above n 372, 206–7.

sufferings.³⁸⁷ I believe that the central idea of this school of thought is a combination of utilitarianism and liberalism, the first aspect coming from utilitarianism and the second from liberalism. Prioritarians do not believe in equality, hence for them inequality is permissible.³⁸⁸ It is clear that the prioritarians inherit the weaknesses of utilitarian thought, in that they undermine the importance of the individual and only concern themselves with people's interests, without paying attention to their abilities or other characteristics. As we have noted, this leads, in the context of disability, to ignoring the differences of persons with disabilities resulting from their disabilities.

The principle of sufficiency has been suggested as a substitute for the principle of equality. According to the sufficiency view, the distribution of resources, especially in the economic sense, should be done in such a way that 'each should have enough' rather than 'everyone should have the same'.³⁸⁹ By 'enough' is meant 'meeting a standard rather than reaching a limit'.³⁹⁰ Meeting a standard is measured by evaluating different distributions to ensure individuals have enough to live above some critical level of disadvantage – a 'utility threshold'.³⁹¹ Probably because of their awareness of the limitless needs of human beings, these theorists set a red line for sufficiency. A person is considered to have enough when they are not actively interested in getting more, nor are under pressure to get more, and are satisfied with what they have.³⁹² 'Enough' means enough to serve useful intended purposes.³⁹³ It is argued that the principle of sufficiency is a perfect choice because it maximises the number of beneficiaries having enough in a populous world with limited resources.³⁹⁴

For the proponents of the sufficiency view, economic equality is harmful, while the needs of the least or less well-off are not discussed, and inequality is acceptable as long as it does not 'violate the ideal of sufficiency'.³⁹⁵ I believe this ideal has some limited value in the

³⁸⁷ Ibid 213; Larry S. Temkin, 'Equality, Priority or What?' (2003) 19(1) *Economics and Philosophy* 61, 64.

³⁸⁸ Parfit, above n 372, 213.

³⁸⁹ Harry Frankfurt, 'Equality as a Moral Ideal' (1987) 98(1) *Ethics* 21, 21.

³⁹⁰ Ibid 37.

³⁹¹ Ibid 30.

³⁹² Ibid 39–40.

³⁹³ Ibid 31.

³⁹⁴ Ibid.

³⁹⁵ Ibid 34.

disability context as it seems to ensure that everyone will have enough based on their needs. In the case of persons with disabilities, they would have their different needs met, e.g., having a handrail in the bathroom for safety reasons – without making claims on anyone else. However, the downside of this school of thought is that it has to ensure that no one stands above anyone else in virtue of their individual capacities and other characteristics. In other words, it has the implication that equality means repressing those who have more than their share of achievement potential.

Other scholars, for example Amartya Sen and Martha Nussbaum, have pioneered a conceptual framework called the capability approach. Central to this approach is the idea that equality is about what people with informed intuitions about a decent life are actually able to do and to be.³⁹⁶ Capabilities here refer to basic human capacities such as the ability to acquire knowledge, express oneself, or participate in community activities.³⁹⁷ This capability approach assesses individual circumstances in relation to inequality, poverty, or participation, in designing and evaluating public policies, especially in the international development context.³⁹⁸ Accordingly, the importance of the capability approach has been acknowledged as an initiative for formulating development strategies for international agencies such as the United Nations. However, it has been criticised on the grounds that it is very hard to capture the meaning of equality under this theory.³⁹⁹ I argue that on the capabilities approach, equality is referred to as a list of actions that people can carry out (for example, designing and evaluating public policies), and that these actions can be compared across a group to measure equality for those people. Hence the capability approach is more a manifesto for agencies committed to working on development projects to lift people out of poverty than an alternative theory of equality.

³⁹⁶ Amartya Sen, 'Equality of What?' (Paper presented at the The Tanner lectures on human values, Stanford University, May 22 1979), 218; Martha Nussbaum, 'Women's Capabilities and Social Justice' (2000) 1(2) *Journal of Human Development: A Multi-Disciplinary Journal for People-Centered Development* 219, 222.

³⁹⁷ Sen, above n 396, 218.

³⁹⁸ Ingrid Robeyns, 'The Capability Approach: A Theoretical Survey' (2005) 6(1) *Journal of human development* 93; Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2-3) *Feminist economics* 33; Nussbaum, above n 396; Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273; Amartya Sen, *Inequality Reexamined* (Russell Sage Foundation, 1995) 396.

³⁹⁹ Wolff, above n 359, 133.

This discussion has revealed that even though different schools of thought have offered the alternatives to the ideal of equality developed by the liberals, they are either too radical or otherwise unsuitable to be of great use in the disability context. In the following section I will analyse the implications of liberal equality for this thesis.

3.2.1.4. Liberal Equality

Liberal equality, as discussed, consists of two elements in an unchangeable order of priority.⁴⁰⁰ They are that each person has equal rights, liberties and opportunities, income and wealth, and values of self-respect,⁴⁰¹ and that the basic structure of the society, as reflected in its political, social and economic arrangements, is responsible for equal and fair redistribution of these primary social goods.⁴⁰² According to liberals, this redistribution should ensure that the least advantaged will benefit the most, and, importantly, that equality will be measured not only by economic efficiency and social welfare but also by the way each individual has a secure sense of his or her own worth.⁴⁰³ This ideal of equality may be referred to as equality as a distributive goal.⁴⁰⁴

In comparison to other schools of thought concerning the ideal of equality, as discussed above – and here I mean to include utilitarianism, libertarianism, prioritarianism, sufficiency, and the capacity approach – liberalism defends and protects individual rights as its primary value and ultimate goal.⁴⁰⁵ This is because, as its supporters have argued, ‘all judgements concerning justice or injustice are ultimately relative to individuals who are benefited or harmed, honoured or dishonoured, in the distribution of contested goods’, and ‘all principles of justice including the liberal principles rest on some view of the good life for individuals’.⁴⁰⁶

⁴⁰⁰ Rawls, above n 346, 214.

⁴⁰¹ Ibid 53.

⁴⁰² Ibid.

⁴⁰³ Ibid 87.

⁴⁰⁴ Patricia A Cain, 'Feminism and the Limits of Equality' (1989) 24 *Georgia Law Review* 803, 823.

⁴⁰⁵ Boyd A. Martin, 'Liberalism' (1948) 1(3) *The Western Political Quarterly* 295, 295; A. Gutmann, 'Liberalism' in Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Pergamon, 2001) 8784, 8787.

⁴⁰⁶ William Galston, 'A Liberal Defense of Equality of Opportunity' in Louis P. Pojman and Robert Westmoreland (eds), *Equality: Selected Readings* (Oxford University Press, 1997 ed, 1986) 170, 170–1.

Defenders of liberalism believe that equality is worthwhile, and particularly advocate equality of individual rights. Originally, liberalism defended the negative rights known today as civil and political rights, such as freedom of speech, religion, and association, and other legal protections of the individual. Gradually, social and economic liberty became one of its priorities because these positive rights are vital in advancing the original values in the form of negative rights.⁴⁰⁷ This is especially true in the situation of persons with disabilities. For example, the right to freedom of expression and opinion and access to information, or the right to participation in political and public life, cannot be realised without accessible communication facilities (or reasonable accommodation as defined under the CRPD).⁴⁰⁸

Over time, even within liberal thought, the ideal of equality has been broadened beyond formal equality to include the concept of substantive equality. This concept includes the idea of equal opportunity and, among other things, allows for various ‘differences’ to be acknowledged. In the following section I will discuss the concept of equality of opportunity, as that will enable me to argue later in this chapter that this form of equality plays a crucial role in the disability context.

3.2.1.5. Equality of Opportunity

Equality of opportunity is dependent upon the notion of opportunity, and I will therefore first explain the notion of opportunity. An opportunity exists if three elements, namely a subject (or subjects), an object (or objects), and a causal connection between the subject(s) and object(s), can be identified.⁴⁰⁹ A ‘subject’ means a person; an ‘object’ can, for example, be a goal to be attained. The causal connection between the subject(s) and object(s) arises when a person with informed consent in a situation chooses whether or not to try to possess some

⁴⁰⁷ Martin, above n 405, 296; Kai Nielsen, *Equality and Liberty: A Defense of Radical Egalitarianism* (Rowman & Littlefield, 1984), 6.

⁴⁰⁸ I will look at equality as an individual right but also keep in view the fact that persons with disabilities form a group and as a group suffer discrimination. Therefore, group rights will be the wider context of my discussion even though I will not go into details about whether group rights are possible in a liberal system.

⁴⁰⁹ Williams, above n 338, 98–100; T. D. Campbell, 'IV – Equality of Opportunity' (Paper presented at the Meeting of the Aristotelian Society, 5/7, Tavistock Place, London, W.C.i, 1974) <<http://www.jstor.org/stable/4544865>>, 51–5; Peter Westen, 'The Concept of Equal Opportunity' (1985) 95(4) *Ethics* 837, 838–9; Simon J. D. Green, 'Is Equality of Opportunity a False Ideal for Society?' (1988) 39(1) *British Journal of Sociology* 1, 4–5.

desirable object.⁴¹⁰ Informed consent pertains when a person is aware of an available opportunity of doing something desirable and makes a choice about whether or not to take it.⁴¹¹ The essential part of this causal connection is that the choice by an individual to act or refrain from acting to achieve desired things should not be conditional upon personal factors such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴¹²

With this background, it is now possible to discuss the concept of equality of opportunity. Equality of opportunity is the idea that if someone wishes to have access to a certain limited primary social good, this person will not be barred from having that access because of some precondition such as being white or able-bodied that may be applied.⁴¹³ In a similar way, inequality of opportunity means inequality of access to the primary social goods due to the preconditions that may be applied.⁴¹⁴

Equality of opportunity does not involve a competition in which everyone strives against the others for a scarce social good, and in which those in privileged positions may always succeed in obtaining the desired goods. It is better construed to mean conducting oneself in a decent way, hence not in a 'way of leaving others behind but still as making the most of one's own potentialities'.⁴¹⁵ There is no competition, but simply the opportunity for personal development in accordance with one's abilities, talents, and skills.⁴¹⁶ Equality of opportunity eventually focuses on personal satisfaction either through undertaking challenging tasks or by promoting genuine respect for excellence.⁴¹⁷

The concept of equality of opportunity includes two varieties, namely, absolute (or strict) equality of opportunity and relative (or handicapped) equality of opportunity. Absolute equality of opportunity refers to the case where all people have the same opportunities to

⁴¹⁰ Campbell, above n 409, 53; Green, above n 409, 4.

⁴¹¹ Campbell, above n 409, 55.

⁴¹² Lawrence A Blum, 'Opportunity and Equality of Opportunity' (1988) 2(4) *Public Affairs Quarterly* 1, 2; Lawrence B Joseph, 'Some Ways of Thinking About Equality of Opportunity' (1980) 33(3) *Political Research Quarterly* 393, 397.

⁴¹³ Williams, above n 338, 99.

⁴¹⁴ James Coleman, 'Equality of Opportunity and Equality of Results' in Louis P. Pojman and Robert Westmoreland (eds), *Equality: Selected Readings* (Oxford University Press, 1973) 189, 190; Joseph, above n 412, 398; Galston, above n , 175.

⁴¹⁵ Blum, above n 409, 17.

⁴¹⁶ Ibid.

⁴¹⁷ Galston, above n 414, 176.

perform a task and are presented with obstacles at the same level of difficulty.⁴¹⁸ An analogy is ‘a high jump competition where the bar is at the same height for all contestants’.⁴¹⁹ To put it in plain language, absolute equality of opportunity means that everyone, regardless of their capacities and personal background, is welcome to compete in a challenge in which the way of performing a given task and the level of difficulty of the task are exactly the same in order to choose the best candidate.

In contrast, relative equality of opportunity takes the varying capacities and circumstances of the contestants into consideration, so that the level of difficulty of the task is varied.⁴²⁰ The concept of relative equality of opportunity therefore enables us to consider social factors that create unfavourable conditions for persons, rather than the persons themselves being viewed as problematic.⁴²¹

Admittedly not everyone agrees with this conception of equality of opportunity. As an example, Peter Singer argues that equality of opportunity ‘rewards the lucky’, for example, those with high IQs and possessing outstanding natural talents that enable them to succeed in whatever career they pursue. At the same time, Singer continues, equality of opportunity ‘penalises the unlucky’ – those born to parents whose ‘genes make it very hard for them to achieve similar success’.⁴²² Yet reality reveals numerous instances where high-achieving parents fail to have high-achieving offspring and not all less achieving persons will not have genius children. Notable examples are Isaac Newton and Abraham Lincoln, whose fathers were farmers, and Margaret Thatcher, the daughter of a shop owner. Conversely, Sean Lennon, the son of John Lennon, may never emerge from the shadow of his talented father. It cannot be denied, however, that there is a general pattern in accordance with which children remain in the same socio-economic class as their parents. The idea of class mobility is something that lends legitimacy to notion that capitalist market economies create persistent

⁴¹⁸ Campbell, above n 409, 60.

⁴¹⁹ Ibid 60.

⁴²⁰ Ibid.

⁴²¹ Williams, above n 338, 100.

⁴²² Singer, above n 369, 39.

hierarchies, a fact which may hinder a wider application of the concept of equality of opportunity.

Many critiques of the concept of equality of opportunity exist. I will give just one example. Schaar pinpoints a negative consequence of equality of opportunity, namely, that it can lure people with the illusion that they have a chance to achieve something beyond their real capabilities, and then, when they fail, they blame themselves.⁴²³ Another difficulty with equality of opportunity is that politicians can use it to buy off potential leaders of disadvantaged groups, enabling these potential leaders to succeed as individuals, but preventing them from taking leadership roles in well-organised movements demanding greater equality, and thus entrenching the ruling class.⁴²⁴ Misused in this way, equality of opportunity 'means an equal chance to leave the less fortunate behind in the personal quest for influence and social position'.⁴²⁵

Campbell argues that if equality of opportunity is viewed as a race to win, the race should ensure that all potential contestants have the same choices open to them.⁴²⁶ First of all, information on the race should be distributed to all potential contestants, and contestants should all have 'the same length of race to run and the same obstacles between the starting and the finishing lines'.⁴²⁷ However, he argues that 'life is not a race';⁴²⁸ life's competitions are not organised in this equitable way with judges ensuring that everyone faces the same obstacles and the best competitor wins.⁴²⁹

From this understanding of the liberal ideal of equality and equality of opportunity, and the limitations of other schools of thought on equality as compared to the liberal conception as I have presented it, and finally, because this thesis is centrally concerned with the differences of persons with disabilities, I will make the liberal ideal of equality the conceptual foundation of

⁴²³ John Schaar, 'Equality of Opportunity and Beyond' in Louis P. Pojman and Robert Westmoreland (eds), *Equality: Selected Readings* (Oxford University of Press, 1967) 137, 140.

⁴²⁴ Ibid 141.

⁴²⁵ Rawls, above n 346, 91.

⁴²⁶ Campbell, above n 409, 58.

⁴²⁷ Ibid.

⁴²⁸ Nozick, above n 358, 235–8.

⁴²⁹ Ibid 235.

my thesis, and seek to develop arguments as to how the liberal concept of equality can be modified and adapted to throw light on the specific experiences of persons with disabilities.

3.3. Equality in Law

The political conception of equality discussed by various schools as described above remains to be translated into legal terms. Since I have adopted a liberal position, I now propose to elaborate on how liberal legal equality can be conceptualised. Under a liberal conception, the starting point of a legal system is that all human beings are perceived as equal legal subjects. Thus, at its very basis, liberal legal equality means the same rights for everyone. However, this statement is overly general, as in all legal systems different rights attach to legal subjects, depending upon various differences between them. The history of liberal legality has been a process of justifying which ‘differences’ require different rights. It is against this background that the following analysis must be understood.

Equality in law comprises two components: equality before the law and equality in the law.⁴³⁰ Equality before the law, often referred to as formal equality, is equality in the enforcement of legal rules.⁴³¹ Equality before the law involves not only individuals but other legal subjects such as states and other legal entities;⁴³² however, my analysis will only focus on equality before the law as it applies to individuals. Equality before the law could be understood as equality as sameness, with varieties ranging over equal treatment, special treatment and preferential treatment.

Equality in the law, often referred to as substantive equality, is equality in the content of legal rules.⁴³³ One way of understanding substantive equality in law is to consider the concepts of equality of opportunity and affirmative action. Substantive equality informs the concept of equality as difference with different treatment.

⁴³⁰ Wojciech Sadurski, 'Equality Before the Law: A Conceptual Analysis' (1986) 60 *Australian Law Journal* 131, 131; Wojciech Sadurski, 'The Concept of Legal Equality and an Underlying Theory of Discrimination' (1998) 1998 *St. Louis-Warsaw Transatlantic Law Journal* 63, 67–9.

⁴³¹ Sadurski, above n 430, 68.

⁴³² Geoffrey Marshall, 'Equality under the Law' in William Letwin (ed), *Against Equality: Readings on Economic and Social Policy* (The Macmillan Press LTD, 1983) 207, 210–2; P. J. Baker, 'The Doctrine of Legal Equality of States' (1923) 4 *British Year Book of International Law* 1.

⁴³³ Sadurski, above n 430, 68.

Both equality as sameness and equality as difference use the same standard of comparison and justify same treatment or different treatment by reference to this standard. The initial point is that the standard for comparison is always a matter of choice, and it is never the case that we can avoid classification. This is about justifying the basis of classification.

In Subsection 3.3.1 I will further discuss equality before the law, which informs the concept of equality as sameness. In Subsection 3.3.2 I will investigate the substantive component of equality in the law with an analysis of equality of opportunity, affirmative action, and equality as difference in law. I will argue that the significant issue for legal scholarship is how differences are accommodated. This will allow me to develop my argument about the way disability ought to be understood in the context of legal equality.

3.3.1. Equality before the Law

Equality before the law refers to the proper enforcement of a legal rule regardless of their content.⁴³⁴ That is, the application of the law by law enforcement authorities shows no fear or favour to anybody, whether or not the content of the rules is just.⁴³⁵ The origin of this understanding of equality before the law stems from the ideal of treating equals equally. Treating equals equally means equal treatment for those who are identical.⁴³⁶ It is contended that this equal treatment is self-evidently just because the ‘equals’ in this context are those who ought to receive certain treatment under supposedly just normative rules.⁴³⁷ This statement is meant to serve not only as a moral foundation for the substance of a would-be-enacted law but as a motive for the proper observation of that enacted law.⁴³⁸

⁴³⁴ Ibid 69.

⁴³⁵ Ibid; Frank Michelman, 'The Meanings of Legal Equality' (1986) 3 *Harvard BlackLetter Journal* 24, 25; Alfonso Ruiz Miguel, 'Equality before the Law and Precedent' (1997) 10(4) *Ratio Juris* 372, 373.

⁴³⁶ Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton University Press, 1990), 193. 'People who are identical with respect to the treatment they ought to receive should be treated identically with respect to the treatment they ought to receive'.

⁴³⁷ Ibid.

⁴³⁸ Kent Greenawalt, 'How Empty is the Idea of Equality?' (1983) 83(5) *Columbia Law Review* 1167, 1170–73.

3.3.1.1. *Equality as Sameness*

Treating equals equally also informs the ideal of *equality as sameness*, which requires consistency in treating like people alike.⁴³⁹ Equality as sameness requires the presence of a comparator of, for instance, the opposite sex or different race or ability for sex or ethnicity or disability issues.⁴⁴⁰ It merely requires two individuals in a similar situation to be treated equally, also known as formal equality. In this however, there is no substantive equality necessarily because equality as sameness ignores the differences of the two comparators, while these differences are often relevant for consideration.

Feminists argue that sameness is typically judged based on norms of male, white or able-bodied characteristics and behaviours for women, black or persons with disabilities.⁴⁴¹ In the context of gender equality, to apply the principle of equality as sameness is to adopt normative rules granting women access to do whatever men have access to. For example, men can be combat soldiers and so can women. And, as feminists argue, equality as sameness ignores differences between women and men, which are among many others women's domestic responsibilities, their educational disadvantages, or time allocation between childcare and career advancement.⁴⁴² The same holds true to other contexts such as race or disability.

As a result, some privileges get entrenched, and corresponding discriminations become established, representing the limitations of equality as sameness. In order to avoid these limitations, legal measures are established to ensure equal protection of the law as equal treatment, setting regulations on special treatment and preferential treatment for the disadvantaged groups. The following brief discussion of these legal concepts will set the background context for deciding how disability related issues should be regulated by the law. Specifically, I will be raising the issue of what might constitute equal protection of the law for people with different abilities.

⁴³⁹ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011), 9.

⁴⁴⁰ Ibid 7–11; Wendy W Williams, 'Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate' (1984) 13 *New York University Review of Law and Social Change* 325, 357.

⁴⁴¹ Sonia Liff and Judy Wajcman, 'Sameness' and 'Difference' Revisited: Which Way Forward For Equal Opportunity Initiatives?' (1996) 33(1) *Journal of Management Studies* 79, 81;

⁴⁴² Ibid.

Firstly, equal protection of the law refers to provisions under a law which prescribe equal protection for all.⁴⁴³ In addition, universally recognised human rights such as political and civil rights and social, economic and cultural rights are incorporated into those provisions.⁴⁴⁴ Furthermore, one of the most important features of the principle of equal protection of the law is that it protects members of a disadvantaged minority groups from being subject to majority prejudices.⁴⁴⁵

Equal protection of the law also refers to equal treatment. Equal treatment sometimes is understood as assimilation because it requires everyone to be the same. Equal treatment also means giving the same treatment to similarly situated persons.⁴⁴⁶ Equal treatment requires that people should receive equal opportunities if they are equally qualified by talent or education to utilise those opportunities.⁴⁴⁷ Generally, in law equal treatment is defined as the absence of discrimination on the grounds of a specific characteristic.⁴⁴⁸

Special treatment refers to anything applied to a sub-section of society, e.g., applied to women or persons with disabilities with the aim of compensating them for disadvantages they have suffered. Special treatment is differently defined under different legal theories. In feminist legal theory, the concept refers to changes in women's roles in the traditional private and public spheres in relation to family, work, employment and empowerment, by redesigning laws and policies that effect women.⁴⁴⁹ In race legal theory, special treatment refers to legislation which gives someone an exemption or privilege for doing or not doing something based on their specially justified reasons.⁴⁵⁰

⁴⁴³ John P. Frank and Robert F. Munro, 'The Original Understanding of "Equal Protection of the Laws"' (1950) 50(2) *Columbia Law Review* 131, 167–8.

⁴⁴⁴ Ibid.

⁴⁴⁵ David A. Sklansky, 'Cocaine, Race, and Equal Protection' (1994) 47 *Stanford Law Review* 1283, 1299.

⁴⁴⁶ Christine Littleton, 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* 1279, 1292–3.

⁴⁴⁷ Thomas Nagel, 'Equal Treatment and Compensatory Discrimination' (1973) 2(4) *Philosophy & Public Affairs* 348, 354.

⁴⁴⁸ Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8(2) *European Law Journal* 290, 295.

⁴⁴⁹ Joan Williams, 'Do Women Need Special Treatment? Do Feminists Need Equality?' (1998) 9 *Journal of Contemporary Legal Issues* 279, 284.

⁴⁵⁰ Andrew Koppelman, 'Is It Fair to Give Religion Special Treatment?' (2006) 2006(3) *University of Illinois Law Review* 571, 572.

Preferential treatment refers to favourable treatment given to members of a specific group over those of other groups on the ground of their membership of that specific group.⁴⁵¹ Preferential treatment includes any selection procedures favouring members of a particular group on the grounds of their race, religion, sex, or any other grounds.⁴⁵² It is contended that preferential treatment is necessary for overcoming longstanding patterns of discrimination.⁴⁵³ Preferential treatment is considered a remedial necessity for dealing with the consequences of inequality and injustice that members of disadvantaged groups have suffered in the past.⁴⁵⁴ It may be used as a temporary measure in law and policies to increase representation of members of a disadvantaged group in some aspect of life in which they are said to be under-represented.⁴⁵⁵ In this sense, preferential treatment aims for equality of result.⁴⁵⁶ It can be applied through the use of a quota system in employment or political representation. Preferential treatment is also designed to help in promoting the aspirations of members of disadvantaged groups by introducing suitable role models.⁴⁵⁷ For example, in relation to hiring at university, if disadvantaged groups such as blacks or women observe people from their own background giving lectures and occupying other positions of authority, this may inspire them to achieve the same levels of authority. Preferential treatment should therefore be considered a type of 'nice moral discrimination' to create more opportunities for all.⁴⁵⁸

The discussion of this subsection offers a brief positive understanding of the principle of equality before the law. At the same time, it reveals its weaknesses. That is that the principle does not see people as actual human beings with various mutable and immutable

⁴⁵¹ Kenneth M. Davidson, 'Preferential Treatment and Equal Opportunity' (1976) 55 *Oregon Law Review* 53, 57.

⁴⁵² Ibid.

⁴⁵³ Ibid.

⁴⁵⁴ Luke Charles Harris and Uma Narayan, 'Affirmative Action as Equalizing Opportunity: Challenging the Myth of "Preferential Treatment"' (1998) 16 *National Black Law Journal* 127, 137; Richard A. Posner, 'The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities' (1974) 1974 *The Supreme Court Review* 1; John Kaplan, 'Equal Justice in an Unequal World: Equality for the Negro-The Problem of Special Treatment' (1966) 61(3) *Northwestern University Law Review* 363, 364; Davidson, above n 451, 57.

⁴⁵⁵ Francine Tougas and Ann M. Beaton, 'Women's Views on Affirmative Action: A New Look at Preferential Treatment' (1992) 5(3) *Social Justice Research* 239, 241.

⁴⁵⁶ Fredman, above n 439, 14–7.

⁴⁵⁷ Posner, above n 454, 1.

⁴⁵⁸ Judith Javis Thomson, 'Preferential Hiring' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds), *Equality and Preferential Treatment* (Princeton University Press, 1977) 19, 39; Posner, above n 454, 1.

characteristics, and therefore ignores this variety of differences.⁴⁵⁹ In addition, it cannot differentiate between different parties in a legal relationship such as that of claimant and defendant, and accused and victim.⁴⁶⁰ Equal treatment might also mean treating equals equally badly.⁴⁶¹ Furthermore, equality before the law cannot function in a legal system without its substantive regulations being discriminatory or creating privileges. Substantive equality in the law is therefore called for and in the following subsection it will be discussed.

3.3.2. Substantive Equality in the Law

Substantive equality refers to the concept of equality present in the content of legal rules.⁴⁶² Substantive equality requires standards of comparison for the treatment among different individuals.⁴⁶³ One way of understanding substantive equality in law is to rely on the concepts of equality of opportunity and affirmative action in law. Substantive equality is also related to the concept of equality as difference. In this subsection I will discuss equality of opportunity and affirmative action, and equality as difference in law. I will argue that the significant issue for legal scholarship is how differences are accommodated. This will allow me subsequently to develop my argument about the way disability ought to be understood in the context of legal equality.

3.3.2.1. Equality of Opportunity in Law

In law, the concept of equality of opportunity involves two parts: formal and substantive. Philosophically, formal equality of opportunity means absolute or strict equality of opportunity. Formal equality of opportunity requires that everyone should be allowed to apply for desirable social positions, and that their qualification will be assessed based on the same set of evaluation criteria during the selection process.⁴⁶⁴ Formal equality of opportunity is

⁴⁵⁹ William Lucy, 'Equality under and before the Law' (2011) 61(3) *University of Toronto Law Journal* 411, 415.

⁴⁶⁰ Ibid.

⁴⁶¹ Westen, above n 436, 190.

⁴⁶² Sadurski, above n 430, 68.

⁴⁶³ Ibid.

⁴⁶⁴ Bălan Sergiu, 'Formal and Substantive Equality of Opportunity' (2012) IV(4) *Cogito-Multidisciplinary research Journal* 85, 91; Richard J. Arneson, 'Equality of Opportunity' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer

strictly merit-based, i.e., the most talented individuals are rewarded.⁴⁶⁵ Therefore evaluation criteria usually include personal qualifications and skills, and do not include the candidates' personal identity in relation to family background and social group membership such as race or sex.⁴⁶⁶ The justification for these exclusions is that immutable characteristics or a person's status are beyond this person's control and should not be a decisive factor in determining their opportunities in life,⁴⁶⁷ and that the inclusion of these considerations would not amount to merit-based evaluation.⁴⁶⁸ A candidate can only be chosen on the grounds of merit.⁴⁶⁹ More importantly, this strictly merit-based concept of equality of opportunity informs one of the anti-discrimination principles, the anti-differentiation for developing discrimination law. An in-depth analysis on the concept of anti-differentiation will be undertaken in Sub-subsection 4.3.1.1 of Chapter IV.

Substantive equality of opportunity, in contrast to formal equality of opportunity, requires that all individuals have the same opportunities to become qualified to occupy desirable social positions.⁴⁷⁰ This would mean that all members of the society have equal opportunities to develop the needed skills and qualifications for occupying these desired social positions.⁴⁷¹ In addition, substantive equality of opportunity takes applicants' actual social situations into account in establishing evaluation criteria of qualification and competence.⁴⁷² It places a responsibility on society to take appropriate measures to ensure those equal opportunities for all, for example, by providing scholarships for deserving individuals who cannot afford to pay for the necessary education.⁴⁷³

The fundamental differences between these two concepts of equality of opportunity are that formal equality of opportunity offers equal opportunities to all members of the society,

2010 Edition ed, 2002) , pt 1; David A. Strauss, 'The Illusory Distinction Between Equality of Opportunity and Equality of Result' (1998) 34 *William and Mary Law Review* 171, 173.

⁴⁶⁵ Sergiu, above n 464, 91.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid 86.

⁴⁶⁸ John Hasnas, 'Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination' (2002) 71 *Fordham Law Review* 423, 433.

⁴⁶⁹ Sergiu, above n 464, 86; Arneson, above n 464, pt 1.

⁴⁷⁰ Sergiu, above n 464, 90.

⁴⁷¹ Arneson, above n 464, pt 2.

⁴⁷² Sergiu, above n 464, 90.

⁴⁷³ Arneson, above n 464; Sergiu, above n 464, 90.

regardless of their personal background or circumstances, and that the society plays a neutral role so as to ensure that the competition is fair and impartial for everyone. Substantive equality of opportunity, on the other hand, ensures that everyone begins at the same starting point, where society plays a crucial role in providing necessary assistance for applicants to develop the needed skills before competing for desired social positions. It is also oriented towards equality of outcomes. The central issue is how society can play this role of ensuring substantial equality of opportunity for all. A desirable and much-used way of doing so is the application of affirmative action,⁴⁷⁴ which I will discuss below.

3.3.2.2. *Affirmative Action*

Affirmative action refers to a range of practices or programmes either private or public to provide opportunities or other benefits to certain disadvantaged groups in order to redress their inequalities or disadvantages.⁴⁷⁵ Originally, affirmative action was intended to ensure substantive equality of opportunity for women and minority or disempowered racial groups in order to counteract their underrepresentation in holding significant positions in society.⁴⁷⁶ Affirmative action is a proactive approach to tackle and prevent discrimination using established practices or programmes.⁴⁷⁷ These practices or programmes are usually implemented in policies for increasing the representation of target groups in public institutions, political parties, educational institutions, workplaces, and so on.⁴⁷⁸ They take different forms, including quotas, preferences, self-studies, outreach and counselling, and anti-discrimination.⁴⁷⁹

When affirmative action takes the form of quotas it aims at maximising the representation of members of a certain disadvantaged target group in holding significant positions in the

⁴⁷⁴ Sergiu, above n 464, 90–1.

⁴⁷⁵ Carol Lee Bacchi, *The Politics of Affirmative Action: Women, Equality and Category Politics* (SAGE Publications Ltd, 1996); James E. Jones, 'The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities' (1984) 70(3) *Iowa Law Review* 901, 903; Fay Marles, 'Affirmative Action, Is It Fair?' (1988) 41(3) *Australian Social Work* 3, 3.

⁴⁷⁶ Faye J. Crosby, 'Understanding Affirmative Action' (1994) 15(1-2) *Basic and Applied Social Psychology* 13, 15; Faye J Crosby, Aarti Iyer and Sirinda Sincharoen, 'Understanding Affirmative Action' (2006) 57 *Annual Review Psychology* 585, 587.

⁴⁷⁷ Crosby, Iyer and Sincharoen, above n 476, 587.

⁴⁷⁸ Bacchi, above n 475, 15.

⁴⁷⁹ David Benjamin Oppenheimer, 'Distinguishing Five Models of Affirmative Action' (1988) 4 *Berkeley Women's Law Journal* 42, 43.

society.⁴⁸⁰ In a true quota model, a certain number of jobs, or classroom seats, and so on, are reserved solely for the members of the disadvantaged group.⁴⁸¹ In this form, affirmative action is connected with special treatment as discussed under the concept of equality as sameness.

Affirmative action can take the form of preferential treatment for members of the disadvantaged group.⁴⁸² This means that these individuals are given some form of preference over others. For example, when selecting from a list of candidates who are being evaluated for employment, race or gender may be used as the decisive factor.⁴⁸³ In this form, affirmative action relates to preferential treatment as discussed under the concept of equality as sameness.

Affirmative action in the form of self-studies requires any public or private entity doing substantial business with the government must engage in a self-study regarding how its employment selection decisions are made. Such a self-study is intended to identify any significant disparity in the number of employees from a particular group and their representation in the general labour market, as well as identifying the cause of any such disparity.⁴⁸⁴ These findings can assist the entity in adjusting its recruitment strategies to reflect the realities of the labour market.⁴⁸⁵

Affirmative action in the forms of outreach and counselling programs is very common. Here the purpose is to increase the number of candidates from disadvantaged backgrounds.⁴⁸⁶ For example, an outreach and counselling program may be run by colleges and universities to increase the number of prospective students from an ethnic minority, or to inform women of employment, career, or promotional opportunities.⁴⁸⁷

Affirmative action in the form of anti-discrimination refers to proactive measures to eliminate discrimination, for example, measures to help employers avoid or abandon practices

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

⁴⁸² David Benjamin Oppenheimer, 'Understanding Affirmative Action' (1995) 23 *Hastings Constitutional Law Quarterly* 921, 926.

⁴⁸³ Ibid 927.

⁴⁸⁴ Oppenheimer, above n 479, 47.

⁴⁸⁵ Ibid.

⁴⁸⁶ Oppenheimer, above n 482, 931–2.

⁴⁸⁷ Ibid.

which have a discriminatory effect on their female and minority employees.⁴⁸⁸ This is an active approach which distinguishes itself from passive anti-discrimination approaches in using court judgments or dispute settlement to deal with discrimination claims.⁴⁸⁹

Critics argue that affirmative action in its present form is directed at whole groups while reparation should in fact be directed to individuals.⁴⁹⁰ The justification for this argument is that there might be some members of a group who do not experience the disadvantages suffered by most members of the group,⁴⁹¹ hence are completely unaffected by discrimination.⁴⁹² That they should receive compensation for being members of the group seems unacceptable.⁴⁹³

These criticisms notwithstanding, I argue that affirmative action has been a successful proactive tool for gradually lifting many target groups out of their disadvantaged situations. As examples, women increasingly participate in politics and became world leaders, persons with disabilities face less oppression, and racial discrimination is less rampant than it was in the past. A well-designed affirmative action plan should take more than a single form.⁴⁹⁴ For example, an affirmative action plan of a university may apply the forms of outreach and counselling, quota system as well as preferential treatment to boost the representation of ethnic minority students.⁴⁹⁵ Affirmative action therefore can be effective as a proactive intervention to create a non-discriminatory environment for all.⁴⁹⁶ I will now discuss equality as difference in law.

3.3.2.3. Equality as Difference in Law

Substantive equality is related to the concept of equality as difference. The ‘differences’ in this context refer to the power relationships between people or groups stemming from their

⁴⁸⁸ Oppenheimer, above n 479, 47.

⁴⁸⁹ Ibid.

⁴⁹⁰ James W. Nickel, 'Should Reparations Be to Individuals or to Groups?' (1974) 34(5) *Analysis* 154, 160.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Oppenheimer, above n 479, 47.

⁴⁹⁵ Ibid.

⁴⁹⁶ Bacchi, above n 475, 17.

particular characteristics.⁴⁹⁷ A power relationship in this sense is, for example, the domination of men over women in the gender issues, the suppression of black people by white people in relation to racial issues, and the oppression of persons with disabilities by those without disabilities with regard to the capacity matters.

When it comes to comparisons, there should be norms or standards of comparison. In judging things the same or different, much depends on those who set criteria for measurement. It has been argued that difference and sameness in matters of gender, race or capacity are usually judged on the basis of norms set by male, white or able-bodied people.⁴⁹⁸

Along with the norms for comparison, equality as difference requires an adequate reason similar treatment.⁴⁹⁹ Here the burden of argument can be shifted to those who favour equal or similar treatment. Where there is no adequate reason for similar treatment, it is assumed that different treatment should be applied.⁵⁰⁰

The question that arises is how equality as difference accommodates the relevant differences that put a particular minority at a disadvantage. In feminist writing, during the 1980s, the call was for society to change the structure of the power relationship, where men dominated women, so as to empower women.⁵⁰¹ It also called for changing differences in the private sphere – for example, with regard to sexual subordination or violence against women, including rape.⁵⁰² It was argued that women were treated differently from men just because they were women.⁵⁰³ The ‘different treatment’ approach addresses the reality that women are different from men with respect to biological bodily capacities such as pregnancy, childbirth, and breastfeeding.⁵⁰⁴

In the disability context, because persons with disabilities are fundamentally different in specific ways from persons without disabilities, it is most important that their differences

⁴⁹⁷ Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1990), 50.

⁴⁹⁸ Nadine Taub and Wendy W. Williams, 'Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?' (1984) 37 *Rutgers Law Review* 825, 834; Liff and Wajcman, above n 441, 80; Kenneth L Karst, 'Why Equality Matters' (1982) 17(2) *Georgia Law Review* 245, 294; Minow, above n 497, 56–9.

⁴⁹⁹ Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2010), 273.

⁵⁰⁰ Ibid 280.

⁵⁰¹ Cain, above n 404, 823.

⁵⁰² Ibid.

⁵⁰³ Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 33.

⁵⁰⁴ Ibid.

should not be compared with the abilities of able-bodied persons. Instead, these differences should be accommodated. I will develop arguments for how the liberal concept of equality can be modified to acknowledge the specific experiences of persons with disabilities, and later I will argue that this approach to difference will work in the context of disability.

3.4. Equality in the Disability Context

My fundamental proposition is that persons with disabilities are different in specific ways from persons without disabilities and their differences should not be brought to compare with the abilities of the able-bodied persons. That is, the standard of comparison should not be the abilities of the able-bodied. The significant question here is what form of equality out of the following four forms would best benefit persons with disabilities: equality of opportunity, equality as sameness, equality as difference, or something that goes beyond equality as sameness or difference. It is also important to decide how to understand equality for people who are defined as different in the context of disability. In this section I will first explore the four abovementioned forms of equality. I will connect the discussion to different concepts of disability as analysed in sections 2.2 and 2.3 of Chapter II. The aim will be to figure out which of the four forms of equality is best suited to the context of disability.

3.4.1. Equality of Opportunity in the Context of Disability

In this subsection I argue that both formal and substantive equality of opportunity are important in the disability context because the disability population is itself, like the population without disability, a diverse pool of human resources.

In the disability context, equality of opportunity is a crucial component of justice for persons with disabilities; it underpins justice for persons with disabilities.⁵⁰⁵ The reason for this is that if persons with disabilities were offered equal opportunities, for example with respect to desirable careers – an important source of well-being to the able-bodied – they

⁵⁰⁵ Cynthia A Stark, 'Luck, Opportunity and Disability' (2013) 16(3) *Critical review of international social and political philosophy* 383, 396–7.

would not suffer from stigmas and disempowerment, and their social and economic positions would be strengthened.⁵⁰⁶ Equality of opportunity also informs anti-discrimination law,⁵⁰⁷ which is vital for persons with disabilities.

Formal equality of opportunity works effectively in the disability context because not every person with disabilities needs assistance in competing from the same starting point. As I argued in Chapter II, disability identity is a matter of personal choice and some persons with disabilities choose not to identify themselves as persons with disabilities. They are able to compete equally with persons without disabilities in applying for desirable social positions. In this sense, these persons prefer to have their qualifications and competences rather than their social group membership considered as decisive factors in competing for the positions. They prefer that their immutable disability characteristics are not considered by others to be a decisive factor in determining their chances in life.

Substantive equality of opportunity is also effective in the disability context. Personal impairment itself cannot directly create poverty, a lack of education, and unemployment for persons with disabilities. It is rather an inaccessible built environment, social and cultural behaviour, and structural systems that place persons with disabilities in unfavourable circumstances. It is these latter factors that prevent persons with disabilities from competing successfully for desirable social positions. They first and foremost need equal opportunities in developing the needed skills in order to become qualified for those desirable social positions. Furthermore, their actual situation should be taken into consideration in establishing evaluation criteria regarding qualifications and competences applicable to applicants in a particular competition. Substantive equality of opportunity places responsibilities on society for ensuring those equal opportunities for persons with disabilities, through proactive intervention, and here affirmative action can also be an option.

It is evident from these considerations that the two concepts of equality of opportunity in law are interrelated and support each other. Neither of them should be rejected because it is

⁵⁰⁶ Ibid.

⁵⁰⁷ Tamako Hasegawa, 'Equality of Opportunity or Employment Quotas?—A Comparison of Japanese and American Employment Policies for the Disabled' (2007) 10(1) *Social science Japan journal* 41, 41; Oppenheimer, above n 479, 49.

not a question of which one is better than the other. The important issue here is that the choice between formal and substantive equality of opportunity will depend on personal choice and the particular circumstances of persons with disabilities, where both forms are available. I will now move on to discuss the implication of equality as sameness in the disability context.

3.4.2. Equality as Sameness in the Context of Disability

In the context of disability, equality as sameness seems to offer a potential means of dismissing the medical model of disability.⁵⁰⁸ This is because equal protection of the law and equal treatment require that persons with disabilities should be treated the same as persons without disabilities. It is contended that when persons with disabilities are treated the same as those without disabilities, the former do not suffer from inequality. If this understanding were accepted I would not be writing this thesis. I obviously do not agree with this view, and in this subsection I will argue that equality as sameness is of very little use in the context of disability.

First of all, equal treatment or treating equals in the same way may sometimes result in treating equals equally badly. For example, a company that insisted on treating every employee in the company equally, irrespective of whether they were women or men, by not providing paid sick leave to anyone in the company during their first year of employment⁵⁰⁹ would be treating all employees equally badly.⁵¹⁰ It would mean that pregnant women could not expect any leave in relation to their pregnancy, childbirth and childcare, an outcome that has obvious absurdities. That would also mean that persons with disabilities could not have paid sick leave relating to their disabilities. I now move on to consider how the special treatment fares in the context of disability.

Special education is a good example of special treatment for person with disabilities. Special education is special treatment because it is specifically reserved for persons with

⁵⁰⁸ The medical model of disability has been discussed in Sub-subsection 2.2.2.1 of Chapter II on disability of this thesis.

⁵⁰⁹ Linda J Krieger and Patricia N Cooney, 'The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality' (1983) 13(3) *Golden Gate University Law Review* 513; Williams, above n 449, 370; Herma Hill Kay, 'Equality and Difference: The Case of Pregnancy' (1985) 1 *Berkeley Women's Law Journal* 1, 11–3.

⁵¹⁰ Krieger and Cooney, above n 509; Williams, above n 449, 370; Kay, above n 509, 11–3.

disabilities, on the assumption that they, especially those with intellectual impairments, cannot fit into general schooling in any aspect. This measure is intended to ensure that persons with disabilities can go to school and get an education. However, instead of helping persons with disabilities to integrate into society by means of an education, it in fact further marginalised them, because it does not give them an education which fits their social and career development or contributes to their feelings of self-worth.

Unlike special treatment, preferential treatment can to some extent provide successful solutions in the disability context. Sheltered employment is a good example. Sheltered employment is a term used for jobs kept exclusively for persons with disabilities who ‘cannot be made fit for’ the open labour market.⁵¹¹ It is an example of preferential treatment because it is given specifically to persons with disabilities over any other groups of people. However, it is of concern that these types of treatment may reinforce prejudice and stereotyping toward those with disabilities because the ‘right of everyone to the opportunity to gain his living by work which he freely chooses or accepts [...] is not realised where the only real opportunity open to [persons with disabilities] is to work in so-called sheltered facilities under sub-standard conditions’.⁵¹² Furthermore, in some cases sheltered employment might amount to discrimination or forced labour since there is a risk of segregation from the community and degrading treatment and labour exploitation in such employment settings.⁵¹³

Legal equality for everyone will never be complete if law or policies are laid down based only on equality as sameness. It is a fact that persons with disabilities are not equal before the law because they are not a target group of protection under previous international human rights treaties on the grounds of disability. It has been strongly contended that equality as sameness legitimises inequality, that ‘you had to be the same as the unquestioned standard

⁵¹¹ *ILO R99 Vocational Rehabilitation Recommendation*, ILO Doc R099. In brief, sheltered employment for persons with disabilities is arrangements for training and employment developed under ensured or supported conditions for those with disabilities who “cannot be made fit for” open labour market.

⁵¹² *ICESCR Committee General Comment No. 5*, UN Doc HRI/GEN/1/Rev.9 (Vol. I), [21].

⁵¹³ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Note by the Secretary-General*, 60th sess, Provisional Agenda Item 73 (b), UN Doc A/60/266 (17 August 2005).

representing the privileged groups in society before you could ever make a legal claim to non-discrimination’.⁵¹⁴

Furthermore, it has been argued that equality as sameness is undesirable because it perpetuates discrimination against persons with disabilities.⁵¹⁵ The ideal of equality as sameness has resulted in persons with disabilities suffering discrimination resulting from treating different cases alike in all aspects of life, when in fact persons with disabilities are different from persons without disabilities. Therefore, different treatment for different abilities has been suggested – something I will discuss in the following subsection.

3.4.3. Equality as Difference in the Context of Disability

Persons with disabilities are obviously in some respect different from persons without disabilities. A person with both legs impaired uses either a manual or an electric wheelchair to walk instead of walking literally on foot, as those without mobility disabilities do. Persons with speaking and hearing impairments literally listen with their eyes by observing others’ hand movements and/or by lip-reading, and they speak with their hands making sign languages as opposed to using ears and mouths for listening and speaking as persons without speaking and hearing impairments do. Persons with visual impairments read with their hands by touching Braille documents instead of using their eyes to read. These functional differences vary depending very much on both the particular impairments and/or the accessibility of social and structural factors.

Because of these functional differences, the central issue is how these different capacities of persons with disabilities ought to be treated in law. Should they be given concessions as equal treatment, special treatment or preferential treatment, or should they be entitled to equality but not on the same standard as applied to the able-bodied? I argue that equality as difference is the preferred choice, and that equality as difference or different treatment in the disability context means accommodating the differences of persons with disabilities both

⁵¹⁴ Arnardóttir, above n 26, 49.

⁵¹⁵ Joan C. Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory' (1991) 1991 *Duke Law Journal* 296, 305.

physically and structurally. Physically, it means the elimination of all physical barriers to access to the built environment. Structurally, it means the elimination of oppression and discrimination against persons with disabilities.

The next step is the need to question the standard of measurement of ability, and to question why the capacities of the able-bodied are considered the appropriate standard of measurement and preferred choice. The answer still lies in the accommodation of the differences of persons with disabilities. Accommodation in this context must be defined not by reference to able-bodied persons' capacities.

The most important issue is how to accommodate these differences. The different treatment approach it is to map out the reality that persons with disabilities are different from persons without disabilities. Here there is an interesting comparison with the gender issues discussed in sub-subsection 3.3.2.3 of this chapter. We should also consider how to transform the structural formation of the power relationship in which persons without disabilities oppress persons with disabilities by the way in which capacity is defined, creating inequalities and placing persons with disabilities in a disadvantaged situation.

In law, equality as difference recognises specific group's differences, such as an ethnic minority or gender status. Examples of 'hard' law for ensuring equality as difference are CERD⁵¹⁶ and CEDAW.⁵¹⁷ Persons with disabilities were invisible under these documents and in international human rights law until the adoption of the CRPD. With the latter development the differences of persons with disabilities have been taken seriously; it is paving the way for accommodating the differences of persons with disabilities.

However, equality as difference is not a problem-free option in the context of disability. The first problem is that the focus on disability highlights the differences of persons with disabilities. It is tantamount to a repeated reminder of all the burdens for the society resulting from the differences of persons with disabilities – this resulting in further marginalisation and

⁵¹⁶ CERD.

⁵¹⁷ CEDAW.

discrimination.⁵¹⁸ Yet it is also a concern that if the difference of persons with disabilities were ignored and the implication of ‘other status’ for persons with disabilities in previous human rights treaties remained unchanged, further marginalisation and discrimination against persons with disabilities would be unavoidable, and there would be other negative consequences of this ignorance of difference.⁵¹⁹ For example, persons with disabilities would still be invisible within the society, and not be considered as members of the society. Their human rights would continue to be denied. Social and structural environments would still be operating as if persons with disabilities did not exist. This problem is sometimes described as the dilemma of difference.⁵²⁰

A further problem lies in another initiative addressing the issue of the differences of persons with disabilities, which is the elimination of all physical barriers of inaccessible built environment. This physical accommodation is argued to be too costly. In this case, discrimination and inequality are regarded as permissible for a relevant reason that this physical accommodation poses an undue or disproportionate burden on society. As an example, a small-sized enterprise will not be required to install accessible facilities at their workplace to accommodate some employees with disabilities because this modification would create a disproportionate financial burden for the employer.

It is therefore argued that equality as difference, like equality as sameness, is undesirable because it cannot change the status quo,⁵²¹ even though it does bring some form of substantive equality for persons with disabilities through accommodating their differences. The various shortcomings of both equality as sameness and equality as difference have led some scholars to look beyond sameness and difference for a possible alternative.

⁵¹⁸ Quinn and Degener, above n 43, 297; United Nations, above n 43.

⁵¹⁹ Quinn and Degener, above n 43, 297.

⁵²⁰ Minow, above n 497, 20.

⁵²¹ Williams, above n 515, 305.

3.4.4. Beyond Sameness and Difference

In feminist legal discourse equality as acceptance has been suggested as an alternative to be debated. Equality as acceptance refers to a model of equality connected with culturally and socially defined differences between men and women as distinct from biological ones such as childbearing, or breastfeeding.⁵²² Equality as acceptance claims that all culturally defined roles should be treated equally.⁵²³ It challenges policies and practices that prioritise male roles, viewing them as standards. This can be done by devising complementary structures representing female norms.⁵²⁴

Theorists of equality as acceptance strongly criticise reasonable accommodation, because it is argued that reasonable accommodation ‘implicitly accepts the prevailing norm as generally legitimate’.⁵²⁵ They even urge that in special circumstances the norm should be made inappropriate for the particular individual or class seeking reasonable accommodation,⁵²⁶ because to them ‘accommodation is something that is modified or adjusted for people to use it, while acceptance is a podium whose height is adjustable’.⁵²⁷

Another suggestion is that disadvantaged groups, including persons with disabilities, should demand the transformation of structural factors that have put them at a disadvantage, rather than fight for equality as sameness or difference.⁵²⁸ This new approach to equality focuses on dealing with those inequality-creating power structures that generate what has been called ‘structural disadvantage’.⁵²⁹

This review of a possible response to the debate on equality as sameness and equality as difference allows me to conclude that they indeed do not offer any workable alternatives. Instead they turn out to be based on the differences between women and men, or between members and non-members of minorities, and so on. In relation to the ideal of equality as acceptance, I would argue that this ideal goes against the ideal of equal opportunity, which, as

⁵²² Littleton, above n 446, 1295.

⁵²³ Ibid 1312.

⁵²⁴ Ibid 1326.

⁵²⁵ Ibid.

⁵²⁶ Ibid.

⁵²⁷ Ibid 1313–4.

⁵²⁸ Williams, above n 515, 306.

⁵²⁹ Arnardóttir, above n 26, 54; Williams, above n 515, 305.

I have pointed out, provides some justice to persons with disabilities. The concept of equality of opportunity allows us to consider social factors that place persons into disadvantaged circumstances, rather than them posing a problem in themselves,⁵³⁰ and suggests ways of accommodating those social factors in order to achieve greater equality. Equality as acceptance, on the other hand, construes disadvantaged people themselves as the problem, and suggests the view that people should modify or correct themselves in order to make them fit for society.⁵³¹ This makes little sense in the disability context; disability is not something that should be modified or corrected to make persons fit for society.

The recommendation of achieving transformation through the reform of the structural factors in society holds promise in the disability context; this kind of transformation of the structural factors would arguably mean an end to the oppression of persons with disabilities regarding their capacity. However, the structural disadvantages of persons with disabilities results from their differences. Specifically, their functional differences along with external factors have put them into disadvantaged situations. Hence any transformation of the structural factors should also give attention to these differences. This causal linkage between the structural factors and differences characterising persons with disabilities brings us back to the ideal of equality as difference in the disability context. The transformation of the structural factors is in fact not a new suggestion but is a part of the concept of equality as difference. I would therefore insist that equality as difference would indeed be an effective way of addressing the problems of persons with disabilities, and that the important issue is how those differences are to be accommodated – something I pointed out in my analysis of equality as difference in the disability context.

3.5. Concluding Remarks

I have in the scope of this chapter argued that the liberal concept of equality is the most favourable theoretical view for articulating the specific experiences of persons with

⁵³⁰ Williams, above n 409, 100.

⁵³¹ Littleton, above n 446, 1314.

disabilities, as compared to other schools of thought such as utilitarianism, prioritarianism, sufficiency, and the capacity approach. This is because the liberal conception of equality ultimately speaks for individuals and advocates of their well-being. It takes the view that individuals have equal rights and that if individuals are treated differently, there should be justification for this different treatment.

From this basic conceptual understanding, I have argued that equality in law is about the search for a solution to the problem of how the differences characterising disadvantaged groups such as women or persons with disabilities ought to be treated in law. My conclusion is that both equality as sameness, with its particular variety of equal treatment, special treatment and preferential treatment, and equality as difference, with different treatment, are concurrently applicable. However, equality as difference seems preferable in respect of its recognition and accommodation of those differences.

Most importantly, I have contended that in the disability context, equality of opportunity offers justice to persons with disabilities. This is because equality of opportunity enables them not only to stand an equal chance in competing for society's goods, in virtue of its component of formal equality, but also gives them the opportunity of acquiring competitive qualifications, in virtue of its component of substantive equality of opportunity. The important issue here is that the choice between formal and substantive equality of opportunity will depend on personal desire and the circumstances of persons with disabilities, with both being made available for their preference.

I have also contended that, in the disability context, equality as sameness only creates formal equality, not substantive equality, for persons with disabilities, and to some extent perpetuates their unequal status; hence equality as sameness has little use in the context of disability. At the same time, equality as difference deserves a position in the disability context as it recognises and accommodates the differences of persons with disabilities through eliminating physical and structural barriers with which they must contend. I therefore conclude that equality on a liberal understanding and equality as difference provide a sound

ideological foundation for establishing and realising the human rights of persons with disabilities.

The concept of equality, together with the concept of discrimination, forms a complete picture of a legal ideology on equality and non-discrimination pioneered with the purpose of protecting certain disadvantaged groups from discrimination on the grounds of their particular traits or characteristics. This also applies in the context of disability. In the next chapter, therefore, I will discuss the concept of discrimination. The discussion of the concepts of equality and discrimination, along with that of disability will help me establish how the concepts of disability, the liberal idea of equality, and discrimination, have been incorporated into the CRPD as its ideological framework.

CHAPTER IV: DISCRIMINATION – FROM PHILOSOPHICAL CONCEPTION TO NORMATIVE UNDERSTANDING IN THE CONTEXT OF DISABILITY

4.1. Introductory Remarks

The concept of discrimination is the necessary complement to the concept of equality for the purposes of formulating human rights for persons with disabilities (and other disadvantaged groups). Therefore, in this chapter, I begin with an in-depth analysis of the concept of discrimination. I will identify the connection between discrimination, equality and the legal understanding of discrimination, and explain why understanding the concept of discrimination is so important to the overall argument of my thesis for promoting anti-discrimination ideology and legislation to protect persons with disabilities.

The analysis of this chapter will help provide a theoretical understanding of discrimination, allowing me to then examine, in Chapter V on the CRPD, how the concept of discrimination has been incorporated into the CRPD's principles and provisions as its ideological framework. The analysis will also allow me to explain in detail, in Chapters VII and VIII on the implementation of the CRPD, the interpretation of the conception of discrimination used by States Parties to the CRPD and the CRPD Committee.

The discussion of this chapter is comprised of four sections. Section 4.1 is the introduction. Section 4.2 explores the conceptual meaning of discrimination, examines different forms of discrimination and explains why discrimination is morally unacceptable. The contents of this section will help establish a clear understanding of discrimination that forms the conceptual background for the whole chapter.

Section 4.3 analyses different antidiscrimination principles, the formulation of certain prohibited grounds, and various options of legal remedies for discrimination, such as using criminal law, civil law, conciliation and affirmative action. The discussion is extended to how these conceptions, formulations and options reflect the context of disability. The discussion

will assist in establishing a clear understanding of disability discrimination and disability antidiscrimination legislation, which will form the background for the interpretation, in Chapter V, of the conception of discrimination contained in the CRPD, and used by States Parties to the CRPD and the CRPD Committee, as described in Chapters VII and VIII of this thesis on the implementation of the CRPD. Section 4.4 draws conclusion from the chapter's discussions of these issues.

4.2. Understanding Discrimination

Unlike the ideal of equality, where the majority of scholars disagree on what equality entails, the meaning of discrimination is uncontested. There is only divergence around the explanation of why discrimination is morally unacceptable. On this straightforward understanding, discrimination is categorised into different types, including direct and indirect discrimination, organisational, institutional or structural discrimination, and conscious or unconscious discrimination. Some of the most common and important concepts are those of direct, indirect and structural discrimination.

I will begin this section by introducing an account of discrimination in a conceptual definition and adopt it for this thesis. I will then examine the three important forms of discrimination, i.e., direct, indirect and structural discrimination, and explain why discrimination is morally unacceptable. In addition, I will examine how the concept of discrimination in its various forms is transformed into concrete legal rules, especially in the context of disability. Thus I will illustrate how discrimination is defined and ought to be understood under municipal law. This will be undertaken by analysing definitions of the general concept of discrimination, and direct and indirect discrimination, by three national disability acts, namely, the USA's *Americans with Disabilities Act 1990* (USADA), the Australian *Disability Discrimination Act 1992* (Cth) (AusDDA), and the UK's *Disability Discrimination Act 1995* (UKDDA). These three acts have been chosen because they are the

very first anti-discrimination acts, serving as role models for other countries, and most importantly, because they give attention to all of the disability and discrimination theories.

4.2.1. Discrimination in Conceptual Definition

Discrimination, in a philosophical and legal sense, refers to differential treatment, either against or in favour of a person, on the basis of their status, physical characteristics, or group membership.⁵³² Group membership in this sense can relate to race, ethnicity, religion, sex, sexual orientation, capacity, nationality, or whatever other grounds for discrimination have been identified.⁵³³ Commonly, discrimination is understood as private discrimination practiced by natural persons. There is also state discrimination,⁵³⁴ which is due to actions conducted by a collective agent or on behalf of the state, also known as structural discrimination.

This understanding of discrimination indicates that discrimination always requires three elements: a treatment or action by a subject or subjects, a ground or basis of action, and a disadvantage. A treatment in this case refers to differential treatment. Differential treatment is thought to be disadvantageous to a person when it is less beneficial or more harmful to that person as compared with the same treatment received by others.⁵³⁵ Differential treatment can include unequal treatment on the grounds of irrelevant physical characteristics, oppressive treatment on the basis of minority group membership, and treatment with the intention of subordinating or perpetuating the subordination of a minority group.⁵³⁶

A subject or subjects refers to an agent or agents who conduct a discriminatory act. In this sense, the subject(s) can be natural persons such as individuals, groups of individuals, legal persons or super-persons such as governments, corporations, or even a very abstract subject

⁵³² Peter Vallentyne, 'Left Libertarianism and Private Discrimination' (2006) 43 *San Diego Law Review* 981, 981; Carl Knight, 'The Injustice of Discrimination' (2013) 32(1) *South African Journal of Philosophy* 47, 47; Hasnas, above n 468, 430–1; Fredman, above n 439, 109.

⁵³³ Vallentyne, above n 532, 981; Knight, above n 532, 47.

⁵³⁴ Vallentyne, above n 532, 982.

⁵³⁵ Kasper Lippert-Rasmussen, 'Private Discrimination: A Prioritarian, Desert-accommodating Account' (2006) 43 *San Diego Law Review* 817, 820.

⁵³⁶ Hasnas, above n 468, 431.

such as a social structure.⁵³⁷ A social structure in this regard refers to a social relation ranging from a personal relationship between and among individuals and groups of individuals, to relationships between and among legal persons, and relationships between and among legal persons and individuals or groups of individuals.⁵³⁸ These subjects usually play a key part in a discriminatory process and are well aware of what they are doing.⁵³⁹

A ground for discrimination refers to a target group of discrimination. A target group of discrimination in turn refers to a group of individuals to whom discriminatory acts, policies or practices are directed on the grounds of their group's common shared characteristics, such as skin colour, sex or capacity. A target group should first of all be a social group, and a social group of individuals can be identified by both a set of shared attributes and sense of identity such as women, men, age groups, racial and ethnic groups, religious groups, and so on.⁵⁴⁰ Individual members of a social group should share with other members of the group an identity such as skin colour, ethnicity, belief, or life experience.⁵⁴¹ Social groups exist not only in a physical sense as real entities, but also as forms of social relations in relation to other groups.⁵⁴² A group may be identified by those who do not share a group identity with them or as a result of their having been labelled as such.⁵⁴³ Because social groups always have individuals as their membership, I contend that victims of discriminatory acts are always individual members of a target group – a contention that fits the liberal conception of equality, which aims to defend individuals with regard to their rights and fundamental freedoms as its primary purpose and ultimate value.

A disadvantage refers to comparative elements, which serve as standard treatment, in order for that to be compared with disadvantageous treatment, imposing upon members of target groups. These comparative elements are similar to the comparative factors discussed under

⁵³⁷ Lippert-Rasmussen, above n 535, 819; Kasper Lippert-Rasmussen, 'The Badness of Discrimination' (2006) 9(2) *Ethical theory and moral practice* 167, 168.

⁵³⁸ Patrik Aspers, 'Analyzing Order: Social Structure and Value in the Economic Sphere' (2008) 18(2) (2008/07/01) *International Review of Sociology* 301, 302; William A. Jackson, 'Capabilities, Culture and Social Structure' (2005) 63(1) *Review of Social Economy* 101, 106–7.

⁵³⁹ Peter Lucas, *Ethics and Self-knowledge: Respect for Self-interpreting Agents* (Springer, 2011), 50.

⁵⁴⁰ Young, above n 134, 42–3.

⁵⁴¹ *Ibid* 43.

⁵⁴² *Ibid*.

⁵⁴³ *Ibid*.

the concept of equality; standard treatment is derived from norms and standards based on male, white or able-bodied characteristics, imposed upon women, black or persons with disabilities, respectively.

With this (of necessity) broad understanding of discrimination, I will now examine the definition of disability discrimination under the USADA to find out to what extent it reflects this theoretical understanding.

Under the USADA there is no fixed general definition of discrimination; instead there are several definitions for each specified area of regulation. The common wording of these definitions is that no one shall be discriminated against on the basis of disability and has available to them the full and equal enjoyment of specified areas of regulation.⁵⁴⁴ This wording indicates that there would be no different treatment against persons with disabilities on the grounds of their disabilities. They are fully and equally entitled to services, facilities and the like in relation to employment and public services, including public transportation, public accommodation, and telecommunications.

Specifically, in the employment sector the USADA defines discrimination in a way that includes all four required theoretical elements for a definition of discrimination: an unequal treatment conducted by a subject or subjects, along with a ground and a disadvantage.⁵⁴⁵ The unequal treatment of job applicants or employees with disabilities is on the ground of an immutable characteristic in the form of a disability. The treatment is in this sense discriminatory in many ways, such as 'limiting, segregating, or classifying job applicants or employees in a way that adversely affects their opportunities or status on the ground of their disability',⁵⁴⁶ or 'using discriminatory qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities',⁵⁴⁷ or not providing reasonable accommodation for employees

⁵⁴⁴ USADA, §§ 12111(a), 12132, 12182(a).

⁵⁴⁵ Ibid § 12111(a).

⁵⁴⁶ Ibid § 12111(b)(1); Stephen L. Mikochik, 'Employment Discrimination against Americans with Disabilities' (1991) 11 *Mississippi College Law Review*, 256.

⁵⁴⁷ USADA § 12111(b)(6); Mikochik, above n 546, 256.

with disabilities.⁵⁴⁸ From this reading, the USADA defines the treatment in discrimination in an absolute form, i.e. unfavourable treatment, rather than in a relative sense which is less favourable treatment as defined under the AusDDA and UKDDA.⁵⁴⁹ This will be further discussed in the following sub-subsection 4.2.2.1.

The subject here is a covered entity referring to an employer, employment agency, labour organisation, or joint labour-management committee.⁵⁵⁰ The ground is on disability. Importantly, the disadvantage can be identified here as, for example, an adverse effect on their opportunities,⁵⁵¹ the screening out candidates with disabilities,⁵⁵² or the perpetuation of existing discrimination against candidates or employees with disabilities.⁵⁵³ I conclude that this definition reflects the concept of discrimination I have discussed above.

4.2.2. Forms of Discrimination

4.2.2.1. Direct Discrimination

Direct discrimination means treating people less favourably than they should have been treated on a certain ground based on the subject's reasoning or justification.⁵⁵⁴ For example, in the case of a racial ground, the subject might presume that people with dark skin colour are less intelligent than those with lighter skin. In direct discrimination the disadvantageous treatment towards a person, as defined under the concept of discrimination, is a less favourable treatment. Basically, direct discrimination stems from the ideal of equality as sameness, which requires consistency in treating like people alike.⁵⁵⁵

Direct discrimination involves a comparator. It does not require an actual comparator but allows a hypothetical comparator.⁵⁵⁶ The comparison in direct discrimination is individual-based, meaning individuals are to be compared to one another to define direct discrimination.

⁵⁴⁸ USADA § 12111 (b)(5)(A).

⁵⁴⁹ Productivity Commission, 'Review of the Disability Discrimination Act 1992' (Australian Government – Productivity Commission Inquiry Report, 2004)583, 306.

⁵⁵⁰ USADA § 12111 (2)

⁵⁵¹ Ibid § 12111 (b)(1).

⁵⁵² Ibid § 12111 (b)(6).

⁵⁵³ Ibid § 12111 (b)(3)(B).

⁵⁵⁴ John Gardner, 'Discrimination as Injustice' (1996) 16 *Oxford Journal of Legal Studies* 353, 353.

⁵⁵⁵ The concept of equality as sameness has been discussed in the subsection 3.3.2.4 on equality as sameness in Chapter III on Equality.

⁵⁵⁶ Fredman, above n 439, 168.

These comparative elements are similar to the comparative factors discussed in the concept of equality, which are norms and standards based on male, white or able-bodied characteristics and the behaviour for women, black persons or persons with disabilities, respectively.⁵⁵⁷ The choice of comparator requires a value judgement as to which aspects of the comparator are relevant or irrelevant.⁵⁵⁸ If there is no appropriate comparator in the situation involving direct discrimination, the less favourable treatment can be unfavourable or detrimental treatment.⁵⁵⁹

Direct discrimination involves intention and explicitness. Intention here means the intention of the subject or subjects to carry out a discriminatory act, together with their explicitness to carry out that intention.⁵⁶⁰ In direct discrimination, intention is deliberate, which means that the subject of a discriminatory act has envisioned the consequences of their action and decided to act in spite of the foreseen consequences.⁵⁶¹ Usually these consequences are disadvantageous or harmful to members of the target group. In other words, intentionality is reflective of the subject's mental state, which means that they have a resolution and a means to act and cause harm to members of the target groups.⁵⁶² It is a concern that the discriminator would rarely acknowledge their intention of treating a person with disabilities less favourably because of their disability, and instead would try to put forward some alternative explanation to the effect that they genuinely if erroneously believe a person with a disability cannot perform certain tasks.⁵⁶³ With this explanation they might escape being held liable for discrimination on the grounds of disability.⁵⁶⁴ These two distinctive elements differentiate direct discrimination from other types of discrimination.

Direct discrimination occurs whenever the subject of a discriminatory act clearly and intentionally directs that discriminatory act at the members of a target group but not at any members of other groups.⁵⁶⁵ In addition, this subject must represent those who share the same

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid 169.

⁵⁶⁰ John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 *Oxford Journal of Legal Studies* 1, 4.

⁵⁶¹ Lucas, above n 539, 44.

⁵⁶² Ibid.

⁵⁶³ Hamilton, above n 236, 218.

⁵⁶⁴ Ibid.

⁵⁶⁵ Lippert-Rasmussen, above n 535, 170.

desires and beliefs to the extent of agreeing with and supporting statements and legislation directed at and discriminating against the target group.⁵⁶⁶

As a remedy for the victims of direct discrimination, the harm principle is called in. In its simplest form, the harm principle is meant to prevent individuals from harming others.⁵⁶⁷ In philosophical language, the harm principle refers to the ideal that intervention in, restriction of, and coercion to an individual's liberty by the state is justifiable in order to protect other individuals from being harmed by that individual.⁵⁶⁸ In other words, the harm principle authorises the state to respond to harms caused by one individual to another. This principle also serves as a warning signal to discourage discriminatory acts, because such acts harm the targeted individuals. The harm principle therefore sends a clear message that if someone attempts to harm another, he or she will face the consequence of their action.

Thus direct discrimination is closely connected with the harm principle as direct discrimination consists of denial harm, stigmatic harm or cumulative harm.⁵⁶⁹ Denial harm refers to the unequal treatment of denying an opportunity to secure a desired benefit – which may include a job, a night's lodging at a motel, a vote, etc. – to members of a minority group.⁵⁷⁰ Stigmatic harm refers to unequal treatment with the intention of creating a feeling of inferiority or segregation in members of a minority group.⁵⁷¹ Cumulative harm refers to the unequal treatment of systematic denial of benefits to members of a minority group on the grounds of their particular difference-making characteristics.⁵⁷²

From this understanding of the harm principle, and the connection between the harm principle and direct discrimination, I suggest that prohibiting direct discrimination is a way of imposing a proactive measure to prevent somebody with an intention to harm others from realising their intention. Yet one might argue that a drawback of using this proactive measure

⁵⁶⁶ Ibid.

⁵⁶⁷ Claudio Tamburrini, 'What's Wrong With J.S. Mill's "Harm-to-Others"-Principle?' (2011) 38(1) *Journal of the Philosophy of Sport* 1, 2.

⁵⁶⁸ John Stuart Mill, *On Liberty* (Batoche Books, 2001 ed, 1859), 13; Sophia A. Stone, 'Harm Principle' in Deen K. Chatterjee (ed), *Encyclopedia of Global Justice* (Springer, 2011) vol 1, 472, 472–3.

⁵⁶⁹ Paul Brest, 'The Supreme Court, 1975 Term Forward: In Defense of the Antidiscrimination Principle' (1976) 90(1) *Harvard Law Review* 1, 8–12.

⁵⁷⁰ Ibid 8.

⁵⁷¹ Ibid

⁵⁷² Ibid 12.

to combat direct discrimination is that it may cause reverse discrimination against and push the targeted groups of the proactive measures out of the protection of the law.⁵⁷³ However, my suggestion is strengthened by an argument that the assumption behind this perception of a drawback is incorrect since if there was no intervention it would mean allowing unjust situations to continue, and the members of the subordinated groups would continue to live in a subordinated environment.⁵⁷⁴

This understanding of direct discrimination has been transformed into concrete provisions under municipal laws. The definitions of direct discrimination under the AusDDA and UKDDA illustrate this transformation.

Under the AusDDA the definition of direct discrimination generally exhibits the philosophical ideal of treating like people alike or the idea that all persons have the right to equal treatment.⁵⁷⁵ Specifically, the definition of direct discrimination reflects what the theoretical definition of direct disability discrimination requires: the presence of a comparator, and treatment on the grounds of disability.⁵⁷⁶ These elements are put in this exact order.

More specifically, s 5(1) of the AusDDA requires a comparator test that includes the identification of a suitable either real or hypothetical person for comparison and identification of circumstances that are the same or not significantly different for the purposes of the

⁵⁷³ John Gardner, 'On the Ground of Her Sex (uality)' (1998) 18 *Oxford Journal of Legal Studies* 167, 187; Christopher McCrudden, 'Changing Notions of Discrimination' in Stephen Guest and Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (ARSP Beiheft 21, 1985) 83574, 86; Sandra Marshall, 'Reversing Discrimination' in Stephen Guest and Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (ARSP Beiheft 21, 1985) 61, 64–5.

⁵⁷⁴ McCrudden, above n 573, 86.

⁵⁷⁵ *Disability Discrimination Act 1992* (Cth) pt 1 s 5, as amended by *Disability Discrimination and Other Human Rights Legislation Amendment Act (No 70) 2009* (Cth) sch 2 item 17. According to the AusDDA, direct disability discrimination occurs when:

- (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
- (2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
 - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
- (3) For the purposes of this section, circumstances are not materially different because of the fact that, because of the disability, the aggrieved person requires adjustments.

⁵⁷⁶ *Ibid* s 5(1).

comparison.⁵⁷⁷ Identification of a suitable comparator is always challenging and, as mentioned, the choice of a comparator requires a valued judgement as to which aspects of the comparator are relevant or irrelevant and this judgement is very much dependent on individual judges considering the complaint. A case *Purvis v New South Wales*, where a boy with intellectual disability engaging in violent behaviours toward teachers and other students had been suspended and then expelled from a main stream school,⁵⁷⁸ is an example on how the choice of comparator can be controversial. It is noted that his disability manifested itself in aggressive behaviour i.e. hitting or kicking, without planning or motivation by any ill intent.⁵⁷⁹

In this case, the judges differed in their opinions on whether a comparator was considered appropriate for comparison.⁵⁸⁰ The majority of the judges considered that hypothetically the comparator in this case should be a student without disability⁵⁸¹ and with disruptive behaviour not related to a disability.⁵⁸² They explained that the boy's disturbed behaviour as a manifestation of his disability and a wilful behaviour of the comparator, unrelated to a disability 'although seemingly outwardly identical, had the same disturbing or harmful effect on others'.⁵⁸³ Therefore, their choice of comparator was valid because they focused on the end result of behaviour.⁵⁸⁴ Their analysis of the comparator issue has been subsequently criticised that they misunderstood disability which includes both physical and functional limitations, and that their analysis gave the impression that the boy was suspended and then expelled because of his behaviour whereas in fact he was treated as such on the ground of his disability.⁵⁸⁵

⁵⁷⁷ Ibid.

⁵⁷⁸ [2003] HCA 62 (11 November 2003).

⁵⁷⁹ *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 (11 November 2003) [182].

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid [213] (Gummow, Hayne, Heydon JJ).

⁵⁸² Kate Rattigan, 'Purvis v. New South Wales (Department of Education & (and) Training) - A Case for Amending the Disability Discrimination Act 1992 (CTH)' (2004) 28 *Melbourne University Law Review* 532, 542.

⁵⁸³ Productivity Commission, above n 549, 309.

⁵⁸⁴ Ibid.

⁵⁸⁵ Elizabeth Dickson, 'Disability Discrimination in Education: Purvis v. New South Wales (Department of Education and Training), Amendment of the Education Provisions of the Disability Discrimination Act 1992 (CTH) and the Formulation of Disability Standards for Education' (2005) 24 *The University of Queensland Law Journal* 213591, 218.

In contrast, the dissenting judges considered that a correct comparator would be a student without disability and without disruptive behaviours.⁵⁸⁶ This is because the boy's disability made him have no understanding of his behaviour, while his comparator without his disability is 'able to control their behaviour, but unwilling to do so for whatever reason'.⁵⁸⁷ In other words, his behaviour was a manifestation of his disability, while his comparator's is an act of free will.⁵⁸⁸ Therefore, this choice of the comparator is appropriate.⁵⁸⁹

Also under the s 5(1) of the AusDDA; after the comparator is identified, judges are then required to compare two ways of treating i.e. one for the complainant and the other for the comparator, in order to determine whether the complainant is treated less favourably than the comparator on the ground of disability.⁵⁹⁰ In addition, they are required to consider whether the 'circumstances' surrounding the treatment of the person with the disability are the same or not significantly different from those of this appropriate either hypothetical or actual comparator without the disability.⁵⁹¹ As mentioned above, the dissenting opinion compared the circumstances of the boy and his comparator in order to conclude he was treated less favourable than his comparator on the ground of his disability.

When less favourable treatment or discrimination on the grounds of disability is proved, usually complainant is required to indicate that there is an involvement of intention to treat or a motive for treating him or her less favourably.⁵⁹² However, the AusDDA does not require the identification of intention instead it focuses the effect of discriminatory act on the complainant.

A significant and new feature of the amended AusDDA makes 'reasonable adjustment' a new ground for identifying both direct and indirect disability discrimination. It states that a failure to make reasonable accommodation for persons with disabilities amounts to both direct

⁵⁸⁶ *Purvis* [2003] HCA 62 [137] (McHugh and Kirby JJ).

⁵⁸⁷ *Ibid* [128] (McHugh and Kirby JJ).

⁵⁸⁸ *Ibid*.

⁵⁸⁹ *Ibid*.

⁵⁹⁰ Rattigan, above n 582, 541.

⁵⁹¹ Dickson, above n 585, 217–8.

⁵⁹² Hamilton, above n 236, 218.

and indirect disability discrimination.⁵⁹³ This significant improvement was to clear suspicion of the High Court in *Purvis v New South Wales* that the act implied an obligation to accommodate or a failure to provide reasonable accommodation would itself constitute discrimination.⁵⁹⁴ It also reflects the argument of the dissenting judges in *Purvis* case, which explained that disability discrimination is different from discrimination on other grounds, e.g. sex or race, because people have various forms of disabilities while attributes of sex and race do not vary.⁵⁹⁵ Hence elimination of disability discrimination includes adjustment or adaptation to different needs of individuals with disabilities.⁵⁹⁶ This amendment also reflects a recommendation from the Productivity Commission,⁵⁹⁷ and will contribute to implementing Australia's treaty obligations under the CRPD.⁵⁹⁸

A 'reasonable adjustment' under the AusDDA is defined simply as one that would not impose 'an unjustifiable hardship'.⁵⁹⁹ It has been hailed that this understanding of the concept of 'reasonable adjustment' has a closer connection with that of the CRPD.⁶⁰⁰ However, it is criticised that this understanding, like the one under the UKDDA, has been founded on a ground of cost in 'construing what is reasonable and unreasonable'.⁶⁰¹ This has resulted in the definition of reasonable accommodation under the UKDDA being criticised for being more sympathetic to persons in power, e.g. employers, rather than protecting vulnerable groups such as employees.⁶⁰² In contrast, the USADA takes a more pragmatic approach to defining reasonable accommodation.⁶⁰³ This includes accessible facilities, equipment or devices, job

⁵⁹³ *AusDDA Compiled July 2016* pt 1 s 5(2), s 6(2)(c).

⁵⁹⁴ Bronwyn Byrnes, 'Improved Protection of Disability Rights: Disability Discrimination Act 1992 Amended' (2009) (214) *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 22, 22; Australian Human Rights Commission, *Changes to the DDA: Disability Discrimination and Other Human Rights Legislation Amendment Act 2008* (30 January 2017) <<https://www.humanrights.gov.au/changes-dda-disability-discrimination-and-other-human-rights-legislation-amendment-act-2008>>.

⁵⁹⁵ *Purvis* [2003] HCA 62 [86] (McHugh and Kirby JJ).

⁵⁹⁶ *Ibid* [88] (McHugh and Kirby JJ).

⁵⁹⁷ Productivity Commission, above n 549, Recommendation 8.1.

⁵⁹⁸ *Disability Discrimination Act 1992* (Cth) pt 1 s 12(8)(b), as amended by *Disability Discrimination and Other Human Rights Legislation Amendment Act (No 70) 2009* (Cth) sch 2 item 20; *King v Virgin Australia Airlines Pty Ltd* [2014] FCA 36 (5 February 2014) [49]; Australian Human Rights Commission, above n 594; Law Council of Australia, 'Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008' (14 January 2009).

⁵⁹⁹ *Disability Discrimination Act 1992* (Cth) pt 1 s 4(1), as amended by *Disability Discrimination and Other Human Rights Legislation Amendment Act (No 70) 2009* (Cth) sch 2 item 13.

⁶⁰⁰ Arnold et al, above n 264, 382.

⁶⁰¹ *Ibid* 383.

⁶⁰² *Ibid*.

⁶⁰³ *Ibid*.

restructuring, part-time or modified work schedules, reassignment to a vacant position, examinations and training materials or policies in accessible formats, provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁶⁰⁴ It was hoped that this would result in the AusDDA following the USADA in understanding reasonable adjustments.⁶⁰⁵

Under the UKDDA, the definition of direct discrimination reflects some features of the theoretical definition of direct disability discrimination including the presence of a comparator, and treatment on the grounds of disability.⁶⁰⁶ In contrast to the AusDDA regarding identification of a comparator, the UKDDA takes a much narrower approach.⁶⁰⁷ The UKDDA does not require comparison of different persons (persons with disabilities to those without) in the same, or not significantly different circumstances as the AusDDA.⁶⁰⁸ As explained in *Clark v TDG Ltd*, the UKDDA only requires examination of the reason for the treatment of persons with disabilities, i.e. finding out why a person with a disability was treated as he or she was.⁶⁰⁹ It then requires comparison with the treatment of others to whom that reason did not apply, to find out if they would have had identical treatment.⁶¹⁰ In addition, it is explained that the phrase ‘that reason’ in the definition refers to ‘facts constituting the reason for the treatment’ rather than a causal link of the reason for the treatment with disability.⁶¹¹ This understanding of the phrase is aimed at avoiding the difficulties in identifying unreal characteristics of a hypothetical comparator such as ‘the characteristics of a hypothetical non-pregnant male comparator for a pregnant woman in sex discrimination cases’.⁶¹²

⁶⁰⁴ USADA § 12111(9)(A)(B).

⁶⁰⁵ Arnold et al, above n 264, 383.

⁶⁰⁶ According to the UKDDA, a subject is considered directly discriminating a person with disabilities if:

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified.

Disability Discrimination Act 1995 (UK) 43 Eliz 2, c 50 pt II.1.5.

⁶⁰⁷ *Clark v TDG Ltd (t/a Novacold)* [1999] EWCA Civ 1091 (25 March 1999).

⁶⁰⁸ *Ibid* (Mummery LJ).

⁶⁰⁹ *Ibid*.

⁶¹⁰ *Purvis* [2003] HCA 62 [215] (Gummow, Hayne, Heydon JJ).

⁶¹¹ *Clark* [1999] EWCA Civ 1091 (Mummery LJ).

⁶¹² *Ibid* (Mummery LJ).

Moreover, the provision requires identifying an appropriate comparator as an individual but not necessarily a person without disabilities.⁶¹³ So an appropriate comparator can be anyone. This implication means that the UKDDA, unlike the AusDDA, does not bring in the bodily differences of persons with disabilities to compare them to those of persons without disabilities, in order to claim equality.

Where a valid comparator can be identified, it must be proved that the treatment was less favourable for a reason relating to the disability of that person with disabilities.⁶¹⁴ This implies that equality only requires equal treatment, which means that it must be no less favourable than the treatment of a comparator.⁶¹⁵ Because the provision is on direct disability discrimination, and the UKDDA contains no provision for indirect discrimination,⁶¹⁶ it is obvious that the provision fails to recognise that equal treatment may in itself be discriminatory. Like the AusDDA, under the UKDDA a motive for discriminating or an intention to discriminate is not required. All that is required is that discrimination happened for a reason related to the disability of the claimant with disabilities.⁶¹⁷

In sum, it is clear that the AusDDA's definition of direct discrimination is more closely aligned to the theoretical understanding of direct disability discrimination than that of the UKDDA.

4.2.2.2. Indirect Discrimination

Indirect discrimination⁶¹⁸ arises from different (or disparate) results of applying neutral rules that put a person with a certain characteristic in a disadvantaged situation vis-à-vis a comparator unless those neutral rules can be legitimately justified.⁶¹⁹ Indirect discrimination also originates from the ideal of equality as sameness, especially equal treatment. Therefore,

⁶¹³ UK DDA pt II.1.5(a).

⁶¹⁴ Ibid.

⁶¹⁵ Hamilton, above n 236, 223.

⁶¹⁶ UK DDA s 5(1).

⁶¹⁷ Hamilton, above n 236, 222.

⁶¹⁸ As termed in the United Kingdom and Europe, and as disparate impact in the United States.

⁶¹⁹ Fredman, above n 439, 177–9.

equal treatment with different results rather than equal results is a precondition for identifying indirect discrimination.⁶²⁰

Indirect discrimination also involves a comparator. The comparator in indirect discrimination, in contrast to that of direct discrimination, is a group-based concept.⁶²¹ This comparator is identified by using statistics,⁶²² or the terminology of ‘particular disadvantage’.⁶²³ The statistical method is used to compare groups in order to determine the disproportionate impact on a certain group resulting from applying neutral rules.⁶²⁴ This disproportionate impact constitutes indirect discrimination against this group. The terminology of ‘particular disadvantage’ is also used to determine whether or not the application of the neutral rules, which put a person with a certain characteristic at a disadvantage when compared with those who do not share that characteristic, is legitimately justified.⁶²⁵

Indirect discrimination occurs when someone applies neutral standards which on the face of it seem fair, but where it is harder for members of a certain social group than it is for others to comply with them, and as a result they cause disadvantages to the members of that group.⁶²⁶ For example, a researcher has accused several of the most prestigious universities, such as Oxford and Cambridge, of indirectly discriminating against students from disadvantaged backgrounds in preventing them from being admitted to these universities.⁶²⁷ According to this researcher, these universities appear to have created fair access for all students from different backgrounds, yet those institutions are in fact academically highly selective in accepting prospective students. The researcher’s claim is that this is discriminatory because academic performance is closely linked to family background — better-off pupils go to good high schools, whose tuition fees are expensive, while worse-off

⁶²⁰ Ibid 178.

⁶²¹ Ibid 183.

⁶²² Ibid.

⁶²³ Ibid 187.

⁶²⁴ Ibid.

⁶²⁵ Ibid.

⁶²⁶ Gardner, above n 554, 355.

⁶²⁷ Katherine Sellgren, 'Universities Accused of Being 'as Exclusive as ever'', *BBC News* (London), 2013 <<http://www.bbc.co.uk/news/education-25119426>>.

ones go to inferior schools because they are generally free of charge.⁶²⁸ Thus the superficially neutral standards of academic excellence which are used as the criterion for admission to these prestigious universities effectively discriminate against the economically poorer sections of society.

Indirect discrimination also occurs whenever an individual, institution or practice operates in such a way that the interests of some individuals are systematically favoured.⁶²⁹ For instance, employers prefer to hire men because the labour-market has been set up to favour men, and employers are unwilling to deal with resulting difficulties in accommodating, for example, the fact that women can fall pregnant and require time off work to give birth.⁶³⁰

A possible solution to dealing with indirect discrimination is the concept of distributive justice. This concept is concerned with the fair sharing of community benefits and burdens among all members of a society.⁶³¹ To put it in a plain language, distributive justice refers to a process whereby states for justifiable reasons legally take income from the better-off and distribute it to the worse-off. Income from progressive income tax, for instance, might be invested in a vocational training school for all – an illustration of distributive justice. This is a liberal concept of distributive justice. Liberal distributive justice considers all rights, both negative and positive, to be compatible with such action.⁶³² It requires that social and economic arrangements benefit the worse-off in society, thus that the transfer of social goods should be organised in a way that maximises benefits for the least advantaged.⁶³³

I argue, with the help of the liberal concept of distributive justice, that states or legal entities can only be neutral in a relative sense. This means that they have the option to ensure a fair sharing of primary social goods among the members of society, especially taking into consideration the benefit of its poorer members, even though this might imply the unequal treatment of other members of the society, such as the rich and better-off. In order to

⁶²⁸ Ibid. It says that 'Posh students go to posh universities because they do better at school and less posh students to less posh universities because they do less well at school'.

⁶²⁹ Lippert-Rasmussen, above n 535, 821–2.

⁶³⁰ Ibid.

⁶³¹ A Kaufman, 'Distributive Justice, Theories of' in Ruth Chadwick (ed), *Encyclopedia of Applied Ethics* (Elsevier Science, 2011) 842, 842; Arnold F. McKee, 'What Is "Distributive" Justice?' (1981) 39(1) *Review of Social Economy* 1, 5.

⁶³² Kaufman, above n 631, 842–5.

⁶³³ Rawls, above n 346, 52–6.

eliminate indirect discrimination, it is necessary to take into account the interests of disadvantaged groups such as women and members of racial minorities when making law and policies.⁶³⁴ A government intervention can promote the development of disadvantaged groups to the benefit of society as a whole.⁶³⁵ The principle here is closely related to that of equality of opportunity as discussed in the previous chapter on equality.

A fundamental difference between direct discrimination and indirect discrimination is the presence or absence of intention. Unlike direct discrimination, indirect discrimination does not involve an intention and explicitness of the intention.⁶³⁶ In addition, the consequences of indirect discrimination might be less harmful than those of direct discrimination. This is because, although both direct and indirect discrimination cause harm, harm suffered from action intentionally motivated is felt more deeply, and is more keenly resented, than that caused unintentionally.⁶³⁷ I will now examine the definition of indirect discrimination under the AusDDA to find out how far it reflects this theoretical understanding.

The definition of indirect discrimination under the AusDDA reflects the theoretical definition of indirect disability discrimination. Different (or disparate) outcomes result from an application of neutral rules and, as result of this application, a person with disabilities is in a disadvantaged situation thus this application is legitimately unjustified.⁶³⁸ Specifically, the

⁶³⁴ McCrudden, above n .

⁶³⁵ Ibid.

⁶³⁶ Gardner, above n 560, 5; Jeremy Waldron, 'Indirect Discrimination' in Stephen Guest and Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (ARSP Beiheft 21, 1985) 93, 93.

⁶³⁷ Waldron, above n 636, 93.

⁶³⁸ According to the AusDDA, indirect disability discrimination occurs when:

- (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
 - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
- (2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
 - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

definition holds that the application of the neutral requirement or condition by the discriminator puts a person with disabilities at a particular disadvantage when compared with those without.⁶³⁹ The definition uses the terminology of ‘particular disadvantage’ to identify a group-based comparator rather than using statistical evidence which aims at determining whether or not the application of the neutral rules is legitimately justified.⁶⁴⁰ The definition also prescribes that, should the discriminator wish to apply a neutral requirement or condition, they are required to provide reasonable adjustment in order to assist persons with disabilities to comply with this neutral requirement or condition.⁶⁴¹ By not doing so they again put persons with disabilities at a particular disadvantage.⁶⁴²

Under this amended AusDDA, the notoriously difficult proportionality test (substantially higher proportion) under the old version for indirect discrimination – where persons without the particular disability can comply and, if any, what proportion can comply – has been removed.⁶⁴³ Instead, the amended AusDDA is concerned with unreasonable requirements or conditions with which a person with a disability cannot comply thus putting them at a particular disadvantage.⁶⁴⁴ By virtue of these changes, it is easier for persons with disabilities to meet the test that they themselves cannot comply with the unreasonable requirement and are disadvantaged by it.⁶⁴⁵ In addition, the reasonableness test is now solely the responsibility of the discriminators who will now have to prove that their requirement or condition is reasonable or that the reasonable adjustment required by persons with disabilities imposes unjustifiable hardship on them.⁶⁴⁶ This change therefore shifts the burden of proving the

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

Disability Discrimination Act 1992 (Cth) pt 1 s 6, as amended by *Disability Discrimination and Other Human Rights Legislation Amendment Act (No 70) 2009* (Cth) sch 2 item 17.

⁶³⁹ *AusDDA Compiled July 2016* pt 1 s 4(1), s 6(1).

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid* s 6(2).

⁶⁴² *Ibid.*

⁶⁴³ Arnold et al, above n 264, 379; Byrnes, above n 594, 22.

⁶⁴⁴ *AusDDA Compiled July 2016* pt 1 s 6(1)(b)(c).

⁶⁴⁵ Arnold et al, above n 264, 379; Sonia Millen, 'Amendments to the Commonwealth Disability Discrimination Act 1992 and Other Recent Amendments in the Area of Discrimination Law' (Paper presented at the Mondaq Business Briefing, 2009).

⁶⁴⁶ *AusDDA Compiled July 2016* pt 1 s 6(3); Millen, above n 645.

reasonableness of the condition onto the discriminators, compared to the previous version where persons with disabilities had to prove a condition was not reasonable.⁶⁴⁷

The case *King v Virgin Australia Airlines* is an example for better understanding of this definition.⁶⁴⁸ In this case a woman named Mrs King, contended that Virgin Airlines' refusal of her bookings for three flights constituted, among other form of discrimination, indirect disability discrimination against her within the meaning of s 6 of the AusDDA.⁶⁴⁹ She reasoned that Virgin Airlines imposed an unreasonable condition by requiring all its passengers to move around without disability aids for boarding and leaving planes and she was unable to comply with this requirement because of her disability i.e. she could not walk and used her disability aids for mobility.⁶⁵⁰ This condition, together with imposition of two-seat capping per flight policy, led to the refusal of her bookings and put her in a particular disadvantage which amounted to indirect discrimination against her.⁶⁵¹ Even though her claim of court fee capping has been dismissed and the claim on indirect discrimination was considered as too wide and contentious by the High Court of Australia,⁶⁵² this case is still a good illustration on how to litigate the definition of indirect discrimination under the AusDDA. In this case, as a complainant with disabilities, Mrs King only needed to state that she could not comply with the requirement set by Virgin Airlines because of her disability in order to bring her case to court.⁶⁵³ Meanwhile Virgin Airlines, as respondent, were required to prove that removal of two-seat capping policy would impose unjustifiable hardship on them such as cost involved in training staff, or buying equipments to deal with more than two passengers with disabilities on board in a flight, or risk of breach of civil aviation regulations.⁶⁵⁴

⁶⁴⁷ *AusDDA Compiled July 2016* pt 1 s 6(3); Byrnes, above n 594, 22.

⁶⁴⁸ The case *Waters v Public Transport Corporation* (1992) 173 CLR 349 (3 December 1991) was recommended by one of the examiners, Prof Thornton for the analysis on the definition of indirect discrimination under the AusDDA. However, this case was decided in 1991 before AusDDA was made into law in 1992 so it is not really up the definition of indirect discrimination amended in 2009. It has been replaced with the case *King v Virgin Australia Airlines* for the discussion.

⁶⁴⁹ *King* [2014] FCA 36 [2].

⁶⁵⁰ *Ibid* [27].

⁶⁵¹ *Ibid* [28].

⁶⁵² *Ibid* [69].

⁶⁵³ *Ibid* [27].

⁶⁵⁴ *Ibid* [30(e)14(f)].

4.2.2.3. *Structural Discrimination*

Structural discrimination occurs when laws, rules, judicial judgements or by-laws such as a company's internal rules are discriminatory. Thus structural discrimination is sometimes known as institutional discrimination.⁶⁵⁵ It is important to note that structural discrimination can take the form of both direct and indirect discrimination.⁶⁵⁶ Structural discrimination is direct discrimination when there is collective intention and explicitness behind the discrimination. The most common case is where a law or policy is adopted and this adoption reflects an ideology or agreement among members of a powerful group of persons in a society, for example a parliament. With this intention and explicitness, a target group of a discriminatory legislation or policy is legitimately and disproportionately placed in a disadvantaged situation. As a result, a discriminatory intention is formalised and legalised, and also enforced in reality. Non-compliance with this discriminatory legislation is illegal and can result in liability or punishment. This structural discrimination is systematic because it manifests in the law itself, and when it happens it can affect a large number of people or many different target groups.

Structural discrimination is indirect discrimination when neutral elements are involved. This occurs when there are neutral provisions in law which seem fair to all, yet are difficult or even impossible for members of a certain social group to comply with, in comparison with those of other groups, and as a result may cause harm to the members of this group.

Currently, due to the rapid development of international human rights treaties and their universal ratification and accreditation, discriminatory laws against any particular group are rare. Furthermore, different human rights monitoring mechanisms have been established within the UN, such as the Human Rights Council, the Universal Periodic Review and many national human rights institutions, to act as watchdogs and whistle-blowers, so states have to take care, when adopting their legislation, to ensure that there is minimal discriminatory

⁶⁵⁵ Andrew Altman, 'Discrimination' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition ed, 2011) , 2–5.

⁶⁵⁶ Lippert-Rasmussen, above n 535, 821–2.

legislation under their jurisdiction. This form of discrimination should therefore progressively cease to exist.

However, this does not mean that structural discrimination is being completely eliminated. For example, Uganda has controversially adopted an anti-homosexual act prescribing that being openly gay can lead to life imprisonment.⁶⁵⁷ This has sparked an outcry from the international community, but amounts to no more than the claim that the law is morally unacceptable; the international community cannot interfere in a country's sovereignty. The question that now arises is why discrimination is morally unacceptable. I will turn to this topic in the next subsection.

4.2.3. Why is Discrimination Morally Impermissible?

Discrimination, as pointed out in the previous subsection, refers to differential treatment either against or in favour of a person on the grounds of this person's characteristics or group membership. However, this differential treatment does not automatically make discrimination immoral, because differential treatment can be in favour of, rather than against, someone. The important point is not to conflate differential treatment with discrimination, because differential treatment that is wrong in one context may be acceptable in another.⁶⁵⁸ The relevant question to ask is what makes the differential treatment discriminatory. The answer is that it is differential treatment based on the grounds of immutable characteristics, prejudice, stereotypes, arbitrariness, or irrationality, and which imposes the majority's standards on a minority group, that is wrong and constitutes discrimination.

Discrimination on the grounds of an immutable characteristic of a person is wrong because the immutable trait is beyond the person's control.⁶⁵⁹ Specifically, immutable status in this sense is a feature of a person and it is unchangeable, such as their sex, skin colour or a disability. In addition, an immutable characteristic can be a person's fundamental choice, such

⁶⁵⁷ *Anti-Homosexuality Act 2014* (Uganda) pt II s 2(2).

⁶⁵⁸ Richard J. Arneson, 'What Is Wrongful Discrimination?' (2006) 43 *San Diego Law Review* 775, 778.

⁶⁵⁹ Gardner, above n 573, 169.

as their sexual preference. Examples of discrimination on such grounds would be when a woman or a gay man is directly discriminated against because they are female or gay.

Discrimination on the grounds of a prejudice or stereotype is wrong because such discrimination originates from a faulty belief that those with certain characteristic do not deserve to be treated as well as those without that characteristic.⁶⁶⁰

Discrimination on the grounds of arbitrariness or irrationality is also wrong. This is especially true in the case of racial discrimination, which is arbitrary and irrational, since reality has proved that people from different races can live together without conflict.⁶⁶¹ Furthermore, there is no difference among races in relation to sensitivity, enjoying pleasure, feeling pain, intelligence, educability or the capacity to self-govern.⁶⁶²

Discrimination on the grounds of merit is also wrong because it violates a rule that the best qualified should be selected.⁶⁶³ It also violates the idea of equal entitlements of people,⁶⁶⁴ as discrimination on the ground of merit can be demeaning.⁶⁶⁵

Discrimination is wrong because it imposes the majority's standards onto the minority. This happens when laws, rules and norms created by the majority systematically disadvantage certain groups, imposing the majority's standards on the minority and disadvantaging certain social groups vulnerable to exploitation and domination by denying them equality of opportunity and other privileges enjoyed by the majority.⁶⁶⁶

Thus it is argued that discrimination is morally unacceptable in any circumstances for any of those reasons. The significant question is whether moral principles can effectively deal with, and prevent, discrimination? The answer is that there is a need for antidiscrimination legislation to deal with discrimination, as I will discuss in the following section.

⁶⁶⁰ Arneson, above n 658, 779–88; Knight, above n 532, 49–52.

⁶⁶¹ Peter Singer, 'Is Racial Discrimination Arbitrary?' (1978) 8(2-3) (1978/11/01) *Philosophia* 185, 200–3.

⁶⁶² Ibid.

⁶⁶³ Arneson, above n 658, 784; Knight, above n 532, 49–52.

⁶⁶⁴ Sophia Moreau, 'What Is Discrimination?' (2010) 38(2) *Philosophy & Public Affairs* 143, 168–9.

⁶⁶⁵ Deborah Hellman, *When Is Discrimination Wrong?* (Harvard University Press, 2008), 32–3.

⁶⁶⁶ Altman, above n 655, 2–5.

4.3. The Conception of Anti-Discrimination Legislation

As explained above, discrimination is morally unacceptable for many reasons and in many circumstances; but why cannot moral principles deal effectively with, and prevent, discrimination? A moral principle prevents rational persons from pursuing their desired goals by any means, including discrimination.⁶⁶⁷ A moral principle entails significant moral values which are important in justifying a rational person's ability to restrain themselves from achieving their goals at any cost.⁶⁶⁸ Despite their long-established status in human history, moral principles are implemented on a voluntary basis. Reality has demonstrated that nothing implemented on a voluntary basis can solve the problem; therefore, something obligatory, forceful and binding such as legal rules is needed to deal with discrimination.

Anti-discrimination legislation in the form of legal rules has been chosen as a standard solution for tackling discrimination in all legal systems. Anti-discrimination legislation in legal theory has several components, which include anti-discrimination principles, the formulation of certain protected grounds, and different forms of legal remedies for dealing with discrimination, such as criminal law, civil law, conciliation, and affirmative action – remedies which I will now discuss, along with the extension of those concepts to the context of disability.

4.3.1. Antidiscrimination Principles

The anti-discrimination principle is designed to eliminate differential treatment that is disadvantageous to a person or group. As mentioned above, differential treatment can include unequal treatment on the ground of irrelevant characteristics, oppressive treatment on the basis of minority group membership, and treatment with the effect of subordinating or perpetuating the subordination of a minority group. In order to deal with these forms of unequal treatment, an anti-discrimination principle transforms into different concepts of the anti-discrimination, which are (1) an anti-differentiation principle to deal with unequal

⁶⁶⁷ Hasnas, above n 468, 433.

⁶⁶⁸ Ibid.

treatment on the ground of irrelevant physical characteristics, (2) an anti-oppression principle to handle oppressive treatment on the basis of minority group membership, and (3) an anti-subordination principle to tackle treatment with the effect of subordinating or perpetuating the subordination of a minority group.⁶⁶⁹ I will now discuss these three concepts. Based on the discussion of them and the understanding of discrimination discussed in Section 4.2, I will then establish a theoretical argument to justify the development of anti-discrimination principles in the context of disability.

4.3.1.1. Anti-differentiation Principle

As an anti-differentiation principle, the concept of antidiscrimination rejects unequal treatment on the grounds of irrelevant characteristics and thus prohibits discrimination based on such characteristics.⁶⁷⁰ These irrelevant characteristics are highly contextualised.⁶⁷¹ For example, if the context is education, a characteristic is considered irrelevant when it is unrelated to an individual's ability to learn or meet the academic requirements of an educational institution.⁶⁷² The anti-differentiation principle is based on the view that it is morally impermissible to treat individuals differently on the basis of characteristics unrelated to the tasks they will be called on to perform.⁶⁷³ It also holds that race, ethnicity and sex are always irrelevant characteristics; hence it prohibits discrimination based on race, ethnicity and sex.⁶⁷⁴

The anti-differentiation principle is a strictly merit-based principle, originating from the strict version of equality of opportunity,⁶⁷⁵ which requires assessing individuals based on the same set of merit-based evaluation criteria, and excludes immutable characteristics or status from being considered a decisive factor in determining someone's opportunities in life. Thus the anti-differentiation principle insists that any differential treatment towards individuals or

⁶⁶⁹ Ibid 431.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid.

⁶⁷⁵ Ibid 432.

groups of individuals must be entirely based on their capacity to achieve their goals.⁶⁷⁶

However, it allows for differential treatment which can be so justified.⁶⁷⁷

Strict adherence to formal equality of opportunity means that the anti-differentiation principle does not extend to accepting affirmative action,⁶⁷⁸ for dealing with discrimination. This is because of the view that affirmative action violates merit-based requirements by giving preferential treatment to members of minority groups as compensation for past discrimination rather than assessing their current capacity.⁶⁷⁹ Furthermore, this principle entails that affirmative action creates reverse discrimination, hence should be prohibited.⁶⁸⁰

4.3.1.2. Anti-oppression Principle

As an anti-oppression principle, the concept of anti-discrimination forbids oppressive treatment of individuals on the grounds of their membership of a minority group.⁶⁸¹ It focuses on pointing out any oppressive intention or motivation behind the treatment that aims at degrading or dehumanising the members of minority groups.⁶⁸²

It is useful to recall here the concepts of oppression and minority groups.⁶⁸³ Oppression in the structural sense refers to the systematic disadvantage, inequality and injustice that some groups of people suffer from in society, resulting from deep-rooted discriminatory norms and practices conducted by economic, political, and cultural institutions and other players. A minority group is any group smaller than half of the population in a society that has subordinate status due to their history and cultural differences; the term ‘minority’ in this sense refers to the power relationship between the majority and minority relating to control over economic, political and social domains.

Because of the emphasis on an oppressive intention or motivation, the anti-oppression principle, unlike the anti-differentiation principle, permits unequal treatment on the basis of

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid.

⁶⁷⁸ The concept of affirmative action has been discussed in Sub-subsection 3.3.2.2 of Chapter III.

⁶⁷⁹ Hasnas, above n 468, 433.

⁶⁸⁰ Ibid.

⁶⁸¹ Ibid 434.

⁶⁸² Ibid.

⁶⁸³ The concepts of oppression and minority group have been discussed in Sub-subsections 2.2.2.2 and 2.2.2.3 of Chapter II.

irrelevant characteristics when there is no oppressive intention or motivation involved.⁶⁸⁴ Thus it does not consider discrimination based on race, ethnicity and sex wrong.⁶⁸⁵ Also, because of this emphasis on intention and motivation, it is clear that the concept of antidiscrimination as an anti-oppression principle is designed to tackle direct discrimination.

In contrast to the anti-differentiation principle, the anti-oppression principle does not require compliance with the strict form of equality of opportunity because this principle only rejects unequal treatment with oppressive intention or motivation.⁶⁸⁶ Anything which is not oppressive to minority groups might be excluded, hence in certain circumstances decisions can be made on the basis of merit.⁶⁸⁷ Accordingly, it allows for affirmative action.⁶⁸⁸ The justification for employing affirmative action is that affirmative action is not oppressive to majority groups and does not create reverse discrimination. Instead it offers opportunities or other benefits to certain disadvantaged target groups in order to redress their inequalities or disadvantages.

4.3.1.3. Anti-subordination Principle

As an anti-subordination principle, the concept of anti-discrimination prohibits any treatment which has the effect of subordinating or perpetuating the subordination of a minority group.⁶⁸⁹ Treatment which has the effect of subordinating a minority group includes that which undermines the social and political positions of minority groups.⁶⁹⁰ It also include treatment which has the effect of perpetuating the subordination of a minority group, or which has the unintended consequence of increasing or perpetuating the socially disadvantaged position of a minority group, even if the treatment is not purposely directed against that group.⁶⁹¹

The anti-subordination principle prohibits a strict application of formal equality of opportunity. A merit-based system does not consider social background and hence could

⁶⁸⁴ Hasnas, above n 468, 435.

⁶⁸⁵ Ibid.

⁶⁸⁶ Ibid 436.

⁶⁸⁷ Ibid.

⁶⁸⁸ Ibid.

⁶⁸⁹ Ibid 436.

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid 437.

perpetuate the subordinated social status of minorities.⁶⁹² The basis for this prohibition is that past oppression of a minority group – for example, the fact that black people usually have lower social status and qualifications – could have the consequence that they are not able to compete equally when applying for desirable social positions in open competition, and when they are assessed on the same set of evaluation criteria during the selection process. The idea that everyone should be made to compete equally for desirable social positions would therefore perpetuate the subordinate status of this minority group. This prohibition also implies a requirement for affirmative action because oppressive action creates subordination and neutral action retains existing subordination.⁶⁹³ Hence only proactive intervention can eliminate the subordinate status of minority groups.⁶⁹⁴

The above discussion of these three anti-discrimination principles reveals that the anti-differentiation principle is very rigid because it insists on strict adherence to formal equality of opportunity. In addition, it rejects the application of affirmative action on the basis that affirmative action gives preferential treatment to one group over another, which can create reverse discrimination. However, this ignores that giving preferential treatment is just one of five forms of affirmative action. In contrast, although not less rigid, the anti-subordination principle prohibits strict adherence to formal equality of opportunity and allows the application of affirmative action.

It is clear that the anti-oppression principle is a compromise between the other two principles and expresses a liberal perspective which allows flexibility in applying formal equality of opportunity and affirmative action. I have adopted the liberal ideal of equality and have maintained that persons with disabilities are an oppressed group; therefore, the anti-oppression principle is my preferred option for dealing with discrimination in the context of disability. I will now establish a theoretical argument to justify the development of anti-discrimination principles in the context of disability.

⁶⁹² Ibid 438.

⁶⁹³ Ibid.

⁶⁹⁴ Ibid.

4.3.1.4. Disability Antidiscrimination Principles

With over fifteen percent of the world's population living with a disability,⁶⁹⁵ persons with disabilities are said to be the largest oppressed group,⁶⁹⁶ and the largest minority group.⁶⁹⁷ The development of the disability movement has resulted in a scholarly discourse on disability and the establishment of organisations of persons with disabilities has served as a catalyst for this. This is because the disability discourse provides ideological arguments and the organisations of persons with disabilities can raise their voices in order to advocate for human rights of persons with disabilities.

The central issue is how the law should conceptualise anti-discrimination in the context of disability. My argument is that the concept of anti-discrimination in this context should be based on the anti-oppression and harm principles and the liberal concept of distributive justice. I take this view because the anti-oppression principle supports a liberal approach of allowing flexibility in applying formal equality of opportunity and affirmative action.⁶⁹⁸ Equality of opportunity can be applicable to persons with disabilities, and affirmative action is considered as one of the more desirable methods for ensuring substantive equality of opportunity for persons with disabilities.⁶⁹⁹ Allowing the application of formal equality of opportunity would mean letting those with disabilities compete equally with persons without disabilities when applying for desirable social positions if they so desire and feel more comfortable with excluding their immutable characteristic of disability from being a decisive factor in determining their chances in life.

The application of affirmative action under the anti-oppression principle would mean ensuring substantive equality of opportunity for persons with disabilities. For example, the application requirements set for persons with disabilities in Vietnam applying for Australian Government Scholarships to study at a master level in Australia are less competitive in comparison to those for applicants without disabilities. For example, they are required to have

⁶⁹⁵ World Health Organisation and the World Bank, above n 1, 29.

⁶⁹⁶ Oliver, above n 127, 30.

⁶⁹⁷ United Nations, above n 43.

⁶⁹⁸ The concept of anti-oppression principle has been discussed in Subsection 4.3.1 of this chapter.

⁶⁹⁹ The concept of equality of opportunity has been discussed in Subsection 3.4.1 of Chapter III.

one year of work experience instead of two as required for other applicants, and there are no English requirements on application except a certificate of English proficiency for non-native English speakers with a minimum required score.⁷⁰⁰ This example illustrates that persons with disabilities are given some preferences over other groups where their actual social situation has been taken into consideration in establishing evaluation criteria. The aim of the scholarship programme is to provide equal opportunities for person with disabilities to develop the needed skills to become qualified for desirable social positions later on. This affirmative action is in the form of preferential treatment for persons with disabilities over other groups such as women and ethnic minorities. Thus the anti-oppression principle should be considered best suited for dealing with disability discrimination.

The concept of anti-discrimination in the disability context can be developed using the harm principle.⁷⁰¹ In the context of disability, however, the harm principle needs to be conceptualised in a particular way. It ensures equal opportunities for persons with disabilities to secure desirable benefits, eliminates stigmatisation on the grounds of disability, and works to stop others from discriminating against persons with disabilities. In addition, a modified harm principle in the disability context would dismiss the idea of autonomy in which only individuals who are mentally competent are seen as capable of deciding how to lead their lives. Rejecting this idea could help to protect persons with intellectual disabilities from the assumption of incapability. Along with the understanding of the social and socio-political models of disability, this leads to a human rights approach to disability.⁷⁰²

The concept of anti-discrimination in the disability context could also be developed based on the concept of distributive justice.⁷⁰³ In the context of disability, the concept of distributive justice is valuable because persons with disabilities are undoubtedly the most disadvantaged among the disadvantaged.⁷⁰⁴ Their disadvantaged situation should be paid adequate attention

⁷⁰⁰ Australia Awards - Vietnam, (15 August 2016)

<<http://www.australiaawardsvietnam.org/index.php/en/applicants/eligibility-criteria/disadvantaged-applicants>>.

⁷⁰¹ The harm principle has been discussed in Sub-subsection 4.2.2.1 of this chapter.

⁷⁰² The social and socio-political model of disability, and human rights approach to disability have been discussed in Sections 2.2 and 2.3 of Chapter II.

⁷⁰³ The concept of distributive justice has been discussed in Sub-subsection 4.2.2.2 of this chapter.

⁷⁰⁴ Handicap International and CBM, *Making PRSP Inclusive* (Projekt Print (Integrative Project), 2006), 127.

– in particular, by State intervention to ensure the fair sharing and redistribution of the primary social goods. This would mean that the focus on personal functional impairment was shifted to social and institutional barriers. Concurrently, it would also mean that responsibilities for ensuring political, legal, and social support for realising the human rights of persons with disabilities was placed in the hands of states or the relevant society. This interpretation of the liberal concept of distributive justice in the context of disability is compatible with the understanding of the social model of disability and a human rights approach to disability.⁷⁰⁵ Thus the liberal concept of distributive justice can be effectively applied in the context of disability.

Throughout the discussion in this subsection it can be seen that a protected characteristic of discrimination is the central tenet because all the discussed anti-discrimination principles are designed to eliminate discrimination on the grounds of certain protected characteristics, including disability. In the following subsection it will therefore be useful to explore how anti-discrimination laws identify or define specific target groups in order to protect them from discrimination.

4.3.2. The Formulation of a Protected Characteristic of Discrimination

4.3.2.1. A Mechanism for the Formulation of a Protected Characteristic

Before identifying the relevant criteria which form a protected group or characteristic for discrimination, I will examine the mechanism by which such criteria may be incorporated into laws. This mechanism includes three different approaches, namely, a legislative exhaustive list of protected grounds, a general provision on protected grounds under a constitution, and a legislative non-exhaustive list of protected grounds.⁷⁰⁶

⁷⁰⁵ The social model of disability and human right approach to disability have been discussed in Sub-subsections 2.2.2.2 and Section 2.3.2 of Chapter II.

⁷⁰⁶ There is a huge volume of literature for this discussion. However, this topic is not the main focus of the thesis. For an introduction to the debates see Fredman, above n 439, 110–30; Jed Rubenfeld, 'The Anti-Antidiscrimination Agenda' (2002) 111(5) *The Yale Law Journal* 1141, 1142.

The first approach is that the law provides an exhaustive list of grounds on which protection against discrimination is available.⁷⁰⁷ On the surface this exhaustive list seems very handy because it is easy to recognise which groups of people are protected. Being prescribed in legislation, it can also endure over time. In addition, when this exhaustive list is adopted by the legislature it indicates the common view of the majority of legislators representing their constituencies and indirectly reflects the common view of the majority of the population.

However, this approach has some limitations. The list is defined under legislation, so no court can modify it, although a court can interpret it.⁷⁰⁸ Additionally, the list can become very rigid and delay justice for a newly aggrieved group when it can only be changed by legislation or a constitutional amendment – something that is in practice invariably a protracted process.⁷⁰⁹ If an aggrieved group would like to be listed in this exhaustive set as a protected group, they have to wait or advocate to a social and political movement influential enough to have the list amended by the legislature.⁷¹⁰ Examples of this approach are the UK *Sex Discrimination Act 1975* or EU antidiscrimination law.⁷¹¹

The second option is a constitutional approach where a constitution comprises an open-ended provision or a set of provisions on equality, guaranteed by prescribing that everyone is equal before the law, which is the model exemplified under the Fourteenth Amendment of the US constitution.⁷¹² This provision is left entirely subject to interpretation by judges,⁷¹³ usually of a Supreme Court or Constitutional Court. However, this constitutional approach has been criticised for making it very difficult for new protected groups to enlist. The first reason for this difficulty is that its extension to a new protected group is very much dependent on the ideological orientation of the judges of the Supreme Court or Constitutional Court.⁷¹⁴ This ideological orientation determines the court's anti-discrimination agenda regarding whether or

⁷⁰⁷ Fredman, above n 439, 113.

⁷⁰⁸ Ibid.

⁷⁰⁹ Ibid.

⁷¹⁰ Ibid.

⁷¹¹ Ibid.

⁷¹² Ibid.

⁷¹³ Ibid 118.

⁷¹⁴ Rubenfeld, above n 706, 1142; Fredman, above n 439, 118–9.

not the court will rule in favour of a claim on a new ground or characteristic for anti-discrimination by a certain group of people.⁷¹⁵ The traditional anti-discrimination agenda holds that laws should be there to protect all entrenched values of a society, e.g., heterosexual marriage, the inferior status of women to men, and the assumption of the incapacity of persons with disabilities, while there is little support for non-traditionally protected groups on grounds such as homosexuality or disability.⁷¹⁶ For example, the US Supreme Court, at a time when there were more conservative judges, held the view that homosexuality should be condemned, as stated in one of its judgements.⁷¹⁷ As a result, it came under strong criticism given the amount of effort expended to uphold these conservative values.⁷¹⁸ A more liberal anti-discrimination agenda holds that vulnerable groups such as homosexuals or persons with disabilities should be protected by the law.⁷¹⁹

Another reason for the difficulty in extending protection to new groups is that this constitutional approach is based largely on precedents; thus when there is no precedent there will be no new protected group.⁷²⁰ An example relates to women, who had been excluded in the past from jury service, there having been no precedent of women doing jury service.⁷²¹ As a result, women were excluded from doing jury service, and for a long time there would be no new protected categories for women.⁷²²

These two approaches are said to be at the two extremes, and relatively rigid.⁷²³ The third approach, in which legislation is adopted with a non-exhaustive list, can however balance the two extremes, as it gives judges some power to interpret the list, and the list itself can be added to or modified by the legislature.⁷²⁴ This non-exhaustive feature can be incorporated through the words ‘such as’, ‘including’, ‘other status’, and in particular, ‘or the like’.⁷²⁵ An

⁷¹⁵ Rubinfeld, above n 706, 1142; Fredman, above n 439, 118–9.

⁷¹⁶ Rubinfeld, above n 706, 1142; Fredman, above n 439, 118–9.

⁷¹⁷ Rubinfeld, above n 706, 1177–8.

⁷¹⁸ Ibid.

⁷¹⁹ Ibid 1164.

⁷²⁰ Fredman, above n 439, 121.

⁷²¹ Ibid.

⁷²² Ibid.

⁷²³ Ibid.

⁷²⁴ Ibid 125.

⁷²⁵ Ibid.

example of this approach is the Canadian Charter of Rights and Freedoms.⁷²⁶ This model gives judges some power to extend the non-exhaustive list in different ways through interpreting other status or finding a similar ground stated in the list.⁷²⁷ The legislature can amend the list as required. However, conservative groups have expressed concern that in this way the non-exhaustive list can be extended by a liberal court by adding non-traditionally protected groups such as homosexuals or persons with disabilities, and the list would become too long.⁷²⁸

This discussion illustrates the various mechanisms for introducing grounds of anti-discrimination into the laws, but we first need to ask which substantive grounds of non-discrimination should be included in the law. Substantive grounds would be race, sex, sexuality, ability, age, and so on. In the following sub-subsection, I will discuss how a substantive ground is identified as a characteristic protected from discrimination.

4.3.2.2. The Substantive Grounds for Formulation of a Protected Characteristics

Several criteria have been enlisted for what constitutes a substantive ground as a characteristic protected from discrimination. These include the presence of a significant minority segment of a population sharing the same characteristic(s), their experience with discrimination, the absence of protection under existing legislation, and/or a social movement for change. Every substantive ground established will not necessarily be selected from these criteria.

According to the first criterion there should be a significant minority segment of the population of a society who share the same characteristics and consequently suffer disadvantages. In establishing race as a substantive ground for non-discrimination legislation in the UK, the way of classifying an ethnic minority, which only referred to black people, had been changed.⁷²⁹ It included immigrants from all backgrounds as a minority accounting for

⁷²⁶ *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') s 15.

⁷²⁷ Fredman, above n 439, 126.

⁷²⁸ *Ibid.*

⁷²⁹ Martin MacEwen, 'Anti-Discrimination Law in Great Britain' (1994) 20(3) *Journal of Ethnic and Migration Studies* 353, 353.

5.5 per cent of the general population according to a 1991 Census.⁷³⁰ Another example is where Australia established disability as a substantive ground for non-discrimination legislation by presenting a comprehensive statistic that 15.6 per cent of the Australian population had some form of disability; they used a statistical method to define a significant minority segment of the population sharing the same characteristic.⁷³¹

The second criterion is that there should be increasing evidence that the minority segment of the population has experienced discrimination in all aspects of life. For example, in establishing disability as a substantive ground for non-discrimination legislation in Australia, there was evidence that people with disabilities were discriminated against in the employment sector, such as in dismissals on the grounds of disability.⁷³² They also had been discriminated against in education, housing and accommodation, and public transportation.⁷³³ Similarly, the mentioned immigrants in the UK experienced racial inequality, and racial attacks, as well as discrimination in housing, employment and education.⁷³⁴

The third criterion is that there should be an absence of protection under the existing legislation for the minority segment of the population. For example, the *Civil Rights Act of 1964* in the US did not cover disability,⁷³⁵ and the US Supreme Court had never before considered disability as a possible ground for discrimination under the equal protection clause of the Fourteenth Amendment.⁷³⁶ In the UK, in establishing sex as a substantive ground for non-discrimination legislation, it was pointed out that related grounds of sexual orientation, marital discrimination, paternity leave, and sexual harassment had not been considered as sex discrimination under the existing legislation such as the *Equal Pay Act*.⁷³⁷

The fourth criterion is that there should be a social movement to change the disadvantaged situation for the minority segment of population. In establishing disability as a substantive ground for non-discrimination legislation in the UK, a disability movement of persons with

⁷³⁰ Ibid.

⁷³¹ Tyler, above n 231, 212.

⁷³² Ibid 231–5.

⁷³³ Ibid.

⁷³⁴ MacEwen, above n 729, 354–5.

⁷³⁵ Quinn and Flynn, above n 222, 31.

⁷³⁶ Ibid.

⁷³⁷ Susan Atkins, 'The Sex Discrimination Act 1975: The End of a Decade' (1986) (24) *Feminist Review* 57, 64.

disabilities emerged in the early 1980s, with an increasing number of disability rights organisations and a campaign for anti-discrimination legislation.⁷³⁸ This provided a sustained push for comprehensive anti-discrimination legislation.⁷³⁹

This discussion briefly reveals how substantive grounds such as race, sex, ability have been made as a protected characteristic from discrimination. Once a protected characteristic has been established, it requires legal remedies to discrimination taking place against this protected characteristic. In the following sub-section, I will turn to this topic.

4.3.3. Legal Remedies for Discrimination

Legal remedies are available for dealing with discriminatory acts, both in mainstream legislation or as stand-alone antidiscrimination laws. The measures used to tackle discrimination include criminal law, civil law, affirmative action, and dispute resolution through conciliation.⁷⁴⁰

Disability has been made a substantive ground for formulating a protected characteristic, as just discussed; hence it is self-evident that disability is also a substantive ground for legal remedies. In addition, at present, on the basis of my research, I estimate that there are around 104 countries worldwide that have disability legislation of some kind in the form of anti-discrimination or general disability laws and regulations.⁷⁴¹ The research results also show that anti-discrimination legislation in those approximately 104 countries applies one, or some, of the four abovementioned approaches to dealing with disability discrimination.⁷⁴²

In this subsection I will assess the relative suitability of utilising these kinds of law – criminal law, civil law, and dispute resolution through conciliation – for tackling discrimination. Affirmative action, a model using policy decisions rather than individual

⁷³⁸ Charlotte Pearson and Nick Watson, 'Tackling Disability Discrimination in the United Kingdom: The British Disability Discrimination Act' (2007) 23 *Washington University Journal of Law & Policy* 95, 101–2.

⁷³⁹ *Ibid.*

⁷⁴⁰ Margaret Quain Wallace, 'The Legal Approach to Discrimination and Harassment' (1985) 57(1/2) *The Australian Quarterly* 57, 63–9.

⁷⁴¹ Disability Rights Education and Defense Fund, *Directory of National Disability Non-Discrimination Laws* (12 August 2016) Disability Rights Education and Defense Fund <<http://dredf.org/legal-advocacy/international-disability-rights/international-laws/>>.

⁷⁴² Theresia Degener and Gerard Quinn, 'A Survey of International, Comparative and Regional Disability Law Reform' in Mary Lou Breslin and Silvia Yee (eds), *Disability Rights Law and Policy International and National Perspectives* (Transnational Publishers, 2002) 3.

actions as in civil or criminal laws, has been discussed in Sub-subsection 3.3.2.2 of Chapter III. I will in due course describe the results of my research on national discrimination laws regarding legal remedies as examples of each approach.

4.3.3.1. Criminal Approach

The criminal law model is used where discriminatory acts are criminalised under criminal laws and any alleged offender is taken to a criminal court by prosecutors. The main idea of the criminal law is to sanction or apply a penalty. The advantage of this criminal law model is that it represents the strictest punitive measure possessed by society in response to any discriminatory conduct.⁷⁴³ Thus the effectiveness of the anti-discrimination laws seems to be maximised, in virtue of being enforced by the whole law enforcement system, including prosecutors, courts, the police, prisons, and the like. This is so because it is contended that criminalised conduct is not only harmful to the victim but to the whole society, and the punishment is legal and imposed upon the persons who have violated the shared norms of the society.⁷⁴⁴ Thus litigation of a criminal penalty in law for discrimination should result in ‘detering potential discriminators’ from engaging in discriminatory acts.⁷⁴⁵

However, criminal sanctions have many disadvantages. First, criminal law can only be applied to deal with direct discrimination, because the intention to harm must be proved according to the fundamental principle of penal law.⁷⁴⁶ There are situations where intention to harm cannot be proven, even though there is apparently (indirect) discrimination, and the perpetrator goes unpunished.⁷⁴⁷ Hence indirect discrimination cannot be dealt with using a criminal approach. Moreover, in terms of the level of proof required, it is difficult to ascertain that there is no reasonable doubt that an act of discrimination has occurred, at least in the common law system.⁷⁴⁸ In terms of legal proceedings, the victims cannot initiate a complaint

⁷⁴³ Margaret Thornton, 'Anti-discrimination Remedies' (1983) 9 *The Adelaide Law Review* 235, 236.

⁷⁴⁴ Julie C. Suk, 'Criminal and Civil Enforcement of Antidiscrimination Law in Europe' (2012) June 2012(14) *European Anti-discrimination Law Review of Social Economy* 11, 11.

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid*; Wallace, above n 740, 63.

⁷⁴⁷ Suk, above n 744, 11.

⁷⁴⁸ Wallace, above n 740, 63; Thornton, above n 743, 236.

directly to a court. Instead they must report the incident to the police.⁷⁴⁹ The involvement of prosecutors will then follow the police investigation, before the case can even reach a court. This whole process takes time.

Other drawbacks relate to the lack of compensation for the victims. It has also been argued that criminal law punishes the perpetrator of a criminalised discriminatory act yet it guarantees no tangible redress to the victims.⁷⁵⁰

I add one more disadvantage: that the criminal approach can be hard to apply to structural discrimination or to direct or indirect discrimination where the action cannot be attributed to an individual. This is because the fundamental principle of criminal law is that criminal responsibility is solely that of individuals. Yet discrimination is conducted not only by individuals but also supra-individuals or organisational subjects. In this sense, holding supra-individuals or organisational subjects of discrimination criminally liable is contrary to the fundamental principle of the criminal law.

Countries that follow the criminal law approach include France, Finland, Spain and Luxembourg. Their anti-discrimination laws prohibit discrimination against persons with disabilities in their criminal laws mainly in the employment sector, and result in punishment or fine. Countries such as Australia, Hong Kong, Mauritius, Israel, the Philippines, Zambia and Zimbabwe have adopted a civil or social law approach to prohibit disability discrimination with a reference to sanctions under their criminal laws.⁷⁵¹ For example, the Australian discrimination statute characterises unlawful discrimination or harassment as an offence punishable with six months of imprisonment or a fine, and the Hong Kong Discrimination Ordinance imposes up to two years of imprisonment if somebody incites hatred towards, serious contempt for, or severe ridicule of persons with disabilities.⁷⁵²

⁷⁴⁹ Thornton, above n 743, 236.

⁷⁵⁰ Ibid; Wallace, above n 740, 63.

⁷⁵¹ Degener and Quinn, above n 742, 20–2.

⁷⁵² Ibid.

4.3.3.2. *The Civil Approach*

The civil approach, in contrast to the criminal approach, is mainly used to deal with disputes between or among private parties.⁷⁵³ The state plays a passive and neutral role as an arbiter in these disputes in civil courts,⁷⁵⁴ even though the court's judgements will be enforced properly by the law enforcement system.⁷⁵⁵ The aim of these civil proceedings is to compensate the victims who have suffered to the greatest extent possible, rather than to condemn the wrongdoers.⁷⁵⁶ Hence, in civil proceedings conciliation, mediation, and settlement are important tools for settling disputes and for compensating the victims without stigmatising or condemning the alleged discriminator.⁷⁵⁷ In addition, neither party involved has to prove intention to harm.⁷⁵⁸ Because of these advantages, civil proceedings for dealing with discriminatory conduct are increasingly used, especially in Europe.⁷⁵⁹

Individual complaint to tribunals or courts is the main method of enforcing anti-discrimination laws in the civil proceeding.⁷⁶⁰ Tribunals are more informal, and incur lower costs than courts.⁷⁶¹ For example, tribunals use a panel of experts to consider the case, and representatives for parties involved are not necessarily lawyers.⁷⁶² Decisions are made by a legal chair and lay members with specialised experiences in the dispute field.⁷⁶³ Courts, in contrast are very formal with complicated pleadings and lengthy process, and above all very costly.⁷⁶⁴

This method, however, poses some limitations. First, the burden of proof is solely the victims' responsibility if they wish to bring an incident to court.⁷⁶⁵ One of the difficulties in this regard is that there is always a difference in the information available to the parties

⁷⁵³ Thornton, above n 743, 236; Suk, above n 744, 15.

⁷⁵⁴ Suk, above n 744, 11.

⁷⁵⁵ Wallace, above n 740, 64.

⁷⁵⁶ Suk, above n 744, 11; Wallace, above n 740, 64.

⁷⁵⁷ Suk, above n 744, 11.

⁷⁵⁸ Wallace, above n 740, 63–4.

⁷⁵⁹ Suk, above n 744, 15.

⁷⁶⁰ Fredman, above n 439, 279.

⁷⁶¹ Ibid 280–2.

⁷⁶² Ibid 280.

⁷⁶³ Ibid.

⁷⁶⁴ Ibid 280–8.

⁷⁶⁵ Suk, above n 744, 15.

involved.⁷⁶⁶ The victims have to provide evidence that discrimination has taken place but the information required for proof is not necessarily in their control or possession.⁷⁶⁷ It is extremely difficult to obtain evidence when evidence is in the hand of discriminators.⁷⁶⁸ The most deterrent factor of this method is that it places greater financial burdens and risks to victims of discrimination and discourage them from pursuing their civil claims, even when they have chance to win the case.⁷⁶⁹ All complainants have to pay court fees and may face an order for costs and expenses for the other parties if unsuccessful,⁷⁷⁰ because court fees and expenses are accounted on the 'loser pays' basis.⁷⁷¹ In addition, of course, there are also lawyers' fees and costs.⁷⁷²

In the civil proceeding, there are several types of remedies after a liability judgment or a settlement following an individual complaint of discrimination. The most popular type of remedy is monetary compensation for emotional and economic losses.⁷⁷³ The payment also contains an inbuilt deterrent element because it holds that discriminator is responsible for the harm done to the victim by paying out for the damages.⁷⁷⁴ The payment of damages is also designed to deter other potential discriminators in the community.⁷⁷⁵

Another type of remedy is in injunctive form.⁷⁷⁶ For example, injunctive forms in civil discrimination lawsuits require that public institutions or companies are required to take measures to eliminate existing discrimination and prevent future discrimination.⁷⁷⁷ Injunctive remedies in the employment context include measures such as reviewing recruitment procedures in order to increase representation of the disadvantaged groups in the workforce,

⁷⁶⁶ Ibid.

⁷⁶⁷ Ibid.

⁷⁶⁸ Fredman, above n 439, 288; Suk, above n 744, 15.

⁷⁶⁹ Fredman, above n 439, 288; Suk, above n 744, 18.

⁷⁷⁰ Fredman, above n 439, 288; Suk, above n 744, 18.

⁷⁷¹ Margaret Thornton, 'Sex Discrimination Legislation in Australia' (1982) 54(4) *The Australian Quarterly* 393, 400.

⁷⁷² Suk, above n 744, 18.

⁷⁷³ Thornton, above n 743, 235; Suk, above n 744, 12.

⁷⁷⁴ Thornton, above n 743, 235.

⁷⁷⁵ Ibid.

⁷⁷⁶ Suk, above n 744, 12.

⁷⁷⁷ Ibid.

providing training on anti-discrimination, and accommodating the individual needs of employees.⁷⁷⁸

However, remedies of the individual complaint procedure are limited to their focus on the individual and primarily available in the form of monetary compensation.⁷⁷⁹ Both courts and tribunals are very reluctant to award remedies in a punitive form, where monetary compensation or injunction is not sufficient enough to punish discriminators for their discriminatory act.⁷⁸⁰ In addition, even though there is an inbuilt punitive element in the payment of monetary damages as discussed, the primary aim of monetary compensation is to restore the victim to their rightful economic status in which they would have been without the unlawful discrimination,⁷⁸¹ not to punish the discriminators.

This is the most common approach employed by countries to deal with discrimination on the grounds of disability.⁷⁸² These countries include Australia, Canada, Chile, Costa Rica, Ethiopia, Ghana, Guatemala, Hong Kong, Hungary, India, Ireland, Israel, Korea, Madagascar, Mauritius, Namibia, Nigeria, the Philippines, South Africa, Spain, Sri Lanka, Sweden, the UK, the US, Zambia, and Zimbabwe.⁷⁸³ Most of these statutes cover employment-related discrimination against persons with disabilities. The most comprehensive disability discrimination laws are from Australia, Canada, Hong Kong, the Philippines, the UK and the US. Critics argue that if disability is treated as positive discrimination, and dealt with under anti-discrimination laws, not all deep-rooted structural barriers that discriminate against persons with disabilities can be removed.⁷⁸⁴ For example, the ADA can prohibit an employer from discriminating against a qualified candidate with disabilities, but it cannot prohibit the employer from failing to equip their workplace with accessible features,⁷⁸⁵ based on the

⁷⁷⁸ Ibid.

⁷⁷⁹ Fredman, above n 439, 289–90.

⁷⁸⁰ Ibid 292.

⁷⁸¹ Thornton, above n 743, 240.

⁷⁸² Degener and Quinn, above n 742, 26–8.

⁷⁸³ Ibid.

⁷⁸⁴ Samuel R. Bagenstos, 'The Future of Disability Law' (2004) 114 *Yale Law Journal* 1, 6.

⁷⁸⁵ Ibid.

principle of proportionality, which can allow a private entity to override fundamental rights.⁷⁸⁶

4.3.3.3. Conciliation

Conciliation refers to a procedure of dispute settlement through an informal proceeding, where the parties involved try to seek some sort of compromise, and none of the rules applied for criminal and civil approaches are followed.⁷⁸⁷ A panel may act as a conciliation body or as a commission trying to find a compromise solution for the parties involved.⁷⁸⁸ This body is impartial,⁷⁸⁹ and can require the parties involved to appear before or submit relevant documents to it.⁷⁹⁰ Conciliation is a private but voluntary process initiated by either party and decided by both parties, in which the outcome is non-binding.⁷⁹¹ If conciliation attempts are ineffective, the parties involved can bring the matter to court.⁷⁹²

Conciliation has a number of disadvantages. The fact that none of the formal rules are applied could mean ‘that any evidence, or rumours, or hearsay, impressions or opinions may be brought up’ in the conciliation process,⁷⁹³ which might prolong the process, as the information needs validating. Conciliation is dependent very much upon the negotiation and communication skills of the parties involved.⁷⁹⁴ Aggrieved complainants may feel constrained to negotiate to their own disadvantage, or an inefficient conciliator or uncooperative respondent might lead the process to deadlock.⁷⁹⁵ The most difficult aspect of this procedure is that it requires the goodwill of the parties involved, especially the discriminator. This is sometimes very difficult to achieve, because when a person has intent to discriminate, it is hard for them to admit this and go through a process that might be embarrassing to them.

⁷⁸⁶ Sheldon Leader, 'Proportionality and the Justification of Discrimination' in Janet Dine and Bob Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Addison-Wesley Longman, Limited, 1996) 110, 110–4.

⁷⁸⁷ Wallace, above n 740, 64; Ingrid Aendenboom and Nathalie Denies, 'What Place for Mediation and Conciliation/Negotiation in Discrimination Cases?' (2012) June 2012(14) *European Anti-discrimination Law Review of Social Economy* 21, 21.

⁷⁸⁸ Aendenboom and Denies, above n 787, 22.

⁷⁸⁹ Ibid.

⁷⁹⁰ Wallace, above n 740, 64.

⁷⁹¹ Aendenboom and Denies, above n 787, 22.

⁷⁹² Ibid.

⁷⁹³ Wallace, above n 740, 63–4.

⁷⁹⁴ Ibid.

⁷⁹⁵ Ibid.

Conciliation is, however, a better approach to handling complaints than going directly court,⁷⁹⁶ and many cases are solved this way.⁷⁹⁷ Thus all anti-discrimination laws use conciliation as their preferred method.⁷⁹⁸ For example, the ADA encourages the application of conciliation to resolve disputes arising under the ADA.⁷⁹⁹ The AusDDA makes reference to conciliation in the *Australia Human Rights Commission Act 1986*.⁸⁰⁰ The UKDDA has conciliation as a measure of dispute settlement for employment.⁸⁰¹

4.4. Concluding Remarks

Discrimination as discussed in this chapter is a complex concept affecting individuals, groups and society. Discrimination has been defined here as a form of detrimental treatment based on one or more actual or perceived personal characteristics such as disability. Against this background, by extending the discussion of discrimination to the context of disability, it has been suggested that the understanding of discrimination in law in the disability context is no different from the understanding of discrimination in general.

The main concern is how this understanding fits into the disability context. As explained above, it has fitted into the disability context because the conceptual understanding of discrimination has been reflected in disability discrimination national laws. This is illustrated in the analysis of the examples of the national laws of Australia, the US and the UK.

A more important concern is how this understanding has been transformed into concrete normative rules to protect persons with disabilities from discrimination. Disability has been made a substantive ground for formulating a protected characteristic, as indicated in the analysis of the national laws of Australia, the US and the UK, as well as a substantive ground for legal remedies. It is clear that national protections from discrimination for persons with disabilities is more pragmatic than international human rights law – something that will be discussed in the next chapter – by using legal remedies such as criminal law, civil rights law,

⁷⁹⁶ Ibid.

⁷⁹⁷ Ibid 64.

⁷⁹⁸ Ibid.

⁷⁹⁹ USADA s 513.

⁸⁰⁰ AusDDA *Complied July 2016* pt 1 s 4(1) pt II div 1 s 67 para (1).

⁸⁰¹ UK DDA pt VIII sc 3.

affirmative action and conciliation for dealing with disability discrimination.

The central issue now is how this understanding fits into international human rights law in the context of disability, specifically the CRPD. The next chapter will investigate how the concept of discrimination, together with those of disability and equality, are formulated under the CRPD as its ideological framework.

CHAPTER V: THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

5.1. Introductory Remarks

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted on 13th December 2006 and came into force on 3rd May 2008.⁸⁰² It is the first comprehensive human rights treaty of the twenty first century and the first human rights convention to be open for signature and subsequent formal confirmation by regional integration organisations.⁸⁰³ At the time of writing, the CRPD encompasses 166 States Parties.⁸⁰⁴

The analysis in this chapter is undertaken to ascertain to what extent the CRPD conceptually advances the cause of the protection of the human rights of persons with disabilities. It will show that the CRPD, with its fundamental principles and provisions, does indeed conceptually do so. Specifically, the analysis will help to establish a clear understanding of the concepts of disability, equality and discrimination under the CRPD through discussing to what extent the CRPD incorporates the concepts of equality, discrimination and disability, as discussed from the beginning of this thesis, in its principles and provisions. It is noted that alongside the conception of the liberal legal equality on human rights as discussed above, the CRPD is also based on a semi-relational model. To enrich the discussion on the theoretical framework of the CRPD, I will briefly discuss this semi-relational model known as the ethic of care.

The analysis of this chapter is also intended to ascertain to what extent, overall, the CRPD normatively advances the cause of the protection of the human rights of persons with disabilities. This doctrinal analysis will present evidence that the CRPD possesses inherent normative merits and values for creating platforms for positive changes for the advancement of the human rights of persons with disabilities. It will then serve as a normative background

⁸⁰² CRPD.

⁸⁰³ Ibid art 43.

⁸⁰⁴ United Nations, above n 21.

for investigating, in Chapters VII and VIII, how the CRPD's principles and provisions will be implemented.

This chapter is divided into five sections. Section 5.1 is the introduction. Section 5.2 gives a brief history of the CRPD, which will help set out the context for the analysis of the CRPD in the following sections. Section 5.3 explores the conceptualisation of disability, equality and discrimination with regard to how these concepts developed and how they are construed under the CRPD in relation to the established understanding of them, and to show that the CRPD conceptually advances the cause of the protection of the human rights of persons with disabilities. A brief discussion on the ethics of care is also included. Section 5.4 examines the most distinctive features of the CRPD that make it different from other human rights treaties, using selected articles of the CRPD to show that it normatively possesses inherent merits and values, creating platforms for positive changes in the advancement of the human rights of persons with disabilities. Section 5.5 concludes the discussion of the chapter.

5.2. A Brief History of the CRPD

In this section I will briefly discuss how the CRPD was promoted on the UN's legal development agenda, how it was negotiated, and who helped shape it. This brief history will serve as a context for interpreting the CRPD's principles and substantive provisions for its implementation.

UN Member States had for some time attempted to campaign for the development of a convention on human rights of persons with disabilities. The Governments of Italy and Sweden, at the forty-second and forty-fourth sessions of the General Assembly, recommended drafting a convention on the rights of persons with disabilities,⁸⁰⁵ but they were unsuccessful. Lamenting these unsuccessful attempts,⁸⁰⁶ the Special Rapporteur of the Sub-Commission on

⁸⁰⁵ *Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Note by the Secretary-General — Views Submitted by Governments, Intergovernmental Organizations and United Nations Bodies Concerning a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/AC.265/2003/4+A/AC.265/2003/4/Corr.1 (16-27 June 2003), para 4.

⁸⁰⁶ Leandro Despouy, 'Human Rights and Disabled Persons' (Human Rights Studies Series No 6, Centre for Human Rights, Geneva, United Nations Publications, 1993) <<http://www.un.org/esa/socdev/enable/dispaperdes0.htm>> [281].

Prevention of Discrimination and Protection of Minorities in his report on Human Rights and Disabled Persons pointed out that ‘persons with disabilities are going to find themselves at a legal disadvantage in relation to other vulnerable groups’ such as women, or migrant workers because those groups have had the protection of the legally binding norms namely the CEDAW or CMW.⁸⁰⁷ He stressed that there was the need for defining specific rights of persons with disabilities with regard to civil, political, economic, social and cultural right, and specific issues such as discrimination, and institutionalisation;⁸⁰⁸ and that there was also a need for an international monitoring mechanism to oversee realisation of their human rights and fundamental freedoms.⁸⁰⁹ The Special Rapporteur emphasised that adopting a convention on the rights of persons with disabilities was the matter of time rather than a lack of good intention.⁸¹⁰

In 2001 the Government of Mexico led a campaign to the General Assembly against the backdrop of the Millennium Development Goals (MDGs), which were formulated based on the United Nations Millennium Declaration, with the aim, among other things, of halving extreme global poverty by 2015, but persons with disabilities were not identified as a specific target group for action in the MDGs.⁸¹¹ The Government of Mexico argued that the MDGs could not be realised if persons with disabilities were excluded from this global development effort.⁸¹² As a result of this advocacy the General Assembly adopted a resolution to establish an Ad Hoc Committee, with New Zealand as chair, to negotiate an international convention to confirm that persons with disabilities had a right to claim their human rights and that these rights were to be protected.⁸¹³

⁸⁰⁷ Ibid [280].

⁸⁰⁸ Ibid [255]–[260].

⁸⁰⁹ Ibid [281].

⁸¹⁰ Ibid [262].

⁸¹¹ *United Nations Millennium Declaration*, GA RES/55/2, UN GAOR, 55th sess, Agenda Item 60(b), UN Doc A/RES/55/2 (18 September 2000).

⁸¹² *Views Submitted by Governments, Intergovernmental Organizations and United Nations Bodies on Draft CRPD*, UN Doc A/AC.265/2003/4+A/AC.265/2003/4/Corr.1 [6].

⁸¹³ *UN GA Resolution 56/168*, UN Doc A/RES/56/168.

At the beginning of the negotiation process there were many ideas for the future of the convention, and some countries such as Mexico,⁸¹⁴ and Venezuela,⁸¹⁵ had already submitted their proposals for a future convention. This effort was well-intentioned, but it diverted the focus to the medical model of disability, because it used the WHO's definition on disability, which had long been criticised for its focus on the functional limitations of individuals.⁸¹⁶

Recognising that the CRPD could not be shaped by so many different ideas and opinions, the European Union recommended setting up a group of experts with the aim of preparing and presenting a draft text for a convention, to serve as a basis for negotiation by Member States.⁸¹⁷ This working group was set up by the Ad Hoc Committee with a membership that included mainly governments with equal geographical representation, and other stakeholders such as non-governmental organisations NGOs, and National Human Rights Institutions (NHRIs).⁸¹⁸

As can be seen from the membership of the Working Group, in shaping the CRPD, civil organisation such as NGOs, and especially Disabled Persons Organisations (DPOs), actively participated in the negotiations, moving from a state-centric model of treaty negotiation, in which treaties are negotiated by states behind closed doors, towards a participatory approach.⁸¹⁹ Though non-state participants in the treaty negotiations have only consultative status, their role should not be underestimated in arguing for the necessary content

⁸¹⁴ *Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Working Paper by Mexico*, UN Doc A/AC.265/WP.1 (29 July-9 August 2002).

⁸¹⁵ *Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Draft Submitted by the Government of the Bolivarian Republic of Venezuela*, UN Doc A/AC.265/2003/WP.1 (16-27 June 2003).

⁸¹⁶ *Working Paper on the Draft CRPD by Mexico*, UN Doc A/AC.265/WP.1, art 2.

⁸¹⁷ *Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities — European Union Draft Resolution*, UN Doc A/AC.265/2003/L.3 (19 June 2003).

⁸¹⁸ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Report of the Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/58/118 & Corr.1 (3 July 2003) [15].

⁸¹⁹ Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), ch 2. Noting the crucial role of the NGO community in the international law making. For example, the CAT is considered as one of the most successful initiative by NGOs, or NGOs had been instrumental in keeping the concept of the International Criminal Court alive.

incorporated into the CRPD draft. For example, Disabled People's International (DPI)⁸²⁰ called for the inclusion of women with disabilities.⁸²¹ The International Disability Caucus (IDC)⁸²² played a particularly important role in setting out, among many other things, the definition of disability and legal capacity which will be discussed in the following sections of this chapter. Hence it has been argued that the CRPD is the product of 'the persuasive, educative and advocacy roles performed by the civil society',⁸²³ rather than the conventional treaty negotiations of UN Members States.

In addition, negotiations happened not only around the UN negotiating table with participation of the negotiating states, but many international and regional conferences and seminars were organised to consult about the draft text – for example, the Regional Seminar on an International Convention on Disability, held in Beijing, China, on 4th – 7th November 2003, or Non-EU Eastern Europe Consultative Meeting on a Draft Comprehensive Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, held in Belgrade, Serbia and Montenegro, on 21st – 23rd March 2006.⁸²⁴ The outcomes of those conferences and seminars were presented at the official negotiation meetings as the negotiating sessions' documents for consultation. After eight negotiating sessions of the Ad Hoc Committee, from July 2002 to August 2006, the CRPD was adopted on 13th December 2006, confirming that persons with disabilities have a right to claim their human rights, and that their human rights are to be protected.

This brief history will serve as the context for examining the CRPD's fundamental definitions and principles on disability, equality and discrimination, and for understanding its substantive provisions in the following sections.

⁸²⁰ Disabled Peoples' International (DPI) is a network of national DPOs, established to promote human rights of persons with disabilities through full participation, equalization of opportunity and development. Website: <http://www.dpi.org/>.

⁸²¹ Sigrid Arnade and Sabine Haefner, 'Gendering the Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (Disabled Peoples International, 2006).

⁸²² The International Disability Caucus was a coalition of international, regional and national NGOs principally DPOs accredited as observers to the GA Ad Hoc Committee responsible for the development of the CRPD. It claimed a participating membership of more than 70 such organizations. Website: <http://www.internationaldisabilityalliance.org/en/about-us>.

⁸²³ Dhanda, above n 27, 429–30.

⁸²⁴ United Nations, *Expert Meetings and Seminars* United Nations Enable <<http://www.un.org/esa/socdev/enable/disglobe.htm>>.

5.3. Conceptual Framework of the CRPD

In Chapters II, III, and IV I explored conceptions of disability, equality and discrimination in relation to their philosophical and political understandings, and how these understandings have been transferred into legal concepts, especially in the disability context. Against this background, in this section, I will explore whether and to what extent these conceptions are present under the CRPD. Specifically, I will investigate which model(s) of disability – medical, social, minority civil rights, and/or the human rights-based approach – have been incorporated into the CRPD. I will then examine whether the CRPD has employed the liberal ideal of equality and equality as difference as I endorsed it earlier. Finally, I will investigate a normative understanding of the concept of discrimination under the CRPD in order to compare it to a theoretical conception.

The doctrinal analysis in this section will help establish a clear understanding of the crucial conceptions of disability, equality, and discrimination under the CRPD, serving as an ideological and conceptual framework for the CRPD for its implementation with regard to state reporting and individual complaint procedures, to be discussed in Chapters VII and VIII of this thesis, respectively.

5.3.1. The Conceptualisation of Disability under the CRPD

The following discussion takes the position that the concept of disability should be a careful selection of elements from various approaches, so that policy is context-specific. In this subsection, I will briefly discuss the context for formulating the definition of disability under the CRPD. I will then show that it has selectively adopted a conception of disability by choosing the best and most reasonable aspects of all existing understandings of disability, to make them legally binding. The analysis will help me investigate, in Chapters VII and VIII, which inquire into the implementation of the CRPD, how this normative understanding of disability is in turn understood and interpreted by the States Parties to the CRPD and the CRPD Committee.

5.3.1.1. The Historical Context for Understanding Disability under the CRPD

Before the adoption of the CRPD there was no universal understanding of disability, especially in relation to its legal aspect, and it has always been a great challenge to come up with such a common understanding. This challenge includes that disability should be defined broadly, and that existing ICF definitions should be utilised. The challenge was clearly reflected in the negotiation process, and in the interpretation of the definition, under the CRPD.

During the negotiation process, opinions about an understanding of disability were so divergent that a definition of disability was always absent in the draft texts. The reason for this divergence was that most participating NGOs and some States supported the option that the future CRPD should define disability broadly and apply it to all persons with all types of disabilities, while a large number of States objected to any attempt to incorporate a generalised definition.⁸²⁵ The opposing States argued that such a broad definition may limit the scope of the future of the convention.⁸²⁶ Yet it has been pointed out that the main reason for this objection was that a broad definition of disability might compel States to recognise, during future domestic implementation efforts, a large number of persons with impairments who are not traditionally identified as persons with disabilities within their societies, such as persons with psycho-social disability.⁸²⁷ Other members were of the view that a definition of this term was not necessary.⁸²⁸ Some members of the Working Group considered that it was more important to provide a definition of ‘persons with disabilities’ rather one of ‘disability’.⁸²⁹

⁸²⁵ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/AC.265/2004/5 (24 May - 4 June 2004), n 12.

⁸²⁶ *Ibid.*

⁸²⁷ Kayess and French, above n 24, 23.

⁸²⁸ *Report of the CRPD's Third Negotiation Session*, UN Doc A/AC.265/2004/5, n 13.

⁸²⁹ *Ibid* n 13.

Some other delegations suggested using the existing ICF definitions.⁸³⁰ However, the IDC vehemently opposed that suggestion on the basis that the ICF comprised a ‘very controversial definition of disability that many disability organizations do not accept’.⁸³¹ In addition, the IDC argued that the ICF is revised every five years, while there is no precedent for a human rights treaty to be revised every five years, and the IDC stressed that disability was an evolving concept.⁸³²

Despite this divergence, it is important to note here that there was general agreement that if a definition was included, it should be one reflecting the social model of disability rather than the medical model.⁸³³ The negotiating text did not reflect this general argument because it was suggested in one way or the other by the negotiating parties that disability was to be understood as an individual functional limitation.⁸³⁴ For example, Australia proposed a definition of disability from its DDA,⁸³⁵ that strongly views disability as a biological condition and has a focus on the medical meaning of terms such as ‘mental’, ‘physical’, or ‘emotional impairment, and on individual functional limitations expressed in words such as ‘loss’ or ‘malfunction of the body’.⁸³⁶

A breakthrough was reached during the 7th session when the Chair suggested that disability should be understood to be a result of interaction between persons with impairments and environmental and attitudinal barriers.⁸³⁷ This served as a foundation for the facilitator of

⁸³⁰ Ibid n 12. The ICF definition on disability has been discussed in Subsection 2.2.1 of Chapter II on disability of this thesis.

⁸³¹ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Daily Summary of Discussion at the Seventh Session Afternoon Session on Article 2 on Definitions* (31 January 2006).

⁸³² Ibid.

⁸³³ *Report of the CRPD's Third Negotiation Session*, UN Doc A/AC.265/2004/5, n 12.

⁸³⁴ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Compilation of Proposed Revisions and Amendments Made by the Members of the Ad Hoc Committee to the Draft Text Presented by the Working Group as a Basis for Negotiations by Member States and Observers in the Ad Hoc Committee at the Third Session* (26 August 2004); *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Comments, Proposals and Amendments Submitted Electronically on Draft Article 5 - Equality and Non-discrimination at the Third Session*; *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Comments, Proposals and Amendments Submitted Electronically at the Fourth Session*.

⁸³⁵ AusDDA's definition on disability has been discussed in Sub-subsection 2.4.1.2 of Chapter II on disability of this thesis.

⁸³⁶ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Compilation of Proposed Revisions and Amendments Made by the Members of the Ad Hoc Committee to the Draft Text Presented by the Working Group as a Basis for Negotiations by Member States and Observers in the Ad Hoc Committee at the Third Session* (26 August 2004).

⁸³⁷ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Possible Definition of “Disability”: Discussion Text Suggested by the Chair at*

the group discussion on the definition of disability to come up with a complete definition on disability for the final CRPD text. The final text came out reflecting the IDC's view of disability as an 'evolving concept' and the result of the interaction between persons with impairments and physical and structural barriers. The final definition reads:

Disability is an evolving concept and results from the interaction between persons with impairments and the attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others.⁸³⁸

One concern is that this concept of disability is placed in the Preamble of the CRPD. A preamble of an international treaty is not considered legally binding or operative; instead it only forms a part of the context for interpreting a treaty.⁸³⁹ Therefore the impact of this concept of disability was rather weak in virtue of not being in a legally binding part of the CRPD. However, because a Preamble forms an integral part of the context for interpreting a treaty, and a treaty is required to be interpreted in good faith according to the ordinary meaning of the treaty's language taken in its context and given its purpose,⁸⁴⁰ this evolving concept of disability should certainly be taken into consideration in interpreting the CRPD. In addition, the evolving concept is affirmed by the definition of persons with disabilities being placed in a legally binding section confirming that a disability is a result of the interaction between personal impairments and external factors that may hinder a person's full and effective participation in society on an equal basis with others.⁸⁴¹ In the following subsection this definition will be analysed in the broader context of the CRPD.

the Seventh Session (16 January – 3 February 2006).

⁸³⁸ CRPD Preamble para (e).

⁸³⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.2.

⁸⁴⁰ *Ibid* art 31.1.

⁸⁴¹ CRPD art 1.2. It reads: '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.'

5.3.1.2. A Depiction of the CRPD's Definition of Disability

From the above reading of the definition of disability under the CRPD, disability is generally not a fixed but an evolving concept.⁸⁴² In addition, it is no longer considered a medical condition, but rather as the result of the interaction between 'negative attitudes or an unwelcoming environment with the condition of particular persons'.⁸⁴³ However, the adopted concept of disability has to be discerned not only from the definition in the Preamble but accumulatively over the CRPD's text and even in its drafting documents. I will therefore go through the CRPD's text and its drafting documents in order to show that it has selectively adopted a conception of disability by choosing the best and most reasonable aspects of all existing understandings of disability, to make them legally binding.

First of all, even though it has been commented that the CRPD departs from the medical model of disability,⁸⁴⁴ I argue that the CRPD has partly retained and applied the medical model. The basis of my argument is that although elaboration on what an impairment would entail cannot be found in the CRPD's text itself, it can be found by revisiting the CRPD's drafting documents as a source of reference for interpreting the term 'impairment' in this definition.⁸⁴⁵ The negotiating documents suggest that limited biological conditions of individuals such as deafness, blindness or immobility resulting from polio or spinal cord injury, and so on, are referred to as individual impairments.⁸⁴⁶ I conclude that the CRPD has recognised disadvantaging biological conditions of individuals and has at the same time partly applied the medical model of disability. This is not to say that it is a bad thing that the medical model is partly retained under the CRPD, and it is important to recall here that I suggested in Section 2.5 of Chapter II that the medical model of disability is not something undesirable, because individual functional limitation does indeed contribute to creating disability.

⁸⁴² United Nations, *Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities* — Question on the Terms "Disability" and "Persons with Disabilities" Defined in the Convention United Nations Enable <<http://www.un.org/disabilities/default.asp?navid=24&pid=151#sqc3>>.

⁸⁴³ Ibid.

⁸⁴⁴ Arlene S. Kanter, 'The Promise and Challenge of the United Nations Convention on the rights of Persons with Disabilities' (2007) 34(2) *Syracuse Journal of International Law and Commerce* 287, 291.

⁸⁴⁵ *Vienna Convention on the Law of Treaties* art 31.2, which serves as Legal recourse for this revisit.

⁸⁴⁶ *Possible Definition of "Disability": Discussion Text Suggested by the Chair at the Seventh Session.*

Secondly, though it has been welcomed that the social model of disability prevails over the medical model under the CRPD,⁸⁴⁷ the question arises to what extent the CRPD has adopted the social model. I argue that the CRPD has partly adopted this model. The basis for my argument is that since the CRPD has certainly partly adopted the medical model, it cannot rely fully on the social model. As an example, rehabilitation and early detection of and intervention in disability, which are always a part of medical intervention as conducted by health professionals under the medical model, are highlighted under Articles 25 and 26 of the CRPD.⁸⁴⁸ Specifically, rehabilitation comes in parallel with an emphasis on the society's adjustment and accommodation, which can be seen in, for example, Article 9 on accessibility. In addition, the early detection of and intervention in disability are conducted on the basis of informed consent, as required under Article 25. The society's adjustment and accommodation, and informed consent always form a crucial part of the social model of disability. Therefore, I conclude that the CRPD has adopted the social model of disability, but only partly; because it does not reject individual functional limitations, but simultaneously stresses that a society needs to change to accommodate the needs of persons with disabilities, and that only by doing so can it facilitate the full integration of persons with disabilities.

Thirdly, I contend that to some extent the CRPD has adopted the civil rights model of disability. Because it holds that disability is a result of social construction shaped by external factors, including built environments, cultural attitudes and social behaviours, it requires reasonable accommodation of the built environment as specified under Article 9,⁸⁴⁹ and changes in attitudinal and social behaviours as defined in Article 8.⁸⁵⁰ Moreover, the CRPD incorporates the view that structural discrimination toward persons with disabilities results in institutional rules and procedures of both public and private entities; hence this structural

⁸⁴⁷ McCallum, above n 23; Shivaun Quinlivan, 'The United Nations Convention on the Rights of Persons with Disabilities: An Introduction' (2012) 13(1) *Springer* 71, 74; Micheal Waterstone, 'Forward: The Significance of the United Nations Convention on the Rights of Persons with Disabilities' (2010) 33 *The Loyola of Los Angeles International and Comparative Law Review* 1, 3; Teodor Mladenov, 'The UN Convention on the Rights of Persons with Disabilities and its Interpretation' (2013) 7(1) *ALTER-European Journal of Disability Research/Revue Européenne de Recherche sur le Handicap* 69, 74; Paul Harpur, 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27(1) *Disability & Society* 1, 3.

⁸⁴⁸ CRPD arts 25(b), 26.

⁸⁴⁹ Ibid art 9.

⁸⁵⁰ Ibid art 8.

discrimination must be eliminated.⁸⁵¹ Additionally, as mentioned, the CRPD does not reject personal impairment but affirms that personal impairment does to some extent contribute to creating disability, thus partly adopting the medical model of disability. All of these are also features of the civil rights model of disability.

Finally, I support the interpretation that the CRPD embraces the human rights approach to disability. This is because it claims persons with disabilities as rights holders and subjects of human rights law on an equal basis with persons without disabilities.⁸⁵² It also recognises disability as a part of human diversity⁸⁵³ and places the responsibility on society and governments for ensuring that political, legal, social, and physical environments support a realisation of the human rights of persons with disabilities.⁸⁵⁴ Any limitations imposed on persons with disabilities by the social and physical environment are regarded as violations of their basic human rights. The human rights-based approach under the CRPD can help ensure the political rights of persons with disabilities to mobilise with their peers. For example, a right to freedom of association and to form organisations of persons with disabilities will ensure that their collective voice on their needs will be heard by legislators and society.⁸⁵⁵

Thus the CRPD can be seen to have taken a pluralistic approach to disability by selectively adopting the most reasonable aspects of all existing understandings of disability. This selective combination, rather than simple summation of all three main models of disability, and the human rights-based approach to disability, means that the CRPD departs from previous definitions of disability under the WPA and Standard Rules.⁸⁵⁶ Furthermore, it illustrates that the understanding of disability under the CRPD is not about the settlement of an endless theoretical debate about which model of disability is better than the others in disability discourse, nor is it about the rejection of impairment or disability. Neither is it about the dichotomy between disability as resulting from personal functional limitation versus its resulting from social and structural barriers. The significance of this moderate and pragmatic

⁸⁵¹ Ibid art 4.1.

⁸⁵² Ibid art 1.

⁸⁵³ Ibid Preamble para (i).

⁸⁵⁴ Ibid art 4.

⁸⁵⁵ Ibid art 29(b)(ii).

⁸⁵⁶ WPA, UN Doc A/37/51, [6]–[8]; *Standard Rules*, UN Doc A/RES/48/96, [17]–[21].

stand is that it allows flexibility in interpreting the CRPD, and most importantly, ensures that any understanding of disability that works to assist the implementation of the CRPD for relevant stakeholders in order realise the human rights of persons with disabilities will count.

Just as disability forms an integral part of the CRPD in terms of crucial concepts, equality also forms an integral part of the fundamental principles in the CRPD. Therefore, in the next subsection the discussion will move on to an examination of the multiple concepts of equality embodied in the CRPD.

5.3.2. Conceptualisation of Equality under the CRPD

In Chapter III of this thesis I explained why the concept of ‘equality as difference’ is so useful for an understanding of equality and for combating discrimination. I use the same concept now to assess the concept of equality incorporated into the CRPD. Therefore, in this subsection, I will briefly discuss the context of the concept of equality to be found in the CRPD. I will then show that it has employed multiple understandings of equality, which include equality of opportunity, equality as sameness, equality as difference, a transformation of structural factors that goes beyond equality as sameness or difference, and de facto equality. This analysis will help me investigate, in Chapters VII and VIII, how the States Parties to the CRPD and the CRPD Committee interpret these different normative understandings of equality.

5.3.2.1. Context for Understanding Equality under the CRPD

Prior to the CRPD, the legally non-binding document on disability, namely the WPA, gave some suggestions on the equalisation of opportunities, as distinct from equality, the former referring to a

process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work

opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all.⁸⁵⁷

Again, the Standard Rules suggests that

equalisation of opportunities means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.⁸⁵⁸

These two concepts of equality under these two legally non-binding instruments focus heavily on physical and tangible factors, which they deem to be causes of inequality. It follows that if these physical and tangible problems were solved, the inequality of persons with disabilities would be eliminated. I however argue that it is not that simple, because these two concepts completely ignore structural factors, which are the root-causes of the inequality of persons with disabilities.

During the CRPD's drafting process, the concepts of equality and non-discrimination were hotly debated. At the beginning of the drafting process the discussion mainly focused on equality before the law, requiring equal treatment for persons with disabilities without any further elaboration.⁸⁵⁹ Later on, negotiating States suggested that the concepts of equality before and under the law without any discrimination, and the equal benefit of the law, should be added.⁸⁶⁰ At the fifth session of the drafting process, Mexico stressed the importance of distinguishing between equality under the law and equality of opportunity, these being related but separate concepts.⁸⁶¹ According to Mexico, equality under the law will be achieved through strict respect for non-discrimination, while equality of opportunity is a social goal, and measures for achieving it should be listed.⁸⁶² Thus Mexico suggested that, because the

⁸⁵⁷ WPA, UN Doc A/37/51, [12].

⁸⁵⁸ *Standard Rules*, UN Doc A/RES/48/96, Introduction [24]–[27].

⁸⁵⁹ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Daily Summary of Discussions Related to Article 7 Equality and Nondiscrimination at the Third Session* (25 May 2004).

⁸⁶⁰ *Ibid*; *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Report of the Coordinator to the Fourth Session — Summary of Discussions on Draft Article 7 Equality and Nondiscrimination* (May 2004).

⁸⁶¹ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Daily Summary of Discussions Related to Article 7 Equality and Nondiscrimination at the Fifth Session* (24 January 2005).

⁸⁶² *Ibid*.

draft article on equality and non-discrimination only mentioned equality under the law, a separate article should be created to address equality of opportunity. This separate article could then promote accessible environments to facilitate the freedom of movement of persons with disabilities and their participation in all activities of daily life.⁸⁶³

At the seventh session, most of the negotiating parties agreed with the proposed provision on equality that ‘States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’.⁸⁶⁴ This proposal was considered as being consistent with Article 26 of the ICCPR.⁸⁶⁵ Thus the CRPD recognises two general principles of equality,⁸⁶⁶ and prescribes a stand-alone article on equality and non-discrimination.⁸⁶⁷ Different forms of equality, namely, equality of opportunities,⁸⁶⁸ gender equality,⁸⁶⁹ equality before the law,⁸⁷⁰ and equality in the law,⁸⁷¹ are mentioned, but without any explanation or elaboration.

5.3.2.2. Depiction of Equality under the CRPD

The question, therefore, is what it really means to say that the CRPD incorporates a guarantee of equality. Because there is no elaboration on what equality would entail, I will review the whole of the CRPD’s text for clues to identify its concept of equality. Another source of reference for interpreting equality under the CRPD comprises the other legally binding international human right treaties as well as non-binding documents on disability such as the WPA and Standard Rules. This is because the CRPD, in its Preamble, recognises all these

⁸⁶³ Ibid.

⁸⁶⁴ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Report of the Seventh Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/AC.265/2006/2 (16 January - 3 February 2006).

⁸⁶⁵ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Comments, Proposals and Amendments Submitted Electronically at the Seventh Session*.

⁸⁶⁶ CRPD art 3(e),(g).

⁸⁶⁷ Ibid art 5.1.

⁸⁶⁸ Ibid art 3(e).

⁸⁶⁹ Ibid art 3(f).

⁸⁷⁰ Ibid art 5.1.

⁸⁷¹ Ibid.

instruments as its predecessors.⁸⁷² I suggest that the CRPD has taken a pluralistic approach to equality by selectively adopting the most reasonable aspects of all existing understandings of equality, which include equality of opportunity, equality as sameness, equality as difference, transformation of structural factors that go beyond equality as sameness or difference, and *de facto* equality.

First of all, the CRPD strongly emphasises *equality of opportunity* as one of its general principles in Article 3(e).⁸⁷³ Being placed under Article 3, on the CRPD's normative principles, equality of opportunity not only provides the ideological foundation of the CRPD but is also a crosscutting principle for its implementation.⁸⁷⁴ In addition, equality of opportunity is considered an integral part of the moral compass for change under the CRPD, because it empowers persons with disabilities 'to use the new opportunities opened up to them by an equality strategy'.⁸⁷⁵ I examine the concept of equality of opportunity under the CRPD according to formal and substantive understandings illustrated in Articles 24 and 27.

In the disability context, not every person with disability needs assistance to compete from the same starting point; in the other words, some persons with disabilities already have an equal chance in applying for desirable social positions.⁸⁷⁶ Article 24.1 reflects this formal understanding of equal opportunity by prescribing that every person with a disability has an equal chance of receiving a general education at all levels, which means that they have the same access to education as those without disabilities.⁸⁷⁷ In a similar sense, Article 27.1 should be understood as saying that persons with disabilities should stand an equal chance of gainful employment.⁸⁷⁸ We can read these provisions as prescribing that persons with disabilities should have equal access to education and employment and should be free to take

⁸⁷² Ibid Preamble paras (d),(f).

⁸⁷³ Ibid art 3(e).

⁸⁷⁴ Kayess and French, above n 24, 27.

⁸⁷⁵ Gerard Quinn, *The UN Convention on the Human Rights of Persons with Disabilities* <<http://www.nhri.net/2007/Berlin-Quinn2.pdf>>, 8–9.

⁸⁷⁶ The concept of formal equality of opportunity in general and in the context of disability has been discussed in Subsection 3.2.1.5 and Subsection 3.4.1 of Chapter III on Equality of this thesis.

⁸⁷⁷ CRPD art 24.1.

⁸⁷⁸ Ibid art 27.1.

these opportunities, and that society is happy to stand aside as a neutral observer to make sure that selection processes are fair and objective for them.

However, in the case where a person with disabilities requires assistance to develop the needed skills in order to become qualified for desirable social positions, States Parties are obligated to take a proactive stance in assisting persons with disabilities to acquire the needed skills. This proactive intervention would include the provision of accessible communication formats such as Braille and sign language, personal assistance, and individualised support in education.⁸⁷⁹ It would also include vocational training, placement services, and accessible workplaces in employment.⁸⁸⁰ All of these proactive measures of reasonable accommodation mean that the education system and the workplace should change to fit the needs of persons with disabilities, rather than expecting persons with disabilities to act as if they do not have a disability.

The important point with the concept of equality of opportunity under the CRPD is that it urges respect for and accommodation of the differences of persons with disabilities, hence respecting the choices of those with disabilities who can compete equally with others, and accommodating those who require assistance to realise their choices.

The next concept of equality that the CRPD has adopted is *equality as sameness*.⁸⁸¹ The CRPD requires equal treatment for persons with disabilities in confirming that persons with disabilities should enjoy equal protection of the law,⁸⁸² making persons with disabilities equal to those without disabilities.⁸⁸³ The CRPD stresses that persons with disabilities should be as fully recognised before the law as persons without disabilities⁸⁸⁴ with its emphasis that persons with disabilities should be ‘on an equal basis with others’ – a sentiment it repeats many times.⁸⁸⁵

⁸⁷⁹ Ibid art 24.2.

⁸⁸⁰ Ibid art 27. 2.

⁸⁸¹ The concept equality as sameness in the context of disability has been discussed in Subsection 3.4.2 of Chapter III on Equality of this thesis.

⁸⁸² CRPD art 5.1.

⁸⁸³ Ibid Preamble para (d).

⁸⁸⁴ Ibid art 12.1.

⁸⁸⁵ Ibid arts 1, 10, 14.

In addition, the CRPD implicitly allows special treatment for persons with disabilities. For example, it allows guardianship arrangements based on the presumption of the incapacity of a person with a disability, especially in the case of those with intellectual disabilities.⁸⁸⁶ An in-depth analysis of guardianship arrangements will be undertaken in Subsection 5.4.2 on legal capacity in this chapter.

The CRPD explicitly requires preferential treatment for persons with disabilities. For example, it aims to increase the number of persons with disabilities in the workforce by urging its States Parties to employ persons with disabilities in the public sector,⁸⁸⁷ or to employ teachers with disabilities in relation to education for persons with disabilities.⁸⁸⁸ More importantly, with a view to boosting the representation of persons with disabilities in the development and implementation of legislation and policies in order to implement the CRPD, it urges its States Parties to actively involve persons with disabilities in those processes.⁸⁸⁹ In addition, the CRPD requires the representation of experts with disabilities in the CRPD Committee in monitoring the CRPD's implementation.⁸⁹⁰

The concept of equality as sameness under the CRPD primarily focuses on increasing the participation of persons with disabilities to the highest level if possible. This might well mean prioritising the quantity, not quality, of the participation. For example, in the reference to increasing the number of persons with disabilities working in the public sector in Article 27, it is not clear as to whether it is promoting the participation of persons with disabilities working as technical experts or just doing simple manual work. Thus equality as sameness might be of little use for the implementation of the CRPD if it is aiming at a quality effect.

Another ideal of equality that the CRPD has explicitly adopted is *equality as difference*, which it strongly emphasises as one of its normative principles.⁸⁹¹ Again, being placed under Article 3, equality as difference is not only an ideological foundation of the CRPD but also a

⁸⁸⁶ Ibid art 12.4.

⁸⁸⁷ Ibid art 27.1(g).

⁸⁸⁸ Ibid art 24.4.

⁸⁸⁹ Ibid art 4.3.

⁸⁹⁰ Ibid art 34.4.

⁸⁹¹ Ibid art 3(d).

crosscutting principle for its implementation.⁸⁹² In addition, equality as difference is considered an integral part of the moral compass for change under the CRPD because equality as difference ‘nurtures the capacities of persons with disabilities so that they can take their place alongside their fellow citizens as equal participants in society’.⁸⁹³

As a normative rule, equality as difference under the CRPD acknowledges the differences of persons with disabilities and considers these to be an integral part of human diversity.⁸⁹⁴ It also recognises different types of differences among persons with disabilities.⁸⁹⁵ More importantly, it stresses that the differences of persons with disabilities are not brought in to be compared with the ability of the able-bodied persons, but instead, it is emphasised throughout the CRPD that these differences are to be accommodated physically and structurally. Physically, this means the elimination of all physical barriers of inaccessible built environments. For example, it requires buildings accessible⁸⁹⁶ or communicative devices in accessible and usable formats for persons with disabilities.⁸⁹⁷ Structurally, it means the elimination of oppression of and discrimination against persons with disabilities. For example, the CRPD requires its States Parties to ‘modify, or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’,⁸⁹⁸ and to prohibit discrimination on the grounds of disability.⁸⁹⁹ The entire text of the CRPD is about the accommodation of the differences of persons with disabilities in exercising their human rights, from civil and political rights to economic, social and cultural rights. This ideal of accommodating the differences of persons with disabilities will be analysed in detail in the next section on the CRPD’s substantive provisions.

The CRPD adopts *an approach of transformation of structural factors*.⁹⁰⁰ In this respect, it expresses a very subtle stand. In order to end oppression in terms of the capacities of persons

⁸⁹² Kayess and French, above n 24, 27.

⁸⁹³ Quinn, above n 875, 8–9.

⁸⁹⁴ CRPD art 3(d).

⁸⁹⁵ Ibid Preamble para (i).

⁸⁹⁶ Ibid art 9.

⁸⁹⁷ Ibid arts 20, 24.

⁸⁹⁸ Ibid art 4.1(a).

⁸⁹⁹ Ibid art 5.2.

⁹⁰⁰ The approach of transformation of structural factors has been discussed in Subsection 3.4.4 of Chapter III on Equality of

with disabilities, especially those with intellectual disabilities, who formerly had no freedom to make their own choices, the CRPD requires that persons with disabilities should have this freedom.⁹⁰¹ This is because traditionally, persons without disabilities have been designated as the guardians of persons with disabilities (and especially those with intellectual disabilities) on the presumption of the incapacity of a person with a disability, especially those with intellectual disabilities. These persons without disabilities, in the capacity as guardians, have been able to make decisions on behalf of persons with disabilities under their guardianship, often without consultation.

In addition, in order to end the oppression resulting from deep-rooted discriminatory institutional norms and practices in all aspects of life, the CRPD urges its States Parties to take all the necessary measures to eliminate all existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities, as one of their general obligations.⁹⁰² It also requests the States Parties to abolish all discriminatory existing laws, regulations, customs and practices in all other articles, for example Articles 24.

More significantly, the adoption of the CRPD itself constitutes a transformation of the structural factors that oppress persons with disabilities. This is because the CRPD considers disability as a human rights issue rather than a medical or charity-based one. In addition, the UN has been convinced that ‘a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make 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’.⁹⁰³

this thesis. This approach to equality in the disability context focuses on the different structures of the power relationship, meaning the oppression of persons without disabilities over persons with disabilities. This oppression creates systematic inequality, injustice and disadvantages for persons with disabilities resulting from deep-rooted discriminatory institutional norms and practices. This approach of transformation of the structural factors would mean an attempt to bring to an end to this oppression.

⁹⁰¹ CRPD art 3(a).

⁹⁰² Ibid art 4.1(b).

⁹⁰³ Ibid Preamble para (y).

Lastly, the CRPD recognises *de facto equality*.⁹⁰⁴ There is *de facto* equality when the law does not specifically prescribe the enjoyment of equality in its provisions, but in reality persons with disabilities enjoy equality, thanks to sensible strategies of law enforcement. *De facto* equality is recognised given the fact that persons with disabilities may enjoy equality as stated in the law known as *de jure* equality, however this *de jure* equality may not be realised when the law is enforced.⁹⁰⁵ An example I have previously pointed out is that, generally, persons with disabilities were assumed to be a target group of protection interpreted under ‘other status’ in all previous international human rights treaties. This meant that they were entitled to *de jure* equality. However, these international human rights treaties have generally been underused in advancing the rights of persons with disabilities when it comes to the implementation of these treaties. The same holds true with regard to national legislation. It is a fact that the constitutions of States Parties always state that everyone is equal before the law, including persons with disabilities. However, persons with disabilities still face inequality, such as high unemployment rates due to limited education and vocational training. The CRPD therefore encourages its States Parties to take any practical measures to achieve *de facto* equality for persons with disabilities, and any measures used to achieve *de facto* equality for persons with disabilities are not considered discriminatory under the CRPD.⁹⁰⁶ The CRPD thus demonstrates that all forms of equality concurrently and harmoniously work together. The significance of this approach is that it allows flexibility in interpreting the CRPD’s provisions when needed and in particular cases. Importantly, it sends a message that the important issue is not about which theoretical understanding of equality is preferred over others but instead that all forms of equality are available to be applied when needed.

Equality and discrimination are theoretically always conjoined and form a complete picture of anti-discrimination legal ideology for protecting a certain disadvantaged group from discrimination on the grounds of a trait or characteristic. Equality and discrimination under the CRPD also form an integral part of its fundamental principles. However, unlike the

⁹⁰⁴ Ibid arts 4.1(b), 5.4.

⁹⁰⁵ Ibid art 5.4.

⁹⁰⁶ Ibid.

concept of equality, which lacks a single concrete definition, the concept of discrimination is precisely defined in the CRPD. In the next subsection, therefore, my discussion will move on to an investigation of the concept of discrimination as enshrined in the CRPD.

5.3.3. Conceptualisation of Discrimination under the CRPD

In this subsection I use the conception of discrimination discussed in Chapter IV to analyse in detail the concept of discrimination operative in the CRPD. Specifically, I will briefly discuss the context of that concept and then analyse it in relation to the general definition of discrimination as well as the different forms of discrimination envisaged in the CRPD, which include direct and indirect discrimination, structural discrimination, *de jure* discrimination and *de facto* discrimination. I will lastly discuss legal remedies for discrimination. All of these issues will then be compared with those raised in other international human rights treaties. This analysis will help me investigate, in Chapters VII and VIII, how the States Parties to the CRPD and CRPD Committee might interpret the normative understanding of the concept of discrimination in relation to the implementation of the CRPD.

5.3.3.1. Context for Understanding Discrimination under the CRPD

The principle of non-discrimination in the UN human rights law can be traced back to the Universal Declaration of Human rights. It states that everyone is entitled to all rights and freedoms without distinction of any kind and that everyone is equal before the law.⁹⁰⁷ Though this declaration is not legally binding, it provides a foundation for the protection of rights, and is acknowledged in all later legally binding instruments on human rights of the UN, including the ICCPR, ICESCR, CERD, CEDAW, and CRC.

The concept of discrimination is defined under international human rights treaties, unlike the concept of equality, which is not defined in any legally binding instruments. Two general covenants – the ICCPR and ICESCR – prescribe that everyone is entitled to all the rights and

⁹⁰⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mgt, UN Doc A/810 (10 December 1948) arts 2, 7 ('UDHR').

freedoms without discrimination and is equally protected from any kind of discrimination.⁹⁰⁸

Even though there is no hint of what that discrimination might be, the ICCPR and ICESCR enumerate the grounds of prohibited discrimination, such as race, sex and nationality.⁹⁰⁹

Discrimination under the thematic conventions, namely the CERD and CEDAW, is defined as ‘any distinction, exclusion, restriction or preference’ based on the grounds of race, colour, descent, or national or ethnic origin, and sex, ‘which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal basis, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.⁹¹⁰

During the CRPD negotiation process, several proposals towards a definition of discrimination worded similarly to the ones under the CERD and CEDAW on discrimination were made by the negotiating parties. Suggestions were made for a more detailed explanation as to what discrimination really entails, such as using a clear distinction between direct and indirect discrimination, or using a definition of multiple discriminations.⁹¹¹ It was also suggested that attention should be paid to situations where discrimination can be justified by undue hardship or disproportionate burden, and to the reversal of the burden of proof to other parties involved rather than claimants with disabilities, and to affirmative action for dealing with all forms of discrimination.⁹¹²

The final text of the CRPD consists of a definition of discrimination and non-discrimination as one of its general principles, and a stand-alone article on equality and discrimination. The CRPD, like the CERD and CEDAW, defines that:

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, and civil or any other field.⁹¹³

⁹⁰⁸ ICCPR arts 2, 3, 26; ICESCR arts 2, 3.

⁹⁰⁹ ICCPR art 26; ICESCR art 2.

⁹¹⁰ CERD art 1; CEDAW art 2; CRPD art 2.

⁹¹¹ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Comments, Proposals and Amendments Submitted Electronically on Draft Article 5 - Equality and Non-discrimination at the Thrid Session.*

⁹¹² Ibid.

⁹¹³ CRPD art 2.

A detailed analysis of this definition will follow in the next sub-subsection.

5.3.3.2. The Depiction of Discrimination under the CRPD

A Definition of Disability Discrimination

The CRPD's definition of disability discrimination squarely reflects the theoretical definition of discrimination discussed in the previous chapter, including the presence of differential treatment practiced by a subject or subjects, a ground, and a disadvantage, which I will point out. It is noted that the understanding of the concept of discrimination includes a general definition and different forms of discrimination, while the CRPD's definition alone does not mention any forms of discrimination. Therefore, I will analyse the understanding of discrimination under the CRPD using several articles for illustrating the general definition and different forms of discrimination.

Differential treatment implied under the CRPD's definition of disability discrimination refers to the occurrence of an act of distinction, exclusion, or restriction. This act must be intentional, having the purpose or the intended or unintended result 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', of persons with disabilities. This definition implies that discrimination involves actions, policies or practice that assumes distinction, or makes an exclusion, or restriction. It is not clear why the CRPD restricts itself to acts of distinction, exclusion, and/or restriction without mentioning 'preference' as the CERD and CEDAW do.

Another form of a differential treatment under the CRPD is a refusal of or failure to provide reasonable accommodation. Reasonable accommodation under the CRPD refers to necessary and appropriate modification and adjustments without imposing a disproportionate or undue burden, where needed in a particular case to ensure that persons with disabilities enjoy or exercise all human rights and fundamental freedoms on an equal basis with others.⁹¹⁴

⁹¹⁴ Ibid. More discussion on the concept of reasonable accommodation under the CRPD will be included in Sub-subsection 7.5.4.2 of Chapter VII.

In terms of the subjects implied in this definition of disability discrimination of the CRPD, they are States Parties to the CRPD. Hence this differential treatment must be practiced by States Parties to the CRPD. These supra-persons are required by the CRPD to undertake appropriate measures to restrain any sub-subjects under their jurisdiction from discriminating against persons with disabilities on the grounds of disability.⁹¹⁵

In relation to the protected ground also implied under the CRPD's definition of disability discrimination, it is easy to see that the CRPD has set out to deal with discrimination on the grounds of disability at the outset as stated in its title, like other thematic conventions such as the CERD to deal with discrimination on the ground of race, and the CEDAW on the ground of gender.⁹¹⁶ In other words, persons with disabilities are the target group of protection under the CRPD.

Last but not least, the presence of a disadvantage completes the CRPD's definition of disability discrimination. The disadvantage in this case is the impairment or nullification of the recognition, enjoyment or exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of persons with disabilities, on an equal basis with others.⁹¹⁷

Forms of Discrimination

The CRPD, like the CERD and CEDAW, does not explicitly define any specific forms of discrimination; however, it states that discrimination on the ground of disability includes all forms of discrimination including the failure to provide reasonable accommodation.⁹¹⁸ This means that all forms of discrimination including direct, indirect, structural, and de facto discrimination are included. I will indicate the presence of all these forms of discrimination under the CRPD by examining its definition of discrimination and the measures it prescribes for dealing with those forms of discrimination.

⁹¹⁵ Ibid art 4.

⁹¹⁶ CERD; CEDAW; CRPD.

⁹¹⁷ CRPD art 2.

⁹¹⁸ Ibid art 2.

Direct discrimination, according to the CRPD, can be identified through the presence of intention and a comparator, and the application of the harm principle. Regarding the presence of intention, the CRPD requires that the acts of distinction, exclusion, or restriction must be intentional because it stresses the purpose behind these acts of ‘impairing or nullifying the recognition, enjoyment or exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’ by persons with disabilities on an equal basis with others.⁹¹⁹ This means that the presence of intention is necessary for identifying direct discrimination in this context. In addition, the identification of direct discrimination under the CRPD requires the presence of a comparator. This requirement can be interpreted through the phrase ‘on an equal basis with others’.⁹²⁰ This comparator is to be individuals but not necessarily persons without disabilities.⁹²¹ This wording implies that the bodily differences of persons with disabilities are not brought in to be compared to those of persons without disabilities in order to claim equality.

Furthermore, direct discrimination can be traced to the application of the harm principle.⁹²² The CRPD requires States Parties to take appropriate measures for dealing with different types of harm. Denial harm must be eliminated to ensure equality of opportunity for persons with disabilities with regard to employment in Article 27,⁹²³ and to ensure the political rights of persons with disabilities by fair and accessible voting and election procedures in Article 29.⁹²⁴ The CRPD urges States Parties also to eliminate stigmatic harm by ensuring there is no form of confinement imposed upon persons with disabilities, by facilitating independent living within the community so as to prevent feelings of segregation, as mentioned in Article 19.⁹²⁵

Indirect discrimination under the CRPD can be identified through different results, the presence of a comparator, and the application of the concept of distributive justice. With

⁹¹⁹ Ibid.

⁹²⁰ Ibid.

⁹²¹ Ibid.

⁹²² The harm principle and different types of harm have been discussed in Sub-subsection 4.2.2.1 of Chapter III on discrimination of this thesis.

⁹²³ CRPD art 27.

⁹²⁴ Ibid art 29(a).

⁹²⁵ Ibid art 19(a).

regard to different results, the CRPD requires that the acts of distinction, exclusion, or restriction must have an intended or unintended result, as it emphasises the effect, behind those distinctions, exclusions, or restrictions, of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field by persons with disabilities, on an equal basis with others.⁹²⁶ In addition, the CRPD requires the presence of a comparator to identify indirect discrimination. Again, this requirement can be interpreted through the phrase ‘on an equal basis with others’.⁹²⁷ Because the wording ‘others’ is in plural form, it can be understood to imply a group of people. Hence it can be interpreted as a group-based comparator as applying in the case of indirect discrimination.⁹²⁸

The application of the concept of distributive justice further helps in clarifying the idea of indirect discrimination in the CRPD. It is clear that the CRPD’s fundamental principle, in this sense, is that persons with disabilities incontestably possess the chief primary social goods in the form of equal rights, liberties and opportunities, income and wealth, and value of self-respect, and that it is the responsibility of the States Parties to ensure or redistribute these primary social goods for them. Specifically, Article 24 on education reflects this proposition. It urges States Parties to redistribute social and economic resources in order to invest in an inclusive education system at all levels in their countries for persons with disabilities, including the provision of accessible forms of learning equipment such as sign languages and Braille format, personal assistance or training of teaching personnel with disabilities.⁹²⁹ This is because an inclusive education system for persons with disabilities helps them achieve a sense of dignity and self-worth.⁹³⁰ Article 27, too, requires States Parties to redistribute social and economic resources for ensuring persons with disabilities have opportunities to work in

⁹²⁶ Ibid art 2.

⁹²⁷ Ibid.

⁹²⁸ Ibid.

⁹²⁹ Ibid art 24.2, 3.

⁹³⁰ Ibid art 24.1(a).

an open labour market.⁹³¹ This is because ‘work is a primary means of enhancing self-esteem and dignity and sense of both belonging and contributing to something larger than oneself’.⁹³²

Structural discrimination under the CRPD is considered to be a form of *de jure* discrimination (discrimination in law). The CRPD, like the CERD and CEDAW, envisions the existence of *de jure* discrimination in States Parties’ existing laws, regulations, customs and practices.⁹³³ Hence it obligates States Parties to eliminate this form of discrimination by all necessary measures.⁹³⁴ However, such measures, in this regard, are entirely at the discretion of the States Parties, as in other international human rights treaties except the CEDAW, which requires states to embody the principle of equality and non-discrimination in their highest legislation.⁹³⁵ Hence States Parties to the CRPD have to work out how to implement this obligation, will be discussed in Chapter VII on the implementation of the CRPD.

Lastly, the CRPD has further categorised discrimination as *de facto* discrimination, which refers to discriminatory acts conducted by a person, an organisation, or a private enterprise.⁹³⁶ Measures to combat *de facto* discrimination are clearly mentioned throughout the CRPD in several articles. For example, Article 24 on education requires States Parties to intervene actively to ensure that the general education system is inclusive so as to increase the numbers of students with disabilities to have the chance to study in the general education system rather than in a segregated one.⁹³⁷ Article 27 on work and employment does not rule out the use of an employment quota system in order to promote employment for persons with disabilities.⁹³⁸ Nor does Article 29 rule out the possibility of a political quota system to increase the representation of persons with disabilities in political parties in States Parties.⁹³⁹ Measures

⁹³¹ Ibid art 27.1.

⁹³² Quinn, above n 875, 16.

⁹³³ CRPD art 4.1(b), (a).

⁹³⁴ Ibid.

⁹³⁵ CEDAW art 2(a).

⁹³⁶ CRPD art 4.1(e).

⁹³⁷ Ibid art 24.2, 3.

⁹³⁸ Ibid art 27.1(h).

⁹³⁹ Ibid art 29(b)(i).

used to combat *de facto* discrimination and to achieve *de facto* equality are not considered discriminatory under the CRPD.⁹⁴⁰

Legal Remedies for Disability Discrimination

There is no explicit provision under the CRPD on how to use legal measures to remedy disability discrimination. The CRPD generally requires that States Parties shall take effective and appropriate measures to tackle discrimination.⁹⁴¹ Indeed, the CRPD plays the role of a guiding policy on human rights for the States Parties. Therefore, States Parties, in order to tackle disability discrimination, can take any measures which are conducive to the realisation of the human rights of persons with disabilities which are not contrary to the CRPD's provisions.⁹⁴² This implies that States Parties, if they so choose, can apply a criminal approach or a civil and/or conciliation approach in combating disability discrimination.

However, the CRPD explicitly acknowledges affirmative action as a measure for dealing with disability discrimination. For example, the CRPD authorises the designation of quotas or the use of affirmative action policies to increase the numbers of persons with disabilities in the workforce, by urging its States Parties to employ persons with disabilities in the public sector in Article 27,⁹⁴³ or to employ teachers with disabilities in relation to education for persons with disabilities in Article 24.⁹⁴⁴

The above analysis of the concept of discrimination under the CRPD demonstrates that the CRPD reflects the theoretical discussion of discrimination to the extent that any aspect of discrimination which falls under the context of disability is to be taken into consideration. This is significant as it allows flexibility in interpreting and then implementing the CRPD for all stakeholders. It sends a message that the theoretical account of discrimination is available when needed to assist all stakeholders in implementing the CRPD. Most importantly, it

⁹⁴⁰ Ibid art 5.4.

⁹⁴¹ Ibid art 4.1(b), (e).

⁹⁴² Ibid art 4.4.

⁹⁴³ Ibid art 27.1(g).

⁹⁴⁴ Ibid art 24.4.

presents the view that any understanding that works within the CRPD's guiding principles in order to protect, promote and realise the human rights of persons with disabilities will count.

In the following and last section of this chapter I will analyse the CRPD's substantive provisions and indicate how a connection between the general principles and specific human rights (specific articles) of persons with disabilities is to be made. Rather than discuss every article, I have selected a few examples that create platforms for positive changes for protecting and advancing the human rights of persons with disabilities.

5.3.4. The Semi-relational Model under the CRPD

It is noted that alongside the conception of the liberal equality as discussed above, the CRPD is also based on a semi-relational model. To enrich the discussion on the theoretical framework of the CRPD, I will briefly discuss this semi-relational model known as the ethics of care with regard to the concept of the ethics of care and its application in the context of disability and under the CRPD.

5.3.4.1. The Concept of the Ethics of Care

Before discussing the ethics of care, it is important to understand the term 'care' in this context. 'Care' represents a practice, and value.⁹⁴⁵ As a practice, care involves work of care-giving with care-giving skills on the part of the carer and uptake of care on the part of the care-receiver.⁹⁴⁶ The effectiveness of the practice of care can be evaluated based on set standards.⁹⁴⁷ Care as a value involves caring relations associating with mutual concern, trustworthiness, attentiveness, and responsiveness, and this relation will be criticised while turning exploitative, mistrustful, or hostile.⁹⁴⁸ Care as a value also involves caring persons

⁹⁴⁵ Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2006), 36–40.

⁹⁴⁶ Eva Feder Kittay, 'The Ethics of Care, Dependence, and Disability' (2011) 24(1) *Ratio Juris* 49, 52; Held, above n 945, 36.

⁹⁴⁷ Kittay, above n 946, 52; Held, above n 945, 36.

⁹⁴⁸ Kittay, above n 946, 52; Held, above n 945, 36.

who are care-givers and care-receivers.⁹⁴⁹ Care-receivers maintain caring relations through care-givers' responsiveness to their needs.⁹⁵⁰

An ethics of care develops on the normative characteristics in this practice and value of care.⁹⁵¹ The ethics of care recognises the interdependence of human beings that we are all care-receivers and care-givers at some point.⁹⁵² Everyone needs care for their early years of life, and many need care when becoming ill and dependent due to frail old age or severe disability.⁹⁵³ The ethics of care reconceptualises traditional mindset about the private and public spheres by maintaining that care is not exclusive private matter of caring for the vulnerable and needy, instead it breaks all the boundaries between the private and public spheres,⁹⁵⁴ and reinforces that care is also the centre of the public life.⁹⁵⁵

The ethics of care calls for various forms of state support for caring and meeting people's needs in caring ways.⁹⁵⁶ It urges society to recognise the responsibilities to its dependent members such as children, persons with disabilities, and the elderly by providing the best possible bringing up and education for children, and appropriate responses to meet the needs of healthcare, and assistance for persons with disabilities, and the elderly.⁹⁵⁷ In addition, it urges the members of wealthy societies to recognise their responsibilities to eliminate hunger and gross deprivations in care in poorer societies.⁹⁵⁸

Finally, the ethics of care calls for the structural transformation with caring values and cooperation including elimination of discrimination of all kinds; promotion of family values; development of educational, health care, and child care institutions; economic development benefiting the poor; increase of women's representation in diplomatic and political

⁹⁴⁹ Held, above n 945, 158; Kittay, above n 946, 52.

⁹⁵⁰ Kittay, above n 946, 52; Held, above n 945, 36.

⁹⁵¹ Kittay, above n 946, 53.

⁹⁵² Held, above n 945, 10.

⁹⁵³ Ibid.

⁹⁵⁴ Sally Holland, 'Looked After Children and the Ethic of Care' (2009) 40(6) *British Journal of Social Work* 1664, 1665.

⁹⁵⁵ Held, above n 945, 12.

⁹⁵⁶ Ibid 159–60.

⁹⁵⁷ Ibid.

⁹⁵⁸ Ibid.

institutions; and legal and political systems with recognition of the values of care as well as justice.⁹⁵⁹

5.3.4.2. The Ethics of Care in the Context of Disability

In the context of disability, the supporters of the semi-relational model have strongly criticised the liberal equality for considering independence as a 'route to a dignified life and dependence as a denigration of the person' because it is not practical for persons with disabilities as well as those without.⁹⁶⁰ They argue that many persons with disabilities cannot make choices for themselves since their cognitive functions are seriously impaired; hence this emphasis on independence automatically excludes many of them.⁹⁶¹ It is further contended that an ethics that only accepts autonomy, rejects the importance of dependence, and ignores people's needs, is not preferred in the construction of an ethics of care in the disability context.⁹⁶² They have also criticised the disability theorists for associating care with impairment cure, institutional confinement, limited social engagement, second-class citizenship, disempowerment and exclusion.⁹⁶³ It is evident from this discussion that the liberal equality is primarily about treating everyone the same and this is done by ignoring their particularities, while the ethics of care recognises that different people need different levels of care.

The supporters of the semi-relational model therefore have searched for an ethics of care that emphasises the importance of additional assistance required by persons with disabilities to realise their human rights, and recognises their dependence resulting from their impairments.⁹⁶⁴ That is called an ethics of inclusion for persons with disability.⁹⁶⁵ They have

⁹⁵⁹ Ibid.

⁹⁶⁰ Kittay, above n 946, 51.

⁹⁶¹ Ibid.

⁹⁶² Ibid.

⁹⁶³ Bill Hughes et al, 'Love's Labours Lost? Feminism, the Disabled People's Movement and an Ethic of Care' (2005) 39(2) *Sociology* 259, 261.

⁹⁶⁴ Jenny Morris, 'Impairment and Disability: Constructing an Ethics of Care That Promotes Human Rights' (2001) 16(4) *Hypatia* 1, 15.

⁹⁶⁵ Kittay, above n 946, 52.

also looked for an ethics of care that enables person with disabilities to express their views, participate in decision making processes, and fully integrate into society.⁹⁶⁶

5.3.4.2. The Ethics of Care under the CRPD

Under the CRPD, though it is not obvious very subtle ethics of care can be found in several articles, expressing vulnerability and interdependence in the disability context, especially by tracing back to the drafting documents of the CRPD. For example, Article 7 on children with disabilities was drafted with the notion of care as is evident in the drafting documents where it is stated that children with disabilities are entitled to inclusive care including early detection, early referral and early intervention and other services.⁹⁶⁷ Article 11 was drafted based on the notion of care for person with disabilities especially those in situations of risk, because States Parties are required to take all feasible measures to ensure protection and care of all persons with disabilities.⁹⁶⁸ Similarly, even though Article 16 on freedom from exploitation, violence and abuse, conceptualises the right in terms of a ‘freedom’, it is in fact based on the idea of care and protection,⁹⁶⁹ because persons with disabilities are at greater risk, both within and outside the home of violence, injury, abuse, negligent treatment, maltreatment or exploitation.⁹⁷⁰ Article 12 requires additional support for persons with disabilities to exercise their legal capacity as to be discussed.⁹⁷¹ Article 23 foresees a situation of a need for care, where his or her immediate family would not care for a child with a disability will be provided with alternative care within the wider family.⁹⁷² Article 26 mentions the notion of peer support to enable persons with disabilities to attain full inclusion and participation in all

⁹⁶⁶ Morris, above n 964, 15.

⁹⁶⁷ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/AC.265/2004/5 (9 June 2004), 36–8.

⁹⁶⁸ *Ibid* 21.

⁹⁶⁹ CRPD art 16.

⁹⁷⁰ *Report of the CRPD's third negotiation session*, UN Doc A/AC.265/2004/5, 26–8.

⁹⁷¹ Subsection 5.4.2. A Tactical Proposition on Legal Capacity.

⁹⁷² CRPD art 23.5.

aspects of life.⁹⁷³ This notion of care can be found in many other articles in the CRPD as well but due to space constraints I cannot list them all.

5.4. Substantive Rights Provisions – Platforms for Change

The CRPD comprises 50 articles, of which the first 30 relate to general principles and substantive rights. The rest of the CRPD relates to issues of monitoring the implementation and procedures, and will be discussed in the next chapter. Article 1 sets out the general purpose of the convention and the States Parties' obligation to promote, protect and ensure the human rights and fundamental freedoms of persons with disabilities.⁹⁷⁴ Article 2 defines five key terms of the CRPD, which have very specific meanings and implications for the CRPD's implementation.⁹⁷⁵ They are 'communication', 'language', 'discrimination on the ground of disability', 'reasonable accommodation' and 'universal design'. Articles 3 to 9 of the CRPD are overarching or crosscutting principles, especially the principles of equality and non-discrimination, and measures to be applied in the implementation of the CRPD.⁹⁷⁶

Articles 10 to 30 of the CRPD prescribe the specific obligations of the States Parties regarding the human rights of persons with disabilities. In particular, Articles 10 to 23 and Article 29 are related to civil and political rights. In some cases, there are new or amplified applications or extensions of these rights.⁹⁷⁷ For example, Article 19 extends the right to deinstitutionalisation. Articles 24 to 28 and Article 30 are economic, social and cultural rights. These Articles place overriding emphasis on inclusion and participation by persons with disabilities in the mainstream education and healthcare systems, the labour market, cultural life, recreation, leisure, and sport, supported by reasonable accommodation and other positive measures required by persons with disabilities to realise these rights.⁹⁷⁸

Three crucial aspects can be noted from this brief introduction of the CRPD's substantive rights. These are that (1) the CRPD is an authoritative and irrefutable combination of two sets

⁹⁷³ *Report of the CRPD's third negotiation session*, UN Doc A/AC.265/2004/5, 52–5; CRPD art 26.1.

⁹⁷⁴ Kayess and French, above n 24, 26.

⁹⁷⁵ Ibid.

⁹⁷⁶ Ibid 27.

⁹⁷⁷ Ibid 28.

⁹⁷⁸ Ibid 30.

of human rights, including a set of civil and political rights and another set of economic, social and cultural rights; (2) it portrays itself as an anti-discrimination treaty, employing the principles of equality and non-discrimination as its guiding principles; and (3) it constitutes extensions of the traditional rights applicable in the context of disability. Such extensions include the right to equal recognition before the law as a legal capacity, the right not to live in a particular living arrangement as deinstitutionalisation, freedom from involuntary medical treatment, and the right to live in a barrier-free society as accessibility. All of these three aspects make the CRPD unique and distinctive from other international human rights treaties.

The normative analysis below will present convincing evidence that the CRPD possesses inherent merits and values for creating platforms for positive changes in the advancement of the human rights of persons with disabilities.

5.4.1. A Hybrid Convention

The CRPD is considered to be a hybrid convention in promoting and protecting the human rights of persons with disabilities.⁹⁷⁹ The question that arises is: what does a hybrid convention mean? The history of international human rights treaties shows that there are different human rights conventions specifying or regulating different subjects. For example, the ICCPR regulates the protection of civil and political rights, the ICESCR is concerned with economic, social and cultural rights, the CERD with dealing with racial discrimination, the CEDAW with tackling discrimination against women, and the CRC with protecting children rights. In the case of the CRPD, hybrid means a combination of various subjects covered by all these previous conventions in promoting and protecting the human rights of persons with disabilities. Specifically, the CRPD as a hybrid convention is a double combination: a combination of two sets (or generations) of human rights, which include a set of civil and political rights and another set of economic and cultural rights, entwined with an anti-discrimination treaty.

⁹⁷⁹ Quinn, above n 875, 9.

The CRPD is primarily a combination of the two abovementioned sets of existing human rights. Thus it does not solely regulate civil and political rights, as the ICCPR does, or economic, social and cultural rights, like the ICESCR. Civil and political rights such as the right to free elections, trial by jury, respect for property and freedom of the press, religion, speech, peaceful assembly, etc., belong to the first set (or generation) of human rights,⁹⁸⁰ also known as ‘negative’ human rights, which require states to abstain from activities that would violate them.⁹⁸¹ The set of economic, social and cultural rights, such as the right to work, education, health, adequate living standards, social protection, sport and culture are viewed as the second set (or generation) of human rights, known as ‘positive’ human rights, requiring governments’ active intervention to be realised.⁹⁸²

There is disagreement on which of these two sets of human rights are true rights.⁹⁸³ It is contended that the first category are genuine human rights because they are clearly definable, self-executing, and easily enforceable.⁹⁸⁴ In addition, they only require governments to refrain from activities which would violate them,⁹⁸⁵ and as a result, few resources are required to implement them.⁹⁸⁶ In contrast, many commentators say that economic, social and cultural rights are not truly human rights.⁹⁸⁷ This is because these are intractable and require significant resources to implement.⁹⁸⁸ In addition, due to their unmanageable aspect, the realisation of economic, social and cultural rights is only progressively achieved.⁹⁸⁹ The CRPD framers seem clearly aware of this dichotomy.

It can be said that the combination of the different categories of human rights under the CRPD has been the intentional product of the negotiating parties. Before the CRPD’s drafting

⁹⁸⁰ Manfred Nowak, *Introduction to the International Human Rights Regime* (Hotei Publishing, 2003), 23–5; Christian Tomushat, *Human Rights between Idealism and Realism* (Oxford University Press, 1st ed, 2003), ch 3. The term “generations” of human rights was created in the 1970s by a Czech human rights expert. Other terms such as “dimensions”, “sets”, or categories of human rights have also been suggested. In this paper, these terms will be used interchangeably.

⁹⁸¹ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156, 159; Tomushat, above n 980, 20.

⁹⁸² Alston and Quinn, above n 981, 159; Tomushat, above n 980, 20.

⁹⁸³ Tomushat, above n 980, ch 3.

⁹⁸⁴ Alston and Quinn, above n 981, 159; Tomushat, above n 980, 20.

⁹⁸⁵ Alston and Quinn, above n 981, 159; Tomushat, above n 980, 20.

⁹⁸⁶ Maurice Cranston, 'Are There Any Human Rights?' (1983) 112(4) *Daedalus* 1, 13.

⁹⁸⁷ Tomushat, above n 980, 20; Cranston, above n 986, 8.

⁹⁸⁸ Alston and Quinn, above n 981, 160.

⁹⁸⁹ *Ibid* 159–60.

process a UN study on a possible human rights convention on disability suggested the combination of these two categories of human rights,⁹⁹⁰ in order to avoid being caught in this dichotomy. This suggestion was based on the rationale that the interpretation of human rights as different generations of rights is not valid because ‘all human rights are justifiable, obligating the states to respect by non-interference, to fulfil by positive actions, and to protect them against the third parties’.⁹⁹¹ The UN study argued that in the disability context these two traditional sets of human rights were interdependent and interrelated.⁹⁹² Thus the CRPD’s final text combines the two. The civil and political rights are defined from Articles 10 to 23 and in Article 29 and the economic, social and cultural rights are defined from Articles 24 to 28 and in Article 30.

By virtue of this combination, the CRPD text itself explains why and how in the disability context these two traditional sets of human rights are interdependent and interrelated. More specifically, it explains why and how the realisation of the economic, social and cultural rights is an essential precondition for realising civil and political rights. For example, for persons with disabilities, the civil right to freedom of expression and opinion and access to information under Article 21 of the CRPD cannot be realised without the realisation of an economic, social and cultural right to accessible communication and/or reasonable accommodation as a precondition. This is because persons with different types of disabilities use different modes of communication to communicate or access information. Persons with speaking and hearing impairments would literally listen with their eyes through seeing others’ hand movements or by lip-reading, and listen and speak with their hands rather than their ears and mouths. Hence they can only access information in written form or sign languages, when it comes to accessing information for example on TV screen. Thus the assumption that civil rights, such as freedom of expression and opinion and access to information in general only require States to refrain from interfering with the exercise of these rights is not quite

⁹⁹⁰ Quinn and Degener, above n 43, 293–7.

⁹⁹¹ Nowak, above n 980, 24.

⁹⁹² Quinn and Degener, above n 43, 293–7.

applicable in the disability context.⁹⁹³ Instead, States need to take positive action and make interventions either by legislation or practical measures to ensure reasonable accommodation of communication as defined under Article 2 of the CRPD. This may require the use of sign languages for persons with hearing impairments or large print or Braille for persons with low vision or complete loss of vision. To ensure this reasonable accommodation, resources have to be mobilised, and non-interference by the States in this sense would only refer to non-interference with what people want and want to express.

The same is true of the political right to participation in political and public life under Article 29 of the CRPD. After confirming that the States are required to guarantee persons with disabilities these rights, the CRPD requires that they should ensure accessibility and necessary reasonable accommodation in relation to voting procedures and the election process, including personal assistance for those needing access to public premises such as polling stations, or needing voting materials in accessible forms. Thus the argument that negative rights require no or few resources to implement is simply flawed; the implementation of a political right requires States to organise elections, which involve the provision of election laws, campaigns, and voting procedures and materials and so on. All of these require an outlay by the State of quite significant financial and human resources. For persons with disabilities to exercise their political rights, in particular, extra resources need to be mobilised.

The CRPD also explains why and how the realisation of civil and political rights in turn serve as an essential prerequisite for realising economic, social and cultural rights. For example, the social right of persons with disabilities to enjoy the highest attainable standards of health, defined under Article 25, becomes forced or involuntary medical treatment if it is conducted without free and informed consent by persons with disabilities, as defined under Article 17, on the civil right protecting the integrity of persons with disabilities. Thus the social right to health defined in Article 25 cannot be realised without the presence of Article

⁹⁹³ Kayess and French, above n 24, 32–3; Alston and Quinn, above n 981, 183–6. Which is on more discussion on the general points that positive actions are required to realize the negative human rights and vice versa.

17 – a civil right. In other words, the realisation of the civil right to free and informed consent is an essential prerequisite for implementing the social right to the highest attainable standard of health of persons with disabilities.

The interrelatedness and interdependence of the two sets of human rights are not only found between and among the articles on substantive rights provisions but can also be found in each individual article.⁹⁹⁴ For example, let us take the right to work under Article 27 for discussion. If persons with disabilities are not protected from degrading treatment such as being held in slavery or servitude – a civil right, as defined under Article 27.2 – the right to work, as an economic right for persons with disabilities, can never be realised. The right to work also serves as a good example of interrelatedness and interdependence, because it combines two kinds of human rights in one article: the right to work as an economic right, combined with freedom of association, as a civil right, and freedom from degrading treatment as another civil right.⁹⁹⁵ By the same token, the civil right to personal mobility ‘with greatest possible independence for persons with disabilities’ under Article 20 will not be realised unless the social right to access to assistive devices and other forms of living assistance such as a personal assistant, is ensured.⁹⁹⁶

This interrelatedness and interdependence of the two categories of human rights under the CRPD cannot be found in any other human rights treaties. It can be argued that the CRPD has put an end to the prolonged argument about the need for a complete separation of the two categories of human rights.⁹⁹⁷ I now move on to discuss the CRPD as an anti-discrimination convention.

Because the CERD and CEDAW are anti-discrimination treaties designed to combat discrimination on the ground of race and sex, respectively, I take these two treaties as examples and pinpoint similar features shared by both of them in order to establish a general format for an anti-discrimination convention. The CERD and CEDAW, as anti-discrimination

⁹⁹⁴ Kayess and French, above n 24, 33.

⁹⁹⁵ CRPD art 27(1)(c), (2).

⁹⁹⁶ Ibid art 20.

⁹⁹⁷ Dhanda, above n 27, 456; Kayess and French, above n 24, 33; Quinn and Degener, above n 43, 296; Mégret, above n 49, 541.

conventions, are titled to indicate the elimination of discrimination on the grounds of race and sex, as their core mandates.⁹⁹⁸ They both define discrimination.⁹⁹⁹ They both also prohibit discrimination, on the grounds of race in the case of the CERD,¹⁰⁰⁰ and on the grounds of sex in the case of the CEDAW.¹⁰⁰¹ They both require States Parties to take appropriate measures to tackle de jure,¹⁰⁰² and de facto discrimination.¹⁰⁰³ More importantly, both the CERD and CEDAW stipulate that the prohibition and elimination of discrimination should be considered a prerequisite for the enjoyment and realisation of all civil, and political, and economic, social and cultural rights for the members of the target groups.¹⁰⁰⁴ Therefore a general format for an anti-discrimination treaty suggested by this brief introduction of these two treaties includes a title indicating the elimination of discrimination on a certain protected ground, the prohibition of discrimination, proactive measures for eliminating discrimination, and prohibition and elimination of discrimination as prerequisites for the realisation of human rights.

Based on this general format, I contend that the CRPD is an anti-discrimination treaty, even though it is not explicitly named as an anti-discrimination convention like the CERD and CEDAW, yet it possesses the features of an anti-discrimination treaty. It contains a definition of discrimination on the grounds of disability,¹⁰⁰⁵ and in addition prohibits discrimination on the basis of disability.¹⁰⁰⁶ It also urges States Parties to take all appropriate measures to eliminate de jure and de facto discrimination.¹⁰⁰⁷ The CRPD enunciates prohibition and elimination of discrimination as a prerequisite for the realisation of human rights of persons with disabilities.¹⁰⁰⁸ Unlike the CERD, but like the CEDAW,¹⁰⁰⁹ it affirms that equality and non-discrimination are two of its guiding principles.¹⁰¹⁰

⁹⁹⁸ CERD; CEDAW.

⁹⁹⁹ CERD art 1; CEDAW art 1. The definitions on discrimination of these two conventions have been discussed in the subsection 5.3.3.1 of this chapter.

¹⁰⁰⁰ CERD art 3.

¹⁰⁰¹ CEDAW art 2(b).

¹⁰⁰² CERD art 2.1(c); CEDAW art 2(f).

¹⁰⁰³ CERD art 2.1(d); CEDAW art 2(e).

¹⁰⁰⁴ CERD art 5; CEDAW arts 7–16.

¹⁰⁰⁵ CRPD art 2.

¹⁰⁰⁶ Ibid art 5.2.

¹⁰⁰⁷ Ibid art 4.1(b), (e).

¹⁰⁰⁸ Ibid art 4.1.

¹⁰⁰⁹ CEDAW Preamble para 7.

¹⁰¹⁰ CRPD arts 3(b),(e),(g), 5. The discussion on equality and non-discrimination as two of its guiding principles has been

The combination of the two sets of human rights and the features of an anti-discrimination treaty hence make the CRPD a double combination or hybrid convention. This hybrid character is a distinctive feature of the CRPD, and distinctive in the context of disability. If the CRPD had been constructed without this hybrid feature, it would simply be like other treaties and might have been less able to protect the human rights of persons with disabilities. But with these features, I argue that, theoretically and doctrinally, the CRPD is a distinctive advance in protecting the human rights of persons with disabilities.

Another striking feature of the CRPD is that it extends the traditional understanding of the right to equal recognition before the law in specific ways as the legal capacity, the right to choose where to live as deinstitutionalisation, freedom from non-consensual medical treatment, and the right to live in a barrier-free society regarded as accessibility in the context of disability. The next four subsections discuss these issues.

5.4.2. A Tactical Proposition on Legal Capacity

The CRPD builds upon the provisions in the UDHR and ICCPR in regard to the concept of legal capacity. The earlier documents of the UDHR and ICCPR talk about ‘the right to recognition everywhere as persons before the law’ without any further description.¹⁰¹¹ But the CRPD has extended the concept of legal capacity to be applied to the unique situation of persons with disabilities. This right under Article 12 of the CRPD constitutes, *inter alia*, a regulation on legal capacity and supporting measures necessary for persons with disabilities to exercise this legal capacity with a safeguard against abuse.¹⁰¹² However, this extension of legal capacity is controversial on two important issues: legal capacity should be understood as a capacity to have rights, or a capacity to act, or both; and which decision-making models (supported or substituted) should be applied to assist persons with disabilities to exercise their

done in the in the subsection 5.3.3 of this chapter.

¹⁰¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 6; *ICCPR* art 16.

¹⁰¹² *CRPD* art 12.1–2.

legal capacity. I will argue below that the CRPD has adopted a tactical proposition on both of these matters. However, it is first necessary to explain briefly the concept of legal capacity.

Legal capacity universally refers to an individual's status and authority within a given legal system.¹⁰¹³ In simple terms, legal capacity has two elements: the capacity to have rights and the capacity to act.¹⁰¹⁴ The capacity to have rights refers to an individual's status to acquire rights such as the right to ownership or the inheritance of property.¹⁰¹⁵ The capacity to act is based on the rights they acquire, for instance the right to conclude contracts in buying, selling or transferring, or renting a property which they own, or the right to appear in court as a party or as a witness.¹⁰¹⁶ Since, without the capacity to act, the rights that a person may have cannot be exercised and/or realised,¹⁰¹⁷ it is recommended that in legal systems that distinguish between the capacity for rights and the capacity to act, legal capacity is best interpreted as the capacity to act or as a combination of both.¹⁰¹⁸

In the context of disability, persons with disabilities are generally presumed to have legal capacity; yet their legal capacity is subject to a test of proving the incapacity.¹⁰¹⁹ There are three methods of carrying out this test, called the status, functional and outcome methods.¹⁰²⁰ The status method applies when an individual is labelled a person with a disability and this person is automatically presumed incapable.¹⁰²¹ This status method of determination implies that a person having a disability is considered incapable, and a person having no disability is considered capable.¹⁰²² The functional method applies when a person with a disability is considered incapable only when he or she is unable to perform a specific function due to his or her functional impairment.¹⁰²³ This functional method implies that having the disability

¹⁰¹³ Minkowitz, above n 29, 410; International Disability Alliance, *IDA Position Papers and Statements: Legal Opinion on Article 12 of the Convention on the Rights of Persons with Disabilities* <<http://www.internationaldisabilityalliance.org/en/ida-position-papers-and-statements>>.

¹⁰¹⁴ Minkowitz, above n 29, 410.

¹⁰¹⁵ Ibid.

¹⁰¹⁶ Ibid.

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Ibid 410; International Disability Alliance, above n 1017.

¹⁰¹⁹ Dhanda, above n 27, 431–3.

¹⁰²⁰ Ibid 431–3.

¹⁰²¹ Ibid.

¹⁰²² Ibid.

¹⁰²³ Ibid.

does not mean this person is incapable but that their capacity is subject to an assessment.¹⁰²⁴

The last method applies when a person with a disability is considered incapable only when this person makes a decision that is not socially accepted.¹⁰²⁵ For example, a person with an intellectual disability decides to discontinue psychiatric treatment, and this decision is considered unacceptable by society on the assumption that person with an intellectual disability should receive psychiatric treatment.¹⁰²⁶ This outcome method implies that having a disability does not mean this person is incapable but that their capacity to make the right decision is subject to question.¹⁰²⁷ Each of these three methods have been criticised for operating on the presumption that all persons with disabilities lack legal capacity,¹⁰²⁸ and for establishing a guardianship system resulting from a finding of incompetence, in which guardians make decisions on behalf of the incompetent person.¹⁰²⁹

Thus an alternative way of understanding the legal capacity of persons with disabilities has been suggested. That is that all persons with disabilities are presumed to have a legal capacity and the burden of establishing incapacity is shifted to those who allege incapacity.¹⁰³⁰ Moreover, the legal capacity of persons with disabilities is, on this approach, understood as distinguishing the incapacity to make a decision from the incapacity to communicate the decision.¹⁰³¹ In addition, it is suggested that assistance to exercise legal capacity should be provided if such assistance is required.¹⁰³² And finally it is suggested that legal systems should support rather than take control of the lives of persons with disabilities requiring assistance.¹⁰³³

However, these recommended understandings of legal capacity in general, and in the disability context, were contested during the CRPD negotiations. On the surface, it seemed to be a linguistic disagreement. The UN consists of more than 200 Member States using many

¹⁰²⁴ Ibid.

¹⁰²⁵ Ibid.

¹⁰²⁶ Ibid.

¹⁰²⁷ Ibid.

¹⁰²⁸ Ibid 433.

¹⁰²⁹ Ibid 434.

¹⁰³⁰ Ibid 433.

¹⁰³¹ Ibid.

¹⁰³² Ibid 433–4.

¹⁰³³ Ibid 434.

different languages, hence possibly interpreting the concept of legal capacity differently. The divergence started within the six UN official languages (Arabic, Chinese, English, French, Russian and Spanish). Out of these six, three – Arabic, Chinese and Russian – understand legal capacity to mean legal capacity for rights, rather than legal capacity to act.¹⁰³⁴ This linguistic explanation is found in a footnote in one of the CRPD's negotiation documents.¹⁰³⁵ However, on a deeper analysis, the footnote has been criticised in that it has the effect of levelling down the standards of protection of the human rights of persons with disabilities in those countries rather than merely compromising on a linguistic issue.¹⁰³⁶ This is especially true for persons with intellectual disabilities, who are potentially the first to be subjected to discrimination due to this denial of the legal capacity to act.¹⁰³⁷

Even though the CRPD has been adopted without this linguistic footnote, some Arabic-speaking countries have maintained their position on the understanding of the concept of legal capacity as a capacity to have the right, by entering a reservation when ratifying the CRPD. For example, Egypt and Syria have stated in their reservation documents that legal capacity as understood under their national law means the capacity for acquiring the right, not the capacity to act.¹⁰³⁸ This reservation has the disadvantage in implementing Article 12, which limits the rights of persons with disabilities, for example, the right to conclude contracts in buying, selling or transferring, or renting a property which they own. Moreover, this limitation is not only confined to Article 12 alone but also extends to other rights such as the right to education or the right to work, or to freedom of speech and expression, or political participation'.¹⁰³⁹ This is because rights under the CRPD are interdependent and interrelated. Hence, in the absence of one of those rights as a result of such a reservation, it becomes very difficult to realise the other rights.

¹⁰³⁴ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Report of the Fifth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/AC.265/2005/2 (23 February 2005), fn a.

¹⁰³⁵ Ibid.

¹⁰³⁶ Lawson, above n 24, 598.

¹⁰³⁷ Kanter, above n 844, 302.

¹⁰³⁸ United Nations, above n 804.

¹⁰³⁹ International Disability Alliance, above n 1017.

Additionally, Article 12 should be read in light of the CRPD's object and purpose in accordance with the general rule of treaty interpretation in international law.¹⁰⁴⁰ It has been also argued that the recognition of full legal capacity, both the capacity to acquire rights and the capacity to act, is necessary for exercising the guiding principles of equality and non-discrimination under the CRPD.¹⁰⁴¹ Even though the CRPD does not explicitly require that the concept of legal capacity should be understood as both the capacity to acquire rights and capacity to act, it does in fact implicitly require this. Therefore, it has been argued that the common comprehension of legal capacity as the capacity to act should be upheld.

How the concept of legal capacity is understood is an important issue, as discussed above. Yet the issue of which decision-making models, supported or substituted, the CRPD allows is more important. This is because it relates to how the right to recognition everywhere as persons before the law, for persons with disabilities, will be implemented in reality. The supported decision-making model¹⁰⁴² refers to the provision of information to a person with a disability, and to assistance for this person in understanding the given information, so that he or she can make decisions relating to their own lives based on their own preferences, when having been fully informed.¹⁰⁴³ This model is an aid to individual empowerment for persons with disabilities in virtue of supporting them to make decisions of their own choice.¹⁰⁴⁴ In addition, it enables all persons with disabilities to retain their legal capacity and their right to exercise that legal capacity.¹⁰⁴⁵

¹⁰⁴⁰ Dhanda, above n 27, 464–5.

¹⁰⁴¹ Ibid 465.

¹⁰⁴² Maths Jespersen, "'Personligt Ombud' in Sweden" (Paper presented at the Symposium on the Legal Capacity of Persons with Disabilities in Light of the UN Convention on the Rights of Persons with Disabilities by European Foundation Centre and European Disability Forum, Belgium, 2009). This model is being implemented in Sweden and replicated in other countries. According to this model a PO (abbreviation for "personligt ombud" in Swedish, or personal agent in English) is a professional, highly skilled person, who works to 100 % on the commission of his client only, who are persons with psychosocial problems of the most difficult sort (living entirely in a symbolic world of their own, living barricaded in their apartment or living homeless in the streets). The PO is in no alliance with psychiatry or the social services or any other authority, and not with the client's relatives or any other person in his surroundings. The PO doesn't act according to what he thinks is "for his client's own good". He only carries out what his client tells him to do. All decisions are made by the client himself and the PO just helps him to express and implement them.

¹⁰⁴³ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Information Sheet on Article 9 : Equal Recognition as a Person before the Law Prepared by the International Disability Caucus.*

¹⁰⁴⁴ Ibid.

¹⁰⁴⁵ Ibid.

In contrast, a substituted decision-making model known as a guardianship arrangement refers to the appointment of a personal or legal representative as a guardian who is authorised to make all decisions on behalf of, and even without consultation with, a person with a disability under their guardianship. These decisions are related to the private lives of those placed under guardianship. This model is based on the presumption of the incapacity of a person with a disability, especially those with intellectual disabilities. Hence it is a concern that if this guardianship model is allowed under the CRPD, guardians would be able to make all decisions on behalf of and even without consultation with the persons placed under their guardianship.¹⁰⁴⁶

It is to be noted that the substituted decision-making model is neither allowed nor prohibited under the CRPD.¹⁰⁴⁷ From the text of the CRPD it is evident that it avoids using strong words such as ‘prohibition’ and mentioning contentious issues in relation to guardianship arrangements. The CRPD details some safeguard measures dealing with these arrangements, including their application on a case-by-case basis and in the shortest time possible, and being made subject to regular review by a competent or judicial authority, and in the best interests of persons with disabilities placed under the guardianship arrangement. However, it leaves these matters completely open for States Parties to interpret in a way that is easiest for them to implement. Therefore, persons with disabilities in different countries have different types of legal capacity, in spite of the fact there is a universal standard on legal capacity in place, namely, Article 12 of the CRPD.

Supporters of the substituted decision-making model argue that not all persons with disabilities can by themselves exercise their legal capacity, despite more intensive support, and that some persons with disabilities will require others to make decisions on their behalf.¹⁰⁴⁸ They therefore argue that the CRPD should be understood to permit the substituted decision-making model involving appointment of a personal or legal representative as the last

¹⁰⁴⁶ Dhanda, above n 27, 446.

¹⁰⁴⁷ CRPD art 12.4.

¹⁰⁴⁸ *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities — Daily Summary of Discussion at the Seventh Session Morning Session on Article 12 – Equal Recognition as a Person before the Law* (18 January 2006). Countries include Canada, Australia, Japan, Kenya, Mexico, Serbia and Montenegro; and DPOs include People with Disability Australia.

resort, and that safeguard measures should be made available to prevent any future abuses.¹⁰⁴⁹

Many States Parties to the CRPD, for example Australia, Canada, Norway, and Poland, have supported this position by entering reservations to Article 12 declaring that they understand that the CRPD does permit both substituted and supported decision-making models, and that they will interpret Article 12 in relation to this matter in accordance with their domestic law.¹⁰⁵⁰

This analysis illustrates that the CRPD does not explicitly define a particular understanding of the concept of legal capacity. It leaves the concept to States Parties to interpret. In addition, it neither permits nor prohibits a substituted decision-making model and leaves the application of either such model entirely to the States Parties. However, in both matters it requires that its substantive provisions should be interpreted in light of its object and purpose and in accordance with the general rule for treaty interpretation in international law.

This tactical silence would also fit with the plural approach to disability under the CRPD, as it adopts selective aspects from all three models of disability including the medical model. The final goal is to transform the legal concepts and normative rules of the CRPD into concrete results in which persons with disabilities are able to exercise their legal capacity in reality. It cannot be denied that persons with very severe intellectual disabilities cannot always make a decision for themselves and in some situations there needs to be somebody there to help them. This should be done in the best interests of the person concerned. Therefore, the matter of there being no specific account of how the concept of legal capacity

¹⁰⁴⁹ *Report of the CRPD's Seventh Negotiation Session*, UN Doc A/AC.265/2006/2. Extraction of the CRPD's negotiating text of the article on Equal Recognition before the Law as following:

[2. States Parties shall recognize that persons with disabilities have [legal capacity] on an equal basis with others in all fields and shall ensure that where support is required to exercise that capacity:

(a) The assistance provided is proportional to the degree of support required and tailored to the person's circumstances, that such support does not undermine the legal rights of the person, respects the will and preferences of the person and is free from conflict of interest and undue influence. Such support shall be subject to regular and independent review;

(b) Where States Parties provide for a procedure, which shall be established by law, for the appointment of personal representation as a matter of last resort, such a law shall provide appropriate safeguards, including regular review of the appointment of and decisions made by the personal representative by a competent, impartial and independent tribunal. The appointment and conduct of the personal representative shall be guided by principles consistent with the present Convention and international human rights law.]

¹⁰⁵⁰ United Nations, above n 21.

is to be read, and the failure either to endorse or prohibit an alternative decision-making model are not the issue. The more important issue is to achieve this final goal. That is why the CRPD has adopted this tactical stand as its distinctive feature to protect the human rights of persons with disabilities. The next distinctive issue of the CRPD to be discussed is the deinstitutionalisation of persons with disabilities.

5.4.3. Deinstitutionalisation

In this subsection, I will briefly introduce the understanding of the concept of institutionalisation and discuss the proposition of the CRPD over institutionalisation and deinstitutionalisation of persons with disabilities.

In order to understand the concept of institutionalisation, it is important to learn about four ways to understand institutionalisation namely bricks and mortar care, policy and legal framework care, clinical responsibility and paternalism in the clinician-patient relationship care, and patient's adaptive behaviour to institutionalised care.¹⁰⁵¹

The classic type of institutionalised care referred to as bricks and mortar of care refers to a closed system of care, isolated from the outside world.¹⁰⁵² The name 'bricks and mortar' symbolises physical barriers with the outside world such as locked doors, high walls, barbed wire, cliffs, water, forests or moors.¹⁰⁵³ Inside these institutions, patients receive custodial care with restricted freedom, being stigmatised, and no normal social roles.¹⁰⁵⁴ These institutions are perceived to have similar characteristics as prisons, concentration camps and monasteries.¹⁰⁵⁵

The policy and legal framework of institutional care sounds transparent, however, this care is still being operated with the patient spending a considerable amount of time behind locked doors, with a staff member to watch patients closely at all times in order to manage the risk of

¹⁰⁵¹ Winnie S Chow and Stefan Priebe, 'Understanding Psychiatric Institutionalization: A Conceptual Review' (2013) 13(1) *BMC psychiatry* 169, 171.

¹⁰⁵² *Ibid* 169.

¹⁰⁵³ *Ibid* 173.

¹⁰⁵⁴ *Ibid* 169.

¹⁰⁵⁵ *Ibid*.

patients running away or self-harming.¹⁰⁵⁶ Besides, seclusion, restraint and sedation are in use and restriction of freedom is still in force.¹⁰⁵⁷

The clinical responsibility and paternalism go together in the clinician-patient relationship where shelter and protection are offered as a part of treatment to patients.¹⁰⁵⁸ It is undeniable that these institutions protect patients from the prejudice and the hostility that they might experience in the larger society.¹⁰⁵⁹ However, patients' safety and wellbeing are sometimes endangered due to the risk of violence from other patients. Such risks arise among other things because some negative forms of environmental and interpersonal stimulation such as disorganisation, noise, the lack of interesting activities, and communication problems with staff members could trigger violent behaviours among patients.¹⁰⁶⁰

The last type of institutional care is where patients have adaptive behaviour to institutionalised care. 'Social withdrawal' is the term used to describe patient status after a long time of being institutionalised,¹⁰⁶¹ because patients who live in any institutional setting are often socially isolated or have limited access to the outside world, and they may lose independence and responsibility after all.¹⁰⁶²

Given the fact that institutionalised care of any type to an extent carries a negative impact on the lives of persons with disabilities such as freedom restriction, or some negative environmental and interpersonal forms as discussed above, the proponents of deinstitutionalisation stress the need to eliminate institutions altogether. To them, institutionalisation is not only a typical measure of the medical model of disability, but also that persons with disabilities living in institutionalised settings face degrading and inhumane living conditions such as a lack of adequate food, clothes and medical care, and are subject to physical, sexual and mental abuses, as well as forced medical treatment.¹⁰⁶³ This plight

¹⁰⁵⁶ Ibid 176.

¹⁰⁵⁷ Ibid.

¹⁰⁵⁸ Ibid 178.

¹⁰⁵⁹ Ibid 177.

¹⁰⁶⁰ Ibid.

¹⁰⁶¹ Ibid 178.

¹⁰⁶² Ibid.

¹⁰⁶³ Eric Rosenthal and Éva Szeli, 'Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo' (Mental Disability Rights International, 2002), 6–9.

usually goes unnoticed and unreported because it takes place in institutions which are not normally open to outsiders. In virtue of this, their human rights are violated – in particular, the right to be free from inhumane and degrading treatment. Thus the institutionalisation of persons with disabilities amounts to the violation of this right.

To the proponents of deinstitutionalisation, the right to freedom from inhumane and degrading treatment is a human right and is resolutely protected under international human rights law. In other words, inhumane and degrading treatment is strictly prohibited under international human rights treaties such as the ICCPR¹⁰⁶⁴ and CAT.¹⁰⁶⁵ Specifically, the prohibition of inhumane and degrading treatment is placed under a non-derogation provision under the ICCPR,¹⁰⁶⁶ which means that no one in any circumstance may be subject to such treatment. This applies even in a time of war or a state of emergency, when it continues to be the States' responsibility to protect people from such treatment. In addition, inhumane and degrading treatment is to some extent considered a form of torture under the CAT,¹⁰⁶⁷ and includes many forms of exploitation, violence and abuse.

Given this causal link between the institutionalisation of persons with disabilities and inhumane and degrading treatment, the proponents of deinstitutionalisation tend to emphasise that the CRPD seeks to outlaw any form of confinement imposed upon persons with disabilities. The right not to be obligated to live in particular living arrangements is not only regulated in a specific article, Article 19, but can also be found in other articles. For instance, Article 17 is about protecting the integrity of the person, where the point is made that persons with disabilities shall not be forced to live in a place against their wills. The recognition of the right of persons with disabilities to independent living requires a shift away from institutions towards deinstitutionalisation, the use of 'in-home, residential and other community support services', and respect for their freedom to make their own choice of where and with whom to

¹⁰⁶⁴ ICCPR art 7.

¹⁰⁶⁵ CAT art 16.1.

¹⁰⁶⁶ ICCPR art 4.1.

¹⁰⁶⁷ CAT art 16.1.

live.¹⁰⁶⁸ Because forced institutionalisation on the basis of disability amounts to inhumane and degrading treatment, it is prohibited in Article 19 under the CRPD, which also requires that support services enabling persons with disabilities to live in the community are made available.¹⁰⁶⁹ Furthermore, because other rights under the CRPD such as the right to privacy under Article 22 cannot be maintained and protected in institutional settings, institutionalisation goes against the CRPD's purpose and objective.

The institutionalising of persons with disabilities is thus a systematic violation of the fundamental freedom of persons with disabilities under international human rights law. It is in violation of Articles 7 and 16 under the ICCPR and CAT, respectively. More importantly, it is also a systematic violation of several other articles, namely, Articles 15, 16, 17, 19 and 22 under the CRPD, which specifically set out to protect the fundamental freedom of persons with disabilities from, *inter alia*, being subject to inhumane, cruel and degrading treatment, and to ensure that they are free from any forms of exploitation, violence and abuse.¹⁰⁷⁰

The proponents of deinstitutionalisation conclude that the rejection of all forms of confinement imposed upon persons with disabilities under the CRPD sends out a message that there is a need for the deinstitutionalisation of persons with disabilities, and that the segregation and institutionalisation of persons with disabilities is not in the best interest of those persons or the society in which they live.¹⁰⁷¹

However, it is argued that these ways of understanding institutionalisation only rely on a restrictive meaning, where patients are victims without autonomy, who are being isolated from the outside world.¹⁰⁷² Thus relevant research that exists supports the idea that institutionalisation involves patients accepting institutional life and developing a lack of desire to leave after a long stay.¹⁰⁷³ However, it is also argued that institutionalisation is still considered an essential type of care today, as community care may not be suitable for all

¹⁰⁶⁸ CRPD art 19(a), (b).

¹⁰⁶⁹ Ibid art 19(b), (c).

¹⁰⁷⁰ Ibid arts 15, 16, 17, 22.

¹⁰⁷¹ MacKay, above n 23, 329.

¹⁰⁷² Chow and Priebe, above n 1051, 179.

¹⁰⁷³ Ibid.

patients, especially those with acute mental illness and a lack of support.¹⁰⁷⁴ In addition, persons with severe mental illness living in the community still episodically get admitted to those institutions.¹⁰⁷⁵ Hence it has been argued that the importance of institutionalised care may increase again regardless of the promotion of the community-based care over the past few decades.¹⁰⁷⁶

It is in this context that it should be understood that the CRPD does not prohibit institutionalisation, it just promotes as much as it can deinstitutionalisation by providing necessary services for this process.¹⁰⁷⁷ At the same time it respects the preference of persons with disabilities with whom and where they live.¹⁰⁷⁸ This is to say that if persons with disabilities make a decision to live in an institution, then the response of the CRPD is that his or her preference should be respected. Thus the moderate view is that it cannot be denied that there are many good institutions providing quality institutional care. Hence, institutional care for persons with disabilities is needed and hopefully with some legal measures as preventive methods, persons with disabilities, if they so choose to live in such settings would not be subject to degrading and inhumane treatment.

Institutionalisation of persons with disabilities perpetuates a harmful environment that in turn makes forced medical treatment more probable. Correspondingly deinstitutionalisation of persons with disabilities can help them choose whether or not to undergo medical treatment deemed necessary for their disability. The issue of involuntary medical treatment is another distinctive matter in the disability area, which I will discuss in the next subsection.

5.4.4. A Strategic Proposition on Involuntary Medical Treatment

Under the medical model of disability, involuntary medical treatment has been considered a potential measure to save lives and protect persons with disabilities, especially those with severe intellectual disabilities, and to protect others from imminent harm. However, I argue in

¹⁰⁷⁴ Ibid 170.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ CRPD, art 19(c).

¹⁰⁷⁸ Ibid 19(a).

this subsection that involuntary medical treatment on the grounds of disability is always detrimental. I will then show that the CRPD can be interpreted as not prohibiting but at the same time not permitting involuntary medical treatment on those grounds. It is therefore necessary to explore the implications of the message sent out by the CRPD in neither prohibiting nor permitting involuntary medical treatment.

Involuntary medical treatment imposed upon persons with disabilities is so detrimental that instead of saving and protecting persons with severe intellectual disabilities from imminent harm, it actually accelerates mental health problems in different forms.¹⁰⁷⁹ The treated individuals are made to believe that they are bad or dangerous to society and incapable of making decisions.¹⁰⁸⁰ They lose their sense of self¹⁰⁸¹ and feel segregated because involuntary medical treatment might include repeatedly forced hospitalisation and institutionalisation. In addition, persons with disabilities who have been forced into involuntary medical treatments have undergone various horror experiences in terms of inhumane and degrading treatment, such as being drugged or even clinical experimented upon against their will.¹⁰⁸² Consequently, persons with disabilities whose conditions have become worse after undergoing forced medical treatment outnumber those who have become better.¹⁰⁸³ The so-called ‘best-intention’ use of involuntary medical treatment can lead to irreparable damage.¹⁰⁸⁴ Those who have undergone such treatment encounter many social problems such as post-traumatic stress and loss of a sense of autonomy, self-worth and self-determination,¹⁰⁸⁵ which in some cases leaves them feeling suicidal.¹⁰⁸⁶

Because of its detrimental effect on persons with disabilities, involuntary medical treatment had been addressed under international human rights laws before the adoption of the CRPD. The principal document in this regard is the *Principles for the Protection of*

¹⁰⁷⁹ World Network of Users and Survivors of Psychiatry, *Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities* World Network of Users and Survivors of Psychiatry
<<http://www.wnusp.net/index.php/crpd.html>> 32.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Ibid.

¹⁰⁸² Ibid 32–3.

¹⁰⁸³ Ibid.

¹⁰⁸⁴ Ibid.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Ibid.

Persons with Mental Illness and the Improvement of Mental Health Care.¹⁰⁸⁷ However, instead of considering involuntary medical treatment as tantamount to inhumane and degrading treatment and condemning its detrimental effects on persons with disabilities, these *Principles* allow for involuntary medical treatment to be conducted. They do provide certain safeguard measures such as supervision by an independent authority and the requirement that the treatment is in the best interests of the patient.¹⁰⁸⁸ Despite controversy, the *Principles* were considered ‘a new departure in the perception of the role of law’ pertinent to the protection of persons with intellectual disabilities, since they emphasise positive treatment and the quality of the treatment,¹⁰⁸⁹ and also prohibit clinical experimentation, sterilisation and psychosurgery.¹⁰⁹⁰ In addition, the *Principles* were considered to be guidelines for the interpretation of Article 7 under the ICCPR in the context of the institutionalisation of persons with disabilities, and to provide necessary information on free and informed consent for medical treatment.¹⁰⁹¹ Furthermore, the *Principles* served as a reference for the interpretation of the right to physical and mental health pertaining to persons with disabilities under the ICESCR Committee’s General Comments.¹⁰⁹²

The CRPD seems not to be able to escape from the shadow of the controversy about involuntary medical treatment, but regulates the issues in Article 17 in a pragmatic way. That is, the CRPD does not explicitly prohibit the use of involuntary medical treatment, but neither does it endorse the idea. In the absence of any explicit regulations, the issue on involuntary medical treatment can only be interpreted by reading the CRPD drafting documents.¹⁰⁹³ From these, the drafting text of Article 17 requires States Parties to protect persons with disabilities from any coercive interventions that aim at ‘correcting, improving or alleviating any actual or

¹⁰⁸⁷ *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991*, UN Doc A/RES/46/119.

¹⁰⁸⁸ *Ibid* Principle 11.6.

¹⁰⁸⁹ Quinn and Degener, above n 164, 33–4.

¹⁰⁹⁰ *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991*, UN Doc A/RES/46/119 Principle 11.

¹⁰⁹¹ Quinn and Degener, above n 164, 33–4.

¹⁰⁹² *ICESCR Committee General Comment No. 5*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) [7]; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (11 August 2000) [2] (*ICESCR Committee General Comment No. 14*).

¹⁰⁹³ *Vienna Convention on the Law of Treaties* art 32.

perceived impairment'.¹⁰⁹⁴ This means that the draft of Article 17 did not prohibit involuntary medical treatment. Because the final text of Article 17 of the CRPD is confined only to a simple statement on the protection of the physical and mental integrity of the person, without any specific description,¹⁰⁹⁵ and within the context of the discussion on the draft text of Article 17, it can be argued that the CRPD does not explicitly prohibit the application of involuntary medical treatment.

Concurrently, it can be argued that the CRPD does not support involuntary medical treatment on the ground of disability. This is because the international disability community, especially DPOs, resolutely advocated for eliminating all forms of such treatment on the ground of disability during the CRPD negotiation process.¹⁰⁹⁶ However, when they recognised that their recommendation on the elimination of all forms of such treatment on the ground of disability for the draft text of Article 17 would not be taken seriously by the negotiating States and would not be incorporated into the draft text of Article 17, they changed their tactic. Thus, instead of having an explicit provision on elimination of all forms of such treatment on the ground of disability, they lobbied for a future CRPD without any regulation on the issue of involuntary medical treatment. The reason behind this tactic was that where there was no provision on either prohibiting or permitting compulsory medical treatment under the CRPD, there would be no legal framework for the interpretation of the issue in the future implementation of the CRPD.¹⁰⁹⁷ Hence it can be argued that the CRPD does not support involuntary medical treatment on the grounds of disability.

In contrast to this position, it is contended that the CRPD should be interpreted to mean that it explicitly prohibits involuntary medical treatment on the grounds of disability. The basis for this argument is that the CRPD recognises equal legal capacity, free and informed consent of persons with disabilities, their equal right to respect for their physical and mental integrity, and their freedom from torture and cruel, inhumane or degrading treatment or

¹⁰⁹⁴ *Report of the CRPD's Seventh Negotiation Session*, UN Doc A/AC.265/2006/2, Annex II, art 17.2.

¹⁰⁹⁵ *CRPD* art 17.

¹⁰⁹⁶ Kayess and French, above n 24, 30.

¹⁰⁹⁷ *Ibid.*

punishment as envisaged under Articles 12, 25, 17, and 15 respectively.¹⁰⁹⁸ It is even further contended that involuntary medical treatment should be criminalised as it is considered a grave violation of human rights.¹⁰⁹⁹ I however maintain that this suggestion is extreme and a step beyond what is practical, and that the CRPD does not in fact prohibit involuntary medical treatment as discussed.

I therefore contend that the CRPD does not explicitly permit involuntary medical treatment, even though the draft text of Article 17 appears to allow it with some strict conditions such as it being conducted only in exceptional circumstances, in ‘the least restrictive setting possible’ and with appropriate legal safeguards, and where it is concerned with the best interests of the person with disabilities.¹¹⁰⁰ My reasoning is that rights and fundamental freedoms of persons with disabilities, including the freedom to make their own choices which the CRPD seeks to protect, are unambiguously stated under its Preamble (n) and Article 1.¹¹⁰¹ In addition, the freedom to make one’s own choices has been recognised as one of the CRPD’s guiding principles,¹¹⁰² and made available to all persons with disabilities. Therefore, in the context of all this background information and the CRPD text, I conclude that the CRPD does not permit involuntary medical treatment.

It has been said that ‘the most critical areas of human rights violation for persons with disability – the use of coercive state power for the purpose of ‘treatment’ – remains without any specific regulation’.¹¹⁰³ However, I argue that by neither prohibiting, nor supporting, nor permitting involuntary medical treatment, the CRPD has adopted a strategic position on involuntary medical treatment. That is, when involuntary medical treatment is neither prohibited nor permitted, there would be no legitimacy for the interpretation of the issue for the future implementation of the CRPD. This is because the drafters of the CRPD envisioned that there would be States Parties who would interpret around the text to apply involuntary medical treatment, and indeed Australia, Canada and Norway have declared that the CRPD

¹⁰⁹⁸ Minkowitz, above n 29, 405.

¹⁰⁹⁹ Ibid.

¹¹⁰⁰ *Report of the CRPD's Seventh Negotiation Session*, UN Doc A/AC.265/2006/2 Annex II art 17.3–4.

¹¹⁰¹ CRPD art 1, Preamble para (n).

¹¹⁰² Ibid art 3(a)

¹¹⁰³ Kayess and French, above n 24, 30.

permits compulsory medical treatment when needed.¹¹⁰⁴ In addition, this subtle refusal on the part of the CRPD to opt for a specific approach on involuntary medical treatment would also fit into its pluralistic view of disability, as discussed, in particular, its adoption of selective aspects of all three models of disability including the medical model. The final goal is to avoid persons with disabilities being subject to involuntary medical treatment, but at the same time, to avoid hostility towards or privileges for being a person with a disability. Therefore, having no specific regulations on involuntary medical treatment does not mean disaster for persons with disabilities. This then is a distinctive feature of the CRPD in dealing with the issue in the disability context.

Having comprehended the hybrid feature, legal capacity, deinstitutionalisation, and freedom from involuntary medical treatment under the CRPD through the preceding analysis, the next step is how to implement all these distinctive normative rules in order to realise the human rights of persons with disabilities. One of the preconditions for the implementation of all these issues is to ensure a barrier-free society for persons with disabilities. By a barrier-free society, I mean accessibility for persons with disabilities, which I will discuss in the following subsection.

5.4.5. Accessibility

The concept of accessibility for persons with disabilities is not novel. It is regulated in many legally non-binding instruments,¹¹⁰⁵ and several municipal laws,¹¹⁰⁶ spelt out in general comments by the ICESCR Committee, though it is narrow in scope, attending only to health facilities, goods and services.¹¹⁰⁷ The concept is also developed by professional organisations specialising in universal and inclusive design.¹¹⁰⁸ But accessibility is an issue of ongoing debate concerning both de facto and de jure solutions to bringing changes to the lives of

¹¹⁰⁴ United Nations, above n 804.

¹¹⁰⁵ WPA, UN Doc A/37/51, paras 113–4; *Standard Rules*, UN Doc A/RES/48/96, Rule 5.

¹¹⁰⁶ *USADA*, title II; *An Act Providing for the Rehabilitation, Self-development and Self-reliance of Disabled Persons and their Integration into the Mainstream of Society and for Other Purposes 1992* (The Phillipines) Republic Act No. 7277, title II ch VI.

¹¹⁰⁷ *ICESCR Committee General Comment No. 14*, UN Doc HRI/GEN/1/Rev.9 (Vol. I).

¹¹⁰⁸ Philip R. Oxley, *Inclusive Mobility: A Guide to Best Practice on Access to Pedestrian and Transport Infrastructure* (Department for Transport Great Britain, 2002).

persons with disabilities worldwide. Therefore, it is not unexpected that accessibility has been recognised as one of the CRPD's guiding principles defined under Article 3(f),¹¹⁰⁹ and strengthened by a stand-alone article, Article 9.¹¹¹⁰

In this subsection I will briefly discuss the concept of accessibility. I will introduce the content of Article 9 covering the scope of accessibility under the CRPD, and look at the importance of accessibility as a precondition for realising the human rights of persons with disabilities under the CRPD. I will then set out the over-reaching scope of Article 9, which in fact represents another tactical choice on the part of the CRPD, rather than a point for criticism. More importantly, I will contend that accessibility is an integral part of universal design and an essential step towards achieving social inclusion for persons with disabilities.

Accessibility refers to the relationship between a person and their environment.¹¹¹¹ Specifically, it is the interaction of personal functional capacity and the built environment, in which functional capacity can be that of a person or a group of persons; and the built environment refers to barriers in the environment resulting in noncompliance with official technical norms and standards.¹¹¹² Hence there are always three components in this relationship: (1) the personal component referring to the functional capacity of the individual or group; (2) the environmental component referring to barriers in the environment in relation to the norms and standards available; and (3) an evaluation of the interaction of (1) and (2) indicating any issue of accessibility.¹¹¹³

Accessibility is designed to accommodate or to respond to an individual experience of disability in interacting with a built environment, or products, services, etc.¹¹¹⁴ Because accessibility seeks to eliminate specific barriers in the original design to increase usability, it usually entails applying the minimum standards set by regulations and building codes. The resolution may be very specific and only address the needs of a particular impairment without

¹¹⁰⁹ CRPD art 3(f).

¹¹¹⁰ Ibid art 9.

¹¹¹¹ Susanne Iwarsson and Agnetha Ståhl, 'Accessibility, Usability and Universal Design — Positioning and Definition of Concepts Describing Person-Environment Relationships' (2003) 25(2) *Disability & Rehabilitation* 57, 61–2.

¹¹¹² Ibid.

¹¹¹³ Ibid.

¹¹¹⁴ Inger Marie Lid, 'Developing the Theoretical Content in Universal Design' (2013) 15(3) *Scandinavian Journal of Disability Research* 203, 209.

considering the needs of others.¹¹¹⁵ In this sense, accessibility represents the ideal of equality as difference, for it accommodates the particular differences of persons with disabilities.

In keeping with the understanding of the concept of accessibility, Article 9 of the CRPD stresses the importance of accessibility to enable persons with disabilities ‘to live independently and participate fully in all aspects of life’.¹¹¹⁶ It describes the need to make the built environment accessible, which includes transportation, information and communications technologies, and facilities open to the public in urban or rural areas.¹¹¹⁷ In addition, the CRPD stresses that accessibility is not just about public places and built environment, it also extends to the services such as information, communications and other services, including electronic services and emergency services.¹¹¹⁸

States Parties are obligated to discharge several duties with regard to realisation of accessibility.¹¹¹⁹ These include, *inter alia*, developing and monitoring standards and guidelines on accessibility, providing tangible assistance such as signage in Braille in public buildings, providing professional sign language interpreters, and promoting access to new technologies, including the internet and accessible information and communication technologies for persons with disabilities.¹¹²⁰

As a guiding principle, accessibility can be found throughout the CRPD as a precondition for exercising and realising the human rights of persons with disabilities. As discussed in the previous section, the right to freedom of expression and opinion and access to information under Article 21 of the CRPD become meaningless if there are no accessible formats of communication and technologies. Similarly, where there is no physical accessibility, notwithstanding the availability of assistive devices, the right to personal mobility as defined under Article 20 will not be realised. The same is true for the rights to justice, to independent

¹¹¹⁵ M. G. Ormerod and R. A. Newton, 'Moving Beyond Accessibility: The Principles of Universal (inclusive) Design as a Dimension in nD Modelling of the Built Environment' (2005) 1(2) *Architectural engineering and design management* 103, 104.

¹¹¹⁶ CRPD art 9.1.

¹¹¹⁷ Ibid.

¹¹¹⁸ Ibid art 9.1(b).

¹¹¹⁹ Ibid art 9.2.

¹¹²⁰ Ibid art 9.2.

living and inclusion in the community, and to participation in political and public life.¹¹²¹ In this regard, accessibility is considered a right belonging to the category of economic, social and cultural rights to assist the realisation of civil and political rights.

Furthermore, accessibility also helps realise economic, social and cultural rights. For example, segregated education would be the main educational method for persons with disabilities if the general school system failed to reasonably accommodate students with disabilities. Such accommodation would require appropriate learning materials and facilities¹¹²² such as learning materials in Braille for students with complete loss of vision. By the same token, inaccessible workplaces, health facilities and recreation areas would create chronic underemployment of persons with disabilities, and their exclusion from healthcare and cultural services.¹¹²³ To summarise, without an accessibility dimension attached, the human rights of persons with disabilities would seldom be realised.

The fact that Article 9 on accessibility being considered as a precondition for realising the human rights of persons with disabilities does not mean that it is not subject to criticism. It has been criticised for being too overarching and offering insufficient regulation on technical standards and guidelines on accessibility such as universal architectural design or measures for the assessment of their future implementation.¹¹²⁴ However, I argue differently, that it is not a preferred option to have legally binding uniform standards in relation to accessibility while States Parties have diverse economic, social and cultural conditions. Given that the universality of human rights has sometimes been contested,¹¹²⁵ it is hardly likely that States Parties would agree with the idea of having legally binding uniform standards on accessibility. It would therefore be more practical to have an authoritative interpretation made by the CRPD Committee to be available for States Parties to consult when needed.

¹¹²¹ Ibid arts 13, 19, 29.

¹¹²² Ibid art 24.

¹¹²³ Ibid arts 25, 26, 27, 30.

¹¹²⁴ Tracy R. Justesen and Troy R. Justesen, 'An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses To Sign This UN Convention' (2007) 14(2) *Human Rights Brief* 8, 38.

¹¹²⁵ Shashi Tharoor, 'Are Human Rights Universal?' (1999) Winter 1999/2000 *World Policy Journal* 1; Thomas M. Franck, 'Are Human Rights Universal?' (2001) 80(1) *Foreign Affairs* 191.

The right to accessibility as the right to live in a barrier-free society is a precondition for realising the human rights of persons with disabilities, and at the same time is an integral part of universal design. The concept of universal design under the CRPD refers to ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design’,¹¹²⁶ and universal design ‘shall not exclude assistive devices for particular groups of persons with disabilities where this is needed’.¹¹²⁷ This is an essential step for achieving social inclusion for persons with disabilities.

5.5. Concluding Remarks

In this chapter I have articulated that the CRPD conceptually possesses inherent merits and values for creating platforms for positive change towards the advancement of the human rights of persons with disabilities. I have analysed to what extent the CRPD has incorporated the concepts of equality, discrimination and disability. I have contended and shown that the CRPD has taken a pluralistic approach to disability by selectively adopting the most reasonable aspects of all existing understandings of disability. Therefore, the CRPD avoids the theoretical quagmires about models of disability and instead has adopted a pragmatic approach. That is, that any understanding of disability that works in the light of the CRPD’s guiding principles to assist the implementation of the CRPD in order realise the human rights of persons with disabilities will count. I have contended, in terms of equality, that the CRPD has demonstrated that all forms of equality concurrently and harmoniously work together. Similarly, with regard to discrimination, the CRPD has reflected the theoretical discussion of disability discrimination, and adopts the position that any aspect, which fits into the context of disability, is to be taken into consideration.

I have also argued that the CRPD normatively possesses inherent merits and values for creating platforms for positive changes towards the advancement of the human rights of

¹¹²⁶ CRPD art 2.

¹¹²⁷ Ibid.

persons with disabilities by its double combination of an anti-discrimination treaty and a combination of two sets of human rights – a tactical position with respect to the understanding of legal capacity and the issue of involuntary medical treatment, along with a rejection of the institutionalisation of persons with disabilities. It has prioritised the final goal of transforming the relevant legal concepts and normative rules into concrete results through which persons with disabilities are able to exercise their legal capacity, and are protected from institutionalisation and involuntary medical treatment. Lastly, the CRPD has defined accessibility as a precondition for realising the human rights of persons with disabilities and at the same time constitutes the essential step towards achieving social inclusion for persons with disabilities.

It is important however, to mention here that the CRPD indeed has much more to offer than just its normative merits and values as discussed above. The CRPD is evidently a product of a social change in understanding the concept of disability. The adoption of the CRPD resulted from a long struggle of the disability movement both nationally and internationally, in which the understanding of the concept of disability has evolved from personal impairment and misery to politics of disablement demanding changes from society and eventual recognition of their human rights. This redefining of the concept of disability has helped change the language of the disability discourse in a way that it puts an end to the endless theoretical debates about which model of disability is better than the others, about the rejection of impairment or disability, and about whether disability results from personal functional limitation or social and structural barriers. Now when disability is mentioned, it is the understanding of disability under the CRPD which prevails.

The CRPD is a product of long but much awaited legal developments. Like other UN human rights treaties commencing as ‘soft law’ and then conjuring up as ‘hard law’ instruments,¹¹²⁸ the CRPD comes into being from not just one but many non-legally binding instruments dealing with the disability issues. Among other things these include from the very

¹¹²⁸ The ICCPR, and ICESCR originated from the UDHR, and the CERD, CEDAW, and CRC originated from Declarations on Elimination of All Forms of Racial Discrimination of 1963, on Elimination of Discrimination against Women of 1967, and on Rights of the Child of 1959, respectively.

beginning resolutions on rehabilitation and prevention of disability to the very primitive notion of human rights for persons with disabilities under the World Programme of Action concerning Disabled Persons and Standard Rules on the Equalization of Opportunities for Persons with Disabilities. Now as a normative standard, the CRPD has made it clear that disability is to be dealt with as a human rights issue rather than as charity work.

As such, the CRPD plays a very important role at the national level when its normative merits and values are transformed into domestic laws. That is the CRPD provides insights for development and reform of disability legislation for States Parties by creating new regulatory regimes that respect and protect the human rights of persons with disabilities. In addition, the CRPD carries the potential to empower persons with disabilities and their DPOs through ensuring their full and meaningful participation in all processes of development, implementation and monitoring of national legislation on disability, which will be discussed further in Chapter VI. The CRPD helps in altering power relations within a State Party through the processes of consulting persons with disabilities when making laws affecting their lives, not just dictating the law as used to be done before, and considering them as equal partners in those law making and implementing processes, not just a target group of help.

Yet it is undeniable that the CRPD has weaknesses, as other international human rights treaties do. In fact, its main strength – of pragmatic flexibility – might create difficulties for the CRPD Committee, who will have to tackle all of its ambiguities in coming times. For example, a compromise has been made on important issues such as legal capacity. One might expect that an international human rights treaty should constitute strict provisions of common standards in order to protect vulnerable groups from all forms of exploitation, violence and abuse in even the most isolated and remote corners of the world. But the CRPD does not always meet that expectation and the CRPD Committee will have to work with its ambiguities.¹¹²⁹

¹¹²⁹ Because international treaty negotiation can relate to a consensus building process, in which almost two hundred countries of the world with extremely diverse in religious, cultural, political and economic conditions have to come to common standards, which can satisfy all the countries involved. The CRPD is an agreement in which each party involved had given up some of the things they wanted so that all parties involved were satisfied at the end, which was to have the CRPD

Another issue is that despite the CRPD's compromises, various States Parties have expressed extensive reservations while ratifying the CRPD.¹¹³⁰ At the time of writing, 166 states have ratified the CRPD, and 29 States Parties and the European Union have lodged 69 substantive reservations and interpretative declarations.¹¹³¹ This number seems small, and certainly not as extreme as in the case of the CEDAW and CRC.¹¹³² However, these reservations have been made to key issues and to all substantive provisions on the rights of persons with disabilities from Article 9 to Article 33. This might be a threat to the CRPD's integrity.

Finally, the biggest challenge now is how to transform these normative rules of the CRPD into domestic disability legislation to bring real changes to the lives of persons with disabilities. A domestic transformation of this kind may be considered as bringing in the greatest impact of a human rights treaty to a State Party.¹¹³³ There are two ways of internalising the provisions of the CRPD, in terms of procedure. According to the monist approach,¹¹³⁴ the CRPD's provision automatically become part of the domestic laws of States Parties through ratification or accession, while according to the dualist approach,¹¹³⁵ the CRPD's provisions need to be incorporated through a legislative process after ratification before they become part of the domestic law.

Yet more importantly, the complexity of internalising the normative merits and values expressed in the CRPD into the domestic laws changes the discourse at various levels. Thus views underlying the concept of disability, principles of equality, non-discrimination and normative norms such as legal capacity, deinstitutionalisation, issue of forced medical

adopted.

¹¹³⁰ Article 46 of the CRPD does not prohibit reservations in general; it does not permit reservations that are incompatible with its object and purpose.

¹¹³¹ United Nations, above n 21.

¹¹³² Rebecca J Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1989) 30 *Va. J. Int'l L.* 643; Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) *American Journal of International Law* 281; Michele Brandt and Jeffrey A. Kaplan, 'The Tension between Women's Rights and Religious Rights: Reservations to Cedaw by Egypt, Bangladesh and Tunisia' (1995) 12(1) *The Journal of Law and Religion* 105; William Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18(2) *Human Rights Quarterly* 472.

¹¹³³ Christof H. Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23 *Human Rights Quarterly* 483, 487.

¹¹³⁴ *Ibid* 490.

¹¹³⁵ *Ibid*.

treatment and accessibility all change in subtle ways. These internalising processes of necessity involve different stakeholders including state actors, civil society (DPOs, parents' organisations of persons with disabilities – even though the CRPD missed out to mention families of persons with disabilities, and NGOs), and market actors (service providers, employers). A powerful aspect of the CRPD lies in its ability to engage those relevant stakeholders especially DPOs and parents' organisations of persons with disabilities in understanding its normative merits and values, and then advocating for development of domestic disability policy and legislation, and national action programmes, as well as judicial interpretation on the disability issues for its implementation.

This complexity will be investigated in Chapter VII on the implementation of the CRPD by its States Parties through examining actual policies and legislation internalised and implemented by States Parties to the CRPD. Before that, however, I will introduce, in the following chapter, the monitoring mechanism of the CRPD, including the CRPD Committee as a main player, along with other players such as NHRIs and DPOs.

CHAPTER VI: THE MONITORING MECHANISM UNDER THE CRPD

6.1. Introductory Remarks

A monitoring system is the single most visible method of measuring compliance with treaty obligations by states parties. In this thesis so far, I have argued that the distinctiveness of the CRPD lies in it adopting flexible and multi-variant dimensions of the concepts of disability, equality and non-discrimination. It thus stands out as an international convention that pursues the goal of achieving a fairer society for persons with disabilities. However, this goal is significantly tied up with the existence of mechanisms to ensure that the State Parties perform their obligations well. It is in this way that the monitoring mechanisms can play a significant role.

The CRPD, like all other human rights treaties, has established the Committee on the Rights of Persons with Disabilities – the CRPD Committee – to oversee its implementation.¹¹³⁶ The CRPD and its Optional Protocol have adopted three procedures: a state reporting procedure, an individual complaint procedure, and an inquiry procedure, which are assumed by the CRPD Committee at the international level.

The CRPD, unlike all other human rights treaties, requires States Parties at national level to establish a framework to promote, protect, and monitor the implementation of the CRPD within their jurisdiction. The framework that the CRPD refers to here concerns national human rights institutions (NHRIs).¹¹³⁷ It requires States Parties to involve civil society organisations, including non-governmental organisations (NGOs) and organisations of persons with disabilities (DPOs) in the monitoring process.

The monitoring mechanism, therefore, is essential for upholding the CRPD's principles and normative rules. In this chapter I argue that the monitoring mechanism under the CRPD is distinctive. The analysis will provide a context for the discussion, in Chapters VII and VIII, of the implementation of the CRPD and its Optional Protocol.

¹¹³⁶ CRPD arts 34–9.

¹¹³⁷ Ibid art 33.2.

The chapter is divided into five sections. Section 6.1 is the introduction. Section 6.2 introduces the CRPD Committee with regard to its membership. I will then analyse its three established functions, namely, consideration of State reports, individual complaints and conducting inquiries. Section 6.3 is an analysis of DPOs and their roles and functions in monitoring the implementation of the CRPD. A similar analysis of NHRIs will be undertaken in Section 6.4. Section 6.5 is the conclusion of the chapter.

It is important to note that this chapter will not present any substantive features of the work of this monitoring mechanism of the CRPD, such as the implementation of concrete Articles of the CRPD. Substantive aspects will be discussed in the next chapters on the CRPD's implementation through monitoring work.

6.2. The CRPD Committee

The CRPD Committee is a body of 18 independent experts established under Article 34 of the CRPD with the responsibility of monitoring the implementation of the CRPD at an international level.¹¹³⁸ Members of the CRPD Committee are elected from a list of candidates nominated by the States Parties to the CRPD at a Conference of the States Parties, for a four year term, with a possibility of being re-elected once.¹¹³⁹ Members must be nationals of the States Parties.¹¹⁴⁰ However, the CRPD does not specify the qualification requirements for being a member, but simply states that the members of the CRPD Committee shall be of high moral standing and recognised for their competence and experience in the field covered by the

¹¹³⁸ Ibid art 34.1. In a very popular form of understanding, the CRPD Committee means a human rights treaty body or committee.

¹¹³⁹ Ibid art 34. Nominations are usually due 2 months before the days of the States Parties Conference. By the time of this writing, there have been 4 Conferences of States Parties to elect new members of the CRPD Committee, which are 1st, 3rd, 5th, and 7th Conferences of States Parties. The due date for nomination for the 7th meeting of the States Parties was 10 April 2014. The nominations and biographical data should be submitted to the Office of the United Nations High Commissioner for Human Rights, United Nations Office at Geneva. At the time of entry into force, there were 12 members elected by the first Conference of States Parties on 3 November 2008, as per regulation under Article 34.2 of the CRPD. The composition of full membership of the CRPD Committee with 18 experts started after there were additional 60 States Parties to the CRPD as per regulation under Article 34.2 of the CRPD and the additional 6 members were elected by the 3rd Conference of States Parties on 1 September 2010. The number of 18 experts is a standard number for most of the human rights treaties committees; however, the number is varied for different committees. For example, the CAT and CED Committees both consist of as few as 10 members; CMW Committee of 14, while the CEDAW Committee and CAT sub-committee on torture prevention comprise up to 23, and 25, respectively.

¹¹⁴⁰ Ibid art 34.5.

CRPD.¹¹⁴¹ What is meant by this will be very much based on the claims of States Parties when putting forward their candidates.

The CRPD Committee is basically no different from any other human rights treaty committee with respect to the procedures for membership nomination and election, monitoring functions and working rules and methods. However, it is distinctive with regard to its membership composition and the formal participation of non-state and other state players, including civil society organisations such as DPOs, NGOs and NHRIs in discharging its functions. It is distinctive, for example, regarding the presence of independent experts with disabilities as members of the CRPD Committee and in that the CRPD Committee works closely with DPOs as non-state players and NHRIs and other state stakeholders in implementing and monitoring the implementation of the CRPD.

In the next section a discussion of the membership of the CRPD Committee is followed by an analysis of the three functions performed by the CRPD Committee.

6.2.1. Members

In the current composition of the CRPD Committee of 18 experts, 6 experts are women and 12 are men.¹¹⁴² Their geographical distribution shows 3 experts from Latin America and the Caribbean, 4 from Africa, 3 from Eastern Europe, 3 from Asia-Pacific and 5 from Western Europe and other States,¹¹⁴³ allocated according to the UN voting regions. Among the 18 members, 17 of them are persons with disabilities, including 7 with visual impairments, 1 with a hearing impairment and 9 with physical impairments. The current members of the CRPD Committee are aged from 40 to 71 years old.¹¹⁴⁴

The CRPD Committee's members have a variety of professional backgrounds such as law, the arts, political and policy science, education, international relations, EU studies, human rights, disability and gender studies, as well as science, including maths, chemistry,

¹¹⁴¹ Ibid art 34.3.

¹¹⁴² Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities — Membership* (26 January 2016) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx>>.

¹¹⁴³ Ibid.

¹¹⁴⁴ Ibid.

information technology, engineering, and computer science.¹¹⁴⁵ This reflects that disability is present in all aspects of life.

A human rights treaty body is often considered to be a quasi-judicial body, so the work tends to appeal to persons with a legal background. 7 out of 18 members of the CRPD Committee have a legal background.¹¹⁴⁶ The extreme cases are the HRC and CEDAW Committee, which have been criticised for having a majority of people from legal professions as their members,¹¹⁴⁷ and this is still the case, with the HRC of 18 being comprised only of people with a legal background.¹¹⁴⁸

Like other human rights committees, the CRPD Committee members tend to be those who have been educated in Western institutions. In the current composition of the CRPD Committee, 7 out of 13 members from non-Western countries have obtained their higher education in Western institutions, mainly the UK, the US and Australia, which means 12 members in total or roughly 70% with a Western university education.¹¹⁴⁹ Critics have argued that this might result in the imposition of a western view of disability on non-western cultural systems.¹¹⁵⁰

In terms of qualifications, all members of the CRPD Committee hold senior positions such as directors, managers, professors and members of Parliaments in their home countries.¹¹⁵¹ There is no formal prohibition by any human rights treaties against members of the human rights treaty committees holding government positions or being employed by inter-governmental organisations.¹¹⁵² In practice, members of any human rights treaty committee tend to be primarily academic. For example, the current HRC has 16 out of 18 members who are university lecturers or professors.¹¹⁵³ However, the CRPD Committee only has 4 out of 18

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Ibid.

¹¹⁴⁷ Geir Ulfstein, 'Individual Complaints' in Hellen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 73, 78.

¹¹⁴⁸ Office of the United Nations High Commissioner for Human Rights, *Human Rights Committee* (26 January 2016) <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>>.

¹¹⁴⁹ Office of the United Nations High Commissioner for Human Rights, above n 1142.

¹¹⁵⁰ Kayess and French, above n 24, 23.

¹¹⁵¹ Office of the United Nations High Commissioner for Human Rights, above n 1148.

¹¹⁵² Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, 1994), 44.

¹¹⁵³ Office of the United Nations High Commissioner for Human Rights, above n 1148.

members who are university lecturers or professors. This illustrates that in the disability field, practical experience is considered more important than academic knowledge.

A distinctive feature of the CRPD is that all members of the CRPD Committee have personal and professional experience in the disability field. Of a total of 18 members, 17 of them are persons with disabilities. The member who is not a person with disability has 25 years of working experience with persons with disabilities.¹¹⁵⁴ This personal and professional experience with disability is vital for being a member of the CRPD Committee, because such experience enables them to understand the challenges and disadvantages of being a person with a disability. It also enables them personally to understand the nature of the oppression exercised over persons with disabilities by society, because persons who have had personal experience with a disability 'are less likely to distort the collective experience of oppression and are less likely to sell out to the highest bidder precisely because of intellectual work is rooted in personal and collective experience'.¹¹⁵⁵

Furthermore, they have better insight in relation to the values of social participation and integration, self-determination, social justice, equality and dignity for persons with disabilities. Importantly, the characteristic of self-determination for persons with disabilities has been shifted from self-advocacy for their daily needs to a stronger emphasis on the elimination of structural discrimination and social integration. The presence of persons with disabilities on the CRPD Committee gives them a chance, at a very macro level, to take control of matters related to their own lives, including their human rights and fundamental freedoms, without requiring the help or participation of persons without disabilities, thus claiming their autonomy, independence and power.¹¹⁵⁶

Being a member of the CRPD Committee means participating in an individual and collective empowering process for persons with disabilities. As an individual empowering process, it helps build up knowledge on human rights and other issues relating to persons with

¹¹⁵⁴ International Disability Alliance, *Questionnaire to Candidates for the UN Committee on the Rights of Persons with Disabilities CRPD Committee Elections: Jonas Ruškus from Lithuanian* (26 January 2016) <<http://www.internationaldisabilityalliance.org/en/seventh-conference-states-parties-june-2014>>, question 2.

¹¹⁵⁵ Oliver, above n 127, 167.

¹¹⁵⁶ Tom Shakespeare, 'Disabled People's Self-organisation: a New Social Movement?' (1993) 8(3) *Disability, Handicap & Society* 249, 251–2.

disabilities, and gaining international working experience. As a collective empowering process, it helps create a ‘sense of solidarity, purpose, and collective strength’, which enhances the disability community.¹¹⁵⁷ Therefore persons with disabilities are the most qualified, and best equipped, and in the best position, to work for themselves and for others with disabilities.¹¹⁵⁸

This is confirmed by the CRPD Committee members themselves. I conducted face-to-face interviews from 31 March to 9 April 2014 with the members of the CRPD Committee in Geneva. In these interviews most of the members stated that being a person with a disability has motivated them to work as disability activists and to become members of the CRPD Committee. However, one member cautioned that being a person with a disability should not be considered as a pre-condition for being a good member of the CRPD Committee.¹¹⁵⁹

With regard to the nature of their service, members of the CRPD Committee serve in their personal capacity, which means that they work as members of the CRPD Committee independently and impartially from their own governments, not as government representatives, even though they are nominated and elected by their governments as the States Parties to the CRPD. The nature of their service is therefore voluntary, yet honourable. Being a member of an international human rights treaty committee requires personal sacrifice, because it is a part-time and unpaid job. One commentator observed critically that ‘no one can make their living by being a member of a human rights treaty committee’.¹¹⁶⁰ The UN only covers travelling and accommodation expenses and provides a daily allowance for the meeting sessions.

Each year, during their membership tenure, each member has to take time off from their full-time job to go to Geneva for 6 weeks for the 2 meeting sessions and pre-sessions. This involves long-haul travel, time-zone difference hardship, and spending their personal time to read all the relevant materials before travelling, thus spending well over 6 weeks on official

¹¹⁵⁷ Ibid 251–2.

¹¹⁵⁸ *Biwako Millennium Framework for Action towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific*, UN ESCOR, Agenda Item 6, UN Doc E/ESCAP/APDDP/4/Rev.1 (24 January 2003) para 16 (*‘Biwako Millennium Framework for Action’*).

¹¹⁵⁹ Interview with Silvia Judith Quan-Chang, Member of the CRPD Committee (Geneva, 1 April 2014).

¹¹⁶⁰ Tomushat, above n 980, 142.

meetings. The members of the CRPD Committee that I interviewed shared with me that they spend a significant amount of time reading States' reports, individual communications and other relevant materials before going to Geneva for the meetings.¹¹⁶¹ All of this is undertaken on a voluntary basis.

More importantly, however, members of the CRPD Committee working on a voluntary basis see their work as community service, and as such it is rewarding. It means gaining valuable knowledge for their own personal experience, and their service is internationally recognised and highly respected. The presence of persons with disabilities on the CRPD Committee combines with their personal background and qualifications to create an ethos of community service in the CRPD Committee.

I will now move on to discussing the CRPD Committee's functions in terms of procedures adopted in the monitoring and implementation of the CRPD and its Optional Protocol.

6.2.2. Functions

As mentioned, the CRPD Committee has been established to discharge its functions in relation to State reporting, individual complaint and inquiry procedures. In order to discharge these functions, the Committee convenes for two meeting sessions a year. Before 2014, the one meeting session was usually in April and lasted one week, and the other was in September and lasted 2 weeks. However, due to the proliferation of State reports and individual complaints, since 2014 both meeting sessions are for 2 weeks and an additional week has been added as a pre-session for each meeting. So in total the CRPD Committee meets for 6 working weeks per year, although nothing official takes place during the pre-session meetings.

The CRPD omits one procedure from its functions, namely, the state complaint procedure. Under other human rights treaties, this procedure refers to one where a State Party can bring another State Party to the attention of the relevant treaty committee on alleged violations of a

¹¹⁶¹ Observation from my empirical research in Geneva from 31 March – 9 April 2014 and the interviews after the empirical research. Recording files are with me.

relevant international human rights treaty.¹¹⁶² This procedure is either mandatory or optional. It is mandatory only under the CERD; any State Party to the CERD can invoke this procedure.¹¹⁶³ However, the procedure is an optional one under the other treaties.¹¹⁶⁴ The procedure is not automatic, because States Parties must first declare that they accept this procedure.¹¹⁶⁵ To date the procedure has never been used in the history of international human rights treaty implementation.¹¹⁶⁶ It is suspected that States Parties prefer to use informal bilateral diplomatic methods over this formal international complaint procedure when they disagree with another State on their human rights policies and practices.¹¹⁶⁷ They believe that informal diplomatic methods between the two States Parties are more effective than involving a third party, in this case which is a human rights treaty committee acting as a quasi-judicial body and that preparation for this formal procedure would involve sufficient financial and human resources.¹¹⁶⁸ Because the CRPD and its Optional Protocol do not prescribe this procedure, no State complaint is possible under the CRPD.

In the following discussion I will introduce three procedures regulated under the CRPD, which are State reporting, individual complaint and inquiry procedures with regard to general formats of these procedures and these three procedures under the CRPD Committee. The State complaint procedure will not be discussed in this thesis.

6.2.2.1. Examining State Reporting

The State reporting procedure is the only mandatory procedure under all international human rights treaties¹¹⁶⁹ under which States Parties to a human rights treaty report periodically to the

¹¹⁶² This procedure is prescribed under 5 out of 9 core international human rights treaties, which are the ICCPR at Article 41, CERD at Article 12, CAT at Article 21, CMW at Article 74, CED at Article 32.

¹¹⁶³ CERD art 11–3.

¹¹⁶⁴ ICCPR art 41; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, open for signature 24 September 2009, Doc.A/63/435 (entered into force 5 May 2013) art 10; CAT art 21; CMW art 74; *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2715 UNTS Doc.A/61/448 (entered into force 23 December 2010) art 32.

¹¹⁶⁵ *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012, A/RES/66/138 (entered into force 14 April 2014) art 12.

¹¹⁶⁶ Tomushat, above n 980, 160; Office of the United Nations High Commissioner for Human Rights, *Human Rights Bodies — Complaints Procedures* (15 August 2016) <<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>>.

¹¹⁶⁷ Tomushat, above n 980, 160.

¹¹⁶⁸ Ibid.

¹¹⁶⁹ ICCPR art 40; ICESCR art 16; CERD art 9; CEDAW art 18; CRC art 44; CAT art 19; CRPD art 35; CMW art 73; CED art 29.

respective human rights treaty committee on their implementation of the human rights treaty concerned. The main purpose of the State reporting procedure is for human rights treaty committees to monitor the compliance of States Parties with their human rights treaty obligations under a human rights treaty to which they have consented to be bound.¹¹⁷⁰

The following part discusses the general format of the state reporting procedure, followed by a discussion of State reporting procedure, working methods for considering State reports, concluding observations after examination of State reports, and the elaboration of general comments by the CRPD committee.

The General Format of State Reporting Procedure

There are two types of reports that States Parties are required to submit to a human rights treaty committee associated with the treaty to which they are States Parties. The first are initial reports that States Parties are required to submit one or two years after the entry into force of the treaty. The second are periodic reports that States Parties are required to submit following the submission of their initial reports, at intervals of every four or five years, or whenever requested by the treaty body. However, a problem with respect to initial and periodic reports is that there are no guidelines on the content of these reports under any international human rights treaties. The treaties only state that State reports should contain measures adopted to give effect to the respective treaty and mention factors and difficulties in its implementation.

In order to solve this problem and effectively support States Parties in preparing their reports, the Office of High Commissioners for Human Rights has published harmonised guidelines on the State reporting procedure. According to these guidelines, State reports, both initial and periodic, consist of two integral parts: a common core document and treaty-specific documents. A common core document refers to background information on a State Party, including factual and statistical information in relation to the social, economic, cultural,

¹¹⁷⁰ Tomushat, above n 980, 136; Human Rights Committee, *General comment No. 30: Reporting Obligations of States Parties under Article 40 of the Covenant*, 75th sess, 2025th mgt, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (16 July 2002); Walter Kalin, 'Examination of State Reports' in Hellen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 16, 37.

political and legal context of the State Party in which human rights treaties are being implemented.¹¹⁷¹ This information aims to assist human rights treaty committees in understanding the domestic context of the State Party concerned.¹¹⁷² The Secretary General submits these common core documents to all human rights treaty committees to which the countries are the States Parties. The aim is to help each committee consider the situation regarding human rights in every State party on an equal basis.¹¹⁷³ The common core documents, which can be updated easily and regularly to save time and resources, also help State Parties avoid unnecessary duplication of information when preparing reports to different human rights treaty committees.¹¹⁷⁴ The treaty-specific documents are to follow the guidelines of the respective human right treaty committees.

The human rights treaty committee then considers the reports. When studying the report, it can request more information from the State Party concerned. This is the format that applies to the State reporting procedure under all international human rights treaties, though the wording on the format varies from treaty to treaty.¹¹⁷⁵ After the examination of the State reports, the human rights treaty committees issue concluding observations on how the State Party concerned has fulfilled its treaty obligations according to the provisions of the treaty concerned.

The State Reporting Procedure under the CRPD Committee

The CRPD has also adopted this traditional format of the State reporting procedure and assigned the CRPD Committee to assume the task.¹¹⁷⁶ States Parties to the CRPD are obligated to submit initial and periodic reports. They are required to submit initial reports within two years of ratifying the CRPD.¹¹⁷⁷ Along with the common core documents, in

¹¹⁷¹ *Compilation of Guidelines on the Form and Content of Reports to Be Submitted by States Parties to the International Human Rights Treaties — Report of the Secretary-General*, UN Doc HRI/GEN/2/Rev.6 (3 June 2009) [27].

¹¹⁷² *Ibid* [32].

¹¹⁷³ *Ibid* [4(b)].

¹¹⁷⁴ *Ibid* [4].

¹¹⁷⁵ *ICCPR* art 40; *ICESCR* art 16; *CERD* art 9; *CEDAW* art 18; *CRC* art 44; *CAT* art 19; *CRPD* art 35; *CMW* art 73; *CED* art 29.

¹¹⁷⁶ *CRPD* art 35.

¹¹⁷⁷ *Ibid* art 35.1.

which the CRPD Committee requests information on disability,¹¹⁷⁸ in addition to the background information detailed under the harmonised guidelines on the State reporting procedure, a State Party is required to report on every article under the CRPD in the initial reports.¹¹⁷⁹ Specifically, the initial reports should focus on the impact of legal norms on persons with disabilities' factual situation and the practical availability, implementation and effect of remedies for violations of the CRPD's provisions. Special attention to particularly vulnerable population groups such as women and children with disabilities is required.¹¹⁸⁰ The initial reports should also focus on any distinctions, exclusions or restrictions made on the basis of disability, even of a temporary nature, imposed by law, practice or tradition, or in any other manner on the enjoyment of the human rights under the CRPD by persons with disabilities.¹¹⁸¹

The periodic reports are due every 4 years or whenever requested by the CRPD Committee following the submission of the initial report.¹¹⁸² Reporting on every article of the CRPD for the reporting period is also recommended for the periodic reports.¹¹⁸³ The periodic reports should include information on the implementation of the CRPD Committee's concluding observations resulting from the consideration of the previous report. Particular attention is required with regard to the CRPD Committee's concerns and recommendations detailed in the previous report, and on measures on implementation and explanations for non-implementation, as well as on difficulties encountered in relation to all the human rights and freedoms set forth under the CRPD.¹¹⁸⁴ Due attention should be paid to anti-discrimination measures.¹¹⁸⁵ At the time of writing, many States Parties who ratified the CRPD at the very

¹¹⁷⁸ Committee on the Rights of Persons with Disabilities, *Guidelines on Treaty-specific Document to Be Submitted by States Parties under Article 35, Paragraph 1, of the Convention on the Rights of Persons with Disabilities*, UN Doc CRPD/C/2/3 (18 November 2009) [A.2.1] ('*CRPD Committee Reporting Guidelines*').

¹¹⁷⁹ Ibid [A.4.2].

¹¹⁸⁰ Ibid.

¹¹⁸¹ Ibid [A.4.3].

¹¹⁸² CRPD art 35.2.

¹¹⁸³ *CRPD Committee Reporting Guidelines*, UN Doc CRPD/C/2/3, [A.5.2].

¹¹⁸⁴ Ibid [A.5.3].

¹¹⁸⁵ Ibid [A.5.4].

beginning should by now have submitted their first periodic reports following their submission of their initial reports, although few States Parties have actually done so.¹¹⁸⁶

In terms of formatting, the treaty-specific documents submitted to the CRPD must be delivered in accessible electronic format and in print. The initial report should not exceed 60 pages and the periodic report should be limited to 40 pages.¹¹⁸⁷ Both initial and periodic reports should include supporting annexes in relation to *de facto* and *de jure* measures for the implementation of the CRPD, such as summaries of the relevant constitutional, legislative, judicial and other texts.¹¹⁸⁸

The Working Methods for Considering State Reports by the CRPD Committee

Before examining State reports in a public meeting, following the receipt of the report submitted by a State Party, the CRPD Committee usually assigns either one or two of its members to be country rapporteur(s), thus to assume lead responsibility for the examination of the report.¹¹⁸⁹ The country rapporteur(s) will then analyse information on that country from all available sources rather than information available only in the set of the State report which includes common core and treaty-specific documents, and to formulate a List of Issues on that report comprising the critical issues which require further explanation from the State Party.¹¹⁹⁰ The List of Issues, once adopted by the full CRPD Committee, is sent to the State Party for written responses.¹¹⁹¹

The CRPD Committee will subsequently examine the report at a public meeting, commonly known as a public constructive dialogue, in the presence of a delegation from the State Party. In the case where the State Party does not send a delegation to the meeting after being requested to do so by the CRPD Committee, the CRPD Committee may examine the

¹¹⁸⁶ Office of the United Nations High Commissioner for Human Rights, *2014 Deadlines for the Submission of Documentation for CRPD* (15 August 2016) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/MasterCalendar.aspx>.

¹¹⁸⁷ *CRPD Committee Reporting Guidelines*, UN Doc CRPD/C/2/3, [A.3.3–5].

¹¹⁸⁸ *Ibid* [A.4.4,] [A.5.6].

¹¹⁸⁹ Committee on the Rights of Persons with Disabilities, *Working Methods of the Committee on the Rights of Persons with Disabilities*, 5th sess, UN Doc CRPD/C/5/4 (2 September 2011) [10] ('*CRPD Committee Working Methods*').

¹¹⁹⁰ *Ibid* [11].

¹¹⁹¹ *Ibid* [5].

State Report in the absence of the State delegation.¹¹⁹² A constructive dialogue between the State delegation and the CRPD Committee is presided over by the chairperson of the CRPD Committee.

The States Parties reports are normally examined in chronological order of receipt, with priority given to initial and long-overdue reports.¹¹⁹³ The report examination lasts for 6 hours and is divided into 2 three-hour meetings.¹¹⁹⁴

A constructive dialogue between the State delegation and the CRPD Committee starts with the head of the State delegation presenting a summary of their State report. Then the country rapporteur comments on the report and presents the list of issues. This is followed by a question and answer session in which each member of the CRPD Committee may in turn make comments, express their concerns and seek further clarification from the State delegation. The question and answer session focuses on the State implementation of the CRPD's articles, which are divided into 3 groups, the first dealing with Articles 1 to 10, the second with Articles 11 to 20, and the third with Articles 21 to 33. The State delegation responds to the CRPD Committee members' comments, concerns and questions after each cluster of articles. Finally, the head of the State delegation, the country rapporteur and the chairperson of the CRPD Committee in turn make concluding remarks.¹¹⁹⁵

It is to be noted that a constructive dialogue is a forum in which the State delegation and the CRPD Committee's members alone take stock of the implementation of the CRPD by the State concerned. NGOs and DPOs are present at the public meeting as observers only; thus no comments, speeches or questions are allowed from them.¹¹⁹⁶

¹¹⁹² Ibid [8].

¹¹⁹³ Ibid [6].

¹¹⁹⁴ Ibid [7].

¹¹⁹⁵ This paragraph is written based on my empirical research notes for my empirical research in Geneva on the work of the CRPD Committee from 31 March to 9 April 2014.

¹¹⁹⁶ This paragraph is written based on my empirical research notes for my empirical research in Geneva on the work of the CRPD Committee from 31 March to 9 April 2014.

The Concluding Observation by the CRPD Committee

After the constructive public dialogue with the State Party, the CRPD Committee adopts its concluding observations in a closed meeting.¹¹⁹⁷ The country rapporteur is responsible for drafting concluding observations after the CRPD Committee has examined the country report in a public meeting.¹¹⁹⁸ The concluding observations include the CRPD Committee's positive comments on what the State Party has done well, and its general concerns on factors and difficulties affecting the implementation of the CRPD, along with its general suggestions and recommendations for improvement.¹¹⁹⁹ Although adopted in a closed meeting, the concluding observations are published at the end of the CRPD Committee's meeting session on the OHCHR's website.¹²⁰⁰ There is a procedure for following up the implementation of the concluding observations in which the CRPD Committee may appoint a follow-up rapporteur to liaison with the State Party concerned for the follow-up process of 12 months.¹²⁰¹

It is important to note that the concluding observations of any human rights treaty committee are not binding and, in spite of being issued under the auspices of legally binding instruments, are no more than general recommendations to the State concerned.¹²⁰² However, these concluding observations do have their impact on a State's human rights reputation, because the State concerned is required to facilitate access to the suggestions and general recommendations by the CRPD Committee to the general public in their own countries.¹²⁰³ It is hoped that this public disclosure of information will contribute to raising general public awareness on the disability rights issues, and will help further improve the human rights situations of persons with disabilities in that State.

¹¹⁹⁷ *CRPD Committee Working Methods*, UN Doc CRPD/C/5/4, [13].

¹¹⁹⁸ *Ibid.*

¹¹⁹⁹ *Ibid* [14].

¹²⁰⁰ *Ibid* [17].

¹²⁰¹ *Ibid* [19–22].

¹²⁰² Tomushat, above n 980, 154.

¹²⁰³ *CRPD* art 36(4).

The Elaboration of General Comments by the CRPD Committee

General comments or general recommendations in some treaties such as the CERD and CEDAW refer to written explanations issued by human rights treaty committees on how a particular article or provision or issue under international human rights treaties should be construed. The general comments are often issued sometime after the coming into force of a human rights treaty, and after the treaty committees have examined relevant States Reports and found any gaps of understanding and interpretation among the States Parties. Thus the purpose of the general comments are to provide a common and correct understanding and interpretation of particular articles or provisions or issues under international human rights treaties, in order to assist States Parties to fulfil their treaty obligations and for other relevant stakeholders to monitor and foster the realisation of the human rights specified under the international human rights treaties.¹²⁰⁴ Despite their legally non-binding status, the general comments have become a valuable source of guidance on the provisions of human rights treaties for States Parties in discharging their treaty obligations.¹²⁰⁵

Strictly speaking, the CRPD only authorises the CRPD Committee to make general recommendations based on the examination of State reports, but not to make general comments on the interpretation of the articles of the CRPD.¹²⁰⁶ However, the CRPD Committee is authorised by the CRPD to establish its own rules of procedure.¹²⁰⁷ Based on its practical experience in considering State reports – in particular, the fact that States Parties commonly do not have a correct understanding and interpretation of particular articles, provisions or issues under the CRPD, such as on matters of legal capacity¹²⁰⁸ – the CRPD

¹²⁰⁴ Human Rights Committee, *Working Methods* (23 June 2014)

<<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx>>, para IX; Social and Cultural Rights Committee on Economic, *Working Methods* (23 June 2014)

<<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx>>, paras 55–8; Committee on the Elimination of All Forms of Discrimination against Women, *Working Methods*, 44th sess, Provisional Agenda Item 6, UN Doc CEDAW/C/2009/II/4 (4 June 2009), para 36; Committee Against Torture, *Working Methods* (23 June 2014)

<<http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx>>, para IX; Committee on the Rights of the Child, *Working Methods* (23 June 2014) <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx>>, para IX; *CRPD Committee Working Methods*, UN Doc CRPD/C/5/4, [54].

¹²⁰⁵ Tomushat, above n 980, 158.

¹²⁰⁶ *CRPD* art. 36.5.

¹²⁰⁷ *Ibid* art 34.10.

¹²⁰⁸ The issue of understating of legal capacity in different ways has discussed under the subsection 5.4.2 of Chapter V on the CRPD of this thesis.

Committee has authorised itself to formulate general comments as stated under its Rules of Procedure.¹²⁰⁹

A process of elaboration of a general comment by the CRPD Committee involves several steps. The CRPD Committee, when deciding to elaborate upon a general comment on a specific topic, normally designates a working group composed of several members to take lead responsibility. The working group is responsible for developing an outline, researching the contents and writing a first draft. Much of this work takes place between meeting sessions.

The next step is an extensive process of consultation with States Parties, specialised NGOs, DPOs and other civil society organisations, individual experts, UN departments and agencies, and other human rights treaty bodies.¹²¹⁰ Such consultative meetings are often organised during the formal meeting sessions of the CRPD Committee called ‘Days of General Discussion’, resulting in significant expert contributions, which help the working group conceptualise the draft general comment from different angles and perspectives.¹²¹¹ The CRPD Committee will then put forward the outline of the draft general comments for further discussion and contributions from different stakeholders.¹²¹² The CRPD Committee will finally organise a closed meeting for reading the draft general comments, then adopt them,¹²¹³ often by consensus.

While consideration of States reports is a mandatory procedure, all other procedures, in particular, individual complaints and inquiry procedures under the CRPD, are optional. The individual complaint procedure is discussed next.

6.2.2.2. Considering Individual Complaint

An individual complaint procedure refers to a procedure that allows individuals who are citizens of a State Party to lodge a complaint on alleged violations of their human rights by their State to a respective human rights treaty committee. The purpose of the individual

¹²⁰⁹ *CRPD Committee Working Methods*, UN Doc CRPD/C/5/4, [54].

¹²¹⁰ *Ibid* [56(a)].

¹²¹¹ This is written based on my empirical research notes for my empirical research in Geneva on the work of the CRPD Committee from 31 March to 9 April 2014.

¹²¹² *CRPD Committee Working Methods*, UN Doc CRPD/C/5/4, [56(b)].

¹²¹³ *Ibid* [56(c)].

complaint procedure is for a human rights treaty committee to determine whether a State Party has violated its treaty obligations in relation to the rights set forth under the respective human rights treaties.¹²¹⁴

An individual complaint procedure is a quasi-judicial procedure,¹²¹⁵ because those involved in resolving individual complaints are expert members of a human rights treaty committee, not judges.¹²¹⁶ The procedure is confidential and the proceedings are written without a public hearing.¹²¹⁷ Decisions are legally non-binding views rather than judgements.¹²¹⁸ In addition, under all human rights treaties and Optional Protocols, individual complaint procedures are named individual communications. It is explained that ‘communication’ is a term that ‘portrays a relationship of good understanding, where a constructive dialogue may remedy all the problems raised by the complainant’, and ‘suggests a friendly environment free of tensions’ for all parties involved.¹²¹⁹

It is important to note that an individual complaint procedure is usually regulated under an optional protocol attached to the main treaty, except in the case of the CERD. It is also important to note that this procedure is not automatic, because States Parties to the main treaty must concurrently be the States Parties to the optional protocol, which regulates this procedure, and they must declare that they recognise the competence of the relevant Committee in this regard.¹²²⁰

The General Format of an Individual Complaint Procedure

The general format of an individual communication under all human rights treaties is that it has a subject, meets criteria of admissibility in order to be considered by a treaty committee, is proceeded in the absence of an oral hearing, and results in legally non-binding views.

¹²¹⁴ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *ICESCR Optional Protocol* art 2; *CERD* art 14.1; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000) art 2; *CRPD Optional Protocol* art 1.1.

¹²¹⁵ Tomushat, above n 980, 185.

¹²¹⁶ Ulfstein, above n 1147, 74.

¹²¹⁷ Ibid; Tomushat, above n 980, 179.

¹²¹⁸ Ulfstein, above n 1147, 74; Tomushat, above n 980, 182.

¹²¹⁹ Tomushat, above n 980, 159.

¹²²⁰ *CAT* art 28; *CEDAW Optional Protocol* art 10; *CRPD Optional Protocol* art 8; *Optional Protocol to the CRC* art 13; *ICESCR Optional Protocol* art 11.

Subjects of the individual complaint procedure are individuals or groups of individuals who are the citizens of States Parties to the treaties that regulate the individual complaint procedure or to the Optional Protocols on individual complaint procedures attached to respective human rights treaties. The subjects of an individual complaint are referred to as the authors in the wording under all the Covenants, Conventions or Optional Protocols. This procedure reflects the progressive development of international law in which individuals become a subject of international law,¹²²¹ specifically international human rights law.¹²²² It also contributes to changing the traditional understanding of international law under which only States were the subject of international law.¹²²³

In order to be examined by a human rights treaty committee, all communications have to pass through an admissibility stage or test. A communication is considered inadmissible if it falls into any of the following criteria: being anonymous, constituting abuse of the right of submission of individual communications, overlapping matters, manifesting non-exhaustion of domestic remedies, being ill-found, or being retroactive.¹²²⁴ Human rights treaty committees consider the merit of the cases only when the case has passed this admissibility test.

There is no testifying from any parties involved,¹²²⁵ during the process of considering the merit of the case. The reason for the absence of a public oral hearing is that such a hearing would require time and resources.¹²²⁶ For example, it would take substantial time to hear the witnesses,¹²²⁷ while a human rights treaty committee only has two meeting sessions of 4 to 6 weeks in which to do its work. In addition, it is often not affordable for the authors of the communications, their witnesses, and other relevant parties to travel to attend oral hearings in

¹²²¹ Malcolm Nathan Shaw, *International Law* (Cambridge University Press, 6th ed, 2008), 257–9.

¹²²² Tomushat, above n 980, 160.

¹²²³ Ibid.

¹²²⁴ *First Optional Protocol to the ICCPR* art 5.2; *CERD* art 14; *ICESCR Optional Protocol* art 3; *CEDAW Optional Protocol* art 4; *CAT* art 22; *CRPD Optional Protocol* art 3.

¹²²⁵ Tomushat, above n 980, 179–80.

¹²²⁶ Ibid.

¹²²⁷ Ibid 179.

Geneva, as there is no legal aid scheme for them.¹²²⁸ More importantly, under this procedure, individual complaints are required to be examined in private meetings.¹²²⁹

As with other functions performed by the human rights committees, the final decision in the examination of an individual complaint is not legally binding.¹²³⁰ The final decision of a human rights committee is ‘a view’ on an individual case rather than a judgement. It is possible that this is for political reasons, because a group of experts cannot hold a state legally liable. Some scholars argue that, based on the functionalities of a human rights treaty committee, a legally binding perspective should be attached to their views on individual complaints, as in the case of the ICJ’s advisory opinions.¹²³¹ However, other scholars have contended that we should not take a rigid view of the legally binding aspect of these views.¹²³² Instead, treaty committees should focus more on the aspects of States’ obligations while examining individual communications in order to establish a common legal understanding for States Parties, which might help in promoting the actual implementation of their views on individual cases in States Parties.¹²³³

Although all individual complaints are examined in closed meetings, the final views of treaty committees are published on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR). For the purpose of keeping the identity of all the authors of individual complaints anonymous, their names are often changed or abbreviated, but the names of States Parties are published. It is hoped this ‘name and shame’ practice will expose the human rights records of non-compliant States Parties with a view to protecting the human rights of individuals.

¹²²⁸ Ibid 180.

¹²²⁹ *First Optional Protocol to the ICCPR* art 5.3; *ICESCR Optional Protocol* art 8.2; *CEDAW Optional Protocol* art 7.2; *CAT* art 21.1(d); *CRPD Optional Protocol* art 5. Interim measures might be applied to avoid irreparable damages to the author(s) of the communications received (e.g. a person under sentence of death) at any time after receiving the communications.

¹²³⁰ Tomushat, above n 980, 182–3.

¹²³¹ Ulfstein, above n 1147, 99.

¹²³² Ibid.

¹²³³ Ibid 100.

The Individual Complaint Procedure under the CRPD Optional Protocol

The individual complaint procedure under the CRPD is regulated under the Optional Protocol to the CRPD, not the CRPD itself. It authorises the CRPD Committee to deal with individual complaints filed by or on behalf of individuals or groups of individuals with disabilities against States Parties to the CRPD Optional Protocol regarding an alleged violation of their human rights as set forth under the CRPD.¹²³⁴ It is therefore important to note that even if a country is a State Party to the CRPD, it is not under the jurisdiction of the CRPD Committee with regard to the individual complaint procedure if it is not a State Party to the CRPD Optional Protocol.

The individual complaint procedure under the CRPD follows the same format as those of other human rights treaties, involving a number of steps after the authors of individual communications submit their complaint documents to the Secretary General. In practice they send their complaint documents to the Petitions Team of the OHCHR in Geneva. These documents will then be transferred to the CRPD Committee after being registered by the Secretariat for the purpose of recording,¹²³⁵ and after the Secretariat has requested clarification and additional information from the authors of the communications if needed.¹²³⁶

After receiving the individual complaint documents from the Secretariat, the CRPD Committee will as a first step consider establishing a working group or appointing a special rapporteur on the individual communication, to assist the CRPD Committee in liaising with the State Party concerned for clarification in relation to the admissibility and merits of the communication.¹²³⁷ This working group or special rapporteur also assists the CRPD Committee in deciding if the communications are admissible and if all the members of the CRPD Committee so agree,¹²³⁸ and in drafting the CRPD Committee's views and decisions on the case.¹²³⁹

¹²³⁴ CRPD Optional Protocol art 1.

¹²³⁵ Committee on the Rights of Persons with Disabilities, *Rules of Procedure of the Committee on the Rights of Persons with Disabilities*, 3rd sess, UN Doc CRPD/C/4/2 (13 August 2010) Rules 55–6 ('CRPD Committee Rules of Procedure').

¹²³⁶ Ibid Rule 57.

¹²³⁷ Ibid Rule 70.3.

¹²³⁸ Ibid Rule 65.

¹²³⁹ Ibid Rule 73.3.

The merit of the communication will be considered in a closed meeting after it has been accepted as admissible.¹²⁴⁰ During this meeting the CRPD Committee will consider the merits of the communication and decide on whether the State Party has violated its treaty obligations, and if so, make recommendations to the State Party on measures to address the case in particular and measures to prevent similar violations in future.¹²⁴¹ Dissenting opinions of any Committee member on the final views or decisions adopted will at this stage be noted and registered.¹²⁴²

The case will be published on the website of the OHCHR, while the working group or special rapporteur is in charge of following up the case in order to ensure that the CRPD Committee's final views are properly implemented by the State Party concerned.¹²⁴³

6.2.2.3. *The Inquiry Procedure*

The inquiry procedure allows a human rights treaty committee under the treaty it monitors to conduct an investigation into alleged serious or systematic violations of human rights committed by a State Party if the committee has received reliable information containing well-founded indications of these violations.¹²⁴⁴ The main purpose of this procedure is to find out if a serious or systematic violation of the human rights under a human rights treaty has been perpetrated by a State Party. This procedure is often referred to as a fact-finding mission conducted by a human rights treaty committee. This procedure is not automatic because States Parties to the treaties must consent to the procedure by declaring that they recognise the competence of the relevant Committee in this regard;¹²⁴⁵ alternatively they may opt out by declaring otherwise.¹²⁴⁶

¹²⁴⁰ Ibid Rule 59.1.

¹²⁴¹ Ibid Rule 73.

¹²⁴² Ibid Rule 73.6.

¹²⁴³ Ibid Rule 75.4.

¹²⁴⁴ CAT art 28; CEDAW Optional Protocol art 10; CRPD Optional Protocol art 8; Optional Protocol to the CRC art 13; ICESCR Optional Protocol art 11.

¹²⁴⁵ CAT art 28; CEDAW Optional Protocol art 10; CRPD Optional Protocol art 8; Optional Protocol to the CRC art 13; ICESCR Optional Protocol art 11.

¹²⁴⁶ CAT art 28; CEDAW Optional Protocol art 10; CRPD Optional Protocol art 8; Optional Protocol to the CRC art 13; ICESCR Optional Protocol art 11.

The General Format of an Inquiry Procedure

An inquiry procedure includes several steps. After receiving reliable information on the alleged violation of human rights committed by a State Party, the human rights treaty committee concerned invites the State Party to co-operate in the examination of the information by submitting observations. The committee may, on the basis of the State Party's observations and other relevant information available to it, decide to designate one or more of its members to conduct an inquiry and report urgently to the committee. If the State Party consents to an inquiry, it may include a visit to the State Party's territory. The findings are then examined by the committee and transferred to the State Party together with any comments and recommendations. The State Party is requested to submit its own observations on the committee's findings, comments and recommendations within a specific time frame (usually six months) and, where invited by the committee, to inform it of the measures taken in response to the inquiry. The inquiry procedure is strictly confidential.

An Inquiry Procedure under the CRPD Optional Protocol

The inquiry procedure is introduced under the Optional Protocol to the CRPD,¹²⁴⁷ and applied only to the States Parties to the CRPD Optional Protocol who have declared that they accept the authority of the CRPD Committee in conducting an inquiry.¹²⁴⁸ The inquiry procedure under the CRPD Optional Protocol involves several steps, as in the case of an inquiry procedure under other human rights treaties.

A significant value of this procedure under the CRPD Optional Protocol is that the CRPD Committee's members who conduct the field mission can not only check whether grave and systematic violations of the rights set forth in the CRPD have taken place, but also witness the real situation, for example, on the accessibility of the built environment, which may or may not manifest signs of the progressive realisation of this programmatic right. The members

¹²⁴⁷ CRPD Optional Protocol art 6.

¹²⁴⁸ Ibid art 8; CRPD Committee Rules of Procedure, UN Doc CRPD/C/4/2, Rule 91.

with disabilities of the CRPD Committee¹²⁴⁹ would also have the chance to experience the situation of persons with disabilities in that country. This is an additional merit of the fact-finding exercise. However, this is not a favoured method of inquiry because it must meet several preconditions, including the consent of the State concerned.¹²⁵⁰ Because this inquiry procedure under the CRPD has never been used it will not be further discussed in this thesis.

While the CRPD Committee monitors the implementation of the CRPD at the international level, DPOs, NGOs and NHRIs play an important role in monitoring this at the national level, as discussed next.

6.3. Organisations of Persons with Disabilities

The CRPD not only prescribes a monitoring mechanism at the national level but also specifies who should be involved in this process, which makes it distinctive from other human rights treaties. Article 33.3 of the CRPD formalises the involvement of civil society in monitoring the CRPD's implementation. In order to understand what the CRPD means by 'civil society' and its roles in monitoring this implementation, it is important to understand the theoretical and doctrinal aspects of this institution – civil society.

Civil society refers to individuals and groups in voluntary associations, including religious, private business, educational, research, and non-governmental organisations, along with the mass media.¹²⁵¹ The most important feature of civil society is that these associations exist on a voluntary basis and outside any political realm.¹²⁵² As a result, they function as non-state actors, sharing values on human dignity and well-being, and forming one of the most powerful forces in international human rights movements.¹²⁵³ The growth of civil society has created a power shift from nation-states to civil society.¹²⁵⁴ Because of the diversity of civil society, and also taking into account observations from my empirical research, I see two key

¹²⁴⁹ CRPD art 34(4).

¹²⁵⁰ CRPD *Optional Protocol* art 6.2–5.

¹²⁵¹ Gordon A. Christenson, 'World Civil Society and the International Rule of Law' (1997) 19(4) *Human Rights Quarterly* 724, 731.

¹²⁵² *Ibid.*

¹²⁵³ *Ibid.*

¹²⁵⁴ *Ibid* 731–2.

actors in civil society playing crucial roles in advocating for the adoption of the CRPD as well as implementing and monitoring its implementation. They are non-governmental organisations (NGOs) and organisations for persons with disabilities (DPOs), either at national or international levels.

In a very broad understanding, an NGO as a part of civil society operating on a voluntary basis, is a non-profit entity with members in the form of individuals or groups with shared interests.¹²⁵⁵ NGOs exist in different forms such as hospitals, universities or research institutes working on a not-for-profit basis.¹²⁵⁶ NGOs work for humanitarian causes such as poverty reduction and hunger eradication, environment protection, and community development.¹²⁵⁷ Some NGOs are classified as human rights NGOs because they devote significant resources to the promotion and protection of human rights.¹²⁵⁸ NGOs assume many functions, such as contributing to the development of international law. In sum, NGOs are playing crucial roles in improving the lives of poor communities, promoting social justice, and defending human rights. However, NGOs have been criticised for having more reason to satisfy donors than to work towards the welfare of their beneficiaries.¹²⁵⁹ Donations are the main source of funding for NGOs, with three-quarters of their budget coming from private donors, mostly giant corporations, placing their mandate of protecting their beneficiaries' welfare at risk.¹²⁶⁰ Furthermore, NGOs' employees are often privileged, with much higher salaries and nicer working conditions than those of the general public. It has been suggested that these privileged employees are not well placed to understand the hardship that their beneficiaries experience, set aside working to improve their lives. Another disadvantage of NGOs is that they are always set up under domestic law so they are confined to the domestic law of a given

¹²⁵⁵ Wendy Schoener, 'Non-governmental Organizations and Global Activism: Legal and Informal Approaches' (1997) 4(2) *Indiana Journal of Global Legal Studies* 537, 538; Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100(2) *The American Journal of International Law* 348, 350.

¹²⁵⁶ Eric Werker and Faisal Z. Ahmed, 'What Do Nongovernmental Organizations Do?' (2008) 22(2) *The Journal of Economic Perspectives* 73, 74.

¹²⁵⁷ *Ibid.*

¹²⁵⁸ Laurie S. Wiseberg, 'Protecting Human Rights Activists and NGOs: What More Can Be Done?' (1991) 13(4) *Human Rights Quarterly* 525, 529–30.

¹²⁵⁹ Werker and Ahmed, above n 1256, 78–80.

¹²⁶⁰ *Ibid* 78–80.

country.¹²⁶¹ Some scholars have viewed the recent proliferation of NGOs with scepticism. They argue that this proliferation could mean too many players and too many causes, hence that we cannot ‘yet say whether NGOs collectively are any better at development than public or private sector institutions.’¹²⁶²

Article 33.3 of the CRPD only requires participation of civil society in the monitoring process of the implementation of the CRPD, yet it does not specifically name NGOs as players.¹²⁶³ In contrast, it particularly names DPOs as key players and stresses their roles this monitoring process.¹²⁶⁴ I therefore will not discuss any further the role of NGOs in this thesis, but instead will focus primarily on the role of DPOs.

As mentioned, persons with disabilities are the most qualified, best equipped, and best positioned to support, inform and advocate for themselves and other persons with disabilities.¹²⁶⁵ Therefore, coming together to form a collective voice to speak on their own behalf is crucial for their full participation and integration into society. DPOs are more motivated than anyone else to speak on their own behalf concerning the proper design and implementation of policy, legislation and strategies which will ensure their full participation in all aspects of life and enable them to contribute to the development of their communities.¹²⁶⁶ Mindful of this fact, the CRPD has more than once stressed the roles of DPOs in both implementing and monitoring the implementation of the CRPD. A general understanding of DPOs is discussed next, followed by an analysis on their specific roles in monitoring the implementation of the CRPD.

6.3.1. The Nature of a DPO

The strong position of the social model of disability in disability discourse and the early legal development, with regard to disability, of legally non-binding instruments during the 1980s

¹²⁶¹ Tomushat, above n 980, 231.

¹²⁶² Werker and Ahmed, above n 1256, 87; Charnovitz, above n 1255, 356.

¹²⁶³ The CRPD Committee has formalised the roles of NGOs’ participation in its work in its Rules of Procedures, Rule 52 and specified activities that an NGO can participate in their work in its Working Methods, paragraphs 43–53, and most recently in its guidelines on the participation of the civil society including NGOs and DPOs in its work.

¹²⁶⁴ CRPD, art 33.3.

¹²⁶⁵ *Biwako Millennium Framework for Action*, UN Doc E/ESCAP/APDDP/4/Rev.1, [16]–[18].

¹²⁶⁶ *Ibid.*

and 1990s, gave rise to a number of organisations of persons with disabilities (DPOs).¹²⁶⁷ These are organisations established and controlled by persons with disabilities.¹²⁶⁸ The purpose of DPOs is to collectively empower persons with disabilities.¹²⁶⁹ Such collective empowerment refers to a process in which persons with disabilities demand a change in their power relationship with persons without disabilities, and social inclusion, and promote a new understanding of disability according to the social model.¹²⁷⁰ Collective empowerment contributes to creating collective self-confidence among persons with disabilities, which in turn helps them engage in political activities to advocate for themselves.¹²⁷¹ The individual empowerment of persons with disabilities takes place at the same time and as a result of the collective empowerment.¹²⁷²

In terms of membership, in the current form of a DPO, a majority of members of DPOs must have some form of disability, and their leaders must be persons with disabilities.¹²⁷³ This understanding of a DPO results from the struggle in which persons with disabilities have gathered together to resist oppression and discrimination on the ground of disability, and to form their own organisations.¹²⁷⁴ More importantly, this understanding of a DPO is confirmed by the CRPD Committee,¹²⁷⁵ and Disabled Peoples' International (DPI), a network with 130 national DPOs as full members, established to promote the human rights of persons with disabilities.¹²⁷⁶ As a result of the process of collective and individual empowerment, persons with disabilities have reached the point where they decide for themselves who they are and whom they would accept as members of their own organisations and elect as their leaders.¹²⁷⁷

¹²⁶⁷ Oliver, above n 127, 148; Shakespeare, above n 1156, 253–4.

¹²⁶⁸ Oliver, above n 127.

¹²⁶⁹ Ibid; Shakespeare, above n 1156, 251–2.

¹²⁷⁰ Oliver, above n 127, 147–8.

¹²⁷¹ Ibid 152.

¹²⁷² Ibid.

¹²⁷³ Disabled Peoples' International, *Constitution of Disabled People's International* <<http://www.dpi.org/Constitution>>, art 2.1.

¹²⁷⁴ Oliver, above n 127, 147–8.

¹²⁷⁵ Committee on the Rights of Persons with Disabilities, *Report of the Committee on the Rights of Persons with Disabilities on its Eleventh Session*, UN Doc CRPD/C/11/2 (31 March–11 April 2014) annex Guidelines on the Participation of Disabled Persons Organizations (DPOs) and Civil Society Organizations in the work of the Committee [3].

¹²⁷⁶ Disabled Peoples' International, above n 1273, art 2.1.

¹²⁷⁷ Jill C. Humphrey, 'Self-organise and Survive: Disabled People in the British Trade Union Movement' (1998) 13(4) *Disability & Society* 587, 589.

This self-conscious transformation stems from within and is defined by persons with disabilities themselves rather than by society.¹²⁷⁸

With regard to their ideological direction, self-determination is the central value embraced by DPOs. This characteristic implies that DPOs have both rights and responsibilities to decide what they require and how they would realise their goals.¹²⁷⁹ However, while self-determination remains fundamental, the priority has changed, with autonomy, integration, and independence now assuming the status of central values.¹²⁸⁰ I assert that this shift of priority among DPOs might originate from the personal consciousness of impairment and disability on the part of persons with disabilities over the time, and that this personal consciousness had turned into the politics of being disabled where disability is understood as a combination of both personal impairment and social construction. This shift might also originate from better economic conditions, which led to a situation where economic needs are no longer a pressing problem; therefore, service delivery has become a least priority issue.

This ideological transformation also enables DPOs to embrace the view that all persons with disabilities are capable of making decisions, including those with intellectual disabilities, when they are reasonably accommodated.¹²⁸¹ They view persons with disabilities as equal partners in procuring social services, rather than clients or beneficiaries.¹²⁸² This ideological factor has also led to an affirmation that it is the responsibility of states to realise and protect their human rights and fundamental freedoms.

This ideological factor has also led to a change in the functions of DPOs, which now advocate for larger goals for their members, such as the realisation of both civil and political, and social, economic and cultural rights, rather than the satisfaction of individual daily needs, as did DPOs in a very basic form.¹²⁸³ Because of this shift, DPOs are now considered active

¹²⁷⁸ Ibid 390; M. A. McColl and W. Boyce, 'Disability Advocacy Organizations: A Descriptive Framework' (2003) 25(8) *Disability and Rehabilitation* 380, 384.

¹²⁷⁹ Humphrey, above n 1277, 589.

¹²⁸⁰ Shakespeare, above n 1156, 261.

¹²⁸¹ McColl and Boyce, above n 1278, 386–7.

¹²⁸² Ibid 384–5.

¹²⁸³ United Nations Economic and Social Commission for Asia and the Pacific, *Self-Help Organizations of Disabled Persons* (United Nations, 1991), 11–2. The very basic form of organisations of persons with disabilities is self-help groups or self-help organisations of disabled persons. A self-help organisation of disabled persons refers to an organisation run by self-

and legitimate players in policy making processes affecting their lives rather than passive participants needing a great deal of self-advocacy effort for a particular issue.¹²⁸⁴

6.3.2. The Roles of DPOs in Monitoring the Implementation of the CRPD

The CRPD formalises the establishment of DPOs,¹²⁸⁵ and States Parties are obligated to create favourable condition for persons with disabilities to set up their own organisations. This means that States Parties are required to make their legal framework support the formation of DPOs. It also means that DPOs are now established according to a legal procedure and have formal status instead of self-organising as they did when they were in a very basic form.¹²⁸⁶

The monitoring function of DPOs under the CRPD is defined under Article 33.3. However, no detail is available on how DPOs can be involved in monitoring the CRPD's implementation. Hence the CRPD Committee, in its Working Methods, has specified activities that a DPO can participate in and contribute,¹²⁸⁷ and elaborates further on this in its guidelines on the participation of civil society, including DPOs, in its work.¹²⁸⁸ According to these documents, DPOs have a role in all State reporting, individual complaint and inquiry procedures.

DPOs can, during a state's reporting period, submit written information on their country's specific human rights situations of persons with disabilities, known as 'shadow reports'.¹²⁸⁹ Usually, the content of a shadow report corresponds in subject matter to a State's report. In order to submit the information, DPOs must closely monitor the implementation of the CRPD in their country. Although, during a state's report examination DPOs are not allowed to take the floor in formal meetings, they can organise informal meetings, known as side-events,

motivated and self-determined disabled persons. The purpose of these self-help organisations is to encourage disabled persons to mutually support their peers through providing community-based services rather than being isolated themselves from the community. In addition, it aims to self-advocate for disabled persons' personal interests and benefits such as achievement of their maximum potential, assumption of responsibilities for their own lives. However, this form of DPOs no longer exists.

¹²⁸⁴ McColl and Boyce, above n 1278, 381.

¹²⁸⁵ CRPD art 29(b)(ii).

¹²⁸⁶ United Nations Economic and Social Commission for Asia and the Pacific, above n 1283, 11–2. The very basic form of organisations of persons with disabilities is explained in the footnote 1283.

¹²⁸⁷ CRPD Committee Working Methods, UN Doc CRPD/C/5/4, [43]–[53].

¹²⁸⁸ CRPD Committee Guidelines on Participation of DPOs and CSOs, UN Doc CRPD/C/11/2 .

¹²⁸⁹ Ibid [5].

between the meeting sessions of the CRPD Committee, to brief its members on developments concerning the CRPD's implementation in their countries.¹²⁹⁰ During my empirical research on the work of the CRPD Committee, I observed DPOs from Sweden, Azerbaijan, Mexico and Costa Rica organising briefing meetings on 13th March and 1st, 2nd and 7th April 2014 for the CRPD Committee's members during its 11th meeting session. These briefing sessions often take place after a lunch break and before the afternoon session, between 1.45 and 2.45 pm, before a constructive dialogue between the CRPD Committee and State delegations. The shadow reports and these informal briefing sessions are very important channels of information to help the CRPD Committee in examining State reports.

DPOs can submit written information when the CRPD Committee formulates general comments.¹²⁹¹ During the CRPD Committee's meeting sessions, DPOs can also organise informal meetings in the same form with the country-specific meetings to express their opinions, positions or findings with respect to the content of the drafting general comments to the members of the CRPD Committee. During my empirical research on the work of the CRPD Committee I also observed DPOs organising informal meetings of this kind to brief the CRPD Committee's members on their positions and research findings on legal capacity and accessibility when the CRPD Committee formulated its first and second general comments on Article 12 on legal capacity and Article 9 on accessibility. For example, Human Rights Watch briefed the CRPD Committee on its understanding of the supported decision-making model and the application of this model.

DPOs are given a significant role in the individual complaint procedure by the CRPD Committee.¹²⁹² They may play an advisory role, including provision of guidance for alleged victims, or potential authors of communications.¹²⁹³ They may represent the alleged victim(s) and submit communications on their behalf to the CRPD Committee.¹²⁹⁴ For example, a DPO in Hungary called the Disability Rights Centre has successfully assisted and represented six

¹²⁹⁰ *CRPD Committee Working Methods*, UN Doc CRPD/C/5/4, [53]; *CRPD Committee Guidelines on Participation of DPOs and CSOs*, UN Doc CRPD/C/11/2, [14].

¹²⁹¹ *CRPD Committee Guidelines on Participation of DPOs and CSOs*, UN Doc CRPD/C/11/2, [21]–[22].

¹²⁹² *Ibid* [25].

¹²⁹³ *Ibid* [25(a)].

¹²⁹⁴ *Ibid* [25(b)].

individuals in Hungary to lodge a complaint to the CRPD Committee, holding Hungary liable for failure to comply with its obligations under Article 29 by the deletion of their names from the electoral registers on the basis of an intellectual disability.¹²⁹⁵ Finally, they may disseminate the CRPD Committee's final views and follow up the implementation of these views in the form of evidence-based reports to the CRPD Committee.¹²⁹⁶

DPOs are playing an important role in assisting the CRPD Committee to perform inquiry procedures. They can initiate an inquiry through submitting reliable information on grave and systematic violations by a State Party of the rights set forth under the CRPD.¹²⁹⁷ They can also assist the CRPD Committee's members during field visits and follow-ups.¹²⁹⁸

Given the important roles of DPOs in monitoring the implementation of the CRPD, the question arises as to how many countries who are the States Parties to the CRPD and its Optional Protocol have national DPOs. As my research results show at the time of writing, out of 166 States Parties to the CRPD, 113 States Parties have national DPOs with full membership of DPI,¹²⁹⁹ a global network with 130 national DPOs as full members, established to promote the human rights of persons with disabilities as mentioned, accounting for 68% of all States Parties. And out of 89 States Parties to the CRPD Optional Protocol, there are 67 who have national DPOs with full membership of DPI,¹³⁰⁰ making up 75% of all States Parties. It is important to note that several of these countries are States Parties to both the CRPD and its Optional Protocol.

While a DPO is independent from a government in monitoring the implementation of the CRPD, an NHRI is a part of the government for this process, because an NHRI is established by the state with specific authority and a mandate to promote and protect human rights. The role of NHRIs in monitoring the implementation the CRPD is discussed next.

¹²⁹⁵ Committee on the Rights of Persons with Disabilities, *Views: Communication No 4/2011*, 10th sess, UN Doc CRPD/C/10/D/4/2011 (16 October 2013) ('*Bujdosó et al v Hungary*').

¹²⁹⁶ *CRPD Committee Guidelines on Participation of DPOs and CSOs*, UN Doc CRPD/C/11/2 [25(d)].

¹²⁹⁷ *Ibid*, [26].

¹²⁹⁸ *Ibid* [28]–[30].

¹²⁹⁹ United Nations, above n 21; Disabled Peoples' International, *National Assemblies* <<http://www.dpi.org/AllNational>>.

¹³⁰⁰ United Nations, above n 21; Disabled Peoples' International, above n 1299.

6.4. National Human Rights Institutions

The international community, especially the United Nations, has long recognised the importance of NHRIs in defending human rights, especially in monitoring compliance with international human rights standards at their meetings, ever since 1946,¹³⁰¹ and through several legally non-binding documents, especially training documents, on the roles of NHRs and capacity building for NHRIs.¹³⁰² By adopting the Paris Principles of 1993, the guidelines on establishing NHRIs for protection and promotion of human rights,¹³⁰³ the UN has officially recognised these roles of NHRIs. However, in terms of legally binding instruments, the CRPD is the only treaty among nine core international human rights treaties which formalises the role of NHRIs in monitoring treaty implementation under its provisions – specifically, Article 33.2. This is another distinctive aspect of the CRPD. In this section I will discuss the general understanding of NHRIs, their general roles and functions, and their specific roles in monitoring the implementation of the CRPD.

6.4.1. Explanation of a National Human Rights Institution

An NHRI refers to a statutory body, usually state sponsored and funded, set up either under an act of parliament, the constitution, or by decree, with specific powers and a mandate to promote and protect human rights.¹³⁰⁴ In other words, an NHRI is a state entity set up to monitor the implementation of international human rights standards and promote human rights.¹³⁰⁵

In terms of composition, an NHRI should include representatives of NGOs, professional organisations, trends in philosophical or religious thought, universities, and Parliament, according to the Paris Principles, in order to ensure the diversity of the composition of a

¹³⁰¹ Linda C. Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1, 3–5.

¹³⁰² The Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4 (Rev. 1) (United Nations Publication, 2010).

¹³⁰³ *National Institutions for the Promotion and Protection of Human Rights*, GA Res 48/134 UN GAOR, 48th sess, 85th plen mgt, Agenda Item 114 (b), UN Doc A/RES/48/134 (20 December 1993), annex ('*Principles Relating to the Status of National Institutions*'), para 2, Competence and Responsibilities.

¹³⁰⁴ Ibid annex ('*Principles Relating to the Status of National Institutions*'), para 2, Competence and Responsibilities.

¹³⁰⁵ Ibid.

NHRI and the independence of the members.¹³⁰⁶ It requires that if there is any representative of any governmental agency, this representative should serve in an advisory capacity only. The Paris Principles also require that the procedure for the election or appointment of all of the members should guarantee the diversity of the composition and the independence of those members.¹³⁰⁷

6.4.2. The Forms and Functions of NHRIs

There are three forms of NHRIs, namely, ombudsman, human rights commission and human rights ombudsman. An NHRI in the form of ombudsman is the first and classic model of an NHRI. It originated from Sweden, dating back to 1809. This is a mechanism which sometimes consists of a single person, sometimes more than one person, elected or appointed by parliament to monitor and ensure the legal and fair conduct of public administration.¹³⁰⁸ It is obvious that the ombudsman model was not created with an explicit human rights mandate, because this model was set up to hold government liable for any administrative misconduct by monitoring their practices to ensure that these practices are legal and fair. In addition, it has authority to receive complaints from the victims of the government's administrative misconduct.¹³⁰⁹ Traditionally, most ombudsmen have enjoyed relatively strong powers to investigate and, in some cases, prosecute instances of government malfeasance. Gradually, many have acquired a human rights mission in addition to their administrative focus.¹³¹⁰

An NHRI in the form of a human rights commission first appeared in the 1970s as a multi-member body with an explicit and exclusive mandate to defend human rights.¹³¹¹ Its members encompass representatives from government and civil society with human rights expertise

¹³⁰⁶ Ibid annex ('*Principles Relating to the Status of National Institutions*'), para 2, Composition and Guarantees of Independence and Pluralism.

¹³⁰⁷ Ibid.

¹³⁰⁸ Thomas Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (2010) 32(3) *Human Rights Quarterly* 729, 733–4; Reif, above n 1301, 8–9.

¹³⁰⁹ Wade M. Cole and Francisco O. Ramirez, 'Conditional Decoupling Assessing the Impact of National Human Rights Institutions, 1981 to 2004' (2013) 78(4) *American Sociological Review* 702, 706; Reif, above n 1301, 9.

¹³¹⁰ Cole and Ramirez, above n 1309, 706; Reif, above n 1301, 9.

¹³¹¹ Cole and Ramirez, above n 1309, 706–7; Reif, above n 1301, 10.

appointed or elected by the government or parliament, or a combination of both.¹³¹² A human rights commission will generally assume several functions. It may serve as an advisory entity to the government on human rights law and policy; it may conduct human rights research and undertake human rights education.¹³¹³ A human rights commission may have jurisdiction over both the public and private sector – for example, it may examine complaints about human rights violations conducted by either governmental or private actors.¹³¹⁴

An NHRI in the form of a human rights ombudsman is a hybrid, combining some aspects of both the ombudsman and a human rights commission. It emerged in the late twentieth century in countries in southern Europe, Latin America and the former Soviet bloc.¹³¹⁵ A human rights ombudsman, as a combined office, is often appointed by the legislature, vested with the twin roles of protecting and promoting human rights and monitoring the government's practice in relation to human rights issues.¹³¹⁶ As such, a human rights ombudsman is structurally comparable to the classic ombudsman, enjoying investigative and court-referral powers, although it does not have authority to examine complaints submitted by private entities and actors.¹³¹⁷ In addition, it oversees administrative fairness and legality, and occasionally has political jurisdiction over issues such as corruption and electoral monitoring.¹³¹⁸ At the same time, a human rights ombudsman shares with the human rights commission an explicit mandate to protect and promote human rights.¹³¹⁹ The institution may also actively engage in human rights policy research, advice, documentation and educational activities.¹³²⁰

The main purpose of all three forms of NHRIs is to defend human rights. However, each has its unique features. The key difference between the classic ombudsman and a human rights commission is that the national ombudsman focuses primarily on the legality and

¹³¹² Reif, above n 1301, 10.

¹³¹³ Ibid; Pegram, above n 1308, 735.

¹³¹⁴ Reif, above n 1301, 10.

¹³¹⁵ Ibid.

¹³¹⁶ Ibid 11.

¹³¹⁷ Pegram, above n 1308, 736; Reif, above n 1301, 11.

¹³¹⁸ Pegram, above n 1308, 736.

¹³¹⁹ Cole and Ramirez, above n 1309, 707.

¹³²⁰ Pegram, above n 1308, 736.

fairness of a government's administrative conduct while a human rights commission mainly addresses issues of human rights violations and discrimination.¹³²¹ This substantive mandate may render the human rights commission more effective than the classic ombudsman.¹³²² Yet at the same time, a human rights commission generally assumes an advisory rather than an investigative role, and for this reason a human rights commission may be less effective than a classic ombudsman.¹³²³ A human rights ombudsman is the newest of the three roles, which may make it less effective than the other two longer-established models.¹³²⁴

In comparing these models with the regulations under the Paris Principles, the human rights commission model best reflects the requirements of the Paris Principles, which makes it the most popular model contemporarily. This is because the coordinating body of NHRIs worldwide applies the Paris Principles as the standards for determining what constitutes a good NHRI.¹³²⁵ This ranking is also helpful in identifying an NHRI globally recognised. 'A' status means the establishment, composition, function and other attributes of an NHRI comply with the guidelines and requirements of the Paris Principles. An 'A' status NHRI represents the best existing monitoring mechanism at the national level for ensuring the application of international human rights standards. As of 5 August 2016, 75 NHRIs among 117 accredited NHRIs worldwide have acquired 'A' status.¹³²⁶

By this global accreditation for NHRIs by their coordinating body and their formal recognition by the UN under its Paris Principles, the legitimacy of NHRIs in defending human rights and monitoring compliance with human rights treaty obligations of States Parties of UN human rights treaties is unquestionable. More significantly, the CRPD has stressed the importance of NHRIs in monitoring the implementation of the CRPD. I will next

¹³²¹ Sonia Cardenas, 'Emerging Global Actors: The United States and National Human Rights Institutions' (2003) 9 *Global Governance* 23, 25.

¹³²² Cole and Ramirez, above n 1309, 706–7.

¹³²³ Ibid 706–7.

¹³²⁴ Ibid 707.

¹³²⁵ The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Chart of the Status of National Institutions: Accreditation Status as of 5 August 2016* (15 August 2016) The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights <<http://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart.pdf>>, 9 ('*NHRIs Accreditation Status 2016*').

¹³²⁶ Ibid.

discuss a form of NHRI recommended by the CRPD for monitoring the implementation of the CRPD.

6.4.3. An NHRI under the CRPD

Under Article 33.2 of the CRPD, States Parties are required to maintain and strengthen an independent monitoring mechanism if they already have one in place, or establish one if they do not.¹³²⁷ Commentators have asked whether it is obligatory for the CRPD's States Parties to have an NHRI but have received no definite answer.¹³²⁸ This is because if a strict interpretation is applied, States Parties would certainly have to have one, but if Article 33.2 is taken into account, it only requires entities that promote, protect and monitor the implementation of the CRPD, which does not necessarily constitute an NHRI. I would argue that the wording of Article 33.2 is very clear and obligates States Parties to have an NHRI to promote, protect and monitor the implementation of the CRPD, because the CRPD should be interpreted in good faith and the true ordinary meaning given to its text in the context of its object and purpose.¹³²⁹

A relevant question at this point is whether an NHRI in a State Party can sufficiently promote and protect the human rights of persons with disabilities, and effectively monitor the implementation of the CRPD. The reason for asking this is that a country is usually a State Party to more than one human rights treaty, and in fact many countries are States Parties to all nine core international human rights treaties – for example, Argentina,¹³³⁰ Honduras,¹³³¹ and Morocco¹³³² – while each country has only one NHRI. Therefore, the task of overseeing the

¹³²⁷ CRPD art 33.2.

¹³²⁸ Gauthier de Beco and Alexander Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention* (Martinus Nijhoff Publishers, 2013) 9, 44–5.

¹³²⁹ *Vienna Convention on the Law of Treaties* art 31.1.

¹³³⁰ Office of the United Nations High Commissioner for Human Rights, *View the Ratification Status by Country or by Treaty – Argentina* (6 February 2016) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN>.

¹³³¹ Office of the United Nations High Commissioner for Human Rights, *View the Ratification Status by Country or by Treaty – Honduras* (6 February 2016) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN>.

¹³³² Office of the United Nations High Commissioner for Human Rights, *View the Ratification Status by Country or by Treaty – Morocco* (6 February 2016)

implementation of all human rights treaties in such a country for one NHRI is enormous. This also means that overseeing the implementation of the CRPD is just a tiny part of this huge task. It follows that the implementation of the CRPD can easily be neglected.

This also means that with only one NHRI responsible for all protected groups under different treaties, persons with disabilities are unlikely to be fully protected. This under-protection happened before the adoption of the CRPD. It is well documented that although none of the previous human rights treaties ever excluded persons with disabilities from their protected groups, persons with disabilities were not paid adequate attention. The same is happening now at the national level, with one NHRI in a country covering all protected groups and trying to do justice for them all. One NHRI cannot effectively oversee the implementation of all human rights treaties including the CRPD, hence cannot offer full protection for all target groups. But there is no precedent of a country having more than one NHRI, with one specifically responsible for the implementation of the CRPD.

Therefore, I suggest a sub-commission specifically in charge of disability issues to be set up within the NHRI, and that the composition of this sub-commission should include members with disabilities and representatives of DPOs.

6.4.4. The Roles of NHRIs in Monitoring the Implementation of the CRPD

The CRPD specifies three functions for an NHRI: promotion, protection and monitoring of the implementation of the CRPD.¹³³³ The first two functions will be discussed in Chapter VII on the implementation of the CRPD. The last function – to monitor the implementation of the CRPD within the State Party by an NHRI under the CRPD – is relevant to this discussion. The monitoring function includes advising Government, parliament and other competent agencies of a State Party on human rights matters regarding disability law, policy development and the implementation of the CRPD. It also includes ensuring the compliance of domestic law and policies with the CRPD, and assisting the State Party in completing its

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN.

¹³³³ CRPD art 33.2.

State reporting obligations, by contributing to reporting preparation, all of which can be found in guidelines under the CRPD¹³³⁴ and the Paris Principles.¹³³⁵

In addition, an NHRI can monitor the State Party in compliance with the CRPD's concluding observations and views in response to initial and periodic reports submitted by States Parties to the CRPD and individual communications.

The CRPD Committee also defines the roles of NHRIs in Rule 51 of its Rules of Procedure, where it indicates that NHRIs can assist the CRPD Committee in discharging its monitoring work by making oral or written statements and providing information or documentation in relevant areas at its meetings.¹³³⁶

Given the important role of NHRIs in defending the human rights of persons with disabilities, it is necessary to clarify how many countries which are States Parties to the CRPD have some form of NHRI. At the time of writing, out of 166 States Parties to the CRPD, there are 107 States Parties that have at least one NHRI of some form.¹³³⁷ And out of 89 States Parties to the CRPD Optional Protocol, there are 53 that have, between them, 57 NHRIs in some form.¹³³⁸ It is important to note that some of these countries are States Parties to both the CRPD and its Optional Protocol.

6.5. Concluding Remarks

The discussion of this chapter on the CRPD Committee in relation to its composition and functions reveals that the CRPD Committee has in general not been different from any other human rights treaty committee. However, it is distinctive in many aspects. In particular, it is dominated by experts with disabilities as its members.

The discussion also reveals that the participation of civil society and NHRIs in monitoring the implementation of a human rights treaty is not novel. What is different about the CRPD is

¹³³⁴ Ibid arts 4, 8, 32, 33, 35.

¹³³⁵ *Paris Principles*, UN Doc A/RES/48/134, annex ('*Principles Relating to the Status of National Institutions*'), paras 1,2, 3, Competence and Responsibilities.

¹³³⁶ *CRPD Committee Rules of Procedure*, UN Doc CRPD/C/4/2, Rule 51.

¹³³⁷ United Nations, above n 21; The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, above n 1325.

¹³³⁸ United Nations, above n 21; The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, above n 1325.

that it formalises such participation, and particularly the involvement of DPOs in the monitoring work.

These two different features of the CRPD's monitoring mechanism have made the CRPD distinctive from other human right treaties. Never before has there been a member with disabilities serving in a human rights treaty committee, even though persons with disabilities can be members of a human rights committee dealing with non-disability matters. And no DPOs, as representative of civil society organisations, have participated in monitoring the implementation of the UN's previous human rights treaties.

These distinctive features of the CRPD are designed in such a way that they are well defined under the CRPD's provisions, instead of being applied as customary rules that have evolved over the time, as in the case of other human rights treaties. They are designed so that the CRPD not only prescribes a monitoring mechanism at the national level but also specifies who should be involved in this process.

These distinctive features of the CRPD are not only well-designed but effective, because they involve persons with disabilities and DPOs in monitoring the implementation of the CRPD. This involvement means that society recognises that persons with disabilities should be actively responsible for themselves, and take control of their own lives through designing and implementing legislation and policies affecting their lives, and that no one is in a better position to assume these responsibilities – that this is all about 'Nothing about Us without Us', a motto of the international disability community. This involvement also serves as a process of collective and individual empowerment for persons with disabilities. I believe that for these reasons the implementation of the CRPD will be undertaken properly, with the involvement of persons with disabilities at both international and national levels.

This Chapter has discussed the monitoring mechanism for the implementation of the CRPD, and Chapter V has discussed the CRPD's conceptual framework and important substantive provisions and issues. The discussion of these two chapters brings together a complete set of components for the implementation of the CRPD: the understanding of the

conceptual framework and substantive principles and provisions of the CRPD, and the monitoring mechanism for its implementation in reality. How the CRPD will be implemented and how this monitoring mechanism will work towards accomplishing its monitoring mission will be discussed next, in Chapters VII and VIII dealing with State reports and individual complaint procedures.

CHAPTER VII: THE IMPLEMENTATION OF THE CRPD – STATE REPORTING PROCEDURE

7.1. Introductory Remarks

The state reporting procedure is the only compulsory procedure assumed by all human rights treaty committees. Under the CRPD, this procedure is regulated under Article 35. Substantively, State reports should include measures undertaken by States Parties to fulfil their treaty obligations under the CRPD.¹³³⁹ With the CRPD having been in force for 8 years, since May 2008, States Parties have submitted their initial and periodic reports on their implementation of the CRPD, and the CRPD Committee has been considering State reports submitted to it. This means that references are available for a discussion on the implementation of the CRPD by States Parties and the work of the CRPD Committee with regard to its consideration of State reports. Reading State reports produces the distinct impression that the CRPD is now being implemented and that States Parties have been transforming the CRPD's norms and provisions into their national laws to realise the human rights of persons with disabilities.

In Chapter V, I contended that the CRPD theoretically and normatively possesses the inherent merits and values that create platforms for positive change in the protection of the human rights of persons with disabilities. In addition, in section 6.2.1 and sub-subsection 6.2.2.1 of Chapter VI I introduced the CRPD Committee and the State reporting procedure under the CRPD, respectively.

Against this background, the question arises as to how States Parties have transformed the CRPD's norms and provisions into their national laws. In this chapter I will demonstrate how this has been done, through investigating state reports on the implementation of the CRPD and the CRPD Committee's work on examining states reports. The discussion of this chapter will help in evaluating whether the CRPD does in practice protect the human rights of persons

¹³³⁹ CRPD art 35.1.

with disabilities. Importantly, this analysis will contribute to answering the thesis question of whether the CRPD represents an advance in protecting the human rights of persons with disabilities.

The discussion of this chapter is divided into six sections. Section 7.1 is the introduction. Section 7.2 explains what is meant by the implementation of the CRPD, and introduces the implementation mechanism of the CRPD. Section 7.3 is a general evaluation of the implementation of the CRPD by the States Parties and the work of the CRPD Committee. The discussion of these two sections provides a contextual background for Sections 7.4 and 7.5 investigating the implementation of the CRPD in relation to the CRPD's theoretical framework and selected substantive norms.

Section 7.4 is a discussion on how the three concepts, of disability, equality and discrimination, are understood under the CRPD and implemented by States Parties to the CRPD, and how they are explained by the CRPD Committee. The discussion then goes on to illustrate how these understandings are related, and compatible with those of the CRPD.

Section 7.5 discusses how the rights under the CRPD, *inter alia*, to legal capacity, and deinstitutionalisation, freedom from involuntary medical treatment, and accessibility are understood and implemented by States Parties to the CRPD, and how they are explained and assessed by the CRPD Committee. Section 7.6 draws conclusion for the discussion of the chapter.

7.2. The Implementation of the CRPD

The Implementation of a human rights treaty at the national level refers to compliance with treaty obligations by States Parties.¹³⁴⁰ A state's obligation in this sense comprises three aspects: the obligations to respect, protect and fulfil. The obligation to respect requires States Parties to respect individual rights and freedoms by refraining from interference in the enjoyment of those rights and freedoms.¹³⁴¹ The obligation to protect requires States Parties to

¹³⁴⁰ Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111(8) *Yale Law Journal* 1935, 1940.

¹³⁴¹ Nowak, above n 980, 24.

protect individuals from abuses of those rights by the third parties.¹³⁴² The obligation to fulfil requires them to take positive and affirmative action in order to realise the enjoyment of those human rights.¹³⁴³

There are two main forms of compliance, namely, the rational actor form and the normative one. In the rational actor model, States Parties comply with their obligations established under an international human rights treaty to which they have consented to be bound, driven by geopolitical interests and strategic benefits that this might have,¹³⁴⁴ such as improving their international reputation, enhancing their geopolitical power, furthering their ideological ends, avoiding conflict, or avoiding sanction by a more powerful state.¹³⁴⁵

In the normative form, States Parties comply with their treaty obligations because of their status as States Parties to the treaty,¹³⁴⁶ the legitimacy and justness of the rules of the treaty,¹³⁴⁷ and the internalisation and invocation of the treaty rules for interaction among States Parties.¹³⁴⁸ Compliance in this form means compliance with substantive treaty obligations outlined in the treaty, with the spirit of the treaty, and with procedural obligations such as requirements to report.¹³⁴⁹

The implementation of the CRPD within this thesis should be understood in this normative form, because the thesis investigates the implementation of the CRPD in the normative form only – that is, it is concerned with the internalisation of international rules regarding direct litigation and the incorporation of the provisions of the CRPD into domestic laws. This includes compliance with procedural obligations, such as submitting periodic reports to the CRPD Committee.

In order to implement an international human rights treaty, an implementation mechanism is required. Under the CRPD, this mechanism at the national level includes involvement of a

¹³⁴² Ibid.

¹³⁴³ Ibid.

¹³⁴⁴ Hathaway, above n 1340, 1944–62.

¹³⁴⁵ Ibid 1944.

¹³⁴⁶ Ibid 1956.

¹³⁴⁷ Ibid 1958.

¹³⁴⁸ Ibid 1960.

¹³⁴⁹ Ibid 1964.

governmental body as well as national human rights institutions (NHRIs) and organisations of persons with disabilities (DPOs).

In this section I will first explain what is meant by the implementation of the CRPD and then introduce the implementation mechanism. The discussion will provide a contextual background for Sections 7.4 and 7.5 discussing the implementation of the conceptual framework and selected normative rules of the CRPD.

7.2.1. An Explanation of the Implementation of the CRPD

Against the background of the implementation of an international human rights treaty at the national level, the implementation of the CRPD means that States Parties to the CRPD undertake their treaty obligations regulated under the CRPD. Treaty obligations can be found in all articles of the CRPD, and there are general and specific obligations.

General obligations are regulated under Article 4 of the CRPD, a model that is similar to other human rights treaties.¹³⁵⁰ With regard to obligations to respect, States Parties are obligated to internalise the CRPD's provisions through adopting new legislation and modifying or abolishing discriminatory legislation on the ground of disability.¹³⁵¹ They are required to ensure equality in law, which means that their national laws should not be discriminatory and prejudicial towards persons with disabilities.¹³⁵² In relation to the obligation to protect, States Parties are required to protect persons with disabilities from discrimination by the third parties, including individuals, organisations, or private entities, on the grounds of disability.¹³⁵³ With respect to the obligation to fulfil, States Parties are required to undertake affirmative action, including conducting disability research, ensuring accessibility of infrastructure and information technologies and providing personnel training on how to work with persons with disabilities to realise their human rights.¹³⁵⁴ Distinctively,

¹³⁵⁰ *ICCPR* art 2; *ICESCR* art 2; *CEDAW* art 2.

¹³⁵¹ *CRPD* art 4.1(a),(b).

¹³⁵² *Ibid* art 4.1(a),(b),(c).

¹³⁵³ *Ibid* art 4.1(e).

¹³⁵⁴ *Ibid*.

in fulfilling their treaty obligations, States Parties are required to consult DPOs as a new general obligation.¹³⁵⁵

Specific obligations are detailed in specific articles on different subjects. For example, a State Party can implement Article 24 on education by referring back to Article 4. This reference will guide them to ensure their educational law is not discriminatory, and to adopt national education programmes on equal opportunity for children with disabilities. A similar process is applied to all other articles on specific rights – for example, the right to work. An implementation mechanism is required to discharge these treaty obligations. This is discussed next.

7.2.2. The Implementation Mechanism of the CRPD

Under the CRPD, the implementation mechanism at the national level includes involvement of governmental institutions, DPOs, and NHRIs. Several States Parties in their State reports submitted to the CRPD Committee have mentioned the involvement of these institutional frameworks in the implementation of the CRPD. In the next subsection I briefly introduce the roles of these governmental institutions, DPOs, and NHRIs in the implementation of the CRPD.

7.2.2.1. Government Institutions for the Implementation of the CRPD

States Parties to the CRPD are required to designate a focal point within their government to deal with matters relating to the CRPD's implementation, as an initial step towards establishing a coordinating mechanism on disability within their government.¹³⁵⁶ Though the CRPD does not explicitly mention such a national institution, the WPA, Standard Rules, and other UN documents recommend such an entity. According to those documents, a national coordinating mechanism should be established based upon a legislative, administrative or

¹³⁵⁵ Ibid art 4.3.

¹³⁵⁶ Ibid art 33(1).

other legal foundation, and located if possible at the highest level of government.¹³⁵⁷ In addition, that entity should be equipped with adequate human and financial resources and a membership of public and private individuals, including representatives of all concerned government ministries, DPOs, and NGOs.¹³⁵⁸ This coordinating mechanism should assume the function of implementing national programmes and policies on disability in all fields,¹³⁵⁹ and coordinating the implementation of the CRPD at all levels. This is the most desirable and strongly supported form of a national coordinating mechanism.

In practice, however, each country has their own model based on their economic, political and social situation. For example, Bulgaria in 2013 established a group of experts with representatives from all responsible state authorities, and later promoted this group as a coordinating and monitoring mechanism for the implementation of the CRPD.¹³⁶⁰ Cyprus designated its Council for Persons with Disabilities as a coordinating mechanism to facilitate the implementation of the CRPD.¹³⁶¹ Uganda assigned its National Council for Disability, a government institution, to spearhead the coordination and monitoring processes, domestication, and implementation of the CRPD.¹³⁶² The Philippines, in 2008, established a national council on disability affairs to be in charge of formulating policies and coordinating and monitoring programs and projects for persons with disabilities.¹³⁶³

¹³⁵⁷ WPA, UN Doc A/37/51, [89]; *Standard Rules*, UN Doc A/RES/48/96 Rule 17; *Social Development: Questions Relating to the World Social Situation and to Youth, Aging, Disabled Persons and the Family*, 46th sess, Agenda Item 94 (a), UN Doc A/C.3/46/4 (6 November 1991) annex I ('*Guidelines for the Establishment and Development of National Coordinating Committee on Disability*') [27].

¹³⁵⁸ WPA, UN Doc A/37/51, [89]; *Standard Rules*, UN Doc A/RES/48/96 Rule 17; *UN Guideline on NCCD*, UN Doc A/C.3/46/4, [27].

¹³⁵⁹ *UN Guideline on NCCD*, UN Doc A/C.3/46/4, [29].

¹³⁶⁰ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Bulgaria*, UN Doc CRPD/C/BGR/1 (29 October 2015) [17] ('*Bulgaria Initial State Report*').

¹³⁶¹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Cyprus*, UN Doc CRPD/C/CYP/1 (27 February 2015) [4] ('*Cyprus Initial State Report*').

¹³⁶² Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Uganda*, UN Doc CRPD/C/UGA/1 (10 March 2015) [18] ('*Uganda Initial State Report*').

¹³⁶³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — The Philippines*, UN Doc CRPD/C/PHL/1 (3 November 2015) [2] ('*Philippines Initial State Report*').

7.2.2.2. DPOs in the Implementation of the CRPD

DPOs' involvement in the implementation of the CRPD is regulated under Article 33.3, but should be read along with Article 4.3 and all other articles of the CRPD. This involvement varies across a wide-range of issues. DPOs can nominate their representatives to participate in coordinating government institutions for the purpose of implementing the CRPD.¹³⁶⁴ DPOs can send their representatives to participate in NHRIs to promote and protect the human rights of persons with disabilities during the course of the implementation of the CRPD.¹³⁶⁵

In addition, DPOs can participate in any process of developing and implementing disability legislation and policies specified under the CRPD.¹³⁶⁶ For example, they can be a part of a parliamentary hearing session on a new bill for ensuring that the bill complies with the CRPD's provisions, or part of an awareness raising effort conducted by a government.¹³⁶⁷ It is hoped that this participation will be an impetus for advancing full inclusion of persons with disabilities into society, ranging from decision-making processes that affect their lives, to the implementation of legislation and policies.¹³⁶⁸ However, it remains a concern that at the implementation stage, and despite being obligatory, States Parties still have full power to decide if they want to invite DPOs to participate at that stage. Moreover, during these processes, DPOs, as a part of civil society, only have consultative status, such as making recommendations for a draft law. This means that the incorporation of their suggestions into a new law will depend entirely on the discretion of States Parties.¹³⁶⁹

DPOs are the essential partners of States Parties in the implementation of the CRPD, with 113 States Parties out of 166 having national DPOs.¹³⁷⁰ As examples, DPOs in Armenia, Australia and the Philippines have submitted recommendations on the structure and content of

¹³⁶⁴ This has been just discussed in Sub-subsection 7.2.2.1 of this Chapter.

¹³⁶⁵ This is to be discussed below in Sub-subsection 7.2.2.3 of this Chapter.

¹³⁶⁶ CRPD art 4.3.

¹³⁶⁷ Beco and Hoefmans, above n 1328, 59.

¹³⁶⁸ Ibid.

¹³⁶⁹ Examples of DPOs, such as Disabled People's International or International Disability Caucus participate in processes of developing and implementing disability legislations and policies including the CRPD have been mentioned in Section 5.2, Sub-subsection 5.3.1.1, and Subsection 5.4.4 of Chapter V on the CRPD.

¹³⁷⁰ United Nations, above n 21; Disabled Peoples' International, above n 1299.

the initial reports on the implementation of the CRPD.¹³⁷¹ DPOs in New Zealand have engaged in advocating for persons with disabilities in all matters.¹³⁷²

7.2.2.3. *NHRIs in the Implementation of the CRPD*

The CRPD designates two functions, of promotion and protection, for an NHRI in implementing the CRPD.¹³⁷³ The first function, of promotion, refers to activities such as the dissemination of information, education and research programmes, and the organisation of public events on disability and the CRPD.¹³⁷⁴ Promotion aims to raise awareness on disability and the CRPD in order to combat discrimination against, and build a physical and negative-attitudinal barrier-free society for persons with disabilities.

The second function, of protection, refers to the responsibility to end the violation of disability rights, including discrimination against persons with disabilities. This covers the individual complaints procedure, which means that for countries that are States Parties to the CRPD Optional Protocol, NHRIs can assist persons with disabilities to lodge complaints to the CRPD Committee,¹³⁷⁵ when national remedies have been exhausted.¹³⁷⁶

With most of the States Parties to the CRPD having some form of NHRI,¹³⁷⁷ the involvement of NHRIs in the implementation of the CRPD has been mentioned in State reports. For example, the National Commission for Human Rights of Rwanda is an independent public institution with the overall mission of promoting and protecting human rights for all, including persons with disabilities, and investigating violations of human rights committed on Rwandan territory by public and private entities and individuals.¹³⁷⁸

¹³⁷¹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Armenia*, UN Doc CRPD/C/ARM/1 (24 March 2015) [6] ('*Armenia Initial State Report*'); Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Australia*, UN Doc CRPD/C/AUS/1 (7 June 2012) [7] ('*Australia Initial State Report*'); *Philippines Initial State Report*, UN Doc CRPD/C/PHL/1, [7].

¹³⁷² Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — New Zealand*, UN Doc CRPD/C/NZL/1 (1 October 2013) [5] ('*New Zealand Initial State Report*').

¹³⁷³ CRPD art 33.2.

¹³⁷⁴ Ibid art 8.

¹³⁷⁵ Beco and Hoefmans, above n 1328, 47.

¹³⁷⁶ CRPD Optional Protocol art 2(d).

¹³⁷⁷ This has been discussed in Subsection 6.4.4 of Chapter VI.

¹³⁷⁸ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article*

This discussion of the implementation mechanisms now leads to a general evaluation of how the CRPD is being implemented by the State Parties, and the next question is how the CRPD Committee monitors such implementation.

7.3. Stocktaking on the Implementation of the CRPD

In this section I will evaluate the implementation of the CRPD by the States Parties and the work of the CRPD Committee with regard to its consideration of State reports. This discussion will provide a contextual background for Sections 7.4 and 7.5

7.3.1. An Appraisal of Implementation by States Parties

At the time of writing, there have been a total of 93 initial reports submitted to the CRPD Committee. Of these I have read the 78 state reports that are in English. In this subsection I will discuss three issues, relating to the formatting, report submission delay, and content of State reports, which are the dominant issues with regard to them. This will offer a background for understanding the analysis on the actual implementation of the CRPD in the two following sections.

In terms of formatting issues, although most States Parties have followed the CRPD Committee's reporting guidelines,¹³⁷⁹ some have not, as the common core documents are mixed with specific reports. For example, Costa Rica, Brazil and the Dominican Republic have included common core documents along with initial reports on the implementation of the CRPD,¹³⁸⁰ making it difficult to follow the flow of the reports when reading.

With regard to report submission delay, most States Parties were late in submitting their initial reports. Commonly, the time of delay is between one and two years. Extreme cases can be much longer. The Philippines' initial report was due in 2010 but not submitted until four

35 of the Convention — Initial Reports of States Parties — Rwanda, UN Doc CRPD/C/RWA/1 (23 October 2015) ('*Rwanda Initial State Report*').

¹³⁷⁹ As discussed in Sub-subsection 6.2.2.1 of Chapter VI of this thesis.

¹³⁸⁰ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Brazil*, UN Doc CRPD/C/BRA/1 (14 July 2014) ('*Brazil Initial State Report*'); Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Dominican Republic*, UN Doc CRPD/C/DOM/1 (4 July 2013) ('*Dominican Republic Initial State Report*').

years later in 2014.¹³⁸¹ Rwanda's was due in 2011 but was not submitted until April 2015.¹³⁸² Canada, as a developed country with available financial and human resources, was overdue by 2 years with a report submitted in 2014.¹³⁸³ Gabon has lately submitted its initial report, due in 2013, after 5 years of delay.¹³⁸⁴ This late submission shows the signs that these countries are overloaded with reporting obligations under different human rights treaties, usually because they are States Parties to more than one such treaty, and in fact many countries are States Parties to all nine core international human rights treaties, for example, Argentina,¹³⁸⁵ Honduras,¹³⁸⁶ or Morocco.¹³⁸⁷ Most importantly, this late submission can be considered as a violation of the reporting obligations under the CRPD, though no sanctions have so far have been applied.¹³⁸⁸

In relation to the content of the state reports, States Parties have reported both their successes and the factors and difficulties as stipulated under Article 34 of the CRPD. With regard to the successes, they have reported full details of what they have done, including concrete numbers of programmes and beneficiaries. Examples include Thailand, which has reported on 4,307 women with disabilities receiving loans from a fund to empower women with disabilities,¹³⁸⁹ and Australia, which reports that only one in 40 persons with disabilities aged less than 65 years have been institutionalised since 2003, compared with almost one in 10 in 1981.¹³⁹⁰

Many States Parties have been able to report the introduction of national action plans on disability, detailing concrete programmes with approved budgets to support persons with disabilities. For example, Slovakia has reported a national action plan on the

¹³⁸¹ *Philippines Initial State Report*, UN Doc CRPD/C/PHL/1, 1.

¹³⁸² *Rwanda Initial State Report*, UN Doc CRPD/C/RWA/1, 1.

¹³⁸³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Canada*, UN Doc CRPD/C/CAN/1 (7 July 2015) 1 ('*Canada Initial State Report*').

¹³⁸⁴ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Gabon*, UN Doc CRPD/C/GAB/1 (14 July 2014) 1 ('*Gabon Initial State Report*').

¹³⁸⁵ Office of the United Nations High Commissioner for Human Rights, above n 1330.

¹³⁸⁶ Office of the United Nations High Commissioner for Human Rights, above n 1331.

¹³⁸⁷ Office of the United Nations High Commissioner for Human Rights, above n 1332.

¹³⁸⁸ Kalin, above n 1170, 32.

¹³⁸⁹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Thailand*, UN Doc CRPD/C/THA/1 (30 January 2015) [21] ('*Thailand Initial State Report*').

¹³⁹⁰ *Australia Initial State Report*, UN Doc CRPD/C/AUS/1, [111]–[112].

deinstitutionalisation of persons with disabilities with a budget of EUR 1,050,000.¹³⁹¹ Brazil now has a national plan to increase the participation of persons with disabilities in society by promoting their autonomy and removing barriers on goods and services, with an approved budget of BRL 7.6 billion.¹³⁹² These facts show that the CRPD is bringing concrete results that are changing the lives of persons with disabilities.

Along with the successes, States Parties have mentioned difficulties in implementing the CRPD. For example, Honduras acknowledges that there are no public services or residences available for persons with disabilities who cannot afford private care services.¹³⁹³ Albania acknowledges that, despite all their new legal developments, they do not have the independent living services to support persons with disabilities, and there remain a number of persons with disabilities living in isolation from their families due to the high costs of the independent living services.¹³⁹⁴ New Zealand acknowledges that it is difficult to help persons with disabilities live in the community because they are not always welcomed by the communities and private property owners.¹³⁹⁵ Uruguay recognises that despite their regulatory and policy advances, it does not have a mechanism for monitoring compliance with accessibility regulations and applying sanctions for non-compliance, and that no national accessibility plans have yet been drawn up.¹³⁹⁶

Indication from this stocktaking of the implementation of the CRPD by States Parties is that States Parties do report carefully and do it in good faith. The concrete numbers and described action plans produced by States Parties do seem to show that the CRPD brings real

¹³⁹¹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Slovakia*, UN Doc CRPD/C/SVK/1 (24 September 2014) [179]–[181] ('Slovakia Initial State Report').

¹³⁹² *Brazil Initial State Report*, UN Doc CRPD/C/BRA/1, [48]–[49].

¹³⁹³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Honduras*, UN Doc CRPD/C/HND/1 (8 July 2015) [172] ('Honduras Initial State Report').

¹³⁹⁴ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Albania*, UN Doc CRPD/C/ALB/1 (May 2015) [35] ('Albania Initial State Report').

¹³⁹⁵ *New Zealand Initial State Report*, UN Doc CRPD/C/NZL/1, [137]–[139].

¹³⁹⁶ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Uruguay*, UN Doc CRPD/C/URY/1 (8 July 2015) [206]–[207] ('Uruguay Initial State Report').

change to the lives of persons with disabilities and that an effort is being made to protect their human rights in practice.

7.2.4. An Appraisal of the Work of the CRPD Committee

In this subsection I will discuss four topics including a number of state reports considered by the CRPD Committee, and the issue of backlog, the List of Issues, concluding observations and follow-up, and general comments, which are the main issues in relation to the function of consideration of state reports of the CRPD Committee.

With respect to the number of state reports considered by the CRPD Committee by the end of July 2016, the CRPD Committee has received 93 initial reports¹³⁹⁷ of which 41 have been considered.¹³⁹⁸ Since the CRPD Committee started its work of considering state reports in 2011, with 2 meeting sessions each year, it has considered 3.5 reports per year on average.¹³⁹⁹ Since 2014 the Committee's meeting sessions have, as mentioned, been increased from 1 to 2 weeks with an additional week added for a pre-session meeting. Currently, at each meeting session the Committee is able to consider 6 or 7 state reports during a main meeting session, and produce 6 or 7 Lists of Issues for another 6 or 7 State reports as preparation for the next meeting session. This means that since September 2014, the Committee has each year been able to complete the consideration of 12 to 14 State reports.¹⁴⁰⁰ Extrapolating from this, it will take the CRPD Committee another 3.5 to 4 years to work through the rest of the reports received to date, that is, not including any reports submitted after July 2016. The efficiency of the work of the CRPD Committee might be hindered by this backlog. Currently there are 166 States Parties to the CRPD,¹⁴⁰¹ with many still to submit their second reports or first periodic

¹³⁹⁷ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities — States Parties Reports* (14 May 2016) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29>.

¹³⁹⁸ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities — Concluding Observations* (13 May 2016) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5>.

¹³⁹⁹ *Ibid.*

¹⁴⁰⁰ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities — Sessions* (13 May 2016) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD>.

¹⁴⁰¹ United Nations, above n 21.

reports, and many others who are still to submit their initial reports, so the backlog of the reports received by the CRPD Committee will be massive.

In terms of the List of Issues presented to States Parties after receiving their reports, the CRPD Committee sends the list to the State Party concerned, requiring it to thoroughly clarify, Article by Article, any measures taken in implementing the CRPD. This has an initial effect of educating the government officials on the situation of persons with disabilities, in preparation for replying to the list. Thus the List of Issues can serve as an awareness-raising tool on disability for busy government officials.

In relation to the concluding observation and its follow-up, at the time of writing the CRPD Committee has issued 41 concluding observations.¹⁴⁰² These have been formulated based on a consideration of each country-specific report; therefore, each concluding observation is strongly individual, applying specifically to the country which submitted the report.

In terms of formulating general comments, at the time of writing the CRPD Committee has adopted two general comments, on Articles 9 on accessibility, and Article 12 on equal recognition before the law.¹⁴⁰³ Two other general comments, on women with disabilities and the right to inclusive education, are currently being drafted.¹⁴⁰⁴

No one seriously doubts that the CRPD is being implemented. How this actual implementation is taking place will be assessed in the following sections, on investigating the State reports on substantive issues, and on the work of the CRPD Committee.

¹⁴⁰² Office of the United Nations High Commissioner for Human Rights, above n 1398.

¹⁴⁰³ Committee on the Rights of Persons with Disabilities, *General Comment No. 2: Accessibility (Art. 9)*, 11th sess, UN Doc CRPD/C/GC/2 (11 April 2014) ('*CRPD Committee General Comment No. 2*'); Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Equal Recognition before the Law (Art. 12)*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) ('*CRPD Committee General Comment No. 1*').

¹⁴⁰⁴ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities — Draft General Comment on Women with Disabilities* (27 January 2016) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GCWomen.aspx>>; Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities — Draft General Comment on the Right to Inclusive Education* (27 January 2016) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GCRightEducation.aspx>>.

7.4. From Conceptual Framework to Implementation – Key Theories

How implementation is understood is in itself intertwined with the concepts of disability, equality and discrimination. Therefore, in this section, an analysis of state reports on these concepts, and the CRPD Committee members' understanding of them, is undertaken. The analysis will proceed by investigating the initial reports submitted to the CRPD Committee and examining the work of the CRPD Committee in considering them. The discussion aims at comparing the understanding of these three concepts under the CRPD with how they are understood by States Parties and how they are explained by the CRPD Committee. This comparison will help in determining whether the CRPD in practice protects and advances the human rights of persons with disabilities.

7.4.1. Disability

The CRPD uses a combined concept of disability. That means a combination of the medical, social and socio-political models of disability along with a human rights-based approach. In this subsection I examine how States Parties use the concept as stated in their States reports and how the CRPD Committee explains the concept after considering State reports, in comparison with the understanding of the concept under the CRPD.

7.4.1.1. Disability as Understood by States Parties as Stated in State Reports

Exactly how the concept of disability is understood and interpreted by the State Parties is an important issue when examining the implementation of the CRPD at the national level because that understanding is a starting point and basis for any legislation and policy interventions in implementing the CRPD. After reading though 78 State reports submitted to the CRPD Committee, available on the website of the OHCHR, my conclusion is that the understanding of the concept of disability under the CRPD by States Parties varies, depending on the level of development and the political outlook of each country. However, this does not mean that a developed country would adopt a more advanced concept of disability, and in any

case it is contentious to state which concept is more advanced than others. The variations can be grouped into four categories, these being those according with the medical model of disability, those comprising a combination of the medical and social models, multiple definitions of disability, and the application of the CRPD's definition to domestic laws.

The concept of disability is predominantly understood according the medical model of disability, construing disability as a personal functional limitation rather than a social construction, without mentioning any external factors. In my examination of the State reports, 37 countries among the 78 (or about 50 percent) have adopted this medical model, including some very developed countries such as Denmark and the UK.¹⁴⁰⁵ Among them, many, such as Denmark and the Cook Islands,¹⁴⁰⁶ contend that their definitions are a combination of both the medical and social models, or, like South Korea,¹⁴⁰⁷ claim that it is harmonised with the definition under the CRPD, but in fact their concepts of disability heavily focus on the personal functional limitations of individuals without referring to any external social factors.

In some cases, viewing disability as resulting from personal functional limitations is extremely harmful. For example, Paraguay defines persons with disabilities as exceptional or handicapped, or as beneficiaries,¹⁴⁰⁸ implying from the very beginning that persons with disabilities cannot do anything to support themselves, and are dependent on society as beneficiaries, which can be interpreted to mean that they are a burden to society. Azerbaijan defines persons with disabilities as those who need 'social assistance and protection because of mental or physical defects arising from birth, sickness or injury'.¹⁴⁰⁹ The most harmful

¹⁴⁰⁵ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Denmark*, UN Doc CRPD/C/DNK/1 (7 May 2013) [24] ('*Denmark Initial State Report*'); Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — United Kingdom of Great Britain and Northern*

Ireland, UN Doc CRPD/C/GBR/1 (3 July 2013) [51] ('*UK Initial State Report*').

¹⁴⁰⁶ *Denmark Initial State Report*, UN Doc CRPD/C/DNK/1, [24]; Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Cook Island*, UN Doc CRPD/C/COK/1 (28 June 2013) [55] ('*Cook Island Initial State Report*').

¹⁴⁰⁷ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Republic of Korea*, UN Doc CRPD/C/KOR/1 (27 February 2013) [10] ('*South Korea Initial State Report*').

¹⁴⁰⁸ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Paraguay*, UN Doc CRPD/C/PRY/1 (28 June 2011) [4] ('*Paraguay Initial State Report*').

¹⁴⁰⁹ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Azerbaijan*, 11th sess, UN Doc CRPD/C/AZE/CO/1 (12 May 2014) [3] *CRPD* ('*Committee Concluding Observations – Azerbaijan*').

definition is that of the Philippines, which views persons with disabilities as abnormal human beings.¹⁴¹⁰ This kind of definition automatically undermines the human rights of persons with disabilities in every respect.

New Zealand has its own way of understanding disability.¹⁴¹¹ It defines it as ‘any self-perceived limitation in activity resulting from a long-term condition or health problem lasting or expected to last six months or more, and not completely eliminated by an assistive device’.¹⁴¹² Even though this reads like a unique way of understanding disability, I contend that it still reflects the medical model of disability in stating that disability is the result of a functional limitation developed over a period of time.

20 among 78 States Parties have adopted a combination of the medical and social models. In this conception, disability is a combination of a personal functional limitation and environmental factors – a conception that is compatible with the understanding of the concept of disability under the CRPD. This understanding can be found in the State reports of, for example, Chile,¹⁴¹³ Lithuania,¹⁴¹⁴ Serbia,¹⁴¹⁵ Spain,¹⁴¹⁶ Ukraine,¹⁴¹⁷ and many other countries. Other States Parties have multiple definitions of disability for different purposes of usage under different laws, such as Belgium,¹⁴¹⁸ Montenegro,¹⁴¹⁹ Slovakia,¹⁴²⁰ Sweden,¹⁴²¹ and Bosnia and Herzegovina.¹⁴²²

¹⁴¹⁰ *Philippines Initial State Report*, UN Doc CRPD/C/PHL/1, [6].

¹⁴¹¹ *New Zealand Initial State Report*, UN Doc CRPD/C/NZL/1, [19].

¹⁴¹² *Ibid.*

¹⁴¹³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Chile*, UN Doc CRPD/C/CHL/1 (10 September 2014) [15] (*‘Chile Initial State Report’*).

¹⁴¹⁴ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Lithuania*, UN Doc CRPD/C/LTU/1 (2 December 2014) [9] (*‘Lithuania Initial State Report’*).

¹⁴¹⁵ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Serbia*, UN Doc CRPD/C/SRB/1 (29 September 2014) [2]–[3] (*‘Serbia Initial State Report’*).

¹⁴¹⁶ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Spain*, UN Doc CRPD/C/ESP/1 (05 October 2010) [9] (*‘Spain Initial State Report’*).

¹⁴¹⁷ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Ukraine*, UN Doc CRPD/C/UKR/1 (12 November 2014) [54] (*‘Ukraine Initial State Report’*).

¹⁴¹⁸ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Belgium*, UN Doc CRPD/C/BEL/1 (13 March 2013) [6]–[9] (*‘Belgium Initial State Report’*).

¹⁴¹⁹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Montenegro*, UN Doc CRPD/C/MNE/1 (30 October 2015) [10]–[18] (*‘Montenegro Initial State Report’*).

The direct translation of the CRPD's definition of disability into domestic laws is another option. Seven countries straightforwardly transpose the CRPD's definition of disability into their domestic law. For example, Ethiopia exactly translates the definition of disability under the CRPD into its law,¹⁴²³ as do Algeria,¹⁴²⁴ Colombia,¹⁴²⁵ Croatia,¹⁴²⁶ Gabon,¹⁴²⁷ Malta¹⁴²⁸ and Poland.¹⁴²⁹

The above discussion shows that most of the States Parties have some form of law on disability and a definition of disability. However, not all of them show any awareness of the need to harmonise their domestic laws with the definition of disability under the CRPD, perhaps because their laws on disability were adopted long before they became States Parties to the CRPD. Very few of them mention harmonising their domestic laws with the provisions of the CRPD in terms of the definition of disability in their State reports. The challenging task is now for the CRPD Committee to convince States Parties to harmonise their definitions of disability with that of the CRPD, by using its persuasive explanation of the concept, and by conveying the message on harmonisation directly to the States Parties concerned in its concluding observations after examining state reports.

¹⁴²⁰ *Slovakia Initial State Report*, UN Doc CRPD/C/SVK/1, [8]–[13].

¹⁴²¹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Sweden*, UN Doc CRPD/C/SWE/1 (18 september 2012) [9]–[14] ('*Sweden Initial State Report*').

¹⁴²² Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Bosnia and Herzegovina*, UN Doc CRPD/C/BIH/1 (15 April 2015) [20]–[24] ('*Bosnia and Herzegovina Initial State Report*').

¹⁴²³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Ethiopia*, UN Doc CRPD/C/ETH/1 (19 March 2015) [6] ('*Ethiopia Initial State Report*').

¹⁴²⁴ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Algeria*, UN Doc CRPD/C/DZA/1 (2 November 2015) [58] ('*Algeria Initial State Report*').

¹⁴²⁵ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Colombia*, UN Doc CRPD/C/COL/1 (14 July 2015) [5] ('*Colombia Initial State Report*').

¹⁴²⁶ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Croatia*, UN Doc CRPD/C/HRV/1 (7 May 2013) [7] ('*Croatia Initial State Report*').

¹⁴²⁷ *Gabon Initial State Report*, UN Doc CRPD/C/GAB/1, [13].

¹⁴²⁸ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Malta*, UN Doc CRPD/C/MLT/1 (11 November 2015) [13] ('*Malta Initial State Report*').

¹⁴²⁹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Poland*, UN Doc CRPD/C/POL/1 (3 November 2015) [10] ('*Poland Initial State Report*').

7.4.1.2. Disability as Explained by the CRPD Committee

A common explanation of the concept of disability used by the CRPD Committee is helpful to State Parties in formulating legislation and policies for the implementation of the CRPD. However, in its concluding observations responding to States reports, the CRPD Committee only generally recommends that disability should be understood according to the human rights-based approach to disability,¹⁴³⁰ without elaborating on what that approach to disability is, but simply stating that the human rights-based approach is set out in the CRPD.¹⁴³¹ There is a lack of explanation on what constitutes disability. Therefore, in the following analysis I have relied on what the CRPD Committee members said to me during interviews I conducted with 15 members as part of my research for this thesis.

One member suggested that the concept of disability should be understood as a combination of both the medical and social models.¹⁴³² In this way impairment is not ruled out because it can be considered a human characteristic, which might be an advantage or disadvantage.¹⁴³³ Impairment cannot be changed but it can be an advantage that empowers persons with disabilities.¹⁴³⁴ At the same time, the social construction model of disability should be invoked, because when disability is a social oppression imposed upon persons with disabilities, it creates the most long-term disadvantage.¹⁴³⁵ This disadvantage should not be tolerated but can be changed through the various measures enumerated under the CRPD.¹⁴³⁶

Another member of the CRPD Committee indicated in a separate interview that because of the controversial nature of the medical and social models of disability, the members of the CRPD Committee have implicitly agreed that they would mention the human rights-based

¹⁴³⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Hungary*, 8th sess, UN Doc CRPD/C/HUN/CO/1 (22 October 2012) [12] ('*CRPD Committee Concluding Observations – Hungary*'); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Argentina*, 8th sess, UN Doc CRPD/C/ARG/CO/1 (8 October 2012) [8] ('*CRPD Committee Concluding Observations – Argentina*'); *CRPD Committee Concluding Observations – Azerbaijan*, UN Doc CRPD/C/AZE/CO/1, [9].

¹⁴³¹ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of El Salvador*, 10th sess, UN Doc CRPD/C/SLV/CO/1 (8 October 2013) [7] ('*CRPD Committee Concluding Observations – El Salvador*').

¹⁴³² Interview with Munthian Buntan, Member of the CRPD Committee (Geneva, 2 April 2014).

¹⁴³³ *Ibid.*

¹⁴³⁴ *Ibid.*

¹⁴³⁵ *Ibid.*

¹⁴³⁶ *Ibid.*

approach to disability but would not mention either the medical or social models.¹⁴³⁷ This tactic has both positive and negative aspects. It is positive insofar as it would help the CRPD Committee to avoid being in the difficult position of explicitly choosing either the medical or social models, while holding fast to the human rights-based approach, even though the CRPD text itself is a combination of positive aspects of all those models. It is negative, on the other hand, because it leaves much room for States Parties to interpret and understand the concept of disability in their own way, as before the adoption of the CRPD. This results in the absence of a unified way of understanding disability under the CRPD. This flexibility has the further disadvantage of failing to guide States Parties towards a correct understanding and then application of the concept of disability. However, these are personal opinions, and not necessarily the view of the CRPD Committee.¹⁴³⁸ At this stage the CRPD Committee, lacking an official or persuasive definition of disability, has not been successful in urging States Parties to modify their national legislation.

7.4.2. Equality

The CRPD has a flexible understanding of the concept of equality,¹⁴³⁹ and one of the main general obligations of the States Parties under the CRPD is to ensure equality in law by ensuring that their domestic legislation is not discriminatory and prejudicial against persons with disabilities.¹⁴⁴⁰ In this subsection I investigate how the concept of equality as embodied in the CRPD is used and implemented by States Parties to the CRPD, and how the concept is explained by the CRPD Committee in correspondence to the state reports. The discussion aims at comparing the understanding of the concept of equality under the CRPD with the understanding of the concept by States Parties and explanation of it by the CRPD Committee.

¹⁴³⁷ Interview with Diane Mulligan, Member of the CRPD Committee (Sky Interview, 14 February 2014).

¹⁴³⁸ More analysis on the understanding of the concept of disability subtly expressed by the CRPD Committee, including an explanation on the human rights-based model of disability, will be presented in Subsection 8.2.1 of Chapter VIII on the implementation of the individual complaints procedure under the CRPD Optional Protocol.

¹⁴³⁹ The discussion on the concept of equality under the CRPD has been undertaken in Subsection 5.3.2 of Chapter V of this thesis.

¹⁴⁴⁰ CRPD art 4.1(b).

7.4.2.1. Equality as Understood and Implemented by States Parties as Stated in State Reports

Equality is ultimately an abstract and philosophical concept. Therefore, how to translate this philosophical concept into concrete law is difficult and very much depends upon the States Parties, who do not always pay much attention to the philosophical implication in a provision of a human rights convention. How the concept of equality is understood and implemented by States Parties will be discussed following the order of the discussion on the concept under the CRPD in Sub-subsection 5.3.2.2 of Chapter V, which is equality of opportunity, followed by equality as sameness, equality as difference, and transformation of structural factors.

With respect to equality of opportunity, several proactive measures to ensure this form of equality for persons with disabilities have been undertaken by States Parties. For example, in education, under Italian legislation, persons with disabilities have equal access to the general education system at all levels.¹⁴⁴¹ In Iran, accessible communication formats such as Braille, audio textbooks, personal assistance and individualised support in education, along with flexible curricular and timetable arrangements have been provided for students with disabilities.¹⁴⁴² In employment, in Norway and Macedonia, persons with disabilities stand an equal chance of gainful employment under labour legislation.¹⁴⁴³ Vocational training, placement services, and an accessible workplace in employment for persons with disabilities are also available in Macedonia.¹⁴⁴⁴

Affirmative action in the forms of quotas and preference, in line with the ideal of equality of opportunity, has been carried out by States Parties. Iranian law regulates a 3% employment

¹⁴⁴¹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Italy*, UN Doc CRPD/C/ITA/1 (6 March 2015) [102] ('*Italy Initial State Report*').

¹⁴⁴² Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Iran*, UN Doc CRPD/C/IRN/1 (8 July 2015) [104]–[105] ('*Iran Initial State Report*').

¹⁴⁴³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Norway*, UN Doc CRPD/C/NOR/1 (7 December 2015) [247] ('*Norway Initial State Report*'); Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Macedonia*, UN Doc CRPD/C/MKD/1 (3 December 2015) [202] ('*Macedonia Initial State Report*').

¹⁴⁴⁴ *Macedonia Initial State Report*, UN Doc CRPD/C/MKD/1, [203]–[205].

quota for persons with disabilities in the public sector,¹⁴⁴⁵ and Italian labour law obligates public and private employers to employ at least 15 workers with disabilities in accordance with a set quota.¹⁴⁴⁶ All of these proactive measures of reasonable accommodation mean that the education system and workplace should change to meet the need of persons with disabilities rather than make persons with disabilities change to adapt to education system and workplace.

Equality as sameness is the most visible feature of the concept of equality found in the state reports. States Parties claim that their legislative laws recognise the principle of equality before the law by stating that everyone, including persons with disabilities, is equal before the law. For example, Denmark claims that all people are equal before the law and that persons with disabilities enjoy the same rights and protection under the law as all other citizens.¹⁴⁴⁷ In a similar vein, Thai legislation ensures that persons with disabilities are equal before and under the law.¹⁴⁴⁸ This implies that they understand equality as sameness – treating equals equally. The Swedish Planning and Building Act is applied in the same way to all, whether they have disabilities or not,¹⁴⁴⁹ representing equal treatment under the concept of equality as sameness. In Lithuania, subsidised employment has been reserved for persons with disabilities whose capacity for work is less than 40 percent, in order to create special conditions for them to remain in the open labour market,¹⁴⁵⁰ representing special treatment under the concept of equality as sameness. And in Chile, preferential treatment is given to persons with disabilities if candidates are of equal merit, when employing staff for the public sector, in order to increase the representation of persons with disabilities in its workforce,¹⁴⁵¹ representing preferential treatment under the concept of equality as sameness.

The concept of equality as difference, unlike the concept of equality as sameness, is subtly expressed in the state reports. Adoption of legislation to ensure accessibility for persons with

¹⁴⁴⁵ *Iran Initial State Report*, UN Doc CRPD/C/IRN/1, [149(a)].

¹⁴⁴⁶ *Italy Initial State Report*, UN Doc CRPD/C/ITA/1, [135].

¹⁴⁴⁷ *Denmark Initial State Report*, UN Doc CRPD/C/DNK/1, [42].

¹⁴⁴⁸ *Thailand Initial State Report*, UN Doc CRPD/C/THA/1, [16].

¹⁴⁴⁹ Committee on the Rights of Persons with Disabilities, *Views: Communication No 3/2011*, 7th sess, UN Doc CRPD/C/7/D/3/2011 (21 May 2012) [4.12] ('*H.M. v Sweden*').

¹⁴⁵⁰ *Lithuania Initial State Report*, UN Doc CRPD/C/LTU/1, [235].

¹⁴⁵¹ *Chile Initial State Report*, UN Doc CRPD/C/CHL/1, [169].

disabilities is a good indication of the application of equality as difference, because the latter's purpose is to ensure reasonable accommodation for persons with disabilities ranging from an accessible built environment to communication tools such as Braille and information technologies. All States Parties have enacted some form of legislation to eliminate all physical barriers creating an accessible built environment for persons with disabilities. For example, Macedonia has adopted legislation to regulate accessibility issues, such as laws regarding public roads, railways, construction, planning, and housing.¹⁴⁵² This is the most popular method adopted by States Parties to eliminate physical barriers facing persons with disabilities.

In terms of structural barriers, States Parties have been eliminating such barriers against persons with disabilities. For example, Slovenia has enacted several laws prohibiting disability-based discrimination, to ensure equal opportunities for persons with disabilities.¹⁴⁵³ The United Arab Emirates has amended and promulgated several laws with regard to education, employment, social insurance, health and housing for persons with disabilities after becoming a State Party to the CRPD.¹⁴⁵⁴ All of this is about accommodating the differences of persons with disabilities so that they can exercise their human rights, from civil and political rights to economic, social and cultural rights. And by eliminating structural barriers against persons with disabilities under the concept of equality as difference, States Parties are implementing the concept of structural equality as well.

7.4.2.2. Equality as Explained by the CRPD Committee

The CRPD Committee does not have any stipulations regarding the concept of equality in response to State reports, giving a great deal of freedom to the States Parties to interpret the concept. In the absence of an official account of equality, I found the suggestions for

¹⁴⁵² Macedonia Initial State Report, UN Doc CRPD/C/MKD/1, [44]–[65].

¹⁴⁵³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Slovenia*, UN Doc CRPD/C/SVN/1 (30 October 2015) [17] ('Slovenia Initial State Report').

¹⁴⁵⁴ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — United Arab Emirates*, UN Doc CRPD/C/ARE/1 (31 December 2014) [70] ('United Arab Emirates Initial State Report').

understanding the concept of equality offered by individual members of the CRPD Committee I interviewed for my thesis helpful for the discussion here.

One member was of the view that equality means everyone having equal opportunities, including persons with disabilities, to access to services, information and communication, education, employment, and so on, regardless of the individual's circumstances, such as their gender, a disability, or the like.¹⁴⁵⁵ In the disability context, a precondition for equal opportunity for persons with disabilities includes, for example, accessibility or reasonable adjustment.¹⁴⁵⁶ Another member suggested that equality means taking special measures to assist people to ensure that they are on a level playing field.¹⁴⁵⁷ These two views reflect an understanding of equality of opportunity.

Several members suggested that equality basically means treating people equally,¹⁴⁵⁸ or the same treatment for everyone,¹⁴⁵⁹ or equal rights and duties for everyone.¹⁴⁶⁰ This suggestion indicates that they understand equality according to the concept of equality as sameness. Others recommended that in the context of disability, equality should mean accommodation of the differences of persons with disabilities.¹⁴⁶¹ This recommendation suggests that these members understand the concept of equality as equality as difference.

These personal understandings of the concept of equality are diverse, and do not necessarily represent the understanding of equality envisaged by other members of the CRPD Committee. This might be one of the reasons why the CRPD Committee has not up to now been able to produce a formal account of this concept.¹⁴⁶²

¹⁴⁵⁵ Interview with Sillvia Judith Quan-Chang, Member of the CRPD Committee.

¹⁴⁵⁶ Ibid.

¹⁴⁵⁷ Interview with Ron McCallum, Member of the CRPD Committee (Sydney, 30 July 2013).

¹⁴⁵⁸ Interview with Diane Mulligan, Member of the CRPD Committee.

¹⁴⁵⁹ Interview with Munthian Buntan, Member of the CRPD Committee.

¹⁴⁶⁰ Interview with Damjan Tatic, Member of the CRPD Committee (Interview in Writing, 5 May 2014).

¹⁴⁶¹ Interview with Diane Mulligan, Member of the CRPD Committee; Interview with Munthian Buntan, Member of the CRPD Committee; Interview with Damjan Tatic, Member of the CRPD Committee.

¹⁴⁶² More analysis on the understanding of the concept subtly expressed by the CRPD Committee will be presented in Subsection 8.2.2 of Chapter VIII on the implementation of the individual complaints procedure under the CRPD Optional Protocol.

7.4.3. Discrimination

In this subsection I discuss how States Parties to the CRPD understand and implement the concept of discrimination embodied in the CRPD, and how the CRPD Committee explains the concept after considering state reports. The discussion aims at comparing the understanding of the concept of discrimination under the CRPD with the understanding of the concept by States Parties and the explanation of the concept offered by the CRPD Committee. Only when States Parties interpret the concept of discrimination in accordance with the CRPD's conception of it in the light of its object and purpose, can it be considered as implemented in good faith by States Parties.

7.4.3.1. Discrimination as Implemented by States Parties as Stated in State Reports

States Parties in their reports claim that their legislation recognises the principle of non-discrimination and that they have anti-discrimination legislation of some form in place to protect persons with disabilities. In this sub-subsection I will discuss how States Parties understand and are implementing the concept of discrimination with regard to the definition of discrimination, forms of discrimination, legal remedies to combat discrimination, and institutional frameworks to deal with discrimination.¹⁴⁶³

In respect of the definition of discrimination, States Parties define it in different ways. For example, Albania defines disability discrimination as any disability-related difference, exclusion, restriction or preference preventing or restricting the exercise of fundamental human rights and freedoms prescribed under its constitution, national legislation or international treaties to which it is a State Party.¹⁴⁶⁴ Bosnia and Herzegovina defines disability discrimination as any different treatment on the grounds of race, skin colour, language, religion, ethnical association, national or social origin, political or other belief, financial standing, membership of a union or other association, education, social standing, gender, or

¹⁴⁶³ The discussion follows the order of the discussion on the concept of discrimination under the CRPD in Sub-subsection 5.3.2.3 of Chapter V of this thesis.

¹⁴⁶⁴ *Albania Initial State Report*, UN Doc CRPD/C/ALB/1, [41].

sexual orientation.¹⁴⁶⁵ Armenia contends that disability discrimination refers to ‘any distinction, exclusion or restriction on the basis of disability which has the aim of rejecting the fact that a person with disability may, on an equal basis with others, exercise his or her rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.¹⁴⁶⁶

This diversity of definition is unsurprising, as a uniform understanding of discrimination is extremely unlikely to be shared across so many different States Parties to the CRPD, with differing levels of development and economic and social circumstances. Furthermore, not many States Parties include a general definition of discrimination in their reports; they simply take it for granted that discrimination is bad and should be tackled. They do have legislation in place to prevent discrimination against persons with disabilities, but without specifying how they undertake even very basic ways of tackling discrimination such as providing equal access to employment and education for persons with disabilities.

In terms of forms of discrimination, direct and indirect discrimination are both regulated under States Parties’ legislation. For example, Austria, Bulgaria and Sweden all define direct disability discrimination as less favourable treatment experienced by a person with disabilities in comparison with the treatment experienced by persons without disabilities in a similar situation,¹⁴⁶⁷ and indirect discrimination as the result of applying neutral but unjustified provisions, criteria or processes that may put persons with disabilities at a particular disadvantage.¹⁴⁶⁸ These definitions do not necessarily reflect the understanding of discrimination in all forms under the CRPD, because a conception of discrimination generally originates from the definition of discrimination under municipal law. These definitions would have been formulated well before the adoption of the CRPD. Hence we cannot expect to have anything better than the understandings already set up under municipal law. The only advance

¹⁴⁶⁵ *Bosnia and Herzegovina Initial State Report*, UN Doc CRPD/C/BIH/1, [31].

¹⁴⁶⁶ *Armenia Initial State Report*, UN Doc CRPD/C/ARM/1, [33].

¹⁴⁶⁷ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Austria*, UN Doc CRPD/C/AUT/1 (10 October 2011) [33] (*‘Austria Initial State Report’*); *Bulgaria Initial State Report*, UN Doc CRPD/C/BGR/1, [24]–[25]; *Sweden Initial State Report*, UN Doc CRPD/C/SWE/1, [16].

¹⁴⁶⁸ *Austria Initial State Report*, UN Doc CRPD/C/AUT/1, [33]; *Bulgaria Initial State Report*, UN Doc CRPD/C/BGR/1, [24]–[25]; *Sweden Initial State Report*, UN Doc CRPD/C/SWE/1, [16].

represented by the CRPD's definition is that it is the best codification of all conceptual and practical definitions under municipal laws.

With respect to legal remedies to combat discrimination, various measures have been taken by States Parties. The Dominican Republic criminalises disability discrimination as defined under its Criminal Code.¹⁴⁶⁹ The most popular measure to deal with disability discrimination used by States Parties is the application of civil law. For example, Belgium's Anti-Discrimination Act prohibits all forms of direct and indirect discrimination and incitement to discriminate or intimidate on the grounds of disability.¹⁴⁷⁰ Australia and the UK also apply civil law to deal with disability discrimination.¹⁴⁷¹

Affirmative action is also in place to tackle discrimination against persons with disabilities. For example, China requires that an entity must have at least 1.5% of workers with disabilities among their total number of employees, and that should they fail to meet this quota, employers must contribute to a fund for promoting the employment of persons with disabilities by paying a disability employment fee.¹⁴⁷² In Tunisia, a quota system has been applied to ensure that a certain proportion of training and employment opportunities are allocated to persons with disabilities, and that persons with disabilities are able to undertake private projects, obtain loans, and have designated parking spaces and transportation entitlements.¹⁴⁷³

In relation to an institutional framework to deal with discrimination, different forms of NHRIs are used by States Parties. An NHRI in the form of an ombudsman is sometimes employed. For example, Lithuania has set up the Equal Opportunities Ombudsman for dealing with individual complaints regarding discrimination on the grounds of disability.¹⁴⁷⁴ Argentina has established the Office of the Ombudsperson to investigate violations of human

¹⁴⁶⁹ *Dominican Republic Initial State Report*, UN Doc CRPD/C/DOM/1, [30].

¹⁴⁷⁰ *Belgium Initial State Report*, UN Doc CRPD/C/BEL/1, [15].

¹⁴⁷¹ I have discussed this under Subsection 4.4.1 of Chapter IV of this thesis.

¹⁴⁷² Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — China*, UN Doc CRPD/C/CHN/1 (8 February 2011) [113] ('*China Initial State Report*').

¹⁴⁷³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Tunisia*, UN Doc CRPD/C/TUN/1 (14 July 2010) [47]–[48] ('*Tunisia Initial State Report*').

¹⁴⁷⁴ *Lithuania Initial State Report*, UN Doc CRPD/C/LTU/1, [23].

rights and interests on the grounds of disability conducted by the public administration.¹⁴⁷⁵

States Parties also use an NHRI, in the form of a human rights commission. For example, the Australian Human Rights Commission deals with complaints and has assumed the function of promoting an understanding and acceptance of, and compliance with, the AusDDA, and reviewing legislation in an advisory role to the Government.¹⁴⁷⁶

A hybrid model of human rights ombudsman is also used by States Parties. For example, Latvia has set up an Ombudsman Office to deal with complaints and at the same time to promote and supervise the implementation of the CRPD.¹⁴⁷⁷ Montenegro has established a Protector of Human Rights and Freedoms to process cases related to discrimination, and to raise awareness on disability among the public and authorities.¹⁴⁷⁸

The discussion of this sub-subsection indicates that the concept of discrimination under the CRPD is being implemented by States Parties even though their legislation does not specify a definition of discrimination, and that tackling discrimination does not mean merely the implementation of Article 5 of the CRPD on equality and discrimination. In fact, by implementing all the substantive provisions of the CRPD, States Parties are actually tackling discrimination on the grounds of disability.

7.4.3.2. Discrimination as Explained by the CRPD Committee

Little material on the understanding of the concept of discrimination as explained by the CRPD Committee is available. This is because in all of its concluding observations so far, the CRPD Committee has only stressed briefly that denial of reasonable accommodation is a form of disability-based discrimination, and recommended that States Parties should adopt ‘fast-

¹⁴⁷⁵ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Argentina*, UN Doc CRPD/C/ARG/1 (28 June 2011) [54]–[55] (*‘Argentina Initial State Report’*).

¹⁴⁷⁶ *Australia Initial State Report*, UN Doc CRPD/C/AUS/1, [34].

¹⁴⁷⁷ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Latvia*, UN Doc CRPD/C/LVA/1 (29 October 2015) [24] (*‘Latvia Initial State Report’*).

¹⁴⁷⁸ *Montenegro Initial State Report*, UN Doc CRPD/C/MNE/1, [64]–[65].

track legal and administrative remedies to obtain reparation’ for persons with disabilities suffering discrimination in this regard.¹⁴⁷⁹

Even though the CRPD Committee has no official position, individual members have their personal understandings of discrimination. However, most of them were unable to give a concise understanding of the concept in the interviews I conducted for this thesis.

Therefore, in my opinion, it may be that the CRPD Committee simply does not need to issue an official explanation on discrimination, because the CRPD’s definition of discrimination is very clear and concise. More importantly, it may be that this definition is the best codification of all conceptual and practical definitions under municipal and international laws. On the other hand, the CRPD Committee does explain some aspects of the concept of discrimination when considering individual communications, which will be discussed in Subsection 8.2.3 of Chapter VIII, on the implementation of the CRPD Optional Protocol.

7.5. From Normative Rules to Implementation – Key Substantive Rights Provisions

In this section, I will examine how the traditional rights under the CRPD including legal capacity, deinstitutionalisation, freedom from forced medical treatment, and accessibility is implemented by States Parties to the CRPD, and how they are explained and assessed by the CRPD Committee. This discussion will help in evaluating whether the CRPD in practice protects and advances the human rights of persons with disabilities.

7.5.1. Legal Capacity

The CRPD has adopted a pragmatic position on the matter of legal capacity. That is, it does not define the concept of legal capacity explicitly, and it does not permit or prohibit the substituted decision-making model. However, in both matters the CRPD requires that its substantive provisions should be interpreted in light of its object and purpose. In this subsection, I examine how States Parties are implementing the concept of legal capacity and applying the supported and substituted decision-making models, and how the CRPD

¹⁴⁷⁹ CRPD Committee Concluding Observations – El Salvador, UN Doc CRPD/C/SLV/CO/1, [16].

Committee explains the concept as embodied in the CRPD, and which decision-making model it recommends.

7.5.1.1. Legal Capacity as Implemented by States Parties as Stated in State Reports

The concept of legal capacity is understood and implemented differently by different States Parties as stated in their state reports. For example, Argentina has claimed that the concept of legal capacity under its Civil Code is being interpreted as the capacity to acquire rights and contract obligations in two aspects: the capacity to acquire rights and the capacity to exercise them.¹⁴⁸⁰ However, States Parties do not usually state how they interpret this concept; for example, China and Colombia do not,¹⁴⁸¹ but instead list the measures taken, including adopting laws and legislation to ensure that persons with disabilities are able to exercise their legal capacity.

In terms of the application of a decision making model, States Parties have explicitly or implicitly confirmed applying the supported decision-making model as much as possible. Yet they have all indicated in their reports that they have also applied the substituted decision-making model when needed. The way of applying this model varies among States Parties. In Australia, Canada, China, and Colombia a legal representative for persons with disabilities can be appointed to assist them to exercise their legal capacity.¹⁴⁸² In Cyprus, a legal and financial administrator for persons with disabilities can be named on the decision of a competent court, and this administrator can make decision on behalf of persons with disabilities.¹⁴⁸³ In Poland a curatorship regime can be established for both partially and fully incapacitated persons unless those persons remain under parental authority.¹⁴⁸⁴ Armenia has authorised the appointment by the court of custodians for persons with limited mental

¹⁴⁸⁰ *Argentina Initial State Report*, UN Doc CRPD/C/ARG/1, [169].

¹⁴⁸¹ *China Initial State Report*, UN Doc CRPD/C/CHN/1, [52]; *Colombia Initial State Report*, UN Doc CRPD/C/COL/1, [59].

¹⁴⁸² *Australia Initial State Report*, UN Doc CRPD/C/AUS/1, [58]–[64]; *Canada Initial State Report*, UN Doc CRPD/C/CAN/1, [34]–[35]; *China Initial State Report*, UN Doc CRPD/C/CHN/1, [52]; *Colombia Initial State Report*, UN Doc CRPD/C/COL/1, [59].

¹⁴⁸³ *Cyprus Initial State Report*, UN Doc CRPD/C/CYP/1, [105].

¹⁴⁸⁴ *Poland Initial State Report*, UN Doc CRPD/C/POL/1, [129].

capacity, and for those with medically mental incapacity all types of transactions are performed by a custodian.¹⁴⁸⁵

Uniquely, Norway uses a new name for the guardianship regime – ‘individually tailored guardianship’. This name reflects a new direction in the traditional guardianship system,¹⁴⁸⁶ where persons with disabilities have full legal capacity to act on an equal basis with others.¹⁴⁸⁷ The guardianship is tailored on a case-by-case basis in consultation with the person in need.¹⁴⁸⁸ The fundamental rule is that the guardian must respect the integrity, will and preferences of the person under guardianship.¹⁴⁸⁹ Should that person become subject to any restrictions regarding his or her legal capacity to act, the guardianship authority must be limited to the least restrictive means possible so as to respect their integrity, will and preferences.¹⁴⁹⁰

As mentioned, a guardianship regime always poses a risk that the rights and wishes of persons with disabilities may be overridden by the guardian; therefore, safeguard measures have to be in place in order to ensure that persons with disabilities are not abused and so that guardians cannot make decision without consulting them. Poland applies safeguard measures which include the involvement of a civil society organisation as a watchdog, the appointment by a court of an attorney for persons with disabilities, and appeal procedures that are available during an incapacitation process.¹⁴⁹¹ Australia sets a time limit for guardianship requests of between one and five years, and any guardianship request is subject to review at the end.¹⁴⁹²

7.5.1.2. Legal Capacity as Explained by the CRPD Committee in its General Comments

The logistics of how the concept of legal capacity is explained by the CRPD Committee is crucial, for it will help define how States Parties transform the legal concept in practice to bring real change to the lives of persons with disabilities. Given this importance, the CRPD

¹⁴⁸⁵ *Armenia Initial State Report*, UN Doc CRPD/C/ARM/1, [107].

¹⁴⁸⁶ *Norway Initial State Report*, UN Doc CRPD/C/NOR/1, [82].

¹⁴⁸⁷ *Ibid* [85].

¹⁴⁸⁸ *Ibid*.

¹⁴⁸⁹ *Ibid*.

¹⁴⁹⁰ *Ibid* [83].

¹⁴⁹¹ *Poland Initial State Report*, UN Doc CRPD/C/POL/1, [134].

¹⁴⁹² *Australia Initial State Report*, UN Doc CRPD/C/AUS/1, [60].

Committee has formulated a general comment on legal capacity. In this sub-subsection I discuss how the concept of legal capacity is explained by the CRPD Committee, and how it views substituted and supported decision-making models in its general comment on legal capacity and concluding observations to States Parties.

The CRPD Committee states in its General Comment on legal capacity that normatively under the CRPD provisions, legal capacity should be understood to contain two elements: the capacity to have rights and the capacity to act.¹⁴⁹³ Specifically, the CRPD Committee explains that legal capacity as a rights holder or to acquire rights refers to full protection of those rights by the legal system,¹⁴⁹⁴ including recognition as a legal person before the law.¹⁴⁹⁵ This may include, for example, having a birth certificate, seeking medical assistance, registering to be on the electoral role, or applying for a passport.¹⁴⁹⁶ The CRPD Committee also explains that legal capacity to act on the rights someone has acquired under the law refers to actions on those rights being recognised by the law.¹⁴⁹⁷ This legal capacity to act recognises that a person is an agent with the power to engage in transactions and create, modify or end legal relationships.¹⁴⁹⁸ The CRPD Committee stresses that persons with disabilities are often denied their legal capacity to act;¹⁴⁹⁹ for example, laws may permit persons with disabilities to own property, but may not always respect the actions taken by them in terms of buying and selling property.¹⁵⁰⁰ Therefore, it is crucial to ensure that legal capacity for persons with disabilities always comprises these two elements. This explanation by the CRPD Committee is in line with the general understanding of the concept of legal capacity and that of the CRPD.¹⁵⁰¹

The CRPD Committee further explains in its General Comment on legal capacity that legal capacity should not be understood only in the context of Article 12; instead, the concept

¹⁴⁹³ *CRPD Committee General Comment No. 1*, UN Doc CRPD/C/GC/1, [12].

¹⁴⁹⁴ *Ibid.*

¹⁴⁹⁵ *Ibid* [14].

¹⁴⁹⁶ *Ibid.*

¹⁴⁹⁷ *Ibid.*

¹⁴⁹⁸ *Ibid* [12].

¹⁴⁹⁹ *Ibid* [14].

¹⁵⁰⁰ *Ibid.*

¹⁵⁰¹ The general understanding of the concept of legal capacity and that of the CRPD have been discussed in Subsection 5.4.1 of Chapter V of this thesis.

should be brought into relationship with a number of other articles under the CRPD.¹⁵⁰² For example, equal recognition of the right to legal capacity is in many respects essential for complying with Article 13 of the CRPD.¹⁵⁰³ This includes recognition as a person before the law with equal standing in courts and tribunals, equal access to legal representation, and equal opportunity to defend one's rights on one's own behalf or with legal representation in court.¹⁵⁰⁴ This also includes being able to perform key roles in the justice system as a lawyer, judge, witness or member of a jury.¹⁵⁰⁵ In addition, equal recognition of the right to legal capacity means provision of and access to health care on the basis of free and informed consent, in compliance with Article 25 on healthcare.¹⁵⁰⁶ It also means promotion and respect of the opportunity to live independently in the community and to make one's own choices regarding with whom and where to live, and to have control over one's everyday life on an equal basis with others, as provided for in Article 19.¹⁵⁰⁷

The CRPD Committee also explains in its General Comment on legal capacity that any denial of legal capacity that has the purpose or effect of interfering with the right of persons with disabilities to equal recognition before the law constitutes discrimination against those persons, and is a violation of Articles 5 of the CRPD on equality and non-discrimination.¹⁵⁰⁸ Denial of the legal capacity of persons with disabilities also constitutes arbitrary deprivation of liberty, violating Article 14, on liberty and security of the person.¹⁵⁰⁹ In addition, denial or restriction of legal capacity could also mean denial of political participation, including the right to vote and stand for election, to certain persons with disabilities, violating Article 29 of the CRPD, on political participation.¹⁵¹⁰

With regard to the application of a decision-making model, the CRPD Committee vehemently rejects the substituted decision-making model in its General Comment on legal

¹⁵⁰² *CRPD Committee General Comment No. 1*, UN Doc CRPD/C/GC/1, [31].

¹⁵⁰³ *Ibid* [38].

¹⁵⁰⁴ *Ibid.*

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ *Ibid* [41].

¹⁵⁰⁷ *Ibid* [44].

¹⁵⁰⁸ *Ibid* [32].

¹⁵⁰⁹ *Ibid* [40].

¹⁵¹⁰ *Ibid* [42].

capacity because this model conflicts with many Articles under the CRPD, as just discussed. The substituted decision-making model is also incompatible with Article 12 of the CRPD, as well as potentially violating the right to privacy of persons with disabilities under Article 20, as substitute decision-makers usually gain access to a wide range of personal information about persons with disabilities.¹⁵¹¹ In addition, substitute decision-making can lead to the removal of legal capacity of persons with disabilities, as decisions are often made without the consent of persons with disabilities.¹⁵¹² Therefore the CRPD Committee urges States Parties to replace the substitute decision-making model by the supported decision-making model.¹⁵¹³

Standing firmly by this proposition in its concluding observations, the CRPD Committee has also repeatedly called for States Parties to review their guardianship legislation and adopt laws and policies to replace the substitute decision-making model by the supported decision-making model.¹⁵¹⁴ The CRPD Committee stresses that the development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with Article 12 of the CRPD.¹⁵¹⁵

Meanwhile the CRPD Committee strongly recommends the application of the supported decision-making model in its General Comment on legal capacity because of its positive aspects. These include having a variety of forms of support that respect the will and preferences of persons with disabilities, its availability to all, accessible forms of communication, and the recognition of the legal status of the supported persons.¹⁵¹⁶ Other positive aspects include the availability of safeguard measures to exercise legal capacity,¹⁵¹⁷ and elimination of mental capacity assessments as a pre-condition for providing support.¹⁵¹⁸ In addition, support in decision-making is not permitted to be used as justification for limiting other fundamental rights of persons with disabilities, especially the rights to vote, marry, establish a civil partnership, found a family, and give consent for intimate relationships and

¹⁵¹¹ Ibid [47].

¹⁵¹² Ibid [27].

¹⁵¹³ Ibid [28].

¹⁵¹⁴ Ibid [26].

¹⁵¹⁵ Ibid [28].

¹⁵¹⁶ Ibid [29].

¹⁵¹⁷ Ibid.

¹⁵¹⁸ Ibid.

medical treatment.¹⁵¹⁹ Finally, the supported person has the right to refuse support and terminate or change the support relationship at any time.¹⁵²⁰

One criticism of these prescriptions has been that they are too philosophical, and that States Parties need something more practical to guide them on what they should do to recognise the legal capacity of persons with disabilities. In addition, it is said that these prescriptions ignore the very real need for the substituted decision-making model in the case of a small minority of persons with disabilities such as those in a coma.¹⁵²¹ The rejection of the substituted decision-making model by the CRPD Committee appears to deny needed support for such people, and as a result, the denial of their human rights. So it is argued that it is best to stick with the original conception of legal capacity as it is understood under the CRPD.

The discussion of this sub-section reveals that even though, in its general comment on legal capacity, the CRPD committee strongly rejects the guardianship arrangement for persons with disabilities, the CRPD seems to accept that the guardianship arrangement is a practical reality in States Parties. It seems to accept that even though the implementation of legal capacity by States Parties is not perfect, it is somehow in accordance with the CRPD's pragmatic position, hence desirable. For example, the CRPD Committee recommended in its concluding observation to Tunisia that it should urgently adopt 'legislative measures to ensure that [Tunisians] with disabilities, including [those] under guardianship or trusteeship, can exercise their right to vote and participate in public life, on an equal basis with others'.¹⁵²² This implies that Tunisia, along with Australia, Canada, China, and Colombia, can maintain the practice of guardianship but should have some legislation in place to protect those under this regime.

¹⁵¹⁹ Ibid [29(f)].

¹⁵²⁰ Ibid [29(g)].

¹⁵²¹ Piers Gooding, 'Navigating the 'Flashing Amber Lights' of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns' (2015) 15(1) (March 1, 2015) *Human Rights Law Review* 45, 54.

¹⁵²² Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Tunisia*, 5th sess, UN Doc CRPD/C/TUN/CO/1 (13 May 2011) [35] ('*CRPD Committee Concluding Observations – Tunisia*').

7.5.2. Deinstitutionalisation

The CRPD has rejected all forms of confinement imposed upon, and urged for the deinstitutionalisation of persons with disabilities.

7.5.2.1. Deinstitutionalisation as Implemented by States Parties as Stated in State Reports

Different measures have been taken by States Parties to realise deinstitutionalisation for persons with disabilities, including adoption of legislation on deinstitutionalisation, the implementation of deinstitutionalisation programmes, and the application of measures to prepare persons with disabilities for this process.

With respect to the adoption of legislation, many States Parties have enacted laws on deinstitutionalisation. For example, Brazil has introduced legislation on residential care services, in which care services and related facilities are personalised, localised and delivered in small groups with involvement of family and community.¹⁵²³ Croatia has introduced law on preventing institutionalisation and strengthening the process of deinstitutionalisation of persons with disabilities,¹⁵²⁴ and also promoting family reintegration in order to reduce numbers of persons with disabilities living in institutions.¹⁵²⁵ Italy has established legislation aimed at closing down mental health hospitals and creating community-based care and rehabilitation.¹⁵²⁶ Slovakia has adopted a strategy for creating a community-based care system.¹⁵²⁷

The most popular method of deinstitutionalisation carried out by States Parties has been the implementation of deinstitutionalisation programmes. For example, Australia provides support to persons with severe intellectual disabilities and their carers to participate in community training programmes on life skills and knowledge of disability to improve their quality of life.¹⁵²⁸ China has implemented the ‘Sunshine Home Project’ to provide community-based services such as life care, occupational rehabilitation and psychological

¹⁵²³ *Brazil Initial State Report*, UN Doc CRPD/C/BRA/1, [154].

¹⁵²⁴ *Croatia Initial State Report*, UN Doc CRPD/C/HRV/1, [104].

¹⁵²⁵ *Ibid* [107].

¹⁵²⁶ *Italy Initial State Report*, UN Doc CRPD/C/ITA/1, [68].

¹⁵²⁷ *Slovakia Initial State Report*, UN Doc CRPD/C/SVK/1, [177].

¹⁵²⁸ *Australia Initial State Report*, UN Doc CRPD/C/AUS/1, [126].

counselling to persons with disabilities, giving them a better chance to live independently and integrate into the society with 3,210 ‘sunshine homes’ having been set up, providing services to 95,000 persons with disabilities.¹⁵²⁹ New Zealand has implemented a housing programme to support persons with disabilities, requiring modified housing, with 2,635 houses modified.¹⁵³⁰ Slovakia has been implementing a national project involving EUR 1,050,000, offering persons with disabilities a range of high-quality public services to promote their deinstitutionalisation and independent living.¹⁵³¹

States Parties are not only implementing deinstitutionalisation for persons with disabilities, but also applying measures to prepare persons with disabilities for this process. For example, Cyprus has offered training on socialisation, self-care and independent living skills for persons with disabilities.¹⁵³² Bolivia has also provided training courses on independent living for persons with disabilities.¹⁵³³ Malta has instituted adapted driving assessments, driving lessons in a modified car, and adaptive equipment such as modified seating systems, for persons with disabilities who wish to lead independent lives.¹⁵³⁴ Sweden now provides personal support for persons with disabilities in the form of individual assistance, a companion service, and short periods of supervision for schoolchildren over the age of 12.¹⁵³⁵ The UK has supported individuals with disabilities in managing their personal budget money.¹⁵³⁶

7.5.2.2. Deinstitutionalisation in the Assessment of the CRPD Committee

The CRPD Committee has not discussed deinstitutionalisation, nor has it offered a general comment or specific statement. The only source of knowledge about its work in this regard is its concluding observations to States Parties after examining their State reports. In these, the

¹⁵²⁹ *China Initial State Report*, UN Doc CRPD/C/CHN/1, [76].

¹⁵³⁰ *New Zealand Initial State Report*, UN Doc CRPD/C/NZL/1, [133]–[134].

¹⁵³¹ *Slovakia Initial State Report*, UN Doc CRPD/C/SVK/1, [181].

¹⁵³² *Cyprus Initial State Report*, UN Doc CRPD/C/CYP/1, [137].

¹⁵³³ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Bolivia*, UN Doc CRPD/C/BOL/1 (28 September 2015) [271]–[275] (*‘Bolivia Initial State Report’*).

¹⁵³⁴ *Malta Initial State Report*, UN Doc CRPD/C/MLT/1, [115].

¹⁵³⁵ *Sweden Initial State Report*, UN Doc CRPD/C/SWE/1, [153].

¹⁵³⁶ *UK Initial State Report*, UN Doc CRPD/C/GBR/1, [176].

CRPD Committee recommends that States Parties who do not have a deinstitutionalisation strategy, plan, policy or framework for persons with disabilities should develop and implement one promoting the closure of residential institutions, and should allocate the necessary resources to support services that would enable persons with disabilities to live independently in their communities.¹⁵³⁷ For States Parties with some form of a deinstitutionalisation strategy, the CRPD Committee recommends that they do more to reduce the number of persons with disabilities living in such institutional settings.

The importance of deinstitutionalisation for persons with disabilities cannot be denied, as deinstitutionalisation respects their freedom to make their own choice of where and with whom to live and supports persons with disabilities to live independently in the community. However, the CRPD Committee seems unable to keep pace with States Parties in this matter. I contend that the CRPD Committee does not pay adequate attention to this issue. The reasons for this might be that it is satisfied with how States Parties are implementing deinstitutionalisation. Thus the implementation of deinstitutionalisation by States Parties discussed in the previous sub-subsection suggests that they are fulfilling their treaty obligations in this regard with a variety of legislative and practical measures to deinstitutionalise persons with disabilities. It might also be that deinstitutionalisation is not a priority for the CRPD Committee, or that it is ignorant of the issue. The lack of adequate

¹⁵³⁷ *CRPD Committee Concluding Observations – Azerbaijan*, UN Doc CRPD/C/AZE/CO/1, [32]–[33]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [42] (*‘CRPD Committee Concluding Observations – Australia’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of China*, 8th sess, UN Doc CRPD/C/CHN/CO/1 (15 October 2012) [32] (*‘CRPD Committee Concluding Observations – China’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Costa Rica*, 11th sess, UN Doc CRPD/C/CRI/CO/1 (12 May 2014) [39]–[40] (*‘CRPD Committee Concluding Observations – Costa Rica’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Dominican Republic*, 13th sess, UN Doc CRPD/C/DOM/CO/1 (8 May 2015) [38]–[39] (*‘CRPD Committee Concluding Observations – Dominican Republic’*); *CRPD Committee Concluding Observations – El Salvador*, UN Doc CRPD/C/SLV/CO/1, [41]–[42]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Kenya*, 14th sess, UN Doc CRPD/C/KEN/CO/1 (30 September 2015) [38] (*‘CRPD Committee Concluding Observations – Kenya’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Mexico*, 12th sess, UN Doc CRPD/C/MEX/CO/1 (27 October 2014) [44] (*‘CRPD Committee Concluding Observations – Mexico’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Mongolia*, 13th sess, UN Doc CRPD/C/MNG/CO/1 (13 May 2015) [30]–[31] (*‘CRPD Committee Concluding Observations – Mongolia’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Qatar*, 14th sess, UN Doc CRPD/C/QAT/CO/1 (2 October 2015) [37]–[38] (*‘CRPD Committee Concluding Observations – Qatar’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Republic of Korea*, 12th sess, UN Doc CRPD/C/KOR/CO/1 (29 October 2014) [37]–[38] (*‘CRPD Committee Concluding Observations – South Korea’*); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Turkmenistan*, 13th sess, UN Doc CRPD/C/KTM/CO/1 (13 May 2015) [33]–[34] (*‘CRPD Committee Concluding Observations – Turkmenistan’*).

attention it pays to the issue might result in the detrimental effect that States Parties will not implement this regulation properly and that, as consequence, more persons with disabilities will be put into institutional care.

7.5.3. Involuntary Medical Treatment

The CRPD has subtly rejected involuntary medical treatment to persons with disabilities because it harms them.

7.5.3.1. Involuntary Medical Treatment as Implemented by States Parties as Stated in State Reports

Medical treatment is provided for persons with disabilities on the basis of their informed consent, and forced medical treatment administered to persons with disabilities is strictly prohibited by law, as confirmed by all States Parties in their State reports. For example, Armenia, Ukraine and Azerbaijan consider forced medical treatment a crime against persons with disabilities, and punishable according to their criminal law.¹⁵³⁸

However, States Parties do legalise forced medical treatment as a last resort, in the best interest of the persons involved, and subject to scrutiny by a competent authority. In Australia, for example, if the person with a disability is a child or someone with an intellectual disability, and cannot give consent, their legal representatives or guardians can give consent on their behalf.¹⁵³⁹ Or this procedure can be undertaken on a court order, as in Bulgaria,¹⁵⁴⁰ and New Zealand.¹⁵⁴¹

Forced medical treatment is used in different forms by States Parties. Mainly, it concerns forced sterilisation and abortion. In Germany, forced sterilisation and abortion are permitted in the case of a life-threatening situation for the person concerned, subject to very strict

¹⁵³⁸ Armenia Initial State Report, UN Doc CRPD/C/ARM/1, [132]; Ukraine Initial State Report, UN Doc CRPD/C/UKR/1, [171]; Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Azerbaijan*, UN Doc CRPD/C/AZE/1 (7 February 2013) [135] ('Azerbaijan Initial State Report').

¹⁵³⁹ Australia Initial State Report, UN Doc CRPD/C/AUS/1, [97].

¹⁵⁴⁰ Bulgaria Initial State Report, UN Doc CRPD/C/BGR/1, [90].

¹⁵⁴¹ New Zealand Initial State Report, UN Doc CRPD/C/NZL/1, [119].

prerequisites and in very exceptional cases.¹⁵⁴² Forced sterilisation and abortion are also permitted in Norway in the case where a guardian has applied for sterilisation or an abortion on behalf of a person with severe intellectual disabilities.¹⁵⁴³ Forced sterilisation for children with disabilities is allowed in Australia to treat a malfunction or disease or in an emergency situation to save a person's life or to prevent serious damage to their health, or at the request of a court.¹⁵⁴⁴

Another form of forced medical treatment is forced hospitalisation. Forced hospitalisation on the grounds of protecting the health or safety of a person with a disability is authorised in Croatia.¹⁵⁴⁵ This forced hospitalisation can be extended by a court after consulting a psychiatrist.¹⁵⁴⁶

Forced medical treatment can take the form of involuntary organ donation by a person with a disability; however, States Parties prohibit this form of forced medical procedure. For example, organ removal from someone with severe intellectual disabilities for transplant purposes is prohibited in Hong Kong.¹⁵⁴⁷ In Armenia, monetary compensation for removed human organs or tissues from persons with disabilities is forbidden, and can result in a term of 2 to 8 years' imprisonment or administrative penalties.¹⁵⁴⁸

7.5.3.2. Involuntary Medical Treatment in the Guidelines of the CRPD Committee

Although the CRPD Committee has not extensively discussed the topic of involuntary medical treatment in a general comment or specific statement, some indication of its views can be found in its concluding observations and its General Comment on legal capacity.

In its concluding observations, the CRPD Committee has expressed its concerns about all forms of involuntary medical treatment. It has been deeply concerned about forced

¹⁵⁴² *Germany Initial State Report*, UN Doc CRPD/C/DEU/1, [138].

¹⁵⁴³ *Norway Initial State Report*, UN Doc CRPD/C/NOR/1, [152]–[153].

¹⁵⁴⁴ *Australia Initial State Report*, UN Doc CRPD/C/AUS/1, [101].

¹⁵⁴⁵ *Croatia Initial State Report*, UN Doc CRPD/C/HRV/1, [93].

¹⁵⁴⁶ *Ibid.*

¹⁵⁴⁷ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Hong Kong China*, UN Doc CRPD/C/CHN-HKG/1 (11 February 2011) [17.3] ('*Hong Kong China Initial State Report*').

¹⁵⁴⁸ *Armenia Initial State Report*, UN Doc CRPD/C/ARM/1, [134]–[135].

sterilisation and abortion being undertaken by States Parties, especially in Argentina,¹⁵⁴⁹ Australia,¹⁵⁵⁰ Brazil,¹⁵⁵¹ Costa Rica,¹⁵⁵² Croatia,¹⁵⁵³ the Czech Republic,¹⁵⁵⁴ the Dominican Republic,¹⁵⁵⁵ El Salvador,¹⁵⁵⁶ Germany,¹⁵⁵⁷ Mauritius,¹⁵⁵⁸ Mexico,¹⁵⁵⁹ New Zealand,¹⁵⁶⁰ Qatar,¹⁵⁶¹ South Korea,¹⁵⁶² Spain,¹⁵⁶³ and Ukraine.¹⁵⁶⁴ The CRPD Committee has also expressed its concern about female genital mutilation in Gabon,¹⁵⁶⁵ and Kenya.¹⁵⁶⁶ It is also deeply concerned about measures taken without informed consent by Mongolia to prevent conception in persons with genetic psychosocial or intellectual impairments.¹⁵⁶⁷ The CRPD Committee has also expressed its deep concern about termination of pregnancy and sterilisation as a method of contraception in Turkmenistan performed on persons with disabilities as a medical necessity, without free and informed consent.¹⁵⁶⁸

Having expressed its concern about involuntary medical treatment carried out in different forms by States Parties under its General Comment on legal capacity, the Committee stresses that forced medical treatment performed by psychiatric and other health and medical professionals violates the human rights and fundamental freedom of persons with disabilities

¹⁵⁴⁹ *CRPD Committee Concluding Observations – Argentina*, UN Doc CRPD/C/ARG/CO/1, [31].

¹⁵⁵⁰ *CRPD Committee Concluding Observations – Australia*, UN Doc CRPD/C/AUS/CO/1, [39].

¹⁵⁵¹ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Brazil*, 14th sess, UN Doc CRPD/C/BRA/CO/1 (29 September 2015) [34] (*'CRPD Committee Concluding Observations – Brazil'*).

¹⁵⁵² *CRPD Committee Concluding Observations – Costa Rica*, UN Doc CRPD/C/CRI/CO/1, [37].

¹⁵⁵³ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Croatia*, 13th sess, UN Doc CRPD/C/HRV/CO/1 (15 May 2015) [27] (*'CRPD Committee Concluding Observations – Croatia'*).

¹⁵⁵⁴ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Czech Republic*, 13th sess, UN Doc CRPD/C/CZEC/CO/1 (15 May 2015) [36] (*'CRPD Committee Concluding Observations – Czech Republic'*).

¹⁵⁵⁵ *CRPD Committee Concluding Observations – Dominican Republic*, UN Doc CRPD/C/DOM/CO/1, [34].

¹⁵⁵⁶ *CRPD Committee Concluding Observations – El Salvador*, UN Doc CRPD/C/SLV/CO/1, [37].

¹⁵⁵⁷ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Germany*, 13th sess, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) [37] (*'CRPD Committee Concluding Observations – Germany'*).

¹⁵⁵⁸ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Mauritius*, 14th sess, UN Doc CRPD/C/MUS/CO/1 (30 September 2015) [29] (*'CRPD Committee Concluding Observations – Mauritius'*).

¹⁵⁵⁹ *CRPD Committee Concluding Observations – Mexico*, UN Doc CRPD/C/MEX/CO/1, [37].

¹⁵⁶⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of New Zealand*, 12th sess, UN Doc CRPD/C/NZL/CO/1 (31 October 2014) [37] (*'CRPD Committee Concluding Observations – New Zealand'*).

¹⁵⁶¹ *CRPD Committee Concluding Observations – Qatar*, UN Doc CRPD/C/QAT/CO/1, [33].

¹⁵⁶² *CRPD Committee Concluding Observations – Republic of Korea*, UN Doc CRPD/C/KOR/CO/1, [33].

¹⁵⁶³ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Spain*, 6th sess, UN Doc CRPD/C/ESP/CO/1 (19 October 2011) [37] (*'CRPD Committee Concluding Observations – Spain'*).

¹⁵⁶⁴ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Ukraine*, 14th sess, UN Doc CRPD/C/UKR/CO/1 (2 October 2015) [34] (*'CRPD Committee Concluding Observations – Ukraine'*).

¹⁵⁶⁵ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Gabon*, 14th sess, UN Doc CRPD/C/GAB/CO/1 (2 October 2015) [40] (*'CRPD Committee Concluding Observations – Gabon'*).

¹⁵⁶⁶ *CRPD Committee Concluding Observations – Kenya*, UN Doc CRPD/C/KEN/CO/1, [33].

¹⁵⁶⁷ *CRPD Committee Concluding Observations – Mongolia*, UN Doc CRPD/C/MNG/CO/1, [27].

¹⁵⁶⁸ *CRPD Committee Concluding Observations – Turkmenistan*, UN Doc CRPD/C/KTM/CO/1, [31].

as defined under the CRPD.¹⁵⁶⁹ Firstly, this practice violates the rights to equal recognition before the law defined under Article 12, and to personal integrity as prescribed under Article 17.¹⁵⁷⁰ It also infringes freedom from torture as defined under Article 15 and freedom from violence, exploitation and abuse under Article 16.¹⁵⁷¹ The application of involuntary medical treatment in any form denies the legal capacity of a person with disabilities and is a violation of Article 12 of the CRPD.¹⁵⁷²

The CRPD Committee has therefore strongly urged States Parties to abolish policies, legislation and practices that allow or perpetrate forced medical treatment, because involuntary medical treatment is an ongoing violation found in mental health laws across the globe, despite empirical evidence indicating its lack of effectiveness and the serious consequences suffered by those who have undergone this treatment.¹⁵⁷³ The CRPD Committee recommends that States Parties ensure that decisions relating to a person's physical or mental integrity can only be taken with the free and informed consent of the person concerned.¹⁵⁷⁴

The discussion on forced medical treatment reveals the attitude of the CRPD Committee toward the practice of forced medical treatment in States Parties, showing its special concern with the issue. This attitude is in contrast with its attitude towards the issue of deinstitutionalisation, as discussed, even though the two issues are related through the issue of informed consent – whether or not the person is willing to undergo a medical treatment or live in an arranged institution. They are also related in terms of ensuring the mental and physical integrity of a human person as regulated under Article 17 of the CRPD. The special concerns of the CRPD Committee also reveal an important connection between the issues of forced medical treatment and legal capacity. That is, recognition of the legal capacity of persons with disabilities means providing medical treatment to them on the basis of their informed consent. It is obvious that legal capacity, deinstitutionalisation and forced medical treatment are

¹⁵⁶⁹ *CRPD Committee General Comment No. 1*, UN Doc CRPD/C/GC/1, [42].

¹⁵⁷⁰ *Ibid.*

¹⁵⁷¹ *Ibid.*

¹⁵⁷² *Ibid.*

¹⁵⁷³ *Ibid.*

¹⁵⁷⁴ *Ibid.*

connected to one another through the common feature of informed consent. Hence, the CRPD Committee might need to show a more consistent position on these important issues.

7.5.4. Accessibility

The CRPD has stressed the importance of accessibility as the right to live in a barrier-free society and considers accessibility to be a precondition for realising the human rights of persons with disabilities. From my research it is clear that accessibility is a matter which States Parties have been most concerned to implement, devoting a large proportion of their reports to this issue. In this subsection I will discuss how accessibility is implemented by States Parties to the CRPD to ensure a barrier-free environment for persons with disabilities, and how this implementation is interpreted and assessed by the CRPD Committee.

7.5.4.1. Accessibility as Implemented by States Parties as Stated in State Reports

States Parties have taken a number of different measures to ensure accessibility for persons with disabilities, which include the adoption and enforcement of legislation, and the implementation of technical standards on accessibility.

With regard to the adoption of legislation on accessibility, such legislation, either in the form of specific or inclusive legislation, is often already in place in States Parties. Brazil's Law No. 11126/2005 specifically regulates for persons with visual impairments, holding that those using guide dogs can freely enter and remain in public facilities with their animals.¹⁵⁷⁵ Most prominently, States Parties have inclusive legislation on accessibility. Armenia's law on social protection requires built environments, including public buildings and transportation, means of communication and information accessible for persons with disabilities.¹⁵⁷⁶ Azerbaijan's law on urban planning requires accessible living conditions for persons with disabilities in cities and other localities.¹⁵⁷⁷ Bulgaria's Railway Transport Act regulates free or

¹⁵⁷⁵ *Brazil Initial State Report*, UN Doc CRPD/C/BRA/1, [112(d)].

¹⁵⁷⁶ *Armenia Initial State Report*, UN Doc CRPD/C/ARM/1, [85].

¹⁵⁷⁷ *Azerbaijan Initial State Report*, UN Doc CRPD/C/AZE/1, [44].

discounted travel for people with disabilities.¹⁵⁷⁸ Kenya's Persons with Disabilities Act 2003 ensures a barrier-free and disability-friendly environment by providing assistive devices and other equipment for persons with disabilities.¹⁵⁷⁹ Uruguay's Act No. 18651 requires removal of physical barriers through the implementation of technical standards on accessibility to ensure accessibility for persons with disabilities.¹⁵⁸⁰

More important is the adoption and implementation of technical standards on accessibility, because general law usually does not specify technical standards even though accessibility requires attention to concrete criteria of measurement for its implementation. Bosnia and Herzegovina have adopted regulations on technical standards for the removal of architectural and town-planning obstacles for persons with disabilities in buildings and public places.¹⁵⁸¹ China has specific technical standards on accessibility for railways, such as design codes for the construction of railway stations for passengers; for civil aviation, such as standards for barrier-free facilities and equipment in civil airport passenger terminal areas; for subways, such as design codes for subway systems; and for road transport, such as design codes for long-distance bus terminal buildings.¹⁵⁸² Italy has issued accessibility guidelines on study books and didactic software for students with disabilities.¹⁵⁸³

Having accessibility inclusive legislation and specific technical standards on accessibility in place does not in itself create a barrier-free and accessible environment for persons with disabilities. This can only be realised by the enforcement of those legislative and technical standards. Various measures of enforcement are being undertaken by States Parties, including awareness raising, training on accessibility, demonstration models, pilot projects, upgrading and refurbishing of old facilities, accessibility criteria as preconditions for building permission, and the promotion of accessibility in communication and other fields.

¹⁵⁷⁸ *Bulgaria Initial State Report*, UN Doc CRPD/C/BGR/1, [49].

¹⁵⁷⁹ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Kenya*, UN Doc CRPD/C/KEN/1 (28 July 2014) [94] ('*Kenya Initial State Report*').

¹⁵⁸⁰ *Uruguay Initial State Report*, UN Doc CRPD/C/URY/1, [172].

¹⁵⁸¹ *Bosnia and Herzegovina Initial State Report*, UN Doc CRPD/C/BIH/1, [57].

¹⁵⁸² *China Initial State Report*, UN Doc CRPD/C/CHN/1, [42].

¹⁵⁸³ *Italy Initial State Report*, UN Doc CRPD/C/ITA/1, [17].

In relation to awareness raising, Kenya promotes public awareness on accessibility through a comprehensive nation-wide education and information campaign conducted by relevant ministries, departments, authorities and other agencies.¹⁵⁸⁴

Training on accessibility for all stakeholders is provided by States Parties. Albania provides training for persons with disabilities on daily life activities with regard to accessibility, including simple matters like using the facilities of a building, crossing the street, or reading road signs,¹⁵⁸⁵ these being vitally necessary skills for independent living for persons with disabilities. Technical training for architects, builders, plumbers and heating engineers on barrier-free planning and building has been conducted in Australia.¹⁵⁸⁶ In Kenya, training on accessibility for community workers, social workers, media professionals, educators, decision-makers, administrators and other stakeholders has been carried out.¹⁵⁸⁷

Demonstration models at governmental workplaces on compliance with the legal framework on accessibility have been created. For example, in Mauritius the Ministry of Social Security has upgraded its office buildings with accessibility features as a demonstration model for other ministries to follow.¹⁵⁸⁸

Pilot projects on accessibility are also being implemented in States Parties. For example, Albania has implemented a project called ‘No Barriers City’, which creates accessible parking spaces for persons with disabilities in 35 locations with approximately 52 parking lots.¹⁵⁸⁹ In addition, under this project, new schools, kindergartens, and sidewalks have been built in line with the accessibility norms for persons with disabilities, with 390 ramps installed in the city’s sidewalks.¹⁵⁹⁰ Uruguay has been implementing its Accessibility Certification Programme since 2005 to eliminate architectural and urban barriers, and also its Commitment to Accessibility project to eliminate barriers in other public, private and civil society

¹⁵⁸⁴ *Kenya Initial State Report*, UN Doc CRPD/C/KEN/1, [110].

¹⁵⁸⁵ *Albania Initial State Report*, UN Doc CRPD/C/ALB/1, [67].

¹⁵⁸⁶ *Austria Initial State Report*, UN Doc CRPD/C/AUT/1, [127]–[129].

¹⁵⁸⁷ *Kenya Initial State Report*, UN Doc CRPD/C/KEN/1, [110].

¹⁵⁸⁸ Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention — Initial Reports of States Parties — Mauritius*, UN Doc CRPD/C/MUS/1 (11 August 2014) [84] (*‘Mauritius Initial State Report’*).

¹⁵⁸⁹ *Albania Initial State Report*, UN Doc CRPD/C/ALB/1, [68].

¹⁵⁹⁰ *Ibid.*

institutions.¹⁵⁹¹

Upgrading and refurbishing inaccessible buildings and facilities has also been undertaken by States Parties. For example, Azerbaijan has upgraded platform areas to the same level as the trains, and has equipped buses with special features such as places reserved for persons with disabilities or the installation of mobile ramps.¹⁵⁹² Chile has installed mobile ramps and metal handrails on both sides inside trains, and wider ticket gates for wheelchair users.¹⁵⁹³ Croatia has adapted public transport vehicles such as buses, ships, trains and trams with accessible features to ensure services usable by persons with disabilities.¹⁵⁹⁴

The application of accessibility requirements in designs for new facilities is commonly required in States Parties in order to obtain building permission. Austria demands tender documents for building permission to comply with regulations on barrier-free construction such as the installation of ramps with railings, sufficient width of passage or gateways, sufficient area for manoeuvring, and barrier-free entrance design.¹⁵⁹⁵ Cyprus requires applications to build parking spaces, refugee houses, and local government buildings to include plans for accessibility features for persons with disabilities before building permit certificates are issued.¹⁵⁹⁶ In Uruguay, any approval of plans for construction is subject to their compliance with accessibility requirements specified under its Act No. 18651 on the protection of persons with disabilities.¹⁵⁹⁷

Accessibility is a relevant issue not only for the built environment; it also relates to accessibility in communication and other fields such as learning environments for children with disabilities, different modes of communication such as sign languages and Braille, and information and communication technologies. Albania requires public television to be broadcast every day at one pm, with a ten minute news edition in sign language that accords with international standards on sign languages for persons with hearing and speech

¹⁵⁹¹ *Uruguay Initial State Report*, UN Doc CRPD/C/URY/1, [200]–[202].

¹⁵⁹² *Azerbaijan Initial State Report*, UN Doc CRPD/C/AZE/1, [48]–[49].

¹⁵⁹³ *Chile Initial State Report*, UN Doc CRPD/C/CHL/1, [65(e)].

¹⁵⁹⁴ *Croatia Initial State Report*, UN Doc CRPD/C/HRV/1, [53(a)]–[53(b)].

¹⁵⁹⁵ *Austria Initial State Report*, UN Doc CRPD/C/AUT/1, [127]–[128].

¹⁵⁹⁶ *Cyprus Initial State Report*, UN Doc CRPD/C/CYP/1, [46].

¹⁵⁹⁷ *Uruguay Initial State Report*, UN Doc CRPD/C/URY/1, [178].

impairment, and also provides audio books and Braille publications for persons with visual impairment.¹⁵⁹⁸ In Canada, different service providers are obligated to comply with accessibility requirements.¹⁵⁹⁹ For example, telecommunications service providers are required to provide a relay service, wireless service providers to offer at least one accessible mobile handset, wireless companies to support text messaging for emergency telecommunications services, and broadcasters to caption all their programmes.¹⁶⁰⁰

In the next sub-subsection an analysis of the explanation of accessibility by the CRPD Committee follows, with a view to bringing it into relation with this discussion of the implementation of accessibility by States Parties.

7.5.4.2. Accessibility in Guidelines of the CRPD Committee

Under its General Comment on accessibility, the CRPD Committee explains the concept of accessibility in theoretical and normative terms, attending to technical standards and the obligations of States Parties.

In terms of theory, the CRPD Committee explains that accessibility is a group right.¹⁶⁰¹ This means that all forms of access should be made available in advance, on the assumption that there will be persons who need to use the facilities later.¹⁶⁰² States Parties should therefore provide these features before receiving an individual request to enter or use a facility, and accessibility standards must be broad and standard.¹⁶⁰³

It also explains that accessibility can also mean reasonable accommodation.¹⁶⁰⁴ Reasonable accommodation, in this sense, means ensuring accessibility for an individual with a disability in a particular situation.¹⁶⁰⁵ It can be used to achieve individual justice in the sense that equality and non-discrimination is thereby assured, and the dignity, autonomy and freedom of

¹⁵⁹⁸ *Albania Initial State Report*, UN Doc CRPD/C/ALB/1, [72]–[73].

¹⁵⁹⁹ *Canada Initial State Report*, UN Doc CRPD/C/CAN/1, [51].

¹⁶⁰⁰ *Ibid.*

¹⁶⁰¹ *CRPD Committee General Comment No. 2*, UN Doc CRPD/C/GC/2, [25].

¹⁶⁰² *Ibid.*

¹⁶⁰³ *Ibid.*

¹⁶⁰⁴ *Ibid.*

¹⁶⁰⁵ *Ibid* [26].

choice of the individual are taken into account.¹⁶⁰⁶ Reasonable accommodation is called into play when group-related accessibility cannot be applied to assist persons with rare types of disabilities.¹⁶⁰⁷ It is enforceable when an individual with an impairment needs accommodating in a given situation, for example, a workplace or school, in order to enjoy her or his rights on an equal basis with others in a particular context.¹⁶⁰⁸

The CRPD Committee further explains that accessibility refers to the strict application of universal design to all new goods, products, facilities, technologies and services because this will ensure full, equal and unrestricted access for persons with disabilities.¹⁶⁰⁹ In addition, this strict application can benefit not only persons with disabilities but also those without disabilities such as pregnant women, people with small children, senior people, or people with large and cumbersome luggage.¹⁶¹⁰ For example, wheelchair users, people with small children in buggies, and people with cumbersome luggage can all use the curb of a pavement or ramp of a building.

With respect to the normative issues, the CRPD Committee stresses that accessibility should be considered a pre-condition for persons with disabilities to enjoy any human rights and fundamental freedoms,¹⁶¹¹ because all rights and freedoms under the CRPD are interlinked, and the realisation of Article 9 involves the implementation of other articles of the CRPD.¹⁶¹² For example, the CRPD Committee has pointed out that ‘freedom of thought and expression and many other basic rights and freedoms for persons with disabilities may be seriously undermined and restricted’ if they do not have access to information and communication services.¹⁶¹³ It gives another example, concerning the right to education under Article 24, by stressing that this right cannot be realised if there is no accessible transport to schools, there are no accessible classrooms, or other modes of communication such as sign

¹⁶⁰⁶ Ibid.

¹⁶⁰⁷ Ibid [25].

¹⁶⁰⁸ Ibid.

¹⁶⁰⁹ Ibid [15].

¹⁶¹⁰ Ibid [16].

¹⁶¹¹ Ibid [14].

¹⁶¹² Ibid.

¹⁶¹³ Ibid [21].

language, Braille, or an alternative script are not in use for those in need.¹⁶¹⁴ Persons with disabilities cannot access the health care services under Article 25 if hospitals are inaccessible and information and communication pertaining to the provision of health care is not in accessible formats.¹⁶¹⁵ The CRPD Committee further points out that persons with disabilities cannot effectively enjoy their work and employment rights under Article 27 if the workplace is not accessible and information pertaining to work, job advertisements and offers, selection processes, and communication at the workplace are not in accessible formats.¹⁶¹⁶ In addition, persons with disabilities would not be able to exercise their political rights equally and effectively under Article 29 if States Parties failed to ensure that voting procedures, facilities and materials are accessible.¹⁶¹⁷

In relation to technical requirements regarding accessibility, the CRPD Committee recommends that technical requirements on signage in buildings and other public places should include signage in Braille and be in easy-to-read and understandable forms.¹⁶¹⁸ In addition, it recommends that the technical requirements on information and communication should include live assistance and intermediaries such as guides, readers and professional sign language interpreters.¹⁶¹⁹ Furthermore, it stipulates that technical requirements for new technologies should include use of hearing enhancement systems such as ambient assistive systems, hearing aid and induction loop users.¹⁶²⁰

Lastly, the CRPD Committee stresses that States Parties have a number of obligations to ensure accessibility for persons with disabilities. They are obliged to adopt a legal framework on accessibility including the mandatory application of accessibility technical standards, and sanctions for noncompliance.¹⁶²¹ If States Parties already have such a legal framework, they should undertake a comprehensive review of it in order to identify, monitor and address gaps

¹⁶¹⁴ Ibid [39].

¹⁶¹⁵ Ibid [40].

¹⁶¹⁶ Ibid [41].

¹⁶¹⁷ Ibid [43].

¹⁶¹⁸ Ibid [20].

¹⁶¹⁹ Ibid [21].

¹⁶²⁰ Ibid [22].

¹⁶²¹ Ibid [28].

between legislation and implementation.¹⁶²² In addition, States Parties should adopt action plans and strategies to identify existing barriers to accessibility, set time frames with specific deadlines, and provide both human and financial resources to remove the barriers.¹⁶²³ States Parties should ensure that all newly designed, built or produced objects, infrastructure, goods, products and services are fully accessible to persons with disabilities, in accordance with the principles of universal design.¹⁶²⁴ Last but not least, States parties should establish and strengthen their monitoring mechanisms on the implementation of a legal framework and action plan on accessibility.¹⁶²⁵

The discussion of this subsection has revealed that the implementation of accessibility has gained strong endorsement from both States Parties and the CRPD Committee. The implementation has met all the requirements of state obligations regarding this issue, and more has been done by States Parties than the CRPD Committee recommends in its General Comment on accessibility. Hence it is evident that accessibility is the first issue where States Parties and the CRPD Committee have no conflict of understanding and share the same proposition – that the elimination of physical barriers is a precondition for ensuring equality in practice and a way of applying equality as difference to persons with disabilities.

7.6. Concluding Remarks

In this chapter I have discussed the implementation of the CRPD by States Parties and the work of the CRPD Committee with regard to the incorporation of the CRPD's substantive rules into States Parties' legislation and the implementation of the legislation, in order to realise in practice the human rights of persons with disabilities. The discussion has been limited to the understanding and implementation of the concepts of disability, equality and discrimination, and the rights to legal capacity, deinstitutionalisation, freedom from involuntary medical treatment, and accessibility.

¹⁶²² Ibid.

¹⁶²³ Ibid [33].

¹⁶²⁴ Ibid [21].

¹⁶²⁵ Ibid [33].

Throughout the discussion it has been evident that there are no right or wrong ways of interpreting the concepts of disability, equality and discrimination under the CRPD by States Parties. Evidently, States Parties do not follow any specific understanding of those concepts. They use their best knowledge of those concepts. Furthermore, their national legal frameworks on disability might have been enacted well before they were States Parties to the CRPD – another reason why, for them, there can be no right or wrong way of implementing those concepts.

The discussion has also revealed that there is no right or wrong way to implement the relevant normative rights by States Parties. The implementation of those rights very much depends upon the good intentions of States Parties. Indeed, the good intentions of States Parties have prevailed with some issues, such as implementing accessibility. At the same time, these good intentions have not always been sufficient, such as when it has come to implementing the legal capacity of persons with disabilities, and the very sensitive issue of forced medical treatment.

The discussion has indicated that the efforts of the CRPD Committee have thrived regarding some issues and been limited regarding others. They have thrived in that the CRPD Committee's diplomatic relationship with States Parties has been very successful in creating amicable dialogues with them – an indispensable factor for cooperation from the States Parties in implementing a human rights treaty. The CRPD Committee has tried its best to ensure the proper implementation of the CRPD by States Parties through its responses to state reports and explanations of the important issues of legal capacity and accessibility. It also has made use of opportunities to express its concerns on state practices deemed harmful and detrimental, such as the issue of forced medical treatment. However, there have also been limits to the CRPD Committee's successes, due to time pressure resulting in a huge backlog of reports received. Another problem has been that the CRPD Committee does not give equal priority and due attention to all important issues, such as theoretical and normative accounts of concepts such as equality, discrimination and deinstitutionalisation. But on the whole the

CRPD Committee has been trying its best to ensure that the human rights of persons with disabilities are properly realised by States Parties.

The gap between implementation by States Parties and assessments by the CRPD Committee exists because each side does things in their own way. Specifically, States Parties implement the CRPD in the ways that they assume are right, while the CRPD Committee sends States Parties concluding observations which they take to be correct. There is little follow-up by States Parties on the CRPD Committee's concluding observations, or assessment of this follow-up. Furthermore, the CRPD Committee's general comments have taken a philosophical form, while the States Parties' reports have been more practically concerned with what they have done.

My discussion has been largely positive because the CRPD is generally being effectively implemented by States Parties. This is important because the implementation of the CRPD has been a massive step forward in raising awareness on disability. It is also important because through the implementation of good practices such as the application of the supported decision-making model, the recognition and promotion of the legal capacity of persons with disabilities, and the creation of an accessible built environment, a positive public attitude will be generated and harmful customs such as forced medical treatment or the institutionalisation of persons with disabilities may eventually be completely eliminated.

I therefore conclude that to some extent the CRPD, with its inherent strengths and values promoting the advancement of the human rights of persons with disabilities, has indeed in practice protected those rights.

While the state reporting procedure is compulsory and can reflect the implementation of the CRPD in realising those rights on a large scale, this procedure is just one of the two existing mechanisms for implementing the CRPD. In the next chapter I will discuss the individual procedure, inquiring how the CRPD Committee might transform the understanding of the concepts of disability, equality and discrimination, and will also discuss the rights to legal capacity, deinstitutionalisation, freedom from involuntary medical treatment, and

accessibility. The investigation of individual communications will enable me to complete my inquiry into the CRPD's mission in advancing and protecting the human rights of persons with disabilities – the central question of this thesis.

CHAPTER VIII: THE IMPLEMENTATION OF THE CRPD – INDIVIDUAL COMPLAINT PROCEDURE

8.1. Introductory Remarks

The CRPD Optional Protocol authorises the CRPD Committee to deal with individual complaints filed by or on behalf of individuals or groups of individuals with disabilities against States Parties to the CRPD Optional Protocol on alleged violations of their human rights as set forth under the CRPD.

The individual complaint procedure of the CRPD is regulated under the Optional Protocol to the CRPD, not the CRPD itself. The CRPD Optional Protocol was adopted on 13th December 2006 and came into force at the same time as the CRPD, on 3rd May 2008.¹⁶²⁶ Currently there are 89 States Parties to the CRPD Optional Protocol,¹⁶²⁷ compared with 166 to the CRPD.¹⁶²⁸ It is important to note that, even if a country is a State Party to the CRPD, this country will not be under the jurisdiction of the CRPD Committee with regard to the individual complaint procedure if it is not a State Party to the CRPD Optional Protocol. Currently, therefore, at least 75 States Parties are not subject to the CRPD Committee's jurisdiction with regard to the individual complaint procedure.

In Chapter V I stated that the CRPD possesses inherent theoretical and normative merits and values for creating platforms for positive changes towards the protection of the human rights of persons with disabilities. In section 6.2.1 and sub-subsection 6.2.2.2 of Chapter VI I gave an introduction to the CRPD Committee and the individual complaint procedure under the CRPD Optional Protocol, respectively.

Against this background, in this chapter I will discuss how these inherent merits and values have been transformed into quasi-judicial judgements by the CRPD Committee, by investigating its views on individual communications. This discussion will help in evaluating

¹⁶²⁶ United Nations, above n 21.

¹⁶²⁷ Ibid.

¹⁶²⁸ United Nations, above n 21.

whether the CRPD, with its potential for advancing the human rights of persons with disabilities (as discussed in Sections 5.3 and 5.4 of Chapter V) will in practice protect the human rights of the individuals with disabilities as complainants of the individual communications in particular, and of persons with disabilities in general. This discussion will help me to answer my central question regarding the mission of the CRPD in advancing and protecting the human rights of persons with disabilities.

This chapter is divided into five sections. Following the present introductory section, section 8.2 is a general evaluation of the work of the CRPD Committee in relation to the individual complaint procedure and will provide a contextual background for Sections 8.3 and 8.4 which contain details of the implementation of the CRPD in relation to its theoretical framework and substantive norms as expressed through the work of the CRPD Committee in examining individual communications.

Section 8.3 is an investigation into how the CRPD Committee explains its understanding of the concepts of disability, equality and discrimination in the process of considering individual communications. Section 8.4 investigates how the CRPD Committee holds a State Party liable for violating the rights set forth under the CRPD with regard to legal capacity, deinstitutionalisation, freedom from forced medical treatment, and accessibility. Section 8.5 is the conclusion of the chapter.

It is important to note here that this chapter does not aim at analysing every individual complaint. Instead, it compares the explanations by the CRPD Committee regarding the concepts of disability, equality and discrimination and provisions on legal capacity, deinstitutionalisation, freedom from forced medical treatment and accessibility provided in the process of considering individual communications, with the explanations of those concepts and provisions analysed in the Chapter V. Therefore, highly selective information has been taken from the communications for each of the topics discussed. Some parts may read repetitiously because in some instances the CRPD Committee has explained more than one concept or issue within the same communication. It is also useful to understand the

‘jargon’ that the CRPD Committee can only explain the concepts of disability, equality and discrimination in the discussion regarding the conceptual understanding; but in the discussion regarding particular rights, the CRPD Committee can hold States Parties liable for not fulfilling their treaty obligations in relation to selected articles.

8.2. Appraisal of the Work of the CRPD Committee on Individual Complaints

In this section I evaluate the work of the CRPD Committee in relation to the individual complaint procedure, starting with the number of communications received by the CRPD Committee at the time of writing, time effectiveness in examining the cases, and issues raised in the communications. This discussion provides a contextual background for Sections 8.3 and 8.4.

As of August 2016, there have been 34 individual complaints lodged.¹⁶²⁹ It is noteworthy that of this total, 92% (or 31 communications) of communications are from individuals in developed countries. The remaining 3 are from Tanzania. This is an indication that persons with disabilities from developing countries have less access to the CRPD Committee, possibly because their own governments do not ratify the CRPD Optional Protocol or because they lack the resources to follow the necessary procedures.

At the time of writing, the CRPD has completed the examination of 13 cases, with their views on each case published on the OHCHR website. Violations by States Parties have been found in 8 of these cases, discussed in Sections 8.3 and 8.4. Non-violation has been found in 2 cases (*Jungelin v Sweden* and *A.F. v Italy*) in which the CRPD Committee concluded that the authors did not provide sufficient evidence for it to establish alleged violations of Articles 5 and 27 of the CRPD.¹⁶³⁰

Three cases were considered inadmissible. One of these (*McAlpine v United Kingdom of Great Britain and Northern Ireland*) was not admissible for a non-retroactive reason, in that

¹⁶²⁹ Committee on the Rights of Persons with Disabilities, 'Individual Complaints Dealt with by the Committee on the Rights of Persons with Disabilities under the Optional Protocol of the Convention on the Rights of Persons with Disabilities: Statistical Survey' (2014).

¹⁶³⁰ Committee on the Rights of Persons with Disabilities, *Views: Communication No 5/2011*, 12th sess, UN Doc CRPD/C/12/D/5/2011 (14 November 2014) [10.6] (*Jungelin v Sweden*); Committee on the Rights of Persons with Disabilities, *Views: Communication No 9/2012*, 13th sess, UN Doc CRPD/C/13/D/9/2012 (19 May 2015) [8.5] (*A.F. v Italy*).

the alleged violation happened before the entry into force of the CRPD and its Optional Protocol for the UK.¹⁶³¹ Another case (*S.C. v Brazil*) was inadmissible because domestic remedies were not exhausted.¹⁶³² The third case (*A.M. v Australia*) was found inadmissible under Article 1 (1) of the CRPD Optional Protocol,¹⁶³³ because the fact claimed by the author had not actually taken place.¹⁶³⁴ When a case is considered inadmissible, the CRPD Committee does not examine its merits.

In terms of time, the consideration of a communication, from its initial submission, takes the CRPD Committee on average 2 years to complete. One year is the shortest time it has taken to complete an examination – the time taken in the cases of *McAlpine v United Kingdom of Great Britain and Northern Ireland*,¹⁶³⁵ and *F. v Austria*.¹⁶³⁶ Four years is currently the longest time taken by an examination – the case of *A.F. v Italy*.¹⁶³⁷ The slowness of the process is caused by the fact that all communications go through a number of different steps, including deciding on admissibility and correspondences between the CRPD Committee, the States Parties concerned, and the authors of the communications.¹⁶³⁸ There are currently 21 pending cases.¹⁶³⁹

With respect to the issues raised in the communications, these have included discrimination on the ground of disability, legal capacity, accessibility and reasonable accommodation, access to information, freedom of movement, voting and elections, conditions of detention, treatment of prisoners, freedom of expression, employment, and access to public services.¹⁶⁴⁰

¹⁶³¹ Committee on the Rights of Persons with Disabilities, *Views: Communication No 6/2011*, 8th sess, UN Doc CRPD/C/8/D/6/2011 (13 November 2012) [7(a)] ('*McAlpine v United Kingdom of Great Britain and Northern Ireland*').

¹⁶³² Committee on the Rights of Persons with Disabilities, *Views: Communication No 10/2013*, 12th sess, UN Doc CRPD/C/12/D/10/2013 (28 October 2014) [7(a)] ('*S.C. v Brazil*').

¹⁶³³ Committee on the Rights of Persons with Disabilities, *Views: Communication No 12/2013*, 13th sess, UN Doc CRPD/C/13/D/12/2013 (29 May 2015) [9(a)] ('*A.M. v Australia*').

¹⁶³⁴ *Ibid* [5.5].

¹⁶³⁵ *McAlpine v United Kingdom of Great Britain and Northern Ireland*, UN Doc CRPD/C/8/D/6/2011.

¹⁶³⁶ *Ibid* 1.

¹⁶³⁷ Committee on the Rights of Persons with Disabilities, *Views: Communication No 1/2010*, 9th sess, UN Doc CRPD/C/9/D/1/2010 (21 June 2013) 1 ('*Nyusti and Takács v Hungary*').

¹⁶³⁸ As discussed in Sub-subsection 6.2.2.2 of Chapter VI of this thesis.

¹⁶³⁹ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities – Table of Pending Cases* (7 May 2016) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Tablependingcases.aspx>>.

¹⁶⁴⁰ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of Persons with Disabilities – Recent Jurisprudence* (7 May 2016) <<http://juris.ohchr.org/en/search/results?Bodies=4&sortOrder=Date>>.

In the light of this information, the question arises whether the current individual complaint procedure does offer an effective protection to individuals with disabilities. In the following two sections I will analyse the actual work of the CRPD Committee. Specifically, I will examine how the CRPD Committee explains its understanding of the concepts of disability, equality and discrimination, and how it finds that violations of the rights to legal capacity, deinstitutionalisation, freedom from involuntary medical treatment, and accessibility by States Parties have occurred.

8.3. From Conceptual Framework to Judgements – Key Theories

Although, in considering State reports, the CRPD Committee has not detailed how the concepts of disability, equality and discrimination should be understood, the examination of individual communications by the CRPD Committee has unveiled, implicitly or explicitly, its interpretation of those concepts.

This section investigates how the CRPD Committee explains its understanding of those concepts while considering individual communications. This analysis was carried out by investigating the views of the CRPD Committee on individual communications regarding the facts, the outcomes, and its reasoning behind these outcomes, for cases analysed as examples of a discussion of a theoretical issue. Because of the limited number of individual communications considered, the discussion will not be able to cover all theoretical aspects of the concepts of disability, equality and discrimination.¹⁶⁴¹ It aims rather at comparing the understanding of these three concepts under the CRPD with the explanation of these concepts by the CRPD Committee in relation to individual communication procedures. This comparison will help in determining whether the CRPD in practice protects the human rights of individuals with disabilities in particular and of persons with disabilities in general.

¹⁶⁴¹ As discussed in Section 5.3 of Chapter V of this thesis.

8.3.1. Disability

The CRPD Committee explains the general definition of disability, the medical model of disability, and the human rights-based approach to disability in its views on two individual communications, *S.C. v Brazil*,¹⁶⁴² and *Gröninger v Germany*.¹⁶⁴³

In *S.C. v Brazil*, the CRPD Committee outlines a general definition of disability and a human rights-based approach to disability, and the facts of the case offer some concrete background for these explanations.¹⁶⁴⁴ Ms. S.C. was an employee of a bank, Banco do Estado de Santa Catarina, working at its Campinas branch. She had three motorcycle accidents, in June 2006, September 2007 and January 2009, resulting in a knee injury. The bank's policy meant that she was restricted to only 2 months' medical leave each time. After the third accident she took 6 months off work on the advice of her doctor but without the approval by the bank. During this time, she was transferred to another branch of the bank to work as a bank teller. When she returned to work she learnt that she had been removed from her position as a bank teller even though she remained employed by the bank. Her doctor certified that she was suffering from chronic illness and advised her to work close to her home because of her health problems, her need for ongoing treatment, and her commuting difficulties. The bank refused to transfer her to a branch closer to her home and the workplace was without a lift or a high desk for her computer keyboard. She had submitted her case to Labour Court but both instance and appeal courts dismissed her case. She therefore made a complaint to the CRPD Committee, claiming to be discriminated against on the grounds of a disability with regard to employment and working conditions by Brazil.

Her communication was found inadmissible by the CRPD Committee because of not exhausting domestic remedies.¹⁶⁴⁵ However, while working on the procedural aspect of the communication the CRPD Committee took the opportunity to explain its understanding of the concept of a disability. The CRPD Committee explained that the interaction with barriers that

¹⁶⁴² *S.C. v Brazil*, UN Doc CRPD/C/12/D/10/2013.

¹⁶⁴³ Committee on the Rights of Persons with Disabilities, *Views: Communication No 2/2010*, 11th sess, UN Doc CRPD/C/D/2/2010 (7 July 2014) ('*Gröninger v Germany*').

¹⁶⁴⁴ *S.C. v Brazil*, UN Doc CRPD/C/12/D/10/2013, [2.1]–[2.7].

¹⁶⁴⁵ *Ibid* [7(a)].

prevented her from enjoying full and effective participation in society on an equal basis with others could be considered a disability,¹⁶⁴⁶ because an illness can develop into an impairment as understood in the context of disability as a consequence of its duration or chronicity.¹⁶⁴⁷ However, this explanation of disability as a consequence of the duration or chronicity of an illness can only be understood and applied in this particular case, because the CRPD Committee stressed that the definition of persons with disabilities, as defined under Article 1 of the CRPD, is a standard definition and should be read together with Preamble paragraphs (e) on defining disability as an evolving concept and (i) on the diversity of persons with disabilities under the CRPD.¹⁶⁴⁸ This means that the CRPD Committee must be cautious in explaining the concept of disability, due to its complex nature, and that any understanding which goes beyond the definition under the CRPD should be put in its particular context.

The CRPD Committee also explains its understanding of a human rights-based approach to disability in this case. According to the CRPD Committee, the human rights-based approach refers to the interaction between individuals with impairments and attitudinal and environmental barriers, taking into account the diversity of persons with disabilities.¹⁶⁴⁹ Basically, on this explanation, disability on the human rights-based approach is no different from disability understood on the social model of disability, which stresses the interaction between individuals with impairments and attitudinal and environmental barriers. The explanation incorporates some aspects of the human rights-based approach, in particular, the recognition of the diversity of persons with disabilities. The explanation does not mention any other elements of the human rights-based approach to disability as implicitly defined under the CRPD.

In *Gröninger v Germany* the CRPD Committee links measures taken by Germany to the application of the medical model of disability.¹⁶⁵⁰ The facts of the case are as follows and will assist in understanding this linkage. Ms Gröninger, the author of the case, claimed on behalf

¹⁶⁴⁶ Ibid.

¹⁶⁴⁷ Ibid.

¹⁶⁴⁸ Ibid [6.3].

¹⁶⁴⁹ Ibid.

¹⁶⁵⁰ *Gröninger v Germany*, UN Doc CRPD/C/7/D/3/2011, [6.2].

of her son - a person with multiple disabilities - that he did not get support from Germany to find a job.¹⁶⁵¹ Specifically, he had no access to vocational training or placement services,¹⁶⁵² nor did he receive any assistance from employment agencies to acquire work experience or to be facilitated in joining the labour market.¹⁶⁵³ In addition, her family had to cover all expenses for his vocational training and disability-related rehabilitation.¹⁶⁵⁴ She argued that the main reason for her son's situation was the shortcomings of the social legislation that prevents the integration of persons with disabilities into the labour market by granting them unemployment benefits as an integration subsidy rather than supports them to join the labour market by more appropriate measures.¹⁶⁵⁵ Another suggested reason is that employment agencies purportedly prolong for years the process of job finding for persons with disabilities, resulting in them eventually being placed under sheltered employment designed specifically for persons with disabilities.¹⁶⁵⁶ Therefore, she contended, persons with disabilities in Germany are not treated equally as compared to persons without disabilities when they apply for jobs, and the federal government is concealing the fact that social legislation is preventing their integration into the labour market.¹⁶⁵⁷ Because no court or other body had investigated her allegations,¹⁶⁵⁸ she filed the communication to the CRPD Committee, claiming that her son's right to employment had been violated by Germany as a State Party to the CRPD.

The CRPD Committee held Germany liable for not fulfilling its treaty obligations under Article 27.1(d) and (e) on employment, because Germany had failed to ensure the realisation of the right to gainful employment of Ms Gröninger's son, by undertaking appropriate measures to promote employment opportunities in relation to vocational training, placement services and other forms of assistance to help her son to find a job.¹⁶⁵⁹

In its reasoning, the Committee pointed out that the measures undertaken by Germany

¹⁶⁵¹ Ibid [1.1].

¹⁶⁵² Ibid [2.4].

¹⁶⁵³ Ibid [2.7].

¹⁶⁵⁴ Ibid [2.4].

¹⁶⁵⁵ Ibid [2.9].

¹⁶⁵⁶ Ibid [2.4].

¹⁶⁵⁷ Ibid [2.9].

¹⁶⁵⁸ Ibid [2.3].

¹⁶⁵⁹ Ibid [6.3].

were medically oriented,¹⁶⁶⁰ and that the whole process resulted from the assumption of the incapability of persons with disabilities, i.e. persons with disabilities are assumed to have no capacity and therefore no role in applying for an integration subsidy, and employers therefore have exclusive power to do so on behalf of employees with disabilities.¹⁶⁶¹ In addition, the integration subsidy can comprise up to a maximum of 70 per cent of wages for a maximum period of 60 months.¹⁶⁶² This means that the provision of integration subsidies is unable to effectively promote the employment of persons with disabilities.¹⁶⁶³ In fact, it may be construed as a pretext to keep employees with disabilities away from work for as long as the subsidy period lasts.¹⁶⁶⁴ The final step of this process is to place persons with disabilities under sheltered employment yet claiming that they have been helped in finding a decent job is a fundamental flaw. The CRPD Committee criticised that all of these measures represent the medical model of disability and stated that they should not be applied because they are not consistent with the general principles set forth in Article 3 and Preamble paragraphs (i) and (j) of the CRPD.¹⁶⁶⁵

It is thus evident that the CRPD Committee strongly rejects the medical model of disability, although it would appear that this rejection does not fit well with the CRPD. However, a deeper analysis shows that the of the CRPD Committee's opposition to the medical model reflects an understanding of the concept of disability, because the concept of disability under the CRPD is not a total sum of all models of disability. The use of the medical model by Germany shows that it has applied all the negative aspects of that model, i.e., an assumption of the incapability of persons with disabilities, and prevention of gainful and inclusive employment for persons with disabilities. Hence, this application is contrary to the purposes and objective of, and non-compliance with the provisions on employment under the CRPD. So in fact the CRPD Committee has corrected the understanding of the concept of disability by States Parties, and in this case by Germany.

¹⁶⁶⁰ Ibid [6.2].

¹⁶⁶¹ Ibid.

¹⁶⁶² Ibid.

¹⁶⁶³ Ibid.

¹⁶⁶⁴ Ibid.

¹⁶⁶⁵ Ibid.

8.3.2. Equality

The CRPD Committee expresses its proposition on the concepts of equality of opportunity and equality as sameness in its views in *Gröninger v Germany*¹⁶⁶⁶ and *H.M. v Sweden*,¹⁶⁶⁷ respectively.

With regard to equality of opportunity, in *Gröninger v Germany* the CRPD Committee finds that affirmative action by Germany to realise the substantive equality of opportunity to assist Ms Gröninger's son to integrate into the labour market was harmful and, in fact, a disguised way of precluding him from joining the labour market,¹⁶⁶⁸ for example, by granting unemployment benefits for unspecified periods of time.¹⁶⁶⁹ In addition, the fact that the employment agencies had allegedly provided him with out-of-date vacancies may well be considered an intentionally dishonest action.¹⁶⁷⁰ The attempt by the employment agencies to exclude him from further education for his career advancement through his taking up part-time employment is also wrong,¹⁶⁷¹ as were the measures of controlling his movement in his residential area and monitoring his attendance at counselling meetings, as they also kept him from entering the labour market.¹⁶⁷² The CRPD Committee therefore implicitly concluded, regarding the concept of substantive equality of opportunity, that such measures are not genuinely helpful in assisting him in developing the needed skills for qualifying for desirable social positions.¹⁶⁷³

In *H.M. v Sweden*, the CRPD Committee implicitly rejects the understanding of equality as sameness, and recommends the application of equality as difference for persons with disabilities.¹⁶⁷⁴ The facts of the case offer a context for a better understanding of the CRPD's position. Ms H.M. had the extremely severe physical disability of not being able to walk or

¹⁶⁶⁶ Ibid.

¹⁶⁶⁷ *H.M. v Sweden*, UN Doc CRPD/C/7/D/3/2011.

¹⁶⁶⁸ *Gröninger v Germany*, UN Doc CRPD/C/7/D/3/2011, [6.3].

¹⁶⁶⁹ Ibid.

¹⁶⁷⁰ Ibid.

¹⁶⁷¹ Ibid.

¹⁶⁷² Ibid.

¹⁶⁷³ Ibid.

¹⁶⁷⁴ *H.M. v Sweden*, UN Doc CRPD/C/7/D/3/2011.

stand, and having difficulty in sitting up and lying down, hence being bedridden for two years.¹⁶⁷⁵ The only type of rehabilitation for her disability was hydrotherapy in an indoor pool in her house, because she could not be transported to hospital or a rehabilitation centre due to the increased risk of injuries resulting from her condition.¹⁶⁷⁶ She therefore applied for a building permit for building a hydrotherapy pool in her house.¹⁶⁷⁷ However, her request was rejected by the local housing committee and then the Administrative Court of Appeal,¹⁶⁷⁸ because the pool was to be built on a piece of land of about 45 square metres where building was not permitted for the general public interest, to preserve the area's status quo as per the local planning map, even though the extension was on her privately owned land. Her application was also rejected on the further grounds that approval of her application might create a precedent for not complying with the Planning and Building Act.¹⁶⁷⁹ She therefore filed a complaint to the CRPD Committee requesting it to decide whether her needs for rehabilitation and care due to the exceptional nature of her disability should prevail over the general public interest.¹⁶⁸⁰ The CRPD Committee held that because Sweden did not address her specific circumstances and particular disability-related needs, the decision rejecting her application for a building permit violated her rights to equality – specifically, equality as difference – and to non-discrimination, health and rehabilitation.¹⁶⁸¹

Explaining its implicit rejection of equality as sameness, the CRPD Committee reasoned that the automatic, strict and neutral application of the Planning and Building Act by Sweden to everyone, including persons with disabilities, would mean the application of equality as sameness in dealing with the differences of persons with disabilities resulting from their impairments.¹⁶⁸² In this particular case, it would mean the application of equality as sameness in the strictest form of the Planning and Building Act to Ms H.M., despite her particular differences resulting from her severe disabilities. More seriously, this application would

¹⁶⁷⁵ Ibid [2.1].

¹⁶⁷⁶ Ibid [2.2].

¹⁶⁷⁷ Ibid [2.3].

¹⁶⁷⁸ Ibid [2.4].

¹⁶⁷⁹ Ibid [2.5].

¹⁶⁸⁰ Ibid [3.1].

¹⁶⁸¹ Ibid [8.8].

¹⁶⁸² Ibid [8.3].

disable her even more by those structural barriers and further disintegrate her from society, because without the hydrotherapy she could be bedridden for an indefinite period of time. Therefore, it recommended that Sweden reconsidering her application for a building permit for her hydrotherapy pool.¹⁶⁸³ Put in philosophical terms, the CRPD Committee implicitly recommended that Sweden apply equality as difference in response to her particular differences, in order to accommodate her particular disability-related needs.

8.3.3. Discrimination

The CRPD Committee offers an explanation of the concept of indirect discrimination in its views in *H.M. v Sweden*¹⁶⁸⁴ and *S.C. v Brazil*.¹⁶⁸⁵

In *H.M. v Sweden*, the CRPD Committee explains that discrimination on the grounds of disability had taken place because Sweden could not prove that approval of her application as an indirect means to provide reasonable accommodation for the author would impose a disproportionate or undue burden on the state.¹⁶⁸⁶ Specifically, the CRPD Committee explains that equal and neutral litigation of the Planning and Building Act by Sweden to everyone, whether or not the person has a disability, might lead to indirect discrimination towards persons with disabilities.¹⁶⁸⁷ This is because this equal litigation has a discriminatory effect in cases such as Ms H.M.'s, where her special situation has not been taken into consideration.¹⁶⁸⁸ In addition, Ms H.M. had been put under a particular disadvantage resulting from the rejection of her application for the building permit by the local authority. This is because if she did not have the hydrotherapy pool in her house for rehabilitation purposes, she would be bedridden for an indefinite period. Sweden, in addition, had without an objective and reasonable justification, failed to treat her differently although her situation was exceptionally different.¹⁶⁸⁹

¹⁶⁸³ Ibid [9.1].

¹⁶⁸⁴ Ibid.

¹⁶⁸⁵ *S.C. v Brazil*, UN Doc CRPD/C/12/D/10/2013.

¹⁶⁸⁶ *H.M. v Sweden*, UN Doc CRPD/C/7/D/3/2011, [8.5].

¹⁶⁸⁷ Ibid [8.3]–[8.4].

¹⁶⁸⁸ Ibid.

¹⁶⁸⁹ Ibid.

Similarly, in *S.C. v Brazil*, the Committee explains that indirect discrimination had occurred resulting from the discriminatory effect of the demotion policy of Ms S.C.'s employer when applied to all employees who take medical leave in excess of three months, regardless of the reason.¹⁶⁹⁰ This demotion policy seems neutral and without an intent to discriminate, but it disproportionately affected the author because the employer, in particular, and Brazil, in general, had failed to take the author's significantly different situation, of having repeat accidents and an initial medical illness progressing to a permanent disability, into account.¹⁶⁹¹

On the basis of this reasoning for concluding that indirect discrimination had occurred in both cases, the CRPD Committee diplomatically directed the States Parties concerned to reflect on the basic idea of indirect discrimination, i.e., that it was not an intention on their part to discriminate against Ms H.M. and Ms S.C., but the apparently neutral nature of their legislation, which resulted in the indirect discrimination. The root cause of this unfortunate situation lay in the very first step of formulating their legislation – the failure correctly to apply a theoretical understanding of the concept of discrimination. Thus the CRPD Committee was implicitly recommending that by eliminating the apparent neutrality of their legislation, similar situations would be avoided in the future.

This conclusion is not solely a lesson learnt for the States Parties concerned but lessons learnt from other States Parties to the CRPD. Iceland is an example. *Gudmundsdottir v University of Iceland* is a case where a student with visual impairment had to withdraw from her studying at this University after 4 years because she did not received any assistance such as adjustment of the curriculum or accessible learning materials from the University to accommodate her disability.¹⁶⁹² The Supreme Court of Iceland in this case established that the University was obliged to make the necessary arrangements in order to reasonably

¹⁶⁹⁰ *S.C. v Brazil*, UN Doc CRPD/C/12/D/10/2013, [6.4].

¹⁶⁹¹ *Ibid* [6.4].

¹⁶⁹² *Gudmundsdottir v University of Iceland* (The Supreme Court of Iceland, No 177/1998, 4 February 1999). This case is cited in Brynhildur G. Flóvenz, 'The Implementation of the UN Convention and the Development of Economical and Social Rights as Human Rights' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 257, 272.

accommodate students with disabilities.¹⁶⁹³ It further established that even though this student had been accommodated to some extent, the root cause of the problem was the absence of a comprehensive plan or general guidelines on how to assist students with disabilities.¹⁶⁹⁴ However, the Court only found that this entailed a breach of her personal rights and the right to education.¹⁶⁹⁵ I would contend the Court should have held that the University of Iceland's neutral practice of offering no necessary assistance and facilities to this student, thus forcing a her to relinquish her studies due to this dearth of reasonable accommodation constituted indirect discrimination. It is hoped that in Iceland now as a State Party to the CRPD, there would be stronger judgements for the similar cases.

The discussion of this section shows that the CRPD Committee implicitly and explicitly reflected on their understanding of the concepts of disability, equality and discrimination under the CRPD in its work with regard to the individual communication procedure. In the following section I will discuss how the CRPD Committee determines that a violation of a right under the CRPD has occurred.

8.4. From Normative Rules to Judgments – Key Substantive Rights Provisions

When considering the merits of cases, the CRPD Committee decides whether there has been a violation of the rights set forth under the CRPD by the States Parties, hence whether to hold a State Party liable for not fulfilling their treaty obligations. This section investigates how the CRPD Committee holds a State Party liable for violating the rights set forth under the CRPD with regard to legal capacity and deinstitutionalisation, freedom from forced medical treatment, and accessibility. The analysis will be undertaken by investigating the views of the CRPD Committee on individual communications. It will be in the form of ascertaining the occurrence of a violation based on the facts of the cases. Obligations of States Parties will then be invoked to prove that the violations have in fact taken place.

¹⁶⁹³ *Gudmundsdottir v University of Iceland* (No 177/1998). This case is also cited in Guðrún D. Guðmundsdóttir, 'Country Report – Non-discrimination – Iceland (Reporting period 1 January 2015 – 31 December 2015)' (European Commission – Directorate-General for Justice and Consumers, 2016), 46.

¹⁶⁹⁴ *Ibid.*

¹⁶⁹⁵ *Ibid.*

It is noted that at the time of writing, the CRPD Committee has not examined the issue of forced medical treatment, as there have been no cases involving this issue. I cannot therefore discuss the issue here, and will only discuss the topics of legal capacity, deinstitutionalisation and accessibility in this section.

8.4.1. Legal Capacity

The CRPD Committee has discussed the issue of legal capacity in *Bujdosó et all v Hungary*.¹⁶⁹⁶ The facts of this case will offer a better context for understanding the CRPD Committee's views in this regard. The authors of this communication are six persons with intellectual disabilities placed under partial or full guardianship who were automatically deprived of the right to vote as defined in Hungarian Constitution. They therefore were not permitted to vote in the parliamentary and municipal elections in 2010.¹⁶⁹⁷ They did not file a complaint to any domestic courts because none of the courts have power to restore their right to vote as this exclusion is regulated under Hungarian Constitution.¹⁶⁹⁸ They therefore filed a complaint to the CRPD Committee claiming to be victims of a violation by Hungary of their rights to vote under Article 29 of the CRPD.

The CRPD Committee found that the State Party had failed to comply with its obligations under Articles 12 and 29 of the CRPD.¹⁶⁹⁹ In particular, under Article 29 Hungary is obligated, but had failed, to ensure that persons with disabilities effectively and fully participate in political and public life on an equal basis with others, which includes guaranteeing their right to vote, and ensuring that there is no restriction, or exception or deprivation in this regard, applied to any group of persons with disabilities.¹⁷⁰⁰ Therefore Hungary is required to ensure that its voting procedures are accessible, allowing persons with disabilities to be assisted in voting.¹⁷⁰¹ In addition, their capacity to vote should not be contested, and nobody should be forced to undergo an assessment of voting capacity as a

¹⁶⁹⁶ *Bujdosó et all v Hungary*, UN Doc CRPD/C/10/D/4/2011.

¹⁶⁹⁷ *Ibid* [2.1].

¹⁶⁹⁸ *Ibid* [3.3].

¹⁶⁹⁹ *Ibid* [9.7].

¹⁷⁰⁰ *Ibid* [9.4].

¹⁷⁰¹ *Ibid* [9.6].

precondition for participating in elections.¹⁷⁰²

This reasoning by the CRPD Committee implies that Hungary only recognises a part of the whole concept of legal capacity for persons with disabilities, which is the capacity to acquire the rights, not the capacity to act. As a result, Hungarians with disabilities in general and the authors of this communication in particular, are only perceived to have the capacity to have right to vote, not the capacity to vote. More specifically, the CRPD Committee held that Hungary had automatically deprived of their right to vote on the pretext of preserving the integrity of the State Party's political system, and imposed individualised voting capacity assessments upon the authors, as a precondition for participating in elections, where the authors were under guardianship, thus violating Articles 12 and 29 of the CRPD.¹⁷⁰³

The justification for this view is that, by automatic exclusion of the right to vote of persons with disabilities under guardianship, and imposition of individualised voting capacity assessments upon them, Hungary does not ensure that persons with disabilities effectively and fully participate in political and public life on an equal basis with others, including their right to vote, as regards its treaty obligations under the CRPD.¹⁷⁰⁴ It further means that in this case the incapacity to make a decision has been assimilated with the incapacity to communicate the decision, which is in contrast with the understanding of legal capacity in the context of disability, where these two types of incapacity are clearly distinguished. In addition, the CRPD Committee held that Hungary, pertaining to its treaty obligations under the CRPD, does not provide appropriate, accessible and easy-to-understand voting procedures, or allow persons with disabilities, upon their request, assistance in voting, or ensure that persons with intellectual disabilities cast a valid vote, on an equal basis with others, while guaranteeing voting secrecy.¹⁷⁰⁵ This means that Hungary has failed to assist persons with disabilities to exercise their legal capacity when that assistance is required.

¹⁷⁰² Ibid [5.11].

¹⁷⁰³ Ibid.

¹⁷⁰⁴ Ibid [9.4].

¹⁷⁰⁵ Ibid [9.6].

From this judgement, the CRPD Committee stands on a clear view that automatic exclusion of the right to vote of persons with disabilities under either partial or total guardianship, and imposition of individualised voting capacity assessments upon them are legally unacceptable as just discussed. This position, to some extent, is partly different from the judgement of European Court of Human Rights in a similar case, *Kiss v Hungary*, under its jurisdiction.¹⁷⁰⁶ In *Kiss v Hungary*, where a person with intellectual disability placed under partial guardianship was automatically deprived of the right to vote as defined in Hungarian Constitution, the Court held that an absolute and automatic deprivation of any person under partial (only partial, the Court did not discuss the situation of those under full guardianship in the case) guardianship, irrespective of his or her actual abilities violated Article 3 of Protocol No. 1 to the European Convention on Human Rights.¹⁷⁰⁷ The CRPD Committee shares this similar judgement. However, the Court left open the question of whether individual voting capacity assessment currently in place would be acceptable.¹⁷⁰⁸ Avoiding this loophole for the future application and interpretation of the CRPD, the CRPD Committee affirmed that imposition of individualised voting capacity assessments upon persons with persons with disabilities under either partial or total guardianship violates Articles 12 and 29 of the CRPD.

In relation to the guardianship regime, even though in its general comment on legal capacity in this regard the CRPD Committee strongly rejects the guardianship arrangement for persons with disabilities,¹⁷⁰⁹ it apparently accepts that the guardianship arrangement is practiced by States Parties. As a matter of fact, in *Bujdosó et all v Hungary* the CRPD Committee recommended that Hungary adopt legislative measures to ensure that persons with disabilities under guardianship or trusteeship can exercise their right to vote and participate in public life on an equal basis with others.¹⁷¹⁰ Surprisingly, however, it did not urge Hungary to abolish the guardianship system currently imposed upon persons with disabilities in Hungary. This might arguably be a pragmatic stance by the CRPD Committee, corresponding to the

¹⁷⁰⁶ *Kiss v Hungary* (European Court of Human Rights, Chamber, Application No 38832/06, 20 May 2010).

¹⁷⁰⁷ *Ibid* [44].

¹⁷⁰⁸ *Bujdosó et all v Hungary*, UN Doc CRPD/C/10/D/4/2011 [7.6].

¹⁷⁰⁹ *CRPD Committee General Comment No. 1*, UN Doc CRPD/C/GC/1, [47].

¹⁷¹⁰ *Bujdosó et all v Hungary*, UN Doc CRPD/C/10/D/4/2011, [9.4].

position under the CRPD that the substituted decision-making model is neither permitted nor prohibited – a position that may be considered an inconsistency on the part of the CRPD Committee.

8.4.2. Deinstitutionalisation

At the time of writing, most of the cases concerning the issue of deinstitutionalisation – in particular, Communications No. 14/2013, 15/2013, and 16/2013 on the institutionalisation of persons with intellectual impairment by Australia, and 17/2013 and 18/2013, on incarceration in high security units of persons with intellectual impairments declared unfit to stand trial in Australia – have not been examined by the CRPD Committee. Therefore, I will discuss the topic on the basis of other material currently available.

In *H.M. v Sweden*,¹⁷¹¹ the CRPD Committee held that Sweden failed to fulfil its obligations under Article 19(b) of the CRPD in rejecting the author's application for a building permit.¹⁷¹² This led to the deprivation of the author's right of access to hydrotherapy, the only option that could support independent living and inclusion in the community,¹⁷¹³ when provisions for independent living are one way of implementing deinstitutionalisation for persons with disabilities. This rejection meant that Sweden did not take effective and appropriate measures to facilitate full enjoyment of independence by persons with disabilities through accessing 'a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community' as per its treaty obligations under the CRPD.¹⁷¹⁴ Put plainly, Sweden had by legislation prevented persons with disabilities from living independently and might further have perpetuated the institutionalisation of such persons; thus in the present case Ms. H.M., without a hydrotherapy pool, eventually had to be admitted to a specialised healthcare institution – in other words, institutionalisation – in order

¹⁷¹¹ *H.M. v Sweden*, UN Doc CRPD/C/7/D/3/2011.

¹⁷¹² *Ibid* [8.9].

¹⁷¹³ *Ibid*.

¹⁷¹⁴ *Ibid*.

to get rehabilitation for her disability.¹⁷¹⁵

8.4.3. Accessibility

Of the 13 cases examined by the CRPD Committee, all are to some extent related to the issue of accessibility. In 5 out of these cases, the CRPD Committee concluded that there had been violations of Article 9, in particular, specifically concerning accessibility issues. In this section I will discuss 3 cases representing 3 types of disability, these being visual, physical, and hearing impairments. The other two cases, which also concern visual and hearing impairments, will not be discussed here so as to avoid repetition.

In relation to accessibility for persons with visual impairments, a good example is *Nyusti and Takács v Hungary*.¹⁷¹⁶ The following facts of the case will present a better context for understanding the CRPD Committee's judgement. Two persons with severe visual impairments used bank services provided by OTP Bank, but they were unable to use the automatic teller machines (ATMs) without assistance, as the ATMs did not have audible instructions or keyboards marked with Braille.¹⁷¹⁷ They both paid the same annual fees for banking services as did other clients.¹⁷¹⁸ Therefore, by being unable to use the ATM services at the same level as other clients without visual impairments, they received less service for the same fees.¹⁷¹⁹ They submitted their case to the domestic courts at all levels, claiming 300,000 Hungarian Forint each for indignity caused by the inaccessible bank service.¹⁷²⁰ Their case was rejected. They therefore filed a complaint to the CRPD Committee claiming to be victims of a violation by Hungary of their rights to non-discrimination, accessibility and legal capacity under Articles 5, 9 and 12, respectively, of the CRPD.¹⁷²¹

The Committee held Hungary liable for failing to fulfil its treaty obligations under Article

¹⁷¹⁵ Ibid.

¹⁷¹⁶ *Nyusti and Takács v Hungary*, UN Doc CRPD/C/9/D/1/2010.

¹⁷¹⁷ Ibid [2.1].

¹⁷¹⁸ Ibid.

¹⁷¹⁹ Ibid.

¹⁷²⁰ Ibid [2.3].

¹⁷²¹ Ibid [9.6].

9, paragraph 2(b) of the CRPD in respect to the issue of accessibility, among other issues.¹⁷²² Even though Hungary had gradually installed general accessibility features for all ATMs and other banking services, which could be used by all persons with disabilities, and had revised its legislation on accessibility applicable to all financial institutions,¹⁷²³ the CRPD Committee held that these measures did not ultimately ensure accessibility to the ATMs for these two complainants.¹⁷²⁴ Because this is an issue of reasonable accommodation for individuals with disabilities and these measures undertaken by Hungary were meant to ensure group-related accessibility, they could not be used to assist the complainants in this particular case.¹⁷²⁵ At the same time, normative obligations under the CRPD require Hungary to ensure that private entities offering facilities and services open to the public shall take into consideration all aspects of accessibility for persons with disabilities.¹⁷²⁶ Hungary failed to do so. Therefore, the CRPD Committee held that a violation of the complainants' right to live in a barrier-free society had taken place.

With regard to accessibility for persons with physical impairments, *X. v Argentina*,¹⁷²⁷ is discussed here as an example. The following facts of the case will offer a background for a better understanding of the CRPD Committee's judgement. Mr X. was sentenced by the Federal Criminal Court of Argentina to life imprisonment for torture and murder committed as a police officer during the Argentinian dictatorship of 1976–1983.¹⁷²⁸ While waiting for trial, and then serving his sentence, Mr X had intellectual, visual and physical impairments. His disabilities were so severe that he could not attend to his most basic daily hygiene needs. In prison, due to the inadequacy of infrastructure for persons with his disabilities, and the poor conditions of detention, he was unable to use the bathroom and toilet without assistance because of the steps leading to, and the small size, of the bathroom and toilet.¹⁷²⁹ He could not

¹⁷²² Ibid.

¹⁷²³ Ibid.

¹⁷²⁴ Ibid.

¹⁷²⁵ *CRPD Committee General Comment No. 2*, UN Doc CRPD/C/GC/2, [9.6].

¹⁷²⁶ *Nyusti and Takács v Hungary*, UN Doc CRPD/C/9/D/1/2010, [9.4].

¹⁷²⁷ Committee on the Rights of Persons with Disabilities, *Views: Communication No 8/2012*, 11th sess, UN Doc CRPD/C/11/D/8/2012 (18 June 2014) ('*X. v Argentina*').

¹⁷²⁸ Ibid [4.2].

¹⁷²⁹ Ibid [2.15]–[3.4].

access the courtyard on the ground floor either, because he had been assigned to a cell located on the first floor where there was no lift.¹⁷³⁰ In addition, there was a lack of timely rehabilitation treatment for his disabilities in prison. He applied for house arrest, but his application was rejected by the criminal courts at all levels. He therefore lodged a complaint to the CRPD Committee claiming that his rights to accessibility, life, justice, liberty, freedom from cruel inhuman or degrading treatment, personal integrity, health and rehabilitation, defined under Articles 9, 10, 13, 14, 15, 17, 25, and 26 of the CRPD, respectively, had been violated by Argentina.

The CRPD Committee held Argentina liable for not fulfilling its obligations under Article 9, paragraphs 1 (a) and (b) regarding the issue of accessibility, among other issues.¹⁷³¹ Specifically, the Committee considered that Argentina did not reasonably accommodate Mr X in using the bathroom, toilet, or recreation yard, independently, hence that these were violations of his right to accessibility.¹⁷³² At this time Argentina was under a treaty obligation to ensure accessibility in prison for all persons with disabilities who are deprived of their liberty.¹⁷³³ Accordingly, Argentina was required take all relevant measures, including the identification and removal of obstacles and barriers to facilities and services in its prisons, so that prisoners with disabilities can live independently and participate fully in all aspects of daily life in their place of detention.¹⁷³⁴ The CRPD Committee thus held that a violation of Mr. X's right to accessibility by Argentine had occurred.

In terms of accessibility for persons with hearing impairments, *Beasley v Australia*¹⁷³⁵ is relevant here. The facts of the case will put the reader in a better position to understand the CRPD Committee's judgement. Ms Beasley is a person with a hearing impairment and requires sign language interpretation for formal communications in order to communicate

¹⁷³⁰ Ibid [2.15].

¹⁷³¹ Ibid [8.5].

¹⁷³² Ibid.

¹⁷³³ Ibid.

¹⁷³⁴ Ibid.

¹⁷³⁵ Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 April 2016) ('*Beasley v Australia*').

with others.¹⁷³⁶ She was summoned to serve as a juror in a criminal court for a three-week period.¹⁷³⁷ However, she was then deemed unsuitable and incapable of effectively serving as a juror after she informed the Sheriff that she was deaf and required sign language interpretation.¹⁷³⁸ She claimed that there was no effective domestic judicial or administrative remedy made available to her.¹⁷³⁹ She therefore lodged a complaint to the CRPD Committee claiming that Australia had violated her rights to accessibility, legal capacity, access to justice, access to information, and performance of public duties under Articles 9, 12, 13, 21 and 29, respectively, of the CRPD.

The CRPD Committee held Australia liable for failing to fulfil its obligations under Article 9(1) in respect to the issue of accessibility, among other issues.¹⁷⁴⁰ Specifically, it found that Australia's failure to provide sign language interpretation to enable Ms Beasley to perform her public duty as a juror was a violation of her right to accessibility,¹⁷⁴¹ because this prevented her from performing her public duty on an equal basis with others.¹⁷⁴² In addition, the CRPD Committee explained that the performance of a public service is considered an 'important aspect of civic life within the meaning of Article 9(1), as it constitutes a manifestation of active citizenship',¹⁷⁴³ while Australia automatically refused this form of expression of active citizenship for persons with hearing impairments. Under Article 9, Australia has an obligation to take appropriate measures to enable persons with disabilities to participate fully in all aspects of life,¹⁷⁴⁴ while in this case Australia failed to undertake such measures.

The CRPD Committee further explained that accessibility in this case meant reasonable accommodation to Ms. Beasley, including the provision of the sign language

¹⁷³⁶ Ibid [2.1].

¹⁷³⁷ Ibid [2.1].

¹⁷³⁸ Ibid [2.4].

¹⁷³⁹ Ibid [2.5].

¹⁷⁴⁰ Ibid [8.6].

¹⁷⁴¹ Ibid.

¹⁷⁴² Ibid.

¹⁷⁴³ Ibid.

¹⁷⁴⁴ Ibid.

interpretation.¹⁷⁴⁵ Australia had failed to take the necessary steps to provide this reasonable accommodation to enable her to participate in the jury service on an equal basis with others.¹⁷⁴⁶ Furthermore, Australia could not demonstrate that the provision of sign language interpretation would constitute a disproportionate or undue burden upon it.¹⁷⁴⁷ Hence adjustments such as a sign language interpreter to enable Ms. Beasley to participate in the jury service should have been provided.¹⁷⁴⁸ Therefore the CRPD Committee held that a violation of her right to accessibility by Australia could be established.

There exists a drastic difference between the views of the CRPD Committee and the judgement of Australian domestic courts regarding this matter. A similar case *Lyons v Queensland*, where a person with a severe hearing impairment and using sign language as a means of communications was summoned to serve as a juror, however, was then deemed incapable of effectively performing the functions of a juror by a Deputy Registrar in Queensland,¹⁷⁴⁹ is a good illustration of this difference. After the views of the CRPD Committee in *Beasley v Australia* on 25 April 2016, the High Court of Australia in *Lyons v Queensland* held on 5 October 2016 that the Deputy Registrar's decision excluding Ms Lyons from a jury panel did not constitute unlawful discrimination against her under Queensland law.¹⁷⁵⁰ The High Court reasons that the exclusion was not made on the ground of her disability, instead it was made on the ground that there was no provision to administer an oath for an interpreter assisting a juror under the current law with regard to affirmation of Auslan knowledge, true and correct interpretation, no participation in the jury's deliberations, and no disclosure of information on those deliberations except as allowed or required by law.¹⁷⁵¹ In addition, according to Queensland law, while the jury was kept together, an Auslan interpreter was not permitted to assist the juror with disability.¹⁷⁵² Without an interpreter, Ms Lyons could not communicate, which led to the conclusion that she was incapable of effectively

¹⁷⁴⁵ Ibid [8.5].

¹⁷⁴⁶ Ibid.

¹⁷⁴⁷ Ibid.

¹⁷⁴⁸ Ibid.

¹⁷⁴⁹ *Lyons v Queensland* [2016] HCA 38 (5 October 2016) [5]–[14].

¹⁷⁵⁰ Ibid [1].

¹⁷⁵¹ Ibid [35].

¹⁷⁵² Ibid [38].

performing the functions of a juror, and as a result ineligible for jury service then unqualified to serve as a juror.¹⁷⁵³ Therefore, her exclusion from the jury service panel was legal and the case was dismissed.¹⁷⁵⁴

From this difference, for those supporting a narrow understanding of this High Court's decision, the argument on discrimination on the ground of disability for this case is out of discussion, and the views of the CRPD Committee regarding this matter is no more than a recommendation for Australia. However, I would argue for a more win-win interpretation that this High Court's decision would pave the way for a domestic legal reform which might lead to adoption of a piece of legislation prescribing administration of an oath to Auslan interpreters assisting jurors with hearing impairments and his/her assistance to a juror with disability when the jury is kept together. By doing so, Australia is observing its treaty obligations under the CRPD in good faith in order to create a more inclusive society for persons with disabilities.

The important point about these judgements by the CRPD Committee is that the issue of accessibility in individual communications should be read as an issue of reasonable accommodation for each individual with disabilities, rather than group-related issue. This is because the facts and specific context of each individual communication relate only to that individual (or particular group of individuals). That is why, in all judgements, the CRPD Committee has stressed the importance of reasonable accommodation and required States Parties concerned to meet the requirement on accessibility as reasonable accommodation. In addition, the judgements support the CRPD Committee's explanation in its general comment on accessibility, to the effect that accessibility is a precondition for persons with disabilities to exercise their human rights. Only by ensuring accessibility and then creating an inclusive and barrier-free society for persons with disabilities can States Parties fulfil their treaty obligations on accessibility under the CRPD.

¹⁷⁵³ Ibid [37].

¹⁷⁵⁴ Ibid.

8.5. Concluding Remarks

The discussion of this chapter has gone through the work of the CRPD Committee with regard to the individual complaint procedure, from its explanation on the theoretical framework to its judgements regarding normative norms. It has shown that the CRPD Committee implicitly and explicitly reflects the conceptual understanding of the concepts of disability, equality and discrimination in its work. In addition, the discussion has indicated that the CRPD Committee, when ascertaining the violation of a right under the CRPD, has not encountered any difficulty in determining when violations have taken place by going through the facts of the communications and then invoking States Parties' normative obligations.

For each individual communication, the CRPD Committee is obliged to render their views in two parts: one specifically directed at the authors of the case and the other directed at the States Parties, to prevent them repeating their violations. With regard to the first part, the impact of the work of the CRPD Committee seems to be limited to each individual communication, as its view is rendered on a very case-specific basic. On the face of it, it seems to promote individual justice only for the authors of each communication. Individual justice is satisfactory when it is admissible and the CRPD Committee has had the opportunity to examine the merits of the communications. In such a case, the authors of the communication will have their human rights restored and will be compensated for any emotional and financial losses. This result is similar to the individual remedies in the individual complaint model under municipal law in the civil proceeding after a liability judgment or a settlement following an individual complaint of discrimination as discussed. It might have an inbuilt deterrent element to the violator as a State Party to the CRPD mainly in an intangible way that the State Party's reputation with the international community will not look good as it leaves such a thing happened under its jurisdiction. This name-and-shame practice would help to improve the human rights record of the States Parties concerned.

In relation to the second part, in a broad perspective, the impact of the work of the CRPD Committee in States Parties when required to change their practices and legislation is

undeniable. For example, in *Nyusti and Takács v Hungary*, although the author might not have received the compensation specifically requested, Hungary has required banks to install accessible features for ATM machines to make them accessible for all persons with disabilities, and reviewed all the legislation on accessibility for persons with disabilities.¹⁷⁵⁵ Following *Bujdosó et all v Hungary*, Hungary repealed the legislation that automatically deprived the right to vote of persons with disabilities under guardianship.¹⁷⁵⁶ This impact of the CRPD Committee's work can be compared to that of the injunctive form of remedy under the individual complaint model under municipal law in the civil proceeding. However, the CRPD Committee like other human rights treaty committees have no power to impose the punitive form of remedies, which is different from national courts. But as discussed, the main purpose of the CRPD Committee's work on the individual complaint procedure is to align with the victims of a human rights violation, require States Parties restore to their rightful status as much as possible in which they would have been without the unlawful violation, and make recommendations of preventing the future similar violation, not to punish and impossible to punish the violators.

In virtue of this impact, I conclude that the work of the CRPD Committee in relation to the individual communication procedure does protect the particular individuals with disabilities involved, as well as contributing to advancing the human rights of persons with disabilities in general.

¹⁷⁵⁵ *Nyusti and Takács v Hungary*, UN Doc CRPD/C/9/D/1/2010, [9.5].

¹⁷⁵⁶ *Bujdosó et all v Hungary*, UN Doc CRPD/C/10/D/4/2011, [4.2].

CHAPTER IX: CONCLUSION

I began this thesis by posing the central research question of whether the CRPD has been able to advance the human rights of persons with disabilities, and after discussion and analysis over seven substantive chapters it is now time to draw conclusions. In this final chapter I reflect on my research findings, and discuss the relationship between previous research and mine, and the implications of my findings. I also point out some limitations of the thesis, and suggest some directions for future research, together with recommendations for policy and action.

9.1. Reflection on Research Findings

My findings have focused on the theoretical, normative, and institutional aspects, as well as on the actual implementation, of the CRPD – issues which are not usually discussed in an integrated way in the literature. I have covered these issues by asking eight research sub-questions which have allowed me to identify the unique strengths of the CRPD and, specifically, to conclude that the CRPD is conceptually, normatively, institutionally, and from the viewpoint of implementation, an advance in the way the human rights of persons with disabilities are protected and promoted.

Firstly, I have found that the CRPD is conceptually an advance over other UN human rights treaties for protecting the human rights of persons with disabilities. This is because the CRPD has made the radical move of conceptualising disability as the result of personal impairment, social attitudes and structural factors. This has meant adopting a pragmatic approach by selecting the most reasonable aspects of all existing understandings of disability, and hence avoiding the theoretical quagmires of other models of disability. It urges that legal development should be open to the application of a combination of all four models, or a selective application of more than one. In the case of the CRPD this selection reflects the theoretical discussion on disability in Chapter II, suggesting that the model of disability that

would most benefit persons with disabilities is one that is workable in practice and is able to balance the needs of persons with disabilities with the availability of social resources.

Furthermore, the CRPD has departed from the usual concept of equality as the same treatment for everyone. Instead it has been shown under the CRPD that all forms of equality can concurrently and harmoniously work together. The concept of equality of opportunity under the CRPD appeals to respecting and accommodating the differences of persons with disabilities; that is, respecting the choices of those with disabilities who can compete equally with others, and accommodating those who require assistance to realise their choices. It calls for appropriate treatment, including equal, special or preferential treatment, for persons with disabilities, on a case by case basis. At the same time, it presents equality as difference as the preferred choice, since equality as difference recognises and accommodates the differences of persons with disabilities by eliminating all physical and structural barriers against them.

The CRPD has shown determination to end disability discrimination by urging its States Parties to take effective and appropriate measures to combat all types of discrimination, including taking legislative, executive and practical measures, as well as using affirmative action, for dealing with discrimination on the grounds of disability. This is because it represents the view that, given that a disability is an immutable characteristic of a person – something that is unchangeable and beyond the person's control – discrimination on the grounds of disability is morally unacceptable in all circumstances. In this way the CRPD has demonstrated that it does conceptually protect the human rights of persons with disabilities.

Secondly, I have determined that the CRPD normatively protects the human rights of persons with disabilities. Thus it has extended conventional human rights to cover the unique situation of persons with disabilities in relation to, *inter alia*, legal capacity, deinstitutionalisation, freedom from forced medical treatment, and accessibility. The CRPD has adopted the strongly pragmatic position of neither prohibiting nor permitting the application of the substituted decision-making model, and forced medical treatment, in order to accommodate the best interests of those in need of assistance. In addition, it has promoted

the transformation of its legal concepts and normative rules into domestic legislation which ensures that persons with disabilities have the ability to exercise their legal capacity and be protected from institutionalisation and involuntary medical treatment. It has defined accessibility as a precondition for realising the human rights of persons with disabilities while at the same time making this an essential step to achieving social inclusion for them. It is therefore evident that the CRPD normatively advances the human rights of persons with disabilities.

Thirdly, the CRPD is institutionally different from other human rights treaties in the way it protects the human rights of persons with disabilities. This is because it has set up a monitoring mechanism, which is also unique to the context of disability, to oversee its implementation. Specifically, the functional aspects of the CRPD are particularly suited to this task because of its committee structure. The CRPD monitoring mechanism with the participation of the CRPD Committee is dominated by experts with disabilities as its members, and DPOs and NHRIs work closely with the CRPD Committee. These features have made the CRPD distinctive from other human right treaties. This participation is an effective tool for monitoring the implementation of the CRPD because, by involving persons with disabilities in all processes at all levels, it indicates that society recognises persons with disabilities as actively responsible for themselves, and able to take control of their own lives through designing and implementing legislation and policies affecting their lives. This involvement also serves as a process of collective and individual empowerment for persons with disabilities.

The CRPD Committee has performed well in its role in supervising the implementation of the CRPD by States Parties. When investigating the work of the Committee, it is evident that its efforts have thrived in some areas. In considering State reports, the CRPD Committee has been very successful in creating amicable dialogues with States Parties – an indispensable factor for cooperation from States Parties in implementing a human rights treaty, and for ensuring the proper implementation of the CRPD by States Parties – through its responses to

state reports and in its explanations of the important issues of legal capacity and accessibility. It has also made use of available opportunities to express its concerns on state practices deemed harmful and detrimental, such as forced medical treatment.

In considering individual communications, the CRPD Committee has not encountered any difficulty in determining which violations have taken place by going through the facts of the communications, and then invoking the States Parties' normative obligations in holding them liable for not fulfilling their treaty obligations.

However, its work has not been problem-free. With regard to state reports, there is a gap between their assessment and their implementation by States Parties, because each side does things in its own way. States Parties implement the CRPD in the way that they assume is right, while the Committee sends States Parties concluding observations that it takes to be correct. In addition, there is little follow-up on these concluding observations from States Parties. In terms of the individual communication procedure, the CRPD Committee's judgements are very case-specific and seem to promote only individual justice for the authors of each communication. However, overall, the CRPD Committee has been trying its best to ensure that the human rights of persons with disabilities in general are properly implemented by States Parties.

Lastly, all of the above theoretical, normative and institutional considerations are relevant to investigating the actual implementation of the CRPD in order to judge whether it is an effective tool for protecting the human rights of persons with disabilities. This implementation is discussed in this thesis by examining State reports and investigating the CRPD Committee's judgements on individual communications. The investigation of state reports shows that States Parties are implementing the CRPD properly and in good faith. Despite varying levels of social, economic and political development, most States Parties have some form of law to deal with issues of disability, ensuring equality, and tackling discrimination against persons with disabilities. In addition, States Parties have been working hard to ensure that persons with disabilities have the opportunity to exercise their legal

capacity, and are protected from institutionalisation and involuntary medical treatment. At the same time, States Parties have implemented accessibility to ensure a barrier-free society for persons with disabilities to exercise their human rights. Hence accessibility is one of the most implemented issues, with States Parties devoting a large proportion of their reports to discussing the implementation. This means that States Parties are transforming the CRPD's principles and provisions into their domestic legislation and realising the human rights of persons with disabilities.

For the most part, States Parties work closely with the CRPD Committee on all these issues. In particular, States Parties and the CRPD Committee agree on accessibility issues. In this regard, both share the understanding that the elimination of physical barriers is a precondition for ensuring equality in practice, and a way of applying equality as difference for persons with disabilities.

However, there are gaps in the implementation activity of the States Parties. For example, they do not always follow a specific understanding of the concepts of disability, equality and discrimination, nor do they take a standard approach in realising the rights to legal capacity, deinstitutionalisation, freedom from involuntary medical treatment and accessibility. The implementation of these concepts and rights very much depends upon the national legal framework and good intentions of the States Parties. Indeed, their national legal frameworks on disability may have been enacted well before they became States Parties to the CRPD. Their good intentions have prevailed in some cases, like implementing accessibility, while they can be questioned when it comes to implementing legal capacity and the very sensitive issue of forced medical treatment. Yet, overall, the actual implementation of the CRPD has been successful in promoting the human rights of persons with disabilities.

The answer to the central research question of this thesis, based on the synthesis of my research findings on the research sub-questions, is therefore that the CRPD does, with regard to the many aspects of the issues I have discussed, constitute an advance in the protection of the human rights of persons with disabilities.

9.2. Relationship to Previous Research

The findings of my research on different topics of discussion are broadly in line with previous research in the discipline. For example, in terms of the concept of disability, my research shares some aspects with a pluralist approach, which is a combination of the medical and social models of disability,¹⁷⁵⁷ suggesting that disability is caused both by personal impairment and social exclusion and discrimination.¹⁷⁵⁸ My research is also consistent with the view that the CRPD is a hybrid convention to protect the human rights of persons with disabilities.¹⁷⁵⁹ It also fortifies the claim that in relation to legal capacity, the CRPD has neither permitted nor prohibited the substituted decision-making regime.¹⁷⁶⁰

However, my research in several areas differs to some extent from previous research. Firstly, its findings run counter to the conventional view that the social model of disability is the preferred model for addressing the needs of persons with disabilities, as Mike Oliver claims.¹⁷⁶¹ My view is that this social model embraces a rigid view of how disability is created and ignores all other factors, while my findings are that a combination of selected aspects of all four models of disability is better. My findings are also, to some extent, at odds with research that claims that the CRPD has adopted the social model of disability,¹⁷⁶² since I have argued that the CRPD has only partly adopted this model, and that it has also only partly adopted the medical model. Finally, I have pointed out that the CRPD has adopted a strongly pragmatic and tactical stance on the issues of legal capacity and forced medical treatment, by neither permitting nor prohibiting them. This goes against previous research which has taken the view that the CRPD prohibits the application of involuntary medical treatment,¹⁷⁶³ or leaves it open, without any regulation.¹⁷⁶⁴

¹⁷⁵⁷ Thomas, above n 152; Williams, above n 196; Bury, above n 196; Hughes and Paterson, above n 145; Shakespeare and Watson, above n 130.

¹⁷⁵⁸ Shakespeare and Watson, above n 130, 24–5.

¹⁷⁵⁹ Quinn, above n 875, 8–9.

¹⁷⁶⁰ Dhanda, above n 27.

¹⁷⁶¹ Oliver, above n 127.

¹⁷⁶² Quinlivan, above n 847.

¹⁷⁶³ Minkowitz, above n 29, 410.

¹⁷⁶⁴ Kayess and French, above n 24, 30.

9.3. Research Implications

All of these different findings have significant implications for research fields concerned with the theoretical, normative, and institutional aspects of the CRPD and its implementation.

In terms of a theoretical framework, my research offers a better framework than other research approaches, because it is not rigid, and its flexibility makes it easier not only for scholars in the field to do research and formulate their arguments, but also for States Parties to the CRPD to implement findings.

Specifically, my research findings offer a different way of looking at the medical model of disability. For the most part, the medical model is utterly indefensible because it has so many times been found to perpetuate the disadvantaged circumstances of persons with disabilities, depriving them of their human rights, and ultimately being responsible for their systematic social exclusion. However, I have presented some considerations suggesting that the medical model is not completely detrimental and cannot be ruled out completely as a means of dealing with the issue of disability. I have argued that the main concern is how this model is conceived and then utilised with a view to advancing the human rights of persons with disabilities. My aim has not been to justify the medical model as a whole, and particularly not when it encourages segregated education, forced medical intervention, and welfare benefits in place of gainful employment, to name but a few of its negative consequences, but rather to indicate some indispensable aspects of this model in dealing the disability issues. My argument is based on the fact that the CRPD, with its progressive outlook, implicitly recognises that the medical model offers some measures that are valid options in advancing the human rights of persons with disabilities. That is, the CRPD sees rehabilitation, a classic measure undertaken under the medical model, as the right rather than just another medical intervention by health professionals, for persons with disabilities. In addition, it does not prohibit the application of the substituted decision-making model for certain persons with disabilities, such as those in a coma, or forced medical treatment for persons with severe

intellectual impairments when safeguard measures are in place. Thus to speak of the medical model of disability as though this referred to the old conception of it is a little misleading. Its undeniable positive aspects should be paid adequate attention.

In addition, my research raises a theoretical question about an issue so far ignored by previous disability discourse, on the understanding of the concept of equality in the context of disability – a question relevant to deciding which conception of equality is best suited for dealing with the issue of disability. In the absence of adequate scholarly discussion of the notion of equality in the disability discourse, I have studied feminist writings for references. In feminist discourse the debate on equality is about how differences between men and women ought to be treated by law. More specifically, it is about different levels of equality, from equality as same treatment, to special treatment, to different treatment, and about which one of these concepts best deals with gender equality and the promotion of legal equality for women.¹⁷⁶⁵ Specifically, there are three stages of feminist legal theory, which use various concepts of equality, these being the initial stage of the 1970s, with its emphasis on same treatment, then the difference stage of the 1980s, with its emphasis on special treatment, then the diversity stage of 1990s and the abandonment of the dichotomy of same and different treatments.¹⁷⁶⁶ It is obvious from the feminist debate that each concept of equality is at each stage either completely endorsed or rejected by respective scholars. For example, scholars of the initial stage only endorsed same treatment between men and women, while those of a later stage only endorsed special treatment.

In contrast with these rigid approaches of the initial and difference stages, and in favour of a more diverse approach of the diversity stage, I suggest that in the context of legal writing on disability legislation, it is best to take the view that equality is not incompatible with the recognition and accommodation of differences of persons with disabilities. This means that both equality as sameness and equality as difference are concurrently applicable in the context of disability. The justification for my view is that, as the CRPD has demonstrated, all forms of

¹⁷⁶⁵ Martha Chamallas, *Introduction to Feminist Legal Theory* (Aspen Publishers, 2nd ed, 1999), 15.

¹⁷⁶⁶ *Ibid.*

equality can concurrently and harmoniously work together. Under the concept of equality as sameness, under the CRPD, equal, special and preferential treatment are all designed to treat persons with disabilities according to their different needs arising from different kinds of disability. For example, equality as sameness in the form of preferential treatment under the CRPD can take various forms, one of these being quotas in employment.¹⁷⁶⁷

So while the CRPD supports the concept of equality as sameness, it also endorses the concept of equality as difference, since it recognises and accommodates those differences. Equality as difference under the CRPD acknowledges the differences of persons with disabilities and considers these differences an integral part of human diversity. It also recognises different types of difference among persons with disabilities. More importantly, it stresses that the differences of persons with disabilities should not be brought in to compare them with the ability of able-bodied persons, but instead, these differences should be accommodated physically and structurally. Physically, this means the elimination of all physical barriers creating inaccessible built environments. Thus it requires physically accommodating the difference of persons with disabilities by making built environments accessible to them, or ensuring that communicative devices in accessible and usable formats are available to them. Structurally, it means the elimination of oppression and discrimination against persons with disabilities. For example, the CRPD requires its States Parties to ‘modify, or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’, and to prohibit discrimination on the ground of disability. The entire text of the CRPD is about the accommodation of the differences of persons with disabilities in exercising their human rights. My research therefore justifies the claim that both equality as sameness and equality as difference are applicable in the context of disability, with equality as difference as a more preferred choice because it recognises and accommodates the differences of persons with disabilities.

Normatively, my research has synthesised a selection of the most critical topics and issues for persons with disabilities dealt with under the CRPD. It has done this collectively, rather

¹⁷⁶⁷ CRPD art 27.1(g).

than discussing these topics separately, ranging from the hybrid convention to the issues of legal capacity, deinstitutionalisation, freedom from forced medical treatment, and accessibility. In particular, my synthesis offers a detailed analysis of how the CRPD has adopted a pragmatic position on the issues regarding legal capacity and forced medical treatment. Specifically, it does not explicitly endorse or reject the application of the substituted decision-making model, or forced medical treatment, upon persons with disabilities. It leaves the matter open for the stakeholders to interpret, requiring only that the interpretation is in line with the CRPD's purpose and objectives. The finding of this moderate and compromise position of the CRPD will hopefully bring to an end the dichotomy of either endorsing or rejecting these controversial responses to these selected issues for future research.

Institutionally, my research offers an analysis of the CRPD Committee, discussing in detail what makes the Committee unique. This uniqueness consists partly in the fact that the Committee has a majority of experts with disabilities as its members, and works in consultation with DPOs and NHRIs. My analysis goes beyond any previous literature in its discussion of the CRPD Committee, while also laying the basis for future research.

Importantly, my research offers a comprehensive investigation of the actual implementation of the CRPD, filling an important gap, since there has been no previous comprehensive study on state reports, and no scholarly discussion at all of the individual communications of the CRPD Optional Protocol. It can therefore serve as a source of information for determining whether and how the CRPD has been contributing to improving the lives of persons with disabilities. Specifically, it offers, for the first time, a detailed discussion of the state reports, giving an overall picture of how the CRPD is being implemented by States Parties. In addition, it offers for the first time a detailed discussion and an analysis of the judgements of the CRPD Committee on individual communications. Without analysing each individual communication, it provides an overall view of how the CRPD Committee is working to protect particular individuals with disabilities.

Finally, my research differs from previous research that clearly separates the study of normative rules and the institutional aspects of human rights treaties. My thesis combines those research areas. It provides an analysis of the normative provisions under the CRPD offering a normative understanding of the rights of persons with disabilities, and also analyses the institutional regulations on the roles and functions of the CRPD Committee. Combined with the theoretical discussion, these analyses of both normative and institutional norms gives the reader both a comprehensive overview and a detailed analysis of the CRPD and CRPD Committee, thereby diversifying available knowledge of human rights treaties, and human rights treaty committees, though with particular reference to the CRPD and CRPD Committee.

9.4. Research Limitations

As with any research, mine cannot escape certain limitations. I should stress that my study has been primarily concerned with the most central topics and issues concerning persons with disabilities, discussing the understanding and implementation of the concepts of disability, equality and discrimination, and the rights to legal capacity, deinstitutionalisation, freedom from involuntary medical treatment, and accessibility. Thus the thesis does not offer an analysis on every single article of the CRPD, nor does it offer a comprehensive analysis of all topics and issues covered by the CRPD.

In addition, at this early stage of the implementation of the CRPD, my thesis focuses on specific issues, examining the implementation of the CRPD with regard to the most urgent and pressing matters regarding that implementation. With a hundred state reports of about 70 to 100 pages each covering the implementation of 33 articles under the CRPD submitted to the Committee, my thesis was simply unable to cover all the topics.

As there have not been many individual communications considered by the CRPD Committee, the materials for my analysis of individual communications were limited. I could therefore only discuss the topics from the materials on individual communication currently

available to me, and my findings were confined to these materials.

Next, although this research offers an overall view on how the CRPD is being implemented, my source of information has primarily been the State reports. I have therefore had to approach my analysis, primarily of these reports, in a critical frame of mind, as the information from state reports is not necessarily objective and is reported at the discretion of persons in power. Consequently, it could be argued that the information does not reflect the on-site implementation of the CRPD.

Finally, the CRPD, with only 8 years of implementation, as compared with the much longer histories of many other UN human rights treaties – for example the ICCPR of 40 years standing, or CRC of 26 years¹⁷⁶⁸ – is very new. Hence this research in many respects only reflects short-term implementation. The evaluation of this short-term implementation can nevertheless serve as a foundation for future evaluations over the longer term implementation of the CRPD.

9.5. Recommendations

These limitations do not however prevent me from suggesting some directions and recommendations for future research, policy and action regarding the state reports, individual communications, particular rights articles, and the CRPD Committee's general comments and follow-up of its concluding observations.

Future research should particularly focus on state reports, in order to investigate how the CRPD is actually being implemented, thus evaluating its effectiveness over the longer term, as my research has only investigated the initial state reports, reflecting a very short-term implementation period. More specifically, the investigation of issues such as access to justice, deprivation of liberty, respect for privacy, and family matters should not be neglected. These are significant issues, but tend to be considered secondary in comparison to other matters such as healthcare, education, and employment, in addressing disability issues. This can be done specifically through examining state reports, because there will in due course be numerous

¹⁷⁶⁸ The ICCPR came into force in 1976, CRC in 1990.

periodic state reports with more detail on the implementation of the CRPD, on a wider range of themes, submitted to the CRPD Committee. Such investigations will provide a broader basis for evaluating the effectiveness of the CRPD and the work of the CRPD Committee. The same holds true of research on the individual complaint procedure, because this will in due course provide a wider range of materials in the form of individual communications for examining how effectively the CRPD Committee protects persons with disabilities.

More research could also be focused on the particular rights of persons with disabilities in order to bring out the differences between the implementation of those rights through the CRPD and through other human rights treaties which take persons with disabilities into consideration. This comparative research is needed to draw up performance indicators for the CRPD Committee as compared with other human rights treaty committees, so as to explore, in particular, whether the distinctive features of the CRPD Committee, as discussed, make a significant difference in protecting the human rights of persons with disabilities over the longer term of implementation.

A suggestion for future policy is that the CRPD Committee should draw more general comments on theoretical issues on disability and discrimination in order to help States Parties to gain a clearer understanding of these concepts, which serves as a starting point and basis for any legislation and policy interventions in implementing the CRPD. More general comments on other critical issues such as the right to life, liberty, personal security and employment would also be welcome. More importantly, when issuing general comments and providing interpretations of provisions of the CRPD, the CRPD Committee should formulate them in such a way that the least developed countries can follow them, to enhance the realisation of human rights of persons with disabilities in those countries.

A suggestion for future action by the CRPD Committee is that it should do more to follow up with States Parties on the implementation of its concluding observations in response to state reports.

9.6. Final Words

My discussion and conclusions have been largely positive, arguing that the fact of the matter is that the CRPD is being widely implemented by States Parties. This is an important finding. The implementation of the CRPD has been a massive step forward in raising awareness on disability, and has led to the entrenchment of many good practices, such as the application of the supported decision-making model, the recognition and promotion of the legal capacity of persons with disabilities, and the creation of an accessible built environment, while supporting the abolition of harmful practices such as forced medical treatment and the institutionalisation of persons with disabilities – practices which it now appears may eventually be completely eliminated.

However, the CRPD is not a panacea for curing all problems facing persons with disabilities. It is only a common standard for all States Parties, with their different levels of social, economic and political development, to observe. In addition, it is just a further legal tool to protect the human rights of persons with disabilities. Therefore, the CRPD cannot be expected to solve all the problems and overturn overnight all the disadvantages facing persons with disabilities. Yet with proper implementation, and with all concerned parties committed to the implementation and monitoring process, including DPOs and persons with disabilities themselves, the CRPD will certainly contribute substantially to protecting the human rights of persons with disabilities. My thesis is an initial study that will hopefully lead to more research in this area.

APPENDICES

Appendix I: Ethics Approval Email

20/2/2014

Macquarie University Student Email and Calendar Mail - Approved- Ethics application- Parashar (Ref No: 5201300394)



THI THU HUONG DUONG <thi-thu-huong.duong@students.mq.edu.au>

Approved- Ethics application- Parashar (Ref No: 5201300394)

5 messages

Ethics Secretariat <ethics.secretariat@mq.edu.au>

1 July 2013 03:08

To: A/Prof Archana Parashar <archana.parashar@mq.edu.au>

Cc: Ms Therese MacDermott <therese.macdermott@mq.edu.au>, Huong Duong <thi-thu-huong.duong@students.mq.edu.au>

Dear A/Prof Parashar

Re: "Does the convention on the rights of persons with Disabilities Advance the cause of protection of Human Rights of Persons with Disabilities?"
(Ethics Ref: 5201300394)

The above application was reviewed by the Human Research Ethics Committee (Human Sciences and Humanities) at its meeting on 28/06/2013. Approval of the above application is granted, effective 01/07/2013. This email constitutes ethical approval only.

This research meets the requirements of the National Statement on Ethical Conduct in Human Research (2007). The National Statement is available at the following web site:

http://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e72.pdf.

The following personnel are authorised to conduct this research:

A/Prof Archana Parashar
Ms Huong Duong
Ms Therese MacDermott

NB. STUDENTS: IT IS YOUR RESPONSIBILITY TO KEEP A COPY OF THIS APPROVAL EMAIL TO SUBMIT WITH YOUR THESIS.

Please note the following standard requirements of approval:

1. The approval of this project is conditional upon your continuing compliance with the National Statement on Ethical Conduct in Human Research (2007).
2. Approval will be for a period of five (5) years subject to the provision of annual reports.

Progress Report 1 Due: 01 July 2014
Progress Report 2 Due: 01 July 2015
Progress Report 3 Due: 01 July 2016
Progress Report 4 Due: 01 July 2017
Final Report Due: 01 July 2018

NB. If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been discontinued or not commenced for any reason, you are also required to submit a Final Report for the project.

Progress reports and Final Reports are available at the following website:

<https://mail.google.com/mail/?ui=2&ik=28671fb931&view=pt&cat=Empirical%20Study&search=cat&th=13f97fd94521a2a9>

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new application for the project. (The five year limit on renewal of approvals allows the Committee to fully re-review research in an environment where legislation, guidelines and requirements are continually changing, for example, new child protection and privacy laws).

4. All amendments to the project must be reviewed and approved by the Committee before implementation. Please complete and submit a Request for Amendment Form available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

5. Please notify the Committee immediately in the event of any adverse effects on participants or of any unforeseen events that affect the continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your research in accordance with the guidelines established by the University. This information is available at the following websites:

<http://www.mq.edu.au/policy/>

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/policy

If you will be applying for or have applied for internal or external funding for the above project it is your responsibility to provide the Macquarie University's Research Grants Management Assistant with a copy of this email as soon as possible. Internal and External funding agencies will not be informed that you have approval for your project and funds will not be released until the Research Grants Management Assistant has received a copy of this email.

Please retain a copy of this email as this is your official notification of ethics approval.

Yours sincerely

Dr Karolyn White
Director of Research Ethics
Chair, Human Research Ethics Committees

Office of the Deputy Vice Chancellor (Research)

Ethics Secretariat
Research Office
Level 3, Research Hub, Building C5C East
Macquarie University
NSW 2109 Australia
T: +61 2 9850 6848
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<http://www.mq.edu.au/research>

Appendix II: List of Interviewees – Members of the CRPD Committee

Updated on 10 January 2014 before my empirical research

Source: The Office of the United Nations High Commissioner for Human Rights of the United Nations at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx>

#	Name	Nationality	Term expires
1.	Mr. Mohammed AL-TARAWNEH	Jordan	31Dec2016
2.	Mr. Martin Mwesigwa BABU	Uganda	31Dec2016
3.	Mr. Munthian BUNTAN	Thailand	31Dec2016
4.	Ms. Maria Soledad CISTERAS REYES (Chairperson of the CRPD Committee)	Chile	31Dec2016
5.	Ms. Theresia DEGENER (Rapporteur of the CRPD Committee)	Germany	31Dec2014
6.	Mr. Hyung Shik KIM	South Korea	31Dec2014
7.	Mr. Lofti Ben LALLAHOM	Tunisia	31Dec2014
8.	Mr. Stig LANGVAD	Denmark	31Dec2014
9.	Mr. László Gábor László	Hungary	31Dec2016
10.	Ms. Edah Wangechi MAINA (Vice Chairperson of the CRPD Committee)	Kenya	31Dec2014
11.	Mr. Ronald MC CALLUM	Australia	31Dec2014
12.	Ms. Diane MULLIGAN	UK	31Dec2016
13.	Ms. Safak PAVEY	Turkey	31Dec2016
14.	Ms. Ana PELAEZ NARVAEZ	Spain	31Dec2016
15.	Ms. Silvia Judith QUAN-CHANG	Guatemala	31Dec2016
16.	Mr. Carlos RIOS ESPINOSA	Mexico	31Dec2014
17.	Mr. Damjan TATIC	Serbia	31Dec2014
18.	Mr. Germán Xavier TORRES CORREA	Ecuador	31Dec2014

Appendix III: The Participant Information and Consent Form

(For the interviews)



Macquarie Law School

Faculty of Arts

MACQUARIE UNIVERSITY NSW 2109

Phone: +61 (0)2 9850 7062

Fax: +61 (0)2 9850 7686

Email: archana.parashar@mq.edu.au

Chief Investigator's / Supervisor's Name: **Archana Parashar**

Chief Investigator's / Supervisor's Title: **Associate Professor**

Participant Information and Consent Form

Name of Project: **Does the Convention on the Rights of Persons with Disabilities**

Advance the Cause of Protection of Human Rights of Persons with Disabilities?

You are invited to participate in an empirical study, forming a part of the thesis which is to examine how far the CRPD has safeguarded the human rights of persons with disabilities (PWDs) especially to ensure equality for, and tackle discrimination, against them, after five years of entering into force. This empirical study aims to collect data which will inform the thesis. Specifically, the study on practical aspects of the work the CRPD Committee will be conducted to ascertain the extent to which the CRPD Committee's procedural mechanisms have been put to work in order to uphold its substantive principles and norms. This empirical study together with the theoretical research to ascertain the ideological and theoretical options for conceptualising and formulating the human rights of PWDs under the CRPD, and normative comparative research to understand how CRPD proposes to safeguard the right to equality and non-discrimination as defined by itself in comparison with those of other human rights treaties and some municipal laws is expected to provide a complete answer to the thesis question.

The study is being conducted by DUONG THI THU HUONG, PhD Candidate of Macquarie Law School, Macquarie University

Phone: +61 (0)2 9850 7670

Email: thi-thu-huong.duong@students.mq.edu.au,

as being conducted to meet the requirements of Doctor of Philosophy in Law under the supervision of A/Prof. ARCHANA PARASHAR of Macquarie Law School, Macquarie University

Phone: +61 (0)2 9850 7062

Email: archana.parashar@mq.edu.au

If you decide to participate, you will be asked to participate in an interview of approximately 45 minute to 1 hour duration. During this time you will be asked a range of questions relevant to the broad aim of the research. You may be asked to comment on any distinctions in normative approaches and practices developed by different human rights treaty committees. You may be asked about your personal experience and opinions, and evaluation on the work of the CRPD Committee or whether you have any suggestion on possible reform options to best uphold the CRPD's principles and norms.

With your consent, the interview will be digitally recorded to ensure that data is accurately recorded and that reliable records are maintained. All records of the interviews will be securely stored at Macquarie University. There will be no secretive use of this recording.

Do you agree for me to digitally record this interview? Yes ☐ No ☐

Any information or personal details gathered in the course of the study are confidential, except as required by law. You will not be identified in any publication of the results without your consent.

Because of the nature of the research, quotes may be used with your written consent.

Do you agree to be quoted? Yes ☐ No ☐

Being a member of a human right treaty committee, your biographical data is made available to the public on the webpage of the Office of the High Commissioner for Human Rights (OHCHR) of the United Nations at <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>, and you are one of 18 members of the CRPD Committee.

Do you agree for me to name you in the research result? Yes ☐ No ☐

It is well known that there are members of the CRPD Committee with some form of disability in compliance with Article 4.3 of the CRPD. One of the discussions of the research is about level of representation of PWDs in the CRPD Committee in comparison to other human rights treaty committees. This aims to promote for further inclusion of PWDs in all aspects of life.

If you have a disability, do you agree for me to indicate your disability status in the research finding?

Yes ☐ No ☐

My supervisors at Macquarie University and myself will primarily access the interview data. Higher Degree Research Committee and Academic Senate of Macquarie University will have the right to access to the research data. Examiners of my PhD thesis might have access to the research data for the thesis examination purpose only.

A summary of the results of the data can be made available to you on request via email. When preliminary conclusions are being developed, you will have the opportunity to provide further comments and feedbacks. Your comments and feedbacks will be incorporated into the final publication.

The result of the interview data will be used for academic purpose(s) only. It will be some integrated parts of my PhD thesis and this thesis will be a part of Macquarie University Digital Theses Collection when being completed. During the thesis writing, I might present the result of the interview data at some relevant conferences and it will also result in the publication of a referred journal article.

No payment of money or other remuneration for this research is involved. Based on the subject matter of the research, it is not anticipated that the interview will create any discomfort or risk for you.

Participation in this study is entirely voluntary. You are not obliged to participate and if you decide to participate, you are free to withdraw at any time without having to give a reason and without consequence.

I, _____, have read [have had read to me] and understand the information above and any questions I have asked have been answered to my satisfaction. I agree to participate in this research, knowing that I can withdraw from further participation in the research at any time without consequence. I have been given a copy of this form to keep.

Participant's Name: _____

(Block letters)

Participant's Signature: _____ Date: _____

Investigator's Name: DUONG THI THI HUONG

(Block letters)

Investigator's Signature: _____ Date: _____

The ethical aspects of this study have been approved by the Macquarie University Human Research Ethics Committee. If you have any complaints or reservations about any ethical aspect of your participation in this research, you may contact the Committee through the Director, Research Ethics (telephone (02) 9850 7854; email ethics@mq.edu.au). Any complaint you make will be treated in confidence and investigated, and you will be informed of the outcome.

(INVESTIGATOR'S [OR PARTICIPANT'S] COPY)

Appendix IV: Interview Questions

Semi-Structured Interview Guide

Project Name: The Convention on the Rights of Persons with Disabilities: From Ideological Conception to Actual Implementation – A Critical Appraisal

Interviewer: **Duong Thi Thu Huong**
(PhD Candidate at Macquarie University, Australia)

Interviewees: **Members** of the CRPD Committee

Interview venue: The Office of the United Nations High Commissioner for Human Rights (mainly), Geneva, Switzerland and Sydney, Australia

Category	Sub-category	Questions
Philosophical aspects	<i>Equality and non-discrimination</i>	1. Can you share with me your understanding of equality and non-discrimination? 2. When did you first become aware of these concepts?
	<i>Concept of disability</i>	3. Can you share with me your understanding of disability? 4. When did you first become aware of this concept? Before or after being a member of the Committee? Was this awareness in part due to being exposed to the writings of scholars?
The CRPD		5. What do you think about the CRPD in redefining the concept of disability? E.g. do you think it is practical to understand disability as a socially caused impediment? 6. When considering States' reports and individual communications, which articles are the most problematic in order for you to conclude that the member states are avoiding fulfilling their responsibilities by adopting a particular interpretation or the rights have been violated?
Procedural issues	<i>Working procedures</i>	7. The content of the CRPD Committee's Rules of Procedure are quite similar to those of other

Category	Sub-category	Questions
		<p>human rights treaty committees, except requirements on individual communications in accessible formats. Did the Committee think when adopting the Rules of Procedure that this similarity makes the Rules consistent to those of other Committees?</p> <p>8. Because of this similarity, what do you think about a criticism that the CRPD Committee just like other human rights treaty committees can hardly ensure equality for persons with disabilities, and protect them from discrimination?</p>
	Working time	<p>9. There are a lot of discussions in relation to the limitation of working time of the Committee, which leads to the huge backlog of States' reports. In addition, each meeting session, the Committee can consider only one individual communication, which may lead to 'justice delay' for rights-holders with disabilities. What do you think is the best way to deal with this backlog and delay? Has the Committee discussed about a solution to this backlog and delay?</p>
	The Committee's members with disabilities only	<p>10. How does your personal experience of disability (as a person with disability) influence your work as a member of the CRPD Committee? E.g. do you think it gives you a better understanding of the issues under discussion?</p> <p>11. Do you think your personal experience as a person with disability gives you stronger motivation to work to protect the human rights of persons with disabilities as a member of the CRPD Committee?</p> <p>12. As a member with disability of the Committee, what difficulties do you have in carrying out your duties?</p> <p>13. What kind of assistance are you getting now from the Secretariat and the OHCHR office?</p>

Category	Sub-category	Questions
		14. What kind of further assistance would be useful from the Secretariat, and OHCHR office to carry out your duties?
The work of your Committee		<p>15. In their reports, States tend to describe the human rights situations within their territories in ‘the rosiest colours’ totally opposite to the shadow reports by the civil society. Do you think there is some merit in this assertion and what do you think is the best way to help the States to report honestly?</p> <p>16. Implementing the Committee’s concluding observations and follow-up depends very much on the States Parties’ good faith and there are some non-compliant States. What are the experiences of the Committee to ensure the States to observe the Committee’s concluding comments and recommendation properly?</p>
	<i>Consideration of Individual communication</i>	<p>17. In your opinion, is the individual petition procedure under the CRPD Committee sufficiently accessible to the rights-holders with disabilities?</p> <p>18. How do admissibility criteria affect regulatory opportunities of persons with disabilities to access to the CRPD Committee?</p> <p>19. In your opinion, what are distinctions in normative approaches and practices developed by the Committee in comparison to other human rights treaty committees in dealing with individual petitions?</p> <p>20. What are your comments and evaluation on the work of the CRPD Committee in relation individual petitions?</p>
	<i>Inquiry procedure</i>	21. This Committee has many members with disabilities and the procedures for conducting an inquiry will may require members to go to a

Category	Sub-category	Questions
		specific state, where buildings, transportation, means of communication and so on might not be accessible to persons with disabilities. How do members of the committee address such issues?
Other issues	<i>Relationship with other human rights treaty committees</i>	<p>22. (Inter-Committee Meetings - ICM are a chance for the Committees' members to make recommendations mainly on procedural issues such as improvement and harmonization of working methods of all human rights treaty Committees.) How are accessible aspects provided for you to fully participate in those meetings?</p> <p>23. How do you feel when you attend the ICM while most of members of other Committees are persons without disabilities?</p> <p>24. Does it take you more time than other ICM participants to access and capture the flow of the meeting due to the meeting materials and communication need to be transferred into accessible formats?</p> <p>25. Have you had any occasion to advocate for inclusion of disability into the work of other Committees at those meetings?</p> <p>26. How does the CRPD Committee apply other Committees' normative and practical approaches in its own work?</p> <p>27. What are your thoughts about the possibility of cooperation with other human rights treaty committees especially in overlapping areas such as States Parties' report?</p> <p>28. What are your thoughts about the possibility of inclusion of more substantive issues into Inter-Committee Meetings' agenda?</p> <p><i>(Note: Chairman of the CRPD also attend the Inter-Committee Meetings)</i></p>

Category	Sub-category	Questions
	<i>Relationship with other agencies</i>	<p>29. Can you share your evaluation on the role of NGO, DPO and NHRIs in monitoring the implementation of the human rights treaties and the CRPD?</p> <p>30. Can you share your evaluation and comments on cooperation of UN specialised agencies with the Committee when needed?</p>
	<i>Other issues</i>	<p>31. What do you think about the proposal of a unified/single human rights treaty body for all human rights treaties? Do you support this proposal? Can you please elaborate why?</p> <p>32. What do you think the human rights situation of persons with disabilities will be under the UN human rights treaty system if the proposal of a unified/single human rights treaty body for all human rights treaties is realised? Because there is a concern of losing expertise diversity including knowledge of disability, then persons with disabilities will again be invisible as they were before the adoption of the CRPD.</p> <p>33. Committee members are supposed to work impartially and independently, have you personally experienced any pressure from your government or know of other members who have felt pressured? In other word, can a member of a human rights treaty committee work impartially and independently?</p> <p>34. What can the Committee do to enable the States Parties to appreciate that the Committee is not a threat to their national sovereignty, but rather a legal institution to help them better implement their human rights treaty obligations?</p> <p>35. Any other comments or suggestions you would like to make?</p>
Specific	<i>Questions for</i>	36. (The Annual Meetings of Chairpersons of the

Category	Sub-category	Questions
questions for targeted members	<i>the Chairman of the CRPD only</i>	<p>Human Rights Treaty Bodies (AMC) provide a forum for members of all Committees to discuss mainly on procedural issues such as streamlining and overall improvement of human rights reporting procedures, harmonization of the Committees' methods of work, follow-up to World Conferences, and financial issues.) How are accessible aspects provided for you to fully participate in those meetings?</p> <p>37. How do you feel when you attend the AMC while all other chairpersons are persons without disabilities?</p> <p>38. Does it take you more time than other AMC participants to access and capture the flow of the meeting due to the meeting materials you need in Braille?</p> <p>39. What are your thoughts about the possibility of inclusion of more substantive issues including inclusion of disability as a cross-cutting issue in the work of all Committees into the Annual Meetings' agenda?</p> <p>40. How does the CRPD Committee apply other Committees' normative and practical approaches in its own work?</p> <p>41. Can you please recommend other members of the CRPD Committee that I should interview?</p>

Appendix V: A List of DPOs as DPI Full Members

DPOs as DPI Full Members whose countries are States Parties to the CRPD and CRPD Optional Protocol

DPOs as DPI Full members: 130 as of 15 August 2016
CRPD: 166 States Parties as of 15 August 2016
CRPD Optional Protocol: P States Parties as of 15 August 2016

Source:

<http://www.dpi.org/AllNational>

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=en

#	DPI Full members (DPOs)	CRPD's State Parties	OP CRPD's States Parties
1.	Albania	Y	N
2.	Algeria	Y	N
3.	Angola	Y	Y
4.	Antigua and Barbuda	Y	N
5.	Argentina	Y	Y
6.	Australia	Y	Y
7.	Azerbaijan	Y	Y
8.	Bahamas	Y	N
9.	Barbados	Y	N
10.	Belarus	N	N
11.	Belgium	Y	Y
12.	Belize	Y	N
13.	Benin	Y	Y
14.	Bolivia	Y	Y
15.	Botswana	N	N
16.	Bulgaria	Y	N

#	DPI Full members (DPOs)	CRPD's State Parties	OP CRPD's States Parties
17.	Burkina Faso	Y	Y
18.	Burundi	Y	Y
19.	Cambodia	Y	N
20.	Cameroon	N	N
21.	Canada	Y	N
22.	Cape Verde	Y	N
23.	Chad	N	N
24.	Chile	Y	Y
25.	China	Y	N
26.	Congo	Y	Y
27.	Cook Islands	Y	Y
28.	Costa Rica	Y	Y
29.	Croatia	Y	Y
30.	Cuba	Y	N
31.	Czech Republic	Y	N
32.	Dominica	Y	Y
33.	Dominican Republic	Y	Y
34.	Ecuador	Y	Y
35.	El Salvador	Y	Y
36.	Estonia	Y	Y
37.	Ethiopia	Y	N
38.	Fiji	N	N
39.	Finland	Y	Y
40.	France	Y	Y
41.	Gabon	Y	Y
42.	Gambia	Y	Y
43.	Germany	Y	Y
44.	Ghana	Y	Y
45.	Greece	Y	Y
46.	Grenada	Y	N
47.	Guatemala	Y	Y
48.	Guinea	Y	Y
49.	Guyana	Y	N

#	DPI Full members (DPOs)	CRPD's State Parties	OP CRPD's States Parties
50.	Honduras	Y	Y
51.	Hungary	Y	Y
52.	Iceland	N	N
53.	India	Y	N
54.	Indonesia	Y	N
55.	Ireland	N	N
56.	Italy	Y	Y
57.	Ivory Coast	N	N
58.	Jamaica	Y	N
59.	Japan	Y	N
60.	Kenya	Y	N
61.	Korea (South)	Y	N
62.	Laos	Y	N
63.	Latvia	Y	Y
64.	Lesotho	Y	N
65.	Liberia	Y	N
66.	Libya	N	N
67.	Macedonia	Y	Y
68.	Madagascar	Y	N
69.	Malawi	Y	N
70.	Malaysia	Y	N
71.	Maldives	Y	N
72.	Mali	Y	Y
73.	Malta	Y	Y
74.	Mauritania	Y	Y
75.	Mauritius	Y	N
76.	Mexico	Y	Y
77.	Mongolia	Y	Y
78.	Morocco	Y	Y
79.	Mozambique	Y	Y
80.	Namibia	Y	Y
81.	Nepal	Y	Y
82.	New Zealand	Y	N

#	DPI Full members (DPOs)	CRPD's State Parties	OP CRPD's States Parties
83.	Nicaragua	Y	Y
84.	Niger	Y	Y
85.	Nigeria	Y	Y
86.	Pakistan	Y	N
87.	Panama	Y	Y
88.	Papua New Guinea	Y	N
89.	Paraguay	Y	Y
90.	Peru	Y	Y
91.	Philippines	Y	N
92.	Portugal	Y	Y
93.	Republic of Congo	N	N
94.	Republique Centrafricaine	N	N
95.	Romania	Y	N
96.	Russia	Y	N
97.	Rwanda	Y	Y
98.	Samoa	N	N
99.	Senegal	Y	N
100.	Serbia	Y	Y
101.	Seychelles	Y	N
102.	Sierra Leone	Y	N
103.	Singapore	Y	N
104.	Slovakia	Y	Y
105.	Slovenia	Y	Y
106.	Solomon Islands	N	N
107.	Somalia	N	N
108.	South Africa	Y	Y
109.	Spain	Y	Y
110.	Sri Lanka	Y	N
111.	St. Kitts and Nevis	N	N
112.	St. Lucia	N	N
113.	St. Vincent and the Grenadines	Y	Y
114.	Sudan	Y	Y
115.	Swaziland	Y	Y

#	DPI Full members (DPOs)	CRPD's State Parties	OP CRPD's States Parties
116.	Switzerland	Y	N
117.	Tanzania	Y	Y
118.	Thailand	Y	N
119.	Togo	Y	Y
120.	Trinidad and Tobago	Y	N
121.	Tunisia	Y	Y
122.	Turkey	Y	Y
123.	Uganda	Y	Y
124.	Ukraine	Y	Y
125.	United Kingdom	Y	Y
126.	United States	N	N
127.	Uruguay	Y	Y
128.	Vanuatu	Y	N
129.	Zambia	Y	N
130.	Zimbabwe	Y	Y

Appendix VI: A List of National Human Rights Institutions

NHRIs whose countries are States Parties to the CRPD and CRPD Optional Protocol

NHRIs accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights **as of 5th August 2016** in accordance with the Paris Principles and the ICC Statute, the following classifications for accreditation are used by the ICC:

A: Compliance with the Paris Principles;

B: Not fully in compliance with the Paris Principles

C: Non-compliance with the Paris Principles.

*A(R): This category (accreditation with reserve) was granted where insufficient documentation was submitted to confer A status; is no longer in use by the ICC. It is maintained only for those NHRIs which were accredited with this status before April 2008.

Summary of Status of Number of NHRIs as of 5 August 2016:

A: 75

B: 32

C: 10

Total: 117

CRPD: 166 States Parties as of 15 August 2016

CRPD Optional Protocol: 89 States Parties as of 15 August 2016

Source:

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>

<http://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart.pdf>

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-
15&chapter=4&clang=_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en)

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-
a&chapter=4&clang=_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_en)

A STATUS INSTITUTIONS

	Countries with A Status NHRIs (Accreditation status as of 5 August 2016)	CRPD States Parties	OP CRPD States Parties
1.	Afghanistan: Independent Human Rights Commission	Y	Y
2.	Albania: Republic of Albania People's Advocate	Y	N
3.	Argentina: Defensoría del Pueblo de la Nación Argentina	Y	Y
4.	Armenia: Human Rights Defender of Armenia	Y	N
5.	Australia: Australian Human Rights Commission	Y	Y
6.	Azerbaijan: Human Rights Commissioner (Ombudsman)	Y	Y
7.	Bolivia (Plurinational State of) : Defensor del Pueblo	Y	Y
8.	Bosnia and Herzegovina: Institute of Human Rights Ombudsmen of Bosnia and Herzegovina	Y	Y
9.	Burundi: Independent National Human Rights Commission of Burundi	Y	Y
10.	Cameroon : National Commission on Human Rights and Freedoms	N	N
11.	Canada: Canadian Human Rights Commission	Y	N
12.	Chile: Instituto Nacional de Derechos Humanos	Y	Y
13.	Colombia: Defensoría del Pueblo	Y	N
14.	Costa Rica: Defensoría de los Habitantes	Y	Y
15.	Croatia: Ombudsman of the Republic of Croatia	Y	Y
16.	Denmark: Danish Institute for Human Rights	Y	N
17.	Ecuador: Defensor del Pueblo	Y	Y
18.	Egypt: National Council for Human Rights	Y	N
19.	El Salvador: Procuraduría para la Defensa de los Derechos Humanos	Y	Y
20.	Finland: Finish Human Rights Institution	Y	Y
21.	France: Commission Nationale Consultative des Droits de l'Homme	Y	Y

	Countries with A Status NHRIs (Accreditation status as of 5 August 2016)	CRPD States Parties	OP CRPD States Parties
22.	Georgia: Public Defender's Office	Y	N
23.	Germany: Deutsches Institut für Menschenrechte	Y	Y
24.	Ghana: Commission on Human Rights and Administrative Justice	Y	Y
25.	Great Britain : Equality and Human Rights Commission	Y	Y
26.	Greece: National Commission for Human Rights	Y	Y
27.	Guatemala: Procuraduría de los Derechos Humanos de Guatemala	Y	Y
28.	Haiti: Office for the Protection of Citizens (OPC)	Y	Y
29.	Hungary: Commissioner for Fundamental Rights	Y	Y
30.	India: National Human Rights Commission of India	Y	N
31.	Indonesia: National Human Rights Commission of Indonesia (Komnas HAM)	Y	N
32.	Ireland: Irish Human Rights Commission	N	N
33.	Jordan: National Centre for Human Rights	Y	N
34.	Kenya: Kenya National Commission on Human Rights	Y	N
35.	Latvia: Ombudsman of the Republic of Latvia	Y	Y
36.	Luxembourg: Commission Consultative des Droits de l'Homme du Grand-Duché de Luxembourg	Y	Y
37.	Malawi: Malawi Human Rights Commission	Y	N
38.	Malaysia: Human Rights Commission of Malaysia (SUHAKAM)	Y	N
39.	Mauritania : Commission Nationale des Droits de l'Homme	Y	Y
40.	Mauritius: Commission Nationale des Droits de l'Homme	Y	N
41.	Mexico: Comisión Nacional de los Derechos Humanos	Y	Y
42.	Mongolia: National Human Rights Commission of Mongolia	Y	Y

	Countries with A Status NHRIs (Accreditation status as of 5 August 2016)	CRPD States Parties	OP CRPD States Parties
43.	Morocco: Conseil Consultatif des Droits de L'homme du Maroc	Y	Y
44.	Namibia: Office of the Ombudsman	Y	Y
45.	Nepal: National Human Rights Commission of Nepal	Y	Y
46.	Netherland: Netherland Institute for human rights	N	N
47.	New Zealand: New Zealand Human Rights Commission	Y	N
48.	Nicaragua: Procuraduría para la Defensa de los Derechos Humanos	Y	Y
49.	Nigeria: National Human Rights Commission of Nigeria	Y	Y
50.	Northern Ireland (UK): Northern Ireland Human Rights Commission	Y	Y
51.	Occupied Palestine Territory: The Palestinian Independent Commission for Citizen's Rights	Y	N
52.	Panama: Defensoría del Pueblo de la República de Panamá	Y	Y
53.	Peru: Defensoría del Pueblo	Y	Y
54.	Poland: Human Rights Defender	Y	N
55.	Portugal: Provedor de Justiça	Y	Y
56.	Qatar: National Committee for Human Rights	Y	N
57.	Republic of Korea: National Human Rights Commission of the Republic of Korea	Y	N
58.	Russia: Commissioner for Human Rights in the Russian Federation	Y	N
59.	Rwanda: National Commission for Human Rights	Y	Y
60.	Samoa: Office of the Ombudsman	N	N
61.	Scotland: Scottish Human Rights Commission	Y	Y
62.	Serbia: Protector of Citizens of the Republic of Serbia	Y	Y
63.	Sierra Leone: Human Rights Commission	Y	N

	Countries with A Status NHRIs (Accreditation status as of 5 August 2016)	CRPD States Parties	OP CRPD States Parties
64.	South Africa: South African Human Rights Commission	Y	Y
65.	Spain: El Defensor del Pueblo	Y	Y
66.	Tanzania (United Republic of): Commission for Human Rights and Good Governance	Y	Y
67.	The Philippines: Commission on Human Rights of the Philippines	Y	N
68.	Timor Leste: Provedoria for Human Rights and Justice	N	N
69.	Togo: National Commission for Human Rights	Y	Y
70.	Uganda: Uganda Human Rights Commission	Y	Y
71.	Ukraine: Ukrainian Parliament Commissioner for Human Rights	Y	Y
72.	Uruguay: Institución Nacional de Derechos Humanos y Defensoría del Pueblo	Y	Y
73.	Venezuela: Defensoría del Pueblo	Y	Y
74.	Zambia: Zambian Human Rights Commission	Y	N
75.	Zimbabwe: Human Rights Commission	Y	Y

B STATUS INSTITUTIONS

	Countries with B Status NHRIs (Accreditation status as of 26 January 2016)	CRPD States Parties	OP CRPD States Parties
1.	Algeria: Commission Nationale des Droits de l'Homme	Y	N
2.	Austria: The Austrian Ombudsman Board	Y	Y
3.	Bahrain: National Institution for Human Rights	Y	N
4.	Bangladesh: National Human Rights Commission of Bangladesh	Y	Y
5.	Bulgaria: Commission for protection against	Y	N

	Countries with B Status NHRIs (Accreditation status as of 26 January 2016)	CRPD States Parties	OP CRPD States Parties
	Discrimination of the Republic of Bulgaria		
6.	Bulgaria: The Ombudsman of the Republic of Bulgaria	Y	N
7.	Chad: Commission Nationale des Droits de L'homme	N	N
8.	Congo : Commission Nationale des Droits de l'Homme (CNDH)	Y	Y
9.	Côte d'Ivoire: Commission nationale des droits de l'homme	Y	N
10.	Cyprus: Commissioner for Administration and Human Rights	Y	Y
11.	Ethiopia : Ethiopian Human Rights Commission (EHRC)	Y	N
12.	Honduras: Comisionado Nacional de los Derechos Humanos de Honduras	Y	Y
13.	Iraq: High Commission for Human Rights	Y	N
14.	Khazakhstan: The Commissioner for Human Rights (CHR)	Y	N
15.	Kyrgyzstan: The Ombudsman of the Kyrgyz Republic (OKR)	N	N
16.	Libya: National Council for Liberties and Human Rights	N	N
17.	Macedonia: The Ombudsman of the Republic of Macedonia	Y	Y
18.	Mali: Commission nationale des	Y	Y
19.	Maldives : Human Rights Commission	Y	N
20.	Myanmar: Myanmar National Human Rights Commission	Y	N
21.	Montenegro: Protector of Human Rights and Freedoms	Y	
22.	Norway: Norwegian Centre for Human Rights	Y	N
23.	Oman: Oman National Human Rights Commission	Y	N

	Countries with B Status NHRIs (Accreditation status as of 26 January 2016)	CRPD States Parties	OP CRPD States Parties
	(ONHRC)		
24.	Republic of Moldova : Human Rights Centre of Moldova	Y	N
25.	Senegal: Comité Sénégalais des Droits de l'Homme	Y	N
26.	Slovenia: Republic of Slovenia Human Rights Ombudsman	Y	Y
27.	Slovakia: National Centre for Human Rights	Y	Y
28.	Sri Lanka: Human Rights Commission of Sri Lanka	Y	N
29.	Sweden: Equality Ombudsman of Sweden	Y	Y
30.	Tajikistan: The Human Rights Ombudsman of the Republic of Tajikistan (HROT)	N	N
31.	Thailand: National Human Rights Commission	Y	N
32.	Tunisia: Comité Supérieur des Droits de l'Homme et des Libertés Fondamentales	Y	Y

C STATUS INSTITUTIONS

	Countries with C Status NHRIs (Accreditation status as of 26 January 2016)	CRPD States Parties	OP CRPD States Parties
1.	Antigua and Barbuda: Office of the Ombudsman	N	N
2.	Barbados: Office of the Ombudsman	Y	N
3.	Benin: Commission Béninoise des Droits de L'homme	Y	Y
4.	Hong Kong Special Administrative Region of China: Hong Kong Equal Opportunities Commission	Y	N
5.	Iran (Islamic Republic of) : Commission Islamique des Droits de l'Homme	Y	N
6.	Madagascar: Commission Nationale des Droits de l'Homme de Madagascar	Y	N
7.	Puerto Rico (United States of America) : Oficina	N	N

	Countries with C Status NHRIs (Accreditation status as of 26 January 2016)	CRPD States Parties	OP CRPD States Parties
	del Procurador del Ciudadano del Estado Libre Asociado de Puerto Rico		
8.	Romania: Romanian Institute for Human Rights	Y	N
9.	Switzerland: Commission fédérale pour les questions féminines (CFQF)	Y	N
10.	Switzerland: Federal Commission against Racism (FCR)	Y	N

SUSPENDED INSTITUTIONS

Fiji: Fiji Human Rights Commission

Niger: Commission nationale des droits de l'homme et des libertés fondamentales

Paraguay: Defensoría del Pueblo

INSTITUTIONS WHOSE ACCREDITATION HAS LAPSED

Burkina Faso: Commission nationale des droits de l'homme

DISSOLVED INSTITUTIONS

Belgium: The Centre for Equal Opportunities and Opposition to Racism

Appendix VII: A List of Countries with National Disability Legislation

Source: The Disability Rights Education and Defense Fund (DREDF)

<http://dredf.org/legal-advocacy/international-disability-rights/international-laws/>

Accessed: 15 August 2016

Total: 104 countries have some form of disability legislation

1. Albania

- Constitution Articles 52, 59
- Law 7889/1994 “Disabled Status of Work” (amended by Law 8052/1995)
- Law 7821/2000
- Law 8098/1996 “On the Status of the Blind”
- 1997 Council of Minister’s Decree No. 227 “On Obtaining the Status of the Blind”
- 2000 Council of Minister’s Decree No. 671 “On the Establishment of Medical Commission of the Blind”
- Law 8626/2000 (“On the Status of Paraplegics and Tetraplegics”)
- 1994 Council of Minister’s Decree No.307 “On services of social care”
- 2001 Council of Minister’s Decree No.31 “On the Benefits from the Status of Paraplegics and Tetraplegics”
- Council of Minister’s Decree No.387 “On Exclusion of Paraplegics and Tetraplegics from Taxes and Tariffs”
- 1994 Council of Minister’s Decree No.311 “On Obtaining Disability Allownces”
- Law 8092/1996 “On Mental Health”
- Law 7995/1995 “On the Encouragement of Employment” Articles 15, 16
- National Strategy on People with Disabilities
- Law 8872/2002 “On Education and Vocational Training in the Republic of Albania”
- No. 9355, date 10.03.2005 ON SOCIAL ASSISTANCE AND SERVICES

2. Andorra

- Labor Code Article 25
- Llei de garantia dels drets de les persones amb discapacitats (Law guaranteeing the rights of persons with disabilities)

3. Antigua and Barbuda

- Constitution Article 14
- 1957 Mental Treatment Ordinance

- 1972 Social Security Act Articles 2, 28
- 2005 The Social Security (Amendment) Act Article 2
- 2005 The Social Security (Amendment) Act Article 2 (alternate link)

4. Argentina

- Law 24314
- Law 24204 – Public Telephony for Hard-of-Hearing Individuals Law
- Law 25634
- Law 19279 and 24183 – Exemption System for the Acquisition of Vehicles for Persons with Disabilities
- Law 25280 – Inter-American Convention for the Elimination of all Forms of Discrimination against Persons with Disabilities
- Law 24657 – Federal Disability Council
- Law 25346 – National Day of Persons with Disabilities
- Law 18910 – Old Age and Disability Benefits Law
- Law 20475 – Granting of Retirement Benefits to the Disabled
- Law 20888 – Granting of Retirement Benefits to the Blind Law
- Law 23413 – Early Detection of Phenylketonuria
- Law 24901 – System of Basic Services for Habilitation and Comprehensive Rehabilitation of Persons with Disabilities
- Law 25421 -Primary Mental Health Care Program
- Law 23462 – Vocational Rehabilitation and Employment of Persons with Disabilities Law
- Law 24716 – Special leave of absence for working mothers who give birth to a child with Down Syndrome

5. Armenia

- Constitution Articles 14.1 and 37
- 2006 Armenian Law on Copyright and Related Rights (Article 22)
- Government Decision No.750-N of 13 June 2003
- Law on Social Protection of People with Disabilities (1993, amended 2002)
- Order 99 of the Cabinet of Ministers on approval of the Statute on criteria for definition of disability status (1997c)

6. Australia

- Disability Discrimination Act 1992
- Aged or Disabled Persons Homes Act, 1989
- Aged or Disabled Persons Care Act, 1954

- Disability Services Act, 1986
- Disability Services Amendment (Improved Quality Assurance) Act, 2002
- Disability Discrimination Amendment (Education Standards) Act, 2005
- Social Security (Disability and Sickness Support Amendment) Act, 1991
- Veterans' Entitlements Amendment (Disability, War Widow, and War Widower Pensions) Act, 2007
- Federal Magistrates Amendment (Disability and Death Benefits) Act, 2007
- Families, Community Services and Indigenous Affairs Legislation Amendment (Child Disability Assistance) Act 2007
- Disability Services (Transitional Provisions and Consequential Amendments) Act 1986
- Human Services and Health Legislation Amendment Act 1994
- Mental Health And Related Services Assistance Act 1973
- Civil Aviation Amendment Act 2005
- Age Discrimination (Consequential Provisions) Act 2004
- Defence Legislation Amendment Act (No. 1) 1999
- Employment Education and Training Act

7. Austria

- Federal Disability Discrimination Act
- Federal Act on the Service of Official Documents Article 29(7)
- Article 1(3) of the E-Government Act
- Federal Law on National Council Elections Articles 52, 66

8. Azerbaijan

- Constitution Article 38
- Order 99 of the Cabinet of Ministers on approval of the Statute on criteria for definition of disability status (1997c)
- The Law of Prevention of Disability, Rehabilitation of Invalids and their Social Protection (1997a)
- Law on Children's Rights Article 35, 36, 41
- Act No. 284 of 25 August 1992 on Social Protection of Invalids
- The Law of the Azerbaijan Republic About Individual Labour Contracts Articles 7, 32
- Law No 54-IIIIG on Employment Pensions Chapter III
- Criminal Procedure Code Articles 92.3.2, 153.2.10, 229
- Resolution of the Cabinet of Ministers (no 103, 08 July 2002)
- The Law on Education Article 36.4

- The Law on Education of Persons with Limited Health Capacity
- Labour Code Section 78(2)
- Paragraph 1.2 of Decree #213 of the Cabinet of Ministers of the Azerbaijan Republic 2005
- Law on Social Insurance Articles 3, 4, 6
- Law on Labour Pensions Chapter III
- Law on Social Protection of Children Deprived of Parental Care Article 1
- The Election Code Article 17, 104
- The Law on Civil Service Articles 19, 23
- Law on Physical Training and Sports

9. Bahrain

- Constitution Article 5
- Labor Law of 2012 Articles 89,114
- Law No. 74 of 2006 with respect to Care, Rehabilitation and Employment of Disabled Persons

10. Bangladesh

- Constitution Articles 15, 28
- 1995 National Policy on Disability
- 2006 Five-year National Action Plan on Disability
- 2011 Bangladesh Persons with Disability Welfare Act

11. Belarus

- КОНСТИТУЦИЯ РЕСПУБЛИКИ БЕЛАРУСЬ (CONSTITUTION OF THE REPUBLIC OF BELARUS)
- Constitution Article 47
- Law of the Republic of Belarus No. 396-Z of July 14, 2008 (Article 19)
- Council of Ministers Decree N 1602 On the State program to create a barrier-free environment for people with physical disabilities in 2011-2015)
- Постановление Совета Министров № 1126 Об утверждении Комплексной программы развития социального обслуживания на 2011 – 2015 годы (Council of Ministers Decree № 1126 On approval of the Comprehensive Program of social services for 2011-2015)
- Закон № 422-3 О предупреждении инвалидности и реабилитации инвалидов (Law № 422-3 on disability prevention and rehabilitation of persons with disabilities)
- Закон № 1224-xii О социальной защите инвалидов в Республике Беларусь (Law № 1224-XII On Social Protection of Disabled Persons in the Republic of Belarus)

12. Bolivia

- Ley no. 1678 (1995), and English summary
- Article 71 of the Bolivian Constitution (Spanish)
- Supreme Decree 27477
- Validation of disability for military service
- Financial aid to the indigent blind
- Equal Opportunity Plan for people with disability
- Adoption of the UN Convention on the Rights of Persons with Disabilities
- Decree number 29608 Amending and supplementing Supreme Decree 27477 promoting the protection, integration, promotion and job security for people with disabilities
- Ley General para Personas con Discapacidad, 2012 (General Law for people with Disability, 2012)
- Ley N° 1678, De La Persona Con Discapacidad del 15 De Diciembre De 1995 (Law No. 1678 of Persons with Disabilities of 15 December 1995)

13. Bosnia and Herzegovina

- Act of 15 March 2010 On Vocational Rehabilitation and Employment of Disabled Persons
- Regulations of 28 January 2002 On Evaluation of Working Capacity in Relation to Pension and Disability Insurance
- Act of 2 August 2001 On the Protection of Mentally Handicapped Persons
- Regulations of 23 June 1999 On Evaluation of Working Capacity in Relation to Pension and Disability Insurance

14. Botswana

- Article 15 of the Constitution
- The National Policy on Care for People with Disability

15. Brazil

- Decree 3298/99 – National Policy for the Integration of Persons with Disabilities, Consolidates protection Standards, and Other Measures
- Law 7853/1989 (Provides for support for people with disabilities, their social integration on the National Coordination for the Integration of Persons with Disabilities)
- Law 10754/2003
- Law 8213/91 (Social Security Benefits and Other Provisions)
- Law 10048/2000

- Law 10436/2002 (Brazilian Sign Language)
- Law 10216/2001 (Provides for the Protection and Rights of People with Mental Disorders and Redirects the Mental Health Care Model)
- Decree 3298/1999
- Decree 4360/2002 (regulates the continuous benefits due to the disabled and elderly)
- Decree 7037/2009 (National Human Rights)
- The Act on National Education Guidelines and Bases (Section 58 on)

16. Bulgaria

- Constitution Articles 48, 51
- Labour Code Article 317 and Supplementary Provision 7
- Employment Encouragement Act
- Law on Protection Against Discrimination

17. Burkina Faso

- Constitution Article 18
- Loi no.012-2010/AN du 1er avril 2010, portant protection et promotion des droits des personnes handicapées (Law no.012-2010/AN April 1, 2010, on the protection and promotion of disabled persons)
- Décret 2012-828 Portant Adoption de Mesures Sociales en Faveur des Personnes Handicapées en Matière de Santé et d'Education (Decree 2012-828 Relative to the Adoption of Social Action in Favor of Disabled Persons in Health and Education)

18. Cambodia

- Digital Divide Act (2001)
- Constitution Article 74
- Law on the Protection and Promotion of the Rights of Persons with Disabilities, 2009

19. Canada

- Constitution – Charter of Rights & Freedoms (1982)
- Human Rights Act
- Employment Equity Act

20. Central African Republic

- Had disability laws but the government was recently overthrown in a rebel coup and constitution suspended.

21. Chile

- Social Integration of Persons with Disabilities (1994), and English summary

22. China

- Law of the People's Republic of China on the Protection of Disabled Persons

- Regulations on the Education of Persons with Disabilities (1994)
- Regulations on the Employment of People with Disabilities (2007)
- Law of the People's Republic of China on the Protection of Persons with Disabilities (adopted 1990, revised in 2008)

23. Colombia

- Disability Act, 1997
- Comprehensive Social Security System Act, 1993
- Constitution Articles 13, 16, 25, 47, 49
- Law 762/2002
- Law 324/1996
- Law 335/1996 article 12 – mandates closed captioning or sign language for TV programs
- Law 100/1993 (The Comprehensive Social Security Act) – Article 26 and 157 – addresses “prevention, education, rehabilitation, labor integration, social welfare, and accessibility”
- Law 643/2001 – subsidizes “mental health care and care for persons with various types of disabilities”
- Law 105/1993 and Presidential Order 1660/2003 – “provide for accessible transportation”
- Law 115/1994 – General Education Act – “The promotion of programs providing ‘education for persons with limitations’”-Articles 46-49
- Law 582/2000 – “the National Sports System for persons with disabilities and establishing the Colombian Paralympics Committee as the highest sports authority”
- Ley 1145 de 2007 Por medio de la cual se organiza el Sistema Nacional de Discapacidad y se dictan otras disposiciones (Law 1145 of 2007 (National Disability Council and other provisions)
- LEY 1306 DE 2009: Por la cual se dictan normas para la Protección de Personas con Discapacidad Mental y se establece el Régimen de la Representación Legal de Incapaces Emancipados. (Law 1306, 2009: Establishing rules for the Protection of Persons with Mental Disabilities and establishes a system for Free Legal Representation)
- Ley 1616 DE 2013: por medio de la cual se expide la ley de Salud Mental y se dictan otras disposiciones (Law 1616, 2013: Mental Health Act)

24. Costa Rica

- Ley no. 7600 (May 29, 1996),
- Law no. 7600 (May 29, 1996) English translation

- Law 5347 National Advisory of Rehabilitation and Special Education
- Adoption Act of 7948 American Convention on the Elimination of All Forms of Discrimination against persons with disabilities.
- Pension for disabled persons with dependent
- Amendments to the national law of the Board of Blind No. 2171 30 October 1957 and its amendments and additions to a new article
- Act. 7219 adopted the Convention on Vocational Rehabilitation and Employment of Disabled Persons.
- Decree no. 19101-S-MEP-TSS-PLAN for establishing national policies for the prevention of impairment and disability and comprehensive rehabilitation.
- Decree 6573-P of the presidency to issue regulations care facilities for elderly and disabled.
- Act 4762 creates the General Directorate of Social Rehabilitation.

25. Croatia

- Constitution Articles 57, 64
- Register of Persons with Disabilities Act
- 2001 Census Act
- Croatian Copyright and Related Rights Act (O.G. 167/2003) Article 86
- Labour Act Article 3

26. Cyprus

- Law L127 (The Law providing for Persons with Disabilities)
- The Equal Treatment in Employment and Occupation Law of 2004
- Law L 79 (I) 1992 for the establishment of Provident Lottery Fund
- Law L103 (I) 2000, for the establishment of Special Fund for the Center for the Vocational Rehabilitation of the Disabled.

27. Czech Republic

- Charter of Fundamental Rights and Freedoms Articles 29, 30
- Act No. 435/2004 Coll. (Act on Employment)
- Act No. 100/1988 Coll. (Act on Social Security)
- Pension Insurance Act No. 155/1995
- Act No. 561/2004 (Education Act)
- Social Services Act No. 100 of 1988
- Social Needs Act No. 482 of 1991
- Health Insurance Act No. 285 of 2002
- Building and Planning Act No. 83 of 1998

28. Denmark

- Danish Consolidated Act No. 164 of March 12, 2003 on Copyright (Article 17)
- 1993 Parliamentary Resolution Concerning Equalisation of Opportunities for Disabled People and Non-Disabled People

29. Dominican Republic

- Act. 42-2000, the Disability Act.
- Decree no. 107/95 establishing standards to ensure equal opportunities and employment rights for people with physical, mental or sensory.
- Act. 21-91 recognizing the rights and duties of persons with physical, sensory and / or mental disabilities.
- Act. 53, which is encouraged by the employment of blind people.

30. Ecuador

- Ley N° 2000–25, Ley sobre Discapacidades del Ecuador
- Reglamento general a la Ley de Discapacidades, effective January 14, 2003
- Ley sobre discapacidades no. 180 (1992), and English summary (now repealed)
- Disabilities Act No. 180 (1992)
- Disabled Act (2001)
- Decree no. 1437 by which dictates the General Rules of the Disabilities Act.
- Act. 97 of Presidential Decree No. reformatory. 1397, concerning the rights of the blind
- Regulations for the use of credit lines for disability organizations.
- Agreement no. 702–A, the Ministry of Social Welfare, laying dictate policies for the development of plans and programs of the National Action concerning Disabled Persons in Ecuador.
- Act. 150 with the decree establishing constant in Article 12 of the law protecting the disabled.
- Official Record #198 – Reform Act of the Labor Code
- Law of the Physical Culture, Sports, and Recreation

31. El Salvador

- Ley de equiparacion de oportunidades para las personas con discapacidad
- Regulation of Law Equality of Opportunity for People With Disabilities
- Decree no. 247 on the obligation to employ people with physical limitations.
- Decree no. 791 of the Legislative Assembly, which requires employers to protect and professional rehabilitation of disabled personnel of the Armed Forces.

- Decree no. 21 establishing the Interinstitutional Committee for the professional integration of disabled people.

32. Estonia

- Constitution Article 28
- Estonian Copyright Act amended 2006 (Articles 19 and 27)
- Disability Benefit Law
- Social Welfare Act
- Health Insurance Act
- Market Services and Benefits Act
- Basic Schools and Upper Secondary Schools Act
- Public Transportation Act
- Minister of Social Affairs Regulation No. 27 (31.03.09)
- Government Regulation No. 256 (12.20.07) “rehabilitation services provided under the list of services, pricing, and the maximum value of the introduction of”
- Minister of Social Affairs Regulation 23 in September 2008.
- Minister of Social Affairs Regulation No. 79 (04/12/2000) “applying for technical aids and favorable separation conditions and procedures”
- Economic Affairs and Communications Minister Regulation No. 14 (11/28/2002) “Requirements for mobility, visual or hearing disability in public buildings”

33. Ethiopia

- The Rights of Disabled Persons to Employment Proclamation, no. 101/1994
- Labour Proclamation, no. 42 of 1993 – extracts
- The Right of Disabled Persons to Employment Proclamation, 1994
- Labour Proclamation No. 377, 2003

34. Fiji

- Social Justice Act 2001 (Section 4 Affirmative Action Plans)
- Fiji Constitution (1988)
- Human Rights Commission Act 1999
- Fiji National Council of Disabled Persons Act 1994

35. France

- Code Penal – extracts
- Code du Travail – extracts
- Decree no. 91–663
- Decree no. 98–543
- Decree no. 99–756

- Decree no. 99–757

36. Germany

- Constitution (1949, amendments to 1998)
- Disability Discrimination Act (BGG)
- Law on Equal Opportunities for Disabled People
- SGB IX (Law on Rehabilitation and Participation of Disabled People)

37. Ghana

- Constitution (1992)
- The Disabled Persons Act 1993
- Persons with Disability Act, 2006 (Act 715)
- Labour Act, 2003
- Workmen’s Compensation Act, 1987

38. Guatemala

- Law of Attention to Persons with Disabilities, 135-1996

39. Honduras

- Decree no. 160–2005 laying gives the Equity Act and integral development for persons with disabilities.
- Act to promote employment of disabled persons (Decree no. 17–91).
- Decree no. 184–87 – Law on Rehabilitation of the Handicapped
- Decree no. 926 establishing the National Council for Comprehensive Rehabilitation
- Vocational Rehabilitation (Disabled) Recommendation, 1955
- Ley de equidad y desarrollo integral para las personas con discapacidad (Law of equality and comprehensive development for persons with disabilities)
- Ley de promoción de empleos para personas minusválidas (Law for the promotion of employment of people with disabilities)
- Política Publica para el ejercicio de los derechos de las personas con discapacidad y su inclusion social en Honduras (Public Policy for the exercise of the rights of people with disability and their social inclusion in Honduras)

40. Hong Kong

- Ordinance on Disability, c. 487 (1990)
- Disability Discrimination Ordinance (1995)

41. Hungary

- Constitution (1949, amendments to 1997)
- Equalization Opportunity Law (Act no. XXVI of 1998)
- Hungarian Act No LXXVI Article 41

42. Iceland

- Labour Market Measures Act No. 55/2006
- Act on the Affairs of People with Disabilities No. 59/1992
- Law on the Service and Information Centre for the Blind, Visually impaired and the Deafblind No. 160/2008
- Regulation for Special Education (no. 389/1996)
- Law on the Service and Information Center for the Blind, Visually impaired and the Deafblind No. 160/2008
- The Compulsory School Act No. 91, 12 June 2008

43. India

- Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995 (no. 1 of 1996)
- The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999

44. Indonesia

- Act of the Republic of Indonesia Number 4, of 1997, Concerning Disabled People
- Nation Plan of Action for the Measure of Social Welfare Enhancement for Indonesia's People with Disabilities
- Ministry of Public Works Decree on Building Accessibility and Environment (2006)

45. Ireland

- Employment Equality Act (no. 21 of 1998)
- Equal Status Act, 2000
- National Disability Authority Act, 1999

46. Israel

- Equal Rights for People with Disabilities Law, 5758–1998

47. Italy

- The Constitution of the Italian Republic, Article 38
- Law 376/1988 (Gratuity of Transportation of Guide Dogs for the Blind on Public Transport and the Right of Access in Venues Open to the Public)
- Law 15/1991 (Rules Designed to Facilitate the Vote of Voters with Limited Mobility)
- Law 104/1992 (Framework Law for the Assistance, Social Integration and Rights of Disabled People)
- Law 17/1999 (Integration and modification of the framework law on February 5, 1992, n. 104, for the assistance, social integration and rights of disabled people)
- Law 17/2003 (New Rules for the Exercise of Voting Rights by Voters Suffering from Serious Infirmary)

- Law 22/2006 (Home Voting for the Disabled)
- Law 118/1971 (Rules in Favor of the Civilian Disabled)
- Law 120/1991 (Blind individuals in public office)
- Law 4/2004 (Provisions to Support the Access of Disabled People to Computing)
- Law 633/1941 – Protection of copyright and other rights related to exercising it
- Law 845/1978 (Framework Law on Vocational Training) Articles 3 and 4
- Law 68/1999 (Regulations for the Right to Work of the Disabled)
- Law 67/2006 (Measures for the Judicial Protection of Persons with Disabilities Who Become Victims of Discrimination)
- Legislative Decree 216/2003 (Implementation of Directive 2000/78/EC on Equal Treatment in Employment and Occupation)
- Law 946/1967 (Admission of Blind Graduates to Certain Competitions for Professorships and the Placing of Qualified Blind Teachers in the Roles of Middle School)

48. Jamaica

- 1999 National Policy of Disability in Jamaica
- Constitution Article 24

49. Japan

- Law to Promote the Elimination of Discrimination Based on Disability (June 19, 2013)
- Human Resources Development Promotion Law
- Law for the Welfare of Physically Disabled Persons (1949, amended 1986)
- The Mental Health and Mentally Disabled Persons Welfare Law (1950, Amended 1993)
- Law for the Welfare of Mentally Disabled Persons (1960)
- Law for Employment Promotion and Matters related to Disabled Persons (1960, amended in 2005)
- Basic Law on Persons with Disabilities (1970, amended 2004)
- Act for Research, Development, and Dissemination of Assistive Devices (1993)
- Act for Promotion of Use of Communication and Broadcasting Services by Disabled Persons (1993)
- 1994 Labour Act
- Services and Supports for Persons with Disabilities Act (2005)
- The Act on Buildings Accessible and Usable for the Elderly and Physically Disabled (June, 1994)

- Law concerning the Payment of Special Disability Benefit for Persons with Special Disability (2004)
- Act on Mental Health and Welfare 1998
- Law for the Support of Developmentally Disabled persons (2004)
- Law on the Facilitation of Movement for Aged and Handicapped Persons (2006)
- Law to support the Independence of Persons with Disabilities (2005)

50. Jordan

- Law for the Welfare of Disabled Persons, no. 12 of 1993

51. Kazakhstan

- Қазақстан Республикасының Конституциясы
- Constitution of the Republic of Kazakhstan (English)
- Law on Social Protection of Disabled Persons (2006)

52. Kenya

- National Social Security Fund Act, 1965 (with 1997 Amendment)
- Persons with Disabilities Act, 2003
- The Regulation of Wages and Conditions of Employment Act, 1951
- The Work Injury Benefits Act

53. Kuwait

- Law No. 8 of 2010 for the Rights of People with Disabilities

54. Laos

- Decree on the Rights of Persons with Disabilities of the Lao People's Democratic Republic (2007)

55. Lesotho

- Articles 18, 33 of the Constitution
- 1995 Education Act
- 1995 Building Control Act
- 2001 National Assembly Election #1 Amendment Act
- 1984 The Lesotho Technical Vocational Training Act
- Special Education Unit of the Ministry of Education and Training
- National Disability and Rehabilitation Policy

56. Libya

- Disabled Persons Law No. 3
- Law No. 13 of 1980 on Social Security
- Law No. 20 of 1998 on the Social Care Fund
- Law No. 5 of 1987 on disabled persons

57. Lithuania

- Constitution Articles 52, 53
- Law on Support of Employment (2006) Article 26
- Social Enterprises Law (2004)
- 2002 Labour Code Articles 92, 127, 129, 135, 150, 154, 155, 161, 166, 169, 170, 184, 214, 279
- 2004 Law on Social Integration of the Disabled
- 2002 Individual Income Tax Act Article 20

58. Luxembourg

- Loi sur les travailleurs handicapés (Nov. 12 1991), and English summary
- Code Penal – extracts (ss. 444 & 453–58) (1997), and English summary

59. Madagascar

- Loi no. 97–044 sur les personnes handicapées
- Code du Travail – extracts (1994)
- Article 30 of the Constitution

60. Malawi

- Constitution (1994)
- Handicapped Persons Act, 1971
- Worker's Compensation Act
- Disability Bill – 2012

61. Malaysia

- Persons with Disabilities Act (2008)

62. Malta

- Equal Opportunities (Persons with Disability) Act (2000)

63. Mauritius

- Training and Employment of Disabled Persons Act, 1996
- Employment of Disabled Persons Act, 1988
- National Pensions (Amendment) Act, 1987
- The Building (Amendment) Act, 1999
- Training and employment of Disabled Persons Act, 1996
- Trust Fund for Disabled Persons Act, 1988
- Unemployment Hardship Relief (Amendment) Act 1990
- Constitution Article 16

64. Mexico

- Ley Para Las Personas Con Discapacidad Del Distrito Federal

- Ley General Para La Inclusión de las Personas con Discapacidad (General Act on the Inclusion of People with Disabilities)

65. Mongolia

- Constitution Article 16(5)
- 1999 Labour Law (Articles 74, 111)
- The Mongolian Social Security Law for People with Disabilities
- Law of Mongolia on Vocational Education and Training (Articles 11, 12, 25)
- State Social Welfare Law
- The Mongolian Social Security Law (Articles 28, 29)

66. Montenegro

- Constitution Articles 64, 68, 69
- 2008 Disability Training and Employment Act
- The 2008 Medical and Technical Regulation

67. Namibia

- Labour Act 1992 – extracts
- Affirmative Action (Employment) Act, 1998
- Namibian HIV/AIDS Charter of Rights, 2000
- National Disability Council Act, 2004
- National Pensions Act, 1992
- Constitution

68. Nepal

- 2007 Interim Constitution Article 18
- 2006 National Policy and Plan of Action on Disability

69. The Netherlands

- Primary Education Act 1998 (WPO)
- Expertise Centres Act (WEC)
- Act on Equal Treatment on the Grounds of Handicap or Chronic Illness (2003)

70. New Zealand

- Human Rights Act, 1993
- Human Rights Amendment Bill of 2001
- Disabled Persons Employment Promotion (Repeal and Related Matters) Bill (18 May 2004, No. 138–1)
- Disabled Persons Community Welfare Act 1975
- Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008

- Health and Disability Services (Safety) Act 2001
- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
- New Zealand Public Health and Disability Act 2000
- Health and Disability Commissioner Act 1994

71. Nicaragua

- Ley no. 202 (1995)
- Decreto No. 50 – 97 (1997)

72. Nigeria

- National Commission for Rehabilitation Act, 1969
- National Provident Fund Act, 1961
- Nigerians with Disability Decree, 1993

73. Norway

- Norwegian Plan for the Inclusion of Persons with Disabilities in Development Cooperation, prepared by the Ministry for Foreign Affairs
- University- and Higher Education Act
- The Education Act of 17 July 1998

74. Pakistan

- The Disabled Persons (Employment and Rehabilitation) Ordinance, No. 46 of 1981
- National Policy for Persons with Disability 2002

75. Palestinian Territory

- Law No. (4) for the year 1999 On the Rights of the Disabled

76. Panama

- Código de la familia, Ley no. 3, may 17, 1994 – extracts, and English summary
- Resolved Vol. 606 AR–256 Establishing the Office of Equal Opportunity.
- Executive Decree 103 which created the National Secretariat for Social Integration of Persons with Disabilities and the National Advisory Council for the Social Integration of Persons with Disabilities.
- Law 42 which sets the equalization of opportunities for people with disabilities

77. Paraguay

- Labour code of 1961 (abstract)
- Political constitution of 1992 (abstracts)
- Act. 36/90 adopting the Convention on Vocational Rehabilitation and Employment of Disabled Persons (Convention no. 159)
- Act. 780 of 30 November 1979 establishing the National Institute of exceptional individuals protection

78. Peru

- Ley No. 27050 – Ley General de la Persona con Discapacidad
- Supreme Decree No. 102–204–EF. Set the scale to be taken into account in applying the additional percentage on the salaries paid to disabled persons who are entitled to income-producing third rate employing disabled people. It also provides methods for certifying the condition of disability.
- Wage Law. 949 per amending the Law on income tax to pay considering the deduction provided for in Article 35 of the General Law on Persons with Disabilities.
- Act. 28,164 amending several articles of Law no. 27050, General Law of Persons with Disabilities.
- Supreme Decree no. 001–2003–TR establishing the Registry of Companies Promote Persons with Disabilities.
- Act. 27,139 amending article 6. of the Act. General Law for 27,050 disabled.
- Engagement. RVMI–010–90, dated 26 January 1990 approving the rules of organization and functions of the National Institute of Rehabilitation.
- Presidential Decree no. 001–89–SA which provides that disabled persons can access the vacancies in the three occupational groups that exist in public sector bodies.
- Ministerial resolution no. 474–88–TR laying people have visual impairment and / or physical limitation in positions of telephone operators working in the sector.
- Presidential Decree no. 037–88–TR for approving the regulations of law no. 24,759 (on the protection, care and occupational rehabilitation of disabled and legal regime governing the business of the disabled).
- Act. 24,759, on Business Conditions of Disabled
- Resolucion ministerial nom. 398–86–TR por la que se aprueba el reglamento interno para el funcionamiento de la Comision Nacional de Apoyo a la Colocacion Selectiva.
- Act. 24,067 shares on the regulation of health, education, social work and advocacy on issues of promotion and delivery of services prevented in order to achieve social integration.
- Law 23,285 of work for people with physical, sensory and intellectual.

79. Philippines

- Magna Carta for the Disabled
- 2006 Republic Act 9442
- 1954 Republic Act 1179 (An Act to Provide for the Promotion of Vocational Rehabilitation of the Blind and Other Handicapped Persons and Their Return to Civil Employment)
- 1955 Republic Act 1373 (Trust Fund for the Benefit of Disabled Filipino Boxers)

- 1963 Republic Act 3562 (An Act to Promote the Education of the Blind in the Philippines)
- 1965 Republic Act 4564 (Annual sweepstakes race for the development and expansion program for the physically disabled)
- 1968 Republic Act 5250 (AN ACT ESTABLISHING A TEN-YEAR TRAINING PROGRAM FOR TEACHERS OF SPECIAL AND EXCEPTIONAL CHILDREN IN THE PHILIPPINES AND AUTHORIZING THE APPROPRIATION OF FUNDS THEREOF)
- 1989 Republic Act 6759 (An Act Declaring August 1st of Each Year as White Cane Safety Day in the Philippines and for Other Purposes)
- 1992 Republic Act 7277 (An Act Providing for the Rehabilitation, Self-Development and Self-Reliance of Disabled Persons and their Integration into the Mainstream of Society and for Other Purposes)
- Section 17 of 2007 Republic Act 9433 (An Act Providing for a Magna Carta for Public Social Workers)
- 2010 Republic Act 10070 (An Act Establishing an Institutional Mechanism to Ensure the Implementation of Programs and Services for Persons with Disabilities in Every Province, City, and Municipality)
- 2012 Republic Act 10524

80. Poland

- Constitution Article 69
- Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (1997)
- The Charter of Rights of Disabled People (1997)

81. Portugal

- Decree Law No. 247/89
- Legislative Decree No. 40/83 of 25 January 1983 and Decree No. 37/85 of 24 June 1985 (The Sheltered Employment System)
- Decree Law 29/2001 of February 3 (Employment Quota System)
- Labor Code
- Law 38/2004 of August 18 (General Legal Basis of Prevention, Enable, Rehabilitation, and Participation of People with Disabilities)
- Constitution Articles 58, 59, 63, 71
- Law 46/2006 of 28 August 2006 (Antidiscrimination Law)
- Law 163 of 8 August 2006 (Accessibility in Construction)
- Law 38 of 18 August 2004 (Judicial and Administrative Law Framework)

82. Russian Federation

- Constitution of the Russian Federation, Article 39
- The decree of the President of the Russian Federation of 22 December 1993, No. 2254, on measures of state support for the activity of all-Russian associations of persons with disabilities.
- The Federal Law on social services for older citizens and citizens with disabilities of 2 August 1995, No. 122.
- The Federal Law on social protection for persons with disabilities in the Russian Federation of 24 November 1995, No. 181.

83. Serbia

- Constitution Articles 21, 60, 69, 97
- 2009 Law on Rehabilitation and Employment of Persons with Disabilities

84. Seychelles

- National Council for Disabled Persons Act, 1994
- Seychelles Pension Fund Act
- Social Security (Amendment) Act, 1980
- Social Security Act, 1987
- Constitution Article 36

85. Sierra Leone

- National Security and Insurance Trust Act, 2001
- Constitution Article 8(3)(e)

86. Singapore

- 1990 Barrier Free Accessibility Code

87. Slovenia

- Constitution Articles 14, 50, 52
- Action Program for the Disabled 2007-2013

88. South Africa

- Constitution – Bill of Rights (1996)
- Employment Equity Bill (B60–98)
- Blind Persons Act, 1968
- Disability Grants Act, 1968
- Employment Equity Act 1998
- Second Pension Laws Amendment Act, 1970
- Special Pensions Act
- Special Pensions Amendment Act, 1998

- Welfare Laws Amendment Act, 1997
- Workmen's Compensation Act, 1941

98. South Korea

- Welfare law for Persons with Disabilities (no. 4179, Dec. 30, 1989)
- Act Relating to Employment, Promotion, etc. of the Handicapped (no. 4129, Jan. 15, 1990)
- The Special Education Promotion Law (amended on Jan. 7, 1994)
- Anti-Discrimination against and Remedies for Persons with Disabilities Act (2007)
- Welfare for Persons with Disabilities Act (WPWDA) 1989
- Special Education Promotion Act (SEPA) in 1977. SEPA is abolished in 2007 and the Act on the Special Education for Individuals with Disabilities and the Like is enacted.
- Act on Mobility Convenience of Mobility Vulnerable (2005)
- Act on Facilities Improvement for Persons with disabilities (1997)
- Act on Employment Promotion and Vocational Rehabilitation for Disabled Persons (2007)
- Anti-Discrimination Against and Remedies for Persons with Disabilities Act (2007)

90. Spain

- Act no. 8, to Promulgate a Worker's Charter
- Ley 51/2003 – de igualdad oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad

91. Sri Lanka

- Protection of the Rights of Persons with Disabilities (1996, amended 2003)
- Rehabilitation of the Visually Handicapped Trust Fund Act (1992)
- Social Security Board Act No. 17 of 1996
- Wage Board Ordinance No 27, 1941
- Employees Trust Fund
- Workmen's Compensation Act Chapter 139, 1934
- Ranaviru Seva Act No. 54 of 1999

92. Sweden

- Act Concerning Support & Service for Persons with Certain Functional Impairments, SFS 1993: 387
- Law on a Ban Against Discrimination Disabled Persons in Working Life, 1999– 132
- Act Prohibiting Discrimination, SFS 2003: 307
- Ordinance (2000:630) and Ordinance (2008:1438) on Special Measures for People with Disabilities that Impaired Work

- Ordinance (2000:628) on the Labor Market Policy
- Work Environment Act (1977 as amended 2005)
- 2008 Discrimination Act (SFS 2008:567)
- the revised 1982 Act on Job Retention (LAS)
- 2008 Act on Social Insurance
- Constitution Article 2

93. Taiwan

- 身心障礙者權益保障法
- People with Disabilities Rights Protection Act 1980

94. Tanzania

- National Employment Promotion Service Act, 1999
- The Disabled Persons (Care and Maintenance) Act No. 3 of 1982
- The Disabled Persons (Employment) Act No. 2 of 1982
- The Workers Compensation Act, 2008
- Zanzibar Social Security Fund Act, 1998

95. Thailand

- 1991 Rehabilitation of Disabled Persons Act
- The Persons with Disabilities Empowerment Act B.E. 2550 (2007)
- The Persons with Disabilities Education Act B.E. 2551 (2008)

96. Turkey

- Türkiye Cumhuriyeti Anayasasi (Constitution of Turkey)
- Özürlüler Ve Bazı Kanun Ve Kanun Hükmünde Kararnamelerde Değişiklik Yapilmasi Hakkinda Kanun
- Sosyal Hizmetler Kanunu (Social Services Act)
- Özel Eğitim Hakkinda Kanun Hükmünde Kararname (Decree on Special Education)
- Law 5378 (Law on Disabled People)
- Turkish Disability Act

97. Uganda

- Constitution (1995)
- Children's Act
- Civil Procedure Act
- The Disabled Persons Act, 2006
- The Geneva Conventions Act
- The Movement Act
- The National Council for Disability Act, 2003

- Traffic and Road Safety Act 1998
- Trial on Indictments Act
- Uganda National Institute for Special Education Act

98. United Kingdom

- Disability Rights Act 1999
- Northern Ireland, Disability Discrimination Regulations 1996
- Disability Discrimination Act 1995
- Disability Discrimination Act 2005
- Special Educational Needs and Disability Act 2001

99. United States of America

- Section 504 of the Rehabilitation Act of 1973
- Individuals with Disabilities Education Act (IDEA)
- The Americans with Disabilities Act of 1990 (ADA)
- ADA Amendments Act of 2008

100. Uruguay

- Ley 16.095. Establécese un sistema para asegurarles una protección integral a Discapacitados

101. Venezuela

- Ley para la integracion de las personas incapacitadas (Aug. 15, 1993)
- Law for People with disability

102. Vietnam

- Ordinance on Disabled Persons (1998)
- The Barrier-Free Access Code and Standards (2002)
- Constitution Article 67
- 2010 National Law on Persons with Disabilities

103. Zambia

- The Persons with Disabilities Act 1996
- Handicapped Persons Act, 1968
- Worker's Compensation Act, 1999

104. Zimbabwe

- Constitution Article 23
- Disabled Persons Act 1992

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