The Right to Work for Persons with Disabilities
International Perspectives
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Preface

This publication compiles articles resulting from the international interdisciplinary conference “The Right to Work for Persons with Disabilities – International Perspectives”, which took place from 8th to 10th March 2017 in Kassel. The conference is the result of an initiative of the publishers who cooperate in a working group “participation research” under the umbrella of the Research Association for Social Law and Social Policy [Forschungsverbund Sozialrecht und Sozialpolitik or FoSS] at the University of Kassel and the Fulda University of Applied Sciences, with participation by the University of Applied Sciences of the German Social Accident Insurance [Deutsche Gesetzliche Unfallversicherung or DGUV]. The conference and this book have been made possible through the support of the Federal Ministry of Labour and Social Affairs of the Federal Republic of Germany as part of a national plan of action relating to the UN Convention on the Rights of Persons with Disabilities. We especially appreciate that the conference enabled full and accessible language mediation and that this book is able to be published and made accessible in German and English.

The conference hosted more than 200 people and sought to facilitate a broad discussion of questions relating to the right to work per Article 27 of the UN Convention on the Rights of Persons with Disabilities. Now signed by 177 member states, this standard requires the signatories to create an open, inclusive and accessible labour market and an equivalent working environment, to eliminate discrimination and to ensure that appropriate measures are taken for persons with disabilities.

This Convention on the Rights of Persons with Disabilities provided the states and people with something shared and unifying. Article 27 of that document, the equal right to work for persons with disabilities, provided the inspiration for the conference and this book.

This does not immediately mean that everyone talking about “disabilities” or “work” or “rights” all have the same meaning in mind. Experiences, cultures and traditions, political systems and developments, and economic conditions differ significantly. The conventions on human rights are not intended to negate or nullify these differences. However, they create a new need and a new opportunity to organize shared and varied means
to a global goal: Achieving respect for, protection of and a guarantee of human rights for persons with disabilities.

This includes the same right to work, just as with the rights to education, to health and to social protection – a fundamental social human right. It creates the conditions for enjoying other rights and for inclusion in a society that is built on a foundation of work and the exchange of goods and services created through that work. The right to work in this context specifically demonstrates the international level that human rights and their conditions have attained because international division of labour has seen significant progress. People able to work are connected to other people around the world through world markets.

Many actors in society are needed to achieve the goal of realizing an equal right to work, open and inclusive workplaces and an open, inclusive and accessible labour market for persons with disabilities.

Legislative bodies must review their labour law and social law for direct and indirect discrimination of persons with disabilities, for the guarantee of accessibility and reasonable accommodation, for the regulatory framework of the labour market and for the effective ability to implement these rights. This requires that they have both familiarity with their laws and the effects of those laws.

Governments, along with legislators, must pay close attention to this legal framework. They must ensure that the framework is effectively put into place as well. This requires paying heed to open, inclusive and accessible public agencies that also do not discriminate against persons with disabilities in individual cases. Governments are responsible for reporting to the United Nations and other signatories and regularly exchanging information with them regarding the implementation of the convention. They must ensure conformance with the UN Convention on the Rights of Persons with Disabilities in other instruments of international law that apply to world trade or the regional and global exchange of labour.

The international organizations of states promote this cooperation, specifically the International Labour Organization, the World Health Organization and the United Nations Human Rights Council. They offer a platform for refining the standards and exchanging facts, figures and evaluations.

The national and international courts, particularly those responsible for labour law and social law, must take up their position in each of the decisive legal disputes for the rights of persons with disabilities. They must
be open, inclusive and accessible so that these rights can be enforced effectively as well.

All three branches of state authority and every level of each state have to work with as well as listen to and engage with persons with disabilities. Participation is a key to an open, inclusive and accessible society.

This requires that persons with disabilities organize and articulate their interests as a part of groups and associations. Going from the object of support to the subject of participation requires personal action.

As employers and clients for public services, states have a great responsibility to facilitate the right to work of persons with disabilities. But the state is not the sole actor behind the economy and working life in any country. The companies acting as employers and the trade unions and employee occupational interest groups specifically shape the details of the working environment and they and their associations shape the happenings on the labour market. An inclusive working environment requires employers, supervisors and colleagues prepared for inclusion. Collective bargaining agreements regulating working conditions in general and on site may not be discriminatory and can be supportive. It would not be possible to shape the human right to work nationally and internationally without associations of companies and trade unions. In work as well, giving persons with disabilities their own voice for their own interests in and with trade unions is key.

Economic life and the labour market are variegated. Large, medium-sized and small companies, various industries and for-profit and non-profit sectors each have their own conditions. Traditionally, non-profit organizations – often sponsored by charities, churches or endowments – are important actors for employing persons with disabilities. Multi-faceted models and the controversial discussion about the future of protected employment show that there are many paths forward here.

Science is used to identify and interpret barriers at the workplace and in the labour market. Properly interpreting them, as applied sciences related to law, society, education, health, rehabilitation and technology, also provides the foundations for specialized experts to understand and handle their task of removing barriers.

The sciences also give state and societal actors the material to work towards an open, inclusive and accessible labour market.

Science does not have any pre-determined results in this endeavour; it is obligated to be impartial. But in the choice of its topics and methods, it can use its freedom to bring awareness to previously neglected dimensions.
Preface

of human rights and how to actualize them. In this sense, additional research is necessary; this book is intended to provide material and suggestions in that regard.

The editors would like to thank everyone who was involved in preparing and holding the conference and creating this book. Special mentions go to Prof. Dr. Bert Wagener and Dr. Friedrich Mehrhoff from the German Social Accident Insurance and its University of Applied Sciences and, from the preparatory team at the University of Kassel, Mag. iur. Eva Nachtschatt and Philine Zölls-Kaser, M.A. as well as Alice Dillbahner, LL.M., Lilit Grigoryan, M.P.P., Micah Jordan, M.A., Kathrin Lueßmann, B.A., Tobias Dunz, B.A. and Christina Janßen, B.A.

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Gudrun Wansing, Felix Welti and
Markus Schäfers
Content

Foreword from the German Federal Government Commissioner for Matters relating to Persons with Disabilities 13

Verena Bentele

1. Fundamental academic contributions in law

The UN CRPD as an International Social Law 19

Eberhard Eichenhofer

Reasonable Accommodation as a Gateway to the Right to Work for Persons with Disabilities in the European Union. Reflections and Comparative Perspectives 35

Delia Ferri

Equal Rights of Persons with Disabilities to Work per Article 27 of the UN Convention on the Rights of Persons with Disabilities 51

Felix Welti / Eva Nachtschatt

2. Fundamental academic contributions in the social sciences

Comparability and Convergence of Work Participation Statistics and Documentation 87

Jerome Bickenbach

Conceptualizations of Disability in ICF and CPRD: Their Contribution to the Realization of the Right to Work 101

Marianne Hirschberg
Content

Gainful Employment between Inclusion and Exclusion
Martin Kronauer
Labour Market Participation of Persons with Disabilities – How can Europe Close the Disability Employment Gap?
Roy Sainsbury

3. Transitions

Return to Work as a Central Aim of Rehabilitation
Friedrich Mehrhoff
Developing International Standards of Competencies for Return-to-Work Professionals: An Overview
Madan M. Kundu / Alo Dutta / Fong Chan
The School-Work Transition of Special Needs Students in the Context of the UN CRPD – Effort towards Systematization
Philine Zölls-Kaser

4. Inclusive labour market and inclusive workplaces

The “Why” and “How” of Disability Inclusion in Business
Jürgen Menze
Workplace Accessibility and Universal Design
Arne Frankenstein
The Situation for Blind and Visually Impaired Persons in the Labour Market, in Employment and in Continuing Education – Including International Perspectives
Heinz Willi Bach
Content

Through Complex Acts and Measures, Transforming Disbelief into Trust 261
Marié-Renée Hector

The Role of Higher Education in Promoting the Right to Work for Persons with Disabilities 273
Bert Wagener

Employment of Persons with Disabilities – Effective Policy and Outcomes Requires Clear Strategy with All Relevant Actors Engaged 281
Siobhan Barron

Persons with Severe Disabilities as Judges/Prosecutors? A Test Case on the UN Convention on the Rights of Persons with Disabilities in Taiwan 291
Nai-Yi Sun

Law of Quotas for People with Disabilities – The Brazilian Experience 307
José Carlos do Carmo

5. Special forms of employment

Barriers and Opportunities for Persons with Disabilities to change from Sheltered Employment Settings into an Open and Inclusive Labour Market – Positions of UN Bodies and some Global, Regional and National Disabled People Organizations (DPOs) 313
Klaus Lachwitz

A Need for Sheltered Workshop Reform? Perspectives from Employees and Legal Trends due to the German Federal Participation Act 327
Mario Schreiner
Content

Sheltered Workshop Policies for People with Disabilities in Taiwan and Japan 343
Yi-Chun Chou

Authors 359
Foreword from the German Federal Government Commissioner for Matters relating to Persons with Disabilities

by Verena Bentele

Ladies and Gentlemen, dear friends and dear readers,

I would like to start by once again thanking the organizers from the University of Kassel for organizing and holding the conference titled “The Right to Work for Persons with Disabilities – International Perspectives.”

Work is the key to participation and involvement as noted in the title of my presentation during the conference. This fact remains pertinent and important. After all, work denotes income, independent living, participation in society, social recognition and motivation.

Article 27 of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) defines a person's right to participate in working life. Subsequently, it must be possible for persons with disabilities to earn their living through work in a labour market that is open, inclusive and accessible to persons with disabilities. The imperative of reasonable accommodation – reasonable support in other words – to enable the pursuit of actions is a central requirement of the convention for this reason.

The ability and extent of participating in working life essentially depends on establishing accessibility in all its facets. Therefore, one of the key political aspects I am calling for is a commitment to the accessibility of private providers of services and products, incidentally an obligation that is also enshrined in the UN CRPD. This is why suitable support measures can include work assistance, work aids and structural changes, both in educational contexts and at the workplace, as well as accommodation of trainees during examinations – to name just a few examples. The aim is
for every person with disabilities to achieve the greatest possible participation in the sphere of labour according to their individual capability through services and facilitation tailored to the individual. It is this support specifically that results in persons with disabilities making their potential available to a diverse labour market. Politically, this requires striving to link funding of all kinds, particularly including corporate subsidies, to establishing accessibility. This would represent a great stride towards a labour market geared toward inclusivity.

In Germany, companies with at least 20 employees are required to fill at least 5% of their positions with employees with disabilities. Companies are obligated to pay an equalization fee under German law if they fail to meet this rate. Nevertheless, more than a quarter of employers do not meet this employment rate. This is why it is critical to raise awareness among employers and human resource managers in order to confront the prejudices against the performance capability of persons with disabilities. Especially in light of the challenges being faced in the context of increasing digitalization, the potential of providing flexibility in working hours and work locations at a company can contribute to increasing the opportunities for the inclusion of persons with disabilities.

An inclusive education system is no less important than the requirement for improved opportunities for inclusion in the labour market. Such a system is also an obligation in the Convention on the Rights of Persons with Disabilities. Only in this way is it possible to promote social awareness for inclusive cooperation from the beginning and thereby shape professional orientation phases in school for young persons with disabilities to be significantly more focused on inclusivity.

An important pillar for inclusion in the labour sphere in Germany is rehabilitation in order to maintain one’s abilities and to acquire new abilities. Alongside prevention at work, it is critical for keeping persons with disabilities in the work process or for reintegrating them, thereby preventing their marginalization. For persons who never could or are no longer able to participate in the general labour market despite all assistance measures, sheltered workshops can be one place of employment and assistance. In order to avoid having this form of action become a separator for persons with disabilities, however, additional tools of inclusion accessible throughout Germany will open up more options for getting closer to the labour market starting in 2018, such as the choice of alternative service providers and the Budget für Arbeit structure for integration into the primary labour market, in order to facilitate the path from the sheltered workshop to the
regular labour market. At this point, one of the challenges of our time is reaching greater fluidity between the various labour market systems in Germany.

It is clear that we have to use great political will, creative concepts and openness to create a labour market that is open to everyone, regardless of their age, whether or not they have a disability, or where they are from, for both men and women.

Best regards

[Signature]
1. Fundamental academic contributions in law
The UN CRPD as an International Social Law

by Eberhard Eichenhofer

This article identifies the UN CRPD as an international standard setting social law, describes the emergence of international social human rights and clarifies the relationship between promises of equality and guarantees of freedom. The UN CRPD, addressing both guarantees, finds a conclusive explanation in the Capability Approach developed by Martha Nussbaum and Amartya Sen. It enables the justification and understanding of the UN CRPD and, furthermore, all social human rights. In closing, this article demonstrates the consequences of international social law for the human rights content of protective regulations for persons with disabilities and explains the resulting obligations for the community of states. It, finally, illustrates the dimensions of the human right to work.

I. Social policy – A matter for state or international lawmaking?

For many, social policy is the defining task of states, and is even the hallmark and proof of national identity for some. Indeed, social policy is standardized in the laws of states down to the minutiae. But does this make them a means of defining the identity of every state? The social states of the world may differ in many details, but do they not respond to the same questions with similar answers in most cases? Does this not show that they are more alike than different?

Poor relief emerged in similar forms throughout the contemporary European world of the 15th century. The creation of social insurance in Germany in the 19th century garnered attention in the outside world as well and led to corresponding reforms in Europe and, eventually, throughout the world. The British concept of unemployment insurance and the French and Belgian ideas of social security through family benefits were emulated in other countries both before and after the First World War. The ILO was founded in 1919 and encouraged the spread of labour and social rights around the world through conventions and recommendations. In this context it is evident that social policies have never and were never intended to be limited to just one country. Rather, the establishment and develop-
ment of social rights have been international events and enterprises and that has not changed to this very day.

Since 1948, human rights have no longer been simply rooted in the constitutional laws of countries, they are also enshrined in international law which must be observed and respected throughout the world. This was a fundamental change, one that also carries great significance for understanding the UN CRPD. What are the effects of having human rights in general (II) and social human rights in particular (III) become international guarantees? What does this ultimately mean for the UN CRPD (IV) and the right to work (V) that it guarantees? These questions are discussed below.

II. International human rights

1. Human rights – Achievements of the nation-state

The history of human rights has not followed a straight path. The people to which these rights apply and the content of these rights have changed since they were proclaimed in the United States and France at the tail end of the 18th century. This came in the form of the Declaration of the Rights of Man and of the Citizen (déclarations des droits de l'homme et du citoyen) rooted first and foremost in natural rights and the ensuing justifications stemming from the general nature of man, although they initially applied de jure only to a small, distinctively elite cadre of property-owning men who were citizens of the state that was guaranteeing those rights. The state was strapped for funds at the time and needed each of them as taxpayers, providing compensation with human rights in turn.\(^1\)

Such rights were aimed at protection through participation in the body politic. Initially, they were granted only to “citizens” who owned property and, as a result, paid taxes. In contrast, this excluded the overwhelming majority, consisting of those without property, women and foreigners;

\(^1\) John Locke, Über die Regierung, The Second Treatise of Government, 1689, p. 140; the maxims of revolution were derived from this – a revolution which, when examined in detail, constituted a taxpayers' revolt: No taxation without representation. Qu'est – ce que, le tiers- état? These statements associated with the revolutions underscore the calls for political participation asserted by holders of wealth subjected to taxation.
therefore, these groups were initially outside the scope of human rights. From the outset, these rights promised individual liberty among equals\textsuperscript{2}. Thus, they were created and designed to allow every human being to do as they wished\textsuperscript{3}. That is why this liberty could not remain a privilege over the long term. The development of human rights since that time must initially and primarily be considered an expansion of personal scope and applicability over several centuries, but the actual content has changed as well.

The 19th century was marked by the “social question” of overcoming the lack of rights for classes not holding property. The essential and vital interests of social human rights attained prominence for the first time. By integrating workers, they became holders of civil (right of association) and political (right to vote) human rights; both of which thus provided the conditions for freedom of association, geared towards the needs of workers and serving their interests, and social insurance to become their own human rights. The end of the 19th century saw the beginnings of the women's rights movement, which began to take hold in the 20th century. The idea of equal rights for men and women strives to overcome the historical division of labour between the sexes and the resulting legal, political, social and economic allocations of tasks that have emerged and the associated unequal treatment of women in relation to men.

2. General declaration of human rights: The international bill of rights

International human rights are closely linked with the formation and goals of the United Nations. The Universal Declaration of Human Rights proclaimed in the Palais de Chaillot in Paris on December 10, 1948\textsuperscript{4} emerged from the experience of war, destruction and genocide due to and during the Second World War. It was written in response to gross, overt violations of human rights and the impotence of international organizations towards dictatorial regimes with disregard and contempt for human rights that characterized the interwar period. These dictatorial regimes never once considered the struggle for human rights to be nothing but what in German

\begin{itemize}
  \item \textsuperscript{2} Ernst Bloch, Naturrecht und menschliche Würde (161), Frankfurt/Main 1972, p. 76.
  \item \textsuperscript{3} Ibid. p. 176; also see Niklas Luhmann, Grundrechte als Institution, Berlin 1974 (2. Aufl.), p. 32.
  \item \textsuperscript{4} Antoine Prost/Jay Winter, René Cassin et les droits de l'homme: le projet d’une génération, Paris 2011, p. 269.
\end{itemize}
is called “Humanitätsduselei” – a sort of humanitarian rhetoric, which is conceived as an idealized observation of the reality, primarily conceived as being nasty and brutish\(^5\); they derided complaints made by states belonging to international organizations because of human rights violations as unsolicited interference in their internal affairs.

Franz Bernheim was a German citizen of Jewish descent who fled from Gliwice (part of Germany at the time) to Prague. In 1933, he petitioned the League of Nations regarding the persecution of Jews occurring in Germany ever since the Nazis had taken power. He criticized the poor treatment of Jewish Germans as a violation of the Convention of May 15, 1922 regarding Upper Silesia that had been initiated by the League of Nations as a protective measure intended to safeguard equal treatment in German civil society for the Jewish and other minorities\(^6\).

The National Socialist leadership protested against this sort of interference in allegedly “internal” affairs, which it deemed illegitimate. At the same time, the German foreign policy utilized delaying tactics in an effort to prevent a legal investigation into the persecution of Jews in Germany and by Germany at the international level. The League of Nations insisted on its request to review and safeguard the protection of human rights even within states\(^7\). The issue became irrelevant once Germany announced its withdrawal from the League of Nations on October 16, 1933. This sort of defensive attitude equated human rights with civil rights and considered both to be an expression of the sovereign nation-state. This attitude fed the misconception that each nation-state may define, shape and allot human rights under its own authority.

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5 Christian Helfer, Humanitätsduselei – zur Geschichte eines Schlagworts, Zeitschrift für Religions- und Geistesgeschichte 1964 (16), p. 179-182; the term with this connotation in common use in Germany today is Gutmensch, which attempts to show contempt for the efforts to meet the assessment of humanity proposed by Johann Wolfgang Goethe: Let man be a noble creature, helpful and good!


7 Graf, Note 6, p. 220f.
3. International human rights define the post-war order

In light of this, the United Nations must be viewed as an attempt to base the post-war world order on basic human freedoms and to allow everyone to experience them. As a follow-up to the four fundamental freedoms identified by US president Franklin D. Roosevelt\(^8\), freedom of speech, freedom of worship, freedom from want and freedom from fear, social rights also form a focal point for all of the guarantees of human rights\(^9\). In this vein, Article 53 of the Charter of the United Nations puts forth raising the standard of living, full employment as well as social and economic progress in and through international cooperation (free-trade, in other words) as goals of the post-war period. Article 68 of the Charter of the United Nations provided for a separate Economic and Social Council. It was given the responsibility of deepening international trade and monetary policy and, finally, protecting human rights.

This is the context of the Universal Declaration of Human Rights. According to Eleanor Roosevelt, widow of the US President and one of the three authors\(^10\), it should be treated as an international bill of rights\(^11\). The internationally proclaimed human rights are thereby intended to form the principles to serve as a means of orientation for future global policies and so that all peoples and nations may set a common standard for achievements in human rights. First and foremost, the human right means the right to have rights and to be considered an independent being and not as a means towards other purposes\(^12\). The core of such a guarantee is that the dignity of every human being must be recognized, every human being must receive all human rights\(^13\) and every state must ultimately ensure they are upheld.

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9 Article 6 of the Atlantic Charter from 1941 set forth the war objectives of the Western Allies. Among them was the post-war aim “that all the men in all lands may live out their lives in freedom from fear and want.”.
10 The others are Charles Malik (Lebanon) and René Cassin (France).
As evidenced in its preamble, the Universal Declaration of Human Rights was created with due consideration because “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and “a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.” It sees the foundation of all human rights in the dignity of every human being. Extensive precepts towards equal treatment and bans on discrimination are intended to safeguard this freedom in totality for all beneficiaries.

The idea that human rights are an expression of state sovereignty has never been successful in promoting understanding of human rights. Ultimately, all human rights limit state authority at a basic level and they direct the states towards the realization of individual liberty through law.

Human rights no longer derive from state sovereignty but instead they set limits on the state and set the trend for sovereignty: A state is only a state of law if it heeds and respects human rights guaranteed and recognized internationally. The contemporary human rights formulated by the international community provide protection against more than just attacks during war as did the first guarantees as part of international humanitarian law. They also protect against state overstep during times of peace. The effects this has on the state are serious: “The rise of principle human rights causes both collusion and confluence between international and domestic law”.

The German legal system seeks to treat Germans and foreigners equally. The universal rule of equality, established in Art. 3 I of the Basic Law [GG] of the Federal Republic of Germany, is not a fundamental right for Germans but for everyone. However, this does not result in strict equal treatment for nationals and foreigners in all matters relating to human rights. This is because the Basic Law [GG] of the Federal Republic of Germany makes distinctions between nationals and foreigners in terms of the freedom of assembly, freedom of association, freedom of employment,

14 Ibid., p. 29.
15 Ibid., p. 27.
free movement and the right to resist\textsuperscript{17}. Quite a few of these distinctions, notably the economic and social ones\textsuperscript{18}, are being overcome by EU law among EU citizens. The single market is not feasible without equal treatment of market citizens; the legal expression of this idea is enshrined in the establishment of EU citizenship (Article 20 of the TFEU and subsequent parts). Foreigners are subject to the territorial jurisdiction of the host state; they are required to recognize, however, personal jurisdiction of the state of origin (allegiance) and to treat everyone in accordance with international human rights\textsuperscript{19}.

III. International social human rights

1. Social human rights and the capability approach

International human rights are the global community's response to one of the three fundamental problems in social justice that Martha C. Nussbaum\textsuperscript{20} still considers to be unsolved problems. She is seeking to answer the question: How can we extend justice to all the world's citizens? She reminds us that even the first international law theorist, Hugo Grotius, found that mutual dependence of states served as a basic premise for universal international law and that this was designed and aligned to create an international community\textsuperscript{21}.

For Nussbaum, internationally recognized human rights have a contemporary explanation in the capability approach she developed together with Amartya Sen. It holds to Kant's theme that every person in an international community must be considered an end and not a means to the enrichment of others. Actions must then be taken on this basis\textsuperscript{22}.

The central human capabilities to be protected by human rights include life, bodily integrity, imagination, emotions, ideas, affiliation with other humans and the control over one's own environment, from which material

\textsuperscript{17} Art. 8, 9, 12, 11, 16 and 20 IV of the Basic Law [GG] of the Federal Republic of Germany.
\textsuperscript{18} Eberhard Eichenhofer, Sozialrecht der EU, Berlin 2015 (6.Aufl.), Note 307ff.
\textsuperscript{20} Martha C. Nussbaum, Frontiers of Justice, Disability, Nationality, Species Membership, Cambridge/Massachusetts 2006, p. 3.
\textsuperscript{21} Ibid., p. 18ff.
\textsuperscript{22} Ibid., p. 70.
and political participation rights emerge. In terms of ideas and social ethics, the capability approach has seen more refinement than the social contract theory used to explain human rights ever since they emerged. This theory states that this social contract is concluded by the readily capable, which is why people with disabilities, foreigners and animals do not appear in this sort of conceptualization.

The capability approach, however, makes it clear that the individual requires care and that this represents an asymmetrical social relationship. The culture of a society can be determined primarily based on the extent to which it assures such needs. In the capability approach, human rights are to be viewed as declarations of international guarantees of positive freedom that, for their part, form the foundation of every state as well as the international community. This was prescribed to the states as well as the international community and given up to make them a reality. After all, liberty can be understood as an “opportunity freedom” determined by income and quality of life. Liberty requires institutions that create social opportunities and social security.

The liberty of the individual also forms the foundation for a social commitment. It is specifically directed towards using that liberty for the general good and for the next generation. Economic and social freedoms do not oppose each other, but rather require each other. One is merely the other expressed in different terms. All of these considerations are central to the situation for persons with disabilities; in this capacity, they provided an intellectual basis for the UN CRPD and, conversely, make it readily accessible to novel socio-philosophical debates and discussions.

23 Ibid., p. 76ff.
24 Ibid., p. 168.
25 Ibid., p. 284. The capability approach makes the significance of human rights clear.
27 Ibid., p. 30ff.
28 Ibid., p. 55f.
29 Ibid., p. 335ff.
30 Ibid., p. 349ff.; in that same vein, at the European level, these are accompanied by the ECHR geared towards civil and political rights and the ESC targeted towards ensuring social rights; Achim Seifert, The Social Dimension of the European Convention on Human Rights, in: Mulder/Hofredt/Nesvık/Sundet (Eds.), Sui generis – Liber Amicorum in Honour of Stein Evja, Oslo 2016, p. 591.
2. International human rights – UN CRPD: From banning discrimination to the human rights of those potentially subject to discrimination

Another peculiarity and occurrence must be noted in the development of social human rights: This leads to a relationship between equality and freedom. The dispute over fundamental social human rights to work, social security, welfare, accommodation, education and health\(^{31}\) alone makes it clear that inequality inexorably leads to a loss of freedom – meaning that freedom and equality regularly go hand-in-hand together. The repudiation of workers' rights and women's rights in the early developmental phase of human rights meant a loss of rights in two senses – refused equality effects a loss of freedom. Securing both – freedom and equality – is the goal of fundamental social human rights for this very reason.

From that, there is a path that leads from bans on discrimination against individual groups of the potentially and currently disadvantaged to individual social human rights specifically necessary for that group to prevent affronts. In the context of the UN CRPD, these are the guarantees of universal accessibility (Article 9 of the UN CRPD) and empowerment (Article 26 of the UN CRPD)\(^{32}\).

The topic area touches on the relationship between the two guarantees of both freedom and equality. All human rights are regularly linked with general as well as special equality imperatives. They include the universal guarantee of equality and combine it with special bans on discrimination with regard to people who are at risk of being held back due to their characteristics as determined by historical experience. This notably applies to


discrimination against people due to their ethnic background, their sex or their age or a disability. The conventions on the rights of children or the rights of disabled persons or eliminating racism are all an expression of the same goal of providing subjective rights for the equality and equal treatment of all victims of potential discrimination.

3. What does the approach towards human rights offer?

Within this regulatory structure, special human rights include personal authority for special groups of targeted discrimination, as special protected persons, to protect themselves against repudiation. While prohibiting discrimination is limited to a legal prohibition under objective law, legal guarantees under subjective law for a victim of potential discrimination are intended to make the realization of banning discrimination into the content of a specific subjective right for the groups concerned and their families. This reinforces the bans on discrimination by using separate human rights to protect those specifically or potentially subject to discrimination.

IV. International human rights and the UN CRPD

1. Setting the standard

The regulatory structure of the UN CRPD also states the insight into the relationship between bans on discrimination and human rights benefiting specific groups of potential victims of discrimination. It is more specific than the UDHR and the guarantees contained within the UDHR for enforceable pacts intended to strengthen rights. Beyond the universal postulates and provisions for human rights, they notably include standards for

36 Welti, Note 32, p. 246f.
international implementation that are concerned with victims of potential discrimination.

Even the act of determining the group of persons for which the special human rights for victims of discrimination apply creates a special category of human rights which grants, as distinct from the universal principle of equality, special and discrete rights of protection to those subject to potential discrimination. In that regard, international human rights law introduces special conditions for individual vulnerable groups of people in need of protection, thereby making human rights protection not only more differentiated but also more substantive.

From an international perspective, the significance of the guarantees stems from the standard set for states: They can meet the international requirements only if and as long as they develop special protection rules for the victims of potential repudiation and shape them in accordance with the internationally proclaimed human rights. The internationally proclaimed human rights for disadvantaged groups thus create a uniform standard for protection against discrimination around the world. All states must be measured by compliance with this standard.

2. Institutionalization of protective regulations

The regulations are much more than “merely symbolic gestures”\(^{37}\); they strive for inclusion and participation and these claims are aimed at specific living environments, which must be implemented in and by the law in individual states. Therefore, applicability of international human rights for protecting disadvantaged groups calls for the legal systems of all states to create specific guarantees to protect those groups and to enforce the guarantees in their own legal system\(^{38}\).

These sorts of guarantees establish a mandate for respect, protection and support\(^{39}\) for the states that can normally be realized only through specific, targeted legislative actions. At the same time, they contain commitments because inclusion evokes solidarity. This, in accordance with Article 29 of the UDHR, is able to afford rights to individual persons in need of protection only to the extent to which it imposes social commitments on

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\(^{37}\) Davy, Note 32, p. 7, 58.

\(^{38}\) Lörcher, Note 31, p. 489.

\(^{39}\) Ibid., p. 490; Davy, Note. 32 p. 7, 35ff.
all others at the same time\textsuperscript{40}. This promotes practical action in job security\textsuperscript{41} or realizing accessibility\textsuperscript{42}. In these contexts, international law both determines the extent of the law and defines the actions to be taken by the states.

3. State commitment

International regulations formulated as human rights for potentially disadvantaged groups are thus necessary programs for juridification and also normally must be in the form of law\textsuperscript{43}. They require that states place their legislative power in service towards objectives and actions substantiated and formulated for the international stage and they use their own state sovereignty to embrace the realization of international human rights as a concern for humanity and to enforce them as part of their own legal system instead of pursuing “national interests” without regard for the interests of others.

V. Right to work

The right to work is guaranteed as a human right in international and European law (Article 23 of UDHR, 6 f. of the International Covenant on


\textsuperscript{42} Andreas Bethke/Clemens Kruse/Markus Rebstock/Felix Welti, in: Degener/Diehl, Note 32, p. 170.

Economic, Social and Cultural Rights\textsuperscript{44}, 1 ESC and 15 CFREU); therefore, every person has the right to work and is linked to a safe and secure workplace. The German Basic Law [GG] does not generally express social rights, but it does guarantee the right of free choice of workplace in Art. 12 I Basic Law [GG]. This encompasses more than the prohibition on forced labour in Art. 12 II Basic Law [GG]. The constitutions of some German states, such as Bavaria\textsuperscript{45}, Berlin and Thuringia, ascribe human labour an additional dimension as a fundamental and human right.

\textsuperscript{44} International Covenant on Economic, Social and Cultural Rights from December 16th, 1966 BGBI. 1973 II p. 1569.

\textsuperscript{45} Art. 166 of the Bavarian Constitution [BayVerf]: (1) Work is the source of our prosperity as people and is under the special protection of the state. (2) Everyone has the right to achieve a comfortable existence through labour. (3) Everyone has the right and duty to choose work commensurate with his or her own abilities and education in service of the general public in accordance with the detailed provisions of law. [“(1) Arbeit ist die Quelle des Volkswohlstandes und steht unter dem besonderen Schutz des Staates.
(2) Jedermann hat das Recht, sich durch Arbeit eine auskömmliche Existenz zu schaffen.
(3) Er hat das Recht und die Pflicht, eine seinen Anlagen und seiner Ausbildung entsprechende Arbeit im Dienste der Allgemeinheit nach näherer Bestimmung der Gesetze zu wählen.”] Art. 167 of the Bavarian Constitution [BayVerf]: (1) The human worker is, as a people's most valuable good, protected against exploitation, operating hazards and other health hazards (2) Exploitation that results in health-related injury may be penalized as physical harm. (3) Every resident of Bavaria who is unable to work or unable to find work, shall be entitled to welfare. [“(1) Die menschliche Arbeitskraft ist als wertvollstes wirtschaftliches Gut eines Volkes gegen Ausbeutung, Betriebsgefahren und sonstige gesundheitliche Schädigungen geschützt
(2) Ausbeutung, die gesundheitliche Schäden nach sich zieht, ist als Körperversetzung strafbar.
(3) Jeder Bewohner Bayerns, der arbeitsunfähig ist oder dem keine Arbeit vermittelt werden kann, hat ein Recht auf Fürsorge.”] Art. 168 of the Bavarian Constitution [BayVerf]: (1) Any honest work shall have the same moral value and claim to appropriate compensation. Men and women shall receive the same salary for the same work. [“(1) Jede ehrliche Arbeit hat den gleichen sittlichen Wert und Anspruch auf angemessenes Entgelt. Männer und Frauen erhalten für gleiche Arbeit den gleichen Lohn.”] Art. 169 of the Bavarian Constitution [BayVerf]: (1) Minimum wages can be defined for every profession to allow an employee a minimum standard of living for oneself and one's family according to the respective cultural conditions. [“(1) Für jeden Berufszweig können Mindestlöhne festgesetzt werden, die dem Arbeitnehmer eine den jeweiligen kulturellen Verhältnissen entsprechende Mindestlebenshaltung für sich und seine Familie ermöglichen.”].
However, several factors notably obfuscate the debates regarding the right to work in Germany. For the most part, it is considered an impossibility because no one can “sue” for a specifically chosen place of work in a market economy and the “right to work” presumes that the state holds all of the jobs, which would, by necessity, be at the expense of all economic freedoms. These objections overlook the fact that social rights must not be misunderstood as a promise of happiness. The right to education does not make every person into a genius and the right to health does not make everyone fit. Social rights are always geared towards inclusion of the beneficiaries into existing social institutions. In the case of a right to work, the aim is inclusion in a working life or, in other words, the labour market in a market economy.

Why should it be impossible to facilitate a human right to work in a market economy regulated in a social state? Labour law has employment rights for persons with disabilities; anti-discrimination law provides claims for damages for lost income in the event that a potential employer refuses a hire without cause and places sanctions on violations of bans against discrimination in this way. A claim such as this conceptually presupposes the entitlement to establish an employment relationship. Social security has been designed to provide protection for individuals against unemployment, which has been a social risk for a century.

In addition, the right to work is formulated as an alternative to slavery and forced labour. After all, it focuses on admission to freely chosen work and specifically does not entail the public allotment of work. Those who claim that the right to work implies public authority over work and the economy and promotes an “unfree society” are mistaking the right to work as a civil liberty. Without this, it would not be possible to explain that labour administration, basic security and unemployment insurance have long been institutions that aim to bring unemployed people into working life. Hundreds of thousands of people in Germany work in these institutions as case managers, educators, social workers, facilitators, debt counselors and therapists. German society spends countless billions of euros in these efforts year after year. Does this all happen for something that neither exists nor can exist?
In the post-war period, the right to work sought to ensure that every person capable of work was included in recovery through work. The commitment to full employment serves as the guiding light for all employment policies. States are obligated to take part in economic policies that promote employment – employment exchange, employment promotion and unemployment insurance – and in other suitable measures towards securing full employment.

The international and European regulations link the right to work regularly with the rights at work. Art. 12 I Basic Law [GG] also give employees a right to freely choose their employer. The internationally recognized right to work also focuses on freely chosen work. It ensures a realistic opportunity to employment for every person as well as access to work without forced labour and free of discrimination or obstacles. Therefore, the right to work creates neither an abstract duty to work nor an enforceable claim to a specific workplace of choice.

Social rights are intended to enable legitimate autonomous action and, as a result, do not dictate that it must take place. This means there is no obligation to work from the right to work. Obligations result only from the observance of rights and only to the extent that they are necessary for realizing rights. The right to work actualizes the entitlement to employment. Directed at freely chosen work, it is designed neither to prohibit the work of others nor to grant a claim to the allotment of work.

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46 Mikkola, Note 31, p. 138ff.; also see below and Martin Kronauer, José Carlos do Carmo, Delia Ferri, Roy Sainsbury, in this book.
47 Mikkola, Note 31, p. 139.
48 Ibid., p. 140.
49 Ibid., p. 145.
The right to work encompasses a multitude of normative dimensions of employment. As a right to inclusion for everyone, it safeguards access to the labour market free of discrimination of any kind\(^{55}\), protects employees from and during unilateral, groundless dismissal by an employer\(^{56}\), ensures a right to inclusion in a labour organization and when defining working conditions\(^{57}\), guarantees the right to the preservation of physical existence and bodily integrity, requires a labour market organization with proof of employment and employment exchange, employment promotion and income from employment as a living wage that guarantees one's livelihood\(^{58}\), and it, in turn, creates the basis for social security appropriate for the occurrence of various recognized social risks.

**VI. Conclusion**

The UN CRPD in itself is not only a significant document for international social law; it is also an excellent illustration of how international social human rights work and how states are committed to realizing them. Social policy in service of international social policy does not primarily bolster the nation-state. Instead it benefits global society and all people living within it. Its goal is for society to accept persons with disabilities along with their disability and to live life together with equality and mutual respect for each other\(^{59}\). Persons with disabilities require and obtain separate, human rights reserved for them so that they can partake on an equal level in the human rights to which all people are included and entitled.

\(^{55}\) Krennerich, Note 54, p. 182; Ssenyonjo, Note 52, p. 284, 310.


\(^{58}\) Krennerich, Note 54, p. 182ff.

\(^{59}\) Lachwitz, in this book.
The chapter focuses on reasonable accommodation in the employment context within the European Union. After having briefly examined what ‘reasonable accommodation’ means in the CRPD, Art. 5 of the Employment Equality Directive is briefly analyzed. Then, this contribution goes on to discuss the extent to which the obligation to provide reasonable accommodation included in the CRPD and in Directive 2000/78 has been implemented at the national level within EU Member States. The contribution highlights inconsistent approaches, ambiguities, but also best practices. The comparative analysis carried out in the final part of this chapter highlights the findings of the report ‘Reasonable Accommodation for Disabled People in Employment Contexts: A Legal Analysis of the EU Member States, Iceland, Liechtenstein and Norway’, co-authored with Prof. Anna Lawson on the basis of country reports provided by the European network of legal experts in gender equality and non-discrimination.

1. Introduction

The concept of “reasonable accommodation” (or “reasonable adjustment”) was first introduced in the United States in 1972 in the ‘Equal Employment Opportunity Act’,¹ and shortly thereafter, in Canadian law. Originally, it defined specific solutions that the employer was obliged to put in place in order to accommodate specific needs related to religious

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* This paper is mostly based on the research conducted for the report Reasonable Accommodation for Disabled People in Employment Contexts: A Legal Analysis of the EU member states, Iceland, Liechtenstein and Norway, co-authored with Prof. Anna Lawson, and written for the European Commission. The report is available at http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_in_employment_contexts_final_en.pdf.

practices. The US Rehabilitation Act of 1973 subsequently introduced the concept of reasonable accommodation in the disability context. Then, in 1990, the ‘Americans with Disabilities Act’ (ADA) introduced a provision requiring employers adopt specific measures to remove environmental and/or social barriers that persons with disabilities face in the workplace. In 2000, the concept of reasonable accommodation was adopted within European Union (EU) legislation. Article 5 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation² (hereafter simply “Directive 2000/78”), explicitly affirmed the duty of the employer to provide disabled workers with reasonable accommodations. In 2006, further to the approval of the “UN Convention on the rights of persons with disabilities” (CRPD), reasonable accommodation has been unequivocally incorporated in the international human rights law framework. In the CRPD reasonable accommodation is embedded in the equality and non-discrimination norms, acting as a gateway for the achievement of substantive equality for persons with disabilities.³

The CRPD, ratified by the Member States of the EU and by the EU itself, as well as by a large number of States globally, has become the benchmark against which laws and policies attempting to protect and promote the rights of people with disabilities are now measured.⁴ In the EU legal system, by virtue of the ratification by the EU,⁵ the CRPD has acquired a sub-constitutional status, beneath the Treaties but above sec-

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ondary law. This means that it must be taken into account by the CJEU in its interpretation of directives, such as the Directive 2000/78.

The implementation of the rights provided for in the CRPD is complex and presents several challenges for the EU and its Member States. One of the areas in which these challenges have emerged is that of reasonable accommodation in the employment context. The reasonable accommodation provision in the Directive predates the CRPD, and its scope is more limited than that of the CRPD. National provisions implementing the Directive vary greatly, and, in some instances, fall quite short of the obligations laid down in the CRPD.

Against this background, this contribution briefly discusses the extent to which the obligation to provide reasonable accommodation included in the CRPD and in Directive 2000/78 has been implemented at the national level within EU Member States. The comparative analysis carried out in this contribution highlights the findings of the report “Reasonable Accommodation for Disabled People in Employment Contexts: A Legal Analysis of the EU Member States, Iceland, Liechtenstein and Norway”, co-authored with Prof. Anna Lawson on the basis of country reports provided by the European network of legal experts in gender equality and non-discrimination.

This contribution is divided into five sections. After this Introduction, Section 2 discusses in a general fashion the role of reasonable accommodation in the CRPD and its relevance in the employment context. Section 3 goes on to succinctly examine how reasonable accommodation is regulated in the EU legal framework, while Section 4 analyses how national laws have implemented these reasonable accommodation obligations and highlights inconsistent approaches, ambiguities, but also best practices.

Section 5 concludes with brief remarks on the challenges in implementing the right to “reasonable accommodation”.

2. Reasonable Accommodation in the CRPD and its Relevance in the Employment Context

The CRPD and its related Optional Protocol, were adopted by the General Assembly of the United Nations on 13 December 2006, and entered into force on 3 May 2008. It is commonly acknowledged that the Convention does not create new rights but rewrites human rights in a disability context. It is informed by the social model of disability\(^9\) and its purpose is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”\(^10\). Dignity, individual autonomy, equality, accessibility and inclusion within society and the acceptance of disability as part of human diversity are key principles around which the CRPD revolves and are listed in Article 3 of the CRPD.

In the CRPD, reasonable accommodation is unequivocally incorporated into the non-discrimination principle and mentioned in several substantive provisions. Article 5 of the Convention, which spells out the principle of non-discrimination and equality, encompasses a prohibition of discrimination and a range of positive obligations, including that of ensuring the provision of reasonable accommodation. Article 5(2) requires States Parties to prohibit ‘discrimination on the basis of disability’. The latter is defined in Article 2 as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’. Article 2 makes also clear that discrimination on the grounds of disability embraces ‘all forms of discrimination,

\(^9\) The social model places emphasis on the social barriers that responsible for creating disability. The social model was developed as a reaction to the “medical model”, which focused on the health condition of the single person and conceptualized disability as a negative condition. It identified disability with the individual’s impairment. On the social model, among many others, see C. Barnes and G. Mercer, Exploring Disability, 2nd ed. (Polity Press, 2010).

\(^10\) Article 1 CRPD.
including denial of reasonable accommodation’. Article 5(3) explicitly requires that States Parties take all appropriate steps to ensure that reasonable accommodation is provided. Reasonable accommodation is clearly defined in Article 2 of the Convention as the “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

Reasonable accommodation is then mentioned in several other provisions of the Convention. With particular regard to the employment context, Article 27 of the CRPD requires States Parties to recognize and take appropriate steps to protect and promote “the right of persons with disabilities to work, on an equal basis with others”. It requires States Parties to create an open, inclusive, and accessible labour market. A list of specific actions is set out in Article 27(1), which includes prohibiting discrimination in relation to all aspects of employment, including the recruitment and terms and conditions of employment, such as remuneration and working hours, working tasks, access to promotions, harassment, and dismissals, and ensuring “just and favorable conditions of work”. Article 27(1)(i) explicitly requires State Parties to ensure that reasonable accommodation is provided in the workplace. The purpose of reasonable accommodation is to enable a person with disability to fully enjoy his, her or their right to work on an equal basis with others. It is evident that reasonable accommodation is an essential tool to create an inclusive and just workplace. From the wording of Article 27 of the CRPD, read in conjunction with Articles 2 and 5 of the CRPD, that reasonable accommodation is essential for the removal of the disadvantage to which a person with disabilities would otherwise be subjected by standard working practices. The material scope of the obligations (including that of ensuring reasonable accommodation) provided for in Article 27 CRPD covers general technical and vocational guidance programs, placement services and vocational and

12 Article 27(1)(a) of the CRPD.
13 Article 27(1)(b) of the CRPD.
14 Article 27(1)(i) of the CRPD.
continuing training, labour and trade union rights and self-employment, and entrepreneurship. Put simply, in relation to the employment context, the right to be provided with reasonable accommodation extends to all workers, job seekers, interns, and trainees with disabilities. Article 27 extends this to all sectors of employment, including the military.

The right to be provided with reasonable accommodations extends to all persons with disabilities. According to Article 1 of the CRPD (which sets out the purpose of the treaty, and does not purport definitions), 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”. This is intended to provide a minimum ground of protection to be fulfilled by the Parties to the Convention.

Reasonable accommodation possesses an individualized nature. The word “reasonable” concerns the relevance and the effectiveness of the accommodation for that particular person, and the expected goal of countering discrimination. There are two main consequences deriving from this individual nature. First, as affirmed by UN Committee on the Rights Persons with Disabilities (CRPD Committee) in its General Comment No. 2, reasonable accommodation is an *ex nunc* duty, enforceable only “from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context’.

Most recently the CRPD Committee in its General Comment No.3 has clarified that “the duty is enforceable from the moment a person requests it in a given situation in order to enjoy their rights on an equal basis in a particular context…”. However, this

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15 Article 27(1)(d) of the CRPD.


17 UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Accessibility, UN Doc. CRPD/C/GC/4 (2016). See also UN Committee on the Rights of Persons with Disabilities, Michael Lockrey v Australia, UN Doc. CRPD/C/15/D/13/2016 (30 May 2016). See also the UN Committee on the Rights of Persons with Disabilities, General Comment. No. 6 on equality and non-discrimination UN Doc. CRPD/C/GC/6.


19 UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Accessibility, UN Doc. CRPD/C/GC/3 (2016), para. 15.
statement appears somewhat contradictory. It would seem more in line with the spirit of the CRPD that the duty arises when the duty bearer knows or ought to know about the disability (and the need for accommodation). Secondly, as explained by Lawson, “the individual-oriented nature of the reasonable accommodation obligation thus requires duty-bearers to resist making assumptions as to what might be most appropriate for a particular individual and demands that instead they engage in a dialogue with such a person about how the relevant disadvantages might most effectively be tackled”.\(^{20}\) This seems in line with Articles 3 and 4 of the CRPD.\(^{21}\)

In the employment context, it appears that the disabled employee has to be consulted with regard to the accommodation and has the right to participate in the decision concerning the nature of the accommodation to be adopted.

The duty to accommodate is subject to the “disproportionate or undue burden” limit. This means that the denial of reasonable accommodation does not constitute a discrimination when the accommodation entails a disproportionate burden on the duty bearer. There is no guidance in the CRPD on what may be a disproportionate burden, and in *Jungelin v Sweden*,\(^{22}\) the CRPD Committee held that States Parties enjoy a margin of discretion when formulating and assessing the reasonableness and proportionality of accommodation measures. The financial cost of a requested accommodation is one of the most relevant factors in determining whether the duty-bearer can duly claim to be exempted from the duty to accommodate. With regard to the employment context, the employee will be entitled to a reasonable accommodation only when this does not lead to a disproportionate burden on the employer. According to Ventegodt Lüsberg, it would presumably result in an undue burden and would be unreasonable


\(^{21}\) As mentioned above, Article 3 provides for the principles of participation and inclusion of persons with disabilities. Article 4(3) CRPD requires close consultation with, and active involvement of, persons with disabilities, through their representative organizations, in the development and implementation of legislation and policies and in all decision-making processes concerning issues relating to persons with disabilities.

to require adjustments for a disability that substantially affect the employee’s core functions.23


In the EU legal framework, reasonable accommodation duties are formulated in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.24 This Directive remains the main piece of legislation that protects and promotes the rights of people with disabilities to date, even though the EU legal framework currently includes disability-related provisions in various areas, such as transport, lifts, public procurement, and electronic communications networks and services.

The purpose of Directive 2000/78 is ‘to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’,25 and sets out minimum standards which Member States must ensure are adhered to in their national implementing laws. Article 5 of the Employment Equality Directive affirms that: “[i]n order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided”. This provision goes on to state that “employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer”. Unlike the CRPD, Directive 2000/78 does not explicitly define the denial of reasonable accommodation as a form of discrimination.26

24 Cit. supra ft. 1.
The Directive applies to both the public and private sector, including public bodies, in relation to employment and occupation, vocational training and membership of and involvement in employer and employee organizations. The material scope of the reasonable accommodation duty provided in Article 5 is the same as the scope of the Directive as a whole. Article 3(4) of the Directive allows Member States not to impose disability discrimination prohibitions (including the duty to provide reasonable accommodations) on the armed forces. In this respect, it is worth noting that the EU has entered a reservation against Article 27 of the CRPD in relation to the employment of disabled people in the armed forces.

The right to be provided with reasonable accommodation according to the Directive operates in favour of “persons with disabilities”, but, as mentioned above only in the employment context. In the Directive there is no definition of disability or persons with disabilities. However, since 2013, with the Ring and Werge\textsuperscript{27} decision, the Court of Justice of the European Union (CJEU) has attempted to embrace the social model and to interpret the Directive 2000/78 in light and in compliance with the CRPD.\textsuperscript{28} In most of its recent decisions, the CJEU has referred to Article 1 CRPD. Nonetheless, considering that the material scope of the Directive is confined to the field of employment, the Court has explicitly referred to professional life. In particular, it has affirmed that “the concept of disability refers to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers”\textsuperscript{29}.

Article 5 does not indicate when the duty arises, and does not elaborate on the meaning of “reasonable accommodation”. Additional guidance on what an accommodation is can be inferred from recital 20 of the Preamble, which affirms that “[a]ppropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for ex-

\textsuperscript{27} Joined cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligelskskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11) 11 April 2013 EU:C:2013:222.
\textsuperscript{29} See inter alia Case C-363/12 Z. v A Government Department and The Board of management of a community school, EU:C:2013:604.
ample adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources”. The term “accommodation” in the text of the Directive refers to any modification of, or adjustment to, a job, an employment practice, the work environment, or the manner or circumstances under which a position is held or performed.30 A wide interpretation of the term “accommodation”, which embraces both physical and organizational adaptations, has been adopted by the CJEU in two recent decisions: Ring and Werge case31 and Commission v Italy.32 Significantly, in both of these decisions, the CJEU has interpreted the Directive in light of the CRPD, and has explicitly cited Article 2 of the CRPD.

According to Article 5 of the Directive, and similar to what is prescribed by Article 2 of the CRPD, the employer is not required to provide an accommodation if this would impose a disproportionate burden on them. What amounts to a “disproportionate burden” is not explicated in the Directive. Article 5 states that ‘[w]hen this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate’. This statement refers to subsidies or other measures that subsidize the cost of the accommodation or which otherwise support the employer to make accommodations. Recital 21, however, gives some further guidance and affirms that ‘[t]o determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance’. It seems clear from this recital that an accommodation constitutes a “disproportionate” when it involves a substantial financial cost for the employer, which is not viable having regard to the overall financial resources of the company and the public subsidies available. However, the Directive does not clarify how the assessment of

31 Joined cases C- 335/11 and C- 337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligelskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11) 11 April 2013 ECLI:EU:C:2013:222.
32 CJEU, Case C-312/11, Commission v Italy, 4 July 2013, ECLI:EU:C:2013:446.
whether the cost is viable should be made and this task has been left to Member States.

4. **Reasonable Accommodation in National Laws: Trends and Patterns**

All 28 EU Member States have introduced reasonable accommodation obligations in employment contexts. In Italy, this duty was introduced very recently, in 2013, following the ruling of the CJEU in *Commission v Italy*, which condemned Italy for the failure to implement Article 5 of the Directive. In several countries (e.g. Denmark, Estonia, Finland, Greece, Ireland, Latvia, and the UK) a reasonable accommodation duty is included in generic multi-ground anti-discrimination law. By contrast, other countries (e.g. Austria, Spain, Hungary) have opted to implement the reasonable accommodation obligation of Directive 2000/78 in disability specific legislation. In a third group of member States (e.g. Croatia, the Czech Republic, Luxemburg) employment-related reasonable accommodation duties are contained in different pieces of legislation. In Germany, for example, the reasonable accommodation duty is not located in the General Law on Equal Treatment of 2006 (*AGG*), but instead appears in Section 164.4 of the Social Code IX – only for the benefit of severely disabled people.

Significantly, in some countries (e.g. Cyprus, Spain and Malta), reasonable accommodation provisions have been amended after ratification of the CRPD and their wording brought into line with Article 2 of the Con-

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34 Law decree 28 June 2013 No. 76, OJ No. 150 of 28 June 2013, then converted into Law 9 August 2013, No. 99, OJ No. 196 of 22 August 2013, page 1, concerning ‘Preliminary Urgent Measures for the promotion of employment, in particular of youngsters, of social cohesion and on and other Urgent financial measures’.

35 See supra ft. 32.

vention. In Italy, where reasonable accommodation duties were included in anti-discrimination legislation only in 2013, an express reference to the CRPD has been included and employers are required to adopt reasonable accommodations “as defined by the UN Convention on the Rights of Persons with Disabilities”.

Looking closely at the content of national provisions, in all 28 Member States reasonable accommodation obligations extend, in compliance with Directive 2000/78, to both the public and private sectors, in relation to employment and occupation, vocational training and membership of, and involvement in employer and employee organizations. In line with Article 3(4) of the Directive, exceptions to non-discrimination principles and to reasonable accommodation duties, apply in the military service in most countries (e.g. Cyprus, the Czech Republic, Germany, Greece, Denmark, France, Ireland, Italy, Malta, Spain, Slovakia, and the UK). In some countries (e.g. Estonia, Bulgaria, Croatia, Hungary, Latvia), national legislation does not explicitly contain a specific exception to non-discrimination legislation for the armed forces, but laws governing the armed forces provide for specific ability or health requirements to be satisfied.37 These exemptions from the duty to provide reasonable accommodations, while complying the Directive, are arguably in breach of the CRPD. Interestingly, only three of these European countries (UK, Cyprus and Greece), together with the EU itself, have entered reservations against Article 27 of the CRPD in respect of the armed forces.

In all of the countries under examination, the duty acts in favor of persons with disabilities, but the way in which disability is defined in national laws varies greatly. In some countries, the definitions of disability is still informed by the medical model of disability, and require a certain percentage of invalidity in order for a person to be entitled to request an accommodation. For example, in Germany, the General Law on Equal Treatment of 2006 (AGG), contains no definition of disability or any of the other protected characteristics. However, Section 2 Social Code IX (Sozialgesetzbuch IX, SGB IX) and Section 3 of the Equal Opportunities for Disabled People Act (Behindertengleichstellungsgesetz, BGG) provide a general legal definition of disability which is to be applied also in the context

of anti-discrimination legislation. According to these provisions, people are disabled if their physical functions, intellectual abilities or mental health have a high probability of differing from the typical state for their age for longer than six months and if, as a consequence, their participation in society is impaired. These definitions (such as the German one) differs from the Art. 1 CRPD, and arguably fail to comply with the CJEU case law on this matter too.

National laws are silent on when the duty to provide a reasonable accommodation arises. In general, in line with the CRPD, this is an *ex nunc* duty. Practice reveals that in some countries, the duty to provide reasonable accommodation arises when the employer knows or ought to know about the disability of the worker, and there is no need for the employee to request for the accommodation. By contrast, in some countries, the duty seems to be triggered by the express request of the employee. In other countries, such as Bulgaria and Luxemburg, the duty arises when the employer is informed by the public authorities about the health conditions of the workers and their specific needs to be provided with reasonable accommodation.

In general, in all the 28 Member States, in compliance with both the CRPD and the Directive, the term “accommodation” is interpreted broadly to encompass any individualized adjustment that objectively and appropriately satisfies the needs of the person with a disability. Accommodations include technical solutions, including transportation to reach the work place, and organizational arrangements, including teleworking arrangements, leave to carry out periodical rehabilitation, extended or additional leave, the provision of assistance (e.g. specialized work assistant or job coach).

Finally, consistent with the CRPD and the Directive, the employer is not obliged to provide a reasonable accommodation when this places a

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disproportionate burden on them.\textsuperscript{40} In most of the 28 Member States, the actual cost of the accommodation and/or the subsidies available to cover that cost are essential elements in verifying whether the employer is subject to the duty or not. In practice, the financial cost is always assessed having regard to the overall turnover and size of the company. In some States, (e.g. Austria, Czech Republic, Malta), however, national laws prescribe a more general evaluation to assess whether the accommodation entails a disproportionate burden. Attention is directed not only to financial cost, but also to other factors such as the activities of the undertaking, the benefit that the person with disability receives, as well as to the benefit that others receive. Differently from other Member States, in Italian law a specific additional limit to reasonable accommodation duties has been provided: public employers must implement the duty ‘without new or increased burdens on public finance and human resources’. This means that public employers could refuse to adopt an accommodation not only when it does entail a disproportionate burden, but also when it increases the cost of that office or activity.

Similar to the CRPD and the Directive, national laws do not include any explicit requirement to consult the disabled person concerned about what they would find an appropriate or effective accommodation. Some good practices, however, have been highlighted. In a number of countries third parties are also consulted. For example in Denmark, disability organizations are also consulted, as well as doctors, the municipality and other experts, to find the most appropriate accommodation. In Cyprus, the Equality Body may be asked by employers to advise on the type of accommodation to be adopted in order to fulfil the duty prescribed by the law. Official guidance on reasonable accommodation is provided in few EU Member States. The most notable example is the Belgian ‘Cooperation Agreement concerning the concept of reasonable accommodation’. There are, however, booklets published by equality bodies, disability commis-

\textsuperscript{40} Even in those States (e.g. Romania and the UK) in which domestic law does not use or define the concept of “disproportionate burden”, the question whether any adjustment is ‘reasonable’ involves the determination of whether the accommodation involves a disproportionate burden for the employer. For further discussion see D. Ferri, A. Lawson, Reasonable accommodation for disabled people in employment contexts, written report for the European Commission, Brussels, 2016, available at http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_in_employment_final2_en.pdf.
sions or other public services that provide guidance on accommodations. In Germany, the Equal Opportunities for Disabled People Act provides that NGOs and social partners should conclude agreements which may specify and provide guidance on reasonable accommodation (and broader accessibility) measures.41

Finally, in almost all Member States the failure to provide the necessary reasonable accommodation amounts to a discrimination on the grounds of disability and gives rise to the right to obtain financial compensation. In some cases, courts can also order the employer to adopt a specific accommodation. Only in Estonia and Latvia, that a failure to provide reasonable accommodation does not amount to discrimination, and this is clearly inconsistent with Article 2 of the CRPD.42

5. Concluding Remarks

The duty to provide reasonable accommodation in the workplace is well rooted in the EU legal framework and in national legislations. Many of the EU Member States have introduced reasonable accommodation obligations in the early 2000s in order to implement Article 5 of Directive 2000/78. Few of them had included in their legislation a reasonable accommodation provision even before the Directive.43 Italy constitutes an exception, since it transposed Article 5 in 2013, and only after an infringement procedure was launched against it by the Commission and a decision of the CJEU being rendered. The ratification of the CRPD by both the EU and its Member States has brought additional legislative developments and

some States have tried to align more closely with the Convention by amending their anti-discrimination legislation.

However, a closer examination of Member States’ legislation on the issue highlights that some inconsistencies and a lack of compliance with the CRPD, and sometimes even with the Directive, remain. In several countries, the definition of disability is still inspired by the medical model of disability, in breach of the CRPD and in contrast with the social model oriented definition of disability embraced by the CJEU. Several Member States exempt the armed forces and military from reasonable accommodation duties, and while this approach is consistent with the Directive, it falls short of the obligations set forth in Article 27 of the CRPD. Finally, several countries have yet to enshrine the denial of reasonable accommodation as a form of discrimination, and this is a clear breach of the CRPD.

All in all, although there is a general acknowledgement of the role of reasonable accommodation in countering discrimination and a growing understanding of its pivotal significance in achieving substantive equality for people with disabilities in the employment context can be seen across the EU, full implementation of the obligations set forth in the CRPD has yet to be achieved. Aside from fully aligning legislation with the requirements of the Convention, awareness raising activities will be seminal importance to promote a better understating of reasonable accommodation and of its role as gateway to the right to work.
Equal Rights of Persons with Disabilities to Work per Article 27 of the UN Convention on the Rights of Persons with Disabilities

by Felix Welti / Eva Nachtschatt

The right to work has a long history and was subject to a variety of influences. It can be found in several areas of German law today. In Germany, the impact of the UN Convention on the Rights of Persons with Disabilities and its support for the right to work for people with disabilities increased in visibility through the Federal Participation Act [Bundesteilhabegesetz or BTHG] in Germany. This led to a number of commitments within Germany. As part of its national implementation, the Convention envisages consultation and participation imperatives that apply to representative organizations for persons with disabilities and are used in monitoring their implementation. The UN Convention on the Rights of Persons with Disabilities’ reservation safeguarding progression affects national implementation, but the right to work for persons with disabilities must not be diminished compared to its status for persons without disabilities. The implementation of Article 27 of the UN Convention on the Rights of Persons with Disabilities is supported extensively by the remaining provisions of the Convention. At the national level, a variety of laws – most notably regulations involving social law – act in concert to realize the right to work for persons with disabilities.

I. Introduction

Equal rights for persons with disabilities are a topic that touches on a variety of fundamental societal questions: Is there a right to work, and what can it encompass? Can this right exist for persons with disabilities? If so, how can it be an equal right under different conditions?

Article 27 of the UN Convention on the Rights of Persons with Disabilities (UN CRPD) includes this type of equal right to work for persons with disabilities. This has encouraged discussion concerning these questions in the Federal Republic of Germany, in its position as a signatory to the UN CRPD, and around the world. It has shifted the balance in the discussion

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1 An earlier version of this article was published in: Catrin Misselhorn/ Hauke Behrendt (ed.), Arbeit, Gerechtigkeit und Inklusion, Stuttgart 2017, p. 146-165.
of policy and law regarding these questions. Socio-philosophical and social-political questions are getting rooted predominantly in positive law to date. At the same time, science is facing new challenges of differentiating between philosophical ideals, political challenges and reasonable legal obligations. In addition, end points and connecting points must be located in national legal systems for the general mandates from the UN CRPD. The international discussion becomes more intense and takes on a new structure once it reaches a consensus on common objectives. Ultimately, the discussion concerning the Federal Participation Act in Germany [BTHG] has made it evident that the UN CRPD is influencing national legislation and is being used as a reference (Preamble, BT-Drs. 18/9522 dated 2016-09-05, 1, 188). At the same time, it is becoming more apparent that the rights from the UN Convention on the Rights of Persons with Disabilities are garnering differing interpretations and that the rights require implementation in the respective national legal and political context. This is putting the services for inclusion in the labour market in sharp review. It is in this context that a new service group is to be established for inclusion in education (§ 5 Nr. 4 Social Code Book [SGB] IX).

II. Legal sources and validity

1. The right to work

The right to work has been intensively debated as part of protections for human rights and fundamental rights for constitutions, international treaties and declarations as far back as the French Revolution. In this context, a distinction can be made between a right to work in the sense of access to gainful employment that supports one’s livelihood, and the freedom to work in the sense of freedom from serfdom, forced labour or compulsory labour and the right to freely choose one’s work and profession, and a right to work in the sense of working conditions that support one’s livelihood and are not dehumanizing (Eichenhofer 2013). All three dimensions are closely related but focus on different end points and have different means of being implemented. They all have become urgent social concerns with the economic and social generalization of gainful employment as the central mode of securing one’s livelihood and the integration of individuals into an increasingly extensive – even international – social division of labour. The demand for access to and conditions for gainful em-
mployment is becoming a more pressing need due to legal institutions such as social security requiring gainful employment that supports one’s livelihood and weakening other means of access to securing a livelihood and inclusion, such as family and local community.

The Weimar Constitution [Weimarer Reichsverfassung or WRV] ensured a dignified existence for all people (Art. 151 WRV) and protection of the labour force through uniform labour law (Art. 157 WRV). In Germany, as in other states involved in the war, millions of people wounded and injured in the war presented the pressing issue of providing rehabilitation and involvement in gainful employment for persons with disabilities. The Severely Disabled Persons Act [Schwerbeschädigtengesetz] from 1920 and the preceding regulation from 1919, which included compulsory employment with potential implementation as forced hiring, regulated public assistance for employing severely disabled persons and directly made the right to work for persons with disabilities into a part of German labour law and social law.

After the First World War, the International Labour Organization (ILO) was founded in 1919 and systematically sought to make labour and social law into a part of international agreements with the participation of states, trade unions and employer organizations. The ILO conventions are divided into fundamental conventions, governance conventions and technical conventions. Germany ratified 85 of these conventions and one protocol, of which only 59 conventions are in force (ILO, Ratifications of Germany). The ILO focused on rehabilitation and inclusion in working life for persons with disabilities back in 1944 with its War-to-Peace resolution. Its conventions have found their way into German legal system both directly and indirectly (Lörcher 2015, 165; Zimmer 2013, 29), also including ILO Convention No. 159 (1983) regarding vocational rehabilitation.

The United Nations Organization was founded after the Second World War as an alternative to war and despotism. In 1948, it proclaimed the Universal Declaration of Human Rights (UDHR), which included the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, to equal pay for equal work, to just and favourable remuneration, and to form and join trade unions (Article 23 of the UDHR). The Basic Law [Grundgesetz or GG] of the Federal Republic of Germany adopted in 1949 also made reference to human rights (Art. 1 (2) Basic Law [GG]), protecting the free choice of employment and professional practices (Art. 12 (1) Basic Law [GG]) and proclaimed a social constitutional state (Art. 20 (1) Basic Law [GG]), but
did not include any explicit fundamental social rights. This is one of the reasons why law and policy for a right to work often face scepticism or repudiation in the Federal Republic of Germany. Yet, the right to work is also part of Article 6 of the International Covenant on Economic, Social and Cultural Rights from 1966 (ICESCR). The Federal Republic of Germany became a party to the covenant in 1973, causing it to become part of the German legal system impacting social law and labour law (Eichenhofer 2015, 89; Lörcher 2016).

The interrelations within the system shows that the right to work is a social and economic right (Welti 2015a, 17). It is bound to and arises from society. The right to work requires that gainful employment generally is based on voluntary agreement between two parties. The right to work is primarily directed at states which do not directly establish a right to work by employing individuals in civil service or by compulsorily creating an employment relationship. This is the result not only of the context of other protected rights, such as the right to property and choice of employment, but also of the classification of work to be created as freely chosen work. In this respect, the right to work is a legal principle and not a strict regulation. It is subject to optimization but it cannot always be ensured on equal terms in every situation. To this end, it differs from the right to subsistence, which does need to be expressed in more specific terms but which is an unconditional right at its core (BVerfG – decision dated 2010-02-10, 1 BvL 1/09 et. al., BVerfGE 125, 175).

In the German legal system, the right to work is linked primarily with the right to employment promotion (Social Code Book [SGB] III), with basic security for job seekers (Social Code Book [SGB] II) and with the right to rehabilitation (Social Code Book [SGB] IX) and, in varying degrees, with the state financial, employment and business cycle policies together geared towards a high employment level and good employment structure (§ 1 Abs. 1 Social Code Book [SGB] III). The right to work operates in understanding of the free choice of employment and professional practices (Bryde 1984, 2177). Dependent work and interest in maintaining it, as well as freedom to enter into employment agreements, are under the protective purview of this fundamental law. The right to form trade unions and employer associations is protected as a fundamental right by the freedom of association (Art. 9 Abs. 3 Basic Law [GG]), which also includes fashioning working conditions through collective agreements. Furthermore, working conditions are shaped and protected by national labour law with due consideration for ILO conventions and European regulations.
2. The UN Convention on the Rights of Persons with Disabilities

The UN CRPD was adopted by the United Nations General Assembly in 2006 and has since been ratified by the member states. At present (as of 2018-06-01), 177 states have done so, with the Federal Republic of Germany taking part in 2008. It came into force for these states on March 26, 2009. In 2010, it was also ratified by the European Union (EU) and is in force separately under EU law.

The UN Convention on the Rights of Persons with Disabilities stems from recognizing that realizing human rights for persons with disabilities faces particular difficulties. While it does contain new regulations, it does not include any new human rights at its core. Rather, it substantiates the rights already guaranteed to date by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (including for persons with disabilities) as well as the right to work, resulting in Article 27 of the UN CRPD being closely linked with Article 6 of the ICCPR. Because the main objective of the UN CRPD is the full enjoyment of human rights on an equal basis (Article 1 of the UN CRPD), it is very much a convention against discrimination due to disability.

As part of the UN CRPD, the right to equal recognition before the law (Article 12 of the UN CRPD) and the right to accessibility (Article 9 of the UN CRPD), alongside Article 27 of the UN CRPD, constitute the basic requirements for utilizing the right to work.

Article 12 of the UN CRPD includes the right of persons with disabilities everywhere to be recognized as persons before the law (Para. 1) and to enjoy legal capacity on an equal basis with others in all aspects of life (Para. 2). The recognition of legal capacity under civil law is an essential requirement for entering into a binding employment relationship and to exercise and enjoy one's rights within the employment relationship.

General accessibility has been standardized in Article 3(f) under the general principles and in Article 9 of the UN CRPD in more specific terms. It promotes access to the physical environment, to means of transportation, to places of work, to information and communication, including information and communication technologies and systems, and to other facilities and services available to the public in urban and rural areas or provided for them. Accessibility in Article 9 of the UN CRPD is a requirement for living an independent life as well as full inclusion in society on an equal standing (UN Committee, General Comment No. 2 par. 1).
3. International law, European law and German law

As a treaty under international law, the UN CRPD binds the states parties that have agreed on mutual and joint monitoring mechanisms (Articles 34-40 of the UN CRPD). It is questionable to what extent it is enforceable such that people, in particular those with disabilities, can invoke it in relation to the states parties. An indication that this is intentional is provided first and foremost by the Optional Protocol, also ratified by the Federal Republic of Germany. It opens up the possibility of individual complaints to the applicable United Nations Committee. Moreover, the national effectiveness and implementation of an international treaty are governed by national law. Its standards are directly applicable, such that a person can invoke them directly, only if this is evident from the text and they are defined in sufficient detail (cf. Ros 1984; for aspects critical to the UN CRPD, see Rosenow 2015). This is not assumed for Article 27 UN CRPD, but for generally prohibiting discrimination in accordance with Article 5 of the UN CRPD and Article 12(1) and (2) of the UN CRPD (Tolmein 2012, 141 Note 17).

The obligation to implement the UN CRPD, however, applies in equal measure to legislation, administration, jurisprudence, the nation as a whole and the states in accordance with Article 4(1) and 4(5) of the UN CRPD such that German laws – including labour law and social law – are to be applied and interpreted so that they are in compliance with the rights from the UN CRPD (cf. Banafshe 2015a, 57; Uerpmann-Witzzack 2016, 29). This corresponds to the duty of state authorities to interpret the law in a manner that supports international law and human rights, an obligation that is also the duty held by the Federal Constitutional Court (BVerfG from 2004-10-14, 2 BvR 1481/04, BVerfGE 111, 307). Because this also extends to interpreting the German Basic Law, the fundamental rights of the Basic Law must be interpreted to be as consistent as possible with the human rights covenants ratified by Germany. To this end, they can acquire indirect constitutional status if and insofar as they express fundamental rights. The amount of directness used for this depends largely on whether and how the courts take up the UN CRPD (Nieding 2016; Welti 2016; Nebe 2014, 1, 9) and whether and how the Convention is used in litigation (Tolmein 2015). In legal discourse, the UN CRPD is also viewed by some as document that is essentially political in nature; one that is or should be without legal significance (Luthe 2016, 40, 45).
The EU’s ratification of the UN CRPD has resulted in the European Court of Justice (ECJ) applying it for the interpretation of EU law, specifically the Equal Treatment Directive for Employment and Occupation (see ECJ from 2013-04-11, C-335-11/337-11, Skouboe Werge; ECJ from 2016-01-12, C-395/15, Daouidi; ECJ from 2017-03-09, C-406/15, Milкова). This, in turn, has influenced the interpretation of national law implementing Directive 2000/78/EC, particularly the General Law on Equal Treatment [Allgemeines Gleichbehandlungsgesetz, or AGG] in Germany.

4. Social human rights and the progressive realization

Although social human rights relate to legal standards, in some cases they are considered to be primarily political programs (see critical assessment in Welti 2015a, 17). One reason for this is the progressive realization, which is enshrined in Article 2(1) of the ICESCR and Article 4(2) of the UN CRPD for scientific, social and cultural rights. In accordance with those documents, the member states are obligated to work towards fully achieving these rights step by step by making full use of their available resources. This emphasizes the principle character and resource dependency of social rights as also defined for social participation rights under German law (BVerfG from 1972-07-18, 1 BvL 32/70 and others, BVerfGE 33, 303). This does not mean social rights are without obligation. The progressive realization is intended primarily to accommodate the situation in developing, post-colonial states. For rich and developed countries, there should be no reason to delay the implementation of social rights. In Article 4(2) of the UN CRPD, it is also stipulated with the limitation of being “without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.” This can be seen as reference to the direct applicability, particularly prohibiting discrimination (Article 5 of the UN CRPD), which can be applied immediately as civil and political law.

This means that the states parties each determine their level of social rights. But they must be developed without any discrimination against persons with disabilities. The level of implementation regarding the right to work may not be lower for persons with disabilities than it is for other persons. Lower labour participation, more widespread under-qualified employment and higher unemployment for persons with disabilities all demonstrate the challenge posed by Article 27 of the UN CRPD.
5. Human rights and participation

There is a special provision in Article 4(3) of the UN CRPD which requires states parties to work in close consultation with persons with disabilities through organizations representing such persons in order to develop and implement legislation and policies for the implementation of the UN CRPD and other decisions related to persons with disabilities. This is generally expressed in the slogan, “Nothing about us without us.” In German legislation, the Federal Government Commissioner for Matters relating to Persons with Disabilities holds this responsibility (§ 18 (2) Act on Equal Opportunities for Disabled People [BGG]). In addition, ministries and parliaments are to consult associations as in the legislation relating to the Federal Participation Act [BTHG] (BT-Drs. 18/9522, 2, 190). This, however, puts the contentious relationship between human rights and democracy in sharp relief: The democratically legitimized institutions must make the decisions. Affected minorities, such as persons with disabilities, have to be heard and need to have the opportunity to draw attention to their living situation and rights.

The provision for consultation and participation is propagated in administration. Here we can refer back to the advisory committees at integration offices and at the Federal Employment Agency as well as to the Boards of Appeal for matters relating to people with severe disabilities (§§ 186, 188, 202, 203 of Social Code Book [SGB] IX) where associations of persons with disabilities are represented. The integration support, however, lacks any such mandatory participation. The provision intended to serve in that function for the participation of persons experienced in social law in accordance with § 116 Social Code Book [SGB] XII is even being withdrawn by the Federal Participation Act [BTHG] for integration support effective 2020-01-01. Associations of persons with disabilities will, however, be involved in service provision contracts, including with sheltered workshops (§ 131 (2) Social Code Book [SGB] IX effective 2020-01-01). An individual's right to participation exists, in one instance, in the participation in the establishment of a participation plan, particularly as part of a participation plan conference (§ 20 Social Code Book [SGB] IX).

Participation as a fundamental principle goes beyond the public sector. This is evident in the protection provided for employer and trade union rights in Article 27 (1)(c) of the UN CRPD. Participation also includes participation in rehabilitation through the support of other persons with disabilities (peer support), as stipulated in Article 26 of the UN CRPD. It
is to be increasingly promoted as independent consultation according to the BTHG (§ 32 Social Code Book [SGB] IX; BT-Drs. 18/9522, 245ff.; Jordan/Wansing 2016).

6. Monitoring and enforcement

Standards governing rights differ from moral standards in their binding effect and enforceability. For principle standards, like the right to work, this presents more of a challenge than for strict regulations. In accordance with Article 33(1) of the UN CRPD, the state parties determine a point of contact for coordinating implementation. In Germany, this is the Federal Ministry of Labour and Social Affairs [Bundesministerium für Arbeit und Soziales, or BMAS], which gives hope for due consideration for the right to work. In accordance with Article 33(2) and (3) of the UN CRPD, independent mechanisms are to be put in place which also incorporate civil society. This takes place through the monitoring body at the German Institute for Human Rights [Deutsches Institut für Menschenrechte, or DIM].

In accordance with Articles 34-36 of the UN CRPD, the state parties submit a report to the UN Committee on the Rights of Persons with Disabilities every four years and the Committee reviews the report. Comments are made as part of the reviews (CRPD/C/DEU/CO/1 from 2015-04-17). The reports are part of domestic discussion, such as in relation to Article 27 of the UN CRPD due to their critical position relative to sheltered workplaces (CRPD/C/DEU/CO/1 (2015) para. (49)(c); Weinreich 2016, 145). In accordance with the optional protocol, the Committee also addresses the individual complaints; it passes the review results on to the state party. These documents do not carry the weight of court decisions. But they can be applied in the interpretation of the UN CRPD.

Thus, the primary mode of protecting individual rights from the UN CRPD must be each nation's domestic legal system. It is within this system, at least in Germany, where the courts have to apply the UN CRPD in a methodologically sound manner for interpreting national law (cf. Nieding 2016; Welti 2016; Nebe 2014, 1, 9). If that law contradicted the UN CRPD, the courts would have to review whether there is a violation of Basic Law [GG] as well. This could be the case due to the court considering the UN CRPD insufficient for interpretation as a fundamental right, such as the ban on discriminating against a disability, or due to it considering the contradiction between national law and ratified international law to be
contrary to the rule of law. In these cases, the court would have to stay its proceedings and submit the regulation to the Federal Constitutional Court for review (Art. 100 (1) Basic Law [GG]).

III. Fundamental terms and relationships

1. Disability

In accordance with the second paragraph of Article 1 of the UN CRPD, 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. This definition of disability ties in with the International Classification of Functioning, Disability and Health (ICF) from the World Health Organization, which reached the professional consensus in 2001 that a disability consists of health impairment and contextual factors. The German Federal Participation Act [BTHG] affected § 2 (1) of Social Code Book [SGB] IX, the disability terminology of import for German law, and brought it closer to the formulation in the UN CRPD effective 2018-01-01 (BT-Drs. 18/9522, 227). This could be significant for determining the status as a person with a severe disability and for the needs assessment of rehabilitation bodies (cf. Hirschberg 2016, 46). However, § 13 Social Code Book [SGB] IX, as a result of the BTHG, is not yet obligating them to provide a uniform needs assessment in accordance with ICF criteria from 2018 onwards (BT-Drs. 18/9522, 233).

For working life, a social disability concept has always been accepted on its own merits. Thus, Convention No. 159 from the ILO defines a “disabled person” as “an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment” (Convention No. 159 Art. 1(1)). Impairment of a person's health by itself cannot be used as a basis for determining whether someone is disabled. Instead, this assessment must stem from whether the impairment, in the context of the respective state of the working environment and labour market, impairs marketing and socialization of the labour force. A health problem becomes a socially, politically and legally relevant disability only through this impact on individual and societal necessity and the expectations of taking part in the work of society and of earning a living in this way. Accordingly, the con-
textual factors of the labour market and working world have consistently been taken into account as well in understanding disability. However, these have often been regarded as abstract conditions of the general labour market in the law relating to reduced earning capacity pensions and severely disabled persons, leading them to be abstracted away from specific personal, regional or economic factors. Less convincing is the criticism that the UN CRPD disability terminology is utopian in nature and could lead to undue expansion of benefit entitlements (as in Luthe 2016, 40, 50).

The ECJ and German Federal Labour Court [BAG] have recently made it clear that health conditions can become disabilities if they lead to detriments in working life due to discriminatory attributions and expectations, as in the case of obesity (ECJ from 2014-12-18, C 354/13, NJW 2015, 391) or symptomless HIV infection (BAG from 2013-12-19, 6 AZR 190/12, BAGE 147, 60). The German Federal Social Court [BSG] has demonstrated that, for chronic illnesses (diabetes in the relevant case), the specific burden of treatment can lead to disabilities (BSG from 2014-12-16, B 9 SB 2/13 R, SozR 4-3250 § 69 Nr. 18).

2. Equality

The equal right to work must be considered in light of the right to equal treatment in accordance with Article 5 of the UN CRPD. For persons with disabilities, this is implemented by bans on discrimination in accordance with Article 2(2) of the ICESCR while also supporting the interpretation of the bans on discrimination in accordance with Art. 3 (3) Sentence 2 of Basic Law [GG]. It obligates the state parties to equal treatment (Article 5(1) of the UN CRPD) and calls on them to forbid private individuals – including employers – from performing any form of disability discrimination (Article 5(2) of the UN CRPD).

The states parties are required to ensure that all of the appropriate steps for providing reasonable accommodation are taken, especially in conjunction with the provision of work (Article 5(3) of the UN CRPD). This involves individual measures to ensure equal enjoyment of human rights (cf. Article 2 of the UN CRPD). Reasonable accommodation can consist of aspects such as individual adjustment of workstations and equipment (Ferri/Lawson 2016). Finally, it makes it clear that positive measures to arrange for actual equal treatment are not discrimination (Article 5(4) of the UN CRPD). These measures can include an employment quota, such as in
China (CRPD/C/CHN/CO/1 from 2012-10-15 para. 41f.), Austria (CRPD/C/AUT/CO/1 from 2013-09-30 para. 44ff.), France (see Hector in this book) or Brasil (see do Carmo in this book) or preferential invitations to interviews. The understanding of equality in the UN CRPD focuses on equality as an end result and not on formal equality as an abstraction from different conditions. Thus, it is fitting for disability as a concept, where resultant equality is achieved frequently only by taking distinctness into account (Fuerst 2009). Article 5 of Directive 2000/78/EC includes the obligation for EU member states to establish a general legal framework wherein an employer is called upon to provide necessary and reasonable accommodation. Necessary, effective and workable measures must be taken on a case-by-case basis. In order to implement this provision, all employers must be subject to the requirement (ECJ in case C-312/11 (2013-07-04, Commission v. Italy); ECJ in the joined case C-335/11 (2013-04-11, HK Danmark v. Dansk almennyttigt Boligselskab) and C-337/11 (2013-04-11, HK Danmark v. Dansk Arbejdsgiverforening)). The requirement for providing reasonable accommodation includes the removal of barriers that prevent the full and effective inclusion of persons with disabilities in working life on an equal standing with other employees. The employer must take suitable and necessary measures in the specific case. This is intended to provide the employee with access to employment, which enables practicing of a profession as well as career advancement and inclusion in ongoing education and training (ECJ in case C-335/11 and C-337/11).

3. Participation

Participation, another principle of the UN CRPD, refers to the goal of equal freedoms as well as the material foundations and conditions for those freedoms. It includes public and political participation (cf. Article 29, 30, 33(3) of the UN CRPD). Participation has already been introduced into German law as a fundamental concept of the rights of persons with disabilities, including those rights related to working life, through Social Code Book [SGB] IX.
4. Independence

Independence is a prominent fixture of Article 3(a) of the UN CRPD and § 1 of Social Code Book [SGB] IX; it accentuates that a right to work means a right to a chosen profession and a chosen position. This becomes evident in social law in the free right to choose a service provider (§ 8 Social Code Book [SGB] IX) and accounting for any predisposition (Banaf-sche 2016; Nebe 2014, 1, 6) and shows that offers of sheltered employment without any alternative are an inadequate implementation.

5. Inclusion and integration

Many discussions involving the UN CRPD include the terms “inclusion” and “integration.” In Germany, there is a focus on whether a principle of the convention in the published German translation from the authentic languages of English, French, Spanish, Arabic and Chinese (Article 50 of the UN CRPD) has correctly translated “inclusion in society” (Article 3(c) of the UN CRPD) and correctly attributed the labour market as “inclusive” in Article 27 of the UN CRPD. In 2015, Austria distanced itself from the translation consensus reached by Germany, Austria, Switzerland and Liechtenstein in 2008 and translated these items as “Inklusion” and “inklusiv” instead of “Integration” and “integrativ” (BGBl. III Nr. 105/2016). The questionable words are written as “Inclusion” and “inclusive” in English, “Intégration” and “favorisant l’inclusion” in French and “Inclusión” and “inclusivos” in Spanish. From this incomplete overview, it is possible to deduce that the proper content lies in a space between the two terms and there is a tendency towards the sense of “inclusion” and “inclusive labour market.”

The occasional conflation of both terms as opposites or mutually exclusive paradigms is not evidenced by the language. The starting point is different: While integration can be defined as combining to form a whole, inclusion is incorporation into a whole. In the context of human rights, inclusion indicates somewhat more clearly that the concept involves including each individual person into society and the labour market. On the other hand, integration in the context of the UN CRPD cannot mean anything other than establishing a whole by integrating persons with disabilities. Inclusion and integration thus do not simply mesh together as concepts (cf. Wansing 2012, 93, 99). The terms themselves do not make it possible to
reach a definitive conclusion when charging the choice of terminology with the question of whether special adjustments make up part of the whole or whether either the whole or the individuals would have to change. It also does not do justice to the complex dynamics used to pattern and alter society and its subsystems.

6. Accessibility

Accessibility is another basic principle shaped in detail in Article 9 of the UN CRPD and is also related to the labour market in Article 27 of the UN CRPD. The ability to live independently and participate fully in all aspects of life is to be enabled by accessibility to the physical environment, to transportation, to information and communications, and to other facilities and services. While reasonable accommodation relates to individual cases, accessibility is generalized and preventive (Welti 2015c; UN Committee, General Comment No. 2 (2014) para. 25). It is intended to prevent barriers and to create positive contextual factors. Article 9 of the UN CRPD describes the measures of states parties as the identification and elimination of obstacles and barriers to accessibility, particularly those for the workplace. Universal accessibility forms a cross-section through every aspect of life. (UN Committee, General Comment No. 2 (2014) para. 1+23). As a result, accessibility affects physical access as well as working conditions. The duty to provide reasonable accommodation is an ex nunc duty. It is enforceable from the moment an individual with an impairment needs it in a given situation, for example at the workplace or at school. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account. The establishment of accessibility standards seems helpful in this endeavor (UN Committee, General Comment No. 2 (2014) para. 26 + 29). Even the European Council directive concerning the minimum safety and health requirements for the workplace from 1989 included considerations for persons with disabilities. As a result, workplaces were supposed to be organized fundamentally with accessible design (Directive 89/654/EEC Annex 1 item 20). The requirements for accessibility as well as accessible workplaces are not new by any means.
7. Work and employment

The discussion here relates to what work means in the context of Article 27 of the UN CRPD. In general language, work is also done for example as self-employment, family work, care work or volunteer work. If the conceptualization were this extensive, these forms of work could also be included in the guarantee. In contrast, the narrow relationship in the text speaks of gaining a living (as in Article 6 of the ICESCR) and of the labour market, clearly indicating gainful employment. Likewise, the duplication of “and employment” in the header of this section cannot be cited. In German law, Beschäftigung (employment, activity) is the terminology of social law (§ 7 Social Code Book [SGB] IV); the English text speaks of “employment” in clear relation to gainful employment.

The right to work singles out gainful employment without rendering it in absolute terms (Brose 2016, 135, 140; Ritz 2016, 34, 39). Other forms of activity or “work” are excepted, such as in Article 23 of the UN CRPD (respect for home and the family), Article 29 of the UN CRPD (participation in political and public life) and Article 30 of the UN CRPD (participation in cultural life, recreation, leisure and sport). Discussions in social policy and social sciences regarding the allegedly declining importance of gainful employment do not have any correspondence in economic, political and social empiricism. It would thus be wrong – and not in compliance with Article 27 of the UN CRPD – to nullify this importance just for persons with disabilities.

Equal rights are not limited by the severity of the health impairment (cf. Article 12 of the UN CRPD; General Comment No. 1 (2014) para. 13). To this end, the right per Article 27 of the UN CRPD is accorded to all persons with disabilities. A limitation through a lower limit of economically useful work, as is enshrined in BTHG (§ 219 (2) 2 Social Code Book [SGB] IX), is problematic for this reason (Riehle 2017; Schumacher 2016; Wendt 2015; the state court of Lower Saxony-Bremen judgment dated 2014-09-23, L 7 AL 56/12 sees this differently). Work is a cooperative social process involving persons with very different performance capabilities. It is impossible to realize any work only if, after exhausting accessibility and reasonable accommodation, it is impossible to realize any cooperation.
8. Labour market

Accordingly, a labour market that is open, inclusive and accessible to persons with disabilities is a central concept of Article 27 of the UN CRPD. For interpretive purposes in this context, there is a non-trivial dependence on the inherent political-economic understanding of the labour market. If this is essentially considered a market where supply and demand decide the marketing of labour, then openness, inclusiveness and accessibility are ultimately foreign attributes applied to the labour market from the outside. This preconception could also take hold when looking at employment of persons with disabilities, for example, in workplaces outside the labour market.

If, on the other hand, the labour market is viewed as a regulated social institution that consists of government and wage regulations as well as sociomoral understandings of those involved instead of just economic “market laws,” incorporating openness, inclusiveness and accessibility for persons with disabilities into the social arrangement of the labour market is a more approachable prospect (Brose 2016, 135, 141; Weinreich 2016, 145, 149). This sort of understanding would also be encouraged by the fact that Article 27 of the UN CRPD emphasizes earning a living through work, putting the reproduction cost at the focus instead of the market price. The provision is intrinsic to the guiding idea of transforming the existing structures of the labour market and the “traditional” work environment for the needs of persons with disabilities (Trenk-Hinterberger 2012, 193 note 8). Persons with disabilities experience exclusion from the general labour market due to insufficient access to school or training or a lack of financial support (World Report on Disability 2011, 239; UN Committee, General Comment No. 2 para. 1). At the EU level, the horizontal social clause of Article 9 of the TFEU emphasizes the promotion of a high level of employment, with the guarantee of adequate social protection. This is intended to combat social exclusion. It is also intended to ensure a high level of education, vocational training and protection of human health (cf. Article 151 in conjunction with 156 of TFEU). The formation of an inclusive labour market was recommended by the European Commission back in 2008 in the area of coordinating expertise in the European Union (Commission Recommendation 2008/867/EC S. L 307/13 (b)). As a result of the Europe 2020 Strategy, the employment rate of persons with disabilities between 20 and 64 is expected to increase to 75%. It is currently below 50%. The risk of poverty and social exclusion is to be combated through

9. Right to education

Education does not end at preparation for the working world. Nonetheless, training a useful labour force and positioning within society based on the division of labour are some of the most important functions of the education system. The right to education based on equal opportunity in an inclusive education system in accordance with Article 24 of the UN CRPD is thus one of the most important requirements of the right to work and establishes good and productive work for decent income (World Report on Disability 2011, 239). General tertiary education (see Wagener in this book), vocational training and lifelong learning are expressly mentioned in accordance with the concept of qualified and inclusive (equal) education (Article 24(5) of the UN CRPD), where the relationship to work and employment is even more evident than in primary education. The right to inclusive education is described as a fundamental human right of all students, especially children. It requires equal access including reasonable accommodations (ECHR, 23/02/2016, Cam vs Turkey, 51500/18; Grigoryan 2017). Inclusive education combines qualitative education and social development of persons with disabilities and, in this way, works to ensure universality and equal treatment for enjoying the right to education. If persons with disabilities remain in special facilities, they are at risk of compartmentalization and they do not experience the best-possible and appropriate education they deserve. The barriers to inclusive education can be ascribed to a variety of factors. The implementation of the right in accordance with Article 24 of the UN CRPD is to be monitored as stipulated in Article 33 of the UN CRPD (UN Committee, General Comment No. 4 (2016) para. 2ff, 12). In terms of inclusive education, accessibility is seen as a dynamic concept subject to periodic, regulatory and technical adjustments (UN Committee, General Comment No. 4 (2016) para. 21). The European 2010-2020 disability strategy, alongside education and training, gives special attention to the transition from education to vocation for young persons with disabilities (European Disability Strategy 2020 para. 4; BT-Drs. 18/10940, 89, see Zölls-Kaser in this book). In Germany, the services (individual help) for participation in education have been provided as part of service groups for participation in working life and for partic-
ipation in social life (BT-Drs. 18/9522 page 258). The establishment of the separate group for services for participation in education can be interpreted as a sign of (political) recognition and appreciation of education. New services are not being introduced by this. The 2nd German participation report attests that education is of central importance in a resume for participation in general social life and for participation in working life (BT-Drs. 18/10940, 108).

10. Rehabilitation

In addition to inclusive participation in important areas of life and societal systems, Article 26 of the UN CRPD also lists habilitation and rehabilitation as effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence and full physical, mental, social and vocational ability. This makes it clear that rehabilitation does not operate counter to a disability policy rooted in human rights; it is to function to the benefit of the requirements of human rights.

11. Right to an adequate standard of living and social protection

Even if the ICESCR and Article 27 of the UN CRPD give the right to work a central role in securing one's livelihood, Article 9 and 11 of the ICESCR and Article 28 of the UN CRPD codify the right to social security and social protection and a reasonable standard of living, because social security is necessary as a supplement to or replacement for gainful employment in the event that certain social risks occur. For persons with disabilities specifically, gainful employment might not be feasible for a time or at all depending on the impairment. In Germany, the right to subsistence is recognized as a fundamental social right derived from the protection of human dignity (BVerfG – judgment from 2010-02-10, 1 BvL 1/09 et. al., BVerfGE 125, 175).

By using the wording “adequate standard of living” Article 28 of the UN CRPD goes beyond protecting subsistence. The fight against poverty is given notable priority in Article 28(2)(a-c) of the UN CRPD. The idea of “continuous improvement of living conditions” makes reference to a social state that does more than just fight against poverty, it also enables and organizes the formation of savings, assets and entitlements – such as...
for retirement benefits (Article 28(2)(e) of the UN CRPD) – which can also include protection for human rights, such as that in accordance with the preservation of property (ECHR from 2015-02-10, 53080/13, Belane Nagy v. Hungary). This is juxtaposed with rehabilitation services, which, as with integration assistance, can be claimed only upon using work income to date. The increase in exemption limits provided by the Federal Participation Act [BTHG] tries to address this (BT-Drs. 18/9522, 198; §§ 135ff. Social Code Book [SGB] IX effective 2020-01-01), without ultimately solving the problem.

IV. Realization

Article 27 of the UN CRPD lists, without any claim of being exhaustive, means of safeguarding and promoting the realization of the right to work. The UN's sustainable development goal 8.5 seeks to achieve full and productive employment, decent work and equal pay and treatment for all women and men by 2030. It also includes young people and persons with disabilities (Sustainable Development Goal 8 – Knowledge Platform).

1. Ban on discrimination

After long debate, discrimination based on disability was banned by §§ 1, 2, 7 of the General Law on Equal Treatment [AGG] in 2006 in all matters in connection with work of any kind, including the conditions of selection, hiring or employment, the ongoing employment status, professional advancement as well as safe and healthy working conditions. This codified an equivalent right to work. A disability may not be an exclusionary or a penalizing criterion for any selection decision involving access to gainful employment unless that criterion is an essential and critical vocational requirement due to the type of work to be performed or the conditions of that work (§ 8 (1) General Law on Equal Treatment [AGG]). In this context, all possibilities for reasonable accommodation must be observed as required of the employer and as possible with the aid of rehabilitation organizations and the Integration Office (BAG from 2014-06-26, 8 AZR 547/13, Behindertenrecht 2015, 92). A lack of accessibility for a workplace as mandated by law can be an indicator that the inaccessibility to the work is discriminatory.
2. Equal right to fair and favourable working conditions

The equal right to fair and favourable working conditions (Article 27(b) of the UN CRPD) is also part of the General Law on Equal Treatment [AGG]. This prohibits lower compensation due to disability for equal or equivalent work because special protective regulations apply in the case of a disability (§ 8 (2) General Law on Equal Treatment [AGG]). This idea also argues against any special exemptions regulated by law, such as a time limit like that which remains in place for previously unemployed older workers (§ 14 (3) Part-time and Limited-term Employment Act [TzBfG]). It is also conceivable that the restriction on public funding, such as the Budget für Arbeit structure for integration into the primary labour market, impairs equal working conditions for equal work at a certain level of compensation. The fact that employment at workplaces does not constitute full employment for persons with disabilities but rather an employment-like legal relationship is very problematic in this context (Wendt 2014, 59; Mrozynski 2016, 299, 306), also as per the Federal Participation Act [BTHG] (§ 221 Social Code [SGB] IX). Occupational safety does apply in this context but, notably, the minimum wage law does not. It seems possible that this configuration is not tenable in light of more recent case law from the European Court of Justice (ECJ, judgment from 2015-09-26 – C 316/13 – Fenoll, NZA 2015, 1444).

3. Equal employee and trade union rights

The ability of persons with disabilities to exercise their labour and trade union rights on an equal basis with others (Article 27(c) of the UN CRPD), is part of Basic Law [GG] in Germany from Art. 9 (3) Basic Law [GG]. The individual and collective exercise of rights is essential so that legal rights can be realized in a specific employer-employee relationship as well. For individuals with disabilities, this primarily means the realization of their equal recognition before the law (Article 12 of the UN CRPD) and their access to justice (Article 13 of the UN CRPD). For this purpose, the Guardianship Law [Betreuungsrecht] is to be patterned accordingly and is to give employees the greatest possible freedom and necessary support under legal care (cf. §§ 1903 (1) Satz 2, 113 Civil Code Book [BGB]). In court proceedings, a special representative is to be appointed (BAG from 2009-05-28, 6 AZN 17/09, NJW 2009, 1665). The exercise of work-
ers' rights must not fail because of an inability to take part in legal affairs. For workers' rights, it is also essential that the enforcement of those rights be based on a legal process with a low threshold, as guaranteed in Germany by the Labour Courts and the Social Courts (see Behrend 2015 for more information).

Workers' rights are also exercised internally by and with the help of a works council or staff council. Here, the factor of prime importance is that the council be given a corresponding express mandate (§§ 75 (1), 80 (1) Nr. 4 Works Council Constitution Act [BetrVG]). The general representation of interests is necessary in order to realize and enforce working conditions for those with disabilities (Nassibi 2012, 720). Accommodation for those with disabilities must be made for working on a works council and the works council election must be accessible (Kohte 2013, 110).

The idea of personal participation by persons with disabilities is filled by the representative body for disabled employees (Schwerbehindertenvertretung, or SBV, § 178 Social Code Book [SGB] IX). This representative body works together with the works council and employer and represents the interests of persons with severe disabilities. Under German law, the representative body for disabled employees represents special interests and performs an important function in enforcing individual rights and accessibility at the workplace (Groskreutz/Welti 2016, 105). The Federal Labour Court does not consider representative bodies for disabled employees to be mandated by Article 27 of the UN CRPD (BAG from 2015-11-04, 7 ABR 62/13, BAGE 153, 187) because the general representative bodies also have a mandate for ensuring the participation and rights of persons with disabilities.

In examining the larger number of employed persons with disabilities, limiting the representative body for disabled employees to those with severe disabilities is not without its problems. It has already taken root, however, in the case of company integration management (§ 167 Social Code Book [SGB] IX) and in the inclusion agreement (§ 166 Social Code Book [SGB] IX). The Federal Participation Act has provided improvements for the representative body for disabled employees, particularly in provision for voiding termination that takes place without its involvement (§ 179 (2) S. 3 Social Code [SGB] IX; BT-Drs. 18/10523, 64). In turn, the reduced participation level in the case of disabled employees in sheltered workshops is problematic. In these workshops, workshop councils are established (§ 222 Social Code Book [SGB] IX) but the Works Council Constitution Act [BetrVG] does not apply.
Persons with disabilities are able to participate in trade unions, even if legal support exists elsewhere. The unions are always responsible for defining the conditions of membership and participation. Most trade unions have statutes with a positive relationship towards the involvement of persons with disabilities and the representative bodies for their social-political and company-internal interests. They are even responsible for the accessibility of union work. Reasonable accommodation, such as necessary assistance for union work, should be oriented towards the services for participation in working life, especially as there is a limited scope of social participation benefits that support civic engagement (§ 78 (5) Social Code Book [SGB] IX).

4. Promotion of work

Persons with disabilities are to have effective access to universal specialized and vocational counseling programs, job placement, vocational training and professional development programs (Article 27(d) of the UN CRPD). This addresses the range of services provided through Social Code Book [SGB] III – Employment promotion – or Social Code Book [SGB] II – Basic security benefits for jobseekers. The general services they provide must be offered free of any discrimination and are not permitted to support discrimination by employers during the search for candidates (§ 33c Social Code Book [SGB] I; § 36 (2) Social Code Book [SGB] III). They can be provided as general services for participation (§ 115 Social Code Book [SGB] III), free of insurance conditions and means testing. This is also necessary because the Federal Participation Act [BTHG] is intended to make organizations for integration assistance no longer responsible for this range of services (§ 111 Social Code Book [SGB] IX effective 2020-01-01; § 140 Social Code Book [SGB] XII). It is all the more important that the Federal Employment Agency, as an organization for rehabilitation and employment services, not focus on the statutory performance limit of earning capacity (§ 8 Social Code Book [SGB] II) but that it be open to all persons with disabilities instead.
5. *Individual promotion*

The states parties are expected to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment (Article 27(e) of the UN CRPD). In Germany, these tasks are assigned to the rehabilitation bodies, occupational accident insurance bodies, maintenance offices, pension insurance bodies and the Federal Employment Agency and Jobcenter (§§ 6, 49 Social Code Book [SGB] IX) and the integration offices § 185 Social Code Book [SGB] IX). Education is a priority for participation in working life in the areas of preschool education, education and vocational training, and lifelong learning (BT-Drs. 18/10940, 65ff.). In addition, education aims to impart skills that enable gainful employment and promote the personal inclinations and abilities of individuals. One of the goals of education is the individual promotion of personal regulatory capacity (“The ability of the individual to independently plan and shape his behaviour and his relationship to the outside world, his own biography and life in a community” [“Die Fähigkeit des Individuums, sein Verhalten und sein Verhältnis zur Umwelt, die eigene Biografie und das Leben in der Gemeinschaft selbstständig zu planen und zu gestalten”]). (Autorengruppe Bildungsberichterstattung, 2014, 1; BT-Drs. 18/10940, 66).

The problem with this is, in turn, whether this promotion is also available to a sufficient extent for those deemed unsuited for the open labour market (§ 8 Social Code Book [SGB] II; § 43 Social Code Book [SGB] VI). This categorization may be necessary for access to pensions and basic social security benefits for those incapable of gainful employment, but, as a barrier to access to support on the labour market, it is hardly compatible with the right to work for persons with disabilities. The contribution of education is rooted in safeguarding and developing quantitative and qualitative workforce potential.

The United Nations committee had reached a decision regarding individual complaints in the Gröninger case (cf. Nebe/Giese 2015). In that case, a young man with impairments was unable to apply for an employment subsidy because it could be claimed only by employers. He claimed that the German Federal Employment Agency had tried to push him into a sheltered workshop under the responsibility of integration assistance. The committee saw this as a violation of Article 27 of the UN CRPD and that
the bureaucratic difficulties in the German system could turn into discrimination.

The Budget für Arbeit structure, an employment subsidy, is intended to mitigate the difficulties marginalized people have in working in the mainstream labour market outside of sheltered workshops. This structure is to be available as a legal federal service in accordance with the Federal Participation Act [BTHG] from 2018-01-01 (§ 61 Social Code Book [SGB] IX; BT-Drs. 18/9522, 255).

6. Promotion of self-employment

The states parties are also expected to promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business (Article 27(f) of the UN CRPD). These areas are of notable significance in light of the labour market in developing countries. But they can also be significant in Germany, including for the ongoing development of a sector of social enterprises. The promotion of self-employment is part of work promotion and rehabilitation law (§ 49 (3) Nr. 6 Social Code Book [SGB] IX). It is supported by the integration office.

7. Employment in the public sector

Traditionally, the public sector has been very important for the employment of persons with disabilities. This is also evident in the employment rate increase to 6% (§ 241 (1) Social Code Book [SGB] IX), the stronger compliance with the legal quota and the duty to invite to a job interview (§ 165 Social Code Book [SGB] IX). The leading role of the public sector and its effect on the labour market is being increasingly called into question due to the increase in limited and otherwise precarious employment in the public sector as well as formal or material privatization of relatively simple work (e.g. street cleaning).

8. Positive measures and incentives in the private sector

The German legal system has incorporated positive measures and incentives for the promotion of employment of persons with disabilities in the
private sector (Article 27(1)(h) of the UN CRPD) for almost 100 years. The employment quota for persons with severe disabilities for companies with 20 employees or more is currently 5%, with a higher weighting given to severely affected persons and education (§ 154, 155, 159 Social Code Book [SGB] IX). Employment of persons with severe disabilities is supported by accompanying integration office assistance in working life (§ 185 Social Code Book [SGB] IX) and services from rehabilitation organizations (§ 50 Social Code Book [SGB] IX). An equalization fee must be paid if the employment quota is not met. This fee can be between €125 and €320 per month depending on the quota fulfilment level. The funds raised are used for a variety of purposes, including the efforts of integration offices.

There is ongoing debate of whether and to what extent these incentives are sufficient and achieve their goal. A moral reflex criticizing the equalization fee as a “buyout” or “penalty” (e.g. Stoppenbrink 2017, 166, 182) is not very productive. Those making this argument would have to denote and specify some more effective means, such as forced hiring or reliance on voluntary action. “Buying out” an entire society from including everyone in working life through “universal basic income” (as put forth by Stoppenbrink 2017, 166, 182) is even less of an alternative to a right to work because one's own work, recognition and autonomy are linked together (Misselhorn 2017, 19, 24).

A more serious prospect is the discussion of an appropriate amount for the equalization fee and tailoring it more closely to persons with severe disabilities who face particular barriers in the open labour market. The employment obligation is not just an obligation to conclude a contract (Deinert 2015, 119, 125). Monitoring of this aspect has been and remains underdeveloped (Düwell 2011, 27, 30). It is also worth discussing how to handle the fact that not all impaired persons eligible for gainful employment are recognized as severely disabled. Conceivable options would be to abandon a formal recognition procedure, which would, however, call into question various instruments – such as the equalization fee and the representative body for disabled employees – or to assume an orientation with a stronger focus on disability terminology in accordance with § 2 Abs. 1 of Social Code Book [SGB] IX and the ICF for the recognition procedure and the Supply Medicine Regulation [VersMedV] that guides it (Seger 2015) as well as greater differentiation between the collective and individual elements of (severe) disability law in working life.
9. **Reasonable accommodation at the workplace**

The states parties are required to ensure that reasonable accommodation is provided to persons with disabilities in the workplace (Article 27(1)(i) of the UN CRPD; cf. Rabe-Rosendahl 2017; Nebe 2014, 1, 3). This requirement has been applicable as part of EU law since 2000 (Article 5 Directive 2000/78/EC), allowing an international comparison of implementation today (Ferri/Lawson 2016; Ferri in this book). It is implemented with disability-friendly workplaces, working hours and working conditions, especially in the Disabled Persons Act (§ 164 Abs. 3-5 Social Code Book [SGB] IX). For other disabled employees, it can be implemented as part of universal labour law (General Law on Equal Treatment [AGG], § 618 Civil Code Book [BGB]). Company agreements and inclusion agreements can be used to put this into practice.

10. **Promotion of work experience**

In accordance with Article 27(1)(j) of the UN CRPD, the acquisition of work experience in the open labour market by persons with disabilities is to be promoted. This regulation is obviously targeted towards persons who have been excluded from the open labour market to date. In addition to the instruments listed previously, corresponding regulations already exist in the form of employer integration allowances (§ 50 (1) 1 Nr. 2 Social Code Book [SGB] IX) and supported employment (§§ 55, 185 (4) Social Code Book [SGB] IX). They are intended to be bolstered by the *Budget für Arbeit* structure for integration into the primary labour market and be reviewed for effectiveness as a whole (Nebe/ Giese 2015).

11. **Vocational rehabilitation**

The states parties are required to promote vocational and professional rehabilitation, job retention and return-to-work programs for persons with disabilities (Article 27(1)(k) of the UN CRPD). This relates to Article 26 of the UN CRPD. This indicates that these programs should include the support of other people with disabilities (peer support) and should be available within the community whenever possible, including in rural areas.
This means that the existing concepts, which primarily rely on centralized facilities, need to be supplemented and transformed. The applicable law is open for rehabilitation within a company or community whenever possible (§ 51 (2) Social Code Book [SGB] IX). For re-entering the workforce after prolonged inability to work, gradual reintegration (§ 44 Social Code Book [SGB] IX) is of particular note (Nebe 2016).

12. Sheltered employment and the open labour market

It is worth noting that Article 27 of the UN CRPD does not include any declarations regarding sheltered employment, as is implemented in Germany in the form of Werkstätten für behinderte Menschen or WfbM (workplaces for disabled persons) and in other forms (sheltered workshops) in other states, such as in Canada, Austria and Japan (see Chou in this book). The UN committee, in its closing remarks, has criticized several factors (see Lachwitz in this book) for the national report for Germany, including that the workshops are closed off from the open labour market, the transition to the labour market is obstructed by disincentives and the WfbM facilities do not manage to prepare employees for the open labour market. As a result, the committee recommended creating employment opportunities in accessible workplaces and phasing out the workshops through immediately enforceable exit strategies, ensuring there is not any reduction in social protection and pension insurance tied to WfbM facilities, and collecting data about the accessibility of workplaces in the open labour market.

From the recommendations, it is clear that the accessibility of the labour market and working conditions must be considered as the openness of operational and labour market structures and not in the confined sense of accessibility as per the Workplaces Ordinance [Arbeitsstättenverordnung]. This openness includes those persons considered to be outside the open labour market in the traditional system of German law. This called into question the functional description of the WfbM as defined by § 219 (1) of Social Code Book [SGB] IX, which specifies that these facilities are for persons who cannot find, cannot yet find or will now be unable to find employment on the open labour market due to the type or severity of their disability. This understanding of the WfbM created a need for exit strategies. These are unlikely to be possible through the closure of the WfbM facilities, however, especially as many employees have become accustomed...
to them over many years and value them in some capacity. It also does not seem reasonable, in the sense of “equal right to joblessness,” to trust in growing labour market accessibility and to unilaterally reduce the current high level of access to sheltered employment and social security (Becker 2016; Trenk-Hinterberger 2015, 652, 656). This puts many persons with disabilities at particular risk of joblessness leading to social exclusion and permanent unemployment. Critical analyses show that the current role of WfbM is embedded in the additional exclusion mechanisms of the education system and labour market (Beck 2015) and that an empirical foundation is not available for strategies (Ritz 2016).

This creates the need for both a transformation from WfbM to social companies providing access to the labour market for persons with disabilities as well as the establishment of various options for labour market access and working environment for persons with disabilities, even if they are deemed to be unfit for gainful employment (Schreiner in this book; Brose 2016, 135, 143; Weinreich 2016, 145, 148; Nicklas-Faust 2016, 201, 207; Ritz 2016, 34; Mrozynski 2016, 299, 306; Trenk-Hinterberger 2015, 652, 658; Finke 2010, 46). The goal must be for work in a WfbM – particularly at a specific WfbM workshop – to not be the sole point of access to work and employment without any alternatives. Through inclusion companies (§ 215 Social Code Book [SGB] IX), social law includes a form in which people with disabilities are employed in proper employment relationships in a proportion of between 25 and 50%. Employment at other companies and administrations requires supported employment (§ 55 Social Code Book [SGB] IX) and greater use of the Budget für Arbeit structure (Ritz 2016, 34, 45; Wuschech/Brüère/Beyer 2016, 10).

The labour law equality between persons in WfbM facilities and other employers could be an important driver of change. In particular, this would mean applying the minimum wage law, which is taking place in sheltered employment in other states (Weinreich 2016, 145, 151). This would increase the income for employees in WfbM facilities, lessening the need to raise income through funds for promoting employment, basic security for those with permanently reduced earning capacity and pensions for reduced earning capacity. However, a permanent employment subsidy would be necessary in many cases to compensate for the lessened productivity of the labour force.

The status of WfbM employees under social law would have to be reorganized as well. At present, WfbM employment mediates access to all sectors of social insurance except unemployment insurance. The provision for
retirement, reduced earning and survivors' risk in the statutory pension insurance scheme is provided by federal contributions financed by taxes. These contributions are set up so that employees earn 80% of the average income of the persons in the pension arrangement (§§ 162 Nr. 2a, 168 (1) Nr. 2, 2a Social Code Book [SGB] VI). After 20 years of WfbM employment, they can also claim a pension for reduced earning capacity as well. This regulation creates a source of income that is not subject to means testing for the second half of a person's life, i.e. after providing any support as a parent, and can help avoid poverty among the elderly. It poses a problem, however, in that this regulation is tied to the place of WfbM employment or the integration project or inclusive company. A regulation would be necessary to ensure, regardless of the place of employment, sufficient social security for persons who achieve only low income from employment due to their disability. This type of reform would be feasible together with a minimum wage that supports one's livelihood and pension reform that strengthens social compensation for lower incomes.

13. Welfare and social insurance

An essential component of the contentious discussion regarding the German Federal Participation Act [BTHG] was the question of the extent to which the reform met its claim of extricating the benefits of past integration assistance from the welfare system (BT-Drs. 18/9522, 2, 190). The relevant social benefits for Article 27 of the UN CRPD are directly related to the work area of WfbM facilities. These services for participation in working life are essentially provided by integration assistance providers. This generally makes them dependent on need, i.e. a test of income, wealth and priority social benefits, both before and after the Federal Participation Act [BTHG]. The services in WfbM vocational training, however, are assigned to the German Federal Employment Agency.

Public relief in the sense of the legal basis of Art. 74 (1) Nr. 7 of Basic Law [GG] includes all social benefits that are not assigned to social insurance, education allowances or support for victims of war. This includes the benefits from integration offices and the youth welfare office. These examples show that means testing is not a necessary requirement for welfare. Even the benefits for participation in working life from the German Federal Employment Agency are not traditional social security benefits because they are not tied to an insurance status or preinsuring periods.
Benefit-based assignment according to logic for compensation for disadvantages financed through taxes or fees is possible from a legal and socio-political standpoint.

In addition to immediate work-related benefits, this question also points to benefits for social participation and care assistance. If the earned income of persons with disabilities or savings from that income is used in the income and wealth assessment for such essential services, this discourages utilization of the right to work. If benefits are to be considered worthwhile and are to contribute to a higher standard of living and higher pensions for persons with disabilities as well, the deduction can be seen as a violation of the right to adequate income and social protection in accordance with Article 28 of the UN CRPD. In this respect, the increased income and asset exceptions in integration assistance are steps towards equal participation but they have not yet achieved that goal.

V. Outlook

If the state, the collective and individual actors on the labour market, trade unions, associations and companies as well as professionals involved in rehabilitation are in talks with persons with disabilities regarding the requirements of an accessible labour market and working environment, and work together to collect the necessary information for identifying barriers and encouraging factors (Article 31 of the UN CRPD), the debate over Article 27 of the UN CRPD itself contributes to raising awareness (Article 8 of the UN CRPD) and to one of the requirements for the equal right to work as a result. This also requires a participatory design to the research (Weber 2016, 78, 83; Nachtschatt 2017).

This discourse can contribute to awareness that the labour market is not some process subject to the whims of fate separate from human action, it is a social institution that can be shaped by policy and that can be used to reconcile productivity, freedom and social rights into a cohesive whole. This can allow persons both with and without impairments to make use of a universal labour market design.
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2. Fundamental academic contributions in the social sciences
Comparability and Convergence of Work Participation Statistics and Documentation

by Jerome Bickenbach

Modern social policy and in particular labour policy recognises the essential role that good statistics plays in the development and implementation of sound and effective policy. More than any other disadvantaged group, persons with disabilities have been limited in their full participation in the labour force by the inadequacy of conceptually sound and empirically accurate information about what is often called ‘work capacity’. In part this has been because of a failure to appreciate the complexity of the disability phenomenon – and in particular that disability is an outcome of a person’s intrinsic capacity and the facilitating or hindering physical, attitudinal, and social environment in which the person lives and works. This so-called ‘interactional’ understanding of disability is now the consensus view, at least academically and across the rehabilitation disciplines. Increasingly the basic social apparatus of collecting disability information – from population surveys, social registries, and disability assessment for supports and benefits – is being retailed to move away from purely medical or impairment-based approaches to interactive approaches where the person’s environment is a key source of information. The remaining challenges concern the comparability of work capacity information across sectors and domains – to ensure continuity of assessment to facilitate work integration – and the convergence of these data toward a social policy that acknowledges and shapes policy in light of personal functioning assets (not merely deficits) and strategies to adapt work environments towards the goal of full work participation. Although obviously these social goals are not solved by good statistics, at the same time, they are unachievable without good statistics.

Introduction

Like any other area of social policy, labour policy cannot function properly, or at all, without valid and robust statistics on labour phenomena. From the obvious, and most basic, information about employment rates, disaggregated by sectors, age groups, and other demographics, to more specific and detailed information about hours and earnings, job openings and turnover rates, almost nothing worth knowing about the labour sector would be known without good statistics (Bickenbach, 2012). This infor-
Information must not only be valid and reliable, it must also be longitudinal since the development, implementation and monitoring of labour policy requires not merely data ‘snapshots’ at discrete times, but ‘data streams’ that provide on-going information from which trends, and predictions, can be derived. What is true of the workforce in general is also true about specific populations, such as people with disabilities: without good data it will be impossible to determine the level of labour participation, but also and more importantly, what can be done over time to improve work participation.

Notoriously in countries at any resource level, people with disabilities, as a group, have one of the highest unemployment rates of any sub-population (OECD, 2010). There are likely many reasons for this and generalization is risky. It is too easy to slip into easy explanations that simply reflect preconceptions – either that people with disabilities lack the skills, knowledge or other qualifications to be successful in the labour market, or, at the other extreme, that discrimination and prejudice on the part of employers are the root causes. Yet one thing is certain and that is that without good information, we will never understand why the employment levels of persons with disabilities are so low, or what we can feasibly do about it. The United Nations’ Convention on the Rights of Persons with Disabilities, CRPD (UN, 2007) speaks to this issue, not merely in identifying in Article 27 the right of persons with disabilities to work, on an equal basis with others, but also in Article 31 in identifying the obligation of States Parties to “collect appropriate information, including statistical and research data” that makes it possible to formulate and implement policies to give effect to this right to work.

In short, one of the reasons why persons with disabilities have been limited in their full participation in the labour force is the general lack of conceptually sound and empirically accurate information relevant to their employment status. Traditionally, the focal point of this information – and the source of modern employment policy concerning people with disability – is the fraught notion of work capacity. Data about work capacity is intended to provide the basis for a determination of, so to speak, the appropriate rate of employment for persons with disabilities. That is, an individual determined to be below some threshold level of work capacity is thereby deemed not to be an appropriate participant in the workforce, so that his or her unemployment should not count when assessing the rate of modifiable or remediable unemployment. Even if it explicitly acknowledges a right to work, no country has the obligation, it is assumed, to se-
cure work for an individual who, because of low levels of work capacity, is unemployable.

Labour statistics for people with disabilities is problematic precisely because this key notion of work capacity, as well as features of the administrative process used to determine levels of work capacity, are problematic. Labour statistics tend to be generated from the administrative process of work capacity determination, and as such are no more valid and reliable than the conception of disability that animates this process. As it happens, work capacity determination in many countries of the world reflects fundamental misconceptions of the nature of disability, its determinants, and its impact on the capacity of an individual to be employed. The result is that this essential source of labour information is distorted and arguably invalid. More importantly, these data unfairly represent the capacity of people to work in ways that are in violation of the CRPD guarantee of a right to work.

In this paper I want to review recent work on the operation of administrative processes of work capacity determination, within the broader context of disability assessment, primarily across OECD countries that highlights this problematic issue at the heart of labour statistics on the participation of persons with disabilities in the workforce. After a brief description of the socio-economic context of disability determination for work capacity, I will turn to the claim that labour statistics distort the picture of employment rates for persons with disabilities because these statistics rely on administrative determinations of work capacity grounded in misconceptions about disability that fail to appreciate the complexity of the experience of disability.

The socio-economic context of work capacity determination

In a 2014 review of disability benefit programming across selected OECD nations by Burkhauser et al., the authors point to an unsustainable growth from 1990 to 2010 in the programme costs, and number of beneficiaries, of long-term disability and social security cash transfers (expressed in terms of the ‘disability recipiency rate’, or beneficiaries as a share of working-age population). What is notable is that this steady growth does not reflect any variation over time within these countries in the rate of self-reported ‘good health’. Coupled with these trends is a dramatic down-
turn during this period in the employment rates for persons who self-report some form of ‘work limitation’.

One factor in these trends in the use of disability programming was the overall social and economic situation during these years, forcing people to seek disability benefits because of high unemployment rates. Evidence suggests that disability rates are countercyclical to the levels of employment (Bickenbach et al., 2015). Since working age adults tend to stay on disability benefits until they either reach old-age retirement or die, and given the worldwide phenomenon of population ageing, the pressure on disability benefits has steadily increased. Countries realized that they needed either to make the exit from disability benefits into employment more attractive, or decrease the inflow of working age adults into disability benefits, or both. Countries like Australia and Netherlands, for example, found themselves dramatically changing disability policy, across the board, and in particular changing their disability determination process to make increasingly more difficult to get benefits (Geurts et al., 2000).

At the same time there was a growing recognition that even people with severe impairments can work, if changes are made to the workplace to accommodate them. This impulse was clearly one of the motivations for the strong claim of a right to employment in Article 27 of the CRPD, which makes the point that underrepresentation of persons with disability in the labour market is both the result of discrimination and the failure, in the words of the Convention, to make the labour market and work environment “open, inclusive and accessible to people with disabilities”.

Burkhauser et al. remarked that the confluence of these two disparate forces – countries needing to save money by encouraging people to work and the human rights impulse to secure the right to work for everyone – has led to the realization that the underlying conception of disability operating in work capacity determination needs to change:

“…over the last 20 years the medical model of disability underlying categorical disability programs in most OECD countries has been rejected and replaced by a conceptualization that recognizes that the social environment is as important as health in determining an individual’s ability to participate in society...

Under this model, “work disability” is a changeable state that depends on a number of factors, including an individual’s health impairment, the level of accommodation offered in the workplace, and the relative economic payoffs associated with working or exiting the labour force to receive disability benefits.” (Burkhauser, 2014)
Burkhauser et al. are pointing here to the realization of a more complex understanding of the experience of disability, and its impact on capacity to work. Implicitly too, they are pointing to the need to collect a wider range of information in order to capture the notion of work capacity. If a person’s capacity to work is as much a function of the configuration of physical and other features of the work environment as the impairments he or she experiences, then labour statistics need to broaden its scope in order to adequately reflect this larger complexity. But this in turn suggests a radically different approach to the work capacity assessment process itself, one that departs from current and traditional approaches.

*Approaches to work capacity assessment*

As a general matter, for those medium and high-resource countries that have a formal system for determining disability in place, *disability assessment* is understood to be the authoritative administrative process of determining the kind and extent of disability an individual has. This is part of a larger administrative procedure called *disability determination*, which determines the eligibility of an individual for supports or services, and will tend to take into account criteria that is independent of the person’s impairments (for example, their income levels, age or geographical location). Disability assessment is used throughout disability policy as part of the determination of eligibility for services, products or protections, and historically has been closely tied to medical sciences and medical professions, both for perceived legitimacy and certainty. When disability assessment is used to determine employment-related benefits, it is typically termed *work capacity assessment* (alternatively, work disability or work ability assessment).

Work capacity is traditionally defined as the overall ability of an individual to perform the physical, mental and emotional tasks needed for the requirements of a particular job, or class of jobs. It is important to note from the outset that what is actually at issue in the determination of work capacity is actually work *incapacity*: That is, in the normal course of the process, an individual with one or more impairments enters into the process under the cloud of the assumption – held by all participants in the process, including the applicant – that the impairments disqualify the individual from being able to work. Although as we will see below, there are variations in the procedures that make up the work capacity determination
process, traditionally, little time is spent determine the capacities, assets or strengths the person possesses (let alone the potential capacities they could develop with proper supports) but rather the incapacities, deficits and weakness they are burdened with, because of their impairments or health conditions.

The ‘deficit focus’ of traditional work capacity processes is important to keep in mind because it accounts for the bias in the data that is collected under the rubric of disability labour statistics. We know a great deal about health conditions, impairments and other limitations in ability, but very little about existing or potential capacities. This is characteristic of the two traditional approaches to disability determination discussed below. Yet, as the Burkhauser et al. quote above suggests, there is a trend toward a broader conceptualization of disability, and a more complex and realistic assessment of work capacity, made necessary by both economic and human rights drivers.

There are roughly three approaches to disability assessment exemplified across medium and high-resource countries of the world (see Bickenbach et al., 2013). (There is a fourth approach found almost exclusively in low-and some medium-resource countries that might be called ‘informal’ in which an official simply makes the determination without recourse to a formalized procedure. I will ignore this approach in what follows.) These three approaches can be called the Impairment Approach, the Functional Limitation Approach and the Disability Approach.

The Impairment Approach is both the oldest and still the most commonly used strategy for determining levels or grades of ‘disability’ for purposes of determining eligibility for services and supports. It is also the most common approach for an assessment of work capacity as a component of a determination of eligibility for employment-related benefits. In essence, the Impairment Approach makes an assessment of the existence and extent of ‘disability’ based entirely on medical information about the claimant’s health condition, morbidity and/or resulting impairments. Generally, an impairment can be understood as any anatomical, physiological, or psychological abnormality or problem in functioning, identified through self-report or clinically. Since bodily functioning is measurable on a continuum from complete functioning to total lack or absence of functioning, to identify a ‘problem’ in some domain of body functioning depends on where a ‘threshold’ on the continuum is placed. That can be done bio-statistically in terms of population norms of normal levels of functioning or in some other manner.
At the heart of the Impairment Approach is the assumption that even for environmentally-influenced phenomena such as the capacity to work, it is sufficient for assessment to verify the existence of an underlying health problem and associated impairments and then to assess the severity of these impairments. This assessment strategy assumes that all that is needed to validly and reliably assess disability in general or work capacity in particular is sufficiently robust information about health conditions and impairments. Disability assessment, in short, can be validly and reliably inferred from impairment assessment.

Historically the Impairment Approach arose from Baremas assessment, invented by the 17th century French mathematician Francois Barrême who devised a table of ordered percentage values for different kinds and severities of bodily damage. When Otto von Bismarck built up the German social insurance system, the Bareme approach was adopted. The approach then spread as the Bismarckian model for social insurance spread across Europe and the world. Technically, a Baremas method of assessment is any arbitrary ordinal scale that attaches percentage values to levels of disability based on impairment of some body part. Nearly every country of the world that has a formal procedure for disability assessment has at one time used, or continues to use, some form of the Baremas system. The most complex and sophisticated form of the Baremas system is the American Medical Association (AMA) Guidelines to the Evaluation of Permanent Impairment, first published in 1958 and now in its 6th edition (Uehlein et al., 2016; Rondinelli et al, 2008).

The Functional Limitation Approach arose in the 1970’s in response to criticism of the Impairment Approach from rehabilitation professionals who argued that physical examination and medical history-taking provided an insufficient evidentiary basis for assessing work capacity. It was argued that a person’s work capacity depended on the extent to which he or she could perform very basic, and easily assessed, actions such as lifting, standing, walking, sitting, carrying, pushing, pulling, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, talking, feeling, hearing, and seeing. These ‘functional capacities’ – or ‘basic activities’ as they are often called – were thought to be essential predictors of work capacity. Assessment of these predictors was required to provide the evidence for employment decisions (Owens, 2004).

In effect, the Functional Limitation Approach characterizes disability as an individual’s capacity to perform a set of simple actions, and combinations of simple actions. The focus on basic actions aligned well with the
clinical focus of the rehabilitation therapist in the assessment of patients to assess ‘independent living’ requirements, such as self-care, housework, taking care of children, shopping, managing medication, and so on. Because these judgments are of great clinical importance a wide range of clinical instruments have been development to assess functional limitations – perhaps the best known of these is the Functional Independence Measure (FIM). The underlying rationale was that, as it is not feasible to assess work capacity directly – given the wide range of different capacities required by different jobs and job expectations – a direct assessment of those basic activities that are presumptively required for any job would give a sufficiently accurate picture of work capacity and employability. On the basis of functional capacity information, in short, the disability assessor would be on firmer grounds when he or she inferred work capacity.

In many OECD countries, disability assessment utilizes both the Impairment and the Functional Limitation Approaches, sequentially. The Impairment Approach is used as a screening tool to distinguish between applicants with very severe impairments –blindness, deafness, tetraplegia, and severe intellectual impairment – who are assessed immediately as being unable to work, and so to qualify for disability cash benefits. The remaining applicants with less severe or more complex impairment profiles would then undergo a second more subtle assessment process using functional capacity assessment. This two-stage process has the advantage that, in light of general economic or demographic changes, the policymakers can adjust the rate of successful applications by manipulating the criteria at either stage.

From an administrative point of view, both of these Approaches are attractive because they are relatively inexpensive to use, and appear to yield determinative (and reliable) judgments. In particular, the commonly-used Impairment Approach is viewed as intuitive and simple, and relies on objective and reliable medical information that can be evaluated by a trustworthy medical professional. For its part, the Functional Limitation Approach, although more time-consuming and therefore more costly, is also intuitive, in the sense that if a claimant lacks the capacity to perform basic activities such as sitting, standing, reaching, remembering and concentrating, it is extremely unlikely that he or she would be able to perform most any job.

Nonetheless, both Approaches have been severely criticized. The Baremas approach in particular has been the focus of countless critiques that point out that the inferred level of ‘disability’ is often utterly arbitrarily
set, with the result that the validity of the approach is highly questionable. Moreover, several studies have questioned the reliability of the approach, citing questionable results from evaluations of inter-rater comparisons. The Functional Limitation approach has been similarly criticized on these technical grounds.

In the end, however, both Approaches suffer from the same problem – they do not assess disability as such, and much less work capacity, but some weakly-correlated proxy of it. Medical evidence about impairments, although certainly relevant for a determination of work capacity, ignores the impact of functional limitations on the performance of basic activities. But when this additional information is added in – assuming that unsolved technical issues can be resolved – the results still ignore the often determinative impact of the working environment on work disability.

Both Approaches, in short, ignore the vitally important complexity of work capacity, and in particular the widely acknowledged fact that two people with the same health condition and array of impairments may profoundly differ in their capacity to perform the same job, if the circumstance of the job, and in particular the level of accommodation and worksite accessibility, available to the two individuals is different. Work capacity – and the phenomenon of disability in general – is not the same as either impairments or problems in the capacity to perform simple actions. Inferring working capacity from information about impairments and functional limitations alone is therefore inadequate.

The final Disability Approach has been proposed as a way of realigning disability assessment procedures so that they more validly and reliably capture the construct of interest – work capacity. Although actual country-level examples of the Disability Approach are few in number, it is relatively clear what such a procedure would involve. The Disability Approach directly assesses work capacity, rather than indirectly inferred from a proxy impairment or functional capacity assessment. Direct assessment gives equal consideration to all determinants of disability – medical, functional, environmental and personal. The Disability Approach, at least in theory, would be fully individualized and based on direct evidence. It would provide valid assessment directly on evidence, rather than an approximation by inference.

The Disability strategy assumes that the object of the assessment is a person-environment, interactive outcome rather than an intrinsic feature of the person (impairment or functional capacity). Disability assessments must be context-dependent rather than global; that is, they must involve an
assessment of work capacity rather than disability overall. Focusing on the environmental context, however, does not mean that only explicit determinants of work performance are involved, since, in real terms, issues such as the availability of public transportation, childcare support and other environmental issues are also highly predictive of work performance. Finally the Disability Approach would assemble information about the non-health aspects of the individual person: education level, skills, ambitions, temperament, life goals, and so on.

In practice, the Disability Approach would require assessors to take into consideration the extent to which the claimant, if provided with rehabilitative or other services, could return to a previous job or find a new job, as well as the extent to which this would be facilitated by changes to the workplace that would make it easier, or possible, for the individual, with current and predicted levels of capacity, to actually perform the work requirements.

At work here, conceptually, is the model of disability operationalized in the World Health Organization’s *International Classification of Functioning, Disability and Health* (ICF) (WHO, 2001) – namely, the outcome of an interaction between features of the individual (impairments, functional capacities) and the person’s environmental context. On the face of it, this is also the operating conception of disability in the UN CRPD, where persons with disabilities are stated to include “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” The Disability Approach, in short, relies on this conception of disability, highlighting the need for assessors of work capacity to evaluate both the environmental determinants of successful employment (workplace and working conditions) as well as the personal determinants (impairments, health conditions, skills and capacities).

*Work capacity, the ICF and work participation statistics*

The ICF is widely recognized to be the only internationally accepted classification and model of functioning and disability that embodies the modern consensus conceptualization of disability. As such it is the only available tool for operationalizing disability, and related notions such as work capacity, in a manner that allows for the collection and analysis of interna-
tionally comparable disability statistics. The ICF is therefore not only the optimal reporting structure or platform for work participation statistics, it is the only available basis for the statistically construction of integral scales that make it possible to assess and measure work capacity. The ICF, in short, makes the Disability Approach feasible.

These practical considerations aside, it is important to notice the fundamental shift in focus that the ICF makes possible in our understanding of work capacity. As mentioned at the outset, traditionally work capacity assessment has been entirely a matter of determining levels of incapacity – what the individual cannot be expected to do. By shifting the focus from impairments and functional limitations to a true and complete conceptualization of the determinants of disability, the ICF points in a very different direction. It allows us to determine, assess and record information about available and potential work capacity – what the individual can do in a work context, or, with approach supports – both personal and environmental – what the person could be expected to do in a work context. This shift from a ‘deficit’ to an ‘asset’ focus resonates with the conclusion of Burkhauser et al., and disability policy analysts in general, that the aim of employment-based disability policy should be to enable people with disabilities who wish to work to do so, rather than to label them – often permanently – as ‘unemployable’.

Arguably, the approach to work capacity that the model of functioning and disability that ICF implies would facilitate a shift in our default picture of persons with disabilities as passive recipients of benefits to that of individuals who, with relevant supports, are or could become participating members of the workforce. By requiring the co-equal evaluation of both assets and deficits, the ICF can move our policy attention from people who are at risk of experiencing restrictions in work participation – identified in terms of their health conditions or impairments – to a profile of potential targets of intervention that would increase the likelihood of expanded levels of work participation. Finally, the ICF and the Disability Approach would underscore the importance of a wider disability policy that links supportive social responses more directly to relevant information about the experience of disability garnered from assessment.

There is, of course, much work that needs to be done to realize this potential. Few countries of the world have explored the possibilities of using a Disability Approach to the evaluation of work capacity. Extending the range of relevant information beyond the relatively easily accessible health data to include information about the person’s overall work context
is a costly requirement. If nothing else, as the few attempts to implement a Disability Approach (e.g. in Taiwan – see Chiu et al., 2013) have demonstrated, it is essential to rely on a multi-disciplinary team of assessors – moving beyond the health professionals to include social workers and other professionals able to provide information about environmental context.

There remain as well, challenges concerning the comparability of work capacity information across sectors and domains – required to ensure continuity of assessment to facilitate work integration – and the convergence of these data toward a social policy that acknowledges the need to collect information both about functioning assets and deficits. As well, strategies to adapt work environments towards the goal of full work participation need to be designed and implemented. Although obviously these social goals are not solved by good statistics, at the same time, as always in social policy, they are unachievable without good statistics. Having a conceptually adequate understanding of disability – one that aligns our best science with our highest normative aspirations of human rights – is, however, the essential first step on this long road.

References


The two constructs of disability, the International Classification of Functioning, Disability, and Health (ICF) and the Convention on the Rights of Persons with Disabilities (CRPD), have similar but different perspectives on disability. The ICF is a health related classification and used especially in the rehabilitation sector whereas the CRPD is an international juridical contract. The signatory states are obliged to implement it regarding justice for disabled people. Consequently, they follow different goals and they are used in different ways. Their contribution to the realization of the right to work will be explored in this essay.

1. Introduction

Disabilities were considered as a problem of the individual for a long time. The UN Convention on the Rights of Persons with Disabilities (CRPD)\(^1\) establishes a changed view of disabilities: It is not people with impairments who are disabled, but rather they are hampered by barriers in the environment. This new concept of disability provides a socio-political impetus to conceptualize disability differently and to keep this in mind for the further juridical development and for societal practices.

The concept of disability that includes social barriers has become accepted internationally. Not only the CRPD but also the World Health Organisation (WHO) includes barriers in the definition of disability. In its understanding of disabilities and impairments, the CRPD is essentially based on the International Classification of Functioning, Disability and Health (ICF) of the WHO.\(^2\)

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1. In this essay the terms: the CRPD or the Convention will be used. The CRPD was adopted by the general assembly of the United Nations in New York on the 13th of December 2006. It got into force in Germany on the 26th of March 2009.
Referring to both conceptualizations of disabilities it is important to be precise how they differ from each other. Therefore, in this essay it will be explained critically with reference to the constructions of disability and normalcy in the ICF and to the Human Rights Model of Disability. The leading questions being discussed are: How is disability construed in the ICF and in the CRPD? How do these conceptualizations contribute to the realization of the right to work?

As a Human Rights Treaty, the CRPD contains two instruments being relevant for participation in the labour market: the principle of accessibility and the individual right to reasonable accommodation. On the contrary, the ICF is an internationally recognised classification system various occupational groups in the health care sector work with. Therefore it provides a common language for describing the state of health and disabilities and the associated conditions in order to improve communication between professionals, research, policy, and the public, but it does not offer any instruments regarding inclusion in the labour market explicitly. Whether the ICF can be regarded as having implicit effects will be tackled shortly. As a conclusion both conceptualizations will be estimated regarding their importance for the right to work and in an overall perspective for an inclusive society for all.

2. Classifications as powerful instruments

Classifications have a long tradition in the health sector, in the juridical field decisions are made with reference to medical norms and standards (Hirschberg 2009: 21ff, 69f). Therefore classifications are important instruments being influenced by societal perspectives on disability and construing or setting societal standards of disability. Classifications are not only to be seen as “Properties of mind and standards, as ideal numbers of floating cultural inheritances” but as having “material force in the world” (Bowker/Leigh Star 2000: 48). Concluding it has to be acknowledged that classifications are powerful constructs as Gregory explained for definitions in the context of disability and rehabilitation (1997). Regarding the ICF its conceptualization has to be estimated in the light of its development as well as the influence and different interests of the various players: the collaboration centres of the WHO, task forces, networks, NGOs, and consultants (WHO 2001: 254ff).
3. Conceptualization of Disability in the ICF

In the light of the CRPD it is crucial to make the participation of disabled persons a priority (Hirschberg 2010). The CRPD understands the term disability as the result of the interaction between persons with impairments and the psychological and physical barriers they face in their environment and society (Art. 1). Its definition of disability is based on the acceptance of the term as outlined by the ICF (Hirschberg 2011). If one applies the standard of participation as outlined in the CRPD to the further development of the ICF, environmental factors become significant because they can be either supportive or obstructive to disabled persons (Wansing 2005). Consequently, environmental factors are a decisive component in disability assessment and social conditions should be precisely categorized according to this component in order to improve the classification in terms of its practical applications, for example in rehabilitation.

3.1 Differentiating Disease and Disability

Since its establishment in 1946, the WHO has been tasked with the classification of diseases (ICD). The ICD provides a means of measuring the seriousness and frequency of diseases worldwide and can be used for various purposes; for example, to collect data for national or international comparison purposes, or to develop measures towards health promotion. After criticism by rehabilitation researchers and the growing international disability rights movement about the amalgamation of disability and disease in the late 1960s and 1970s, the WHO developed the International Classification of Impairments, Disabilities and Handicaps (ICIDH) and adopted it in 1980. The ICIDH was the first to differentiate disability and disease clearly (Hirschberg 2009: 46ff). Its development process to specifically address disability shows that several stakeholders not only proposed, but indeed insisted that the definition of disability should not be limited to its physical dimension (Hirschberg 2006). The impact on the specific population as well as their position within society were also to be taken into account.

Due to a number of points of contention such as the view that disability is a consequence of disease in the ICIDH, the WHO launched a revision process in the early 1990s which resulted in 2001 in the adoption of the ICF. Contrary to the ICIDH, the ICF addresses all populations, even
though it only classifies disabilities and not the individual’s specific abilities (i.e. functioning) (WHO 2001: 7; Hirschberg 2009: 207ff.). However, primarily the ICF remains relevant for disabled people given that their impairments are assessed in conjunction with their social environment. The ICF thus lays the foundations for rehabilitation measures. As such it serves as a benchmark for, for example, the Assistive Technology Guidelines of the Federal Joint Committee in deciding which technologies should be covered by the German national health insurance (GBA 2008).

### 3.2 Disability: no longer a consequence of disease, but the result of the interaction between individual and society

The ICF is the first document taking into account the social environment of the individual. Disability is no longer regarded as a corollary to disease or impairment (as in the ICIDH), but rather as the result of the interaction between different components. It is defined as the negative result of the interaction between the following health components (Fig. 1):

“Disability is an umbrella term for impairments, activity limitations and participation restrictions. It denotes the negative aspects of the interaction between an individual (with a health condition) and that individual’s contextual factors (environmental and personal factors)” (WHO 2001: 213).

Thereby, not only physical, individual and social components in disability are taken into account, but also the private sphere and personal life experiences as well as specific personal barriers or facilitators.

The conceptual changes to the notion of disability date back to the disability rights movement and its demands to remove barriers and social obstacles (as well as challenge negative attitudes towards disabled people): “In our view it is society which disables physically impaired people. Disability is something imposed on our impairments by the way we are unnecessarily isolated and excluded from full participation in society” (UPIAS in: Oliver 1996: 33).
Interaction between components of disability (WHO 2001: 18)

This perspective being known as the Social Model of disability comprehends disability as a product of society (Oliver 1990) instead of perceiving it as a purely individual problem as in the medical system. The WHO has tried to unify these concepts: the medical and the social model within its biopsychosocial model of the ICF (2001: 20).

In my discourse analysis, I found the ICF-model to be somewhat imprecise and suggest that this model should be enlarged so that all components interact with each other. Therefore, I added the arrows in order to highlight the interdependencies between the health condition and the environmental and personal factors. So, in the revised model all components interact with each other (Fig. 1; WHO 2001: 18 modified according to the results of my analysis of the ICF, Hirschberg 2009). It can be used to understand chronic diseases, as well.

3.3 Analysis of the Conceptualisation of the ICF

Due to the fact that the ICF belongs to the Family of International Classifications it is a powerful, multipurpose instrument designed to be used in an international context, in different disciplines and for various purposes. Therefore it is important to analyse how disability is conceptualised in the ICF; not only by the definition but throughout the classification.
By integrating the medical and the social model of disability in the ICF the WHO attempts to achieve a synthesis of these opposing models with the “biopsychosocial” approach. Regarding the conceptualization of these models disability is viewed in different ways: one centres on the individual body and the other on the social environment. To analyse the conceptualization of disability in the ICF the analysis of this synthesis shows an uneven integration of both models: the individual perspective on disability is much stronger, more differentiated in detail than the perspective on environmental factors of the physical and social environment (Hirschberg 2009: 234ff, Imrie 2004). Viewing the biopsychosocial approach critically, internal ambiguities can be identified (ibid. 289ff).

Examining how far the different understandings of disability relate to a one-dimensional or to a pluralistic conception of normalcy, to normative (social, medical or juridical) norms or to normalistic (statistically based) norms both are found in the ICF. The former is referred to as protonormalistic, the latter as flexible-normalistic (Link 1999: 77ff). In distinguishing different conceptions of normalcy reference is made to the theory of “normalism” that has been developed by the German literary scholar, Jürgen Link (1999, 2004). As a result of the discourse analysis the ICF represents a pluralistic understanding of disability and normalcy on the grounding of a clear normative dichotomy between disability and functioning (Hirschberg 2009: 299ff). The heterogeneity of the relationship between disability and normalcy is not only perceptible in this dichotomy but in the flexibility characterising the spectrum between disability and functioning in the ICF, as well (ibid. 302ff). For example, there are features of a grey area between severe and light impairments, and furthermore from light impairments to “superhigh” functioning. The transition zone in the ICF between normalcy and abnormalcy is identified by risks through disabilities, construing abnormalcy as a risk area of denormalisations (Link 2004). According to Link’s theory of normalism disability and normalcy are conceptualised as a flexible normalist differentiation on a protonormalist basis in the ICF (for the detailed comparison Hirschberg 2009: 304).

As a conclusion, the different constructs of disability in the ICF have to be understood recognising the historical development of conceptualizations of disability. The diversity of voices in the lines of discourses in the ICF reflects the heterogenous conceptualization of disability: especially regarding biomedicalisation, capacity and participation (cf. for a critical analysis of biopolitics Foucault/Sennelart 2010). The ICF as a classification is not only a product of a discourse of influential players but it consti-
tutes and construes the notion of disability, as well, as a practise. Hereby, disability is constructed as societal reality – in the light of the analysis of the biopsychosocial approach as a synthesis of medical and social model in the ICF it is decisive how the ICF is employed practically: whether for the identification and reduction of barriers or for a medicalised, individualised view and treatment of people with disabilities. The ICF should therefore be applied to facilitate the participation of disabled people in society and thereby promote the goal of the CRPD. This is relevant for the application of the ICF in different disciplines and for various purposes.

4. Conceptualization of Disability in the CRPD

Human Rights are an analytical instrument and normative fundament for politics as I will explain for the CRPD.

4.1 Disability Rights as Human Rights

Disability Rights are Human Rights – why is this so important to emphasize?! Considering the long shadow of history with regard to the participation of disabled people in German society, especially the shadow of the national socialist regime’s mass murder of disabled people, the CRPD is an important tool against the discrimination of disabled people. With the CRPD as international and national law crimes as the systematic murder of disabled people by the national socialist, being euphemistically called “euthanasia”, should be prevented.

By the ratification Germany as state party is obliged to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability” (Art. 4 Para. 1 CRPD). A lot of different measures are linked with the duty to implement the CRPD, including legislation, and “to refrain from inconsistent practices with the … convention and to ensure that public authorities and institutions act in conformity with (it)” (Art. 4 Para. 1d CRPD) as well as to take appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise (Art. 4 Para. 1e CRPD). Article 4 is the core of the CRPD, explicitly entitling the obligations of the signatory states.
Considering the importance of these obligations in the light of the long shadow of historical neglect, ignorance and NS mass murder the meaning of the state’s duties is definitely clear: “to promote, protect and to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities” (Art. 1 CRPD). Hereby, it is clearly stated that all disabled persons, without distinction, have the same rights. There is no differentiation between persons with minor or severe impairments, nor any exclusion of persons regarding the intersection with other categories of difference as race, class, gender, religion, age or any other status (Preamble Cl. p CRPD). Thus, regarding the debate about whether all people with all kinds of disabilities can be included in the German regular school system or whether distinctions shall be made according to severity of impairment, there is neither a juridical fundament in the CRPD, nor in any other human rights treaty. Nevertheless, the discussion concerning individual capacity, productivity or effectiveness is not new and it is necessary to be alert and vigilant that no one is judged or excluded because of little capacity (Foucault 1973, Foucault/Sennelart 2010). In practice it is decisive to focus on the depletion of barriers, the increase of accessibility and the provision of individual reasonable accommodation with the aim not only to have but to enjoy human rights.

Similar to the establishment of a memorial of the mass murder of disabled people by the national socialists in Berlin, established as late as 2014, the CRPD was developed very late compared to other human rights treaties, as the treaties to prevent discrimination against women or children, or the Convention on the Elimination of All Forms of Racial Discrimination. Disabled people were and maybe still are a forgotten group, often not being regarded as part of human diversity. Without the international disability rights movement the CRPD would not have been developed, and disabled persons would still not be acknowledged as subjects with legal rights but as objects of welfare, health and charity as they were before (Degener 2016, Sabatello 2014). This paradigm shift is backed by human rights principles, especially focusing on non-discrimination, equality of opportunity, and explicitly the “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” (Art. 3d).

The CRPD contains no new but the same rights as the other Human Rights Treaties, as for instance the Covenant on Civil and Political Rights and the one on Economic, Social, and Cultural Rights. Yet, it adds a new perspective on these Human Rights: assisted self-determination of people
with disabilities (Hirschberg 2017). This perspective is supported by the instruments of accessibility, reasonable accommodation and universal design (Art. 3f, Art. 9, Art. 2 Sub-Para. 4 and 5).

Now, with the CRPD there is a clear outline of state obligations and societal responsibility, but still the challenges of how to change respectively improve the living conditions of disabled people with the implementation of the CRPD have to be faced. With the CRPD the rights of disabled people can be claimed but it will be a long way before disabled people may enjoy the rights in everyday life without any discrimination.

4.2 Discrimination on the Basis of Disability

In the light of the CRPD and, also, in the light of its disability conceptualisation, social legislation and any legislation that is concerned with disability have to be re-read and re-interpreted. This is a process that started with the ratification of the CRPD and will take a longer period. Discrimination on the basis of disability has to be prevented immediately; the right to non-discrimination has to be observed immediately, if it is self-executing (Art. 2 in conj. with Art. 5 on equality and non-discrimination). Nobody may suffer discrimination on the basis of a disability, as is defined: “For the purposes of the present Convention, ‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation” (Art. 2 Sub-Para. 3).

In concrete terms, the issue is not the discrimination on the basis of somebody being a woman or a man or achieving low performance, but on the basis of the particular disability. The denial of reasonable accommodation as a discriminatory element is emphasized here, and thus, its significance has to be strengthened in legislation in those states having ratified the CRPD.
The CRPD defines, on the one hand, who is meant by the term *persons with disabilities*: “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” (Art. 1 Sub-Para. 2). Thereby, it also characterizes impairments as relating to individual, long-term and different aspects of the body. Furthermore, it states that a disability is in principle the result of an interaction between two components: an impairment and a barrier. Only the result of the interaction is taken to be a disability: being hindered in one’s participation in society (Hirschberg 2011).

This understanding records the daily experiences of disabled persons who are not disabled by virtue of their impairments but by the interaction between the barriers existing in society and their impairment. This leads to the conclusion that people cease to experience disabilities as soon as the barriers in society are removed. Thus, the social conditions are crucial and affect the opportunities of disabled persons to be able to participate in society as far as education, work, accommodation, culture, health, politics, etc. are concerned.

The Preamble of the CRPD states that the concept of disability is “constantly evolving” (Preamble Cl. e). These explanations show the concept of disability is open: it supplements the main emphasis: the interrelationship between impairments and barriers, which can lead to participation being restricted. A distinction is also made with respect to barriers, which can be “attitudinal and environmental” (ibid.). This refers to various barriers of the physical, institutional or technical environment but also to prejudices or stereotypes which exist individually or can be influential in society (also Art. 8). The different forms of barriers are explained in terms of accessibility; they can include restrictions on “access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas” (Art. 9 Para. 1).
5. Embodiment of Intersectionality in the CRPD and in the ICF

The WHO points out the ICF does not contain an intersectional perspective:

“The classification does not cover circumstances that are not health-related, such as those brought about by socioeconomic factors. For example, because of their race, gender, religion or other socioeconomic characteristics people may be restricted in their execution of a task in their current environment, but these are not health-related restrictions of participation as classified in the ICF” (WHO 2001: 7).

For sure, categories of difference are no reason for a restriction of health but they have implications for one’s participation restrictions. Therefore, especially the intersectional disadvantage or disablement should be discussed as it could be relevant regarding the broader assessment of disability and functioning of a person (Campbell 2009, Crenshaw 1991).

In contrast, the CRPD advocates an intersectional perspective and relates disability to further categories of discrimination. A catalogue of preliminary provisions precedes the agreements of the States Parties: the Preamble. This illustrates the purpose of the CRPD. The intersectional discrimination experienced by disabled persons is emphasized, against whose background the legally-binding articles are to be understood and implemented as legislation: “Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status” (Preamble Cl. p). Even though the Preamble is not legally binding, it is to be applied to all articles of the CRPD.

Explicitly, as a human rights principle (Art. 3), the equality of women and men is emphasized. This human rights principle is part of all human rights treaties. Furthermore, the CRPD emphasizes the possible multiple discriminations of disabled girls and women (Art. 6, Preamble Cl. q). The state must take measures to protect against discrimination, in particular “to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention” (Art. 6 Para 2, also in the Preamble Cl. q). The gender-specific aspects are also pointed out expressly in the provisions regarding health and the freedom from exploitation, violence and abuse (Art. 16 and 25). These
multiple emphases can be particularly attributed to the involvement of disabled women in the development process of the CRPD (Arnade 2010).

The relevance gets clear by the difference between the passive possession of human rights and the active exercise of rights (the access to the right): If women with disabilities are not protected against experiencing discrimination the right to non-discrimination remains unexercised (Art. 5).

6. The relevance of the ICF and the CRPD for the right to work

Persons with disabilities (in conjunction with further categories of difference, see above) do not have adequate access to the labour market, neither historically nor currently (Pieper/Haji Mohammadi 2014). How can they acquire this? What do they need in order to be able to participate in the labour market without discrimination? Which barriers do they experience in a society that is governed by the underlying focus on performance and efficiency, as well as in conjunction with the interconnected axes of difference of ableism and other dimensions of discrimination (Crenshaw 1991, Campbell 2009)?

According to the CRPD, disabled people are to be considered as subjects with the same human rights as everybody else. This also includes the right to work on an equal basis with others and the participation “in a labour market and work environment that is open, inclusive and accessible to persons with disabilities” (Art. 27 Para. 1).

6.1 ICF and Access to the Labour Market

Regarding the right to work the ICF has to be acknowledged in two ways: On the one hand it can be judged as a rehabilitation-related classification being employed to support disabled people returning to work by classifying their disability (Post et al. 2006, Heerkens et al. 2004). This application is relevant for all medical and rehabilitation experts and users of the ICF, relating it with the state’s duty to fulfil the right to work according to the CRPD and the necessity of health professionals promoting this in their daily work. On the other hand the ICF contains of work related items in the common list of the components activity and participation but does not tackle the issue of the right to work concretely (WHO 2001: 165f). Sum-
ming up the ICF’s relevance to access to the labour market the main focus is raising awareness in the use of the ICF for this goal.

6.2 CRPD and Access to the Labour Market

The CRPD provides two instruments to promote participation in the labour market: The significance of the human rights principle of accessibility (Art. 3 and 9) and the legal instrument of “reasonable accommodation” (Art. 2) will be elucidated. These instruments are applied to the right to work focusing the human rights principles of participation and inclusion. Which specific obligations do employers have if they have to provide reasonable accommodation for disabled employees? Which obligation is placed on the state with respect to the rights of disabled persons with regard to their individual right of non-discrimination (Art. 5)? According to the principle of accessibility, the state is obliged to systematically create the conditions for an accessible labour market in society. These two instruments act in different ways, but can be used together effectively.

6.3 Access to the Labour Market for Persons with Disabilities

Disabled people are confronted with various barriers concerning their working life. This is similar in Germany and in other developed countries (WHO/World Bank 2011). Although the German legislation offers different measures to reduce discrimination against persons with disabilities in education and vocational training, their participation in the labour market is still limited (BMAS 2016: 160f.). Therefore, the unemployment rate of people with a severe disability was about 13.4% in 2014 (BMAS 2016: 161). To improve participation of disabled people in the labour market, social and labour market policy instruments, such as wage subsidies, assistance in working life, or support by assisting services could be applied. All of the instruments should help to overcome the barriers to the labour market in individual cases. Nevertheless, for most disabled people their wish remains unfulfilled to be employed regularly. Instead, many are trained in special vocational training centres, sheltered workplaces and vocational rehabilitation centres and, thereby, have a relatively low income (BMAS 2016: 160ff.).
The reason for the gap between legislation and societal practice are socio-psychological, institutional and structural barriers. Concerning socio-psychological barriers, often, employers still have a broad range of prejudices and are partly focused on assumed deficits. In many cases, neither are employers prepared for inclusion nor is this issue considered as strategically necessary. As a result, disabled people are confronted with discrimination against them in job application procedures and in workplaces. From an institutional perspective, barriers often exist because the workflow is not adapted for disabled staff members, and some colleagues avoid being in contact with them. The reason for these incidences could be found in too little awareness of the range of possible employment, the efficiency and the toughness of disabled people. Often, there also is a lack of information about possible assistance, facilitators and financial or personal support for employers. The structural barriers could be identified in the structure of the regional labour market, the difficult situation of the labour market as a whole and their impact on the employment possibilities of disabled people (Kardorff et al. 2013, BMAS 2016).

6.4 Two Instruments for Participation in the Labour Market of the CRPD

While accessibility is a structural means towards achieving full and effective participation in society on an equal basis the instrument of reasonable accommodation is directed at individuals (Art. 9 and Art. 2). Both are used for the objective of the CRPD, to promote equality of disabled persons with respect to non-disabled persons and to prevent discrimination (in conj. with Art. 5).

6.5 Accessibility as a Structural Principle

Accessibility is already widespread through the efforts of the disability rights movement; it has to be implemented structurally in all areas of life, such as access to the labour market and also in the education system and healthcare, for instance. This requires both a change of awareness in society, as well as a short-term, medium-term and long-term plan of measures by the state.

The human rights principle accessibility (Art. 3) goes along with a wider understanding of accessibility in the sense of universal design
(Frankenstein 2018). In detail Art. 9 explains which measures States Parties have to take “to enable persons with disabilities to live independently and participate fully in all aspects of life” (Art. 9 Para. 1). This means all state institutions are obliged to take suitable measures “to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public” (Art. 9 Para. 2a). Furthermore, the state has to ensure private entities that provide public facilities and services “take into account all aspects of accessibility for persons with disabilities” (Art. 9 Para. 2b). Both public and private institutions are therefore called upon to implement accessibility though private entities only indirectly via the state (Welti 2012, Gould et al. 2012).

The measures to create access to the public domain include suitable technical, animal or personal assistance for blind or visually-impaired people, professional sign language interpreters and further forms of simplified communication and information (Art. 9). The obligation of the state to create comprehensive accessibility derived from Art. 9 alludes the structural responsibility for the self-determined, independent participation of disabled people in society by taking the measures required in each case. The implementation of this structural principle of accessibility can be illustrated by means of a social services office whose structural design is accessible to all clients, as well as to people with different impairments being employed there.

6.6 Instrument of Equality: Reasonable Accommodation

Reasonable accommodation is subject to the following conditions: It must be “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (Art. 2 Sub-Para. 4). The characteristics are:

• the necessity of an accommodation for the disabled person in a specific situation,
• a proportionate burden for the institution (state, employer or similar) providing the accommodation
and with the objective of being able to exercise all human rights and fundamental freedoms on an equal basis with others.

Examples include the necessary provision of an individually-adapted computer mouse at the workplace having to be provided for a disabled employee but may not consist of disproportionately expensive and unreasonable material. A further example would be the provision of a sign language interpreter for a deaf employee or – as an alternative – the provision of a sign language course for colleagues as a measure to create accessibility.

Reasonable accommodation is approved on a case-by-case basis to ensure equality. It is an integral part of individual rights such as the right to work or to education (Art. 27 and Art. 24). Therefore reasonable accommodation must be made exactly for the needs of an individual in the workplace or in the education system in order to ensure that the right to work or to education can be realized. The instrument of reasonable accommodation is closely linked to the principle of equality and non-discrimination. However, in Germany, for instance, it is sometimes not yet structurally implemented in legislation, especially where employment is concerned. It has to be included in national legislation; the denial of reasonable accommodation has to be expressly stated as an element of discrimination. The state must gradually create the conditions to ensure reasonable accommodation is provided (Art. 5). The implementation is directed towards creating substantial equality and strengthening disabled persons’ protection against discrimination.

Every disabled person has the right to reasonable accommodation so that their workplace is appropriately designed to meet their needs. Reasonable accommodation depends on the individual needs; it is used to overcome barriers in an individual case. It would be sensible to enshrine it in national law as an obligation (Art. 2). As part of the non-discrimination principle under human rights, it is immediately effective and legally enforceable (Lord/Brown 2010).

7. Conclusions

With both being oriented towards individuals, the CPRD is based on but looks beyond the ICF’s concept. The ICF as a health related classification focuses more on the individual perspective and the different components...
of disability than on the environmental factors, i.e. barriers and facilitators. In contrast, the CRPD emphasizes physical and attitudinal barriers much more. While the ICF contains of a categorization system of barriers and facilitators and thereby acknowledges the relevance of the environment regarding disability the CRPD as a Human Rights treaty is a normative instrument disabled people can use to claim their rights. The emphasis of accessibility as a human rights principle and the interdiction of discrimination of people with disabilities are related to the right to participation in the labour market.

Concluding, as both constructs of disability belong to different disciplines, they follow different interests and have different goals. The ICF as a classification in the health and rehabilitation sector is oriented towards disseminating the biopsychosocial approach regarding disability among health professionals whereas the CRPD as a juridical instrument the signatory states have to implement focuses on justice for disabled people. Both conceptualisations are relevant in their specific field, the Human Rights perspective should be leading and acknowledged in the field of health and rehabilitation, as well. Regarding the right to work the impact of the ICF-conceptualisation has not to be underestimated as a contribution strengthening the full and effective participation of persons with disabilities in society on an equal basis with others.
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Conceptualizations of Disability in ICF and CPRD


This article presents the argument that, in capitalist market economies, a right to work must entail a right to gainful employment but that such an individually enforceable right to gainful employment does not exist. It poses the question of why there should be such a right and what the consequences are for a lack of this right for the individual and for society as a whole. It outlines important reasons explaining why gainful employment is an essential component of social inclusion for individuals in capitalist societies and why it also consistently entails the possibility of social exclusion that has occurred in various forms throughout history. The conclusion of the article discusses how this internal contradiction could be mitigated.

These conference proceedings are titled “The Right to Work for Persons with Disabilities” What kind of work does the “right to work” entail? A right to work in the sense of staying busy is not necessary. We are permitted to perform the activities we want to do, such as digging in a garden, preparing a lunch, organizing a meeting, and conducting presentations – assuming we have the material resources and physical skills to do so. But we do not have a legal right to gainful employment. This is true even if it might be enshrined in a state's constitution. It is true that there is legal protection against unfair dismissal. However, there is no individually enforceable right to gainful employment in the Federal Republic of Germany or other capitalist societies, neither for persons with disabilities nor for those without disabilities.

Why should there be a right to gainful employment at all? What makes gainful employment so desirable that it should be deemed a right? Is it in fact desirable? If yes, why is there no legal right to gainful employment in our societies? Finally, what are the consequences of not having this right, both for individuals and for society as a whole? When discussing the right to work, we have to grapple with these tricky questions and start by examining how it affects all people, both those with and without disabilities. The UN Convention on the Rights of Persons with Disabilities already suggested moving the debate beyond persons with disabilities, because it argues the topic with reference to human rights as a whole.
The answers to this issue clearly depend on the significance attributed to gainful employment in our societies and what types of societies are involved. By far, the most prevalent form of gainful employment in our societies is paid labour, in which compensation is provided through wages and salaries. This type of gainful employment says something about the type of society: These societies are capitalist market economies. As such, when speaking of the right to work here, we are talking about the significance that gainful employment, and particularly gainful employment as dependent work, has in a society with a capitalist market economy. It is also about the consequences of not having a right to gainful employment within this society.

This leads right to the topic of this article: Gainful employment between inclusion and exclusion. The purpose of this phrasing is to express the fact that a high significance is attributed to gainful employment in our societies, both for people in relation to themselves and to society, and for societal cohesion. This aspect is contained in the term “inclusion”, which conveys a sense of belonging within society. But the title also addresses the reverse, which is that societies that make gainful employment such a strong focus consistently exclude people from society and this, in turn, undermines societal cohesion. This aspect is encapsulated in the term “exclusion.”

Gainful employment in societies with capitalist market economies includes both of these aspects: They are a central facilitator of inclusion, but dependent gainful employment also entails the potential for and danger of exclusion. The requirement for a right to work, which is a requirement for a right to gainful employment under the given conditions, seeks to overcome this paradox to achieve inclusion. However, significant resistance is to be expected from those who quite literally profit from the capitalist market economy in all its current forms. As such, the requirement for a right to work takes aim at a fundamental problem in our societies. For this very reason, it is both important and justified. We will return to this point later.

First, let us discuss the reasons for the two assertions made above: the assertion that gainful employment is attributed a high importance for inclusion in our societies and the assertion that the societal organization of work as gainful employment always entails the possibility of exclusion. I will start with the following:
A look at the statistics gives us the first sign of the importance of gainful employment. In Germany, it shows that the proportion of employees from 15 to 65 years old relative to the entire population has increased steadily since 2000. In 2015, the employment rate was 73.8%. In 2000, this figure was 65.4%. This does not include the jobless who are seeking gainful employment. These figures do not reveal anything about the extent of gainful employment (the average hours worked is decreasing) or anything about the quality of the employment relationships (limited employment, marginal employment and temporary employment also increased). But they also indicate that gainful employment does not just play an important role in the lives of a large majority of people in this age group. It shows that gainful employment is even on the rise in many areas, especially among women, who are a growing part of the workforce.

Both directly and indirectly, dependent gainful employment is the main source of livelihood for most people once they have left school and completed their initial training. Indirectly means in this case that many social benefits also are derived from earned income. And household members who are not employed themselves still rely heavily on the wages or salary of the head of the household. Since self-provisioning as a means of survival is scarcely possible to any extent in our highly industrialized societies, gainful employment is a necessity for all but those who can live on the interest from their assets.

The concept of dependency in dependent gainful employment involves heteronomy from an employer, be it public or private. The level of heteronomy varies based on the assignment of tasks and organization of work. Professors may hardly be aware of their dependency on an employer, but temporary workers for instance are certainly and intimately familiar with it. Moreover, elements of heteronomy persist, even if they have been internalized by dependent employees and are perceived as a self-imposed obligation or even an incentive to improve one’s achievements. In private companies, the employment of labour and the organization of work are structured to make a profit. Therefore, in addition to the element of het-

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eronomy, they also entail the exploitation of workers. The term “exploitation” may carry a negative connotation, but it has a precise meaning when used in the context of profit-making enterprises.

If necessity, heteronomy and exploitation are, in one way or another, inherent features of gainful employment, why should there even be a “right to gainful employment?” One answer to this question is most certainly because gainful employment is the central source of income. As a rule, however, supporters of a right to inclusion in gainful employment have additional aspects in mind as well. The importance of those aspects often does not come to mind until gainful employment is not accessible, whether this is due to unemployment or because the transition to gainful employment is unsuccessful from the outset.

Marie Jahoda, who has pioneered unemployment research in the 1930s with the study “Marienthal: The Sociography of an Unemployed Community”\(^2\), described these additional aspects later as “latent functions” of gainful employment. They are latent because they mostly operate behind their manifest functions without being noticed. The purpose of the manifest functions is to generate income for the wage earner and a profit for the company.

Jahoda differentiates between five of these latent functions that explain why participation in the labour force is important to people for reasons beyond the income they earn. “It (gainful employment) gives structure to waking hours; it expands the spectrum of social relationships beyond family members and immediate neighbours, which are often highly emotional” (this, in particular, is an incentive for the increasing labour participation of women, besides earning one’s own income and the search for independence, M.K.); “through the division of labour, it demonstrates that the goals and services of a collective transcend those of the individual; it assigns a social status and clarifies personal identity; it demands regular activity”\(^3\). In short, according to Jahoda, participation in gainful employment in societies with a capitalist market economy facilitates what we can call societal belonging and societal recognition. This holds true despite the heteronomy and exploitation that are also a part of (dependent) gainful employment.

To this day, Jahoda's observations from the early 1980s provide important insights as to the importance of gainful employment for social inclusion, though some modifications may be necessary and additions may be appropriate. The nature of the functions in some of the dimensions addressed by Jahoda and in specific working environments has since changed. For example, the time structures of gainful employment are in many cases more fluid, more flexible and, depending on the profession and task, might be even more subject to the employee's discretion; the activities (such as on-call work) are more irregular. Nevertheless, dependent gainful employment, even if organized for greater flexibility, still includes time structuring according to external requirements and specifications. This also allows people to relate and experience their individual working time as part and parcel of societal work time, thereby giving it purpose that goes beyond personal aspects.

There are additional dimensions and aspects worth mentioning, in particular the potential power of employees to resist heteronomy and exploitation, for instance by means of strike. As long as one's own labour power is needed and asked for, this constitutes a source of countervailing power in the company as well as in society as a whole. Those who are excluded from gainful employment do not have this type of countervailing power. The fact that they are not even exploited, as Robert Castel writes⁴, but considered “superfluous” makes them rather powerless.

In each of the dimensions stipulated by Jahoda, it is the inclusion in the socially recognized division of labour which generates the latent functions so positively described by her. However, this division of labour is largely based on the market and entails an imbalance of power between capital and labour. Because of this, inclusion through gainful employment always remains precarious and exclusion is always possible. This brings me to my second point:

*The relationship between gainful employment and exclusion*

The demand to a right to work first arose in the early 19th century. It is underpinned by the concept of the significance of work, which is a rela-

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tively new concept and essentially coincides with the expansion of gainful employment. The reverse of this idea is also a unique experience of social exclusion, which is also associated with the expansion of gainful employment. A brief historical review will illustrate this point.

From antiquity to the late Middle Ages, any work performed to secure basic life necessities was considered demeaning. People of distinction did not have to work and could devote themselves to politics and contemplation, warfare or courtly diversions. This was the first privilege of all rulers.

The value of work did not increase, religiously or morally, until the transition to the modern era occurred. Work, vocation and entrepreneurship were newly sanctified, particularly by the Reformation and Protestantism. The other side of the increase in the value of work was the degradation of those who did not work. If this critique was directed against idle noblemen it could take on a revolutionary direction. However, primarily it was aimed at the “undeserving poor”. The differences between support for the “deserving” poor, who get into dire straits through no fault of their own and are therefore cared for by their community and the “undeserving” poor accused of getting handouts instead of providing for themselves go all the way back to the 12th century. But they have begun to see more real-world effects beginning in the 16th century. Expansion of the money economy destroyed the means of earning a livelihood for many rural people. They left their villages and moved to cities in a search for work and food. But labour markets as we think of them today did not yet exist. Accused of vagrancy while they were begging, they were subject to expulsion or imprisonment. These early jobless people faced the harshest form of exclusion: the deprivation of any rights. They had lost the protection of their hometown and at the same time were considered to be vagabonds and undeserving poor wherever they went. Until the mid-19th century, the “social question” was about the poverty and exclusion of the socially uprooted rural population.  

The relationship between gainful employment and exclusion took on new forms with the introduction of legal regulations that created labour

6 Robert Castel, Die Metamorphosen der sozialen Frage, l.c., p. 28.
markets in the first half of the 19th century. The social question became
the question of wage labour. The poor were now forced to take up gainful
employment. For those labourers who found employment in the rapidly
growing industrial cities, however, this did not mean that they were also
accepted as full members of society. Since the 18th century, only those
who could prove that they owned property were considered full citizens
because their property was to ensure financial independence and therefore
that they would be capable of making independent judgments also on behalf
of the community. This expressly excluded the unpropertied class of
the proletariat from citizenship. 8

Wage labourers also were in permanent danger to become paupers with‐
out any rights, subject to misery and complete exclusion in times of eco‐
nomic crises and unemployment or even just illness or old age. By de‐
manding a “right to work”, workers struggled to overcome these condi‐
tions, aiming to break the dominance of capital over their work and their
lives. 9 By struggling for a right to work, they also fought for entitlements,
i.e. the recognition as citizens.

Whenever we have to discuss the relationship between gainful employ‐
ment and social exclusion today, we do so in a different historical context.
In the roughly thirty years of economic and employment growth and ex‐
pansion of welfare states after World War II, people involved in dependent
gainful employment – wage earning workers, salaried employees and their
families – have been integrated into bourgeois-capitalist societies in a
scope that was previously unheard of. One might say they were socially
included, though this term was not used at the time. Expansion of the
range of rights granted played a crucial role here. Personal and political
rights that were granted to wage earners after fierce struggles in the 19th
and 20th centuries (some of which were then taken away in dictatorships)
were enhanced by the addition of social rights. These rights had to be
fought for from the outset, and the first rudimentary attempts at social in‐
surance in Germany would not have been possible if Bismarck had not
sought to use them to weaken social democracy. 10

8 Robert Castel, Die Krise der Arbeit. Neue Unsicherheiten und die Zukunft des In‐
9 For arguments regarding the right to work, see Robert Castel, Die Metamorphosen
10 “Bismarck, the Reich Chancellor at the time, wanted to introduce the social insu‐
rance laws for the primary purpose of countering the risk of revolution from the

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Great Britain was the country that took a pioneering role in developing modern welfare states after World War II. Shortly after the war, the English sociologist and welfare-state theorist Thomas Humphrey Marshall summarized the purpose of social rights as follows: “By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society. The institutions most closely connected with it are the educational system and the social services.”

To Marshall, it was clear that high labour participation must serve as the basis for this structure of social rights. However, he did not view this as an issue because there was full employment at the time.

With respect to the element of economic security, great importance was attributed to the expansion of social insurance closely associated with gainful employment. In most countries, social insurance systems are based on a shared risk pool of dependent employees because these systems are mainly financed from their incomes (from a precise economic perspective, the employer's contribution in Germany is also part of the wages). French sociologist Robert Castel refers to social insurance systems as “social ownership.” It also provided members of classes who did not traditionally own property with insurance against the risks of income loss inherent in gainful employment due to joblessness, illness and old age. It thereby enabled them to plan their lives beyond day-to-day activities. As such, the social insurance systems are a counterpoint and counterbalance to private property, which had previously served as the foundation for citizenship. This social civil right was the first to make dependent employees citizens of a community.

Nevertheless, there is no reason to idealize the decades following World War II. Though class inequality was weakened, it was not eliminated. Eco-
economic ownership structures were untouched, economic decisions were still made without democratic control, despite (in Germany) co-determination of workers at the workplace. The conventional division of labour between the sexes was even reinforced by welfare state regulations. Unconventional lifestyles and orientations were discriminated against or excluded.

But the risks of social exclusion that were historically always associated with gainful employment seemed to be eliminated. Joblessness was virtually no issue anymore and income inequality and associated poverty were reduced substantially. This period ended with the return of unemployment in the 1970s and then long-term unemployment in the 1980s. Both short-term and long-term poverty also increased again.

Currently, approximately one million people in Germany have been depending on basic social benefits for years. It is more than doubtful if this social assistance enables them to “live the life of a civilized being according to the standards prevailing in the society”, which are the words Marshall used to describe a general function of social rights. These are people who have to report to job centers and are subject to penalties if they don’t even if they no longer have a realistic chance of finding gainful employment. Once again, we now live in a society in which even an increase in employment rates does not prevent poverty from rising as well.\textsuperscript{13} The “working poor”, for a long time unheard of in Germany, have become a widespread social reality.

Not only has the phenomenon of the working poor made a comeback (this includes those whose gainful employment does not take them above the poverty threshold), the phenomenon of social exclusion associated with gainful employment as the reverse side of it is also back, albeit in new forms. After all, those falling by the wayside of gainful employment

\textsuperscript{13} “Despite record employment, 16.5 million Germans are facing poverty or social exclusion – 300,000 more than the previous year,” [“Trotz Rekordbeschäftigung droht 16,5 Millionen Deutschen Armut oder soziale Ausgrenzung – 300.000 mehr als im Jahr zuvor”] wrote the Spiegel online in November 2015 with reference to the Statistische Bundesamt (German Federal Statistical Office) (Spiegel online, Studie Jeder fünfte Deutsche ist von Armut bedroht, 2015-11-05, 10:51 am. http://www.spiegel.de/wirtschaft/soziales/millionen-deutschen-armute-vor-armut-oder-sozialer-ausgrenzung-bedroht-a-1061225.html).

no longer lose their rights like the vagabond in the 16th century and the pauper in the 19th century.\textsuperscript{14} 

In the meantime, unemployment itself has been institutionalized and the unemployed have been granted rights and obligations (“Fördern und Fordern”, “supporting and demanding” is the official phrase in the pertinent German law). For the long-term unemployed who lack any further opportunities in the labour market, this makes it even more clear that there is no more escape from work society. They feel excluded precisely because they are captive in a society with a strong and institutionalized emphasis on employment but fail again and again at becoming gainfully employed, which is what is expected of them.

Poverty also no longer means that the impoverished have no rights. However, social rights lose their inclusive power when the support they guarantee does not enable a culturally appropriate minimum living standard and is also linked to discriminatory conditions.

The long-term unemployed of today, unlike those in the 19th century, do not lose their right to vote. But those who have to deal with difficulties in managing their own lives on a daily basis are not encouraged to get involved in public affairs. We know that an increase in the precariousness of living conditions coincides with a reduction in the willingness of those affected to participate in elections or to be otherwise politically engaged.\textsuperscript{15}

Nowadays, social exclusion does not suspend democracy in a formal sense, it hollows it from the inside out. Being a part of society without participating in it – or, as a pioneer of sociology, Georg Simmel, put it: the “relationship of being inside and outside society at the same time” [“Verhältnis des simultanen Drinnen und Draußen”]\textsuperscript{16} is now characteristic of social exclusion.\textsuperscript{17}

But how did unemployment, precarious employment conditions and increasing poverty make a comeback? And how did this result in the development of exclusion dynamics? A separate paper would be required to ad-

\textsuperscript{14} See Footnote 17.
\textsuperscript{16} Georg Simmel, Soziologie, Berlin (Duncker and Humblot) 1983 [1908], p. 368.
dress these questions. It would have to take into account factors related to globalization, especially the political deregulation of financial markets since the 1970s, the political level of action of the European Union and, last but not least, the tax policies, labour market policies and social policies at the level of the nation-state. Covering this in depth as necessary is not possible here. But one issue needs to be at least briefly addressed, the issue of the dynamics of social exclusion. To characterize these dynamics, Robert Castel uses the image of a “shockwave” that he claims originates at the epicenter of work and extends to the different spheres of societal life.\(^\text{18}\)

The fact that earthquakes at the epicenter of work can extend to the various spheres of societal life is largely due to the close relation between social welfare systems and gainful employment. In most countries, social welfare benefits and services are decreasing for people who are unemployed for extended periods or who find themselves in a precarious employment situation, i.e. when they need such benefits and services most. This increases the risk of them getting trapped in a vicious cycle of impoverishment and exclusion.\(^\text{19}\) At this point it becomes most evident that in the building of social rights that has been erected in Germany and other European countries after World War II one cornerstone is utterly missing: a social right to work, meaning the right to gainful employment.

\textit{Once again: the right to work}

In closing, I want to return once again to the topic at the beginning of this article. I argued that the absence of a right to work reveals a fundamental problem in our societies and that, because of this, the problem affects people with and without disabilities. But what are the consequences? I do not want to speculate about what a society might look like if it democratically organized work in a manner other than that based on capitalist markets. Rather, my goal is to briefly address two suggestions that are already under discussion and that are vastly different in their solutions.

The first suggestion is a universal basic income without conditions attached to it. To me, the intention of the proposal seems to be to circum-


vent the problem of access to gainful employment altogether (and of the inherent tendency of capitalism to produce unemployment). Since, if the universal, unconditional basic income were high enough, there would be no necessity to be involved in gainful employment. In addition to other concerns I have and which relate to the design of such a basic income (seen by some proponents as an alternative to other social benefits), I view the fact that it is an attempt to circumvent the issue of inclusion in gainful employment as one of its major shortcomings. The problem is that it tends to disregard all the aspects of participating in society discussed above which in capitalist market economies will continue to depend on gainful employment. Capitalism, however, would not be questioned by a universal, unconditional basic income, and therefore even mainstream economists and businessmen can be (and actually are) supporters of it.

The second suggestion comes from Anthony Atkinson, the outstanding scholar of economic and social inequality. In his last great work, “Inequality – What Can Be Done?”, which has now become his legacy to some extent, there is a section entitled “Employment and Pay in the Future”. Here he asserted the following: “The state should make an explicit goal of preventing and reducing unemployment and prove its political will by offering all those seeking work a guaranteed public post that pays minimum wage”. As Atkinson goes on to explain, applications for this kind of public post should be voluntary, combinations with part-time work (up to a specific number of hours) would be permitted and a guarantee of employment would not replace other social benefits (including a participation income supported by Atkinson), but would supplement it.

Of greater interest than the details of his proposal is in our context the thrust of Atkinson’s argument. I hold this for three reasons. First, Atkinson recognizes that gainful employment in capitalist societies is of utter importance for social inclusion and at the same time inherently carries the risk of social exclusion due to unemployment and underemployment. Second, he searches for solutions to mitigate this contradiction and convincingly demonstrates that what counts is having the political will to act. Third, the solutions he proposes for securing employment as a right leave enough room for further specification, even in terms of the special require-

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ments and needs of persons with disabilities. I believe the discussion regarding a right to work must proceed along these lines of thought.

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Labour Market Participation of Persons with Disabilities – How can Europe Close the Disability Employment Gap?

by Roy Sainsbury

The disability employment gap is one of many injustices facing disabled people in Europe. The evidence of its existence and its magnitude has been around for over 20 years and yet little progress appears to have been made. This is despite an unprecedented amount of policy activity during this time in individual countries and through the UN Convention on the Rights of Persons with Disabilities, the EU Disability Strategy and the European Pillar of Social Rights. Labour supply strategies have not closed the disability employment gap so there is an argument for new thinking on how to reduce, and eventually eliminate it. The chapter considers a range of policies designed to increase directly the number of disabled people employed in the mainstream and non-mainstream labour markets, such as quota schemes, wage subsidies, job creation programmes, sheltered/supported employment and an expansion of the social enterprise sector.

Introduction

The aim of improving the employment rates of disabled people across Europe has been a repeated theme in a range of major policy instruments from the EU and the United Nations over the last 20 or so years. However, the impact of these has been limited. Despite a large amount of policy activity in all European countries (and also in OECD countries) the gap between the employment rates of non-disabled people and disabled people has remained persistently high. Measures of employment rates vary but the disability employment gap has been consistently around 20 to 30 percentage points over this period.

The Lisbon Treaty (2000) set a target for the employment rate of all EU citizens (including disabled people) at 70% which was increased to 75% in its successor, Europe 2020. Such high levels of employment for disabled people seem a distant hope in 2017 when the rate was only 48.7% (EC 2017). In Europe 2020 the employment rate is one of the principal measures by which its success is meant to be assessed. Further emphasis on improving employment rates for disabled people came in the Convention
on the Rights of Persons with Disabilities (CRPD) adopted by the United Nations in 2006. Article 27 of the Convention contains a comprehensive range of requirements and obligations that countries are required to meet. Its message is a strong one: “States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”. The European Disability Strategy 2010-2020 further reinforces the aspirations of the CRPD with its aim to increase significantly the proportion of disabled people who are employed in the open labour market.

Efforts from the EU to increase broad social rights including employment have continued in recent years. At the time of writing a Pillar of Social Rights for all EU citizens is being developed. It proposes rights to employment support for unemployed people, with a commitment to providing long term unemployed people (who are often persons with disabilities) with enhanced personalised support. The Pillar also establishes a distinct and separate right for persons with disabilities to “services that enable them to participate in the labour market and in society, and a work environment adapted to their needs.” There is however little detail about how governments must guarantee the rights in the Pillar.

In this chapter I will present a simple argument: the evidence of a persistent disability employment gap suggests that new thinking is needed on how to reduce, and eventually eliminate it. I will set the scene by firstly explaining the requirements placed on countries by Article 27 of the CRPD and secondly by summarising what we know about the disability employment gap in Europe and the rest of the world. The next section looks at how a selection of countries in Europe is faring in meeting the requirements of Article 27. In this section I will draw principally on data and analysis from a multi-country European research project on how to improve the active citizenship of disabled people (the ‘DISCIT’ project) which is explained below. This evidence will be augmented by analysis of EU reports on the implementation of the CRPD and work by the Academic Network of European Disability experts (ANED). I will use the example of the UK to describe and analyse the policy ideas in one country aimed at reducing the disability employment gap. The penultimate section sets out some options for tackling the enduring problem of the inequalities in labour market participation of disabled people and non-disabled people through strategies to increase the demand for disabled people’s labour. The
conclusion will make the case that a programme of job creation for disabled people is needed to complement the current suite of policies which is failing to tackle the disability employment gap effectively.

The UN Convention on the Rights of Persons with Disabilities

The UN CRPD was adopted by the UK in 2006 and launched in 2008. It is a comprehensive package of over 40 ‘articles’ that cover all aspects of the lives of disabled people from freedom from discrimination, rights to education, accessibility and mobility, health, independent living and rights to employment. By 2016 the Convention had been signed by over 170 countries.

Article 27 on ‘Work and employment’ sets out a general responsibility on governments to “…recognize the right of persons with disabilities to work…” which is elaborated in 11 more detailed requirements as shown in Box 1.

Box 1: How governments must address the overall requirement of Article 27 of the UN CRPD

<table>
<thead>
<tr>
<th>Article 27 provisions on employment</th>
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<tbody>
<tr>
<td>(a) Prohibit discrimination</td>
<td></td>
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<tr>
<td>(b) Protect the rights of persons with disabilities (i.e. to equal treatment on pay and employment conditions)</td>
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<tr>
<td>(c) Ensure people can exercise labour and trade union rights</td>
<td></td>
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<tr>
<td>(d) Effective access to technical and vocational programmes</td>
<td></td>
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<tr>
<td>(e) Promote employment opportunities and career advancement</td>
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<tr>
<td>(f) Promote opportunities for self-employment</td>
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<tr>
<td>(g) Employ persons with disabilities in the public sector</td>
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<tr>
<td>(h) Promote employment in the private sector</td>
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<tr>
<td>(i) Ensure that reasonable accommodation is provided</td>
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<tr>
<td>(j) Promote work experience</td>
<td></td>
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<tr>
<td>(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes</td>
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</table>

As we can see from Box 1, Article 27 covers a wide and diverse range of aspects of employment. However, the Convention does not include any clear targets or milestones for the achievement of its aims. Nevertheless, as part of the ongoing monitoring of the CRPD governments have been re-
required to submit occasional progress reports to the UN Committee on the Rights of Persons with Disabilities. By 2017 most countries had submitted an initial report although some were completed as far back as 2011 and have not been updated.

In contrast to the CRPD the EU Disability Strategy (2010-2020) does not place obligations and requirements on governments but aims to promote employment opportunities for disabled people indirectly through facilitating better information and knowledge. The Strategy commits the European Commission to “… (provide) Member States with analysis, political guidance, information exchange and other support. It will improve knowledge of the employment situation of women and men with disabilities, identify challenges and propose remedies. It will pay particular attention to young people with disabilities in their transition from education to employment. It will address intra-job mobility on the open labour market and in sheltered workshops, through information exchange and mutual learning.”

Exploring the disability employment gap

Figure 1: The disability employment gap in the late 2000s (OECD 2010)

Employment rates of people with disability are low and have been falling in many countries

Employment rates by disability status in the late-2000s (left axis) and trends in relative employment rates since the mid-1990s (people with disability over those without, right axis)

Data source: EU-SILC 2010

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In this section I will look at two sets of data on the disability employment gap, i.e. the gap between the employment rates of disabled people compared with non-disabled people. Figure 1 is reproduced from an OECD report published in 2010. It draws on data from the EU-SILC survey of 2007 for EU countries and a range of national survey data for non-EU countries.

This diagram is striking for two main reasons. First the difference in the height of the vertical bars demonstrates clearly the size of the disability employment gap in individual countries and across the OECD as a whole (over 30 percentage points). In most countries fewer than 50% of disabled people were in paid employment in the late 2000s. This situation can be viewed as deeply disappointing but the second striking feature presents a possibly even worse picture. The diamonds in the diagram show the ratio between the employment rates of disabled and non-disabled people in the mid-1990s (the pale coloured diamonds) and the late 2000s (dark coloured). For most countries the ratio is lower in the late 2000s compared with the 1990s indicating a worsening comparative situation for disabled people despite as the OECD report notes “…increased growth and employment opportunities in the past decade” (p.50). So, we not only have evidence of the persistence of a large disability employment gap in most countries but also of a failure to reduce it.

Figure 2 presents data on the disability employment gap for the EU countries only based on EU-SILC for 2010 (Grammenos 2013).

Figure 2: Employment rate by disability status and Member State (age 20-64), 2010

Data source: EU-SILC 2010
Even though the data in Figure 2 is three years later than Figure 1 the picture it presents is still the same. Rates of employment for disabled people fell a long way behind those for non-disabled people. However, the diagram also shows the target employment rates for all citizens, including disabled people (the diamonds) which are clearly far higher than any individual country had achieved (Sweden was the only country with an employment rate for disabled people of over 60%).

Having shown the extent of the challenge in addressing the disability employment gap the next section introduces the DISCIT project which allows an exploration of the range of policy instruments that have been adopted by different countries.

The DISCIT project (“Making persons with DISabilities full CITizens”)

The DISCIT project was a large multi-national study that aimed to promote the full and effective participation of persons with disabilities in society and the economy. It ran from 2013 to 2017 (Halvorsen et al. 2017). Participating countries were selected to represent different welfare regimes: ‘Liberal’ (Ireland, Switzerland and the United Kingdom), ‘Conservative’ (Germany, Italy), Nordic (Norway, Sweden) and post-Communist (Czech Republic, Serbia). The project comprised a number of ‘work packages’ which investigated distinct, but interrelated, mechanisms through which full citizenship might be pursued. These included community living, access to and use of social services, assistive technology, political participation, financial structures, and employment. This chapter draws principally on the work package focused on employment. Data was generated in three different, but complementary ways.

First, existing knowledge was collected on policies and programmes to support disabled people into work and on the rates of employment in the DISCIT countries. This showed that the disability employment gap generally remained stable over a ten-year period to 2012. Secondly, life course interviews were conducted with 212 disabled people with a range of disabling conditions from three age cohorts (i.e. people born in the early 1950s, early 1970s and early 1990s). Data were collected on their diverse and changing labour market careers. Finally, 84 key stakeholders and policy experts were interviewed in order to identify problems and opportunities for increasing disabled people’s participation in the labour market.
How are countries addressing the disability employment gap?

At a high level of generality it is possible to distinguish between three principal types of strategy for increasing the employment levels of disabled people in the labour market that reflect the three main stakeholders: disabled people themselves, employers and government. First, there is a range of labour supply measures designed to improve the employability and motivation of disabled people. Secondly there are labour demand policies aimed at changing the attitudes and behaviour of employers. And thirdly, although governments have a role in both these policy areas there are other ways in which they support those already in work (i.e. rather than assisting them to enter the labour market), for example by protecting employment and trade union rights. These distinctions are not necessarily clear-cut in practice as we shall see but they are useful in identifying where governments have focused their policy activity and where there are gaps and opportunities.

Labour supply strategies

Labour supply policies and programmes aim to increase the employability of disabled people to make them more attractive to potential employers and allow them to compete in the open labour market with non-disabled job seekers. They include skills training and education, work trials and work experience, help with job searching, CV development and interview techniques, confidence building and health interventions. In the DISCIT study these were the most common forms of help for disabled people (see further Figure 3 below).

Article 27 of the CRPD devotes nearly half of its requirements to labour supply policy as shown in Box 2.
Labour supply focus in the CRPD

Box 2: Labour supply focus in the CRPD

<table>
<thead>
<tr>
<th>Provisions of Article 27 with a labour supply focus (from Box 1)</th>
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<tbody>
<tr>
<td>(d) Effective access to technical and vocational programmes</td>
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<td>(e) Promote employment opportunities and career advancement</td>
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</table>

Labour supply approaches to disabled people’s unemployment are common and well-developed in many Europe countries. In contrast labour demand approaches are less common.

Labour demand strategies

Labour demand approaches to increasing the employment rates of disabled people tend to focus on anti-discrimination measures, offering forms of financial incentive to employers (such as tax breaks or wage subsidisation), or providing disabled people with financial and other practical assistance in setting up businesses or becoming self-employed. Article 27 of the CRPD refers to these approaches in its provisions, as shown in Box 3, but also places a direct requirement on governments to ‘employ persons with disabilities in the public sector’.

Box 3: Labour demand focus in the CRPD

<table>
<thead>
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</table>

The provisions in Box 3 are interesting in the differences in the language used in relation to the public and private sectors. The obligation placed on governments to provide employment to disabled people is direct and clear, but they only have to promote employment in the private sector. However, a common approach to both these requirements is the application of quota schemes on private and public employers.
Of the EU 28 countries, 21 maintained quota systems in 2015 which fall into three main types: (a) legislative recommendations (i.e. voluntary), (b) legal obligations without effective sanctions, and (c) legal obligations with effective sanctions (EU 2015). The last of these usually means that firms failing to meet the quota (which vary from 2% to 8% for firms with 20 or 25+ employees) are subject to a fine or levy. Some countries have different quota targets for private sector and public sector employers but the latter are not subject to fines or levies. In some countries the fines are redistributed to forms of employment (such as sheltered workshops) or employment support for disabled people. In other countries firms are allowed an alternative way of fulfilling their legal obligations other than directly hiring a disabled person, such as subcontracting work to sheltered workshops, self-employed disabled people, or other firms that employ disabled people. The European Commission (2012) notes that some governments fail to enforce their quota systems and reports evidence that some quota systems fail to generate many jobs (or ‘real’ jobs) for disabled people or that only those who are less disabled are offered work. However, the overall conclusion of the Commission is that quota systems are positive: “Quota systems do not always work as intended and are often not enforced in all countries where they exist. Nevertheless, they appear to have an important side effect, which is that they can be used as a door opener to dialogue with an employer. This should be considered when designing the package of incentives to be applied in the individual country” (EC 2012, p.215).

Employment protection in the CRPD

Although not the main focus of this chapter, which concerns addressing the disability employment gap, Article 27 of the CRPD contains two important provisions that concern protections for disabled people once they enter the labour market. For completeness these are reproduced in Box 4 but not discussed further.
Provisions of Article 27 regarding in-work protection (from Box 1)

(b) Protect the rights of persons with disabilities (i.e. to equal treatment on pay and employment conditions)
(c) Ensure people can exercise labour and trade union rights

This section has reviewed the type of policies and programmes that have been adopted in European countries having the potential for increasing the employment rates of disabled people. This has been done in the context of the UN CRPD because this is the most comprehensive supra-national document regarding employment. For example, its 11 requirements are more explicit than the European Disability Strategy 2010-2020. However, using Article 27 as a framework for discussion leads to the omission of other approaches that do not fit within it. Of these, two are labour demand strategies that are particularly important: the provision of employment for disabled people through sheltered or supported employment and the establishment of social enterprises. These will be explored in more depth later but before that we will consider the evidence for the effects of the wide and varied policy activity that falls under the umbrella of Article 27.

Exploring the effectiveness of Article 27 of the CRPD

In this section we draw on two sources of data. First we report on findings from the DISCIT study and secondly we draw on the progress reports to the EU from the same countries on the implementation of the CRPD.

DISCIT data on effectiveness

In the DISCIT study country reports were commissioned from each of the national research teams. All current policy measures (in 2013) were catalogued according to their relevance to the requirements of Article 27 of the CRPD. In addition, the national informants were asked to carry out an exercise to identify any research or evaluation reports that provided good evidence of the effectiveness of each measure. The findings from this exercise are shown in Figure 3. The dark bars show how many DISCIT countries had policies in place in 2013. The length of these suggests a high
rate of policy activity in most countries. For example, every country had anti-discrimination legislation in place and provisions for reasonable accommodation, and eight countries had policies on the rights of disabled people, access to vocational programmes, career advancement, public and private sector employment, and rehabilitation programmes. The only area where fewer than half of the countries had policies was in relation to trade union membership. This evidence suggests that governments have been taking the employment of disabled people seriously although it should be noted that many of the provisions catalogued by the national research teams had been in place before the introduction of the CRPD in 2008. The UK for example has had anti-discrimination legislation in place since 1995.

The lighter bars in Figure 3 present a different story however. These indicate where there the national teams could find evidence of a policy having a positive impact on the employment of persons with disabilities. It can be seen that evidence of positive impact overall is not common. This is not to conclude that policies are necessarily ineffective in some countries, only that the evidence base is lacking. This is most striking for policies to ensure trade union rights and to promote self-employment – no country had carried out any assessment of the impact of their policies in these areas.

Another noteworthy finding from Figure 3 is that the area of policy where there is the best evidence of a positive impact is on promoting the employment of disabled people within public sector organizations. This is perhaps not surprising. This is the one area of policy where governments can have the most direct impact because they can control their own employment practices.
Figure 3: How DISCIT countries addressed Article 27 (2013 data)

<table>
<thead>
<tr>
<th>Measure</th>
<th>DISCIT countries</th>
<th>2013 data</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Prohibit discrimination</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>b) Protect the rights of persons with disabilities</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>c) Ensure people can exercise labour &amp; trade union rights</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>d) Effective access to technical &amp; vocational programmes</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>e) Promote employment opportunities &amp; career advancement</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>f) Promote opportunities for self-employment</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>g) Employ persons with disabilities in the public sector</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>h) Promote the employment in the private sector</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>i) Ensure that reasonable accommodation is provided</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>j) Promote work experience</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>k) Promote vocational, rehabilitation etc. programmes</td>
<td>4</td>
<td>8</td>
</tr>
</tbody>
</table>

Data source: EU-SILC 2010

Country progress reports on the implementation of the CRPD

In this section we draw on the country reports prepared by individual governments of the DISCIT participants on their implementation of the CRPD (focusing on Article 27). These are varied in their length and depth and have been produced at different times between 2011 and 2015. We also use the UK as a case study of how one European country has committed itself to addressing the disability employment gap in the future.

The country reports of the DISCIT countries demonstrate a wide range of policy activity and some innovation. There are interesting examples of policy innovation and development that might provide useful lessons for other countries. The Czech Republic, for example, has wage subsidisation schemes that are higher for severely disabled people in order to create an incentive for employers to hire them. The Czech Republic also allows employers to count a severely disabled person three times against their quota targets. In Germany the ‘Job4000’ programme which ran from 2007-2013 aimed specifically to place 4000 disabled people into employment through
a mix of incentives to employers to take on severely disabled people, apprenticeship schemes and programmes for school leavers. The scheme exceeded its targets.

The progress reports from some countries mention sheltered and supported employment schemes as ways in which the employment of disabled people can be increased (for example Czech Republic, Germany, Serbia, Sweden) and in some countries there has been increased support for social entrepreneurship and the development of social enterprises (for example in the Czech Republic and Sweden). These types of labour demand strategy will be discussed further in the next section. Noticeably, some countries place an emphasis on increasing the employment opportunities of young people, a group who have suffered particularly badly from the economic downturn that started in 2008 (Germany, Norway, Sweden, UK).

Overall we find a consistent picture of countries engaging in a variety of policy activity but without much evidence of its impact. We now turn to the UK as a case example of recent thinking about addressing the disability employment gap.

How the UK is addressing the disability employment gap

It is not common to find a direct reference to the disability employment gap in the policy documents of European countries. However, in the UK there has been since 2015, an explicit policy aim of reducing the gap, first set out in the election manifesto of the Conservative Party in which they pledged to ‘halve the disability employment gap’ which at the time stood at 32 percentage points. In late 2016 the government published its more detailed plans for how it intended to succeed in this aim in a consultation document titled ‘Improving Lives – The Work, Health and Disability Green Paper’ (Department for Work and Pensions and Department of Health 2016). The ways in which the government proposed to meet its ambitions were a mix of improving the employability of disabled people through greater opportunities for training and work experience, integrating health, care and employment services, enhancing the knowledge and skills of public employment service staff who help disabled people find work so that people receive tailored support, and offering tax incentives to employers to recruit more disabled people.

What is striking about the UK Green Paper is how much of its emphasis is on labour supply responses, which echoes the responses of governments
across Europe as we have noted above. A prominent disability organiza-
tion, Disability Rights UK, made this point in its formal response to the consultation document:

“…the Green Paper repeats the mistake of previous plans in casting the prob-
lem as being largely one of labour market activation rather than the need for a balance of demand and supply side measures.” (Disability Rights UK 2017, paragraph 42)

Unfortunately, the UK consultation exercise was never completed because the Prime Minister, Theresa May called a general election for May 2017, subsequently won by the Conservative Party but with a reduced majority over the Labour Party. The 2017 Conservative manifesto is interesting because it subtly changes the party’s intentions about disabled people’s employment. Importantly the Conservatives did not repeat the commitment to ‘halve the disability employment gap’ but instead redefined their ambitions as follows:

“We will get one million more people with disabilities into employment over the next ten years.” (Conservative Party 2017)

In the UK increasing the employment of disabled people by one million is a very ambitious and possibly unrealistic target. Disability Rights UK (2017, para. 143) referred to official estimates that the UK’s improving economy over the period 2016-2020 would only create 500,000 jobs to argue that even if every one of these jobs was taken by a disabled person then the government’s ambition would not have been achieved.

The situation in the UK is instructive. On the one hand there has been one of the clearest statements by a European government of the nature of the problem as a moral issue. As the Green Paper Improving Lives states:

“Employment rates amongst disabled people reveal one of the most significant inequalities in the UK today… This is an injustice that we must address.” (para. 1)

However, on the other hand, one of the leading disability organizations in the UK casts doubt on whether the proposals in the Green Paper can actually achieve what it sets out to do. Furthermore this doubt would seem well-founded given that there is nothing particularly innovative in the UK government’s ideas.

In this section we have reviewed progress with the implementation of Article 27 of the CRPD and looked in more detail at the UK’s plans to address the disability employment gap. If we combine this review with the evidence on the persistence of low rates of disabled people’s employment
we arrive at a depressing picture, which is reinforced by evidence from the European Commission in a recent progress report on the implementation of the European Disability Strategy (EC 2017). Although it lists a number of positive developments, such as a number of initiatives to promote youth employment, social enterprises and supported employment, there is no evidence presented of any impact on the levels of disabled people’s employment rates across Europe. Rather, it reports that “The employment rate of people with disabilities remains very low at 48.7%.”

Having reached this conclusion, and after our examination of the landscape of policy activity in Europe, it appears justified to suggest that much more attention needs to be given to the demand side of the labour market equation. Two decades of activity have not improved the employment situation of disabled people in Europe and new ideas seem to be lacking.

Exploring the potential of labour demand strategies

In this section attention will be focused on labour demand strategies for addressing disabled people’s unemployment. The reason for this is to explore whether these strategies have the potential to make a significant impact on closing the disability employment gap given that policy activity over the past 20-30 years, which has been mostly comprised labour supply approaches, has failed to do so. To recap, labour demand strategies are those that create a direct route into employment for disabled people rather than merely equipping them to compete for jobs in the open market.

An important distinction can be drawn here between (a) approaches aimed at mainstream employers (in the private or public sectors) using ‘carrot and stick’ (i.e. reward and punishment) measures and (b) strategies for direct job creation such as sheltered/supported employment and social enterprises.

Sheltered and supported employment

The sheltered and supported employment sectors in Europe are complex and confusing, but have features that can contribute to thinking about how to increase disabled people’s employment. Part of the complexity and confusion arises because there are no internationally agreed definitions that we can refer to. A study by the EU in 2015 noted that the term ‘supported
employment’ has a variety of meanings in different countries (2015, p.6) but in general meant “providing support to people with disabilities or other disadvantaged groups to secure and maintain paid employment in the open labour market” (p.34) and comprised five stages: “client engagement, vocational profile, job finding, working with employers, and on/off the job support” (p.41). Typically, companies take on a disabled worker as a ‘supported employment’ placement and receive some financial reward (through wage subsidisation for example, or payments for adaptations) while the disabled person is actively supported by a job coach supplied by the public employment service or a specialist contractor. It is arguable therefore that supported employment schemes defined in this way resemble labour supply strategies rather than labour demand.

The report makes a clear distinction between supported employment and sheltered employment: “Supported employment is not … sheltered employment or segregated employment” (pp.34-35, emphasis in the original). So, sheltered employment is seen as those forms of employment that are not part of the mainstream labour or economic market. They are subsidised, typically offer their workers only ‘pocket money’ or access to social security benefits instead of genuine wages, and provide few if any employment rights (for example against dismissal). Sheltered employment settings (often referred to as sheltered workshops) are generally not seen as temporary places of work on the way to employment in the open labour market. However, in the EU report it is clear from the individual country reports that ‘sheltered employment’ is not always used in this limited way but refers also to forms of transitional, paid work characterised elsewhere as ‘supported employment’. In some countries sheltered employment is seen as a stepping stone to participation in supported employment, but in others they are separate sectors with no planned or expected movement of people between them.

One distinguishing feature between sheltered and supported employment is that generally supported employment is seen as a temporary step on the way to employment in the open market where sheltered employment is seen as more or less a permanent alternative to the open labour market. Sheltered employment effectively creates jobs that the open labour market fails to do.
Social entrepreneurship and social enterprises

Two other forms of job creation, which are therefore clear labour demand responses to disabled people’s unemployment, are self-employment and social enterprises. Self-employment is a form of work that has advantages for disabled people because it gives them control over the type, and hours of work they do. Social enterprises, like sheltered employment, lack a universally agreed definition (which makes comparisons across countries difficult) but can generally be thought of as commercial businesses operating in the open market that serve a social purpose rather than generating private profit for business owners and shareholders. Profits are sought but these are re-invested in the social enterprise to ensure its stability, sustainability and growth. The focus of many social enterprises are on disadvantaged groups such as disabled people (but include young people, ex-prisoners for example) or on deprived areas. They are a growing feature of the economic landscape of Europe: “Recent years have seen a burgeoning interest in social enterprise across Europe, strongly driven by a growing recognition of the role social enterprise can play in tackling societal and environmental challenges and fostering inclusive growth” (European Commission 2015). Typically, social enterprises are allowed some form of favourable tax treatment compared with mainstream firms.

Social enterprises receive resources from a variety of sources, the two principal ones being income from the sale of goods and services, and non-market sources such as government subsidies and grants, charitable donations and in-kind contributions such as unpaid labour from volunteers. Examples of social enterprises that provide employment for disabled people include cafes and restaurants, assembly and packaging in factories, and retail businesses. Some but not all social enterprises aim to advance their workers into the open labour market.

In this section I have focused mainly on two types of labour demand strategy – sheltered/supported employment and social enterprises – because at present they are the most widely used across Europe. Other approaches to boosting labour demand include ‘job carving’ or ‘niche jobs’ and wage subsidisation. The principle of job carving is to select elements of jobs that would be within the capabilities of a disabled person and exclude those elements that are unsuitable. In other words, jobs are ‘carved up’ to create opportunities for disabled people. Wage subsidisation has been mentioned earlier as a way of encouraging employers in the mainstream labour market to employ a disabled person.
It is clear from reviews by the EU that there is considerable policy activity on labour demand responses to disabled people’s unemployment. Unfortunately, consistent and comparable data across Europe are currently lacking about the extent of sheltered/supported employment and social enterprises. However, it is known that both provide employment in addition to that provided by the open labour market. The question for policy makers and other stakeholders is therefore whether they should be further promoted and supported by government, and if so in what ways.

**Conclusion**

The disability employment gap is one of many injustices facing disabled people in Europe. The evidence of its existence and its magnitude has been around for over 20 years and yet little progress appears to have been made. This is despite an unprecedented amount of policy activity during this time at national and regional level in individual countries and at the supra-national level through the European Union and the United Nations.

More clearly needs to be done but there does not seem to be a clear way forward. The past appears to provide no clear prescription for success. As the OECD noted in 2010:

“Higher employment rates of people with disability are not systematically associated with a particular set of employment policies. For instance, higher rates are found in countries with a strong focus on vocational rehabilitation, with a mandatory employment quota, with other employer obligations and incentives or with widespread subsidised employment, but also where none of these provisions are in place.” (OECD, 2010, p.50)

A conservative approach would be to follow the direction of many of the experts interviewed in the DISCIT project and (a) increase resources for current policies for increasing disabled people’s employability, enhancing social security provision and removing barriers to employment and (b) make efforts to ensure their effective implementation. This is an overall strategy that will almost certainly lead to an increase in disabled people’s employment but it is questionable whether such a strategy would achieve the sort of success that, for example, the UK government has set itself. A more ambitious strategy would focus policy attention on the demand side of the labour market equation. Labour demand approaches are essentially interventions in the operation of the free labour market and have always therefore been controversial. However, if we view the disability employ-
ment gap as a manifestation of one form of market failure then government intervention becomes justified. As Anna Lawson has argued “…the shortfall in the dissemination of disability-related information is so great … as to amount to a ‘market failure’” and “…the evidence suggests that employers generally underestimate the potential productivity of disabled people and that they overestimate the cost of accommodations” (2008, p.248).

The aspirations of the UN Convention on the Rights of Persons with Disabilities, the EU Disability Strategy and the European Pillar of Social Rights can clearly form the foundation on which progress can and should be made. The disability employment gap has been too large for too long.

References


Roy Sainsbury


3. Transitions
This article focuses on retaining and restoring the employability of people. This return to work benefits many stakeholders and is a human right related to both the state and to civil society. If a health impairment occurs in the course of working life, regardless of whether at work or outside of work, employers should assist the employees in finding and accepting help and should support service providers – especially institutions insuring against life risks such as illness, work accidents, old age and unemployment. Suitable strategies and methods focusing on implementing the right to work are introduced. Article 27(1)(k) of the UN CRPD establishes the connection to Article 26 of the UN CRPD (Rehabilitation). The article summarizes the essential global criteria for success: Awareness and responsibility of the employer and employee, early prevention of unemployment, comprehensive and workplace-based actions in which all prevention and rehabilitation experts are involved and, in individual cases, effective participation management by qualified consultants using rehabilitation measures. This serves as the basis for the corresponding guidelines of the International Social Security Association (ISSA) and the golden rules of Rehabilitation International (RI) for “paid work” while taking the German legal system into account.

1. Preliminary remarks

This topic is relevant to approximately one billion people with health impairments around the globe. This means that up to 20% of the population of each country is affected by this topic (approximately 16 million people in Germany). Some 80% of all disabilities are not in-born. Instead, they develop during a person's lifetime, predominantly at working age. Many of these people are in fact unemployed due to chronic illnesses and are dependent on other people or on welfare benefits for their entire lives. This data can be found in WHO publications (national report) (www.who.int).

A state that has ratified the Convention on the Rights of Persons with Disabilities (CRPD) must do everything in its power to help the working population get back to their workplace, company or gainful employment after suffering an accident or illness. This is a human right. Article 27 of the UN CRPD (“Work and Employment”) (in Para. 1 Item k) stipulates
that the states shall guarantee and promote the right to work through occupational rehabilitation measures, job retention and return-to-work programs.

Ultimately, the purpose of this legal specification is to retain and restore the employability of employees with health impairments. This includes the efforts to re-training access to those people who are without work, often due to severe disabilities. Article 26(1)(a) of the UN CRPD (“Habilitation and Rehabilitation”) flanks this human right with the note that programs promoted by the state shall be started at the earliest possible stage and based on a multidisciplinary assessment of individual requirements and the capabilities of persons with disabilities. (1)

The “return to work” promotes the productivity of a country, especially if there are not enough specialists or the population continues to grow older, as is the case in Germany. The employers have an interest in keeping their employees healthy or helping them to recuperate. Health service providers such as medical professionals would have to address their patients’ “return to work”. Why do states invest in an expensive health system? Ultimately, all social insurance companies around the world that cover the risks of health, old age and unemployment must make a transition, and not wait until permanent social benefits have to be paid in the form of money. They must provide support in early stages to use all appropriate resources to prevent the sick employee from falling out of working life.

2. Model of success

In late 2013, the International Social Security Association, ISSA in Geneva adopted international guidelines for returning to work to retain employability (www.issa.int). These regulations were drafted together with Rehabilitation International (RI) in New York (www.riglobal.org) and the “International Disability Management Standard Council (IDMSC)” in Vancouver (www.nidmar.ca). The target group of these recommendations is the senior management in all branches of social security (e.g. the members of the ISSA) in order to track suitable goals and take appropriate action. Three success factors that are explained in the aforementioned guidelines are explained in more detail below. (2)

The return goals of the ISSA are based on a 3-stage model that also overlaps with the model in Germany. The first goal is to reintegrate employees with health impairments into their previous working-places when-
ever possible. The second goal is to maintain the relationship with the previous employer/company so that it does not take extensive effort to reintegrate the employee back into working life in another enterprise. After this and after all measures of prevention have failed, everything must be done in order to prepare the unemployed for the inclusive open labour market through measures such as job placements or retraining.

a. Comprehensive approach

A return to work for employees with a health impairment only works if everyone involved inside and outside of the companies starts to help the injured or sick employee to become and remain employable again even while they are still unable to work. Doctors, psychologists or physiotherapists and other medical professions (especially occupational therapists) must continuously track the participation of their patients as a therapy goal and must be reimbursed accordingly. The biopsychosocial model of the ICF of the WHO (see above) provides an important method explaining the interaction of specialist disciplines. This classification instrument only deals with health professions if it is aligned with participation in working life (e.g. if it includes the needs and services for participation in working life. This approach is and continues to be implemented in core sets (e.g. an injured hand). Despite many efforts, including the action plan of the WHO to implement the UN CRPD, which takes a step towards implementation in Article 26 (Rehabilitation), there is still a lack of cooperation between the actors in healthcare and industry and cooperation between WHO and ILO at the international level (www.ilo.int). Similarly, there is not enough cooperation between the Federal Ministry of Health and the Federal Ministry of Labour and Social Affairs here in Germany.

If work conditions do not change, such as work positions that are stressful or put strain on one's back, then all efforts provided through rehabilitation/participation services are inefficient. After all, the effort in these cases is disproportionate to the failure at long-term success. This is why all specialists who deal with employability within and for the company must work together to achieve long-term success according to the company size. This is not limited to healthcare professionals. It also includes experts at companies dedicated to prevention and to the rehabilitation of employees, such as company physicians.
Other specialists include company integration management [Betriebliches Eingliederungsmanagement or BEM] officers (disability managers) who work with employees who are on sick-leave for extended periods as well as occupational safety specialists who are deal with factors that put occupational safety and health in jeopardy. These experts have to contribute to long-term return-to-work success because they are familiar with the work conditions. In Germany, workplace risk assessments are one tool that can be useful in prevention and rehabilitation. All companies are required to conduct these assessments. The health of employees cannot be subdivided into technical occupational health and safety protection under the responsibility of company prevention experts and into personal health problems that HR managers, company physicians or disability managers feel is within their area of responsibility.

Only a liability of an employer to its employees can emphasize the importance of ensuring that the working population is healthy enough to return to work. While this legal mandate does not exist in most of the world, German law requires all employers to implement specific measures to assist employees who have been unable to work for more than six weeks in a given year. This company integration management legislation from 2004 supplements the efforts of employees in rehabilitation to return to work with assistance from their employer. As in virtually every other country in Europe, and some others around the world, the social insurance systems are tasked with implementing rehabilitation services to promote returning the sick or injured to work instead of providing them with life-long financial compensation.

Complete success can be achieved only if both parties, the employers and the social insurance institutions, work together. This is especially true of smaller companies that are often confronted with the task of company integration management. However, every social jurisdiction must find its own suitable incentive system that makes companies, and the employees themselves, responsible for helping co-workers to return to work. Promoting involvement to this extent can also change the obligation of employers into a long-term benefits period, even beyond three years as is the case in Holland. However, interactive collaboration with all social insurance institutions that focuses on getting their insured clients back to work is always important. Both the insured and the companies want social one-stop-shop services. (3)
b. Participation management

In developed countries that have a well-developed social security system, such as those in Europe, the return to work is successful in 80-95% of cases without additional assistance. Healthcare services, including those for rehabilitation/participation, and personal involvement of health professionals, contribute to this high inclusion rate. But at least 5% of the cases, which can be designated as complex cases, require individual participation management to be successful as early as possible. This must be implemented under job-based conditions, be interdisciplinary and have a long-term impact.

Because this individual case management designed to assist employees' return to work is costly in terms of personnel expenses, many providers frequently refuse to provide social assistance. However, approximately 5% of the cases that require participation management create up to 80% of the respective total costs. Incidentally, just 10% of the long-term sick (the company integration management cases in Germany) create approximately 80% of the “sick-leave” days. In order to achieve a return on investment, social security providers should not wait, but should instead act by providing proactive support to employees who are having difficulties returning to work due to a complex health problem. (4)

In principle, experts in this form of participation management specially oriented to participation in working life, meaning it must be closely aligned with the company, are not the traditional health professionals. All attempts in various countries to grant the medical staff an exclusive key role have resulted in unresolved challenges. The rapid pace and tightly budgeted time in every healthcare system does not provide much leeway to deal with the specific working conditions of patients or to speak with stakeholders at the company. Sometimes the “gradual reintegration” tool, which is valuable in principle, suffers as a result. Doctors in Germany use this principle to stipulate how patients can temporarily work less or work differently in spite of their work disability in order to reach their full work capacity again over the long term. (5)

An internationally recognized education program for experts in returning to work was established in Germany in 2003. Several educational institutions provide further qualification for specialists from various professions, including company physicians, psychologists and business economists, with various roles such as a representative for persons with severe disabilities, as personal advisors or as health advisors. The test to
become a Certified Disability Management Professional (CDMP) takes place at the University of Cologne, and is certified by the DGUV, the license holder and responsible parties in Germany. Here, there is a focus on ongoing further education. Of more than 1600 CDMPs (www.disability-manager.de), approximately half work as company integration management representatives at German enterprises or providers for enterprises, including insurance institutions. They all focus mainly on employees returning to work after injury or illness.

The success factors of efficient participation management, i.e. helping the employee return to work using an appropriate cost-benefit ratio, mainly depends on so-called entry criteria that are used to identify complex cases early and to get into contact with the affected persons, employers and doctors promptly. Accordingly, participation requirements oriented to the “return to work” participation objective must be clarified in detail individually. From a methodical perspective, the use of the aforementioned ICF and the approach of combining medical indicators with psychosocial factors, such as the burden of family members that require care or existential worries of the employees, are helpful. These are often critical barriers to returning to work when there is an injury or illness. (6)

c. Participation and inclusion

The UN CRPD mandates that the signatory states do everything in their power to prevent the focus being on the deficits of persons with disabilities but instead on their abilities and individual strengths, regardless of any disability and associated limitations, in order to ensure that they are included and remain in the primary labour market wherever possible. In addition to the healthcare system aligned with working life (see 2 a above), the state must provide suitable educational measures to ensure a right to work, create incentives for companies and, wherever possible, remove barriers that often originate in the minds of the people. The objective must be to organize an economic and social order that ensures that work is a worthy pursuit, even for and by persons with other and differing abilities.

In many countries in Europe, employers must pay a fee if they do not employ a certain number of persons with severe disabilities. In most countries, this budget is beneficial to work participation programs to increase the employment rate of persons with disabilities, including and especially in the private sector. (7) The objective of a society is to ensure the highest

Friedrich Mehrhoff
possible participation rate of persons with disabilities in the mainstream labour market. The UN CRPD only permits the provision of special equipment, such as sheltered workshops like the *Werkstätten für behinderte Menschen* (workplaces for disabled persons) in Germany, in exceptional cases. A variety of offers for job training and for transitioning to the mainstreaming labour market, through inclusive companies or integration companies, provide suitable bridges to participation in paid gainful employment.

Persons with disabilities and their organizations must be involved in all programs and measures because, as experts in their own affairs, they know best who can do what one thing and who can do another. There is demand for abilities that those with chronic health problems have and which require creative thinking to achieve the unimaginable. One example is employing autistic individuals as quality assurance representatives at software firms. (8) Furthermore, there are numerous good examples that can be applied from one country to another at the international level. For example a study started in Germany by DGUV in 2018 to identify best practices models of accessible working places around the world (ask the author of this article for more information).

After the ratification of the UN CRPD, some states implemented close-to-work measures to help employees get back to work. This included the National Action Plan 2.0 (NAP) of the German federal government (www.einfach-teilhaben.de). Many laws from 2015/2016 implemented the objectives and measures in the NAP, including the expanded prevention mandate in the compulsory pension insurance through the Flexible Pension Act [*Flexiretentengesetz*], the collaboration of institutions in social security in health promotion and safety according the Prevention Act [*Präventionsgesetz*] and the cooperation of social security institutions in single cases of individual needs in participation (Federal Participation Act or *Bundesteilhabegesetz*). Persons with disabilities and their interest groups are closely involved with all these legislative measures. The objective of all rules is to simplify access to work life in an appropriate manner, to remove barriers and to provide suitable support services for persons with disabilities and to prepare them for companies by creating an inclusive labour market and an inclusive society.

The best, simplest and most sustainable way to provide access to work for persons with various health impairments is to make these affected persons consultants for other affected persons by sharing their own experiences (peer principle). Germany, thanks to specific work councils for per-
sons with severe disabilities, has the oldest peer principle within companies, which was established long before the UN CRPD existed. Once a company reaches a certain size, these representatives of employees inside of a company are selected to be part of the works councils to guard the interests of persons with severe disabilities within a company. Wherever possible, they also work for inclusion and preventive health topics such as company integration management, and they work to eliminate problems within the company experienced by persons with health impairments, including problems related to other employees. (9)

Representatives for persons with severe disabilities provide a good example of how all other service providers that offer participation management, such as the disability managers mentioned above, actually benefit from the experiences of affected persons. Without this peer support, the well-intentioned and expensive financial incentives paid to employers would be futile. Peer counseling programs in civil society can be developed in several respects, such as amputees helping other amputees or consultancy services for persons with epilepsy who are often confronted with the preconception that some workplaces are too dangerous for them due to the risk of experiencing epileptic seizures (10). Ultimately, the supplementary, independent consultant centres founded in 2017 (the centres organized by groups of persons with disabilities), will have to be evaluated based on in terms of their contribution to the “return to work” strategy.

3. Outlook

The states that align their jurisdiction and social order based on the employability of the population, cleverly combining what belongs together, make their social system future-oriented and also meet the obligations from Article 27 of the UN CRPD. However, it is not possible to retain and restore employability without the use and expansion of rehabilitation measures aligned with Article 26 of the UN CRPD. Politicians and participants in civil society, including social security institutions who fund the return-to-work measures, must work together to create programs that benefit persons with disabilities and companies. Drafting suitable reforms requires having an overview of international experiences in other countries. Article 32 of the UN CRPD emphasizes this significance. The conference in Kassel in March 2017 made a great contribution to putting the article into effect. The conference should be a recurring event and should be used...
as a model that illustrates to other organizations in Germany that deal with the issue of rehabilitation that it makes sense to attend national conferences to see the big picture.

Remarks:

(1) You can read more about the details regarding implementation of the UN CRPD in the essays by Welti and Nachtschatt: “Equal Rights of Persons with Disabilities to Work per Article 27 of the UN CRPD” (in this book) and Trenk-Hinterberger: “The Significance of Article 27 of the CRPD to the Right to Participate in Work Life” (Article D 10-2012 www.reha-recht.de). This information portal and the associated electronic discussion forum contain other publications and commentaries on this topic. This platform is organized by the German Association for Rehabilitation [Deutsche Vereinigung für Rehabilitation or DVfR] with the support of the Federal Ministry of Labour and Social Affairs [BMAS] (www.dvfr.de).

(2) This article was authored by the chairperson of the work group of IS-SA, who is also the chairman of the “Employment” commission on the Executive Board of Rehabilitation International (RI). Positions for aligning rehabilitation with career participation have been drafted and instruments geared towards the needs of the companies have been published there (www.riglobal.org).

(3) The work accident insurers in Germany, and a large number of those in Austria and Switzerland, can offer their members, companies and their employees a one-stop-shop package. This consists of support in occupational safety and health issues, including occupational health hazards, first aid and, in the case of a work accident and an occupational disease, through the use of all legal-based services (“with all appropriate means”) for recovery, medical rehabilitation, and participation in working life and the community. In addition, the accident insurers pay out cash benefits, including injury benefits, temporary allowances and pensions for insurance claims. Last but not least, the work. Accident insurers have created a comprehensive project (2016-2018) to support companies in their integration management (www.dguv.de).

(4) In 2013, the social accident insurers in Germany (DGUV), Austria (AUVA) and Switzerland (SUVA) compiled their globally recognized
experiences in rehabilitation management into a brochure that is available in German, English, French and Italian at www.dguv.de and elsewhere.

(5) In 2017, this was the main topic at the discussion forum mentioned above (Remark 1). Just like the results of the discussion about company integration management a few years ago, the results of this discussion are available at www.reha-recht.de. At the level of the Confederation for Rehabilitation [Bundesarbeitsgemeinschaft für Rehabilitation or BAR] (www.bar-frankfurt.de), the social insurance institutions in Germany have agreed on several joint recommendations, including recommendations on implementing step-by-step integration.

(6) At the aforementioned BAR level, the social security institutions which are responsible for rehabilitation in Germany are currently drafting criteria for participation requirements for all their members when there are various medical indications and for statistics on determining the requirements commissioned by Federal Ministry of Labour and Social Affairs [BMAS]. The membership in the German Association for Rehabilitation [DVfR] includes almost all important organizations of funders, users and providers of rehabilitation services, including the professionals involved in social security, and this association provides support in implementing the Federal Participation Act [BTHG], particularly for participation requirements of persons with disabilities related to working life.

(7) The institution “Rehadat” in Cologne, which is financed by employers paid funds and organized by the employer’s owned Cologne Institute for Economic Research, offers plenty of practical information and tips for implementing services related to participation in working life (www.rehadat.de). This also includes notes on the occupational risk assessments mentioned in the text that are combined into hazard groups by the work accident insurers.

(8) One example is SAP. The company as a whole has largely positioned itself to implement the UN CRPD using its own action plan (www.sap.de). Several companies in Germany with the shared objective of inclusion and participation combined to form a corporate organization www.unternehmensforum.de. Their action plans are also posted on that website. All the action plans of public authorities and private companies are compiled by the Federal Ministry of Labour and Social Affairs [BMAS] at www.einfach-teilhaben.de.
(9) There has been an umbrella organization for all representatives for persons with severe disabilities at German companies since 2017: Verde (www.vvdp.org). This organization complements the representatives that have been present in industry for years, such as those in the German automotive industry and retail industry.

(10) This project is carried out at accident-insurers-owned BG-Kliniken in Germany (www.kuv.de) as one of the measures related to involvement of the affected persons in work accident insurance that is contained in the “Accident insurer action plan 2.0” (2014-2017) (www.dguv.de). Currently, the epilepsy consulting service (www.epilepsieberatung-muenchen.de) is being expanded and uses the financial support from the employers` funds (quota system) managed by Federal Ministry of Labour and Social Affairs [BMAS] to conduct evaluations.

All other supporting documents relevant to this article can be viewed by e-mailing friedrich.mehrhoff@dguv.de.
Developing International Standards of Competencies for Return-to-Work Professionals: An Overview

by Madan M. Kundu / Alo Dutta / Fong Chan

Globally, employment rates for people with disabilities fall far below that of the general population. As a result, increased importance is being placed on the planning and delivery of employment-related services designed to address social and fiscal effects of disability. In order to successfully achieve this goal, the factors that may make a return-to-work (RTW) less likely must be addressed by a trained professional. Job responsibilities of this professional may include evaluating barriers to return-to-work; developing a return-to-work plan, including work related accommodations; obtaining stakeholder and client input and support; and ensuring proper implementation of the return-to-work plan. The existing training programs designed to reflect all responsibilities must emphasize on developing and maintaining interpersonal relationships leading to problem solving in a positive and effective manner. However, there needs to be concerted global effort to clearly identify focused knowledge domains for the establishment of professional preparation and certification standards for this important stakeholder in employment-based service delivery to persons with disabilities.

Globally, the challenges of seeking, obtaining, and maintaining gainful employment are significant for all persons with disabilities, especially those from economically disadvantaged and marginalized communities. Persons with disabilities who harbor similar aspiration as those without disabilities, but are at a 1.5-2.0 times higher risk of being unemployed as they strive to enter and/or re-enter the work force with little education, few or no job skills, limited social skills, and often non-existent support network. Additionally, the presence of low expectation of society that relegates members of this population is the status of a second class citizen and complicates the situation even further (Bohatko-Naismith, James, Guest, & Rivett, 2016; Chan, Taylor, Currier, Chan, Wood, & Lui, 2001; Schimmel & Stapleton, 2012).

In spite of limited availability of data and variability in data collection mechanisms, it is well established that employment rates for people with disabilities are usually far below that of the general population. According to International Labour Organization [ILO] (2003) (the latest data avail-
able), the country-specific employment rates varied between 30% in South Africa and 38% in Japan to 81% in Switzerland and 92% in Malawi. As per the World Health Organization (2011), results of a 51-country survey reveal that the employment rate of men with disability is 52.8% (64.9% for men without disability) and that of women with disability is 19.6% (29.9% for women without disability). These challenges are mainly due to the prevailing contextual factors that make employers hesitant to hire members of this population. The primary hindering variables are social stigma and lack of accurate information on modes of harvesting the immense potential of persons with disabilities.

In case of persons who are employed, work-related disabilities are a major cause of long-term absence, reduced productivity and earning potential, and job loss. It is widely documented that the prevalence of work-related disabilities is on the rise, especially among racial and ethnic minorities as a direct result of their low socio-economic status that forces them to work in high risk occupations (Allaire, Wolfe, Niu, & Lavalley, 2008; Seabury, Terp, & Boden, 2017). The origins of work related disabilities are multifactorial that reflect an interaction between a person with an existing or a worksite acquired health condition causing an impairment and the environment, which may induce or aggravate symptoms and limit functional ability. Therefore, the modes of reducing the effects of work-related disabilities must involve components such as the person, the worksite, the social environment at home, training level of the provider, and receptiveness of the employer in making accommodations required by an employee. All of the above mentioned factors are essential components of vocational rehabilitation process of any person with a disability (Blanc, Burney, Janson, & Toren, 2003; Matthews et. al., 2015).

The provisions of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) focus on the goal of inclusion of persons with disabilities in the mainstream. Article 27 of UNCRPD mandates the right of persons with disabilities to work and have the opportunity to gain a living via employment in an inclusive and accessible environment. Additionally, it safeguards the right of persons with acquired employment-related disabilities to continue to work with appropriate accommodations. However, a number of following factors impact employment outcomes for persons with disabilities: productivity differentials; labour market imperfections related to discrimination and prejudice; and disincentives created by disability benefit systems. As a result, increased importance is being placed world-wide on the planning and delivery of employment-related
services (or vocational rehabilitation services) designed to address social and fiscal effects of disability.

Cost of Staying Out of Labour Force

The economic and social consequences of disability-related joblessness that vary across the diverse perspectives of stakeholders are usually documented as substantial. Persons with disabilities and their families experience significant reduction in quality and standard of living often spanning generations (Schimmel & Stapleton, 2012). The consequences for the government supported programs and taxpayers are enormous and long-term. Limited involvement of employers in return-to-work efforts are counterproductive as the employer is the stakeholder that decides on retention efforts and implements policies to help persons with disabilities return-to-work quickly (Stapleton, Burkhauser, She, Weathers, & Livermore, 2009; Society for Human Resource Management, 2012). The societal lack of expectation of persons with disabilities often results in decreased access to services, limited retention when services are sought, and reduced potential to return-to-work (Bardos, Burak, & Ben-Shalom, 2015).

Purpose

Participation in labour force is one of the potent modes of improving physical and mental health of persons with disabilities (Harvey et al., 2014; Rueda et al., 2012; U.S. Department of Health and Human Service, 2005). In keeping with this understanding, a large section of persons with disabilities prefer to become a productive employee rather than be at home and isolated (International Association of Professionals in Disability Management [IAPDM], 2017). In order to successfully achieve this goal, the above mentioned factors that may make a return-to-work less likely must be addressed by a trained professional. Extant literature profusely supports the fact that early intervention by and support of a return-to-work professional not only reduces cost of rehabilitation but simultaneously enhances general well-being of the person. The primary role of a return-to-work professional is to identify and eliminate or reduce (jointly with person with a disability) the effects of personal and contextual barriers to work.
Role and Competencies of Return-to-Work Professionals

The position of a return-to-work professional can have varied titles such as return-to-work coordinator, supervisors, case manager, rehabilitation counselor, job placement specialist, job coach, and other employment-support focused staff. The employment settings of these professionals can be in clinical, corporate, insurance, and government sectors. Job responsibilities of this professional may include evaluating barriers to return-to-work; developing a return-to-work plan, including work-related accommodations; obtaining stakeholder and client input and support; and ensuring proper implementation of the return-to-work plan. In order to address the multifarious requirements of this position and generate favorable return-to-work outcomes, professionals must have the proficiency to demonstrate sensitivity to the (a) complexities related to work organization and the beliefs; (b) importance of roles, perceptions, and expertise of stakeholders; and (c) interaction of social and contextual factors related to job placement of persons with disabilities (Matthews et al., 2015; Tan, Yeo, Giam, Cheong, & Chan, 2016).

A few of the highest-rated competencies are maintaining confidentiality, following ethical practices, listening and communicating in a culturally appropriate manner, responding in a timely manner, and demonstrating good organization and planning skills. Additionally, a return-to-work coordinator may be required to function as an ergonomist to facilitate early workplace reintegration following a disability-related absence through face-to-face, on-site communication among workers, supervisors, and other stakeholders (Tan et al., 2016; Shaw, Hong, Pransky, & Loisel, 2008). Gardner et al. (2010) identified 10 domains of competencies of a return-to-work coordinator: (a) ability to identify client-related and inherent per-
sonal traits, attitudes, and behaviors less likely to be modified by training or mentorship, (b) conflict resolution skills including ability to remain neutral, negotiate, and mediate effectively for promoting collaboration of involved stakeholders, (c) problem solving skills for creative job modifications, being receptive to input, and incorporating solution-oriented techniques, (d) ability to maintain a balance between advocating for the client and projecting the view of the employer, (e) ability to coordinate the return-to-work process, e.g., accurate and timely documentation; well-developed organizational, administrative, and time management skills; and maintaining a smooth flow of information among stakeholders, (f) being able to communicate and listen effectively so that collaboration among all concerned can be maintained, (g) possessing formal and practice-based knowledge of ergonomics, workers’ compensation laws, musculoskeletal disorders, and organizational, and psychosocial aspects of disability, (h) ability to conduct initial biopsychosocial assessments (e.g., needs and barriers), match job demands with transferrable skills of worker based on labour market search, and ascertain and address the effects of disability on work place and colleagues, (i) skills required to develop and implement return-to-work goals and objectives, jointly with clients and stakeholders, and (j) ability to comprehend and respect perspective of others, establish rapport with clients from all levels of society, and develop a trusting relationship with employer.

An Overview of Training and Certification for Return-to-Work Professionals

The following paragraphs will provide a synopsis of graduate level program in rehabilitation counseling and related disciplines that train professional to provide vocational and life style enhancement support. The focus will be limited to four countries (USA, Canada, Australia, and Taiwan) in keeping with the fact that most competency based and role-and-function related studies were conducted and significant number of accredited master’s level programs exist in the USA (Bohatko-Naismith, James, Guest, & Rivett, 2016; Chan, Leahy, Saunders, Tarvydas, Ferrin, & Lee, 2003; Durand, Nastasia, Coutu, & Bernier, 2017; Dutta, Kundu, Chan, Wang, Huang, Fleming, & Bezyak, 2015; Frain, Bishop, Tansey, Sanchez, & Mijngaarde, 2013; Kundu, Dutta, Chan, Torres, & Fleming, 2011; Leahy,
Chan, & Saunders, 2002; Leahy, Chan, Sung, & Kim, 2013; Matthews, et al., 2015; Shaw, McMahon, Chan, & Hannold, 2004).

In the U.S.A., the responsibilities of a return-to-work coordinator are discharged by disability management specialists. According Cormwell and King (2010), Chan et al. (2001), Currier et al. (2001), and Habeck (1996), the job tasks of this professional differs from those of a master’s level private-sector rehabilitation counselor or a public-sector vocational rehabilitation counselor in terms of: (a) providing early intervention and return-to-work programming at the onset of injury or illness; (b) delivering services at the workplace to a greater extent; and (c) maintaining a proactive employer-employee focus. However, the largest employment-based support service provider in the country is the state-federal vocational rehabilitation system. This country-wide network of agencies has more than 90 years of experience in placing persons with disabilities in jobs and returning individuals to the work after a period of absence due to a work-related condition. Concurrently as mentioned above, the discipline of vocational rehabilitation has amassed a substantial body of empirical literature on the jobs and functions of a vocational rehabilitation counselor that need master’s level training.

The Council on Rehabilitation Education (CORE), the national accrediting agency was established in 1971 and the Commission on Rehabilitation Counselor Certification was established in 1974. CORE used to accredit about 50 bachelor’s and 90 master’s level Rehabilitation Counseling programs. On July 1, 2017 CORE merged with the Council for Accreditation of Counseling and Related Educational Programs (CACREP). The CACREP has a provision of a 48 hour master’s degree in Rehabilitation Counseling leading to a Certified Rehabilitation Counselor (CRC) or 60 hour curriculum in Clinical Rehabilitation Counseling/Clinical Mental Health Counseling leading to a Licensed Professional Counselor (LPC). The Board of Directors has adopted the newly revised Rehabilitation Counseling Standards as the eighth entry-level specialty in the 2016 CACREP Standards. The standards consist of six foundational domains, 23 contextual domains, and five practice domains. Together these 34 domains cover knowledge areas such as, interdisciplinary collaboration in continuum of care; evidence based practices in public vocational rehabilitation, independent living, and private sector workers’ compensation; diagnostic processes; effects of social and contextual variables on client’s life care and career development; role of legislative mandates on service provision and accountability; use of transferable skills, functional assess-
ments, assistive technology, and work-related supports for effective job placement and retention; group, family, psychological counseling; human development; research and program evaluation; professional issues affecting rehabilitation counselors, such as independent provider status, expert witness status, forensic rehabilitation, and access to and practice privileges within managed care systems.

At present, Canadian postsecondary institutions offer (a) four master’s level programs in counseling psychology one with a specialization in vocational rehabilitation counseling, another in addictions, another in global mental health; and another in guidance and counseling; (b) one in counseling with a specialization in addictions counseling; and (c) one in education with a specialization in guidance and counseling. The 48-hour master’s degree programs in counseling are accredited by the Council on Accreditation of Counselor Education Programs (CACEP) in Canada. The required core concepts and competencies are: profession of counseling, ethical and legal issues, counseling and consultation processes, group counseling, human development and learning, human diversity, lifestyle and career development, assessment processes, research methods, and program evaluation. Among the elective concepts are school counseling, counseling in higher education, community/agency counseling, rehabilitation counseling, career counseling, and family counseling. Additionally, the following certificates and diplomas in counseling related fields are offered: post-master’s certificate in counseling with a specialization in group counseling and processing skills; extension certificate in children’s mental health; graduate certificate in counseling with a specialization in chemical dependency counseling; two graduate certificates in career development practitioner one with a specialization in career management and another in employment services; two certificates in mental health; certificate in career exploration and development skills; graduate diploma in disability studies; two certificates and/or diplomas in addictions education; and certificate in cognitive behavior therapy. The International Association of Professionals in Disability Management in Canada conducts an examination to assist professionals become a Certified Return-to-work Coordinator (CRTWC). The certification, recognized in 28 countries, is awarded by the International Disability Management Standards Council (IDMSC).

The master’s degree programs in Australia that focus on rehabilitation counseling are accredited by the Australian Society of Rehabilitation Counsellors (ASORC) and the Rehabilitation Counselling Association of Australasia. The core competencies identified by ASORC are divided into
two areas underpinning core competencies with seven domains and rehabilitation counselling and work environment specific competencies with eight domains. Together, the following domains, present an extensive body of knowledge requirement for a qualified rehabilitation counselor: 1) psychosocial foundations of behavior; 2) rehabilitation theory and philosophy; 3) knowledge of disability and its effects; 4) caseload management and reporting; 5) legal and policy aspects of disability and rehabilitation; 6) community liaison and consultation; 7) research and evaluation; 8) rehabilitation counselling professional attitudes and behavior; 9) vocational assessment and counselling; 10) vocational training, job development, and job placement; 11) interpersonal skills; 12) independent living; 13) injury prevention, injury management, and disability management; and 14) life care planning.

In Taiwan, currently there are three graduate level programs in rehabilitation counseling at the National Chunghua University of Education, National Taiwan Normal University, and National Kaohsiung Normal University. The influence of CORE and CACREP standards on the curricula of counseling programs is apparent. The graduate programs offer a maximum of 48 credit hours of course work (including thesis). In addition to the usual courses required by a CACREP accredited program in the U.S.A., specialized classes are offered in social psychology, personality development, mindfulness-based stress reduction, dream work, leisure counseling, social therapy, psychodrama, and music therapy.
## Table 1: Summary of the core master’s level knowledge domains in the U.S.A., Canada, Australia, and Taiwan

<table>
<thead>
<tr>
<th>Knowledge Domains</th>
<th>U.S.A.</th>
<th>Canada</th>
<th>Australia</th>
<th>Taiwan</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Interdisciplinary collaboration</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>2. Evidence based practices in vocational rehabilitation</td>
<td>X</td>
<td></td>
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<td>X</td>
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<tr>
<td>3. Independent living</td>
<td>X</td>
<td></td>
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<td>X</td>
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<td>4. Assessment and diagnostic processes</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>5. Career development</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td>6. Workers’ compensation and managed care</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
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<td>7. Laws and regulations</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>8. Assistive technology</td>
<td>X</td>
<td></td>
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<td>X</td>
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<tr>
<td>9. Group counseling</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>10. Psychological and mental health counseling</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
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<tr>
<td>11. Community liaison, consultation, and expert witness</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>12. Human development</td>
<td>X</td>
<td>X</td>
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<td>X</td>
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<tr>
<td>13. Research methods</td>
<td>X</td>
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<td>X</td>
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<tr>
<td>14. Program evaluation</td>
<td>X</td>
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<td></td>
<td>X</td>
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<tr>
<td>15. Electives</td>
<td>X</td>
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</tbody>
</table>

**Unified Global Training Standards for Return-to-work Professionals**

A steady upward trend in life long cost of serving persons with disabilities, decrease in employment participation, and increase in provisions of...
legal mandates for integrating persons with disabilities in the work force and communities have necessitated the development of numerous return-to-work initiatives. Empirical evidence has established that when properly developed, implemented, and administered, participatory return-to-work programs can effectively reduce the socio-economic cost of disabilities for employers, providers, and clients and maintain employability of persons with disabilities. To ensure accomplishment of the above objectives, it is essential that professionals charged with implementing the intricately planned return-to-work programs possess a uniform set of characteristics in experience, skills and competencies that are transferrable across international borders. Therefore, there exists a significant need for the establishment of an international standard of training and certification of return-to-work professionals, first at the bachelor’s level and then in the near future at the master’s level (Bohatko-Naismith, James, Guest, & Rivett, 2014; Matthews, et al., 2015; National Institute on Disability Management and Research, 2004).

Similarities among the roles of vocational rehabilitation counselors, who can also function as a return-to-work coordinator in various parts of the globe, are apparent from the above discussion. However, in order to establish global criteria for competency the development of occupational standards must precede the development of certification requirements. For example, this process may draw from the steps implemented to compile the Occupational Standards in Disability Management (NIDMAR, 2004) with active participation of return-to-work stakeholders in Canada, Australia, Europe, New Zealand, and the U.S.A. Development of a psychometrically appropriate certification measure started in 2001 and resulted in the formulation of a 300-item multiple choice examination. The test covered the following nine domains: disability management knowledge, theory, and practice; legislation and benefit programs; labour and management relations; communication and problem-solving skills; disability case management; return-to-work coordination; health, psychosocial, prevention and functional aspects of disability; program management and evaluation; and ethical and professional conduct. The measure was constructed with active participation of several government entities, leading employers, unions, workers compensation boards.
Conclusion

There appears to be a consensus about the competencies required for the delivery of successful services by return-to-work professionals. The broad range of training to reflect all responsibilities must emphasize on developing and maintaining interpersonal relationships and communicating through a complex network of contextual process leading to problem solving in a positive and effective manner. However, there needs to be concerted global effort to clearly identify focused knowledge domains and related competency areas for the establishment of professional preparation and certification standards for this important stakeholder in employment-based service delivery to persons with disabilities. Therefore, it is being strongly recommended that institutions of higher education take active role in establishing academic programs at bachelor’s, master’s, and doctoral levels for career development of return-to-work or disability management professionals. Also, the resulting pool of highly qualified individuals will be able to establish a scientific basis for conducting role and function studies, and identifying evidence based practices leading to quality service delivery in both public and private sectors.

References


The School-Work Transition of Special Needs Students in the Context of the UN CRPD – Effort towards Systematization

by Philine Zölls-Kaser

This article addresses the wide variety of options for retaining graduates of special needs schools. After presenting the initial schooling conditions, this article describes different ways of transitioning from school to work\(^1\) for special needs students. The reasons for a lack of available data in this area are also discussed here. The three possible paths (mainstream labour market, transition system and occupational rehabilitation system) are presented for former special needs students to transition from school to work, taking into account the current figures and developments in light of the UN Convention on the Rights of Persons with Disabilities (UN CRPD).

1. Introduction

The diverse system of occupational schooling, training and vocational education with a wide variety of opportunities for schooling, training, and continuing education has diverged into a divisional support environment in Germany since the 1960s. Various categories such as “disabled”, “severely disabled” or “rehabilitation patient” grant or prevent the access of special needs school graduates\(^2\) to various professional education options and support systems. A current and critical overview of education/training access options and barriers to occupational education/training for special needs students has been missing from the professional discussion thus far. For this reason, the aim of this article is to systematically illustrate paths and barriers to transitioning to occupational education/training of special needs students after they have graduated. First, the conditions or initial situation for special needs students transitioning to professional

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\(^1\) The transition from school to work here entails three options that are open to students upon graduation. School graduates can either attend higher level schooling, begin a training program or pursue employment.

\(^2\) This article focuses on special needs students who have graduated. This does not include special needs students from inclusive schools. However, there is not yet any representative data on the disposition of these students after they have graduated.
training and work are defined. The conditions for special needs students are examined in the context of the UN CRPD. The UN CRPD took effect on March 26, 2009 in Germany. Articles 24, 26 and 27 from the convention are of particular interest here. From there, the various options of transitioning from school to work training/education and work for special needs students is addressed. Here, it is important to note that this article discusses (former) special needs students and not disabled students because a student with special needs is not necessarily considered “disabled.” “Rather, it must instead be assumed that most students classified as having special needs are not considered to have disabilities outside of a school context both before and after their schooling” [“Es ist vielmehr davon auszugehen, dass die meisten der als sonderpädagogisch förderbedürftig klassifizierten Schüler/-innen außerhalb des schulischen Kontextes bzw. vor und nach der Schulzeit nicht als behindert gelten”] (Wansing, Westphal, Jochmaring, Schreiner 2016, p. 76).

In light of the fact that the German labour market will include more skilled jobs in the future, this will make completed vocational training the most important ticket to the labour market in the future (Bosch 2011, p. 29). In addition, forecasts predict that, from 2005 to 2025, the pool of available positions for persons without training qualifications will shrink by 600,000 positions: “The labor market situation for persons without training qualification will remain precarious in upcoming (...) years, all the more, as the supply of persons with low qualifications is approximately 1.3 million greater than the expected demand due to the high proportion of young persons without vocational training qualification” [“Die Arbeitsmarktsituation von Personen ohne Berufsabschluss wird damit in den nächsten (...) Jahren weiterhin prekär bleiben, umso mehr, als wegen des hohen Anteils Jugendlicher ohne Berufsausbildung das Angebot an gering qualifizierten um rund 1,3 Mio. über der erwarteten Nachfrage liegen wird”] (Bosch 2011, p. 28).

2. Initial schooling conditions

In order to understand the situation of special needs students with respect to the transition from school to occupational education/training, it is important to focus on the difference between their actual schooling and the legal standardization stipulated by the UN CRPD.
Article 24 Paragraph 1 of the UN CRPD constitutes part of the legal framework here. It states the following:

“States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning (…).”

Article 24 Paragraph 2b of the UN CRPD stipulates that the States Parties shall ensure that

“(…) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.”

In fact, expansion of mainstream schooling for children in Germany has increased substantially over the last few years, as is indicated in the last participation report (BMAS 2016, p. 108) (2005: 14%; 2014: 34%). But the paradox is that this is taking place without dismantling special needs schools and the proportion of special needs students since 2008/2009 has reduced by a negligible amount, from 4.9% to 4.6% (ibid.). Furthermore, there are substantial differences with respect to the expansion of inclusive schooling a) in relation to the special needs, b) in relation to the school types (Grundschule, Hauptschule or Gymnasium) and c) in relation to the federal states in Germany.

a) For example, schooling for students with special needs [Förderschwerpunkt or FS] related to intellectual development (Geistige Entwicklung or GE) (91%) takes place almost exclusively at special needs schools. At 92%, only special needs students suffering from illness are taught more frequently at special needs schools (BMAS 2016, p. 105).

b) The proportion of all students with special needs integrated into mainstream schools was 34.1% in 2014 (Kultusministerkonferenz 2016, p. XVIII). Of these students, most – at 44.3% – attended primary schools (Grundschule), followed by 18.2% at integrated comprehensive schools (Integrierte Gesamtschule) and 11.3% at secondary schools (Hauptschule) at 11.3% (ibid.).

c) Regional differences are quickly evident from looking at the states of Bremen (77% of students with special needs attend a mainstream school) and Hessen (23% of students with special needs attend a mainstream school) (BMAS 2016, p. 110).
Special needs students do not just take on an exclusive role during their time in school with respect to where they attend school. Differences between (former) students with and without special needs are also apparent after schooling with respect to school-leaving certificate. In 2014, 71% of special needs students left the school system without a certificate of secondary education (BMAS 2016, p. 131). In every federal state of Germany, obtaining a certificate of secondary education or higher qualification is not defined as the intention of special needs schools focused on intellectual development. In most German states, there is merely an option to obtain a specific leaving certificate (Autorenguppe Bildungsberichterstattung 2014, p. 181). So it is not surprising that, when looking at the types of access and the most predominant type of disability in workshops for disabled persons [Werkstätten für behinderte Menschen or WfbM] in Germany in 2006, 67% of persons with an intellectual disability transferred from a school to a WfbM without having completed occupational training or a similar qualification (11% of those who transferred were unemployed, 10% transferred from “other/unknown” and 7% transferred from an “occupational program” to the WfbM) (Detmar et al. 2008, p. 77).

This initial school situation for (former) students with special needs lessens the opportunity to complete education because, without a qualification, the chances of receiving an education are greatly limited. In 2014, of all newly concluded training contracts, only 2.9% were for persons without a certificate of secondary education and 28% were for persons with a certificate of secondary education (Autorenguppe Bildungsberichterstattung 2016, p. 111).

3. On the transition system from school to work for special needs students

There is now a close examination of the situation for special needs students after schooling, the options available to them for transitioning to occupational training and work, and the lack of data in these areas. The transition system is to be illustrated here systematically with its options.

There is still not enough data on the disposition of special needs students (see: Niehaus et al. 2012, p. 52ff.; Gericke and Flemming 2013; Autorenguppe Bildungsberichterstattung 2014, p. 182). The available statistics only provide a vague idea of the paths of former special needs students to training, work or other transition programs: “The analysis of the time situation (how many young persons with which disabilities join
which education and labor market) cannot use official statistics to draw a comparison to the initial situation analysis (how many of those finishing school are available to join the education and labor market and what disabilities do they have)” [“Die Analyse der Zielsituation (wie viele junge Menschen mit welchen Behinderungen treten in welchen Ausbildungs- und Arbeitsmarkt ein?) kann im Abgleich mit der Analyse der Ausgangssituation (wie viele Schulentlassene mit welchen Behinderungen gibt es, die potenziell in den Ausbildungs- und Arbeitsmarkt eintreten können?) nicht über die amtlichen Statistiken erfolgen”] (Niehaus et al. 2012, p. 10).

This can be traced back to two circumstances: On the one hand, when special needs students end their schooling, their status is terminated. From that point on, special needs students are designated as persons undergoing rehabilitation, persons with severe disabilities or persons seeking training/trainees. Categorization of persons as having or not having disabilities (in relation to participation in working life) in accordance with § 19 Social Code Book [SGB] III, and the associated occupational rehabilitation programs in the form of training with a focus on practice, only apply to rehabilitation counselors from the German Federal Employment Agency (Bundesagentur für Arbeit 2010, p. 5). A recognized degree of disability or special needs during schooling is not sufficient here. Rather, this categorization decision must be made based on established knowledge and a comprehensive performance profile. The counselor is given this in advance in the form of a registration form, work package, health questionnaire, expert report, overall assessment form from the school, report cards, job references and/or internship reports. It may be necessary to include the special services of the German Federal Employment Agency (the medical

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3 § 19 Abs. 1 Social Code Book [SGB] III: “This book's definition of 'disabled' includes, but is not limited to, persons whose prospects to participate at all in working life or participate more fully in working life are substantially lessened for a brief period due to the type or severity of their disability in accordance with § 2 Abs. 1 of the Ninth Book and who therefore require assistance to participate in working life, including persons with learning disabilities” [“Behindert im Sinne dieses Buches sind Menschen, deren Aussichten, am Arbeitsleben teilzuhaben oder weiter teilzuhaben, wegen Art oder Schwere ihrer Behinderung im Sinne von § 2 Abs. 1 des Neunten Buches nicht nur vorübergehend wesentlich gemindert sind und die deshalb Hilfen zur Teilhabe am Arbeitsleben benötigen, einschließlich lernbehinderter Menschen”].
On the other hand, the lack of data can also be attributed to the statistics themselves because the personal characteristic of having a disability is not included in the corresponding surveys and statistics in relation to occupational training (the German Federal Institute for Vocational Education and Training [BIBB] survey of newly concluding training contracts on September 30 of each year and the vocational training statistics from statistical offices of Germany and the German states, survey on December 31 of each year). As a result, no definitive statements can be made regarding the scope of vocational training for persons with disabilities in a dual system (BMBF 2017, p. 89; Gericke and Flemming 2013, p.2).

Three paths for transitioning from school to work

For students who have finished special needs schools, there are three options (see Niehaus et al. 2012, p. 9 & p. 45ff.):

1) **Mainstream labour market**: A trainee or employee (under certain circumstances, a person with severe disabilities or person with minor disabilities; with or without support from the German Federal Employment Agency)

2) **Transition system**

3) **Vocational rehabilitation system**

In spite of the insufficient amount of data, there are individual statistics that can illustrate the disposition of special needs students:

1) **Mainstream labour market**

Persons with severe disabilities or persons with minor disabilities can complete training at a company in the mainstream labour market (with or without support from the German Federal Employment Agency). As described above, the general statistics (vocational training and education statistics) on training contracts exclude persons with disabilities who attend training for a state-approved vocation in the dual system in accordance with the German Vocational Training Act [Berufsbildungsgesetz or BBiG] or the German Handicrafts Regulation Act [Handwerksordnung or HwO] because the personal attribute of having a disability is not recorded
Two notification procedures can be used to glean information about the number of persons:

- It is possible to deduce information about the number of persons with severe disabilities at companies in accordance with § 80 Social Code Book [SGB] IX using the equalization fee (§§ 71-79 Social Code Book [SGB] IX) (Niehaus et al. 2012, p. 9). In 2015, there were 1,030,222 employees with severe disabilities reported (including equivalent and other eligible persons). In addition, there were 7099 trainees with severe disabilities (Statistik der Bundesagentur für Arbeit 2017 (a), Table 6). The number of trainees with severe disabilities continues to increase (Statistik der Bundesagentur für Arbeit 2017 (c), p.7). Training of persons with severe disabilities rarely takes place at a company. According to figures from the German Trade Union Confederation [DGB], 9600 funded training sessions took place at a company and 40,000 training sessions took place at external providers. Young persons who participate in an external training session often have worse chances of getting a job (DGB 2013, p.8). Generally, the proportion of companies that train young persons with disabilities is low (24.1%) (Enggruber, Rützel 2014, p. 8).

In the vocational training model that has existed since 2012, the participant figures are also very low (173 persons; annual average from 2016) and are not leading to the desired positive result (Bundesagentur für Arbeit 2017 (b), Table 7).

- Furthermore, the statistics from the German Federal Employment Agency on the integration and employer allowances for persons with severe disabilities can be used to draw conclusions about the number of employees with disabilities (Niehaus et al. 2012, p. 9 and: DGB 2013, p. 6f.). Status in 2016: Subsidies for trainee compensation for persons with minor disabilities and severe disabilities: 5028; integration subsidy for persons with minor disabilities and severe disabilities: 4798; assistance during training: 1908 (Statistik Bundesagentur für Arbeit 2017 (b), Table 7).

Training and employment of former special needs students should be the top priority on the mainstream labour market, particularly with respect to Article 27 of the UN CRPD, which stipulates a labour market that is open, inclusive and accessible to persons with disabilities. Furthermore, Article 24(5) of the UN CRPD must be viewed as a framework that stipulates the following: “States Parties shall ensure that persons with disabilities are
able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.” The persistent segregation of the labour market is a point of criticism of the United Nations in its concluding observations on the initial report of Germany relating to Article 27 of the UN CRPD (United Nations 2015, p. 9).

The following points (2 and 3) make it clear that very few former special needs students have access to general vocational training. Rather, after schooling, they either end up in the transition system that assists those who are disadvantaged or in the occupational rehabilitation system.

2) The transition system

A minute number of former special needs students start training right after their schooling (Niehaus et al. 2012, p. 52). The target group is much more likely to work towards a qualification in the transition system (as “disadvantaged persons”) or use occupational rehabilitation services (as a rehabilitation patient) (see Point 3).


In accordance with § 115 Social Code Book [SGB] III, the general measures in vocational preparation and vocational training include (Statistik der Bundesagentur für Arbeit 2014, p. 5):

- Preparatory measures for vocational training [Berufsvorbereitende Bildungsmaßnahmen or BvB-a]
- Entry level vocational qualification [Einstiegsqualifizierung or EQ]
- Assistance during training [Ausbildungsbegleitende Hilfen or ABH]
- External vocational training [Außerbetriebliche Berufsausbildung or BAE]
- Subsidies for training compensation for persons with minor disabilities and severe disabilities [Ausbildungszuschüsse or AZ]
- Subsidy paid to the employer in conjunction with training/professional development program for a person with severe disabilities [EGZ-SBiA]

The occupational transition system includes training/education sessions that are part of qualified vocational training and do not lead to any recognized graduation certificate, but instead are intended to improve the individual competencies of young persons necessary to start a traineeship or job and, in part, to subsequently enable them to obtain a general school-leaving certificate (Konsortium Bildungsberichterstattung 2006, p. 79). The various measures of the transition system often bypass disadvantaged persons (persons from families with low educational attainment and a low socioeconomic status, Bundesinstitut für Berufsbildung 2010, p. 9).

In addition to the aforementioned measures, the transition system also includes the following additional measures: Preparatory vocational measures from the German Federal Employment Agency (see above), academic vocational preparation year, vocational basic education year, educational programs in vocation schools that provide partial qualification, vocational traineeships and entry-level vocational qualification (Bundesinstitut für Berufsbildung 2010, p. 9). The transition system is continuously criticized as being a waiting line for participants. In addition, the lack of a uniform structure, standardization and certification also receives criticism, as does the fact that the associated programs do not lead to any certificate providing vocational qualification (Schultheis and Sell 2014). In 2011, 281,662 (28%) of persons in the occupational training system were in the transition system (52% in the dual system and 21% in the school-to-job system). In general, the number of participants in the transition system has been trending downward since 2005. Since 2015/2016, however, this figure has been increasing steadily again, which can be attributed to programs for young refugees and immigrants for learning German as a foreign language (BMBF 2017, p. 69). Of the participants in 2013, 51% were persons with a certificate of secondary education and 20% were without a certificate of secondary education (BMBF 2014, p. 32). Former special needs students (e.g.: students with learning disabilities; also see: Ginnold 2009) are reflected in both of these figures. According to the results of the

4 Only limited information is available on the portion of young persons with disabilities for the transition system (vocational preparation year, vocational school) as well (Autorengruppe Bildungsberichterstattung 2014, p. 173).
German Federal Institute for Vocational Education and Training [BIBB] transition study from 2011, 30% of the young persons in the transition system obtained a school-leaving certificate, 42% started a training course within 6 months after finishing the program that lead to full qualification (BMBF 2014, p. 34).

3) Vocational rehabilitation system

The vocational rehabilitation system is divided into initial integration and reintegration. Persons with disabilities have access to special (rehabilitation-specific) services for participation in working life in accordance with § 117 Social Code Book [SGB] III “assuming this is required in the individual case due to the type and severity of the disability or to ensure successful integration” [“sofern dies wegen Art und Schwere der Behinderung oder zur Sicherung des Eingliederungserfolgs im Einzelfall erforderlich ist”] (Statistik der Bundesagentur für Arbeit 2014, p. 5):

- Preparatory measures for vocational training [Berufsvorbereitende Bildungsmaßnahmen or BvB-Reha]
- Special professional development measures (besondere Maßnahmen zur Weiterbildung or Reha-bMW)
- Aptitude test/vocational training (Eignungsabklärung or Reha-EA, including the diagnostic measures for determining employability (DIA-AM))
- Special training profession measures (besondere Maßnahmen zur Ausbildungsförderung or Reha-bMA)
- Individual case assistance (Einzelfallförderung or Reha-EF, including vehicle assistance, technical work assistance)
- Other individual, rehabilitation-specific measures (individuelle rehaspezifische Maßnahmen or irM, including an entry process/vocational training area in sheltered workshops, specialist integration service (IFD))
- Supported employment (Unterstützte Beschäftigung or Reha-UB)

In 2016, 41,025 persons (Statistik der Bundesagentur für Arbeit 2017 (d), Table 1) were recognized as rehabilitation patients in initial vocational integration (2012: 43,177) (Statistik der Bundesagentur für Arbeit, 2012, p. 3).
6) with 27,179 persons in vocational reintegration (2012: 22,744) of the German Federal Employment Agency (access). These existing figures also show that the number of participants is decreasing: As of 2016: 170,533 (Statistik der Bundesagentur für Arbeit 2017 (b), Table 2); as of 2012: 181,764.

According to the only currently known evaluation from the German Federal Employment Agency, which differentiates based on the type of disability (final figures from December 2016), the most common type of disability for rehabilitation patients in initial integration is a learning disability (50.9%), followed by mental disability (18.7%) and intellectual disability (16.4%). In reintegration, the largest group, at 49.8%, is persons with a physical disability affecting the musculoskeletal system, followed by those with mental disabilities (27.8%) (in both cases, disabilities related to sensory organs remain below 5%) (Statistik der Bundesagentur für Arbeit 2017 (d), Table 4a)).

According to the annual average (initial integration and reintegration, stock figures) from January 2016 through January 2017, the largest group, with 30,974 persons in “special measures to promote training” (of these persons, only 173 were in supervised vocational training sessions), followed by “other individual rehabilitation-specific measures (including: sheltered workshop entry process/vocational training: 23,341 and special-

5 The literature contains divergent figures, e.g.: Berufsbildungsbericht 2017: “According to the annual average from 2016, a total of approximately 38,000 persons with disabilities attended a vocational promotion program leading to training qualification as part of initial vocational integration (2015: 39,000). On average, approximately 13,000 young rehabilitation patients (unchanged from the previous year) attended occupational programs during the year” [“Im Jahresdurchschnitt 2016 suchten insgesamt rund 38.000 Menschen mit Behinderungen im Rahmen der beruflichen Ersteingliederung eine berufsfördernde Maßnahme mit dem Ziel eines Berufsabschlusses (2015: 39.000). Rund 13.000 junge Rehabilitanden (unverändert zum Vorjahr) befanden sich zudem jahresdurchschnittlich in berufsvorbereitenden Maßnahmen”] (Berufsbildungsbericht 2017, p. 89). The 2016 participation report also contains data lacking further documentation: “In 2012, just under three quarters of young persons without a secondary education qualification ended up in the transition system after leaving school (preparatory measures for vocational training) (Autorengruppe Bildungsberichterstattung 2014 (unpaginated))” [“Im Jahr 2012 mündeten knapp drei Viertel der Jugendlichen ohne Hauptschulabschluss nach Verlassen der Schule in das Übergangssystem (berufsvorbereitende Bildungsmaßnahmen) ein (Autorengruppe Bildungsberichterstattung 2014 (ohne Seitenangabe))” (BMAS 2016, p. 119).
ist integration service: 564) with 23,942 persons, followed by rehabilitation entailing preparatory measures for vocational training with 10,871 persons (Statistik der Bundesagentur für Arbeit 2017 (b), Table 7).

Even these figures only show the annual entries because no further granularity is available for the statistics: “With respect to the issue of the disposition of those who have been discharged from school, there is a lack of information about both the corresponding characteristic behind their discharge and suitable age data for drawing conclusions about those who have been discharged” (“Für die Frage nach dem Verbleib von Schulentlassenen fehlt zum einen das entsprechende Merkmal der Schulentlassung und zum anderen geeignete Altersangaben, um auf die Schulentlassenen schließen zu können”) (Niehaus et al. 2012, p. 54). From November 2014 to October 2015, 65.3% of the former participants were employed in jobs requiring social insurance contributions at 3 months after completing rehabilitation and 14.2% were unemployed (Statistik der Bundesagentur für Arbeit 2017 (b), Table 5).

The location where those measures are carried out is noteworthy: The vocational training centers are the largest providers of programs leading to vocational qualification measures (Niehaus et al. 2012, p. 55) in the form of external programs (before the training/job as preparation for the mainstream labour market), preparatory measures for vocational training [berufsvorbereitende Bildungsmaßnahmen or BvB] or support during vocational training and external vocational training [außerbetriebliche Berufsausbildung or BaE] (Niehaus et al. 2012, p. 47). In addition to integrating rehabilitation patients into the mainstream labour market, the vocational training centers have the objective of personal development, because they do not just offer initial vocational integration. They also facilitate basic qualifications by providing training centers, vocational schools and accommodations. (Niehaus et al. 2012, p. 55). It is also worth mentioning here that the rehabilitation patients at vocational training centers are divided into 6 disability categories: Learning disability, physical disability, sensory disability, mental disability, intellectual disability and multiple disabilities. However, with just a few exceptions, the 'intellectual disability' category is not intended for preparatory measures for vocational training at the vocational training centers because rehabilitation patients with an 'intellectual disability' can obtain more specific services in the entry procedure/vocational training area in sheltered workshops (Niehaus et al. 2012, p. 55).
Another opportunity for former special needs students after schooling is training as a \textit{Fachpraktiker}, a person with a disability who is taught a trade using more hands-on training and less theoretical instruction. This includes (totaling 47 training professions in all): \textit{Fachpraktiker} in animal care, in baking, and in metal construction (www.planet-berufe.de from the German Federal Employment Agency). It is important to note that these training courses focusing on practical application do not cover all training professions.

However, normally, § 64 German Vocational Training Act [BBiG] and § 42k German Handicrafts Regulation Act [HwO] stipulate that persons with disabilities are to be trained in recognized training professions. On request from a person with disabilities or their legal guardian, training courses can be conducted in becoming a \textit{Fachpraktiker} for persons with disabilities in accordance with § 66 German Vocational Training Act [BBiG]/§ 42 German Handicrafts Regulation Act [HwO]. In 2014, of the 1.4 million persons in vocational training, approximately 25,000 were in training for professions intended for persons with disabilities. The total number of apprenticeships is declining overall (negative 15%), but this trend is particularly drastic in professions geared to persons with disabilities (negative 37%)\textsuperscript{6} (BMAS 2016, p. 120). In contrast, the demand for \textit{Fachpraktiker} training courses (10%) was substantially higher than the supply between 2009 and 2012. Furthermore, it is important to note that the training courses for professions catered to persons with disabilities (in accordance with § 66 German Vocational Training Act [BBiG]/§ 42m German Handicrafts Regulation Act [HwO]) are mostly conducted at vocational training centers and only approximately (estimate\textsuperscript{7}) 10% at companies (Autorengruppe Bildungsberichterstattung 2014, p. 172). In 2016, 8679 new training contracts were concluded across Germany in accordance with § 66 German Vocational Training Act [BBiG]/§ 42m German Handicrafts Regulation Act [HWO] (BMBF 2017, p. 88).

\textsuperscript{6} There may be two explanations for this, though evidence is not available for proving either: Either fewer young persons with disabilities are applying for these training positions or more younger persons are participating in mainstream training courses (see BMAS 2016, p. 121).

\textsuperscript{7} Reconstructed estimate and only for the apprenticeships in accordance with § 66 German Vocational Training Act [BBiG]/§ 42m German Handicrafts Regulation Act [HwO]. Additional information: Autorengruppe Bildungsberichterstattung 2014, p. 172.
Article 26 of the UN CRPD stipulates that the states parties shall take measures “to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.”

The precise Fachpraktiker training course just outlined would work well at companies with its specific curriculum because it lets young persons both with and without special needs in the past complete a training course and there is no separation between companies and vocational training centers (or between groups of people). For persons with disabilities, this enables “inclusion in the community and all aspects of society” (Article 26(b) of the UN CRPD).

For those who have left school, the entry process and vocational training area of sheltered workshops are another option and are listed in the statistics. In 2016, 23,000 persons received support (unchanged from the previous year) (BMBF 2017, p. 89). In 2014, 264,842 persons were employed at sheltered workshops. This figure has increased 20% since 2007 (220,227), rising continuously (BMAS 2016, p. 198). The number of persons in vocational workshops [Tagesförderstätten] is also increasing continuously (this group of people also includes former special needs students): 2012: 29,019 persons; 2014: 33,598 persons (BAGüS 2014, p. 44).

Here, I could not provide a detailed discussion of whether sheltered workshops enable persons with disabilities to participate in working life. However, it is worth noting that the continuously increasing number of sheltered workshop employees (particularly those with mental impairments) and the low number of persons transitioning from sheltered workshop to the mainstream labour market is a point of criticism (see Schreiner 2017, p. 164f.). Indeed, there are positive effects for sheltered workshop

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8 The sheltered workshop is intended to employ persons who cannot find, cannot yet find or will now be unable to find employment on the open labour market due to the type or severity of their disability (§ 136 Abs. 1 S. 2 Social Code Book [SGB] IX). “Sheltered workshops are available to all disabled persons in accordance with Paragraph 1, regardless of the type or severity of their disability, assuming it can be expected that they will perform a minimum level of economically viable work after participation in measures in vocational training.” [“Die Werkstatt steht allen behinderten Menschen im Sinne des Absatzes 1 unabhängig von Art oder Schwere der Behinderung offen, sofern erwartet werden kann, dass sie spätestens nach Teilnahme an Maßnahmen im Berufsbildungsbereich wenigstens ein Mindestmaß wirtschaftlich verwertbarer Arbeitsleistung erbringen werden.”] (§ 136 Abs. 2 S. 1 Soci- al Code Book [SGB] IX).
employees, such as a daily structure and social contacts, “other effects of gainful employment, such as work incomes that is a guarantee of one’s livelihood that can be used to provide a subsistence living (as is stipulated in Article 27 of the UN CRPD: remarks from the author) and which free them from dependences (social) services, thereby promoting autonomy and independence. However, employment at a sheltered workshop does not offer this.” [“andere Effekte von Erwerbsarbeit, wie beispielsweise ein existenzsicherndes Arbeitseinkommen, mit dem der Lebensunterhalt bestritten werden kann (wie in Artikel 27 UN-BRK gefordert wird: Anmerkungen der Autorin) und welches von (Sozial-) Leistungen unabhängig macht und somit Selbstbestimmung und Unabhängigkeit fördert, bietet die Beschäftigung in einer WfbM jedoch nicht.”] (Schreiner 2014, p. 92). The closing remarks from the UN committee include the following recommendation:

“Phasing out sheltered workshops through immediately enforceable exit strategies and timelines and incentives for public and private employment in the mainstream labor market” (United Nations 2015, p. 9).

4. Conclusion

In the phase after schooling, former special needs students are granted or prevented access to various professional education options and support systems. There is currently a muddled, highly complex selection of various service providers, qualification measures and support services. Due to the new categories from the German Federal Employment Agency, the former special needs students are assigned to various systems (transition system or vocational rehabilitation system). This attributes a significant role to the German Federal Employment Agency because it advises students during schooling and recommends actions.

In light of the UN CRPD and the articles presented here, the training and employment opportunities at companies must be strengthened for former special needs students and access paths must be opened to them.

Existing (support) options such as supervised vocational training, supported employment and Fachpraktiker training courses should take place at companies because they “provide good conditions for inclusive vocational training due to the corresponding legal regulations” [“aufgrund der entsprechenden rechtlichen Regelungen gute Voraussetzungen für eine inklusive berufliche Bildung bieten”] (Schmidt 2017, p. 104). Because the
number of persons participating in these options has been decreasing in recent years, these options should be implemented and advertised more intensively. Furthermore, there is a great need for a representative, quantitative survey that records the transition and progression of former special needs students differently based on the special needs in order to identify difficulties and problem areas in the school-work transition and to enable the development of solutions.

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Muche, Claudia; Oehme, Andreas; Truschkat, Inga: Übergang, Inclusiveness, Region. Eine empirische Untersuchung regionaler Übergangsstrukturen.


4. Inclusive labour market and inclusive workplaces
The “Why” and “How” of Disability Inclusion in Business

by Jürgen Menze

The business case for diversity has been widely recognized and companies aim to bolster up their efforts to create and retain diverse workforces. So far, companies focused on gender and ethnicity in their diversity policies. However, disability is increasingly gaining importance and recognition as an essential area for harnessing the full potential of diverse and inclusive workplaces. Global frameworks like the CRPD, the SDGs, the UNGPs and the UN Global Compact’s Ten Principles as well as changing societal expectations and national legislation are creating conducive environments for businesses to initiate or intensify their disability inclusion efforts.

There is a wide range of measures and activities companies can take to create workplaces that are more inclusive of employees, customers and business partners with disabilities. Key among them are a company policy on disability inclusion, disability awareness training for staff and managers, a plan to increase accessibility in the company, the provision of reasonable accommodation throughout the employment cycle, a strategy to recruit persons with disabilities, and the collaboration with external partners.

Introduction

What are businesses looking for in order to flourish and be successful in the long run? Internally, one of the key needs companies try to address is a skilled and committed workforce, which can contribute to effective problem solving and innovation in an ever faster changing globalized economy. Externally, a positive and favorable reputation of the company can help increase its customer base and approval in society.

Including persons with disabilities as employees, customers and business partners can help companies to meet these needs.

Benefits of diverse and disability-inclusive workplaces

The business case for diversity has been well established by research in recent years. The benefits of diverse workplaces include an increased talent
pool and employee satisfaction, strengthened customer orientation, improved innovation and creativity, as well as an enhanced company image.

However, the bulk of research has focused on the impact of workplace diversity in terms of gender\(^1\) and racial diversity. For instance, a study of more than 500 organizations has shown that every 1% increase in gender and racial diversity is correlated with a 3% and 9% increase in sales revenues respectively.\(^2\) Another study of 366 public companies has found that companies in the bottom quartile in terms of both gender and racial diversity are less likely to achieve above-average financial returns than average diverse companies.\(^3\)

While companies increasingly recognize the benefits of building and retaining diverse workforces, disability as part of diversity has mostly been neglected in both research and company inclusion practices. A survey of over 300 executives at multinational enterprises has found that respondents feel they have made progress in gender diversity but have fallen short in areas such as disability. Only 52% of respondents indicate that disability is part of their companies’ diversity and inclusion efforts, compared to 81% for gender and 77% for ethnicity/national origin. Subsequently, respondents recognize disability as the diversity area which would need most improvement in their companies.\(^4\)

Investments in including disability in a company’s diversity mandate leads to many business benefits, similar to those on gender and ethnicity. A study on disability-specific inclusion strategies in two companies demonstrated that making disability a priority increases employees’ and customers’ loyalty, lowers employee turnover, improves a supportive workplace culture.

**Global momentum for disability inclusion**

Given the current political climate and the global call for action, including the United Nations Guiding Principles on Business and Human Rights

\(^1\) ILO (2017) Gender diversity journey: Company good practices, Geneva.
\(^4\) Forbes (2011) Global diversity and inclusion: Fostering innovation through a diverse workforce, Jersey City.
(UNGPs), the UN Global Compact’s Ten Principles and the 2030 Agenda for Sustainable Development, companies are called upon to be champions of human rights and sustainable development.

There has never been a more opportune point in time for businesses to engage on the inclusion of persons with disabilities than now. In recent years, people with disabilities have gained increased visibility and recognition globally. Important expressions of the advocacy for equal opportunities and treatment of people with disabilities are the widely ratified UN Convention on the Rights of Persons with Disabilities (CRPD) and the many disability references throughout the 2030 Agenda’s 17 Sustainable Development Goals (SDGs), adopted by all UN Member States.

These global commitments reinforce the change of perceptions and expectations towards people with disabilities held by companies, people with disabilities themselves as well as their families and friends, and society at large. More than ever before, companies are expected to contribute to positive social change and more inclusive societies.

In addition, to align their national legislation with provisions of the CRPD, States increasingly revise mainstream and disability-specific laws. These also address issues like non-discriminatory employment practices, the provision of reasonable accommodations in the workplace as well as the accessibility of products and services, and therefore have a direct impact on companies.⁵

**Measures to create disability-inclusive workplaces**

To benefit from greater workplace diversity, businesses should design and adopt policies to promote the inclusion of persons with disabilities, either as part of a wider company policy, e.g. on diversity and inclusion, or as a disability-specific policy. Senior management should clearly and regularly communicate its commitment to such a policy and ensure that all organizational units and procedures are actively engaged in implementing it, in particular human resources development departments.

Moreover, to create more disability-inclusive workplaces, it is essential to provide disability awareness training to staff and managers, either as

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part of a wider training, e.g. on diversity, anti-stigma or unconscious bias, or as a stand-alone training on disability issues.

Based on an assessment of current barriers in its physical environment, websites, information and communication system and emergency evacuation procedures, the company should develop and implement a plan for gradually eliminating the identified barriers and thereby increasing accessibility for persons with disabilities as employees, customers, and business partners. Staff members with disabilities or other persons with disabilities should be involved in this process, as they will be able to help identify barriers, provide feedback, and plan subsequent priority actions.

Reasonable adjustments, oftentimes also referred to as reasonable accommodations, aim to provide equal opportunities for employees at the workplace, so their skills and talents can be used to full capacity. Job candidates and employees with disabilities who have a need for a reasonable adjustment need to be accommodated throughout the employment cycle, i.e. in the recruitment process, during a person’s professional development or when returning to work after an absence.6

To increase the number of staff with disabilities, the company should adopt and implement a strategy to recruit persons with disabilities. Elements of such a strategy include explicitly welcoming applications by disabled candidates in job advertisements, ensuring the accessibility of the recruitment process, e.g. online platform, interviews and material, providing disability awareness training for recruiters and reasonable accommodation, if needed.

To help implement the above measures, companies can benefit from advice of external partners like organizations of persons with disabilities. These organizations can usually offer support in areas like awareness raising on the rights of persons with disabilities, accessibility audits, or job matching. Further, networks of companies that are committed to promote disability inclusion offer opportunities for peer-to-peer support and mutual learning. There are more than 20 of these national business and disability networks worldwide, including in developing countries. At the international level, the ILO Global Business and Disability Network offers such a platform for multinational enterprises to learn from their peers, to inform a

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global audience about their disability inclusion practices\textsuperscript{7}, and to get support for disability inclusion activities at national level.

\textit{Conclusion}

The business case for diversity has been widely recognized and companies aim to bolster up their efforts to create and retain diverse workforces. So far, companies focused on gender and ethnicity in their diversity policies. However, disability is increasingly gaining importance and recognition as an essential area for harnessing the full potential of diverse and inclusive workplaces.

Global frameworks like the CRPD, the SDGs, the UNGPs and the UN Global Compact's Ten Principles as well as changing societal expectations and national legislation are creating conducive environments for businesses to initiate or intensify their disability inclusion efforts.

There is a wide range of measures and activities companies can take to create workplaces that are more inclusive of employees, customers and business partners with disabilities. Key among them are a company policy on disability inclusion, disability awareness training for staff and managers, a plan to increase accessibility in the company, the provision of reasonable accommodation throughout the employment cycle, a strategy to recruit persons with disabilities, and the collaboration with external partners.

\textsuperscript{7} ILO (2014) Business as unusual: Making workplaces inclusive of people with disabilities, Geneva.
Workplace Accessibility and Universal Design

by Arne Frankenstein

From a legal perspective, this essay deals with the concept of universal design, which in the German juridical context has, to date, been less common than the more widely used term of accessibility. In this context, this paper investigates the degree of obligation assigned to this concept by the Convention on the Rights of Persons with Disabilities (UN CRPD), the areas of legal regulation in Germany where universal design has already been adopted and whether that implementation needs to be revised to meet the requirements of the Convention with regard to work and employment. This includes the Workplace Ordinance (Arbeitsstättenverordnung), Social Code Book (SGB) IX and the Anti-discrimination Law (Antidiskriminierungsrecht) in particular. In conclusion, the article details the areas of regulation where changes have to be made in order to achieve a better implementation of the concept of universal design and the legal instruments that can be used to ensure corresponding enforceability.

Universal design has made its way into one of the most modern sources of international treaty law: the Convention on the Rights of Persons with Disabilities. Is the design concept expressed therein a Utopian dream or could it truly be a future-oriented approach for living together without discrimination? This is the subject of much theoretical and practical discussion. This question was also discussed at length in the relevant workshop and will not be evaluated here in greater detail. Answering it is the responsibility of those professions that occupy themselves with the technical and social factors of product design and its real-life interdependencies with other design requirements, particularly engineering, sociology and psychology.

It would seem appropriate, however, to find solutions which organize an approach to the research and development of goods, services, devices

2 See very detailed commentary on this: Hansson, p. 16ff.
and institutions that is based on human rights. This human rights-based approach has to satisfy fixed standards not only during manufacturing – as it is rightfully demanded regarding production facilities, particularly in developing countries\(^3\) – but must also be included in the design with regard to its practical application. In this way, design can contribute to a situation where nobody is prevented from using something from the outset or – formulated positively – where as many people as possible can use every product without special accommodation. Without being targeted exclusively at the needs of persons with disabilities, this progressive approach could be conducive to promote the full and effective participation, on an equal basis, of persons with disabilities, as the core objective and general principle in accordance with Article 3(c) UN CRPD to a significant extent. A highly relevant characteristic of the concept of universal design is the fact that it has fundamental effects on all areas of life, and as a result on one of the core areas of human activity: work. Work has been recognised as a documented human right since at least Article 6(1) of the International Covenant on Economic, Social and Cultural Rights and is tailored to the context of disability in Article 27 of the UN CRPD. Best-practice examples confirm that workplace design based on human rights is being increasingly recognised and implemented in terms of universal design.\(^4\)

In light of these issues, this article explains – from a legal perspective – the question of what “universal design” means in comparison with the term “accessibility,” which is used more frequently in a juridical context in Germany. Next, the degree of obligation assigned to this concept by the UN CRPD is examined, followed by observations regarding the areas of legal regulation in Germany where universal design has already been adopted and whether the current implementation needs to be revised to meet the requirements of the Convention in terms of work and employment. Concluding, this study details the areas of regulation where changes have to be made in order to achieve a better implementation of the concept

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3 See detailed commentary on the legal framework in developing countries: Olufemi, p. 110ff.

4 Very instructive information on the topic of design in the workplace, if in part very similar with regards to the actual design concepts, is provided in the overview in: Impulse für Wirtschaftswachstum und Beschäftigung durch Orientierung von Unternehmen und Wirtschaftspolitik am Konzept Design für Alle – Gutachten im Auftrag des Bundesministeriums für Wirtschaft und Technologie, 2009, available for download at: www.idz.de/dokumente/DFA_schlussbericht.pdf, p. 179ff.
and the legal instruments that can be used to ensure corresponding enforceability.

I. Universal Design – Accessibility

Universal design has its origin in the United States of America. There, the number of disabled veterans after the end of the Second World War made it politically expedient to promote the reintegration of this group of persons into society.\textsuperscript{5} The disability rights movement of the 1960s and 1970s can be viewed as the driving force.\textsuperscript{6} The movement successfully campaigned for the replacement of institutionalised health care with an awareness of societal responsibility oriented towards the removal of barriers. Initially, this movement was only concerned with persons with physical disabilities.\textsuperscript{7} Over the course of time, this change in awareness also made headway into legislation, beginning with the Architectural Barrier Act of 1968 through the Americans with Disabilities Act of 1990 and to the Telecommunications Act of 1996.

The legal, economic and social potential of the concept of universal design was recognised in the United States earlier and more deliberately than in Europe.\textsuperscript{8} Universal design refers to the design of all products, buildings and public spaces in such a way that they are usable to a large extent by all people.\textsuperscript{9} First suggested in 1977 by architect Michael Bednar, who considered barriers within buildings and in the designed environment to be overcome only once a concept of an environment usable by all people on an equal basis had taken hold, it was Ron Mace who first coined the term of universal design at the Center for Universal Design at North Carolina State University.\textsuperscript{10} At that institution, a concept of seven fundamental

\textsuperscript{5} Story/Mueller/Mace, p. 10.
\textsuperscript{6} Story/Mueller/Mace, p. 7ff.
\textsuperscript{7} The Center for Universal Design, NC State University, About UD, Federal Legislation: https://www.ncsu.edu/ncsu/design/cud/about_ud/udhistory.htm, retrieved on 31 July 2017.
\textsuperscript{8} The Center for Universal Design, NC State University, About UD, Barrier-Free to Universal Design: https://www.ncsu.edu/ncsu/design/cud/about_ud/udhistory.htm, retrieved on 31 July 2017.
\textsuperscript{9} Mace/Hardie/Place, p. 2.
\textsuperscript{10} Ostroff, paragraph 1.1ff.
structural principles of universal design was developed in April 1995 and presented publicly in April 1997.\textsuperscript{11} They are as follows:

1. Equitable use: The design is useful and marketable to people with diverse abilities.
2. Flexibility in use: The design accommodates a wide range of individual preferences and abilities.
3. Simple and intuitive use: Use of the design is easy to understand, regardless of the user’s experience, knowledge, speaking abilities, or current level of concentration.
4. Perceptible information: The design communicates necessary information effectively to the user, regardless of ambient conditions or the user’s sensory abilities.
5. Tolerance for error: The design minimizes hazards and adverse consequences of accidental or unintended actions.
6. Low physical effort: The design can be used efficiently and comfortably and with a minimum of physical exertion.
7. Size and space for approach and use: Appropriate size and space is provided for approach, reach, handling, and use regardless of user’s body size, posture, or mobility.

The concept of universal design\textsuperscript{12} is thus fundamentally different from the concept of freedom from barriers or accessibility, because it addresses all users and not just persons with disabilities. In contrast to this, accessibility in accordance with the legal definition in section 4 of the Equal Opportunities for Disabled People Act (\textit{Behindertengleichstellungsgesetz} or BGG)\textsuperscript{13} means that structural and other systems, means of transportation, technical implements of daily use, information processing systems, acoustic and visual sources of information and communication systems as well

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\item \textsuperscript{11} Story, paragraph 10.3ff.
\item \textsuperscript{12} Other concepts with similar definitions such as “design for all” or “inclusive design” will not be discussed here in greater depth. Both concepts have features in common with the concept of universal design. However, they originate from Europe and have a stronger focus on persons with health impairments, see Fisseler, p. 46.
\item \textsuperscript{13} This refers to the BGG at the federal level from 27 April 2002, BGBI. I p. 1467, most recently modified by section 19(2) of the law of 23 December 2016, BGBI. I p. 3234., which has its counterpart in the Equal Opportunities for Disabled People Acts of the sixteen German federal states (Landesbehindertengleichstellungsgesetze).
as other designed areas of life can be found, accessed and used by persons with disabilities in the usual manner, without additional complication and generally without the help of others. Thus, the point of reference for the legal definition of accessibility is persons with disabilities,\textsuperscript{14} while the point of reference for the definition of universal design is the entirety of humanity. However, both concepts have in common that they aim at a systematic improvement of the usability of products of all kinds. Because of this, the concept of universal design is sometimes described as “accessibility in a more general, proper sense.”\textsuperscript{15}

Such an expanded understanding of accessibility has also entered some German statutory provisions, for example building ordinances of federal states. Thus, section 39(1) of the Building Code of Baden-Wuerttemberg (BaWüBauO) stipulates that structural installations predominantly used by persons with disabilities and elderly persons (not necessarily with disabilities) be created in such a way that they can be used in accordance with the structures' purpose by those persons without the use of aiding devices. Section 50(2) of the Building Code of Bremen (BremBauO) goes even further and stipulates that – in sections intended for general visitors – structural installations that are open to the public be accessible to persons with disabilities, elderly persons and persons with small children and that the installations be able to be used in accordance with the structures' purpose without the help of others. Legislation concerning public transport often mentions persons with disabilities and persons with other mobility impairments who, however, are not (necessarily) disabled. These include laws such as section 3 of the Federal Highway Act (\textit{Bundesfernstraßengesetz}) as well as sections 19d and 20b of the Air Traffic Act (\textit{Luftverkehrsge- setz}), or section 8 of the Passenger Transportation Act (\textit{Personenbeförderungsgesetz}), which even mentions persons with limited mobility or sensory perception.

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\begin{itemize}
\item \textsuperscript{14} Banafsche, p. 871.
\item \textsuperscript{15} See Bundeskompetenzzentrum Barrierefreiheit (BKB), presentation on its homepage, \url{http://www.barrierefreiheit.de/bgg_barrierefreiheit.html} retrieved on 31 July 2017.
\end{itemize}
II. Universal design in accordance with the UN CRPD

The UN CRPD mentions universal design in a prominent place, that is, among the general obligations addressed by the States Parties of the convention. In accordance with Article 4(1)(f), the States Parties shall undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities, without discrimination of any kind based on disability. For this purpose, the States Parties accept the obligation of undertaking research and development of universally designed goods, services, equipment and facilities, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.

In view of this provision, it seems warranted to interpret the general principle of accessibility as specified in Articles 3(f) and 9 of the UN CRPD in accordance with the extended understanding of accessibility as mentioned above and thus to assign a meaning to it that originates from the understanding of universal design. This interpretation, which is to be implemented in accordance with the rules for the interpretation of treaties as set out in the Vienna Convention on the Law of Treaties, initially only touches on the question of what is to be understood by accessibility in accordance with the Convention. However, the principle of commitment to international law, which is expressed in the regulatory regime of the German constitution, the Basic Law (Grundgesetz or GG), and which facilitates the generation of international law through participation on the federal level and guarantees a certain effectiveness to the international law so generated, however results in this convention compliant interpretation entering domestic German legislation. In accordance with the jurisprudence of the German Federal Constitutional Court, international treaties serve, at the constitutional level, as interpretation aids for the definition of content and scope of fundamental rights and the rule-of-law principles of the Basic Law. Because of this, an evaluation is necessary of whether the

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17 Federal Constitutional Court of Germany, judgment from 26 October 2004, 2 BvR 955/00, 2 BvR 1038/01, BVerfGE 112, p. 1, 28.
term of accessibility in section 4 Equal Opportunities for Disabled People Act (BGG) can be interpreted in a manner that presupposes an extended understanding in terms of universal design. This may be in doubt because the title of the act includes “disabled people”. However, no cogent counter argument can be formed regarding exclusion of other groups of persons.\textsuperscript{19} But such a conclusion could be indicated if the deliberations contained in the explanatory memorandum had presupposed a separation of terminology. However, this is not the case here; rather, the law seems to pursue a usage of terminology that understands universal design as a component of accessibility even though the terms are not treated as being completely synonymous. In accordance with the explanatory memorandum for the creation of the Equal Opportunities for Disabled People Act (BGG) in 2002, the purpose of accessibility is, in terms of universal design, a general design of the environment in which all people live that, if possible, does not exclude anybody and that can be used by everybody to the same extent.\textsuperscript{20} The fundamental governmental draft of the most recent amendment to the Equal Opportunities for Disabled People Act (BGG) “On the further development of the law on equal rights for persons with disabilities” clarifies with succinct words that the definition of accessibility already has been designed comprehensively and openly, that it takes up the principles of universal design and that it thus essentially meets the requirements of Article 9 the UN CRPD.\textsuperscript{21}

However, to reach the goal of ensuring full and effective participation of persons with disabilities in society in accordance with Article 3(c) of the UN CRPD, the in the context of work important equality of opportunity in accordance with Article 3(e) of the UN CRPD, and a labour market that is open, inclusive and accessible for persons with disabilities in accordance with Article 27(1) of the UN CRPD, it is not sufficient to interpret the term “accessibility” in the sense of universal design.\textsuperscript{22} Rather, supple-

\textsuperscript{19} Banafsche, p. 872 with methodical references to Klug and Larenz.
\textsuperscript{20} Bundestags-Drucksache (Bundestag document or BT-Ds.) 14/1720, p. 24.
\textsuperscript{21} BT-Ds. 17/7824, p. 34.
\textsuperscript{22} Bühler, p. 48, differentiates between an individual and a systematic perspective on the design of accessibility and refers to the fact that access for all is simply not possible as a paradox for accessibility. However, this threatens to blur the complementary nature of the concepts of accessibility, assistive technologies and assistance.
mentary concepts are required. This is based on the assumption that users may exist who, in a largely accessible environment, can still not use a product due to their individual impairment.\textsuperscript{23} To highlight the fact that, to this extent, individual aids may still be required, the need for assistive technologies is often specified, which also finds its normative reference point in the Convention. For example, the States Parties pledge in accordance with Article 4(1)(g) and (h) to promote research and development of such technologies, to promote their availability and use and to provide information about them.\textsuperscript{24} In some cases, accessibility, universal design and assistive technologies are grouped under the umbrella term of technologies that compensate for disabilities.\textsuperscript{25} However, this seems ambiguous insofar that assistive technology must also be understood to include personal assistance. However, because this assumes that assistance services are rendered by assistance providers,\textsuperscript{26} it is more conducive to understanding if we designate accessibility in terms of universal design, and consider assistive technologies and personal assistance together as mutually complementary concepts. Practically speaking, therefore, it can be necessary, independently of the concept of universal design, to reach solutions in individual cases that meet individual requirements in a manner tailored to individual needs. This is also illustrated by the provisions of the UN CRPD, because despite the approach of universal design, Article 9(2) illustrates

\textsuperscript{23} This is in accord with General Comment No. 2 of the UN committee on accessibility, as stated in No. 15: “The application of universal design does not automatically eliminate the need for technical aids.”.

\textsuperscript{24} Furthermore, the concept of assistive or supportive technology is also found in Article 20(d) of the UN CRPD with regard to mobility, in Article 26(3) with regard to rehabilitation, in Article 29(1)(a)(ii) for participation in political life, and in Article 32(1)(b) with regard to international cooperation.

\textsuperscript{25} For example, in the report of the Committee for Education, Research and Technology Assessment (Ausschuss für Bildung, Forschung und Technikfolgenabschätzung) regarding the opportunities and prospects for technologies in the workplace that compensate for disabilities, BT-Ds. 16/13860. Here, technologies that are based on the individual and their functional impairments and are to compensate for these are called assistive technologies, while such technologies based on environmental conditions are called universal design. This concept of “universal design” is generally translated into German as Barrierefreiheit (accessibility or lack of barriers).

\textsuperscript{26} Regarding personal assistance in the everyday life of persons with disabilities: Vernaldi, p. 241ff.
that accessibility is accomplished by a set of measures\textsuperscript{27}, particularly also including appropriate, person-specific provisions. Examples of these can include human and animal assistance and intermediaries such as text readers or sign language interpreters, see Article 9(2)(e) UN CRPD. In the context of work and employment, this includes the different variants of individual forms of support for persons with disabilities in their working lives.\textsuperscript{28} This includes, in particular, work assistance in accordance with sections 49 and 185 Social Code Book (SGB) IX, but also the task – assigned to specialised integration services in accordance with sections 192ff. Social Code Book (SGB) IX – of supporting occupational participation of persons with severe disabilities who need special support and the supported employment programmes, directed towards the same target group, in accordance with section 55 Social Code Book (SGB) IX.

It is precisely the countries with highly advanced economies, like Germany, that are prompted to becoming active at both developing high-tech solutions\textsuperscript{29} for assistive technologies and advancing accessible infrastructure in terms of a concept that meets the requirements for universal design. An incremental implementation process must be organized that provides the necessary resources, including financial ones.

\section*{III. Concrete provisions and reception in German law}

To date, adoption of universal design in Germany has been very limited and has led to corresponding codification only in very few areas, despite the concept's relationship with human rights.

It is worth pointing out that when North Rhine-Westphalia passed an Inclusion Enforcement Act (\textit{Inklusionsstärkungsgesetz})\textsuperscript{30} and at the same revised the Equal Opportunities for Disabled People Act for North Rhine-Westphalia (NRW-BGG), it used the term universal design in German law expressly for the first time. In accordance with section 4(4) NRW-BGG,

\begin{itemize}
\item \textsuperscript{27} Welti, p. 131.
\item \textsuperscript{28} An overview of this topic from a social science perspective: Schartmann, p. 135ff.
\item \textsuperscript{29} These can be made even more effective and useful through ambient intelligence (AMI) environments (cf. Emiliani/Stephanidis, p. 605ff.).
\item \textsuperscript{30} Erstes allgemeines Gesetz zur Stärkung der Sozialen Inklusion in Nordrhein-Westfalen from 14 June 2016, Official Gazette of NRW 2016 Nr. 19 from 30 June 2016, pp. 441-448.
\end{itemize}
the state maintains an agency (such as the Agentur Barrierefrei NRW) that informs and advises associations of persons with disabilities and public interest bodies in matters of accessibility and in developing and implementing concepts to create accessibility. The content of its work, in accordance with clause 3, particularly includes “the initial consultation, provision, compilation and ongoing development of supporting information about establishing accessibility, about universal design and assistive technology and raising awareness through PR work and developing concepts and research in the area of technology-supported accessibility.” The explanatory memorandum, on the other hand, does not specify the concept of universal design, nor does it make any statement about extending the term Barrierefreiheit in a corresponding sense. However, it emphasises that the understanding of Barrierefreiheit encompasses a broad meaning and is, above all, open.\footnote{31 Landtagsdrucksache (federal state parliament document or LT-Ds.) of NRW 16/9761, p. 76.}

The European Union (EU), which has ratified the UN CRPD,\footnote{32 Signed 30 March 2007, came into force on 23 December 2010.} has used the term universal design in its Directive 2016/2102/EU\footnote{33 Official Journal of the European Union, L 327 from 12 February 2016, pp. 1-15.} on the accessibility of websites and mobile applications of public sector bodies in the recitals, which precede the text of the Directive equivalent to a preamble. Recital No. 12 states the opinion that the UN CRPD demands that “the design of products, environments, programmes and services should enable their use by all people, to the greatest extent possible, without the need for adaptation or specialised design.” Unlike regulations, EU directives do not have direct and immediate effect, but must be transposed into national law in order to take effect. Therefore, member states have a certain amount of leeway in implementing a directive. In this context, however, it must be noted when implementing the Directive that both the UN CRPD and the recitals of the Directive, which demands that mobile applications be made more accessible (Article 4 Directive 2016/2102/EU), are based on a comprehensive understanding of accessibility in the sense of universal design.
Besides these provisions that directly take up the concept of universal design but have only indirect legal effects, there are provisions in German law that could contradict this concept. The following will provide, by way of illustration, only those specific provisions in German labour and social law which have a direct relationship to the employment of persons with disabilities.

In accordance with section 3a(2)(1) of the German Workplace Ordinance (Arbeitsstättenverordnung)\(^ {34}\), the employer – if persons with disabilities are employed – shall furnish and operate the workplace in such a manner that the special needs of these employees are taken into account with regard to health and safety. In accordance with clause 2, this applies particularly to the accessible design of workstations, washrooms, break facilities, waiting rooms, cafeterias, first-aid facilities and lodgings as well as the associated doors, transport routes, escape routes, emergency exits, stairs and orientation systems used by employees with disabilities. According to the most recent amendment of the German Workplace Ordinance in 2016, the additions in section 3a(2) became necessary because also washrooms, break facilities, waiting rooms, cafeterias, first-aid facilities and lodgings must, where necessary – to the extent that persons with disabilities are employed – be furnished and operated in a manner that is suitable for persons with disabilities.\(^ {35}\) This makes it clear that – despite the fact that the space within a business to be made accessible for persons with disabilities has been expanded and now no longer extends solely to the workstations, their means of ingress and egress and washrooms – a limiting differentiation of the quality of facilities is still deemed correct and no basic design in the sense of a universal design has been introduced. In addition, only those facilities are included that are actually used by employees with disabilities. In this respect, it is not the potential for use that is of primary importance, but, following the will of the legislator, it is the actual, specific use. To this extent, the amendment of the Ordinance implements the sustainability strategy of the German Federal Government – as set out in the justification without further specification – that workplaces now have to be designed to not only be suitable for persons with disabilities, but also suitable for the elderly.\(^ {36}\) This places the focus on two

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\(^{35}\) Bundesratsdrucksache (Bundesrat document or BR-Ds.) 509/14, p. 27.

\(^{36}\) Ibid., pp. 19/20.
specific groups of employees, but not on a fundamental design of accessibility for all.

This Ordinance is, in turn, further specified by the Technical Rules for Workplaces (Technische Regeln für Arbeitsstätten) issued for this purpose.\textsuperscript{37} They are determined by the Committee for Workplaces and promulgated by the German Federal Ministry of Labour and Social Affairs in the Joint Ministerial Gazette, an official publication. Technical rules are not legislation, nor do they become such by being referenced in laws that introduce them. Rather, they remain decision-making tools in a specific case,\textsuperscript{38} which, however, are still given great weight by the user of the standard. In accordance with section 2(1) of the Technical Rules for Workplaces, the effects of the disability and the resulting individual requirements must be taken into account as part of a health and safety assessment of the accessible design of the workplace. Accessible design of the workplace is mandatory for those areas of the workplace to which the employees with disabilities must have access. Section 2(2) of the Technical Rules makes a reverse exception to this, namely for the case that in existing workplaces, the technical measures necessary to make the design accessible are associated with outlays that are obviously disproportionate. The employer can then ensure health and safety protection through organizational or individual measures in a comparable fashion.

Similarly positioned is the provision in section 164(4)(4) Social Code Book (SGB) IX, which grants persons with severe disabilities a right to disability-friendly furnishing and maintenance of the workplace provided by their employer, including operating equipment, machines and devices, as well as the design of the workstations, work environment, work organization and working time, particularly taking the risk of accidents into account. This entitlement safeguards a requirements-based design of the workplace for employees with severe disabilities and is geared towards enabling participation in working life even if no corresponding design has

\textsuperscript{37} Technische Regeln für Arbeitsstätten, ASR V3a.2 Edition August 2012, most recent revision in Joint Ministerial Gazette (Gemeinsames Ministerialblatt or GMBI) 2017, p. 398.

\textsuperscript{38} For more information about the weight of technical regulations: Federal Administrative Court (BVerwG) from 29 July 2019, p. 1567; Federal Administrative Court from 30 September 1996, DÖV 1997, p. 303; Federal Supreme Court (BGH) from 07 July 2010, NJW 2010, p. 3088.
taken place to date. However, one problem is that this claim does not arise until a person with severe disabilities is employed by a business. It relieves employers from having to establish comprehensive accessibility in the sense of universal design, thus potentially creating incentives not to employ persons with disabilities because their employment could result in substantial adaptation costs. To this extent, it stands in opposition to a comprehensive understanding of accessibility. While a failure to employ persons with severe disabilities triggers a mandatory compensatory levy in accordance with section 160 Social Code Book (SGB) IX, the income from the levy is not allocated to build accessible structures.

The provision of section 164(4)(5) Social Code Book (SGB) IX refers, in contrast, to the specific equipment of the workstation with the necessary technical working aids, taking into account the disability and its effects on the employment, and to this extent, corresponds to the requirements of creating assistive technologies. Again, however, the requirement does not arise until an employee with severe disabilities is hired.

All of the stipulated regulations have one aspect in common: they are contrary to human rights requirements to the extent that they do not codify a comprehensive development approach in the sense of universal design. Rather, the entitlements remain specific to the disability and are also subject to restrictions with regard to the scope or may face objections based on proportionality arguments. A more consistent application of the concept of universal design could be an effective means of countering current situations of segregation in the world of work. It appears logical that the separation between persons with disabilities who are capable of doing a minimum of economically valuable work as defined by section 219(2)(1) Social Code Book (SGB) IX and are employed in sheltered workshops and those who are not categorised accordingly can be broken down by establishing broad-based accessibility more consistently. This could help to further open the mainstream labour market for workshop employees and – where it appears logical to do so – improve the options for free choice of occupation that also meet the requirements of German constitutional law.

Furthermore, changing the understanding of accessibility is capable of having an impact on anti-discrimination law. Fundamentally, in accor-

39 The law also pursues this approach elsewhere by testing what is called the Budget für Arbeit structure as a reintegration service in accordance with section 97 Social Code Book (SGB) XII in conjunction with section 17 Social Code Book (SGB) IX.
dance with section 7(1) in conjunction with section 1 of the General Law on Equal Treatment (AGG), any discrimination of employees based on the protected characteristic of disability is prohibited. However, section 8(1) General Law on Equal Treatment (AGG) declares such discrimination to be permissible in exceptional cases, if the protected characteristic negatively affects an essential and critical vocational requirement, due to the type of task to be carried out or the conditions for carrying it out, insofar as the purpose is lawful and the requirement is reasonable. For persons with disabilities, the conditions for undertaking a professional activity depend primarily on the design of the workplace and workstation. A more comprehensive understanding of accessibility would automatically result in more stringent requirements for such a legal denial of employment justified by law. 40 This may result in a not justified denial of employment more often than now, which – depending on the individual case – can trigger claims for damages and compensation for pain and suffering.

IV. Required changes and tools for enforcement

It is evident that further acts of transposition are necessary in domestic law to reflect the understanding of accessibility in accordance with the Convention, in the sense of universal design, and, to this extent, to promote the process of applying the Convention in national law.

At the moment, the obligation to ensure accessibility is not comprehensively codified in law, and the Equal Opportunities for Disabled People Acts of the German federal government and federal states address only public authorities. Looking at the private sector in particular, no significant progress has been made since 2009. 41 Instead of creating a system for monitoring compliance and punishing breaches, the responsibility for implementing progress using the largely ineffective tools of agreed goals and class-action lawsuits, will continue to be put on civil society. 42 For the area of accessibility of workplaces and workstations discussed in this paper which is in large part the responsibility of the private sector, neither

40 Such an approach could result solely from interpreting the term “accessibility” in terms of universal design in line with the Convention, but should also be codified in law for reasons of clarity.
41 DIMR, Submission, p. 9.
42 DIMR, Parallelbericht, p. 18.
the obligation to ensure accessibility has been complied with completely nor has the principle of universal design been observed adequately. As a consequence, legislative efforts are required to implement the specifications of the Convention.

The same conclusion was reached by the UN Committee on the Rights of Persons with Disabilities in its state report on Germany. In this report, the Committee expresses its concern about the fact that private entities cannot be obliged in a binding manner to refrain from creating new barriers and to eliminate existing barriers to accessibility. In addition, it expresses its concern about the inadequate implementation of the provision with regard to accessibility and universal design. It recommends, among other measures, mandatory requirements, monitoring mechanisms and effective sanctions in case of infringement in order to also extend accessibility in all sectors and areas of life and to also extend these measures to private entities.

Accordingly, accessibility in the sense of universal design must be developed much more as a basic requirement, for which, with regard to participation in working life, the obligation should be to create accessible workplaces not only in those places where persons with disabilities work, but everywhere. The barrier to creating such accessible workplaces can, in individual cases, be only the proportionality of such a design process. For this purpose, the existing requirements of Social Code Book (SGB) IX, which convey a corresponding entitlement to an employee with a disability, are not to be abolished. Rather, they remain relevant in individual cases as the embodiment of reasonable accommodation. In fact, what is required is an accompanying provision of a fundamental design mandate. The legislative competence for this purpose is assigned to the German federal government within the framework of competing legislation in accordance with Article 74(1)(12) Basic Law (GG) with regard to employment law. Insofar as the revision of the anti-discrimination law is part of civil law, it is under the purview of the German federal government in accordance with Article 74(1)(1) of the Basic Law (GG).

As a State Party to the UN CRPD the German legislature is obliged to employ the concept of universal design when developing legislation. This means that the provisions shown above, which contradict universal design

43 UN CRPD Committee, paragraph 21.
44 Ibid., paragraph 22.
requirements, are not the only ones that have to be put to the test. Rather, the formative definition of accessibility in legislation regarding equal opportunity for persons with disabilities must be reviewed and adapted accordingly. To enable effective judicial control, authorities and courts must be able to examine what the legal concept of “accessibility” entails. This concept forms the reference point for objective obligations according to which for example specific legal entities must establish accessibility following the general rules for new buildings or modifications or subjective rights entitling the individual to have accessibility established in a concrete situation. The definition determines which benchmark is to be applied in administrative and court decisions and whether legislators are willing to implement universal design requirements in the future.

The control mechanisms of civil society, specifically the mechanisms developed in the Equal Opportunities for Disabled People Act (BGG) such as class-action lawsuits, could be maintained despite the changed benchmark, which will also affect subordinate legal specifications. Nevertheless, they should be re-designed to be more effective, because currently they are an underdeveloped element of collective legal protection. This includes adapting the class-action lawsuit so it is free of charge and an action for performance. Finally, if the agreed goals are not met due to the failure to provide reasonable accommodations, it should be possible to file a class-action lawsuit to increase the pressure on civil society to take part in such negotiations.

V. Summary and outlook

As shown here, the establishment of accessibility in the form of a universal design is required by human rights, but it must be specified by domestic law. When the establishment of accessibility in terms of the legislator’s prerogative is viewed as a developing, dynamic process which can be implemented only gradually and while taking into consideration the concept

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45 As in section 8(1) Equal Opportunities for Disabled People Act (BGG).
46 If the purpose of the general accessibility provision is to prevent an abstract hazard, the aim of subjective rights is to prevent a specific hazard to a person to ensure equal access and equal use of goods and services. This may have an effect on the area of accessible design for workshops and workplaces.
47 Halfmeier, p. 134.
of proportionality, this fails to recognise, however, that the right of accessibility can, depending on the relevance of the concrete location for human rights – i.e. potentially even a workshop or a workplace –, crystallise into an unconditional right. Moreover, it must be noted that direct implementation can be required with respect to any instances of actual discrimination. In addition, insufficient consideration has been given to the fact that even this gradual implementation has to follow a concrete implementation strategy that has to comply with human rights requirements. As illustrated above, an interpretation of the Convention’s provisions related to universal design result in the concept of accessibility having to be interpreted broadly, which also has to have effects on the gradual implementation in domestic law. The provisions in the German Workplace Ordinance (Arbeitsstättenverordnung) and the Social Code Book (SGB) IX must be changed or supplemented with respect to the accessibility of places of work and also the general definition of accessibility must be amended.

Finally, it must be noted that there is a link between the definition of disability, which arises through the interaction of an impairment with attitudinal or environmental barriers which may hinder participation, and the definition of universal design, which calls for minimising discriminating environments to minimise barriers as well. Understood in this way, universal design is an effective instrument to prevent disabilities from being created in the first place. The objective of legislative endeavours should be to use this instrument and to design the respective legal system as a supporting context factor.

References


48 Memorandum to BT-Ds. 16/10808, pp. 45, 51.
49 Welti, p. 128.
50 In relation to this, see Preamble(c) and Article 1 subparagraph 2 of the UN CRPD and regarding the human rights model of disability see: Hirschberg, p. 1ff.

Deutsches Institut für Menschenrechte, Monitoringstelle zur UN-BRK (DIMR): Submission of the National CRPD Monitoring Body of Germany to the CRPD Committee on the Rights of Persons with Disabilities on the occasion of the preparation of a list of issues by the Committee in the review of Germany's Initial Report, Berlin 2014.

Deutsches Institut für Menschenrechte, Monitoringstelle zur UN-BRK: Parallelbericht an den UN-Fachausschuss für die Rechte von Menschen mit Behinderungen, Berlin 2015.


In this article, blind and visually impaired people in the labour market are representative of people with severe disabilities who face discrimination in labour markets. However, there are no official statistics regarding the employment and unemployment rate in Germany for these people. By no means is the available data any better for the other considered countries – Sweden, France, The Netherlands, Austria, Italy, Poland, Romania and Turkey. It becomes apparent that disability type and disability intensity and experienced disabilities correlate strongly with the perceived discrimination intensity in the professional context. This article discusses the possibilities for how to better integrate visually impaired job applicants into work and career. The focus of attention is on the supply and demand conditions in labour markets, and on the capacity of job placement institutions and employment institutions in Germany. This article looks at some promising initiatives in the area of Disabled People’s Organizations in cooperation with specialized educational institutions and the agencies and job centers of the German Federal Employment Agency.

1. How many people are affected with blindness in Germany, how many are employed, and how many are looking for work?

If one attempts to gather data about blind people, one runs into a nebulous field in Germany, with many cases going unreported. But even a look across the borders to other European countries does not produce a more informative picture. The statistics on persons with severe disabilities [Schwerbehindertenstatistik] are compiled in Germany every two years. These findings are the statistical summary about the existence and the changes of persons who were awarded severe disability status based on the degree of their disability by institutions of what is called the welfare administration. The large overview table 2.1 of the respective statistics of persons with severe disabilities (for example Destatis 2017b) differentiates by disability type and age group as well. However, only the disability that
is presumed to be the most severe applies. This is often the one that occurred first. In this table, a distinction is made between visually impaired people with “blindness or loss of both eyes," “severe visual impairment” and “other visual impairments”. Some 73,070 people were declared blind in 2015. One might assume that blindness is always specified as the most severe type of disability, but this is not always the case. Examining the analysis in greater depth reveals that it is necessary to increase the number of blind people by approximately eight percent to account for those with blindness as a second or third disability. This might be the case for someone suffering from diabetes who loses their kidney function, needs dialysis and loses their eyesight. Blindness could thus be classified as a third disability. This applied to 78,916 people in 2015. This requires increasing the number of persons with profound visual impairments by approximately eight percent. The difference is far greater with other visually impaired people. Taking into consideration any second and third disabilities, the number of affected people increases by approximately eighty percent. The total number of affected people is certainly greater than the number given in table 2.1 of the statistics on persons with severe disabilities (Destatis 2017b).

Another issue to think about is the following: These statistics record only those people who had (voluntarily) requested their severe disability status. One cannot expect that all circumstances of life are statistically included.

In order to determine the number of blind people in Germany, one could alternatively look at the number of “BI” (for blind) identification marks granted during the recognition process of their severe disability. To what extent this identification mark was assigned cannot be gathered from the statistics on persons with severe disabilities. According to table 1, the identification mark BI was assigned 104,978 times in Germany between 2011 and 2014. (Table 1 is the result of a data analyses by the German Association for the Blind and Visually Impaired People.) In accordance with § 72 Social Code Book [SGB] XII, these people are legally blind. The same definition regarding blindness is used in the statistics on persons with severe disabilities.
Table 1: Inhabitants and Bl (blind) identification mark recipients in Germany sorted by federal states from 2011 to 2014

<table>
<thead>
<tr>
<th>German federal state</th>
<th>Population</th>
<th>Blind persons (Bl)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baden-Wuerttemberg</td>
<td>10,569,111</td>
<td>9,981</td>
</tr>
<tr>
<td>Bavaria</td>
<td>12,519,571</td>
<td>14,301</td>
</tr>
<tr>
<td>Berlin</td>
<td>3,375,000</td>
<td>3,315</td>
</tr>
<tr>
<td>Brandenburg</td>
<td>2,449,500</td>
<td>4,287</td>
</tr>
<tr>
<td>Bremen</td>
<td>654,770</td>
<td>600</td>
</tr>
<tr>
<td>Hamburg</td>
<td>1,734,000</td>
<td>2,854</td>
</tr>
<tr>
<td>Hesse</td>
<td>6,016,000</td>
<td>8,602</td>
</tr>
<tr>
<td>Mecklenburg-Vorpommern</td>
<td>1,600,300</td>
<td>3,186</td>
</tr>
<tr>
<td>Lower Saxony</td>
<td>7,778,995</td>
<td>10,701</td>
</tr>
<tr>
<td>North Rhine-Westphalia</td>
<td>17,554,329</td>
<td>22,505</td>
</tr>
<tr>
<td>Rhineland-Palatinate</td>
<td>3,990,278</td>
<td>4,548</td>
</tr>
<tr>
<td>Saarland</td>
<td>994,287</td>
<td>1,424</td>
</tr>
<tr>
<td>Schleswig-Holstein</td>
<td>2,806,500</td>
<td>3,643</td>
</tr>
<tr>
<td>Saxony</td>
<td>4,050,000</td>
<td>6,711</td>
</tr>
<tr>
<td>Saxony-Anhalt</td>
<td>2,259,000</td>
<td>4,080</td>
</tr>
<tr>
<td>Thuringia</td>
<td>2,170,500</td>
<td>4,241</td>
</tr>
<tr>
<td>TOTAL</td>
<td>80,522,141</td>
<td>104,979</td>
</tr>
</tbody>
</table>

Sources:
Baden-Wuerttemberg: Badischer Blinden- und Sehbehindertenverein, as of 2012.
Bavaria: Zentrum Bayern Familie und Soziales (ZBFS), as of 2013-12-31.
Brandenburg: Blinden- und Sehbehindertenverband Brandenburg, as of 2011 and 2012.
Bremen: Statistisches Landesamt Bremen, as of 2011-12-31.
Hesse: Landeswohlfahrtsverband Hessen, as of May 2014.
Mecklenburg-Vorpommern: Ministerium für Arbeit, Gleichstellung und Soziales, as of 2012-12-31.
Lower Saxony: Niedersächsisches Ministerium für Soziales, Gesundheit und Gleichstellung, as of 2013.
North Rhine Westphalia: Ministerium für Arbeit, Integration und Soziales NRW, Referat V B 3, as of 2012-12-31.
It is puzzling how 78,916 blind persons could carry the identification mark BI for blindness 104,979 times. Even experts who are working in this field for the German Federal Statistical Office could only speculate. It may be significant that in the 2015 survey for the statistics on persons with severe disabilities, approximately 18 percent of all persons with severe disabilities were recorded as “miscellaneous” with regard to their type of disability. Consequently the number of blind people as measured against the number of those that were assigned the identification mark BI for “blind” seems comparatively the more valid number. In accordance with this criterion, 105,000 persons are affected by blindness.

Various estimates project higher numbers for Germany.

a) “Looking at the WHO Europe numbers for 2002, it is possible to calculate that 164,000 blind persons (0.2%, WHO blindness categories 3, 4 or 5) ... lived in Germany in 2002.” [“Aus den WHO-Europazahlen 2002 kann man errechnen, dass in Deutschland 2002 164.000 Blinde (0,2%, Blindness WHO Grad 3, 4, oder 5) ... lebten.”] (Bertram 2005, 1)

b) “As a comparison, one can consult the number of blind allowance recipients in North Rhine in 1997. If one extrapolates this to cover all of Germany, one arrives at the conclusion that there were 133,660 recipients who received an allowance for the blind.” [“Zum Vergleich kann man die Zahl der Blindengeldbezieher in Nordrhein von 1997 heranziehen. Wenn man diese auf ganz Deutschland hochrechnet, kommt man auf 133.660 Blindengeldbezieher.”] (Bertram, reference as above) (“The difference is the result of the stricter criterion regarding the allowance for the blind in Germany (corresponds to WHO category 5, 4 and only 3 in part), the increase in blind persons and a small number of
blind persons who have not applied for the allowance for the blind” [“Die Differenz ergibt sich aus dem etwas strengeren Blindengeldkritерium in Deutschland (entspricht WHO-Grad 5, 4 und nur partiell 3), der Zunahme der Blinden und einer wahrscheinlich relativ kleinen Anzahl von Blinden, die kein Blindengeld beantragt haben.”] (Bertram, ibid.)

c) “The German Association for the Blind and Visually Impaired (DBSV) has at its disposal valid data for visually impaired people for the former GDR” [“Der Deutsche Blinden- und Sehbehindertenverband (DBSV) verfügt über valide Daten über Sehbehinderte in der ehemaligen DDR”] (Bertram reference as above) A full census took place there regularly. If one extrapolates the blind allowance statistics created by the GDR Ministry of Heath from the late 1980s onto Germany as a whole, this results in a figure of approximately 150,000 blind persons (see: http://www.dbsv.org/infothek/zahlen-und-fakten/#c922).

The author sets a number of 150,000 blind persons in Germany as the average value derived from the above three estimates (a, b, c) for the following presentation and determines the number of those of working age (31.2 percent) with 46,800 persons (see table 2).

In the context of this study, the total number of blind persons is not of interest, but rather the number of those who are of working age. Official statistics define age cohorts starting from age 15 through age 64, inclusive. There are strong reasons to restrict the margin for blind persons, for example from 20 to 60 years as the infas institute did in its survey of blind persons in the 1990s (Schröder, 1997). Persons who become blind in their younger years are rarely employed before they reach age 20. Persons who become blind in their working age were often “forced into early retirement”, thus exiting the labour market earlier than usual. For reasons of consistency and practical definitions, the author continues to use the “official” definition of gainful employment.

The statistics on persons with severe disabilities reveals that only 31.2 percent of blind people are of working age. Blindness in younger years is an event that occurs increasingly rarely. Blindness primarily affects old and very old people.
Table 2: Blind persons of working age in Germany

<table>
<thead>
<tr>
<th>Category</th>
<th>Blind persons Overall</th>
<th>Of working age (15 through 64 years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>78,916</td>
<td>24,622</td>
</tr>
<tr>
<td>2</td>
<td>104,979</td>
<td>32,753</td>
</tr>
<tr>
<td>3</td>
<td>150,000</td>
<td>46,800</td>
</tr>
</tbody>
</table>

Sources: Destatis 2017b, Schröder 1997, Bertram 2005, own calculations

Depending on the total number of blind persons on which the assumption is based, the number for persons of working age ends up being between 24,622 and 46,800 looking at the three scenarios (see Tab. 2).

The question now arises as to what extent visually impaired people actually participate in working life, and how high the ratio of employed persons actually is among them. As expected, it is only possible to make a comment about their size. Two pieces of information are available to us: The infas study questioned more than 1,000 people in Fall of 1993 and identified the employment rate of the recipients who receive an allowance for the blind at only 26 percent in the Rhineland. Persons between the ages of 20 and 60 were part of this study. While Schröder (1997) speculated: “Blind men and women of working age have a vastly below-average employment rate in comparison to other disability groups” [“Blinde Männer und Frauen im erwerbsfähigen Alter haben im Vergleich zu anderen Behindertengruppen eine weit unterdurchschnittliche Erwerbsquote”] (reference as above, 502), one learns that this is not true today.

The first participation report of the German federal government shows the current employment rate for persons with severe disabilities with a disability degree of 90 or 100 at 26 percent (men 29, women 23 percent) (Teilhabebericht der Bundesregierung 2013, 135, table 4-26).

The population here consists of persons between the ages of 15 and 64. If the infas study (20 through 60 years) would have set the age limit equal-

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1 An additional 7 percent were unemployed or were looking for work; this corresponds to an underemployment rate at the time of 21.2 percent. Only three out of four of those who describe themselves as unemployed indicated that they are registered with the job centers – that is why the specific unemployment rate is calculated at the rate of 16 percent (see Schröder 1997 and own calculations).
ly broadly, the percentage of the blind people surely would have been even less. The data shows that the employment situation for blind people has not improved at all since the 1990s. If anything, the opposite is true.

If one applies the 26 percent employment rate to the three different values for the number of blind people who are of working age, one obtains the range in form of three scenarios of blind people who are employed (see table 3).

Table 3: Employed blind people in Germany

<table>
<thead>
<tr>
<th>Category</th>
<th>Blind persons</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Overall</td>
<td>Of working age</td>
</tr>
<tr>
<td>1</td>
<td>78,916</td>
<td>24,622</td>
</tr>
<tr>
<td>2</td>
<td>104,979</td>
<td>32,760</td>
</tr>
<tr>
<td>3</td>
<td>150,000</td>
<td>46,800</td>
</tr>
</tbody>
</table>

Sources: Destatis 2017b, Bertram 2005, Schröder 1997, Teilhabebericht der Bundesregierung 2013, own calculations

The given values in table 3 regarding the precise specified number of persons should not give the impression that the results are more accurate than they really are. They show the bandwidth within specific parameters for possible alternative scenarios in which blind people participate in working life. This table shows that the number of employed blind people is very likely between 6,500 and 12,000. This information shows a rather wide range. According to this author, the most probable value is at approximately 8,500 people; this value is based on the estimate of the assigned identification marks BI for blind in the ID card for severely disabled persons. This paper continues to use this value.

However, it is worth noting that the extensive reporting systems for employment statistics and unemployment statistics do not make it possible to view the extent and the structure of the employment of blind persons. Therefore, one needs to rely on the above surveys and calculations in order to get an impression about the relevant scale.
Table 4: Blind and visually impaired people in and outside working life in Germany

<table>
<thead>
<tr>
<th>Type of disability</th>
<th>Total</th>
<th>Ages 15-64</th>
<th>employed</th>
<th>not employed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Absolute</td>
<td>absolute</td>
<td>in %</td>
<td>absolute</td>
</tr>
<tr>
<td>Blind</td>
<td>105,000</td>
<td>32,760</td>
<td>31.2%</td>
<td>8,518</td>
</tr>
<tr>
<td>Profoundly visually impaired</td>
<td>52,302</td>
<td>11,193</td>
<td>21.4%</td>
<td>2,910</td>
</tr>
<tr>
<td>Otherwise visually impaired</td>
<td>419,528</td>
<td>123,761</td>
<td>29.5%</td>
<td>55,692</td>
</tr>
</tbody>
</table>

Sources: Destatis 2017b (Blindheit, hochgradige Sehbehinderung oder sonstige Sehbehinderung als 1. – 3.-schwere Behinderungsart), BI identification mark and calculations performed by the author

Following a comparable procedure, data is obtained for the emergence of profoundly visually impaired people and other visually impaired people, and their percentage of working age, their actual employment rate and – last but not least – the inactivity rate. The number of the affected persons who are profoundly visually impaired taken from tab. 2.1 Destatis 2017b is higher by eight percent because the author takes into account visual impairment as a second or third disability. In accordance with this approach, the number for otherwise visually impaired people increases by some eighty percent.

In accordance with various methods, it is determined that only a quarter (26 percent) of the blind and the profoundly visually impaired people who are between 15 and 64 years old have an occupational task. Three-quarters of this group of persons (74 percent) are unemployed, looking for work or – at first glance – are economically inactive. Surveys show that this economic inactivity is mainly involuntary (Schröder 1997). This is completely unacceptable in light of the Convention on the rights of persons with disabilities, especially in light of the fact that four out of five of all working-age people (about 80 percent) are employed on average and thus only-one fifth is economically inactive. This needs to be reiterated again.

The employment situation is more favourable for otherwise visually impaired people. At least 45 percent of the employable among them work, but more than half do not. Consequently their employment participation is approximately half as much as the employable population in general.
2. Possible causes for the low employment rate for blind and visually impaired people

According to the infas study (Schröder 1997), the employment rate for persons who go blind early (in other words, blindness occurs in childhood or in adolescence) is significantly higher, in some cases twice as high as has been reported above. These people have already experienced their general education, vocational socialization and finding a first job under the conditions of their disability. This is clearly the minority, however. There are only 2,938 persons who went blind before reaching the age of 25 (Destatis 2017b). The people most affected are already clearly of working age and almost 100 percent of them are in their career when the impairment occurs. Schröder (1997) states that most of them leave work after going blind. In doing so, they missed the opportunity to resume their previous work at their previous private or public sector employer

• after ophthalmologic and vocational rehabilitation. This is the best solution for many reasons, but it occurs only rarely.
• to practice a job unlike the one previously tailored with the same employer. At least this is rated as the next best solution because their operational experience, professional experience and industry experience can be used, and not least because of the integration into their group of colleagues.

If this seems unlikely, the person with a disability is dependent on the mainstream labour market and the local consulting services and placement systems. The high unemployment level and the long unemployment duration for persons with severe disabilities (Teilhabeberichte der Bundesregierung 2013 and 2016) demonstrate significant shortcomings in the labour markets. Schröder (1997) stated that 7 percent of the blind persons between the ages of 20 and 60 were unemployed or were looking for jobs; this corresponds to an underemployment rate of 21.2 percent at that time. Only three out of four of those who describe themselves as unemployed indicated that they were registered with the job centers – the result is a specific unemployment rate of 16 percent. The average unemployment length for these people is about 11 years (see Schröder 1997 and the author’s calculations).
This paper differentiates the problem areas in terms of the following issues:

- Labour supply and education issues
- Labour demand
- Placement systems.

a) **It appears that the pertinent variables on the supply side are:**

**Motivation:** Given the high degree of retirement, one could argue that the affected people have little motivation to pursue professional activity any longer after the (partial) loss of their eyesight. A British study questioning blind persons admittedly shows a more nuanced picture. Shortly after the disability occurred, the affected people perceived the extremely easy application process for retirement in Great Britain (a certification from the family doctor was sufficient) as an immense relief at that time, but a different picture emerges after six months in their first post-survey. A number of affected people would have liked to be reintegrated into a career. The majority of those interviewed were interested in being able to practice a professional activity again following the second post survey after 24 months (Resnikoff et al. 2004). This article assumes that a similar trend with regard to motivation exists in Germany. Interviews demonstrate here as well that the desire for vocational activity increases again as time goes by.

**Vocational rehabilitation:** When employees intend to return to their previous job or at least a certain different job with the previous employer, rehabilitation can clearly be planned and implemented more efficiently than when the goal is to participate in the mainstream labour market. Questions about qualification, expertise, and flexibility take a different form here. The affected people need to be made as employable as possible based on their qualification emphasis, their previous professional experience, their inclinations, their expectations on future tasks and their knowledge about pertinent labour markets.

A bigger problem for blind people is frequently rooted in the requirement for spatial mobility that is often connected with a new job in an environment that is unknown.
b) The demand side – supply of suitable positions:

Obtaining an idea of the performance capability of blind employees is pertinent for the employer side when looking for workers. People associate helplessness, need for help, orientation problems and low performance with blindness because for the most part, the general population associates blindness with people who go blind in old age.

Competent and experienced rehabilitation experts and placement specialists from the Federal Employment Agency assess a high willingness to recruit staff when the following are true:

- The people who decide about the hiring are in close contact with blind and visually impaired people in their immediate environment (family, friends) and therefore have experience with them.
- The decision makers at the private/public sector employers were able to gather positive experiences with blind or visually impaired people.
- The decision makers at the private/public sector employers are especially dedicated to social, religious or other issues, and therefore are open-minded and have an awareness about the issue.
- Interesting basic conditions (trial employment, bonuses, integration subsidies, workplace furnishings, but also positive public designations such as “Inclusion company of the year”) have an attractive effect.

The study “Unemployment and integration opportunities of persons with severe disabilities” [“Arbeitslosigkeit und Integrationschancen schwerbehinderter Menschen”] published in 2004 and commissioned by the German Federal Employment Agency [BA] gives a succinct impression about the actual differences regarding the opportunities of participating in work and career (Schröder & Steinwede 2004). It is the merit of this study to have reported in a methodical way for the first time on how employers assess the employment opportunities for job applicants with various impairments. To date, no more current differentiated empirical information looking at the type of impairment is available to address these questions. There is an urgent need for research, also from a human rights perspective.

“In looking at assessing the entry requirements of job applicants with severe disabilities, a more differentiated consideration of the market opportunities based on the type of disability is necessary. Such a comparison between different disability groups points to particular ‘problem groups’ in the first labour market.
Private and public sector organizations\textsuperscript{2} were questioned about persons affected with nine different disabilities with regard to:

- Whether there are employment possibilities without further constraints for these job-seekers with severe disabilities.
- Whether employment is possible under certain circumstances, i.e. with appropriate technical and financial support.
- Whether this is not possible, even with the appropriate support. [“Will man Zugangsbedingungen von schwerbehinderten Arbeitsuchenden einschätzen, so ist eine differenzierende Betrachtung der Marktchancen in Abhängigkeit von der Art der Behinderung notwendig. Ein solcher Vergleich zwischen verschiedenen Behindertengruppen weist auf besondere ‘Problemgruppen’ am ersten Arbeitsmarkt hin.

Die Unternehmen und Verwaltungen\textsuperscript{3} wurden für Betroffene von neun verschiedenen Behinderungsarten gefragt,

- ob für diese schwerbehinderten Arbeitsuchenden ohne weitere Einschränkungen Beschäftigungsmöglichkeiten bestehen,
- ob die Beschäftigung unter Umständen möglich ist, das heißt bei entsprechender technischer und finanzieller Unterstützung,
- oder ob dies selbst bei entsprechenden Hilfen nicht möglich ist.]

\textsuperscript{2} Some 815 private and public sector organizations were questioned within this survey (Schröder & Steinwede 2004, 65ff).

\textsuperscript{3} 815 Unternehmen und Verwaltungen wurden im Rahmen dieser Untersuchung befragt (Schröder & Steinwede 2004, 65ff).
The findings from back then may well still be valid today. As Fig. 1 illustrates, considerable differences exist with regard to the market resistance depending on the type of disability present. Furthermore, significant differences exist in the assessment of integration possibilities according to sectors of the economy and company sizes. In major corporations and civil service, the willingness to hire is relatively great. Furthermore, the study has some surprising results, which, however, will not be discussed in greater detail here."


A strong “market resistance” also exists towards blind or visually impaired applicants – no further distinction has been made here – compared to those affected by other types of disabilities.

### Employment opportunities for persons with severe disabilities

<table>
<thead>
<tr>
<th>Category</th>
<th>0%</th>
<th>20%</th>
<th>40%</th>
<th>60%</th>
<th>80%</th>
<th>100%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Persons with internal diseases, organ damage (e.g. following a cancer diagnosis, cardiovascular disease, HIV, diabetes, etc.)</td>
<td>23%</td>
<td>28%</td>
<td>31%</td>
<td>37%</td>
<td>49%</td>
<td>62%</td>
</tr>
<tr>
<td>Persons with a physical impairment</td>
<td>17%</td>
<td>21%</td>
<td>33%</td>
<td>40%</td>
<td>41%</td>
<td>44%</td>
</tr>
<tr>
<td>Persons with a speech impediment</td>
<td>22%</td>
<td>26%</td>
<td>35%</td>
<td>41%</td>
<td>45%</td>
<td>50%</td>
</tr>
<tr>
<td>Persons with a hearing impairment, deaf persons</td>
<td>15%</td>
<td>19%</td>
<td>29%</td>
<td>31%</td>
<td>37%</td>
<td>47%</td>
</tr>
<tr>
<td>Persons with a learning disability</td>
<td>12%</td>
<td>17%</td>
<td>27%</td>
<td>38%</td>
<td>48%</td>
<td>60%</td>
</tr>
<tr>
<td>Persons with a seizure disorder, epilepsy</td>
<td>15%</td>
<td>17%</td>
<td>19%</td>
<td>21%</td>
<td>26%</td>
<td>34%</td>
</tr>
<tr>
<td>Persons with a visual impairment, blindness</td>
<td>6%</td>
<td>4%</td>
<td>11%</td>
<td>20%</td>
<td>25%</td>
<td>79%</td>
</tr>
<tr>
<td>Persons with a mental disability</td>
<td>4%</td>
<td>10%</td>
<td>20%</td>
<td>25%</td>
<td>40%</td>
<td>59%</td>
</tr>
<tr>
<td>Persons with an intellectual disability</td>
<td>4%</td>
<td>10%</td>
<td>20%</td>
<td>25%</td>
<td>40%</td>
<td>59%</td>
</tr>
</tbody>
</table>

Source: Written survey of 815 companies and administrative departments, infas 3160

The Situation for Blind and Visually Impaired Persons

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"The study carried out at that time reveals the many layers involved in vocational integration problems and the need for individualized assistance at work. In light of this study, attempts to match job-seekers with available open positions seem to provide less effective results for a portion of the clientele. Search strategies appear more successful here when initially based on the personality traits of the applicants to find the respective (best) suited employment options for the individual or even to create and design them. This search strategy, which is based on the individual’s talents, includes important features of coaching.

Among other important information, the survey results reveal how strong deficit-oriented thinking is when hiring persons with disabilities, but that this exists to a different extent in light of the different types of severe disabilities that are recognized. It also becomes apparent that the more differentiated the knowledge about and experience with persons with disabilities in the public or private sector is, the less deficit-oriented motivations play a role. This is true for personnel officers, supervisors, colleagues, customers and, not least, for the specialists who help in the job search.” [“Die damalige Untersuchung lässt somit deutlich werden, wie vielschichtig sich die beruflichen Eingliederungsprobleme darstellen und dass es einer individuell maßgeschneiderten Arbeitsförderung bedarf. Vermittlungsvorschläge auf vorhandene offene Stellen erscheinen im Licht dieser Untersuchung für einen Teil des Klientels wenig zielführend. Hier erscheinen Suchstrategien erfolgreicher, die zuerst an den Persönlichkeitsmerkmalen der Bewerberinnen und Bewerber ansetzen, um die jeweils (best-) geeigneten Beschäftigungsmöglichkeiten für das Individuum zu finden oder auch zusammenzustellen und zu gestalten. Diese an den Talenten ansetzende Suchstrategie weist wichtige Merkmale des Coachings auf. Die Befragungsergebnisse zeigen nicht zuletzt, wie stark das defizitorientierte Denken bei der Beschäftigung beeinträchtigter Menschen vorherrscht, dies allerdings vor dem Hintergrund verschiedener Arten von anerkannter Schwerbehinderung in erheblich unterschiedlichem Ausmaß. Weiterhin wird deutlich: Je differenzierter die Kenntnisse über und Erfahrungen mit Menschen mit Beeinträchtigungen im Unternehmen oder der Verwaltung sind, umso weniger spielen defizitorientierte Beweggründe eine Rolle. Dies gilt für Personalverantwortliche, Vorgesetzte, Kollegen, Kunden und nicht zuletzt für das arbeitsvermittlende Fachpersonal gleichermaßen.”] (Bach, in: Zweiter Teilhabebericht der Bundesregierung 2016, 247)

c) What service do the information-providing and placement systems provide?

As the third determinative dimension of rehabilitation and reinclusion in work, let us consider the institutions that provide information and support and help people find jobs. Public job placement is the responsibility of the administrative offices of the German Federal Employment Agency in ac-
cordance with Social Code Book [SGB] III and the job centers in accordance with Social Code Book [SGB] II. Rehabilitation remains the responsibility of German pension insurance, accident insurance companies, institutions as provided by the German Federal War Victims Relief Act [Bundesversorgungsgesetz] and in accordance with Social Code Book [SGB] VIII or integration assistance in accordance with Social Code Book [SGB] IX. However, these do not exercise any job placement tasks themselves.

The “market resistance” against blind and visually impaired applicants makes it clear how intensive the personal coaching efforts of job placement institutions have to be to succeed under these conditions. Here, it is usually necessary to look for the specific job that is right for the coachee and that he or she can do, or to assemble tasks into such a job. Specialized integration services, integration companies, educational institutions and others can support this effort, but intensive efforts of the job placement institutions are required for coaching, empowering where necessary and providing follow-up support at the workplace after a successful placement.

The successes in placement and vocational inclusion among blind and visually impaired applicants are anything but satisfactory in terms of both scope and their development over time. It would be erroneous to attribute all the blame for this to the placement systems. The situation is a complex problem indeed. Therefore, a number of initiatives have recently developed from the area of self-help for the blind and visually impaired and from the educational institutions developed for these groups of persons. These initiatives will be investigated further in the following section.

3. Promising initiatives for the labour market and jobs

This section will briefly describe initiatives of Disabled People’s Organizations and educational institutions that can significantly improve the vocational participation of visually impaired people, with long-lasting effect.

a) The TriTeam mentoring program
b) AKTILA-BS – a program for the long-term unemployed
c) Innovation and inclusion – new participation approach for work and vocation
d) IBoB – Eliminating discrimination in the professional development sector
a) The TriTeam mentoring program

Spring 2015 saw the start of the “TriTeam” mentoring project of the German Association of Blind and Visually Impaired Students and Professionals (Deutscher Verein der Blinden und Sehbehinderten in Studium und Beruf, DVBS): Blind and visually impaired students from throughout Germany have since participated in three rounds of the project and have been interacting with mentors experienced in the job who are also visually impaired. They collaborate in developing customized academic and educational goals, experience in using aids/auxiliary supplies, completing applications, etc. They receive important information and tips from the mentor. The mentoring team makes it easier to overcome the hurdles of everyday academic life and put important prerequisites in place for academic focal points with regard to the student's vocational future. Before getting started on their plans and ideas, mentees can discuss them with experienced mentors who are well-versed in the subject matter. If they need supplementary expertise, a team can take advantage of support from an additional specialist coach – whether this involves questions about purchasing tools/auxiliary supplies, answering specialized questions or serving as a mediator providing vocational information, arranging studies under visiting professors and making contacts. A joint workshop takes place at the beginning and end of the mentoring relationship, which is usually a one-year arrangement. The first workshop is for getting to know each other and coordinating expectations as well as procedural rules for the project period. Previously, the applicants have undergone a selection process. In addition to the written application, this also includes a phone interview with employees of the DVBS office who also serve as the project managers. The teams are assembled by the project managers based on the field of study/vocational orientation. Subsequently, the teams can interact regularly by phone or e-mail. In-person meetings of the TriTeam are also possible. There is no cost to the participants in the project, and their travel expenses are paid. At the end of the project, there is another joint meeting of all workshop participants to enable large-group interaction, lock in results and suggest improvements for future mentoring rounds. Some of the teams remain intact far beyond the project duration.

The project is being underwritten by the Commerzbank Foundation and multiple individual donors (for additional information: www.dvbs-online.de/projekte).
Current labour market reports show that the unemployment rate of persons with severe disabilities is alarmingly high, despite the fact that unemployment as a whole is decreasing. This is despite the fact that unemployed persons with severe disabilities usually have above-average qualifications compared to persons without disabilities. This is particularly true for blind and visually impaired persons. Only about a quarter of blind and visually impaired people of working age in Germany have a job.

In light of these facts, the project for “Activation and integration of (long-term) unemployed blind and visually impaired persons” [“Aktivierung und Integration (langzeit-) arbeitsloser blinder und sehbehindelter Menschen”] has taken upon itself the task of investigating the following research questions:

- What are the reasons for the relative decline in participation of persons with severe disabilities in the labour market?
- Are the programs offered for support and integration not disability-specific enough?
- Is the disability-specific understanding of the mentors not adequate?
- Are employers not open to the idea of hiring unemployed persons with severe disabilities?
- Is the motivation of persons with severe disabilities to participate too low?
- Which barriers in the area of context factors have an effect in the transition from unemployment to employment for persons with severe disabilities?
- Which specific barriers have an effect for blind and visually impaired job applicants and how can these barriers be overcome?

During the course of the project, plans call for the research questions specified here to be answered and for intervention forms and procedures to developed as models for case management, based on concrete, case-specific integration efforts. These lead to a higher degree of vocational participation of blind and visually impaired unemployed persons and can be used further by the various responsible placement agencies active in the field.
Reaching the project objective involves attaining the following partial objectives:

*Actual analysis:* In a comprehensive actual analysis, suitable target persons (blind and visually impaired long-term unemployed individuals), as well as service providers and employers, are asked about the causes and circumstances of long-term unemployment among blind and visually impaired people. The objective is to identify the critical obstacles to placement and employment and to derive the actions necessary for improvement from doing so.

*Designing and implementing an integration program:* In the rest of the project, strategies and tools for integration are designed that are specifically customized to the target group. In the most individual way possible and in close cooperation with the service providers, they address deficiencies, update existing knowledge and ensure the vocational competence of participants. In particular, the hindrances to placement identified during the starting phase (lack of mobility, lack of motivation, lack of self-confidence, outdated knowledge and so on) are taken into account. After an intensive applicant training program, the participants are given support in the search for a suitable internship position. If the internship is successful, they are hired on as employees. In this manner, the purpose of the AKTI-LA-BS project is to help a total of 50 blind and visually impaired unemployed persons find a long-term job.

*Designing and implementing a mentor system:* In addition to all of the specialized professionalism required, activating and coaching persons unemployed for prolonged periods involves practical tips and tricks and confronting one’s own disability, fears, hopes, insecurities and sometimes a lack of courage. Therefore, the AKTI-LA-BS project also integrates project employees into the activation process who, as a result of their own impairments and a successful vocational integration, are capable of motivating blind and visually impaired unemployed people, giving them advice and accompanying them through the integration process. These may be successful graduates of the vocational training centers or employed members of the Disabled People’s Organizations who have suitable skills through schooling to pass on their experience in a peer-to-peer coaching session.

*Developing suitable support programs for service providers:* To ensure integration, as part of the project, the responsible service providers (job centers or employment agencies in the majority of cases) are supported using a variety of suitable means: through expert diagnosis and potential analysis specific to the blindness or visual impairment, through a descrip-
tion of workplace profiles that is suited to requirements, advice in purchasing aids/auxiliary supplies and, above all, by coordinating the efforts of all concerned. The result of this partial project is a “toolbox” that the service providers can apply to the following cases in the future.

Sustainability: The AKTILA-BS project runs for three years, but the results will remain in effect far beyond that. The sustainability is ensured by the fact that both the evaluation results and the action strategies drafted in the project period are made accessible to all project partners as well as to all parties participating in the process of vocational rehabilitation, with permission granted to pass them on and to reuse them. Thus the project contributes to long-term improvement in vocational participation for blind and visually impaired people.

The project is supervised by the Vocational Training Center Würzburg with the involvement of other specialized vocational centers [Berufsförde‐ rungswerk or BFW], the DVBS association, the blista (Deutsche Blinden‐ studienanstalt) educational institution and with scientific support from Int‐ erval GmbH Berlin. Planned to last three years, the project is funded by the German Federal Ministry of Labour and Social Affairs [BMAS] from funds collected through the equalization fee relating to employment quotas.

c) Innovation and inclusion – new participation approach for work and vocation

Support for blind and visually impaired persons in (re-)entering educati‐ on, vocation and entrepreneurship: Where handicapped and non-handi‐ capped persons work together professionally in teams, the seed is planted for a new culture of diversity. This involves issues such as self-confidence over the wide spectrum of individual potential, more flexible and more ef‐ ficiency-oriented distribution of tasks and responsibilities, innovative sol‐ lutions, and new ideas for products and businesses. Therefore, in the last year, the blista and the Kompass Zentrum für Existenzgründungen merged their initiatives for labour market integration and supporting business start-ups under the umbrella of “Innovation and Inclusion.” Both coopera‐ tive pilot projects are being funded by grants from the Hessian Ministry for Social Affairs and Integration and from the European Union (European Social Fund).
Competence-oriented approach “on equal footing”: As a competence center for integration and reintegration into the primary labour market, the blista serves as a strong advocate, ensuring that blind and visually impaired people are successful and placed in a job or training position. The blista pilot project “Inclusion & Innovation” focuses on a competence-oriented approach. The objective is to support blind and visually impaired job-seekers through good location analysis, support specifically for the blind and visually impaired through the application process, targeted qualification and accessible job placement coaching.

After a no-obligation initial consultation, the programs extend all the way to a successful placement in an internship, vocational training, employment or starting one's own business or extend over a period of six months. After clarifying the specialized, social, vocational and disability-specific competencies, the parties involved work together to draft the realistic vocational objectives. The implementation is customized and supported step-by-step, taking into account the company's requirements.

The participants make use of the facilities and the workplace equipment of the blista consulting center, which is designed with blind and visually impaired people in mind. This is enhanced by independent implementation of agreed work tasks and excursions to the inclusive events and workshops at the Kompass Center for Entrepreneurship in Frankfurt.

The following are some of the modules available, which are tailored exactly to individual needs.

- Starting assessment
- Application training that is designed with blind and visually impaired persons in mind
- Accessible placement coaching
- Compass workdays
- Thinking and acting like an entrepreneur
- How do I present my skills and expertise?
- Idea workshop about starting a business and self-employment
- Interaction and networking as the foundation of idea factories

Achieving goals precisely with idea factories: The requirements companies face are often fast-paced, complex and multifaceted. By acquiring expertise in entrepreneurial thinking, blind and visually impaired participants make themselves more employable. Having the business value creation chain in mind helps when talking to potential employers and when developing ideas concerning self-employment and starting a business.
The “idea factories” and “innovation workshops” of the Compass pilot project have also illustrated the exciting dynamics within this new cooperation model under the shared name of “Innovation & Inclusion”. For the start-up teams and young companies in the Kompass pilot project, it is not the limitations that count, but primarily individual skills. They are open to inclusion-oriented business ideas and interested in the development of barrier-free products. In practice, the joint initiative already achieves the desired successes in labour market integration (Troltenier 2014).

d) iBoB (“Inclusive and accessible vocational education” [“Inklusive berufliche Bildung ohne Barrieren”] – Platform of accessible further education for blind and visually impaired employees or self-employed people/freelancers)

The iBoB model project has the objective of creating a web-based, accessible information platform, thus enabling the blind and visually impaired to better keep pace with the push towards structural economic change and, in particular, the progressive digitization of working life. This is intended to let affected persons secure their participation in job-relevant professional training programs and thus be made capable of coping with the extremely rapid pace of change in the world of work and thus avoid exclusion.

In particular, the following four focal points of work are being implemented in this context:

1. Developing the prototype of an accessible professional development program on the Internet, testing it and establishing it there for the long term.
2. Making available a target group-specific range of programs for specialized professional development.
3. Providing a service for timely drafting of accessible participant documents and adapting methodical-didactic concepts of the education providers.
4. Offering consulting services for specialized professional development both for blind and visually impaired employees as peer-to-peer consulting as well as for companies and relevant parties and organizations.

This is intended to give blind and visually impaired employees and their employers a central, easy-to-use point of access to professional develop-
ment that secures participation in the workplace and furthers one's career, despite the regionally widespread professional needs that are of relatively low quality. The fact that the platform is operated and the consulting and support service is provided by a non-profit self-help organization enables participation support aligned solely with the interests of affected employed persons in accordance with the UN Convention on the Rights of Persons with Disabilities (Art. 24(5) of the UN CRPD).

The central product of the project is implementing a web-based information platform that is accessible to all interested parties and that covers existing programs at locations that are accessible and can be used by blind and visually impaired people for professional further development with additional information about legal claims, application procedures etc. Networked and centrally managed educational providers will operate this platform.

In addition, the following products are available or are under development:

• Accessible operating manual and user guide for the informational platform
• Six educational modules
• Six workshops for testing/further developing new educational modules
• Three training videos for provider staff
• Handout: accessible teaching methods and e-learning
• Three workshops: Training the provider staff to “Train the Trainer”
• Handout: P2P (peer-to-peer) counseling for advising persons
• Six training workshops for P2P counselors
• Handout and counselor training: Pertinent legal rules for employees and employers
• Informational video: Employment possibilities and opportunities for professional development of the target group

Furthermore, as part of the results, a variety of information is collected, packages for the participants and job-specific educational modules are processed and newly developed which are made available for national use for affected employees, employers, educational providers and educational players, agencies representing persons with severe disabilities, integration offices, integrative services, job centers, employment agencies and German pension insurance institutions.
4. Findings from partner countries in the European Union regarding the employment of visually impaired people

The comparison of the European countries is interesting and provides valuable insight. Primarily, the author gathers data from the report “The Hidden Majority” published by the European Blind Union, as well as from a study by the University of Orleans, France and from an article by Dino Capovilla (2014).

Sweden

“According to data from the National Statistics Bureau of Sweden, 65,000 people in Sweden state that they are affected with visual impairments in one way or another that affects their daily life. Approximately 30,000 people stated that the impairments have an impact on their ability to work. Of those, 47% were employed and 10% were registered as unemployed with the public employment service. The remaining 43% received a disability pension and did not look for work.” [“Laut Daten des schwedischen nationalen Statistikamts geben 65.000 Personen in Schweden an, von irgendeiner Form der Sehbehinderung betroffen zu sein, die sich auf das tägliche Leben auswirkt; ca. 30.000 Personen gaben an, dass sich diese auf ihre Arbeitsfähigkeit auswirke. Davon waren 47% in Beschäftigung und 10% bei der staatlichen Arbeitsvermittlung als erwerbslos gemeldet. Die übrigen 43% erhielten eine Invalidenrente und befanden sich nicht auf Arbeitssuche.”] (Reid & Simkiss 2013, 6)

These findings are by far the best results about the job situation compared to the rest of Europe. However, one must take into account two special features:

1. Sweden does not differentiate between blindness, profound disability and other visual impairments; the criterion is the effect of the visual impairment on the ability to work, a criterion that ICF uses. Using this consideration, approximately 40 percent of the visually impaired people in Germany are employed.

2. Sweden has at its command a special tool in reducing long term unemployment, namely a six month employment guarantee (at least in the public sector) after (every) two years of uninterrupted unemployment.

Romania

“The number of registered people with disabilities who are of working age is at 200,730 in Romania. 36,500 of those had a visual impairment and 3,155 were employed. This means that 86% visually impaired people who were of working age were without work.” [“Die Zahl der gemeldeten behinderten
Persons im erwerbsfähigen Alter lag in Rumänien bei 200.730. Davon hatten 36.500 eine Sehbehinderung und 3.155 waren erwerbstätig. Das bedeutet: 86% der Sehbehinderten im erwerbsfähigen Alter waren ohne Arbeit.”] (Reid & Simkiss 2013, 6 f.)

The Netherlands

“The public employment service has no statistics regarding the number of blind and visually impaired people who are of working age or their employment status. Recognized experts in this field estimate that their number amounts to 60,000, of which 15,000 are employed.” [“Die staatliche Arbeitsvermittlung besaß keine Statistiken zur Zahl der Blinden und Sehbehinderten im erwerbsfähigen Alter oder zu deren Beschäftigungsstatus. Laut Schätzungen von Experten in diesem Bereich belief sich deren Zahl auf 60.000, von denen 15.000 einer bezahlten Beschäftigung nachgingen.”] (Reid & Simkiss 2013, 7)

France

“French Government agencies at the departmental and community level ... collected statistical data about blind and visually impaired people in France, however, their assessment findings about the disabilities were never published. One NGO estimated that there are approximately 20,000 blind people who are of working age, and approximately 7,000 are employed. That same NGO reached the assumption that 16% of unemployed blind and visually impaired people could find work with reasonable support in the labor market.” [“In Frankreich wurden statistische Daten über Blinde und Sehbehinderte ... von staatlichen Stellen auf Ebene der französischen Departements und Gemeinden erhoben, doch die Ergebnisse der Beurteilung der Beeinträchtigungen wurden nicht veröffentlicht. Schätzungen einer NRO zufolge gibt es in Frankreich ca. 20.000 Blinde im erwerbsfähigen Alter, von denen ca. 7.000 erwerbstätig sind. Dieselbe NRO ging davon aus, dass 16% der nicht erwerbstätigen Blinden und Sehbehinderten bei angemessener Unterstützung auf dem Arbeitsmarkt eine Beschäftigung finden könnten.”] (Reid & Simkiss 2013, 7)

The University of Orléans Lab for Economic Research conducted a survey on behalf of the French Association for the Blind and Visually Impaired on the issue of employment and vocational integration for blind and visually impaired people in France. It was published in December 2013 and authored by Bruno Gendron, Master of Economics at the University of Orléans. He summarizes: The vocational integration of blind and visually impaired people in France is a significant challenge, with approximately 20,000 blind people of working age. Of these, approximately 7,000 are employed. One NGO estimated that 16% of unemployed blind and visually impaired people could find work with reasonable support in the labor market. These findings highlight the importance of support and integration for blind individuals in the workforce.

4 Non-governmental organization.
impaired people still constitutes a serious problem, because the unemploy-
ment rate is around 50 percent (the study estimates that only 41 percent
are employed, 29 percent are looking for work and 17 percent are inac-
tive), but most people expressed a desire to work. The law on equal oppor-
tunity, participation and citizenship for persons with disabilities that was
passed in February 2005 did not have the desired effect in regard to the
vocational integration of the blind and visually impaired working popula-
tion. This was particularly evident in the economic crisis, because they
were the first who were affected by the cuts in the labour market.

Poland

“It is estimated that the total number of the legally blind and visually im-
paired people between the ages of 15 and 64 years in Poland is 145,900 (0.5%
of the total population in this age group). The employment rate was 18.9%.”
[“Die Gesamtzahl der gesetzlich Blinden und Sehbehinderten zwischen 15
und 64 Jahren in Polen wurde auf 145.900 (0,5% der Gesamtbevölkerung
dieser Altersgruppe) geschätzt. Die Erwerbsquote betrug 18,9%.”] (Reid &
Simkiss 2013, 7)

Austria

“The Austrian Federal Ministry of Labor had no statistics available on how
many people who are of working age are legally blind and visually impaired
or how many were employed/unemployed. It could only provide information
on how many legally blind people are recorded in the quota system.” [“Das
Bundesministerium für Arbeit besaß keine Statistiken darüber, wie viele Men-
schen im erwerbsfähigen Alter gesetzlich blind bzw. sehbehindert oder wie
viele erwerbstätig/nicht erwerbstätig waren. Es konnte lediglich Auskunft da-
rüber erteilen, wie viele gesetzlich Blinde im Quotensystem erfasst waren.”]
(Reid & Simkiss 2013, 7)

Italy

Dino Capovilla assesses the lack of employment opportunities for blind
and visually impaired people as extremely critical, even after 40 years of
total school inclusion in Italy and the low labour market integration in
South Tyrol despite special regional inclusion funding there. “Even as a
well trained person without disabilities, it is difficult to find a job that cor-
responds to your training, but it is scarcely possible as a trained job appli-
cant with a disability and impossible as a person with a disability without
a school-leaving certificate.” [“Schon als gut ausgebildeter ,Normalo‘ ist

Turkey (not a EU member state)

In Turkey's “Population and Housing Census” 2011, the country indicated that the number of blind people was 1.039 million people, which constituted 1.4 percent of the population (“cannot see at all”). The number for the visually impaired people was 5.640 million, which is 7.6 percent of the population (“some”). The findings are differentiated by province and are distributed very widely in some cases. In addition, it also provides statistics about blind people differentiated by gender and age group. Some 11.6 percent of the blind people are 74 years and older, 26 percent are 60 years and older. Clear gender differences are apparent (see Turkish Statistical Institute 2013, 90 and 116).

When interpreting the findings in the different European states, one needs to take into account that there are quite different medical definitions regarding blindness, profound visual impairment, practical blindness and other visual impairments in the countries. Nevertheless, the findings about the participation of visually impaired people in the countries considered are quite sobering.

5. Conclusion and appeal

The relatively low number of blind and profoundly visually impaired people in qualified professions suggests that individual inclusion is often more advantageous than greater group measures for their professional participation. Niches where visually impaired people can be particularly successful in their jobs have been found again and again, but they are often limited in number and are not permanently available. Having general and vocational training undoubtedly pays off. The affected people must take a great interest in confidently mastering and refining the methods, technical devices and skills that compensate for their impairment. Regardless of this approach related to the individual person, research and development are continuously being pushed to establish and pave the way for new tasks and career options within the economic and social structural changes (participation research). New professional tasks for blind and visually im-
paired people must be developed and sometimes downright fought for, while traditional jobs for blind people such as jobs in industry and the trades for the blind, word processing, and telephone switching have been destroyed in the structural change for the most part.

Given the increasing demands and the new challenges resulting from the digitalization forced on all employees, one question that is increasingly pressing remains which job offers are still possible for visually impaired people who are less qualified. The competitive labour market seems more and more closed because suitable low-skilled jobs are being eliminated, automated or exported more and more or are unsuitable for persons with disabilities. The developed secondary labour market in the form of sheltered workshops for people with (intellectual and/or mental) disabilities is not the appropriate option for low-skilled job applicants who are only visually impaired. Public labour market policy and social policy, schools for students with disabilities, providers of vocational rehabilitation, vocational training centers, vocational advancement centers and all further relevant educational providers, labour wage agreement partners and last – but not least – the Disabled People’s Organizations for the blind and the visually impaired are called upon to shape a labour market and job options here.

The number of affected persons is not very large. We cannot allow them to fall victim to long-term unemployment or to be forgotten. Schröder states that the underemployment rate for blind people and profoundly visually impaired people was at 21 percent in 1993, while the unemployment rate was at 16 percent. The average length of unemployment for this group of people was about eleven years (see Schröder 1997 and author's calculations). What does the labour market situation look like today? We do not know. We do not have more current data available. More recent studies do not exist.

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Through Complex Acts and Measures, Transforming Disbelief into Trust

by Marie-Renée Hector

Since the second half of the 20th century, in France, people with disability understood they should be united to work together. Consequently they have gained social rights through laws, acts and financial measures. Much has been achieved, with the contribution of many highly educated people with disability, together with schools and thanks to organizations often managed by disabled people themselves.

Solid education, orientation and vocational training remain capital for work access; nonetheless, historical and cultural circumstances have a societal impact that can either slow down or speed up legislation and employment evolution.

Still, much remains to be done to open minds to differences and overcome prejudices and sterile fears, so that their negative impact may decrease. Humans have always been more or less resentful of those who don’t look or think like them. However, hopefully, we are now on the road towards a fully inclusive society respectful of all citizens and their dignity.

Introduction

In 1784, when Valentin Haüy started teaching the Blind, he wrote that their learning and working would be beneficial not only to them but also to society. Regarding hearing-impaired children, l’Abbé de L’Epée shared the same belief when he founded his school in Paris. Both of them were able, educated and open-minded men. In his book “Les Aveugles au Travail” (The blind at work), Philippe Chazal insists on the value of work for valid citizenship for all. Little by little, between the end of the 18th century and the aftermath of the First World War, disabled people gained access to education as well as some kind of vocational training. Their learning and working capabilities began to be acknowledged. But their rights to work were hardly outlined at the end of the 19th century and they were looked down upon as second-rate citizens in France like in many countries. As is often the case in Africa nowadays, their essentially manual work used to provide a small income for their special schools, but the...
blind working pace, for example, was too slow for them to make a decent living.

Since then, disabled people have gained social rights through laws, acts and financial measures. Much has been achieved, with the contribution of many highly educated people with disability, together with schools and thanks to organizations often managed by disabled people themselves.

Solid education, orientation and vocational training remain capital for work access; nonetheless, Historical and cultural circumstances have a societal impact that can either slow down or speed up legislation and employment evolution.

Still, much remains to be done to open minds to differences and overcome prejudices and sterile fears, so that their negative impact may decrease. Humans have always been more or less resentful of those who don't look or think like them. However, hopefully, we are now on the road towards a fully inclusive society respectful of all citizens and their dignity.

Acts and measures

From a historical standpoint, the aftermath of World War I in France saw the creation of several organizations for people with disability, notably war veterans for whom the first legal actions were taken around 1918 namely to encourage disabled soldiers' rehabilitation and employment. Later on, mainly in the years following the Second World War, many associations of or for people with disability united in Federations, each acting for the social promotion of their members with disability. At present, rights are defended, upgraded and discussed in common by all organizations with governmental and social stakeholders, among which la Confédération Française pour la Promotion Sociale des Aveugles et Amblyopes (the French Confederation for the Social Promotion of the Visually-Impaired), l'Association des Paralysés de France (the National Association of physically-impaired people). Ever since they were given the opportunity to get an education, disabled people have made their voice heard. In the first half of the 20th century, many people with disability were at work; and during the dark years of World War II, a hundred blind and many others took part in the resistance. The Vichy government passed a decree forbidding the disabled from working in the civil force, especially when recruiting was processed by means of competitive examinations – which it still is. This abomination was ended in 1959 thanks to the Associ-
ation of VI academics (Groupement des Intellectuels Aveugles ou Amblyopes). But the most important acts regarding work were passed in 1975, 1987 and 2005. During this legislative process, people with disability had their say by means of their associations and many professors and lawyers with disability themselves took part in their wording. In France, the 2005 Disability Act\(^1\) is the main legislation regarding measures to support workers with disability and incite employers to hire them.

According to the French law, in which discrimination of any kind is prohibited, the disabled and their potential employers have many tools that can positively favor the disabled workers' inclusion into the work force, either in the private or public sector.

In France, the 2005 Disability Act already mentioned above, the 1987 Disability Employment Act\(^2\) and the French Labour Law (“Code du Travail”) are the three main legislations regarding commonplace labour employment.

Under the current legislation, private companies and public offices with a work force of more than 20 employees must hire 6% of workers with disability. Employers are provided with 3 options to meet this target:

- hiring disabled workers as employees (direct hire)
- subcontracting workers from the sheltered sector (indirect hire)
- paying a contribution fee to AGEFIPH (“Association de gestion du fonds pour l'insertion professionnelle des personnes handicapées”), or Fund for the professional inclusion of disabled people, an organization dedicated to furthering professional inclusion in the private sector. This organization provides financial support by granting the employer necessary funds to adapt worker stations or other necessary implements.

Its funds providers are the companies who do not meet their 6% employees with disability.

A complementary service, the Service d'Aide au Maintien dans l'Emploi, focuses on the worker's needs to be given all possibilities to keep his or her work position after the onset of a disability. The employer can get technical and financial help to contribute to make work efficient and accessible for the employee.

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2 Loi n° 87-517 du 10 juillet 1987 en faveur de l'emploi des travailleurs handicapés.
For job seekers with disability, Cap emploi, a special labour agency has been created to orient and advise them in their seeking. This agency can help them get vocational training if they need it.

Sheltered work is also possible for workers who need either help or more training and adapted work pace.

With the 2005 Disability Act mentioned above, the Government Decree on Sheltered Work is the second main legislation regarding sheltered employment.

In fact, the French sheltered sector is made of specific centres known as ESAT (“Etablissement ou Service d'Aide par le travail”, or Inclusion through Work). Sheltered positions are open to people based on an estimation of their working capacity in a given profession (from 5% to 35% compared to an able worker). Many such centres also operate as subcontractors to other companies in the non-sheltered sector. Unlike other sectors which are regulated by the French Law on Labour (“Code du Travail”), the sheltered sector is regulated by the Government Decree on Sheltered Work. Sheltered workers do not have a work contract, and they cannot be made redundant. Instead, they sign a support contract which is renewed every year.

There are also work units called Etablissements adaptés where 80% workers have to be disabled. These workers sign a contract like all able workers and get a salary. Whereas in sheltered ESAT, workers get a smaller amount of money.

In the public sector, there is no sheltered work. The 2005 Disability Act solely sets its legal framework. “The standard recruitment process in the French public sector is a competitive entry examination. Candidates with disability are entitled to reasonable accommodations when sitting for such entry test to try and join the civil forces. Alternatively, they may be exempted from entry tests; they may join the civil sector and receive the tenured employee status upon completing a one-year internship instead.

Public offices face the same 6% disability employment target as the private sector. They are “provided with 3 options to meet this target:

• hiring disabled workers as employees (direct hire)
• subcontracting workers from the sheltered sector (indirect hire)

3 Décret n° 2006-1752 du 23 décembre 2006 relatif au contrat de soutien et d'aide par le travail et aux ressources des travailleurs des établissements ou services d'aide par le travail.
• offices who do not meet the 6% target must pay a compensation to a specific fund, the FIPHFP ("Fonds pour l'insertion des personnes handicapées dans la fonction publique", or Fund for the professional inclusion of disabled people in the public sector), or Fund for the professional inclusion of disabled people in the public sector. The FIPHFP fund is used to support professional inclusion within public services.

**Independent work evolution**

A new organization has recently been created to advise and help people with disability wishing to create their own independent job or their company. It is called UPTIH, standing for Union Professionnelle des Travailleurs Indépendants Handicapés. This association has been very successful in its activities and three quarters of independent workers with disability have now been at work for several years.

The AGEFIPH which helps companies from the private sector is also granting money to independent workers who submit their project files.

According to AGEFIPH, 33,000 disabled people's jobs are self-employed in France. Statistics show a marked increase in numbers in the last few years.

The people with disability who are willing to create their own job can submit a funding application to AGEFIPH. They can get “guidance to help define and plan the business project. In addition to working with a Counsellor, workshops are available on accounting, methods or how to target a market. Disabled people receive priority access to these workshops. All this contributes to build the person's project and the AGEFIPH application.”

These people can also have courses in management and help from counsellors, at each step in the development of the project until completion.

**More is still needed**

There still seems to be some lack of human coordination between various services and departments, and mental obstacles stand in the way. Specialized associations for people with disability intervene each time they are informed about difficulties faced by people with disability; most of the time
the complexity of administrative requests is the first reason for people's need for help.

Nevertheless, obstacles are both social and psychological. They can also be in relation with accessibility issues.

The socially hampering dominant factor is inadequate education because of which teenagers with disability cannot achieve a good vocational training. Their qualification remains insufficient especially for those who leave school without any professional skill. Statistics show that the level of unemployment of people with disability is about three times higher than in the rest of the French population. Besides, it is often difficult for less educated parents to know the best orientation for their children; many of them find it difficult or feel scared, when trying to understand forms they have to fill in for their children's educational or financial rights, even though social workers are present in administrative special departments to advise and help them.

Adults with disability themselves have to have good understanding skills to assert their rights. For this reason, many of them go and seek the help of associations who are active in social inclusive guidance and can advise them even for finding a vocational training course.

After acts and decrees are passed in favor of disabled people's working conditions, they have to be implemented with adequate personal support. Obviously, they need to be understood by all those who are intended to put measures into practice, with a positive look.

Moreover, this positive look is capital. Lack of awareness and trust either by social services or employers are among these wall-like obstacles.

As technology has transformed and created many jobs, doubts survive as to what disabled people can do, even sometimes when they are highly educated. Some fear remains that their productivity rate might be too slow or bad quality. But employers who have hired disabled workers know the good quality of their work; such workers do not want to lose their job.

What's more, people with disability themselves feel doubts as to their being trusted by those around them and have to overcome their fears or difficult accessibility conditions.

Accessibility issues are of many kinds:

- The structure of buildings with lots of steps and small toilet cubicles where wheelchairs cannot be handled.
- Lack of communication tools for language subtitles or translations for the hearing-impaired.
• Computer software or websites that cannot be used by visually impaired workers whose existence is often forgotten by designers.

**Self-confidence and management awareness, Actions for training and informing**

These are the reasons why some charities have organized projects or services to help or guide people with disability personally. Some charities manage sheltered work places. The Association Voir Ensemble has created a model farm for visually impaired workers; other charities have created work units, which sell office products.

These charities also have organized small guidance departments to accompany people with disability when official services have not succeeded or need more resources. This is more specific for workers with psychic impairment and hearing or visually impaired people.

Several disabled people's charities have also opened vocational training centers, each time there were specific needs to be met with, for those whose education level requires more special technicity. For visually impaired people, when new computer programs and new jobs appear, new training courses have to be made accessible. Luckily, associations can get funding from AGEFIPH.

However, vocational training often entails visiting companies and meeting managing teams and their staff.

In the field of awareness expansion, there is a lot to do for many of our organizations.

The French public administrations and the various organizations that cater to the blind and partially sighted public conduct various actions and projects in this field. Initiatives to further the professional inclusion of the visually impaired include information campaigns and awareness raising amongst recruiters and employees, as well as Job Days events ("Journées de l'Emploi") where disabled job seekers and employers can meet.

Each year, in November, "la semaine de l'emploi des personnes handicapées" is the week when companies either seek to gain awareness and invite organizations to visit them and inform their staff, or try to raise money for charities who help disabled job seekers in their endeavour.
In the prospect of inclusive job opportunities, the Groupement des Intellectuels Aveugles ou Amblyopes has developed a specific service with an innovative programme called Club Emploi. This Association of Visually-Impaired Academics, whose aim is cultural, social and professional inclusion support, created a job-coaching club to help visually impaired people find an inclusive job or be kept in their previous professional position. Its activity consists in leading job applicants to define and clearly express their personal aspirations and professional life project, in accordance with their capabilities and skills.

This coaching support is given by volunteers who have had a managerial experience in either the private or public sector. As a team, all these volunteers have elaborated their common work methodology and have acquired a good knowledge of visual impairment, with an attentive and sympathetic listening practice. They work by pairs, one disabled and the other not. Therefore, they join their professional expertise to their disability awareness to help the applicant on the way to self-confidence.

Ideally, a disabled inclusive job applicant has to be able to act independently, with the maximum autonomy, to talk about what tasks he/she can do with more or less rapidity or efficiency.

The coaching club motto is “Believe in yourself and they will trust you”.

If a manager is convinced about a disabled worker's competences, he/she can then convince his/her managing team, which will open the way to recruiting.

So far, out of 350 accompanied persons, since the creation of the Club in 2008, 40% found a job solution that suits their wishes and qualifications. 20% chose to change project or go to another vocational training.

To sum up the club’s methodology, we can say that there are three keys to successful coaching:

1. helping the person to become active and autonomous in his/her job search, to become self-confident.
2. bringing manager and staff to change from a kind to a trustful look in the prospect of their recruiting a visually-impaired worker in the future.
3. A methodology including guidance by a pair of expert volunteers, the creation of an adapted guidebook for supporting the visually-impaired,
several training sessions for the club's coaching team, working sessions with specialized public departments or services.

In this respect, the club's work follows three guidelines:

- The continuity of its action: taking into account the evolution of the working world with future new professions.
- The diversification of geographic units, so as to help more visually-impaired people.
- The organization of awareness development sessions for social work forces, so that visual disability can be better understood.

To conclude about this methodology, let us also say that the club's volunteers even organize oral interviews for the job seekers they have accompanied, who have found a potential job. Some volunteers being multilingual, oral interviews can be made in Spanish or English too.

**Defending Enforcing and Updating**

In France, Decision-Makers officially consult disabled people's charities representatives. However, the latter's task is often made difficult, as they are often left with short delays to analyze more or less accessible documents. Nevertheless, they do not give up.

They carry on attending meetings when their rights are discussed or new legislation projects elaborated. Two commissions are capital:

1. La commission des droits et de l'autonomie des personnes handicapées or Commission for the Rights and Independence of Disabled People: which delivers the disabled worker status guaranteed by Article 323.3 in French Labour Law (“Code du Travail”).
2. The CDAPH is an instance which is responsible for disabled people's rights in general (it also handles disability compensation matters, pensions, etc); it has offices in each “département” (local administrative division).

The disabled worker status is open to those who match the following requirements:

- Workers whose work accident resulted in a disability estimated at 10% or more
- Disability pensioners
War veteran pensioners
• Holders of a disability card
• Recipients of the Disabled Adult Allowance.

The following rights are guaranteed to those who qualify as disabled workers:
• Assistance and guidance from CDAPH in order to find a position in the sheltered sector
• Access to professional training and rehabilitation workshops.
• Assistance and guidance from Pôle emploi (National Job Centre) and Cap Emploi (specific recruitment organization)
• Funding and practical help provided by the AGEFIPH and FIPHFP
• All the provisions otherwise guaranteed by French legislation.

Le Conseil Consultatif national des Personnes Handicapées or national consultation council of people with disability is an instance where all political and social orientations aspects of the rights for people with disability are debated and suggestions are made. It is chaired by a parliament member and representatives are appointed for three years. It includes all representatives of disabled people's organizations, trade unions, as well as other instances related to health insurance companies. It was created in 1975.

Conclusion

The right to work for disabled people is linked to the ensemble of rights granted to them in the law. That's why disabled representatives have to stand for these rights either when decisions are made or new acts debated upon. They have to be active and vigilant citizens, especially when belonging to a minority.

The last act voted by the parliament at the end of 2016, in whose wording disabled representatives took part, is the digital accessibility act. Another new measure has just been implemented, which is intended for more

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individual approach and arrangements to accompany workers with disability who need more specific help.

When meeting in government instances, people with disability or their representatives are powerful ambassadors of other disabled citizens' cause and contribute to the ever too slow social changes. Being seen and heard will later on make the difference. Like politicians, employers have to meet, talk to and therefore know people with disability, to understand them better. Anyway, what employers want is skill and capability, and they can get it with many people with disability, when they come to trust them.
The Role of Higher Education in Promoting the Right to Work for Persons with Disabilities

by Bert Wagener

Because this conference examines the international perspective of the right to work, it seems logical to ask what an inclusive institution of higher education might look like in its ideal form. This paper takes into account three target groups: the students, the employees at institutions of higher education, and guests. Multiple factors must be included in the discussion. Accessibility, awareness and participation are the main considerations of this paper. The creation of juridical standardized principles is the first step towards enabling equal participation for persons with disabilities in our society. In looking solely at the state of realizing inclusion at institutions of higher education, it becomes apparent that the path towards an extensively inclusive higher education landscape requires further progress. Inclusiveness in the higher education landscape is an elementary component for achieving the right to work.

The United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) has existed for more than ten years. This presents the question of what the status of people's right to work is in terms of the Convention. How “open, inclusive and accessible” are the labour market and the work environment for persons with disabilities? The focus here is not only on the “classic” labour market but also on colleges and universities as educational institutions which function as employers as well as actors that could create the foundation for implementing the right to work.

The “right to work” question was pursued during the international conference in Kassel, Germany with participation from a large number of recognized experts from Germany and abroad. This conference was conducted in partnership with the School of Applied Sciences of the German Social Accident Insurance (HGU) and funded by the German Federal Ministry of Labour and Social Affairs, by the Research Association for Social Law and Social Policies [Forschungsverbund für Sozialrecht und Sozialpolitik, FoSS], by the Fulda University of Applied Sciences and the University of Kassel.

Based on the international perspective on the implementation of inclusion in working life, this generated awareness for the right to work for per-
sons with disabilities as a human right and fostered ideas for implementation.

Inclusion at institutions of higher education

Since the Universities of Kassel, Fulda and Bad Hersfeld considered the right to work through an international lens during the conference, it seems logical to ask what the ideal inclusive institution of higher education would really look like.

This paper takes into account three target groups: the students, the employees at institutions of higher education, and guests.

Multiple factors must be included in the discussion. Accessibility, awareness and participation are the main considerations of this paper.

Given the complexity of this topic, the presentation gives an exemplary overview.

1. Accessibility

In order to implement the UN CRPD, the German Federal Government and the states developed action plans for their respective jurisdictions. The declared objective is now “[…] to attract more students with disabilities by increasing the focus on the accessibility of institutions of higher education and the content they offer.” [“[…] die Zahl der Studierenden mit Behinderungen zu erhöhen, indem Hochschulen und ihre Angebote zunehmend barrierefrei ausgestaltet werden”].¹ This poses the question of how to achieve this objective.

Basic structural requirements

Physical, structural conditions are one aspect of accessibility. As a result, it is necessary to differentiate between different types of disabilities. Persons with reduced mobility must at least be able to reach all areas of

the institutions of higher education without any problems. Access should be at ground level and all building sections must be accessible. People with reduced mobility must also be able to access all additional hallways and rooms. Consequently, doors that use motion sensors are essential.

Elevators are vitally important if these persons are to participate in lectures on higher floors or if they must reach the workplace. Everyday life at an institution of higher education is a unique challenge for visually impaired people. For example, they often cannot read the information off of blackboards still commonly in use today. Consequently, not only are special workstations with computer equipment vitally important, but it is also necessary to refurbish signposts in buildings and to properly format announcements for events.²

The equipment in lecture halls and seminar rooms also must be adapted to the needs of students with disabilities. Ramps and lifts must be available for persons with reduced mobility. It is important to have enough space between desk rows to allow for mobility. Special communication devices for persons with hearing impairments, such as amplifying hearing aids, or visual impairments, such as Braille writing or audible material, must be installed in such spaces.³

**Accessible teaching**

Before the government approves courses of study, an accreditation of the course of study is necessary. The accreditation guidelines set forth that the course of study can be studied and the concerns of students with disabilities must be taken into account. Another point is that accommodations in regard to time and formal requirements must be ensured.⁴

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If persons with disabilities want to complete a course of study, the teaching must be accessible. The faculty must consider numerous issues. It is most important that students receive enough time, for example, to be able to discern the writing on the board and subsequently take notes about the content, that the environment not be overly noisy and that, if necessary, a microphone be used. Accessibility must be taken into account in documentation. Often, documents consist solely of pictures or unstructured text, which is of limited use for persons with disabilities.5

Students with disabilities can experience problems adhering to time and formal requirements. Those students consequently need greater flexibility in areas such as the design of exams or adherence to due dates. This can be achieved through accommodation. The objective here is to ensure equal opportunity for all students.

Two sides must be considered here. For one thing, the disability-related disadvantage of the students must be offset. However, these persons must not receive any advantages over other students due to the decided provisions. All students must master the same content in order to pass the examination.

Qualifications of instructors

Qualifications of the teaching staff at an institution of higher education is an additional issue when dealing with an inclusive institution of higher education. It is the teaching staff who imparts knowledge to students with disabilities and thus enables them to find a job.

For one thing, the teaching staff must demonstrate adequate sensitivity in order to deal with the different limitations and to view each student as an individual.

In this context, further training of the teaching staff is unavoidable. How do you design instruction for persons with disabilities? What has to be taken into account? Inclusive pedagogy looks at the individual needs and specific nature of each student and asserts fairness for students with and without disabilities at every place of learning.

Shared knowledge transfer requires that the individual educational needs and special needs of the students be met. Goals for learning development can be similar or dissimilar on a case-by-case basis.\textsuperscript{6}

In order to also ensure training of teaching staff at institutions of higher education, training programs can be carried out on-site so that the teaching staff promptly receive information about new developments in lesson planning and design.

2. Participation

Participation is an important consideration for implementation of the UN CRPD. It outlines the attendance and participation for persons with disabilities.

An inclusive institution of higher education can be achieved only if persons with disabilities can have a say in what is helpful to them and what is not. They are the experts in matters that affect them personally.

Higher education officers for the needs of students with disabilities or chronic illness can also be consulted. The higher education officer shall demand the environment and measures provided by law in order to satisfy the special needs of students with disabilities. The higher education officer has another important task of representing the needs of students with disabilities or chronically ill students with respect to all institutions, organizations and boards of the college or university at a central level and at the department level as well as with respect to teaching staff.\textsuperscript{7}

3. Creating awareness

The UN CRPD prompts all member states to adopt immediate, effective and appropriate measures to raise awareness throughout society (Article 8

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of the UN CRPD). The objective is to heighten the social awareness for the rights of persons with disabilities and to combat prejudices. The convention further outlines the potential form the measures will take, such as initiating and maintaining effective public awareness campaigns. Support is necessary for measures that promote a respectful attitude towards the rights of persons with disabilities in the educational system and measures that support training programs for everyone and which promote awareness with regard to the rights of persons with disabilities. Likewise the media is encouraged to provide explanatory information about persons with disabilities and their rights.\(^8\)

**Conclusion**

The creation of juridical standardized principles is the first step towards enabling equal participation for persons with disabilities in our society. Therefore, passing the UN CRPD was an important step forward, which has made a positive impact on development towards an inclusive society. Since then, the social landscape in Germany has been characterized by a growing awareness of persons with disabilities. However, this basic concept has not yet penetrated all areas of society. Inclusion is a task for society as a whole.

In looking solely at the state of realizing inclusion at institutions of higher education, it becomes apparent that the path towards an extensively inclusive higher education landscape requires further progress. Inclusivity in the higher education landscape is an elementary component for achieving the right to work.

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278
References


Employment of Persons with Disabilities – Effective Policy and Outcomes Requires Clear Strategy with All Relevant Actors Engaged

by Siobhan Barron

In order to address the barriers to employment for persons with disabilities a whole systems approach is necessary involving many policy areas and joint working by the actors concerned. This must be considered from a supply and demand approach, not just focused on supporting individuals on the pathway to work and in work but also by engaging employers. Ireland’s Comprehensive Employment Strategy is designed with this in mind to progressing increase employment opportunities and for delivery through three yearly action plans.

Ireland is conscious of the need to address the low levels of employment participation by persons with disabilities, through a range of approaches. In so doing it is important to be aware of the issues and how they can be addressed.

I. National Disability Authority

The National Disability Authority1 (NDA) of Ireland is a statutory body with responsibility for providing independent, objective and evidence informed advice to the Government on disability relevant matters and help to progress the inclusion of disability in mainstream policy and practice.

The NDA’s work covers many areas relevant to the everyday lives of persons with disabilities so it crosses most Government Departments and works with Ministers and officials. Its functions include research and policy advice, and also to assist the Minister in the co-ordination of relevant policy areas. It also has responsibility for monitoring the employment levels of staff with disabilities in the public sector and promote universal design of the built environment, places, products, services and ICT as relevant to the population as a whole.

1 www.nda.ie.
II. Convention on the Rights of Persons with Disabilities and National Disability Action Strategy

Ireland has signed the UNCRPD but has yet to ratify it, but has yet to do so at time of writing this (Nov 2017). The approach of the Irish Government on international conventions is to prepare for and be ready to implement their provisions before ratification. There are a number of especially complex issues being addressed in Irish legislation and a roadmap to ratification was published by the Government in 2015.

An Assisted Decision Making (Capacity) Act will enable compliance with Article 12 UNCRPD and another Bill is currently before the Houses of Parliament to amend various legislation on other matters relevant to implementing the Convention.

Ireland has for many years continued to advance a programme of policies and reform, which are very much in line with the Convention and its objectives. Building on equality and human rights legislation and infrastructure, there is a National Disability Strategy since 2004, which is being further refreshed in 2017 and implementation to be overseen by a Cabinet Committee of the Government.

The Strategy has specific actions but also encompasses a number of thematic disability strategies and action plans including:

- A move away from institutional care to supported independent living in the community;
- Move away from traditional centred based adult day services to participation and integration into mainstream life of the community, valued social roles and employment.
- Developing primary care services in the community – a multi-disciplinary approach instead of dependence on segregated services;
- Outcomes measurement of policy impact on quality of life including focus on having a job and other social roles.

In Ireland social care services are funded in the health sector which differs to many other countries where it tends to be the local authorities. The major reforms are being rolled out gradually and require a cultural shift in services but also in the community to be effective.

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2 www.justice.gov.ie.
For many years some children with disabilities have moved direct from post primary schools, including mainstream schools, into adult day services funded by health services. NDA has been working with the health and education sectors to start earlier to identify and support alternative routes to mainstream further education, training and employment, through joint working. The National Disability Strategy also includes a commitment to implement the Comprehensive Employment Strategy for Persons with Disabilities (CES) 2015 to 2024\(^5\).

III. What the Data tells us

The population of Ireland (2016) is over 4.7m persons. The National Census 2011 indicated that approximately 13% of the Irish population had a disability, with 50% aged over 55 years and 34% aged over 65 years.

Eurostat report on Labour Force Survey data compared disability population percentages showing Ireland at 12.8% compared to 26.8% for EU28 and 54.6% for Finland. It is difficult to compare like with like when different definitions may apply and the culture of self-reporting can vary greatly. People in Ireland are much less likely to say they have a disability unless it is a significant impairment. Therefore, when looking at the percentage of those in employment the activity rate can seem quite low compared to other countries.

National data for 2011 showed people with disabilities were only half as likely to be working as those without a disability, although more recent data shows the gap has grown. Research has shown that transitions from economic inactivity can be very low – even in the boom years as low as 4%.

Likelihood of employment can be impacted by a range of factors, including the position on employment in the households generally. In 2011 Ireland fared poorly compared to other EU countries as we had the highest proportion of 18 – 59 year olds living in jobless households – 15.8% compared to an EU average of 11.1%.

Because of the greater prevalence of ill-health, for some people with disabilities, a degree of under-representation in total employment is to be

expected, but there is certainly scope for improvement. Certainly, 15% of those who said they have difficulty working were in fact in work in 2011. When NDA assessed the figures by types of impairments, certain impairment groups fare more poorly than others in employment, particularly those with intellectual disabilities and those with physical disabilities in particular with employment levels of 17% and 18% respectively. Even those who declared that they were ill had higher employment levels 32%.

NDA knows that approximately 66% of younger persons with disabilities (aged 18 – 34) are interested in working and over half of all those with disabilities. Half of those with mental health difficulties want to work. People with disabilities aged over 45 years experiencing health challenges or significantly reduced energy or stamina are much less likely to express an interest in having a job. Fears also impact e.g. that there are no suitable jobs, losing benefits, fear about attitudes or discrimination.

IV. Barriers

Extensive research, workshops, round table discussions and consultation provides learning on the barriers as well as the areas to be addressed. For example these barriers can impact on pathway to work.

- Attitudes and Expectations in society
- Lower confidence levels
- Research shows people with disabilities are more likely to have low education levels and lower expectations in terms of employment
- While there is some good practice there is a need for national policies and systems that ensure supports for those who need them, especially at transition points between education levels and on into employment
- It may not be financially worthwhile for some people to take up work if they lose benefits, especially medical entitlements
- Many employers are not employing people with disabilities often due to lack of understanding and fears
- Agencies are not working together at national and local level to ensure services are joined up and easy to navigate.
Research NDA commissioned in 2006 concluded 5 main pillars to advancing employment for people with disabilities:

1. Remove disincentives and benefit traps, and support transitions to employment or pre-employment activities;
2. Enhance the capacity and effectiveness of the education, training and employment system so individuals can compete for employment in the open labour market;
3. Ensure that both the public and private sectors implement policies to support the recruitment and retention of people with disabilities;
4. Devise and implement a preventative strategy: a) reduce early school-leaving; and b) improve retention in employment following the onset of a disability;
5. Develop a systematic process of engagement with people with disabilities to realise their employment aspirations.

In addition, it is essential that the volume and approach in programmes of education, training and employment is sufficiently diverse to meet the needs of all people with disabilities, particularly those experiencing severe disabilities. Actions must be implemented in an integrated manner if significant progress is to be achieved, so joined up working is critical.

V. Strategy on Employment

NDA worked bilaterally and with groups of Departments – seven Departments in total – identifying, targets for specific actions as well as an overall global target in employment levels to be achieved over a 10-year period.

Increasing employment levels is dependent on two separate factors – the supply of jobs coming on stream and the share of those jobs that will go to people with disabilities. Ireland has been recovering from the 2008 crash in its economy, and while job opportunities are increasing, competition arises from the ready supply of workers laid off by the recession, returning emigrants and others such as students completing school and college competing for available vacancies. Jobs that are freed up due to de-

partures or retirements provide scope for increasing the share of hires to people with disabilities.

In considering an employment target for the strategy, NDA looked at:

- The economic growth forecasts, because Ireland is particularly susceptible to international factors
- Supply of jobs and share that could go to people with disabilities
- Competitive nature of labour market
- Likely movement of job leavers and job hires versus new jobs
- International evidence shows that once people with disabilities have been out of work long-term the return to work rate is extremely low – consistently in the order of 1% in developed countries working with different policies. Doubling this rate would add just 0.3 percentage points to the overall employment rate of people with disabilities.
- Employer engagement
- The impact of initiatives under the Strategy – some will be slow burners.
- Any significant increases in employment for people with disabilities arising from the strategy would likely be towards the end of that term.

It is estimated that the overall global target might be in the order of 38% by 2024 pending delivery of the national Comprehensive Employment Strategy and depending on national economic developments etc over the period of the strategy. The Strategy is based on a framework of a pathway to work, while recognising it may not be a linear journey for everyone.7

With this in mind, the Strategy is built on 6 strategic priorities:

1. To build skills, capacity and independence – focus on education, training and lifelong learning.
2. To provide bridges and supports into work, including transport to get there.
3. Make work pay – having regard to potential disincentives and how they may be addressed.
4. Promote job retention and re-entry to work – particularly noting the need for an effective national vocational rehabilitation system.
5. Provide co-ordinated and seamless support.
6. Engage employers in both the public and private sectors.

The Strategy was launched by the Government in October 2015. It is also an integral part of the Annual Action Plan for Jobs. Implementation of the Strategy is monitored by a group of senior officials and disability sector representatives with an independent chair. They meet regularly to discuss progress and areas for improvement.

VI. Action to Implement the Comprehensive Strategy for Persons with Disabilities

The Strategy comprises an action plan for the first three years, recognising this stage as the essential foundation stage. This phase entails advancing and refining policies, reviewing pilot models, developing new policy approaches, research and incremental roll out of initiatives and firming up on joint working between the education, training and employment sectors. The Actions are captured under each Priority and accountable Departments and Agencies assigned with timeframes for delivery.

Priority 1 is very much focused on supporting individuals and families through positive messaging and information to raise expectations and support young persons with disabilities in their aspirations to work. The focus is on presumption of capacity to work. It includes a new model of resource allocation to schools built on needs instead of determined by diagnosed condition. It is also focused on how schools support children with vocational guidance, work placements and in their transition on to further education, training or work. It requires the health and education sectors to work together – sharing information, and working jointly to ensure that children can, where appropriate, be encouraged and redirected post school towards further education and employment instead of automatic dependence on social care services.

Priority 2 is focused on work activation, particularly to ensure work is on the agenda in social care services and ensure effective work activation programmes. In particular, it is about transitioning away from the sheltered employment model funded by the health services disability budget to roles in the mainstream community and to work in the open labour market.

The government’s Department of Social Protection is promoting work sampling, expanding internships as a recruitment route and enhancing capacity of its local offices as a gateway to employment activation for people with disabilities. The National Transport Authority has committed to actions to improve accessibility of public transport, address the supply of ac-
cessible taxis as well as look at car sharing schemes supporting people with disabilities to get to work.

**Priority 3** is focused on how to make work worthwhile from a financial perspective. The Government appointed a working group of officials with an independent Chair to look at the financial disincentives to employment for persons with disabilities – the Make Work Pay Group\(^8\). It is looking at how schemes under different departments work together for the individual, or not as the case may be. A Ready Reckoner will help individuals assess the impact of earnings on their overall income and benefits. It is recognised that income supports need to be improved so they are flexible to allow individuals enter or leave the workforce with ease.

**Priority 4** recognises that 80% of people with disabilities acquired their disability during working age. The longer an absence from the labour market the more challenging it is to return to work. While there are good models of vocational rehabilitation in operation, they have developed on an ad hoc basis and it is recognised that Ireland needs to ensure an effective national programme and integrated systems.

The NDA has been researching practice in other jurisdictions to guide a national programme\(^9\). In particular, this looks at how to co-ordinate clinical and vocational rehabilitation, early intervention, pathways to vocational rehabilitation and returning to work earlier, seeing this as part of recovery, case management approaches and how to enhance occupational health services in Ireland.

**Priority 5** is about achieving co-ordinated and seamless support. Again there are some good models in place for supported employment but no national programme. Actions include building capacity in the mainstream employment activation service which is progressing well. There are some voluntary disability service providers proactive in getting people with disabilities into work as well as a number of pilot projects.

The most challenging area relates to individuals who have high support needs. The NDA has been working with three Government Departments and their agencies to agree a co-ordinated policy approach and implementation plan for supported employment, including pre-activation stage to be set out in a report to the Minister before the end of 2017.

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Priority 6 is focused on employers. NDA met with the main employer bodies to understand the challenges from their perspective. Actions are focused on awareness and guidance, but also getting employers themselves to play their part in supporting each other and taking initiative. The network initiative is receiving state funding for collaborative working between 3 employer bodies to support all employers through a help line, website and briefing events. It will work to encourage employers to actively hire people with disabilities through shared learning and awarding good practice. Also encouraging better take up of employer grant schemes.

This priority will also focus on enhancing employment for people with disabilities in the public sector. There is already a 3% target obligation in place for public sector bodies. The overall level is approximately 3.6% for 2015 having increased slowly over recent years. The Government has decided to increase the target to 6% by 2024 and NDA is exploring alternative recruitment routes with them as the standard approach does not work for everyone. Good practice guidance and guidance for line managers working with autism are also planned.

Priority 6 also focuses on entrepreneurship and self-employment. The Irish economy is small seeing many in self-employment and sub-contracting roles. Recent figures suggest that less than half of private sector businesses employ staff, with as little as 8% of companies employing ten or more staff. The Strategy therefore includes actions involving Enterprise Ireland which is the government agency responsible for the development and growth of Irish enterprises. It is working to build awareness of entrepreneurship for people with disabilities and looking at a potential suitable programme for them.

VII. Conclusions

The Comprehensive Employment Strategy recognises the right to work for people with disabilities and that a systematic approach is required to address the barriers to realising this. Through a series of three-year action

10 See NDA annual reports on compliance by public sector with Part 5 of the Disability Act 2005 at www.nda.ie.
plans, it should allow policies to be tested and embedded to deliver sustainable incremental improvements.

Its success depends on the Government Departments and agencies working together as committed to a common goal – increasing employment opportunities for people with disabilities. It will be challenging and requires joint problem solving and to ensure that bodies work together beyond policy and funding silos for better outcomes for people with disabilities and longer term benefits. Some of this will be helped by agreed protocols on their respective roles and sharing of information.

Focus must be on the open labour market and involve employers in implementing the strategy. There is good practice to build on, and the first phase should provide a strong foundation but it will be a long-term project. Changing attitudes and cultures are important, starting from the earliest stage in school, encouraging and supporting aspirations to work. Ireland is transforming disability services, establishing new models that support ordinary lives and ordinary places. Work is a core part of ordinary lives, and while not may mean economic independence for all persons it is important to achieving social inclusion.

References


Persons with Severe Disabilities as Judges/Prosecutors? A Test Case on the UN Convention on the Rights of Persons with Disabilities in Taiwan

by Nai-Yi Sun

Taiwan incorporated the UN Convention on the Rights of Persons with Disabilities (CRPD or the Convention) into its national legal system in 2014, in the form of a national law that is referred to as the Implementation Act. At its core, the CRPD is based on the concept of substantive equality, which views failure to promote accessibility or make reasonable accommodation for people with disabilities as discrimination. The concept is at significant odds with Taiwan’s current legal system and its legal doctrine of equality. As a result, the government of Taiwan is facing immense challenges in implementing the Convention, largely due to a lack of expertise relating to the core concept of the Convention.

This paper details the main problems in implementing the CRPD in Taiwan, using the regulations for judicial services examinations as an example. These regulations in effect exclude examinees who have a high level of visual impairment, hearing impairment or physical disability from the core aspects of their legal career. This paper makes reference to the parliamentary implementation project relating to the Convention to demonstrate why authorities in Taiwan are mischaracterizing their obligation towards to fully realize human rights and fundamental freedoms for all persons with disabilities in accordance with the CRPD and the CRPD Implementation Act. The paper shows that the services present in the law to ensure the rights of persons with disabilities offer the authorities an important reference point for meeting their obligation to implement CRPD.

I. Introduction

The sovereignty of the island nation of Taiwan is generally not recognized internationally and as a result, Taiwan is deprived of the opportunity to participate in human rights agreements under international law. Since 2009, Taiwan has gradually incorporated a number of important UN human rights conventions into domestic law, in the form of national legislation referred to as the implementation acts. Conventions incorporated in this way include the International Covenant on Civil and Political Rights (ICCPR) (2009), the International Covenant on Economics, Social and

Because the UN Secretary General has rejected the deposit of the ratification instrument by Taiwan\(^3\), the corresponding legal measures are purely domestic.\(^2\) Yet they still matter under international law. For one thing, the Taiwanese government has unilaterally agreed to commit to the international human rights standards, even without being recognized as a party to the Convention.\(^3\) In addition, the implementation acts have developed a form of monitoring mechanism, which is parallel with the UN model but distinct from an examination of national reports by the respective convention committee. Instead, the government invites internationally experienced experts and academics in the field of each convention to review Taiwan's national reports, and to engage in intensive dialogue with government representatives and representatives of civil societies about Taiwan’s performance. The government strives to fulfil recommendations made by these international experts and the duty of implement the conventions in accordance with the respective convention and to prepare for subsequent reports accordingly. This process appeals to the international human rights

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1 Pursuant to the UN General Assembly Resolution No 2758, Taiwan has not been a UN member since 1971. As a result and in accordance with the “One China Policy," it is denied from becoming a party to UN human rights conventions.

2 The Treaties Concluding Act （條約締結法） was passed in Taiwan in 2015. The ratification process adopted by this Act reflects the difficulties the government of Taiwan faces in participating in the international community. In accordance with Subparagraph 1, Paragraph 1 of Article 11 of this law, the president promulgates a convention upon parliamentary approval, even if it is not possible to deposit the document of ratification with the competent authority. After the announcement, the convention takes legal effect in Taiwan in accordance with Paragraph 2, Article 11 of the aforementioned law.

NGOs and has come to be known as the “Taiwan model”. Using this model, Taiwan has held first and second review committee meetings in relation to its implementation of the ICCPR, the ICESCR and the CEDAW. Meetings to review its initial state reports for the CRC and the CRPD were also held in November 2017.

In regard to the CRPD, the Taiwanese government is required, in accordance with Article 10 of the CRPD Implementation Act, to examine the compatibility of all national laws, ordinances and administrative measures with the Convention within two years of the CRPD Implementation Act taking effect and to identify the regulations that need to be changed, amended or derogated, as well as administrative measures that need improvement. The result of such review revealed that the use of discriminatory terminologies in domestic law is the main problem that needs to be addressed (65% of all non-compatible issues). The remaining problems relate to regulations that impede the rights of persons with disabilities (24%), and regulations that promote participation of persons with disabilities in social life (11%). The bulk of regulations (73%) that are not compatible with Article 27 of the CRPD (which relates to the right to work and employment for people with disabilities), fall into the disadvantage category, in that they provide that the practice of certain professions requires a certain level of physical functioning and/or mental health. A rele-

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7 Taiwan invited Jaap Egbert Doek, Judith Karp, Nigel Cantwell, John Tobin and Laura Lundy to examine the initial state report on the Convention on the Rights of the Child, and also invited Osamu Nagase, Diane Kingston, Adolf Ratzka, Michael Ashley Stein and Diane Richler to examine the initial state report on the Convention on the Rights of Persons with Disabilities.
vant example is the regulation relating to civil service entrance examinations for judges and prosecutors, as set out in the Regulations for Judicial Examinations under Civil Services (公務人員特種考試司法官考試規則) (Regulations for Judicial Examinations).

In Taiwan, people demonstrate their competence to become a judge or prosecutor in a joint civil service examination that consists of three stages. The first and second stages are written tests, the third is an oral examination. Participants who take the second stage of the written examination must undergo a medical examination. Anyone who does not satisfy the physical requirements is not admitted to the subsequent oral examination. The Regulations for Judicial Examinations, prior to their amendment on 23 February 2018, stipulated that persons who exhibit a high degree of visual impairment, hearing impairment or physical disability, who are infected with tuberculosis or whose capacity is clearly restricted by reason of mental disorders or other issues are not suitable to practice as a judge or public prosecutor. Persons with severe disabilities are thus excluded from a main role in their legal careers. Although the findings of the review ascertained an incompatibility with the CRPD, the responsible authorities have since rejected the doubts about the constitutionality of the Regulations for Judicial Examinations.

Based on the above example, Section II of this paper briefly outlines the opinions of the authorities. Section III then analyses why the findings in both official documents are being neglected although the obligation to implement holds true for all authorities according to the CRPD Implementation Act. The analysis identifies an inadequate implementation process, and a gap between the equality concept in the CRPD and the current legal system of Taiwan as the main issues. Section IV discusses the possibility of abolishing the Regulations for Judicial Examinations, and using existing laws to promote the participation of persons with disabilities in working life (IV). This is followed by a concluding observation in Section V.

II. Statements from authorities about the need for physical requirements for judges and the public prosecutors

In 2016, the Taiwanese parliament held a hearing about the physical demands, and hence requirements placed on the judgeship and prosecution roles. The responsible ministry for national examinations of the civic ser-
vice remained neutral. The opinions of the Judicial Yuan\(^8\) and the Ministry of Justice, the latter of which is responsible for appointing judges and public prosecutors, were pivotal. Both authorities submitted official opinions afterwards. On the one hand, they recognized the fact that persons with significant disabilities are not excluded from a career as a public lawyer in Germany, France, Japan and South Korea from the outset. In France, the hiring authorities are obligated to make appropriate provisions for qualified civil servants with disabilities, and there are also cases in Germany, France and in South Korea where lawyers who are visually impaired hold a judgeship. On the other hand, these authorities continued to defend the need for the Regulations. Their rationale was largely based on previous jurisprudence by the constitutional judges of Taiwan about equality before the law.

Pursuant to Article 7 of the Constitution of the Republic of China, all citizens are treated equally before the law regardless of their gender, religion, race, social class or political affiliation. Out of this comes the universal principle of equality. In accordance with the settled case law of the Constitutional Court, the principle of equality does not ban all differentiations and instances of unequal treatment resulting from legislation. On the contrary, the legislature can treat one group unequally compared to another group upon considering the constitutional values, the purpose of the law, and the factual substantiation for such treatment.\(^9\) Equality before the law is violated only when there is no appropriate connection between the purpose of the law and the differentiation\(^10\). In an example of unequal treatment in relation to a physical shortcoming, the Judicial Yuan rendered Interpretation No. 626, which states that the unequal treatment between persons with and without colour blindness with respect to the entrance exam of the Police College is constitutional, because colour blindness restricts the full exercise of multi-faceted police service. There is a rational

\(^8\) In accordance with the Taiwan constitution, the Judicial Yuan (司法院) is the highest judicial body, which, aside from its constitutional jurisdiction, supervises the administrative tasks of the lower courts (Supreme Court, High Courts and District Courts, Supreme Administrative Court and High Administrative Courts, Intellectual Property Court and Commission on the Disciplinary Sanctions of Functionaries).

\(^9\) See Judicial Yuan Interpretation No. 485, 593, 626, 649, 682, 694, 701.

relationship between the differentiation and the high-order public interest when selecting suitable Police College students for police service.\textsuperscript{11}

The Ministry of Justice argues on the basis that persons with profound disabilities are not capable of carrying out the function of the office of a public prosecutor. Because the management of a criminal investigation often demands time flexibility as well as local, spatial and geographical mobility, one cannot always expect to have barrier-free access or personal assistants at the crime scene. Due to limited budget, it is out of the question to tailor how the prosecution service is conducted or to hire personal assistants due to a public prosecutor’s disability.

The opinion of the Judicial Yuan is more accommodating than the opinion of the Ministry of Justice. The possibility exists that persons with physical disability, visual impairment or hearing impairment can carry out a judgeship with the help of technical tools or in part by using an official substitute during investigations. However, the Judicial Yuan holds that effective legal protection of the public in legal proceedings takes precedence and is important for the common good, and as a result an unequal treatment can therefore be justified. Judicial Yuan remains sceptical about eliminating the physical requirements in the Regulations for Judiciary Examinations without sufficient measures for accommodation.

\textbf{III. Lack of knowledge about the CRPD as the main problem of its implementation in Taiwan}

The documents of the Judicial Yuan and the Ministry of Justice do not mention Article 27 of the CRPD, which relates to work and employment. This was despite the fact that they had participated in the legislative review under the CPRD Implementation Act, which required authorities to consider the compatibility of laws, ordinances and administrative measures with the CRPD. As a result, it remains doubtful whether all government authorities paid sufficient attention to the fundamental principles of

\textsuperscript{11} Nai-Yi Sun (2015), Legal entitlement of disabled persons to barrier-free access to public institutions and services? Using as example the Law on the Rights of Persons with Disabilities in Taiwan, in: Werner Heun/Christian Starck (ed.), Grundrechte, Rechtsstaat und Demokratie als Grundlage des Verwaltungsrechts, p. 109 (112f.).
the CRPD. This may be attributed to inadequate parliamentary procedures to implement the convention.

1. The CRPD’s implementation process in Taiwan

After the CRPD Implementation Act came into force, important citizens' initiatives in Taiwan campaigned with all party factions in parliament, emphasizing the importance of the Convention and demanding its implementation into the domestic legal system to bolster disability policy and legislation, which at that time was essentially limited to welfare benefits. Unfortunately, the executive branch declined in its last term (from 19 May 2012 to 20 May 2016) to ratify the CRPD in parliament and to incorporate relevant legislation into domestic law. It was of the opinion that multiple laws and standards already guarantee the rights of persons with disabilities and that the Rights Protection Act for Persons with Disabilities (身心障礙者權益保障法) should be completely revised based on the fundamental idea of the “social model” contained in the CRPD. In order to overcome the executive branch’s passivity, parliamentarians from both the ruling party and the opposition party (several of whom have been working together intensively with citizens' initiatives for a long time) drew up legislative proposals to implement the CRPD.

Although the political atmosphere in parliament and the relationship between President Ma and the opposition parties was strained due to the China policy at that time, members of the parliament reached a consensus on a legislative proposal for the CRPD Implementation Act. On August 1, 2014, the draft was passed without the convention being ratified at the same time. This means that neither the executive branch nor the parliament discussed either the provisions of the CRPD or its translation into

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14 Worth mentioning are the “Eden Social Welfare Foundation”, the “Parent's Association for Persons with Intellectual Disability, Taiwan” and the “League of Welfare Organizations for the Disabled”.

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traditional Chinese in great detail. In 2016, the newly elected Parliament (from February to 2016 to January 2020) approved the draft Implementation Act without reservation. This time, there was also no discussion about CRPD’s content or its individual articles during these parliamentary proceedings, nor was a study undertaken to examine the legal standards likely to be affected as a result of the new law. According to the executive branch’s “Action plan for implementation of the CRPD” (落實身心障礙者權利公約推動計畫) (which was to be carried out from 1 December 2014 to 31 December 2019), training and education programs, the legislative review to check compatibility with the Convention and the preparation of the initial state report should take place at the same time. Despite the fact that civil servants, members of parliament and judges lacked sufficient familiarity with the Convention, they must complete the latter two tasks no later than 2016.

2. The CRPD concepts of equality before the law and the Constitution of the Republic of China

Article 27 of the CRPD obliges the government to protect the equal right to work for persons with disabilities and to promote its implementation. Any discrimination on the basis of disability in all matters in connection with work of any kind is not allowed, including the conditions of selection, hiring and employment of candidates. The government must ensure reasonable accommodations are made for persons with disabilities at their workplaces. This relates to the core concepts in the convention, namely - prohibition of discrimination on the grounds of disability and substantive equality before the law.

Article 2 of the CRPD signifies 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

15 The official Chinese translation by the UN is based on the Chinese language of the People's Republic of China which deviates from the Chinese writing used in Taiwan.

16 After the Taiwanese government was unsuccessful in depositing the ratification document with the UN, the Taiwanese president did not promulgate the CRPD in accordance with the Treaties Concluding Act until May 17, 2017. See Official Journal of the Presidential Office of the Republic of China (Taiwan), No. 7305 from May 17, 2017, p. 3.
recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in all fields. This also includes the denial of reasonable accommodation. Article 2 of the CRPD defines the term “reasonable accommodation” as meaning necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

With this definition, the non-discrimination clause of Article 5(1) of the CRPD expands the traditional understanding of legal equality before the law to include equal protection and equal benefit of the law. Omission of necessary and appropriate adjustment measures leads to a violation of the non-discrimination obligation. The government must therefore allocate a certain amount of financial resources to meet its obligations to provide reasonable accommodation to eliminate discrimination in accordance with Article 5(3) of the CRPD. This positive obligation augments the purely negative ban on unequal treatment. This positive character is also outlined in Article 9 of the CRPD regarding accessibility. In accordance with General Comment No. 2 on Article 13 of the Convention and the newly emanated jurisprudence in Mr. F. v. Austria from the UN Committee on the Rights of Persons with Disability, insufficient compliance with the obligation by the States Parties (see Article 9(1) and (2)(f) and (h)) exists if public transportation is not accessible, and this is considered a violation of the prohibition of discrimination in Article 5(2) of the CRPD.

By contrast, Taiwanese constitutional justices believe equality before the law according to Article 7 of the Constitution of the Republic of China is restricted to the dimension of a negative right. In the above mentioned Interpretation No 626, unequal treatment among persons with and without colour blindness can be justified when a physical limitation that hinders performance in police service exists. Furthermore, whether or not persons

19 Communication No. 21/2014, from 2015-09-21, CRPD/C/14/D/21/2014.
with colour blindness can perform certain types of police service if operating procedures were adapted does not need to be considered when determining the question of equality under the law.\textsuperscript{20}

In addition to the general principle of equality, it is the responsibility of the state to ensure equality for persons with disabilities for all practical purposes. In accordance with Article 155 of the Constitution of the Republic of China, the government is obligated to provide help and support to persons with disabilities from the perspective of a welfare state. Furthermore, in accordance with paragraph 7, article 10 of the Additional Articles of the Constitutional, the government is obligated to ensure the autonomy and free development of one's personality for persons with disabilities. According to the prevailing views of legal scholars in Taiwan, these social state clauses are constitutionally binding and are used as a legal test of the constitutionality of measures favourable to persons with disabilities.\textsuperscript{21} But they constitute no violation of equality if the government does not guarantee or fully guarantee the necessary prerequisites for the equal enjoyment of fundamental rights on an equal basis for people with disabilities.\textsuperscript{22}

3. The foreignness of the term “reasonable accommodation” to the Taiwanese justice system

In the area of legislation, the constitutional law mandates are further substantiated in the Rights Protection Act for Persons with Disabilities with regard to disability rights. The general part of the Act includes a non-dis-
discrimination clause (Article 16), which sets out the three dimensions of equality for persons with disabilities in relation to others:

1) a prohibition on discrimination regarding the dignity of persons with disabilities in relation to their rights to education, participation in examinations, hiring, employment, living independently, freedom of movement and provision of health care (paragraph 1 of Article 16);

2) A requirement that private and public administrators of facilities/installations available for the public shall not prevent people with disabilities from using and enjoying the equipment fairly (paragraph 2, Article 16);

3) A requirement that private and public service operators who advertise entrance examinations and hiring examinations to the public must meet reasonable accommodations adapted to the individual needs of participants with disabilities, to thereby guarantee the equal opportunity of persons with disabilities (paragraph 3, Article 16).

Overall, Article 16 of the Rights Protection Act for Persons with Disabilities yields negative rights, positive obligations and protective rights.23

However, the term “reasonable accommodations” is not yet established in the Taiwanese legal system, in regard to the absence of the legal consequences in case of violations and hindering equal opportunities for persons with disabilities; neither lack of regulations for accessibility ex ante nor the obligations of providing reasonable accommodation ex nunc24, or their incomplete implementation constitute a violation of the non-discrimination rule.25 Two examples demonstrate this.

In the event that an employer dismisses an employee with a hearing impairment, the employer faces an administrative fine and the employee may demand under the Civil Law for restoration of the contract or compensation, if the dismissal is assessed as discrimination based on their disability. Case law on this issue in the administrative courts has not made a definitive determination on whether the employer is legally obligated to offer a hearing-impaired employee hearing aids or visual warning signals at their

workplace, which would result in illegal dismissal without adapting reasonable accommodations.\(^{26}\) This issue also has not yet been discussed in labour case law.\(^ {27}\) In the case of lack of accessibility, administrative courts in Taiwan denied a public legal claim seeking to remove barriers at entrances of public institutions pursuant to the Rights Protection Act for Persons with Disabilities, relying on the theory of “norms with aims of protecting individual rights” (Schutznormtheorie).\(^ {28}\) According to these opinions, where there is a lack of accessibility to public facilities, without further legal provisions, a claim by persons with disabilities for accommodation commensurate with their particular needs against the administrators in charge still cannot be justified. To this end, achieving equal enjoyment of participation in social life for persons with disabilities depends more on policy and less on legal justifications.

In spite of obvious shortcomings, the government’s initial CRPD state report still assessed, in somewhat vague wording, the regulations and measures concerning anti-discrimination and reasonable provisions as being

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26 The Fubon Company refused reasonable accommodation measures and dismissed an employee with a slight hearing impairment. The responsible authority accused the company of discrimination and imposed a corresponding fine. However, the Taipei High Administrative Court reversed the decision. The Taipei High Administrative Court’s decision refers to the theory of “reasonable accommodation” which is derived from the Americans with Disabilities Act (ADA). Ultimately, though, the court is of the opinion that a claim for a hearing aid is not related to the tasks that the employee is assigned. See ruling on January 24, 2008 – 96 Nien-Du-Su-Tze No. 915 (台北高等行政法院 96 年度訴字第 915 號判決).

27 The District Court of Taipei and the High Court of Taiwan classify termination of the employment contract in the case of the Fuban Company to be lawful. See Taipei District Court ruling on September 11, 2007 – 95 Nien-Du-Lao-Chung-Tzem No. 204 (臺北地方法院 95 年度勞訴字第 204 號判決), Taiwan High Court ruling on May 28, 2008 – 97 Nien-Du-Lau-Shan-Tze No. 3 (臺灣高等法院 97 年度勞上字第 3 號民事判決). In both rulings, the employee did not claim the right to reasonable accommodation.

28 Criticisms regarding the Kaohsiung High Administrative Court ruling on August 17, 2010, – 98 Nien-Du-Su-Tze No. 186, (高雄高等行政法院 98 年度訴字第 186 號判決), the Supreme Administrative Court ruling on August 18, 2011 – 100 Nien-Du-Pan-Tze No. 1454 (最高行政法院 100 年度判字第 1454 號判決), the Supreme Administrative Court ruling on August 18, 2011 – 100 Nien-Du-Pan-Tze No. 1454 (最高行政法院 100 年度判字第 1454 號判決) and the Supreme Administrative Court ruling on September 20, 2012 – 101 Nien-Du-Tsai-Tze No. 1931 (最高行政法院 101 年裁字第 1931 號裁定), see Nai-Yi Sun (2015), Fn. 11, p. 109 (117ff.).
adequate\textsuperscript{29}, without systematically addressing the key questions of limited enjoyment of rights for persons with disabilities in accordance with CPRD.

4. Conclusion

In view of the above, it is possible to explain why the assessments of the Judicial Yuan and the Ministry of Justice only work from the legal principle of equality before the law. Their approach fails to recognize their obligations in accordance with the CRPD and its Implementation Act to contribute with all appropriate legislative, administrative and all other necessary measures to fully implement all human rights and fundamental freedoms for all persons with disabilities without any discrimination based on disability. Furthermore, both authorities lack prior knowledge of the term “reasonable accommodation” and therefore are ignorant of the tools provided in the Rights Protection Act for Persons with Disabilities. These tools are available for persons with disabilities and their employers to enable their full participation in a professional life and an independent social life.

\textit{IV. From abolishing the physical requirements in the Regulations for Judicial Examinations to enabling the practice of law for judges and public prosecutors with disabilities}

In the first round of the legislative review, the Regulations for Judicial examinations were included in the priority list of regulations that were non-compatible with CRPD priority list.\textsuperscript{30} According to the CRPD Implementation Act, these regulations shall be revised by the end of 2017. Following a new consultation round with experts, the Regulations for Judicial Examinations were amended with a limited extent on February 13, 2018. Accordingly, severe physical disabilities are eliminated as an exclusion

\textsuperscript{29} Initial Report of Republic of China (Taiwan) on CRPD (2017), 23 February 2017, para. 6-7.

criterion for participation in the oral examination, while the exclusion of persons with severe vision impairments and hearing impairments remain unaffected. However, the uncertainties raised by the Judicial Yuan and the Ministry of Justice remain unsolved- In particular, there are no precedents as to how persons with profound disabilities may engage in professional activities and how resources are to be allocated in such cases. The numerous services stipulated in the Rights Protection Act for Persons with Disabilities should not be overlooked. They are certainly not reasonable accommodation measures in the narrower sense, but they allow persons with severe disabilities to participate directly in employment and to lead an independent life.

Measures for job accommodation for persons with disabilities are earmarked in the fourth chapter of the Rights Protection Act for Persons with Disabilities. Paragraph 2, Article 37 of the Act authorizes the Ministry of Labour and its local service providers to design, inform, and provide advice on an accommodation plan based on the needs of each disabled individual, the substance of their employment and the conditions of their workplace and to regulate the size of the subsidy in greater detail by legislative decree. In accordance with the “Directive of Management and Subsidiary of Job Accommodation for Persons with Disabilities” (身心障礙者職務再設計實施方式及補助準則), employers, employees with disabilities and self-employed persons with disabilities can file such a request. Civil servants with disabilities or associates of hiring authorities are also entitled to do so. In addition to the accommodation plan to improve the working environment or division of labour, tools can be supplied at the workplace, for example hearing aids, screen readers, and adjustable desks, and assistants can be made available (e.g. assistants for the visually impaired, secretaries for verbatim dictations, sign language interpreters or traveling companions). The resulting financial burdens for the employers can be partially mitigated through subsidies.

On the other hand, in accordance with Article 50 of the Rights Protection Act for Persons with Disabilities, and the “Individual Service Directive for Persons with Disabilities” (身心障礙者個人照顧服務辦法) authorized by Article 51 of the Act, the hiring of individual assistants is intended as a type of benefit to promote autonomy and participation in social life for persons with disabilities. Local authorities carry some of the costs based on their financial capacity. Examples of this include a mathematics scholar at the Academia Sinica who, despite having cerebral palsy, leads an independent daily life and can continue his scientific career; and Nai-Yi Sun

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Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
an activist with brittle bone disease who heads a citizens initiative for persons with disabilities and who regularly delivers speeches at various locations and attends conferences abroad with the help of her personal assistant.

These tools offer the Judicial Yuan and the Ministry of Justice an important reference point for meeting their implementation obligation (responsibility for reviewing and authorizing applications to acquire the tools rests with the labour administration). In this way, key elements of reasonable accommodation can be substantiated as a “necessary and suitable change or modification” on one hand and “disproportionate and unreasonable burden” on the other hand, with respect to the role of the judgship and prosecutors. Unfortunately most authorities are not familiar with these elements because they are not the authority in charge. To what extent the amended Regulations for Judicial Examinations can achieve de facto equality of enjoyment of occupational freedom for persons with physical disabilities, depends furthermore on a detailed study examining the extent to which the core tasks associated with judgship and the prosecution roles can be carried out with the assistance of devices, but not third parties, and examining the practice of other tasks which have been made possible with adaptive measures and infrastructure. It does not exist yet.

V. Outlook

The introduction of the CRPD into Taiwan's national legal system creates important incentives for implementing equality in all areas of life for persons with disabilities. It forces the previous legal doctrine of equality before the law to fiercely contend with the standard of international human rights. The question of whether the conventional justification for inequality between persons with and without disabilities is still acceptable must be examined more stringently, in view of the government’s duties to fulfil the rights of persons with disabilities imposed by the CRPD Implementation Act. Here, the longstanding debate about removing the physical requirements in the Regulations for Judicial Examinations provides a meaningful example. It is a litmus test for how deeply the guiding values of the CRPD have taken root in the national legal system and to what extent the concept of equality can be further developed in Taiwan's national legal system.
Law of Quotas for People with Disabilities – The Brazilian Experience

by José Carlos do Carmo

This paper focuses on the labour market situation of people with disabilities in Brazil and the significance of the 1991 introduced Quota Law for people with disabilities. The presented statistical data shows, inter alia, the development of employment data in general in relation to the percentage of workers with disabilities. Regarding the diverse types of disability, the figures highlight a still existing discrimination concerning the access to the formal labour market. Yet, the approval of the UN Convention on the Rights of Persons with Disabilities and the Brazilian Law on the Inclusion of Persons with Disabilities have led to various improvements.

According to the last Brazilian national demographic census, conducted in 2010, 24.9% of the population had some kind of disability. Even excluding from this group people with low degree of severity and those out of the working age, the contingent of persons with disabilities able to work represents a considerable portion of the population. This group of people has historically been victim of prejudice and exclusion when they seek their insertion in the formal labour market.

In Brazil, the right to work is guaranteed by the Federal Constitution, which also prohibits any kind of discrimination based on disability.

As an affirmative action, aiming employment equity, in 1991, the national congress approved a Quota Law for people with disabilities, which obliges companies with 100 or more employees to reserve a percentage of their positions, ranging from 2% to 5% of the total number of employees.

Workers rehabilitated by the professional rehabilitation public services may also be included in this quota.

<table>
<thead>
<tr>
<th>Number of employees</th>
<th>Quota</th>
</tr>
</thead>
<tbody>
<tr>
<td>100 to 200</td>
<td>2%</td>
</tr>
<tr>
<td>2001 to 500</td>
<td>3%</td>
</tr>
<tr>
<td>501 to 1,000</td>
<td>4%</td>
</tr>
<tr>
<td>1,001 or more</td>
<td>5%</td>
</tr>
</tbody>
</table>

The hiring of people with disabilities is therefore a legal obligation, enforced by the Ministry of Labour.

The model of supervision adopted is aimed, above all, at stimulating and supporting companies to hire people with disabilities, but, whenever necessary, also imposing fines.

The Ministry of Labour, since 2007, included in its official database, the information on the number of employees with disabilities, but these data are more reliable only after 2009. The numbers show that in these last years there has been a progressive increase in the number of disabled workers, even when there was a decrease in the total number of employees due to the economic crisis in Brazil. There is a consensus that this upward trend in the number of workers with disabilities is mainly due to the existence of the Quota Law and the supervision carried on by the Ministry of Labour.

The figures below refer only to private companies, not including public companies, which are not required to comply with the Quota Law.

<table>
<thead>
<tr>
<th>Year</th>
<th>(A) Total number of employees</th>
<th>Variation %</th>
<th>(B) Employees with disabilities</th>
<th>Variation %</th>
<th>B / A %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>41,207,546</td>
<td>6.9%</td>
<td>288,593</td>
<td>6.0%</td>
<td>0.7%</td>
</tr>
<tr>
<td>2010</td>
<td>44,068,355</td>
<td>5.1%</td>
<td>306,013</td>
<td>6.3%</td>
<td>0.7%</td>
</tr>
<tr>
<td>2011</td>
<td>46,310,631</td>
<td>2.5%</td>
<td>325,291</td>
<td>1.5%</td>
<td>0.7%</td>
</tr>
<tr>
<td>2012</td>
<td>47,458,712</td>
<td>2.5%</td>
<td>330,296</td>
<td>1.5%</td>
<td>0.7%</td>
</tr>
<tr>
<td>2013</td>
<td>48,948,434</td>
<td>1.3%</td>
<td>357,797</td>
<td>8.3%</td>
<td>0.7%</td>
</tr>
<tr>
<td>2014</td>
<td>49,571,510</td>
<td>-3.0%</td>
<td>381,322</td>
<td>6.6%</td>
<td>0.8%</td>
</tr>
<tr>
<td>2015</td>
<td>48,060,807</td>
<td>16.6%</td>
<td>403,255</td>
<td>5.8%</td>
<td>0.8%</td>
</tr>
<tr>
<td>2009-2015</td>
<td></td>
<td>16.6%</td>
<td>39.7%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
With regard to the type of disability, although census data (2010)\textsuperscript{4} showed that visual impairment was the most prevalent in the general population, among the employed workers (2009-2015), 52.0\% had physical disability, followed by hearing impairment (21.7\%), visual (8.4\%), mental/intellectual (6.5\%), multiple (1.5\%) and rehabilitated (10.0\%). This shows that there is also discrimination in relation to the contracting of different types of disability.

In recent years the recovery of the rights of people with disabilities has gained important legal advances. In 2008, the UN Convention on the Rights of Persons with Disabilities and its optional protocol and, in 2015, the Brazilian Law on the Inclusion of Persons with Disabilities\textsuperscript{5} were approved, which led to important changes in different fields, such as education and health assistance. It is important to emphasize that there are often proposals in the national congress for the quota for people with disabilities to be extinct or significantly reduced, but fortunately, these initiatives for the time being have been frustrated.

The presence of people with disabilities in the formal labour market, although incipient, has greatly contributed to a cultural change in society in general, and in the business world in particular.

The ideal is to build an effectively inclusive society in which the Quota Law is unnecessary. However, until this occurs, this law has been an important and indispensable tool for combating discrimination and valuing diversity.

The inclusion of workers with disabilities at work is premised on the paradigm of equity and the acceptance of diversity as a value linked to human rights and to the construction of a more just, solidary and sustainable society.


5. Special forms of employment
Barriers and Opportunities for Persons with Disabilities to change from Sheltered Employment Settings into an Open and Inclusive Labour Market – Positions of UN Bodies and some Global, Regional and National Disabled People Organizations (DPOs)

by Klaus Lachwitz

This article prepares an overview of the legal framework of Article (Art.) 27 Convention of the Rights of Persons with Disabilities (CRPD), the Right to Work. It highlights the States Parties obligations, especially avoiding discrimination and providing accessibility to the open labour market. The right to work and employment as a social human right is subject to Art. 4 paragraph (para.) 2 CRPD, and has to be realized progressively by a State Party to the maximum of its available resources. Regarding the implementation of Art. 27 CRPD a lot of States Parties face the situation of sheltered workshops in their countries. The question, if the current situation in the member states corresponds to the requirements of Art. 27 CRPD, and alternatives to sheltered workshops, are discussed. Finally, the importance of Goal 8.5 of the Sustainable Development Goals (SDGs) is reasoned.

I. Human Rights Approach

The Right to Work and Employment is a fundamental human right. It is essential for realizing other human rights and forms an inherent part of human dignity. Work and Employment are key elements of life such as education, housing, leisure time activities and retirement. They are elementary factors in ensuring the full and effective participation and inclusion of persons with disabilities in society as described in the General Principles of the CRPD (Art. 3 lit. c).

II. The Legal Framework of Art. 27 CRPD

The Right to Work and Employment as described in Art. 27 para. 1 CRPD defines some essential criteria which must be met by States Parties, if they claim to successfully implement the Human Right to Work and Employment:

- It is the recognition of the right of persons with disabilities to work on an equal basis with others. This does not mean to work in the same way as non-disabled persons, but the basis for work must be equal in comparison with the working conditions of non-disabled workers. Careful examination of such working conditions shows that there is hardly any country in the world which guarantees employment for all people of working age, but usually all persons can apply freely for work and employment, if they are qualified for the work they want to carry out. For persons with disabilities this means that labour laws and practices which limit their work perspectives in comparison with non-disabled workers to a small number of professions, low-skilled jobs or restricted work only, even though they are qualified and/or capable to perform other kinds of work, are not in line with Art. 27 CRPD.
- The requirements of Art. 27 para. 1 are met only, if the work offered to persons with disabilities includes the “right to the opportunity to gain a living”, i.e. to receive a remuneration for the work performed.
- It must be a work opportunity “freely chosen and accepted”, i.e. a person with disability seeking work must have the chance to choose between different options of work and employment.
- Finally Art. 27 para. 1 prescribes that the work opportunity must be provided “in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”. This requirement contains two different aspects for the implementation of Art. 27. First of all it means that persons with disabilities should not be restricted to work opportunities which are segregating them from non-disabled workers by forcing and limiting them to work in workshops, institutions and comparable settings which are not part of the open labour market and which are not inclusive. And secondly it contains the obligation of States Parties to safeguard and promote the right to work as described in detail in Art. 27 para. 1 a – k by helping to establish and provide a labour market and work environment at national level that is open, inclusive and accessible not only to non-disabled workers, but also to persons with disabilities.
The Right to Work as a Social Human Right:

The Right to Work and Employment is a social human right with regard to social, cultural and economic human rights. Art. 4 para. 2 CRPD prescribes that the full realisation of these rights by a States Party usually must be achieved progressively only and to the maximum of its available resources. But there are exceptions from this general rule: According to the last half sentence of Art. 4 para. 2 CRPD there are obligations contained in the CRPD that are immediately applicable. This is in particular the prohibition of discrimination on the basis of disability. This prohibition is an obligation with immediate effect!

The Right to Work and the Protection against Discrimination:

The immediate effect includes the Right to Work and Employment as Art. 27 para. 1 lit. a CRPD expressly “prohibits discrimination on the basis of disability with regard to all matters concerning all forms of employment.”

The term discrimination is defined in Art. 2 para. 3 CRPD in a very broad and comprehensive way: Discrimination on the basis of disability “means any distinction, exclusion or restriction [...] which has the [...] effect of impairing or nullifying the [...] exercise, on an equal basis with others, of all human rights [...] in the political, [...] social [...] or any other field.” With regard to the Right to Work and Employment, this means: Employers who offer workplaces, which are not accessible for persons with disabilities and therefore exclude them from exercising their Right to Work discriminate against these persons with disabilities. States Parties are obliged to prohibit such discrimination.

Accessibility of Workplaces:

The easiest ways to avoid, reduce or abolish discrimination in the field of work and employment are appropriate measures taken by the States Parties to eliminate obstacles and barriers to accessibility. Such measures are described in Art. 9 CRPD (Accessibility) and include buildings, roads, transportation, etc., schools, housing, medical facilities and workplaces (Art. 9 para. 1 lit. a).

The Right to Work and Reasonable Accommodation:

Other ways to eliminate discrimination in the field of work and employment are appropriate steps taken and initiated by the States Parties to help
to modify and adjust workplaces *in individual cases* to ensure that persons with disabilities can enjoy or exercise their right to work and employment in the open labour market on an equal basis with others. The legal description used in the CRPD for such *individual measures of support* to enable a person with disabilities to exercise the right to work in an open and inclusive labour market is the term “*reasonable accommodation*”.

According to Art. 5 para. 3 CRPD States Parties are obliged to “*take all appropriate steps to ensure that reasonable accommodation is provided.*” This obligation is again specified in Art. 27 para. 1 lit. i CRPD which declares that States Parties “*ensure that reasonable accommodation is provided to persons with disabilities in the workplace.*” The term “*reasonable accommodation*” is defined in Art. 2 para. 4 CRPD: It “*means necessary and appropriate modification and adjustment not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and freedoms.*” It should be added that according to Art. 2 para. 3 sentence 2 CRPD the denial of reasonable accommodation is a form of discrimination.

Result: The legal framework of Art. 27 is clearly structured and sets distinct criteria for the implementation of the Right to Work and Employment of Persons with Disabilities.

### III. Implementation of Art. 27 CRPD by the UN States Parties with regard to persons with intellectual, psychosocial and multiple disabilities

From a global perspective it must be mentioned that persons with intellectual, psychosocial and multiple disabilities belong to the poorest of the poor in many parts of the world. According to Human Rights Watch many disabled persons are forced to live in the deplorable conditions of mental asylums. Reports published by Human Rights Watch describe and show
horrible camps for persons with disabilities in Ghana\(^1\), Indonesia\(^2\), Mexico\(^3\) etc. In Russia and some of the former Soviet Union countries for decades new born children with intellectual disabilities were taken away from their parents at birth and detained in orphanages, where many of them still live without education and work opportunities.\(^4\)

In many parts of Africa, Asia and Central and South America treatment, care, education etc. totally rests on the shoulders of parents and other members of the family as community services to assist, train and promote persons with profound disabilities are not available. Not all families are capable to carry out these tasks themselves. Some persons with intellectual or psychosocial disabilities are, therefore, hidden by their families and separated from participation in social life. Even in countries belonging to the Global North there are huge institutions which segregate persons with disabilities from non-disabled persons. In its General Comment on Art. 12 CRPD (Equal Recognition before the Law) the UN Committee on the Rights of Persons with Disabilities states: “There is a widespread denial of legal capacity to persons with disabilities which allows others to consent to their placement in institutional settings. The directors of institutions are [...] commonly vested with the legal capacity of persons with disabilities residing therein” (United Nations CRPD/C/GC/1, May 19, 2014 No. 46). As a result of that it is hardly known whether some of these institutions provide work opportunities or not. According to the new Zero Project Report 2017 on “Employment – Work and Vocational Education and Train-

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which describes 56 innovative practices, 11 innovative policies and 21 social indicators with regard to the right to work and employment from 121 countries there is “a worldwide gap on data about people living in institutions” (p. 38). The same applies for sheltered workshops and comparable settings. They exist in many countries of the Global North, for instance in many parts of the European Union, and in countries with emerging markets, but based on a Study for the Committee on Employment and Social Affairs (EMPL) of the European Parliament from 2015 (“Reasonable Accommodation and Sheltered Workshops for People with Disabilities: Costs and Returns of Investments”6) sufficient data is not available as there is no common definition of sheltered workshops in the EU member States and in other countries. The reason is that the national social laws defining and describing sheltered workshops are different. Therefore, it is not possible to collect, for instance, comparable data on the nature and scale of sheltered workshops for the European Union.

Germany, however, seems to be the biggest provider of sheltered workshops in Europe. According to the German Federation of Workshops for Persons with Disabilities (BAG WfbM) there were 680 workshops for persons with disabilities all over Germany in 2016 with 2,759 manufacturing sites. 30,062 persons with disabilities took part in vocational training in sheltered workshops and 261,562 persons with disabilities were working permanently in the work areas of these workshops. They have social insurance, but they do not enjoy employee status and the average remuneration of 180 EURO per month is not only far below the average earnings, but also far below the subsistence level.

There are another 17,067 persons with severe disabilities working and assisted in separate parts of the work areas of the workshops without receiving social security and without getting any kind of a basic remuneration.

5 Zero Project Report 2017, Employment – Work and Vocational Education & Training
Thus, more than 300,000 persons with disabilities are working in sheltered workshops in Germany and the number is increasing year by year.

One of the reasons for keeping or even enlarging sheltered workshops is that in particular many older parents of sons and daughters with intellectual disabilities defend the existence of workshops as in their view many of them provide workplaces and staff members of high quality and develop creative methods to manufacture products and to offer services which are useful and in line with the requests of many persons with disabilities in the workshops. Many self-advocates and younger parents of persons with intellectual disabilities, however, more and more ask for inclusive work options at the open labour market. There are discussions going on between families, self-advocates, DPOs, experts and politicians which differ between segregated work in isolated places and sheltered, but inclusive work which tries both to protect the needs of workers with intellectual, psychosocial and multiple disabilities and to include them in workplaces close to the open labour market or even being part of the open labour market. It is, therefore, not possible to measure all 680 workshops in Germany by the same standards. Many of them do not correspond with Art. 27 CRPD as they are situated outside the community in the “open countryside” and as they even accommodate persons with disabilities, who permanently work in the work areas of the workshop, in facilities and group homes, which are part of the premises of the workshops. But there is a growing number of other workshops which cooperate successfully with supermarkets, gardening centres, restaurants and hotels to find work for their clients outside the workshops and to build up strong and regular connections to community services and to the general population living in the community. In most cases, however, the attempts to include workers of the workshops in the open labour market are legally taking place “under the roof of the workshops”, i.e. the workers with disabilities are not employed by the owners of the supermarkets, gardening centres etc. but remain working members of the workshops. The main reason for this is that the social protection of persons with disabilities working in workshops is fairly high developed and that the German social law guarantees a pension after 20 years of work in a workshop. If persons with disabilities change from the working area of a workshop to an employment contract at the open labour market they risk the reduction of social security benefits and pension insurance, which are currently, tied to workshops for persons with disabilities.
Traditional and Transitional Sheltered Workshops in Europe:

According to the above mentioned 2015 EU Study for the Committee on Employment and Social Affairs (EMPL) there are two types of sheltered workshops in EU countries: Traditional sheltered workshops which primarily employ people with severe disabilities who are characterized as being unable to be included in the open labour market; moreover, transitional sheltered workshops which aim to transfer persons with disabilities from sheltered into non-sheltered employment. But at the time being this aim seems to be a fiction only as just 3% of persons in transitional sheltered workshops move on to the open labour market!

The question, therefore, remains whether work and employment in sheltered workshops corresponds with Art. 27 CRPD.

The Views of UN Bodies and Global, Regional and national DPOs on Sheltered Workshops:

There are very clear legal statements now that sheltered work which is not freely chosen but the only option to work without accessibility to the open labour market violates the right to work and employment as described in Art. 27 para. 1 lit. a CRPD.

Position of UN Bodies:

This has, for instance, been stated by the Office of the UN High Commissioner for Human Rights in the “Thematic Study on the Work and Employment of Persons with Disabilities” (General Assembly December 17, 2012 – A/HRC/22/25):

“It is imperative that States Parties move away from sheltered employment schemes and promote equal access for persons with disabilities in the open labour market!”

The UN Committee on the Rights of Persons with Disabilities shares that view. There is no General Comment (GC) so far adopted and published by the Committee on the Right to Work and Employment (Art. 27 CRPD). The Committee, however, carefully examined several comprehensive reports by EU States Parties on measures taken to give effect to their obligations under the CRPD and summarized its concerns with regard to sheltered employment in its Concluding observations as follows:
Overview on some EU countries:

Germany

“The Committee is concerned about segregation in the labour market and the fact that segregated, sheltered workshops fail to prepare workers for or promote transition to the open labour market.”\textsuperscript{7} The Committee recommends to phase out “sheltered workshops through immediate enforceable exit strategies and timelines and incentives for public and private employment in the mainstream labour market.”\textsuperscript{8}

Austria

“The Committee notes with concern that approximately 19,000 Austrians work in sheltered workshops outside of the open labour market and receive very little pay.”\textsuperscript{9} “The Committee recommends that the State arty enhances programs to employ persons with disabilities in the open labour market.”\textsuperscript{10}

Czech Republic

“The Committee notes with concern the high unemployment rate of persons with disabilities and [...] that close to one third of employed persons with disabilities work outside the open labour market.”\textsuperscript{11} The Committee urges the State party “to develop measures, intensify efforts and allocate sufficient resources to promoting the employment in the open labour market of persons with disabilities, especially women.”\textsuperscript{12}

Italy

“The Committee is concerned that persons with disabilities in the State party may be restricted to the performance of certain professions on the grounds of disability.”\textsuperscript{13} The Committee recommends that the State party “removes any

\textsuperscript{7} Concluding observations on the initial report of Germany (2015) CRPD/C/DEU/CO/1, para. 50.
\textsuperscript{8} Ibid.
\textsuperscript{9} Concluding observations on the initial report of Austria (2013) CRPD/C/AUT/CO/1, para. 44.
\textsuperscript{10} Ibid. para. 47.
\textsuperscript{11} Concluding observations on the initial report of the Czech Republic (2015) CRPD/C/CZE/CO/1, para. 51.
\textsuperscript{12} Ibid. para. 52.
\textsuperscript{13} Concluding observations on the initial report of Italy (2016) CRPD/C/ITA/CO/1, para. 69.
legislation limiting the right of persons with disabilities to perform any profession on the grounds of their disability.’’

Luxembourg

“The Committee recommends that the State party adopt measures to phase out sheltered workshops, with a time-bound schedule and plan for transfer of those currently employed in sheltered workshops into the open labour market, and increase the level of employment of persons with disabilities in the open labour market […].”

Portugal

“The Committee is also concerned about the working conditions of persons with disabilities in the Occupational Activity Centres, including their average wage, and about the fact that when they exercise their right to work and employment the most common outcome is employment in these Centres.” The Committee recommends that the State party pushes aside “segregated working environments” […]

Slovakia

“The Committee recommends that the State party step up efforts on the transition from sheltered workshops to an open labour market for all. The process must include an action plan, timetable, budget and training for public and private sector employers, including on the provision of reasonable accommodation.”

Position of Global DPOs:

Inclusion International, London, United Kingdom, represents more than 200 national member organizations for persons with intellectual disabilities and their families in 115 countries. There is a growing number of self-advocates with intellectual disabilities and family members working in the

14 Ibid. para. 70.
15 Concluding observations on the initial report of Luxembourg (2017) CRPD/C/LUX/CO/1, para. 47.
16 Concluding observations on the initial report of Portugal-Advance Unedited Version (2016) CRPD/C/PRT/CO/1, para. 51.
17 Ibid. para. 52.
18 Concluding observations on the initial report of Slovakia (2016) CRPD/C/SVK/CO/1, para. 74.
governing bodies of Inclusion International at global and regional level who claim inclusive education in regular schools as described in Art. 24 CRPD (Education). Many of them complain that there is a huge gap between inclusive education and employment after education at school has been finished. Usually many persons with intellectual disabilities do not find a job at the open labour market and are forced to work in sheltered workshops and comparable settings. As they want to actively participate in society, they aim at work opportunities in an open and inclusive labour market and support the requests and claims of UN Bodies and other stakeholders to replace sheltered workshops step by step by alternative work opportunities at the open labour market.

Inclusion International takes the view that Art. 27 CRPD should be read and applied in connection with the General Principles of Art. 3 CRPD and other Human Rights, in particular with Art. 19 (Living independently and being included in the community): “Full and effective participation and Inclusion” of persons with disabilities “*in society*” as described in Art. 3 lit. c CRPD is possible only, if “States Parties to the Convention recognize the equal right of all persons with disabilities to live in the community, with *choices* equal to others […]. Persons with disabilities have access to 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”. (Art. 19 CRPD).

This position is shared by the World Network of Users and Survivors of Psychiatry and the International Disability Alliance (IDA), Geneva, New York City, the international umbrella organization for persons with disabilities representing 14 global and regional DPOs such as the World Blind Union, the World Federation of the Deaf, Inclusion International, the European, the African, the ASEAN Disability Forum etc.

Position of Regional DPOs:

The European Disability Forum (EDF), Brussels, Belgium, which represents all 28 National Councils of Persons with Disabilities in the EU and another 25 European Organizations (NGOs) adopted a “Resolution on
Employment of Persons with Disabilities” on the occasion of a Meeting of EDF’s Board on February 19, 2017 in Malta claiming to move away from segregated employment schemes.

Position of National DPOs:

Let’s finalize this overview by referring to the situation in the United States of America and in the European Union.

In January 2011 the National Disability Rights Network published a “Call to Action – Segregated and Exploited. The Failure of the Disability Service System to Provide Quality Work.” In this pamphlet it is stated that the 1990 Americans with Disability Act (ADA) opened the doors for new approaches to persons with disabilities: People with disabilities should live and work independently in their communities. Segregated and sheltered work goes against this very principle. But more than that, it keeps people with disabilities marginalized and hidden in the shadows and these environments create opportunities for abuse and neglect to occur. Segregated work facilitates feelings of isolation for many people and impinges on the natural desire to connect with others. People with disabilities deserve the right to live and work independently in their chosen communities.”

Some national DPOs situated in the European Union do not react in the same way. There is no coordinated strategy how to deal with sheltered workshops. Whereas MENCAP, UK’s leading charity working with persons with learning disabilities and their families and carers, for instance, claims to shut down sheltered workshops, other national DPOs take a differentiated view. On the one hand all of them urge their States Parties to build up a labour market which is open and inclusive for all persons with disabilities including persons with intellectual, psychosocial and multiple disabilities. On the other hand many of them plead to proceed gently and to avoid that the closing of sheltered workshops leads to the result that many of its workers with disabilities finish up unemployed at the open labour market.


Despite of the fact that the unemployment rates of persons with disabilities are far too high and that too many persons with disabilities are restricted to segregated work, there are already many interesting steps taken to include a growing number of persons with disabilities in the open labour market.

Supported Employment:

Many of these examples may be summarized under the term “supported employment” and the above mentioned Zero Project Report 2017 contains a lot of innovative practices describing how workers with disabilities receive on-the-job training in a regular workplace by job coaches and how employers learn to organize work options and to adjust their working equipment for the benefit of employees with disabilities. It should, however, be added that the term “supported employment” is not part of the CRPD terminology. “Supported employment” is a term which was already used before the CRPD was negotiated and adopted. It describes a big variety of work performed by persons with disabilities with the assistance of a third party, barrier free equipment of the working place etc. These forms of supported employment are, however, in line with the CRPD only, if the criteria for the Right to Work and Employment as described in Art. 27 CRPD are met.

Budgets for Work:

In Germany a new and very comprehensive disability law came into force on January 1, 2018 entitled Federal Participation Law (Bundesteilhabegegesetz). It still contains detailed regulations for sheltered workshops, but it offers an alternative to sheltered work: A person with disabilities who is entitled to work in a sheltered workshop may apply for a “Budget for Work” (§ 61 SGB IX). It is a direct payment provided by the public welfare offices and comprises a wage subsidy for an employer who signs a working contract with a person with disability. Its aim is to balance the reduced performance of the employee with disabilities and to replace the costs of assistance and training on the job by experienced social workers. The wage subsidy may amount to 75% of the remuneration/salary regularly paid by the employer.

As mentioned above it is an option to sheltered work and it will be interesting to learn how many persons with disabilities will make use of this
new legal offer. The idea is not new. Some German States (Rhineland-Palatine, Lower Saxony etc.) already tried to promote so called “personal budgets for work” at regional level, but there were a lot of bureaucratic hurdles involved for individuals applying for these personal budgets and only a small number of employers reacted positively offering a few working places to persons with intellectual or psychosocial disabilities. Due to these rather disappointing experiences it seems to be advisable that persons with disabilities who want to make use of the new “Budgets for Work” act together collectively and try to build up some organizational structures. They will need legal advice and practical training, if they want to succeed with their applications. If, for instance, 50 persons with disabilities who intend to apply for “Budgets for Work” join each other to discuss the requirements of these budgets, to find independent and experienced persons to assist them to draft the budget applications, to negotiate the budget requirements and to help to find employers prepared to employ persons with disabilities on the basis of budgets for work their chances will grow to finally receive these budgets to get employed at the open labour market.

V. The Importance of Goal 8.5 of the SDGs for the Right to Work and Employment

From a political point of view, it should be mentioned finally that all EU countries have signed the Post 2030 Development Agenda which contains 17 Sustainable Development Goals (SDGs).

Goal 8.5 reads that by 2030 the UN Member States will “achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.”

It is a big challenge and a great chance to include persons with disabilities in an open and inclusive labour market!

It is, therefore, important not only to fight for the implementation of Art. 27 CRPD, but also for the implementation of goal 8 of the SDGs.
This article addresses the perspectives of shop employees with respect to their participation in society and social recognition resulting from their employment at a shop. The perceptions of and desires for participation in the workforce formulated by those affected are addressed in relation to the changes brought about by the German Federal Participation Act [Bundesteilhabegesetz or BTHG]. An assessment is performed to determine the extent to which the demands formulated by sheltered workshop employees can be achieved through legal reform and the new variants of providing services included in that reform.

I. Perspectives of sheltered workshop employees

1. A critical look at sheltered workshops

Over the past few years, sheltered workshops (called Werkstätten für behinderte Menschen or WfbM in Germany) have been a frequent topic of discussion. For example, the voices of opposition to shops state the following: “Shops [are said to be, author’s note] too rigid, not flexible enough, almost immovable and [...] cannot be financed over the long term” (”Werkstätten [seien, d. Verf.] zu starr, nicht flexibel genug, kaum beweglich und [...] fiskalisch auf Dauer nicht finanzierbar”) (Finke 2007, 1). There are also supporters that ascribe positive employee functions and characteristics to sheltered workshops and evaluate these workshops as suitable locations for participation in the work life for persons with severe

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1 The article is based on a workshop from the conference “The right to work in accordance with Article 27 UN CRPD – international perspectives,” which took place at the University of Kassel on March 8-10, 2017.
disabilities (see Weber 2015). These discussions about the pros and cons of sheltered workshops are often polarizing. Oftentimes, the arguments that result do not have an empirical basis. The fact is that the occupancy rates of sheltered workshops are continuously on the rise, while the momentum of the annual increase has decreased slightly in recent years. It is also true that there are still not enough insights into the assessments and perspectives of the effects of sheltered workshop employment from the perspective of those entitled to services. What effects does employment in sheltered workshops have on the perception of social participation and societal recognition? Do sheltered workshop employees feel a sense of belonging in workshops or do they want alternatives to workshops? If yes, how exactly should these alternatives be designed? The author explored these questions by conducting a qualitative study. In this study, 20 sheltered workshop employees (9 males and 11 females) from 20 to 57 years old were interviewed at four different workshops in Hesse (see Schreiner 2017). The results offer an initial impression of their perception of societal participation, social recognition and an assessment of workshop employment from the employees' perspective. Based on the presented results, an attempt is made to compare the potential of the amendments to workforce participation services formulated in the Federal Participation Act [BTHG] (particularly those designed for shop employees) with the perspectives of those entitled to services.

2. Perspectives and ideas of workshop employees on participation in the workforce

The interviews reveal that work plays a central role and has great significance in the lives of shop employees. The descriptions of employees largely focus on the positive aspects of work at the workshops. Participa-

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2 The two specified authors have been selected simply to illustrate an example and do not represent the entire discourse about sheltered workshops.

3 The statistics on sheltered workshops from 2006 to the present published by the Federal Association for Rehabilitation were referenced to derive the occupancy figures and admissions to sheltered workshops (at www.bagwfbm.de).

4 The study was performed as part of the author's dissertation (support provided by Software AG Foundation).

5 For large parts of population, work is extremely important (see Jahoda et al. 1975; Morgenroth 2003; Promberger 2008). In Germany, it is currently in the second
tion in meaningful employment seems to be of central importance to the extent that the negative aspects of workshops, such as an isolated employment situation at an organization for persons with disabilities, are (often) omitted. The (unique form) of employment at workshops means that most workshop employees are aware of the differences between their employment situation and that of employees on the open labour market. This is made clear when looking at the value attributed to the performed work and the reputation of the shop work (see ibid., p. 114, 118 and 124f.). Institutional allocation of persons to sheltered workshops draws attention to their disabilities and manifests their status as persons with disabilities. As a result, sheltered workshops cause stigmatization. The descriptions of respondents make a clear distinction between “insiders” – those at the shops and disability assistance organizations – and “outsiders” (see ibid., p. 119 and 144f.). This distinction reinforces the impression that sheltered workshops are exclusive organizations and are also perceived as such by employees.

The central result of the study identifies four types of shop employees. They have different assessments of shop employment and fall within a spectrum from satisfied to dissatisfied shop employees.

Fig. 1: Workshop employee types (author's illustration in accordance with Schreiner 2017, p. 154)

<table>
<thead>
<tr>
<th>Workshop employee types</th>
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</thead>
<tbody>
<tr>
<td>Type 1</td>
</tr>
<tr>
<td>Somewhat satisfied</td>
</tr>
<tr>
<td>Type 2</td>
</tr>
<tr>
<td>Dissatisfied</td>
</tr>
<tr>
<td>Type 3</td>
</tr>
<tr>
<td>Critically ambivalent</td>
</tr>
<tr>
<td>Type 4a</td>
</tr>
<tr>
<td>Satisfied</td>
</tr>
</tbody>
</table>

Type 1 refers to somewhat satisfied shop employees. This type is mostly male, represented in all age classes and makes up more than a third of the place in important areas of life (after relationships with family and partner) (see Gaspar / Hollmann 2015).

6 The types were standardized in accordance with the empirical type standardization method in Kluge 1999. This process was adapted to the respective data.

7 Due to the sample size, there are not results that are representative of the shop employee population as a whole. Achieving such results would require a broader-based quantitative study.
respondents. Workshop employees of this type have come to terms with their employment at a workshop and can generally talk about the pros and cons of their workshop employment. They frequently had negative experiences on the open labour market and imagine that they will remain at the workshop into the future, which is strengthened, in part, through the social support they receive. At the workshop, they maintain important social contacts and friendships. They take advantage of the sheltered environment that the sheltered workshop offers. In this regard, some of the employees of this type exhibit behaviours that are not tolerated in employment relationships on the open labour market.  

These employees are aware that sheltered workshop employment often has a negative perception among outsiders and that the employees there are not seen and recognized as equal adults who are making their contribution to ensure the success of the country and the local community. Many somewhat satisfied employees have experienced discrimination and/or neglect due to their disabilities. Their contact persons are part of their immediate family or from disability assistance institutions (see ibid.).

Type 2 refers to dissatisfied shop employees. The respondents of this type view their workshop employment and the resulting living conditions in a negative light. Dissatisfied shop employees have spent most of their lives being assisted due to their disabilities. They view themselves as excluded, and this feeling is exacerbated by disability assistance organizations. From the perspective of these respondents, utilization of participation services such as sheltered workshops makes their status as “persons with disabilities” visible and manifests this status. Type 2 persons do not view themselves as part of the workforce due to their employment at a workshop. Rather, they experience discrimination and unequal treatment both within and outside the shop due to their disability and the sheltered workshop employment. In principle, these shop employees are advocating for the participation of persons with disabilities on the open labour market (see ibid.).

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8 As examples, the respondents mentioned arriving late, unannounced absenteeism from the workplace and poor social behavior.
9 These statements are normally about shop employees or supervised living situations.
10 This group includes two females and one male with ages between 31-52 years old.
Type 3 employees can be described as critically ambivalent.\textsuperscript{11} Due to their lifelong or longtime utilization of disability assistance services, these persons have been socialized mainly in institutions for persons with disabilities and have a sense of belonging in these institutions. At the same time, they have a critical view of them and occasionally criticize the approach and conduct practised in the institutions where they stay. Their sheltered workshop employment gives them a sense of participation in and belonging to the working society. However, they also report experiences that make them question these perceptions. In this case, the perception of outsiders, which is at times negative, is decisive because the persons of this type have already experienced discrimination outside of sheltered workshops. Among other factors, these negative experiences contribute to their ambivalent attitude. They may perceive criticism of their own job performance within a sheltered workshop as disregard or contempt for them as a person. These persons want increased participation on the open labour market by those entitled to work at workshops. To this end, critically ambivalent employees believe that interim and temporary solutions that combine sheltered workshops and the open labour market could be implemented (see ibid.).

There are two versions of the fourth type contained in the interview material. The first type, Type 4a, refers to satisfied workshop employees. This applies to approximately one fourth of the surveyed workshop employees, and includes all age classes and both male and female shop employees. Persons of this type view their workshop employment as the type of participation in the workforce that suits them. They appreciate the opportunity provided by work at the shop that is tailored to their capabilities and that the workshops provide sheltered environments which they view as a necessity due to their disabilities. Their experiences on the open labour market are characterized by negative occurrences such as failure and discrimination. At workshops, on the other hand, they feel accepted and have a sense of belonging. As such, respondents of this type usually do not have a sense of belonging to persons without disabilities. They clearly distinguish between “outsiders” and “insiders” and view themselves as insiders (see ibid.).

\textsuperscript{11} In the underlying survey, only one person is assigned to this type. Significant differences between the other types resulted in a separate type.
Type 4b refers to workshop employees who, for the time being, are convinced that sheltered workshops are the right place for them to participate in the workforce. They are largely identical to Type 4a. The difference is that they are young and female (at least in this study). They are classified as being satisfied for the time being because they have had brief stays at sheltered workshops and have announced future plans to work outside of the sheltered workshop. The longer these persons remain at sheltered workshops, the more their future plans seem to be put on the back burner (see ibid.).

In summary, a third of the respondents feel like they belong in sheltered workshops and want to continue to utilize the services of sheltered workshops for participation in the workforce. However, many of the respondents support/want alternatives to workshops, including in the form of part-time work, sometimes in combination with sheltered workshops. Some respondents want to transition from the shops to full-time employment on the open labour market. The majority of employees think that the services of sheltered workshops will need to be expanded or refined in the future. They are often not familiar with alternative forms of participation in the workforce for persons entitled to work at workshops or they cannot be used by those entitled to these services without overcoming great hurdles.

II. Changes to participation in the workforce at sheltered workshops resulting from the Federal Participation Act [BTHG]

1. Requirements from the United Nations

The United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) has been in effect in Germany since 2009. National case law must be adjusted based on the UN CRPD. The BTHG was adopted in December 2016 and fulfills this requirement in Germany. Article 27 of the UN CRPD is titled “Work and employment” and includes explanations of participation in the workforce by persons with disabilities. The article requires a “right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities” (Article 27(1)(1) of the UN CRPD). Whether sheltered workshops can meet these requirements is up for debate (see Trenk-Hinterberger 2012). The state party report of the
United Nations from 2015 on implementing the UN CRPD in Germany states that the labour market is segregated and offers financial disincentives that hinder or prevent participation of persons with disabilities on the open labour market. The report states that sheltered workshops would exclude persons from the labour market and would not prepare persons to transition to the open labour market or would not provide adequate assistance in this transition. As such, the sheltered workshops would be violating the UN CRPD requirements, which is why it has been recommended that Germany gradually eliminates its sheltered workshops (see United Nations 2015). Despite the recommendations stipulated in the state report from the United Nations, the sheltered workshops essentially remain in the adopted Federal Participation Act in its current form. Nevertheless, there are some new features of the Federal Participation Act [BTHG] with the potential to offer changes in the provision of services to ensure participation in the work life.

2. New legal situation for sheltered workshops: Reform or resumption of the status quo?

In the Federal Participation Act [BTHG], the described spirit and purpose of the Services at workshops for persons with disabilities [Leistungen in Werkstätten für behinderte Menschen] (§ 56 Social Code Book [SGB] IX n.F.) is maintained verbatim. The explanations of the Services in the entry process and vocational training [Leistungen im Eingangsverfahren und im Berufsbildungsbereich] (§ 57 Social Code Book [SGB] IX n.F.) also remain unchanged. Only the use of language changes in §§ 56 and 57 Social Code Book [SGB] IX n.F., from behinderte Menschen (“disabled persons”) to Menschen mit Behinderungen (“persons with disabilities”). Changes and additions are being made to the regulations for Occupational services [Leistungen im Arbeitsbereich] – § 58 Abs. 1 Nr. 1 and 2 Social Code Book [SGB] IX n.F. This now stipulates that persons with disabilities can utilize sheltered workshop services only if, due to the

“type and severity of the disability,
1. Employment on the open labour market, as well as employment at an inclusive company (§ 215) or

2. Vocational preparation, an individual vocational qualification as part of supported employment, a vocational adaptation and ongoing education or vocational training (§ 49 Absatz 3 Nummer 2 to 6), are not considered, have not yet been considered or will not be considered and if these persons are capable of doing a minimum of economically valuable work.”

Admission to a shop is limited in the revised version of § 58 Social Code Book [SGB] IX n.F. to the extent that, prior to admission to a shop (in addition to the existing admission criteria) it should be clear whether employment at an inclusive company is impossible and whether workshop services are required as a result. An “individual, vocational qualification as part of supported employment” [“individuelle betriebliche Qualifizierung im Rahmen Unterstützter Beschäftigung”] is also added to § 58 Social Code Book [SGB] IX. This option must be ruled out as an alternative to shops based on the type and severity of the disability before a person can be admitted to a sheltered workshop. It remains to be seen if and how these new regulations will be implemented in practice and which approach/procedure can be used to objectively review whether sheltered workshops provide suitable benefits for participation in the workforce. For example, as part of a measure, a trial may be carried out to determine which form of employment or which workforce participation benefits might be suitable for each individual. This is similar to the entry process for sheltered workshops. Legislation must stipulate where or at which providers these measures for determining capabilities should be conducted. It is crucial that the decisions that are reached be objective and take into account the professional goals of those entitled to benefits.

To date, admission to a sheltered workshop has required completion of vocational training at a sheltered workshop. In the future, it will be possible to be admitted to a sheltered workshop after completing a similar procedure at another provider (in accordance with § 60 Social Code Book [SGB] IX n. s.). Another new regulation stipulates that vocational training can be omitted if certain requirements are met. One example would be if the required capabilities have been attained through experience on the primary labour market. In terms of admission practices, this means that those coming from equivalent areas do not need to complete vocational training. In this case, it is questionable when or upon presentation of what vocational experience this will happen. This requires determining the person who will make the decision of whether or not to complete vocational training as well as the criteria used to reach that decision. It remains to be seen
whether implementation of these new regulations will have an effect on vocational training at sheltered workshops and, if necessary, how the implementation will affect the future design of this vocational training.

The introduction of the Federal Participation Act [BTHG] also doubles the funds for promoting employment to be paid by rehabilitation organizations for workshop employees from 26 to 52 euros and the tax-exemption amount is increased accordingly to 299 euros. If the amount of the wages and funds for promoting employment together exceeds 351 euros, wages are reduced accordingly (see § 59 Social Code Book [SGB] IX n.F.).

The longtime demand for more flexible options for transitioning from sheltered workshops to the open labour market and, if necessary, back to sheltered workshops is now included through amendments to the § 220 Abs. 3 Social Code Book [SGB] IX n.F. For persons who have transitioned from a workshop to the open labour market and who use the “Budget für Arbeit” structure for integration into the primary labour market or use services from other providers, these amendments grant the right to transition back to sheltered workshops. When transitioning to the open labour market, pension claims earned at sheltered workshops are also carried over, which invalidates so-called “pension entitlements”\(^\text{13}\). After twenty years of working at a sheltered workshop, the claim to a reduced earning capacity pension based on the average value is disregarded in favor of the typical pension regulations.\(^\text{14}\) However, if an employee transitions back to a sheltered workshop, the previously earned pension entitlements are carried forward and the claim to a pension remains after a total of 20 years of workshop employment (for information on pension regulations due to a reduction in earning capacity, see § 43 Social Code Book [SGB] VI). If sheltered workshop employees who have transitioned from the workshop to the open labour market experience failure, they now have the security of transitioning back to a sheltered workshop. This new regulation provides sheltered workshops the opportunity to increase transitions

\(^{13}\) The term “pension entitlements” is understood as the claim to a pension for reduced earning capacity after twenty years of workshop employment. This pension for reduced earning capacity for workshop employees is based on government funds that amount to 80 percent of the average pay for pension insurance.

\(^{14}\) This amount is based on the actual wage amount and not on a dummy wage, as is the case at sheltered workshops. For this reason, the pension claim gained on the open labour market is likely to be less.

335
to the open labour market and, if necessary, in the opposite direction. This could remove a serious hurdle to transitioning.\textsuperscript{15}

3. Other service providers, the “Budget für Arbeit” structure and the right to choose for persons with disabilities

Upon introduction of the Federal Participation Act [BTHG] and in compliance with the more flexible transition options from the sheltered workshops, persons who are entitled to work in workshops (in accordance with §§ 57, 58 Social Code Book [SGB] IX n.F.) receive workforce participation benefits from other service providers and not from sheltered workshops (§ 60 Social Code Book [SGB] IX n.F.). In the case of employment with other service providers, employees with disabilities are in an employment-like legal relationship in accordance with § 221 Social Code Book [SGB] IX n.F.; this is similar to the legal status of workshop employees.

The same regulations apply as those for sheltered workshops.\textsuperscript{16} The following measures deviate for other service providers:

1. “They do not require formal recognition,
2. they do not need to have a minimum job number requirement and the material equipment that is required to provide benefits at workshops,
3. they can limit their provision of benefits in accordance with § 57 or § 58 or portions of such benefits,
4. they are not obligated to provide benefits for persons with disabilities in accordance with § 57 or § 58 if and as long as the benefit requirements are in place,
5. a board of representatives is elected that is similar to the workshop council once there are five eligible voters. If there are up to 20 eligible voters, the board consists of one member and

\textsuperscript{15} In addition to the aforementioned changes, changes in the self-representation of workshop employees as part of the introduction of the Federal Participation Act [BTHG] are not addressed in this article. Schachler/Schreiner 2017 includes an overview of the reform of the Sheltered Workshop Participation Regulation [Werkstätten-Mitwirkungsverordnung].

\textsuperscript{16} This means that the stipulations in the Workshop Participation Regulation [Werkstättenverordnung or WVO] and the regulations in Social Code Book [SGB] IX, which are tailored to sheltered workshops, provide the legal basis for other providers.
6. if there are five eligible female voters, one women's representative is elected. If there are 20 eligible female voters, one female representative is elected.” (§ 60 Abs. 2 Social Code Book [SGB] IX n.F.)

It will be interesting to see who the other service providers will be and how the service selection will be designed when the new law is implemented. It remains to be seen which quality standards have to be fulfilled by the other providers and how compliance with these standards is to be ensured as, according to the law, they do not require any formal recognition. Likewise, it remains to be seen which persons will be employed by the other providers, as generally, these providers are not obligated to admit persons entitled to services. In addition, the service provider is not obligated to “enable benefits from other service providers” [“Leistungen durch andere Leistungsanbieter zu ermöglichen”] (§ 60 Abs. 3 Social Code Book [SGB] IX n.F.). Due to these regulations, it is feasible that not everyone seeking employment at other providers instead of employment at sheltered workshops will be able to achieve that goal.

The Federal Participation Act [BTHG] transforms the proven “Budget für Arbeit” structure for integration (see Nebe/Waldenburger 2014) that was successful in model projects into a standard benefit in § 61 Social Code Book [SGB] IX n.F. Persons who are entitled to employment at a sheltered workshop in accordance with § 58 Social Code Book [SGB] IX have a claim to a “Budget für Arbeit” structure for integration into the primary labour market. The foundation for the budget is the presence of an employment contract on the open labour market, which establishes a work relationship subject to social insurance contribution and with remuneration typical of the area. On this basis, an employer may receive a long-term wage subsidy of up to 75% of the paid wages as compensation for employees with disabilities. To a certain degree, the duration of the availability of the budget is effectively indefinite and is determined on a case-by-case basis. Payment of a wage subsidy is not possible if another employee is let go to make room for a person who is entitled to the “Budget für Arbeit” structure. Any necessary instruction and supervision of the “Budget für Arbeit” recipients can be offered as a “pooled” benefit17 (see § 116 Social Code Book [SGB] IX n.F.). In the case of the “Budget für Arbeit”

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17 “Pooled” benefits are benefits that are claimed by multiple persons entitled to benefits, such as shuttle services.
structure for integration, the service provider is not required to provide benefits.

Likewise, the second reform step of the Federal Participation Act [BTHG] going into effect on January 1, 2018 strengthened the right to choose for persons with disabilities for claiming workforce participation benefits with § 62 Social Code Book [SGB] IX rev. Accordingly, benefits for participation in the workforce can be provided upon request from a person entitled to benefits who is coming from either a sheltered workshop, a sheltered workshop and other providers, or one or more other providers. If portions of the benefits are provided at a sheltered workshop or another provider, then this requires approval of the service provider that is directly responsible.

This provides the opportunity to utilize (sub)benefits for workforce participation – for part-time work as an example – outside of sheltered workshops and to combine workshop employment and benefits from other providers individually. The implementation itself must show how these hybrid forms of benefit provision can be designed and how coordination can be achieved among different service providers. Bureaucratic hurdles can also be critical to the success or failure of these new benefit provision and combination options. These hurdles may prevent a change based on the design of the administrative practices for benefit provision by different providers and workshop employees who may have an interest in alternative forms of benefit provision.

4. Innovative ability in the changes to the Federal Participation Act [BTHG] with respect to the requests voiced by workshop employees

The altered and added criteria for admission to sheltered workshops (§ 58 Social Code Book [SGB] IX n.F.) could make it necessary or customary for persons who may be entitled to work in a workshop to complete vocational orientation before being considered for admission to a workshop. Establishing such a vocational orientation phase would make it possible to gain experience in the open labour market during transitions such as that

from school to the workplace. Gathering experience in the open labour market corresponds to a wish expressed frequently by the workshop employees in the above-mentioned interviews and in the requirements of Article 27 of the UN Convention on the Rights of Persons with Disabilities. Such orientation phases would provide experience regarding the capabilities and inclinations of the addressed persons with disabilities, which in turn, would provide a basis for objective and open decisions about vocational prospects. This could avoid the automatic mechanisms that lead more or less inevitably to the sheltered workshops. The persons entitled to the services thus have the ability to obtain services from other providers in the future or to make use of the “Budget für Arbeit” structure for integration and have alternatives to the sheltered workshops, depending on how the programs are structured. In particular, the right to choose arising from § 62 Social Code Book [SGB] IX n.F., along with the service provision variants that open up, provide persons entitled to work in workshops a legal force for individually choosing programs for participation in the workforce. In this way, it could be possible, for example, to take advantage of part-time solutions and combinations of various types of programs. The wish expressed by the workshop employees for individualized participation solutions could be met with these types of individually planned solutions for participation in the workforce. The interviewed workshop employees frequently cite difficult transition conditions, with little flexibility, from the workshop into the open labour market or to alternative types of programs. The interviews highlight the danger that, after failing to make the change from a sheltered workshop, it is difficult to be taken back. In this context, there is also a risk of losing the existing pension entitlement. The more flexible transitions from sheltered workshops and, if necessary, back to the sheltered workshops created in the Federal Participation Act (§ 220 Social Code Book [SGB] IX n.F.) have the potential to offer workshop employees greater leeway for actions and decisions because, going forward, inhibitive risks from the transitions from the sheltered workshops will be mitigated to a large extent.

III. Conclusion: Future requirements for sheltered workshops

The Federal Participation Act [BTHG] implemented both alternative and additional programs for participation in the workforce stipulated by law. Ensuring that persons entitled to services adopt and utilize the alternative
programs to the sheltered workshops requires a means of access that is as simple as possible. To date, it is unclear how the practical implementation of the new programs will take place and whether this implementation will meet the wants and needs of workshop employees. However, the changes as part of the Federal Participation Act [BTHG] are a signal of the trend towards inclusive options for persons entitled to employment in workshops to participate in the workforce. It is now up to legislation to ensure, for example, that taking advantage of these options does not fail due to complex administrative procedures. In this context, the most important aspect will be that the newly established alternatives to workshop employment are known and accessible to the persons entitled to workshop employment.
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Sheltered Workshop Policies for People with Disabilities in Taiwan and Japan

by Yi-Chun Chou

This paper examines sheltered workshop policies for people with disabilities in Japan and Taiwan and their relationships with welfare state regimes and disability policy models. Sheltered workshops in most countries share features such as long-term support, low wages, and facilities-based daily living. The sheltered workshop policy has long been regarded as an important part of disability policy in the welfare state, differences among countries in their sheltered workshop policies are closely related to the type and structure of each welfare state system. Welfare state systems in East Asian countries such as Taiwan and Japan share similar features and also differ slightly from those in continental Europe (e.g. Nordic countries) as well as English-speaking countries. Welfare policies in East Asian countries are formed to increase economic development, thus putting more responsibility on families, and depend on ruling parties for political democratization. This study is based on the typology of welfare states and disability policies to explore the characteristics, development, and challenges of sheltered workshop policies in Taiwan and Japan as well as the impact of international conventions such as the Convention on the Rights of People with Disabilities on sheltered workshop policies in these two countries.

1. Introduction

In general, sheltered workshops in most countries share several of the same characteristics. First, sheltered workshops are often set up for disabled people who cannot work in the open labour market or cannot be trained vocationally by general ways. Second, disabled people in sheltered workshops need long-term support for their work and training. Third, the disabled people in workshops follow the solid design plan and often interact with the same people every day. Fourth, the disabled people often get wages lower than in the open labour market. Fifth, governments’ provisions for sheltered workshops in most countries are unavoidable. However, there are still differences in the sheltered workshop policies between countries. The sheltered workshop policy has long been regarded as an important part of the disability policy in the welfare state policy, and the different-
ces in the sheltered workshop policy in countries are highly related to the
different welfare state system types and structures of each country. The
welfare state system in East Asian countries like Taiwan and Japan, which
is described in this paper, is slightly different from the traditional Nordic
countries, European countries and English-speaking countries. In Japan
and Taiwan, there are some similar characteristics between sheltered
workshops for people with disabilities. The objective of this paper is to ex-
plore the characteristics of sheltered workshop policies for disabled people
in Japan and Taiwan, and to point out the similarities and differences in
the development of sheltered workshop policies between East Asian coun-
tries and other countries belonging to the traditional welfare regimes.

First, sheltered workshops under welfare regimes and disability policy
models will be analyzed, and the East Asian model for disability employ-
ment policy will also be discussed. Then, the disability employment and
sheltered workshop policies for people with disabilities (PWDs) in Japan
and Taiwan will be examined to compare the similarities and differences
of the sheltered workshop policies in these two countries.

2. Sheltered workshops under welfare regimes and disability policy
models

Disability policy is a part of welfare state construction. Disability policy
models have been classified by different scholars on the basis of various
criteria including policy functions, civil rights, and state expenditures.
However, these classification criteria do not always comprehensively ac-
count for all dimensions of the policy. Michael Maschke, a German scho-
lar, used the following classification criteria with clear academic defi-
nitions: policy function, social operation mode, principle of social policy,
service model for PWDs, benefit systems and items, and financial resour-
ces. He proposed three disability policy models: compensation-oriented,
rehabilitation-oriented, and participation-oriented models. The United Sta-
tes, Germany, and Sweden currently use the compensation-, rehabilitati-
on-, and participation-oriented models, respectively (Maschke 2007;
2008). Here, we could find many similarities, such as financial resources,
policy functions, and state’s roles, between the disability models by
Maschke and the typology of welfare state regimes by Esping-Andersen
(1990). If the welfare state model is used to explain disability employment
policies in countries, a more in-depth analysis of sheltered workshop pol-
icities can be performed. In this paper, I explore the developments of shel-
tered workshops in Sweden, Germany, and the United States of America (USA). These three countries belong to Esping-Andersen’s typology of welfare state regimes, which include the social democratic model, conservative corporation model, and liberal model. The results are discussed in the following sections.

2.1 Compensation-oriented model

The USA are an example of the liberal welfare state model and the compensation-oriented model of disability policy. According to Esping-Andersen’s analysis, this type of welfare state emphasizes four aspects: the role of the labour market in every individual’s social security, self-responsibility, a small government, and a low degree of social welfare spending. These aspects lead to the privatization and marketization of social rights. The market takes more responsibilities than the state to ensure economic security for PWDs.

The first sheltered workshop in the United States was established in 1840 and aimed to provide employment opportunities for blind people and those with intellectual disabilities at that time. Before the 1960s, sheltered workshops were supported by many families of disabled people and thus expanded to about 3,000 units. However, in 1980, people began to harshly criticize the low wages and isolation from the outside world of sheltered workshops. The US-government implemented the Americans with Disabilities Act (ADA) in 1990 and advocated antidiscrimination policies against PWDs. The sheltered workshops are seen as discrimination facilities for PWDs because of low wages and facility-based methods (Hoffman 2013). In recent years, the US government promoted supported employment to replace sheltered workshops. Nevertheless, some surveys have indicated that the supported employment polices did not help people with intellectual disabilities to work in the open labour market. Thus, the number of people with intellectual disabilities in day care institutions has increased.

The United States largely focus on antidiscrimination legislation; however, its welfare policies have a low degree of decommodification and a high degree of stratification. Such liberal welfare states put the responsibility of providing jobs to PWDs on the open labour market and ask for adequate working conditions, but the state does not want to support PWDs
and the companies they work for. This could reduce employment opportunities for PWDs, because the company will not pay for their cost of employment and the state also will not support them.

2.2 Rehabilitation-oriented model

The policy functions of prevention and rehabilitation are implemented through medical, life, and vocational rehabilitation for PWDs to resume their work and social life in this model. An instrumental association was established as the social operation mode for this rehabilitation-oriented policy model. Social insurance is the principle of the rehabilitation-oriented policy model. PWDs are considered workers with reduced productivity. The disability policy assists these people in returning to their workplaces and protects them through the national social insurance institution by providing diverse rehabilitation benefits. These benefits are funded by social insurance, taxation, and employer fines.

Germany is an example of the conservative corporatist welfare model. This welfare state model has social insurance based on active labour market policies, state intervention in the market economy, and social welfare spending, which is relatively higher than that of the United States. Social insurance facilitates funding this welfare state model and allows for employment promotion, which is the focus of Germany’s disability policy. PWDs are seen as workers with lower labour abilities, but their work ability can be improved through vocational rehabilitation programs such as sheltered workshops.

In order for Germany to provide vocational rehabilitation to PWDs, the state can intervene in the labour market. As of 2014, there were more than 700 sheltered workshops in Germany. Sheltered workshops provide rehabilitation therapy, vocational training, and employment opportunities for PWDs. According to the laws concerning PWDs, sheltered workshops are social settings for PWDs who cannot work in the open labour market and want to adapt and participate in a working lifestyle. Sheltered workshops are seen as “special labour markets” with a special purpose. Sheltered workshops can receive tax benefits and other benefits from the state such as the labour training cost for PWDs. In contrast to the United States, sheltered workshops still play an essential role for those who cannot go into the open labour market.
2.3 Participation-oriented model

Sweden is an example of the social democratic model and the participation-oriented model by Maschke’s Discourse. Sweden has universal welfare based on high taxes and state intervention in the market economy. The social welfare spending accounts of Sweden are approximately 65%–70% of the total state expenditure. Sweden provided barrier-free design and antidiscrimination laws to improve the social environment for PWDs. However, Sweden uses other special multiprograms to ensure employment rights for all PWDs, especially for those with mental disabilities.

Sweden emphasized an “active society” to develop human capital. A larger human capital was achieved using the barrier-free design, which increased employment opportunities. In addition, “welfare to work programs” helped increase human capital by empowering the unemployed people to work. Thus, PWDs are encouraged to stay in the labour system, because working enhances the dignity of the individual and increases social participation. However, not all PWDs, especially those with mental disabilities, can work in the open labour market; therefore, sheltered workshops are necessary to provide jobs for some PWDs (Holmqvist 2010).

According to statistics, Sweden has the highest number of disabled people employed by sheltered workshops. It is the government’s responsibility to create jobs and vocational opportunities for people with all types of disabilities. The Swedish government established sheltered workshops as state-owned enterprises and uses state resources to cover the potential financial costs. The government provides direct benefits for private organizations, particularly larger organizations, to establish sheltered workshops.

2.4 An East Asian model for disability employment policies?

Whether there exists a welfare regime that can completely represent the welfare policies of East Asian countries such as Japan, South Korea, Taiwan, Hong Kong, Singapore, and even China, remains inconclusive. Some have called this East Asian welfare regime a “developmental accumulation welfare regime” or “productive welfare regime”. Some believe that the East Asian welfare system is only a “hybrid regime” from the three traditional welfare regimes (Esping-Andersen 1997), whereas others believe that the East Asian welfare regime is a completely “unique welfare regime”. However, compared with the aforementioned three welfare re-
gimes, general and similar characteristics of welfare states in East Asian countries could be found, including large differential treatment, relatively high family welfare capacity, low social security expenditure, high welfare stratification, high personal welfare responsibilities, and low pension coverage (Lee/Ku 2003). The factors engendering these characteristics are often deduced from the special Confucian culture system and the government’s strong intervention in economic development. The states implement only limited social policies that are conducive to economic development.

Although the characteristics of the East Asian welfare system are clear, the research literature on the disability policies in East Asian countries is lacking, and the relationship between the East Asian welfare system and its disability policy is rarely studied. Therefore, this article explores if and how the disability employment policies in Japan and Taiwan have similar features as those of the East Asian welfare regimes by using sheltered workshops as examples of comparison. Therefore, this article tries to explore the characteristics of disability policies in East Asian countries by comparing sheltered workshops in Japan and Taiwan as examples.

3. An overview of disability employment policies for PWDs in Japan and Taiwan

First, I introduce the disabled population and its structure in Japan and Taiwan briefly. Then, I explain and compare the present contents of the employment policy in both countries. According to statistics in 2013, there are approximately 7,411,000 persons with disability certification in Japan, and the appearance ratio of PWDs in Japan is approximately 5.82%. The number of PWDs of working age accounts for 31.3% of the total number of PWDs in Japan (Cabinet Office 2013). The labour and non-labour forces of PWDs of working age in Japan are 40.3% and approximately 60%, respectively (Ministry of Health, Labour and Welfare 2006).
Table 1: Disability population and employment situation in Japan and Taiwan

<table>
<thead>
<tr>
<th></th>
<th>Japan</th>
<th>Taiwan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total people with Disabilities</td>
<td>7,411,000 (2013)</td>
<td>1,155,650 (2015)</td>
</tr>
<tr>
<td>Disability prevalence rate</td>
<td>5,82% (2013)</td>
<td>4,94% (2015)</td>
</tr>
<tr>
<td>Total people with Disabilities of working age (15-64)</td>
<td>31,3% (2013)</td>
<td>57,6% (2013)</td>
</tr>
<tr>
<td>Labour Force</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment rate</td>
<td>40,3% (2006)</td>
<td>19,7% (2014)</td>
</tr>
<tr>
<td>Unemployment rate</td>
<td></td>
<td>17,5%</td>
</tr>
<tr>
<td>Non-Labour Force</td>
<td>59,7% (2006)</td>
<td>80,3%</td>
</tr>
</tbody>
</table>

Sources:

According to statistics in 2015, there are approximately 1,155,650 persons with disability certification in Taiwan, and the appearance ratio of PWDs in Taiwan is approximately 4,94%. The number of PWDs of working age accounts for 57,6% of the total number of PWDs in Taiwan. The labour force of PWDs is approximately 17,5% in Taiwan, the unemployment rate of PWDs is 2,2%, and the non-labour force of PWDs is 80% (Ministry of Health and Welfare 2016).

As listed in Table 1, the proportion of PWDs of working age is higher in Taiwan than in Japan, and the aging population in Japan is very high. However, the non-labour force of PWDs is higher in Taiwan than in Japan. The similarity in both countries is the relatively low appearance ratio of PWDs. This possibility shows the narrow definition of PWDs in both countries compared with that in other Western countries such as Germany with 10% (Kudo 2010).
3.1 Disability employment policy in Japan

The actual structure and characteristics of the disability employment policy in Japan exist since 2005, with only little changes. The disability employment policy in Taiwan is also roughly the same since 2007. There are vocational rehabilitation systems to provide professional service for PWDs in both countries, such as vocational assessment and job coaching. As shown in Figure 1, the disability employment policy in Japan includes the quota system, special subsidized companies, supported employment, stable employment, sheltered workshop, and transition-to-work support program (Terashima 2013). According to the results of my interviews, most Japanese academic scholars and practical workers have argued that the quota system has a significant effect on access to work for disabled people. The quota system for PWDs in Japan is applicable only to employers with at least 56 employees in the private sector and agencies with at least 56 employees in the public sector. The regulation rate of the quota system in Japan is 2%–2.3%. The state would take levies or provide grants by hiring less or more than the regulation quota rate in the private sector. There is some criticism about the work equality of PWDs after using the quota system in Japan.

Figure1: Employment support policies for disabilities in Japan

Source: Terashima (2013)
3.2 Disability employment policies in Taiwan

As shown in Figure 2, the disability employment policy for PWDs in Taiwan encompasses the quota system, supported employment, and sheltered workshops. There are no special subsidized companies that is relatively more able to assist PWDs to work in the regular labour market.

Many curriculum-based vocational training programs are provided in the vocational rehabilitation system in Taiwan. It is expected by the government that preparation services before employment, such as building work attitude and office skills, can be learned more efficiently in school; only curriculum-based vocational training programs do not help people with mental disabilities, developmental disabilities, or intellectual disabilities to get a job. For people with these disabilities, preparation services before employment may have more effects. Compared with Japan, the quota system in Taiwan is facing relatively more problems. Many companies do not want to hire disabled people, preferring to pay a fine. Moreover, although some companies hire PWDs because of the quota system, employees with disabilities are often discriminated against job content, wages, and working hours. The goal of including disabled people through participation in the regular labour market has not been fully achieved by the quota system in Taiwan. In Taiwan, the quota system-related problems that must be solved include not only the quality of work but also the actual access of employees.

Figure 2: Employment support policies for disabilities in Taiwan

Source: Organized by author (2017)
A comparison of the disability employment policies in Japan and Taiwan is shown in Table 2. We could observe many similar supports for PWDs such as the vocational rehabilitation system, quota system, sheltered workshop, and relatively low employment rate, in contrast to European countries. However, the lack of services for employment preparation, such as practicum and adaption in companies, and services of stabilizing employment for employers are distinct in Taiwan. This may explain, in part, the reason why the employment rate of PWDs in Japan is considerably higher than that in Taiwan.

**Table 2: Disability employment support in Japan and Taiwan**

<table>
<thead>
<tr>
<th></th>
<th>Japan</th>
<th>Taiwan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vocational rehabilitation system</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Quota System</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Special subsidy company</td>
<td>yes</td>
<td>No</td>
</tr>
<tr>
<td>Supported employment</td>
<td>yes</td>
<td>Y/N</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Only services for PWDs, Not for employers</td>
</tr>
<tr>
<td>Sheltered workshop</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Transition-to-work support program</td>
<td>yes</td>
<td>No</td>
</tr>
<tr>
<td>(preparing before job)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Organized by author (2017)

4. Sheltered workshop policies for PWDs in both countries

4.1 Sheltered workshop policies in Japan

As presented in Table 3, there are two types of sheltered workshops for disabled people in Japan, namely Type A and Type B. The difference between Type A and Type B is the work capacity and wage. Disabled people can go to the workshop they want to work for and ask for assessment. According to my interview data, it is not difficult to work in a sheltered workshop for disabled people in Japan.

Type A can provide the minimum wage per hour to disabled people. However, it does not indicate that disabled people in Type A can get the minimum wage for a month. Disabled people in Type A must be capable
to work for 20 hours a week. Nevertheless, only a small number of disabled people in Type A can work for 40 hours a week, as done in the regular labour market, indicating that the economic security in Type A for PWDs is not always ensured. There are 3,340 Type A sheltered workshops in Japan, and nearly 60,934 PWDs work in Type A (Ministry of Health, Labour and Welfare 2015). Type A workshops always attempt to transit their employees with disabilities to the regular labour market. The successful transition rate could reach 40% of PWDs in Type A who want to work in the regular labour market, but it is still difficult for some disabled persons in Type A to transit.

**Table 3: Policies and situation of sheltered workshops for PWDs in Japan and Taiwan**

<table>
<thead>
<tr>
<th>Type of sheltered workshops</th>
<th>Japan</th>
<th>Taiwan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Type B</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Only one Type</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Type of sheltered workshops services</td>
<td>Employment</td>
<td>Opportunities to production</td>
</tr>
<tr>
<td>Wages for PWDs in sheltered workshops</td>
<td>Minimum wage / hour</td>
<td>Under minimum wage</td>
</tr>
<tr>
<td>Amount of workshops (2015)</td>
<td>3,340</td>
<td>10,321</td>
</tr>
<tr>
<td>Amount of PWDs (2015)</td>
<td>60,934</td>
<td>216,237</td>
</tr>
<tr>
<td>Amount of PWDs/per workshop</td>
<td>About 18-22</td>
<td>About 14</td>
</tr>
<tr>
<td>State provision for sheltered workshops</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Access to sheltered workshops</td>
<td>Sheltered Workshops</td>
<td>Vocational rehabilitation assessment</td>
</tr>
</tbody>
</table>


Compared with Type A sheltered workshops, the work in Type B sheltered workshops is relatively simple, involving tasks such as making candles. The wages for disabled people in Type B are much lower than those in Type A (average 14,000 yen or approximately 100 Euros every month). Moreover, disabled people in Type B, but not Type A, receive disability
pension (approximately 600 Euros every month). It is easy for PWDs to work in industries operated in Type B. The number of professions that assist disabled people to work in Type B is higher than that in Type A. There are 10,321 Type B sheltered workshops in Japan, and approximately 216,237 PWDs work in Type B sheltered workshops (Ministry of Health, Labour and Welfare 2015).

The work ability, work hours, job contents, and wages are different between Type A and Type B. However, there are many similarities between Type A and Type B. First, people with intellectual, developmental, and mental disabilities constitute the highest number of disabled employees working in both types of sheltered workshops. Second, both workshops get the state provision, especially for service charge, that the sheltered workshops provide for disabled persons.

In response to the Convention on the Rights of Persons with Disabilities (CRPD), which Japan signed in 2007 and ratified in 2014, Japan’s Cabinet Office established a Committee for Disability Policy Reform to provide input and guidance on reforms of policies and legislation aimed at PWDs in 2009. The labour wage standard in facility-based employment, such as sheltered workshops, is an issue of concern. However, a major change in sheltered workshop policies and situation is not observed. The effect of the CRPD on sheltered workshop policies in Japan remains unclear (Boeltzig-Brown et al. 2013).

4.2 Sheltered workshop policies in Taiwan

As shown in Table 3, there is only one type of sheltered workshop for PWDs in Taiwan. Sheltered workshops in Taiwan provide only employment opportunities without training for PWDs. PWDs must go to the vocational rehabilitation center in their local government and pass the evaluation. Then, they can go to sheltered workshops with the document to apply for a job. The sheltered workshops can accept or reject the applications of the PWDs. This is because sheltered workshops in Taiwan are seen as fully private companies, and private companies always require PWDs as an employee with high capacities. The government provides provisions for sheltered workshops, but compared with the huge operating costs of such workshops, government provisions are actually quite inadequate. There are 132 sheltered workshops for PWDs in Taiwan, and they employ 1,783 PWDs (Ministry of Labour 2015).
The PWDs in workshops get wages that are lower than in the regular labour market, and only a few PWDs can have the minimum wage of workers in the regular labour market. It is difficult for sheltered workshops to transit disabled employees with high work ability to the regular labour market; nevertheless, disabled employees with high work capacity are very important for the production of sheltered workshops. Moreover, discrimination against PWDs still exists in the open labour market. PWDs cannot find any jobs without sheltered workshops. Similar to Japan, most employees with disabilities in sheltered workshops in Taiwan have intellectual, developmental, and mental disabilities. One special thing in sheltered workshops in Taiwan is the operating industries including restaurants, cafes, shops for second-hand goods, and cleaning companies. In these industries, PWDs have many opportunities to interact with the guests and communities.

Taiwan is not a member of the United Nations, but it implemented the CRPD nevertheless in 2014. The state report of the CRPD will be released in October 2017. Thus, it is difficult to evaluate how and what type of effect the CRPD has on the sheltered workshop policies in Taiwan.

5. Conclusion: Similarities and differences

Comparing the sheltered workshop policies in Japan and Taiwan reveals several similarities. First, the wages for PWDs in the sheltered workshops of these two countries are lower than those in the regular labour market and not adequate for independent living. In fact, the issue of appropriate economic security for persons with disabilities should have been discussed along with cash benefits such as social allowance for disabled people or social assistance out of the wages in sheltered workshops, however those benefits are not explored in this paper because of length limits. Second, the size and location of sheltered workshops in both countries are small and often near city centers, unlike some western countries, where the sheltered workshops are in broad land areas. Western countries typically have sheltered workshops that are far away from communities and have large numbers of disabled persons; however, these kinds of sheltered workshops are not commonly found in Japan and Taiwan. Third, the effect of the CRPD on sheltered workshop policies in both countries is still unclear; although the ratification of the CRPD in both countries has already occurred.
On the one hand the ratification of the CRPD is relatively late in Japan and Taiwan, so that the national governments need more time to think about solutions. On the other hand, the expectation for an enormous change of sheltered workshop policies in these two countries is unlikely to be foreseen.

Differences still exist between the sheltered workshop policies in Taiwan and Japan. Compared with Taiwan, the sheltered workshops for PWDs in Japan have more functions; for example, such workshops not only provide training for employment but also have more autonomy to decide whether to accept the application of PWDs, have more possibilities for transiting PWDs to the open labour market, and give more opportunities to PWDs to enter into employment rather than just stay at home or live in care facilities. Sheltered workshops in Taiwan accept PWDs as employees only when the PWDs have high work capacity without the need of training. However, sheltered workshops in Taiwan operate in a similar manner to normal companies in communities. Thus, the PWDs in sheltered workshops have more contact with the society, and the traditional image of sheltered workshops, such as separation or exclusion, is not the common situation in Taiwan.

Whether the sheltered workshop policies in Taiwan and Japan present the features of welfare regimes in East Asia remains inconclusive. The sheltered workshop policies in South Korea, China, Hong Kong, and Singapore should be also explored for a complete analysis and comparison.

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