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# “Reasonable Accommodation” and “Accessibility”: Human Rights Instruments Relating to Inclusion and Exclusion in the Labor Market

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**Abstract:** Ableism is a powerful social force that causes persons with disabilities to suffer exclusion. The UN Convention on the Rights of Persons with Disabilities (CRPD) is based on the human rights principles of equality and freedom for all people. This Convention contains two human rights instruments: the principle of accessibility and the means of reasonable accommodation, which can be used to protect the human rights of disabled persons. The extent to which they are used depends on whether the state implements the Convention adequately and whether companies accept their responsibility with respect to employing disabled persons and making workplaces available and designing them appropriately. Civil society can demand the adequate implementation of the human rights asserted in the CRPD and, thus, in national legislation, as well. A crucial point here is that only a state that has ratified the Convention is obliged to implement the Convention. Civil society has no obligation to do this, but has the right to participate in the implementation process (Art. 4 and Art. 33 CRPD). The Convention can play its part for disabled persons participating in the labor market without discrimination. If it is not implemented or not heeded sufficiently, the state must push this and put more effort into its implementation. If the state does not do this, this violates human rights and has direct consequences for the living conditions of disabled persons. The powerful ideological force of ableism then remains dominant and hampers or prevents the participation of persons with disabilities in the labor market and, thus, in society as a whole.

**Keywords:** CRPD; reasonable accommodations; accessibility; labor market; ableism

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## 1. Introduction

Persons with disabilities (in conjunction with further categories of difference, such as migrant background, age, gender, sexual orientation, class, religion or political or other opinions) do not have adequate access to the labor market, neither historically nor currently [1]. How can they acquire this? What do persons with disabilities need in order to be able to participate in the labor 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 [2–4]?

Before having a glance into ableism, the Introduction will give a short overview of what we are going to deal with concerning the UN Convention on the Rights of People with Disabilities (CRPD) [5] in this article. According to the CRPD, persons with disabilities are not objects of charity, medical treatment and social protection, but subjects with the same human rights as everybody else. This means a paradigm shift from the medical model of disability to the human rights approach in the CRPD. “The purpose of the present Convention is to promote, protect and ensure the full and equal

enjoyment of all human rights and fundamental freedoms by all persons with disabilities” (Art. 1). This also includes the right to work on an equal basis with others and the participation “in a labor market and work environment that is open, inclusive and accessible to persons with disabilities” (Art. 27 Para. 1). With some references, we use the German situation as an example.

### *1.1. CRPD and Access to the Labor Market*

We explain which instruments the Convention provides to promote participation in the labor market. To this end, 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 (Art. 27) 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 labor market in society. These two instruments act in different ways, but can be used together effectively.

The access to the labor market for disabled persons in Germany is analyzed sociologically against the background of social closure. While the CRPD promotes possibilities for the inclusion of disabled persons, the labor market in contrast is more competitive than ever before, especially for persons with a disability, a migrant background, who are older, a member of a non-Christian religion and women. It is therefore necessary for the government to develop measures to persuade employers to hire disabled persons (also in conjunction with further categories of difference) and to establish programs for raising awareness in relation to the labor market (Art. 8 and, e.g., the anti-discrimination legislation in the German General Equal Treatment Act [6]).

In addition to the Convention on the Rights of Persons with Disabilities, it makes sense to also take into account the other applicable agreements on human rights.

As a conclusion, we discuss that inclusion and exclusion can only be examined in relation to each other. This is also illustrated using the example of a segregated school system, since an increased percentage of disabled children are taught not in ordinary schools, but in special schools, and are thus excluded from ordinary schools [7,8]. If the state does not expressly assist persons with disabilities, their majority will continue to be excluded from the labor market. The economy measures of the European austerity policy aggravate this situation even more [9]. Goodley, Lawthom and Runswick-Cole see austerity policy establishing an ecosystem for the nourishment of ableism, which they define as neoliberal-ableism [10]. According to this perspective, it is necessary to deal with ableism to better understand what should be the role of the CRPD to strengthen human rights and participation in the labor market for persons with disabilities.

### *1.2. Access to the Labor Market for Persons with Disabilities*

Persons with disabilities are confronted with various barriers concerning their working life. This is similar in Germany, as in other developed countries [11]. Although the German legislation offers various measures to reduce discrimination against persons with disabilities in education and vocational training, their participation in the labor market is still limited [12]. Therefore, the unemployment rate of persons with disabilities of working age was about 14.8% in 2011. Taking into account all persons, the rate was about 7.9% [13]. To improve the participation of persons with disabilities in the labor market, social and labor 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 labor market in individual cases. Nevertheless, for most persons with disabilities, their wish remains unfulfilled to be employed regularly. Instead, many persons with disabilities are trained in special vocational training centers, sheltered workplaces and vocational rehabilitation centers and, thereby, have a relatively low income [12].

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, persons with disabilities 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 staff members with disabilities, 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 persons with disabilities. 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 labor market, the difficult situation of the labor market as a whole and their impact on the employment possibilities of persons with disabilities [13]. These barriers cannot be isolated from the social strategy of ableism.

### 1.3. Ableism

Ableism is a network of beliefs, processes and practices that produces a particular kind of self and body projected as perfect and species typical. This projection is seen as essential for being fully human. Therefore, any self and body that differs from this projection is regarded as less human, as are disabled persons [14].

Wolbring [15] goes beyond and focusses not only on the self and the body, but also on relationships with others within humanity, other species and the environment. This approach includes the judgement of others. Ableism favors certain abilities that are projected as essential. Any deviation from or lack of these abilities is seen as a diminished state of being [16]. The favor of certain abilities finds its equivalent in social and societal relations within the concept of ability privilege. Ability privilege is linked to the experience that one getting certain advantages out of certain abilities is unwilling to give up these advantages [17]. Having privilege is interwoven with having the power to set standards in society [18]. These standards are enforced by growing ability expectations and lead to various forms of disablement with the possible consequence of direct or indirect discrimination [17].

Goodley focusses on the interconnection of neoliberalism and ableism: neoliberal-ableism. "The neoliberal-ableism normalizes through the constitution of the ideal citizen" who tries hard "to become more independent, self-sufficient and productive" [19]. The idealization of independent and autonomous citizens is pursued through transforming economies, restructuring nation states and worshipping the market. In a meritocracy, a limiting definition of citizenship is in favor that only values the productive laborer. For disabled persons, as a consequence, they "have to embrace ableism to overcome their disabling conditions" [10], and even further, under neoliberal circumstances, "individuals need to embolden the ability side of the dis/ability complex in order to survive, hopefully thrive, but definitely make do and mend" [10].

As Goodley argues "ableism cannot be divorced from hetero/sexism, racism, homophobia, colonialism, imperialism, patriarchy and capitalism" [19]. This argument refers to the intersection of different isms. Wolbring [16] frames ableism as an umbrella term for other isms, such as racism, sexism or ageism. In this sense, ableism would represent the intersectionality of different discriminations with which one could be confronted. Intersectionality is also represented in the concept of ableist normativity in the work of Campbell [2,20]. For her, research on ableism can be fruitful not just for thinking about disabilities, but also about other differences that lead to marginality or disadvantages. Insofar as regarding the historic and cultural circumstances, the nuances of ableism are transcategorically orientated towards other factors, such as race and gender [20]. However, what are the consequences of ableist normativity on employment? Is employment thinkable beyond ableism regarding neoliberalism and its austerity policy? From the perspective of critical disability studies, employment in a meritocracy is always interconnected with neoliberal-ableism. Under these conditions, employment is not thinkable beyond this complex, as Goodley and Runswick-Cole worked out. In their work with

intellectually-disabled people, they found an appeal to normative idea(l)s, including a right to work, education, a healthy love life and heteronormative desires for family, marriage and parenting. This is not problematic “as long as the debates, questions and conversations about the dis/ability complex continues” [21].

Maskos’ perspective is comparable. She argues that a description of impairment is needed to remain capable of acting, to minimize disadvantages and to claim for technical aids and personal assistance. However, she also emphasizes the necessity to be aware of the negative consequences. This kind of labelling risks that individuals are reduced to their impairment and live with an excluding automatism. To get out, one is forced to find alternatives, to have support and other resources [3].

## 2. Human Rights Treaties: International Law and National Legislation

Treaties on human rights are concluded in order to respond to the structural and systematic experience of injustice. After the development of the Universal Declaration of Human Rights [22] and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights [23], several conventions were adopted, which are aimed at the circumstances of special groups, such as the Convention to Eliminate All Forms of Discrimination Against Women, known as the Treaty on the Rights of Women [24], the Convention on the Rights of the Child [25] or the Convention on the Rights of Persons with Disabilities. The human rights covenants and conventions have to be considered against the background that the rights of humans have been disregarded not only individually, but also structurally. A human rights treaty comes into force in a state after this state has signed and ratified it; the treaty is legally binding for the state after the expiry of the deadline stated in the ratification protocol as an act ranked as a normal law.

Human dignity is the guiding principle for all treaties on human rights. The entitlement to be protected against the violation of human rights, as well as the entitlement to participate in the life of the community are both derived from it.

The development of the Convention on the Rights of Persons with Disabilities can be understood discussing the background in more detail: the reason for human rights and, thus, all human rights treaties, on the one hand, and the specific experiences of disabled persons, on the other.

## 3. Reason for and Development of the Convention on the Rights of Persons with Disabilities

In December 2001, the General Assembly of the United Nations resolved to develop a convention to protect the human rights of disabled persons in order to take up their specific experiences in legislation. During the next five years, UN member states and international organizations with observer status and non-governmental organizations worked out the Convention on the Rights of Persons with Disabilities and its Optional Protocol at UN Headquarters in New York. It was adopted on 13 December 2006 by the General Assembly of the United Nations and entered into force on 8 March 2008.

The Convention on the Rights of Persons with Disabilities came about against the background of the specific prospects of disabled persons. The intersectional experiences of disabled women were especially taken into account here (Art. 6). The combination of gender and disability and also their intersections with other categories of difference with respect to multidimensional discrimination were discussed and incorporated into the Convention (Preamble Clause p and q and Art. 6). The Convention manifests the paradigm shift concerning the conceptualization of disability: disabled persons should not be seen as “objects of charity”, “medical treatment and social care”, but as “subjects with rights” who are able to advocate their own rights and to make decisions about their life that are based on their free and informed consent. They are also able to be active members of society [26]. The dignity of disabled persons is thus recognized around the world by the Convention.

Compared to the earlier human rights treaties, the Convention is unique in being a developmental instrument and, at the same time, a human rights instrument. As a policy instrument providing direction, it expresses the right of all humans with any type of disability to participate in all aspects of

life. All over the world, organizations for the disabled and the representatives of the States Parties in New York had compared their experiences with, and their perspectives of, their circumstances against the background of a performance-oriented society and drew up the Convention together on this basis.

### 3.1. *The CRPD: Not a Special Convention*

The CRPD develops the international protection of human rights further. It takes up the existing human rights treaties, makes them more precise and puts them into concrete terms for the circumstances of disabled persons, without establishing genuinely new rights. The Convention on the Rights of Persons with Disabilities thus comprises civil and political rights, such as the right to freedom of expression and opinion (Art. 21) or the right to liberty and security of a person (Art. 12 and Art. 14) and relates these to the circumstances of disabled persons. The Convention also takes up rights contained in the International Covenant on Economic, Social and Cultural Rights [23], such as the right to work, to education and to health. In the Convention on the Rights of Persons with Disabilities, each of these rights is put in the context of the principle of accessibility (Art. 9) and also the right to reasonable accommodation (Art. 2) in order to realize the right to non-discrimination (Art. 5). The existing human rights principles are also taken up and supplemented or also expanded where necessary.

Since the circumstances of disabled persons demonstrate significant and structural violations of human rights despite the two international covenants on human rights, it was deemed necessary to draw up a separate convention on the rights of persons with disabilities, who are considered to be a particularly vulnerable group [27,28]. A separate human rights convention is deemed to be crucial especially given the circumstances of disabled persons in institutions, such as hospitals, educational institutions and sheltered workplaces or care homes. The restricted self-determination and the violation of human rights in special institutions was already being criticized by the independent living movement, an international movement of persons with disabilities. In Germany, this criticism was strongly expressed by the “*Krüppelbewegung*” (cripple movement). Its demand was for the implementation of human rights and humane living, education and working conditions. The disability movement of the seventies and the early eighties was the pioneer for the new understanding of disability, and it pointed out at an early stage how living conditions could be improved by means of assistance and counselling by and for disabled persons (peer counselling) [29,30].

### 3.2. *The Guiding Principle of the CRPD: Human Dignity*

The first objective of Article 1 of the Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity” (Art. 1 Para. 1). All persons are included, regardless of the form or severity of their disability; human rights and human dignity of everyone (e.g., with a severe neuro-degenerative disease) must be respected.

This article takes priority over the other stipulations, which are each concerned with the specific circumstances of the people and has to be applied to all of them. As well as any disability, all other characteristics of difference have to be taken into account, such as gender, age, ethnic origin, religion, political and other beliefs and sexual identity: no-one shall suffer discrimination because of them. All humans are entitled to the status of a subject of human rights, regardless of their abilities and without any conditions, as Graumann discusses in depth from the theory of human rights standpoint [31,32]. Human dignity as the foundation underpinning human rights is particularly important, because respect for human dignity makes it possible to bring about moral and legal obligations between humans and also to maintain them [33].

### 3.3. *Impairments, Disability and Barriers: Definitions According to the CRPD*

The Convention 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). The Convention thus 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 [34].

This understanding takes up 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. The social conditions are thus crucial and affect the opportunities of disabled persons to be able to participate in the life of society as far as education, work, accommodation, culture, health, politics, *etc.*, are concerned.

The Preamble of the Convention states that the concept of disability is "constantly evolving" (Preamble Cl. e). These explanations show that 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 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; for the principle of accessibility, see below).

#### 3.4. Embodiment of Intersectionality in the CRPD

The Convention advocates an intersectional perspective and relates disability to further categories of discrimination. A catalogue of preliminary provisions thus precedes the agreements of the States Parties: the Preamble. This illustrates the purpose of the Convention. 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, color, 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 Convention.

Explicitly, as a human rights principle (Art. 3), the equality of women and men is emphasized. This human rights principle is contained in all human rights treaties. Furthermore, the Convention emphasizes the possible multiple discriminations of disabled girls and women, which they can experience (Art. 6). 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 the emphasis in the Preamble Cl. q). The gender-specific aspects are also expressly pointed out 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 Convention [35].

The difference becomes clear in 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).

#### 4. Human Rights Principles of the CRPD

Regarding the various principles that apply to all human rights and, thus, also to the right to work and employment (see below), we will pick out a few that, in our opinion, are particularly important for inclusion and participation as opposed to ableism in the labor market. In addition to the principles of “respect for inherent dignity, individual autonomy ... and independence of persons”, “equality between men and women”, “accessibility”, “equality of opportunity” and “non-discrimination”, it is primarily “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” (Art. 3a–g). All principles are to be interpreted in such a way that disabled persons can live their life in a self-determined way with the amount of assistance they require.

##### 4.1. *Respect for Difference and Acceptance of Persons with Disabilities*

The respect for difference of persons with disabilities (Art. 3) is one of the general principles of the CRPD. It refers to an intersectional perspective considering Preamble Cl. p. That means being disabled is just one dimension of difference within the group and in relation to the environment and others without disability. Concerning the difference of persons with disabilities, one has to keep in mind other dimensions, such as age, gender, sexual orientation, social-economic status or migrant background. Referring to the study of Pieper/Haji Mohammadi dealing with the dimensions of disability and migrant background, it shows the impact of the dominant social strategies of ableism and racism on participation in the labor market. “These two vectors of discrimination act as powerful ushers, performing control functions in terms of school attendance and educational paths; and thus they exert a decisive influence on participation in the labour market, with all the associated long-term biographical consequences” [1]. The emphasis on the difference of persons from an intersectional perspective also opens up the option to develop tactics one’s self, to keep a position of employment despite the powerful social strategies of ableism, racism or the interconnection in between when one has disabilities or a migrant background [1]. Pieper and Haji Mohammadi emphasize micro-practices used by the job-seeking disabled people and those with a migrant background whom they interviewed to counter the negative attitudes and practices of the neoliberal biopolitical regime. Characteristically, they pursue their own interests and desires and try to initiate a meeting on an equal footing [1]. It is crucial that they do not internalize the dominant social strategies of ableism and racism and submit to them [36,37].

The human rights principle of “Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” (Art. 3d) has particularly to be observed against the background of an equal right to work and employment and the access to this right on an equal basis with others. In combination with the right to non-discrimination, it can be derived from this that persons must not be categorized on the basis of a disability.

##### 4.2. *Non-Discrimination Principle*

The non-discrimination principle is deemed a fundamental principle of the international protection of human rights and covers direct and indirect discrimination (Art. 3). In addition to this principle, this equality right is explained in an article of its own, which obligates the States Parties to undertake specific protection measures (Art. 5). The State Party shall not only prohibit “all discrimination on the basis of disability” and guarantee “equal and effective legal protection against discrimination” (Art. 5 Para. 2), but “in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided” (Art. 5 Para. 3). Reasonable accommodation in individual cases has to take a form specific to the person with disability concerned (for more details, see below).

#### 4.3. Discrimination on the Basis of Disability

Against the background of the Convention and, thus, also, against the background of its disability concept, social legislation and any legislation that is concerned with disability has to be re-read and re-interpreted. This is a process that started with the ratification of the Convention and will take a longer period. Discrimination on the basis of disability has to be prevented immediately; however, the right to non-discrimination has to be observed immediately, if it is self-executing (Art. 2 in conjunction with Art. 5 on equality and non-discrimination). Nobody may suffer discrimination on the basis of a disability, as is defined in the definitions: "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.

### 5. Participation as the Objective and Principle of Human Rights

Participation is the objective not only of the Convention on the Rights of Persons with Disabilities (Art. 1), but of all human rights treaties. The civil society movements that championed the civil rights of black people, women or gays and lesbians pursued the objective of the full exercise of human rights. This also included participation in political processes, in research or in public transport. The black civil rights movement in the USA fought for access to the public transport system on an equal footing, for example, after African Americans were allowed to sit only at the back of the bus until the late 1950s in the U.S., and the front part of the bus was reserved for the white population. The efforts of the disabled movement for accessible local and long-distance public transport was thus in the tradition of the fight for human rights. In the same way, the state has an obligation to compile data on the circumstances of disabled persons on the basis of human rights, and disabled persons are involved in research processes regarding disability [38]. With both examples, the access to public means of transport for black or disabled persons and the adherence to ethical human rights-based principles when researching disability, it is crucial that disabled persons not only have human rights in a passive form, but that they can actively exercise them, as well.

This requires awareness-raising measures to be taken in order to sharpen awareness about the rights of disabled persons and "to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life" (Art. 8 Para. 1b).

Above and beyond the human rights principle of participation, the state is obliged to actively involve disabled persons and their organizations "in the development and implementation of legislation and policies to implement" the Convention "and in other decision-making processes concerning issues relating to persons with disabilities" (Art. 4 Para. 3). As a so-called implementation clause, Article 4 is directed expressly at the state as the State Party of the United Nations and comprises the general obligations that have to be observed in conjunction with every individual human right. This means, for example, that disabled persons have to be involved in the development and revision of legal provisions regarding working in the labor market or regarding sheltered workshops. It must be noted here that sheltered workshops as separate workplaces must be abolished (Art. 27 Para. 1; for more details, see below).

Participation is important in order to recognize and respond to specific needs and thus strengthen an individual disabled person. The Convention emphasizes everywhere that the issue is complete, effective participation in society on an equal basis, not partial participation, as can be explained by way of example using the right to participate in political and public life, where the States Parties shall

guarantee that persons with disabilities have political rights and the opportunity “to enjoy them on an equal basis with others” (Art. 29 Para. 1). The States Parties undertake here “to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, ..., including the right and opportunity ... to vote and be elected” (Art. 29 Para. 1 a) [1,39].

## 6. Two Instruments for Participation in the Labor Market

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 Convention, to promote equality of disabled persons with respect to non-disabled persons and to prevent discrimination (in conjunction with Art. 5).

### 6.1. Accessibility as a Structural Principle for Living an Independent Life

Accessibility is already widespread through the efforts of the disabled movement and organizations of disabled persons; it has to be implemented structurally in all areas of life, such as access to the labor market, and also in the education system and healthcare, however. This requires both the enlightenment of society, as well as a short-term, medium-term and long-term plan of measures by the state.

The Convention formulates accessibility as a human rights principle (Art. 3) and explains in detail 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 that 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 that private entities that provide public facilities and services also “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, but private entities only indirectly via the state [40–42].

The measures to create access in 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 Article 9 points to a structural responsibility for the self-determined, independent participation of disabled persons 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 such that it is accessible to all clients, as well as to persons with different impairments who work there.

### 6.2. 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:

- (1) the necessity of an accommodation for the disabled person in question in a specific situation,
- (2) a proportionate burden for the institution (state, employer or similar) providing the accommodation
- (3) 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, which has 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. An alternative would be 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 and is an integral part of individual rights, such as the right to work or to education (Art. 27 and Art. 24). Reasonable accommodation must therefore be made 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 person with disabilities has a 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 anchor it in law as an obligation (Art. 2). As part of the non-discrimination principle under human rights, it is immediately effective and legally enforceable [43,44].

## 7. The Right to Work and Employment

With respect to the right to work and employment, there are several conditions a State Party has to fulfil. We will pick out a few of them below, which are particularly important in the context of inclusion and exclusion in the labor market.

In general, 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 labor market and work environment that is open, inclusive and accessible to persons with disabilities" (Art. 27 Para. 1). In the binding English<sup>1</sup> text of the Convention, the requirements are emphasized more strongly, the right to work "on an equal basis with others" in a labor market and environment that is "inclusive and accessible".

Trenk-Hinterberger puts it into concrete terms that the opportunity to gain a living by work does not mean purely physical survival, "but a suitable standard of living" [45,46]. He links this provision with Article 28 Para. 1 CRPD on the adequate standard of living and social protection, which also follows the European Social Charter Art. 4 Para. 1 on the rights of employees [45]. As an alternative version, he considers that the wording could mean "the right to the opportunity", "although it does not have to be possible to realize this in every case" [45]. This seems to us to be rather out of place, because the characteristic of the Convention is expressed by the primacy of human dignity and the principle of human rights (see above), which can be illustrated with adequate food as part of the standard of living, for example (also Art. 9 [23]).

The "right to work, on an equal basis with others" again emphasizes the principle of non-discrimination (Art. 5, Art. 3) and puts it in concrete terms for the area of life concerned with work. However, the same right of all persons to work takes different forms, *i.e.*, according to the individual impairment, and is implemented as such. This is carried out by making reasonable accommodation: the States Parties shall "ensure that reasonable accommodation is provided to persons with disabilities in the workplace" (Art. 27). In concrete terms, reasonable accommodation can comprise a large number of instruments, including financial provisions to create or maintain accessible work and training places or technical work aids or assistance in the workplace.

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<sup>1</sup> Art. 50 Sub-Para 1: The Convention is binding only in the languages stated there: Arabic, Chinese, Russian, Spanish, French and English.

The emphasis on an open, inclusive and accessible labor market requires that the labor market as a whole is restructured. Special institutions, such as sheltered workshops or so-called sheltered institutions, therefore, do not correspond to the stipulations of the CRPD explained here. As Trenk-Hinterberger clearly explains in his comment on Article 27, “this guiding principle of an inclusive labour market” is “thus in considerable contradiction to the existing labour market, which is permeated by the neo-liberal zeitgeist and which is determined by competitive thinking, by striving for profit and by economic efficiency” [45]. The issue is therefore not to create a few accessible workplaces in the labor market, but the provisions of the CRPD demand the development of an alternative concept to the neo-liberal and ableistically-oriented labor market (critical to the current development of the working conditions and the analysis of the precarity of work and life [47]). The state is obliged to implement this blueprint of an accessible, inclusive labor market step by step and, thus, shape the work environment in a more just way.

The right to work and employment is made more concrete by the further provisions on how a State Party has to safeguard and promote this right: “Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia: Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions” (Art. 27. Para. 1 a).

In brief, the non-discrimination principle is spelled out again for all steps into the world of employment: for the job application phase and also for the hiring and all further phases of the employment relationship. All issues connected with the right to work are included, and it is emphasized that disability can also be acquired in the course of employment and can therefore not represent a reason for termination. This stipulation, as well, makes clear that top priority has to be given to the equality principle and the right to non-discrimination, and the state is obligated to observe them [45].

The labor and trade union rights have to be emphasized as a special provision: the states ensure and promote the right to work and employment also by guaranteeing that “persons with disabilities are able to exercise their labor and trade union rights on an equal basis with others” (Art. 27 Para. 1c). The state has to take appropriate steps so that disabled persons can exercise the election of a works council or can be elected. This would involve organizing elections in an accessible form. Furthermore, the provision obligates the state to create the conditions so that disabled persons can establish unions or become union members.

With this provision, as well, the discrepancy is evident between the regular and the segregated labor market, because in sheltered workshops and all special institutions, there is no employee or staff representation that fulfils this provision. Even if special institutions, such as sheltered workshops, are not work institutions, but rehabilitation institutions according to their legal basis, their self-advocacy structures have to be appropriately restructured as long as they have not been abolished. On the labor market, employee and trade union rights have to be implemented in an accessible way for disabled persons, as well.

Summarized in brief: the state is obligated to take appropriate measures, including enacting legal provisions, in order to ensure equal, accessible access to the labor market (Art. 27 in conjunction with Art. 9 and Art. 4). The employer also, whether state institutions, institutions undertaking public services and functions or companies, is obligated to provide reasonable accommodation for the individual employee (Art. 27).

## 8. Inclusion and Exclusion Factors

Whether the Convention on the Rights of Persons with Disabilities is realized, however, depends on whether the state fulfils its implementation obligation and whether the institutions or facilities bear their responsibility for the right to work in an accessible way and with the requisite reasonable

accommodation in any individual case. If the state does not take “appropriate steps” to safeguard and promote the realization of the right to work (Art. 27, also Art. 5 [18]), this makes it difficult for persons with disabilities to access the labor market on an equal basis, and they experience exclusion from the labor market. This illustrates that the ratification of human rights treaties is only the first factor in bringing about inclusion.

Crucial are also the structural and social conditions, which are often understood as given, but can be changed (on the intersectional analysis of barriers and discrimination experiences, see also [48]). For centuries, groups of people have been made “scapegoats” in times of social crises, such as wars, epidemics or economic collapse, and, thus, assigned to a social role that coincided with the construct of “being different”. Economic crises, in particular, are often characterized by inscrutable decision-making structures and hierarchizations and also by the fact that the specific players in battles over the distribution of social resources cannot be openly recognized [49]. In a hierarchical society, there is no space that is non-hierarchized nor free from hierarchy.

The current social situation in Germany, and in Europe, as well, is characterized by, e.g., austerity policies and, thus, the economy measures, which particularly affect disadvantaged social groups, such as disabled or chronically ill people, but also other groups of people, such as people with a migrant background or poor people [21,50].

## 9. Opening up and Closing Processes or the Game of Powerful Players

The social discrimination strategy of ableism is dominant for a variety of reasons. On the one hand, the explanations above lead to the conclusion that the CRPD has not only to be in force, but has also to be implemented and enforced in order to prevent discrimination. As Pieper and Haji Mohammadi clearly characterize, however, “ableism and racism” form “in the era of neo-liberal governmentality a total, biopolitical machine, as it were—a network of power hierarchies, discourses and ways of subjectivization aiming at productivity from which nobody can withdraw” [1]. Thus, in addition to the legal foundation, which needs to be implemented further, the second issue is the influence and interests of various players in society. The side-lining, the inclusion or exclusion of disabled persons in conjunction with further categories of difference from the labor market cannot be separated from the situation of those without disability or who work there or are not subjected to processes of exclusion.

In the education system, where opportunities to access the labor market are distributed, it can be demonstrated that there are parties interested in an inclusive education system for everybody, as well as those who are interested in maintaining the segregated school system with its privileges (e.g., the case study on the German federal state of Hamburg school reform, which provided for an extension of the joint primary school period from four to six years [51]). If one considers for example the analysis by Powell and Wagner of the discrimination on the basis of ethnic origin and disability together with the results of the case study, it becomes clear that in addition to disability in conjunction with other categories of difference, a low socio-economic status and the level of education in the family are important factors for access to the general education system [51–54].

Access to education and access to work are generally linked, also with respect to the exclusion of persons with disabilities. The opportunity to obtain a high educational qualification is crucial for access to the labor market. However, even then, disabled persons will face ableism. Hirschberg analyses recruiting strategies for teachers and figures out that the employment of persons with disabilities is restricted explicitly to job candidates only with suitable qualifications. Keeping in mind that employees are always heading for job candidates with suitable qualifications, this explicitly refers to an ableist perspective that is interconnected with a deficit-orientated imagination of disability. Altogether, this leads to discriminating practices [55].

If people are discriminated against on the basis of disability and poverty, and are subject to social exclusion processes despite the CRPD being implemented, this refers to the difficult balance of opening and closure regarding access to society [56]. While the Convention strengthens the rights of disabled persons, on the one hand, and is thus intended to facilitate their social participation by designing

society so as to be accessible, the opportunities to access society, on the other hand, remain limited by the social conditions excluding and characterized by ableism.

These processes could be counteracted if the education system (and here, vocational training, as well) were structured and funded in such a way that social inequalities were reduced by education opportunities [56]. A change would therefore coincide with changed, more equal access to educational and social resources for everybody. Further factors to reduce the exclusion processes affecting access to the labor market would be instruments for an egalitarian redistribution of income or also special measures (affirmative action) that accelerate the real equality of disabled persons.

## 10. Conclusions

If we cannot escape from ableism, we suggest using the CRPD as an instrument to find a balance between inalienable human rights and ableist normativity. The human rights principle of accessibility and the instrument of reasonable accommodation offer opportunities for this balance. We do not argue that it is easily possible to overcome ableism with the CRPD. The main topic is to discuss the potential of the CRPD to reduce exclusion from the labor market, keeping in mind that the intersections of ableism with other powerful strategies of discrimination could be identified as reasons for the marginality and disadvantages of persons with disabilities.

The Convention is binding for state labor market policy; it also forms the basis for all non-state players. Legal and social measures and all other awareness-raising programs to produce non-discrimination, inclusion and participation of disabled persons (in conjunction with further categories of difference) in the labor market therefore should be developed. The two instruments of accessibility and reasonable accommodation should be used in the labor market to sustainably improve the structural and individual working and employment conditions of disabled persons in the labor market and to counteract the powerful strategy of ableism that is not only discriminating against persons, but additionally often associated with discriminatory strategies of racism, classism, discrimination based on educational status or socio-economic background, which would thus also be counteracted.

These discriminatory strategies will remain influential in the increasing neo-liberalism of society if the state does not use the scope it has for action and realize the Convention in justiciable legislation and initiate awareness-raising measures that increase the respect shown towards disabled persons, fight prejudices and promote the perception of the skills and contributions of disabled persons [39]. There are doubts that the state will fulfil the obligations of the CRPD in whole and not only to some extent. The means of reasonable accommodation could be seen as an important instrument regarding ability privileges. It could be possible that powerful social groups, including governments, employers and educational institutions, try to determine what should be seen as reasonable [7]. Ableist normativity or neoliberal-ableism cannot be separated from neo-liberal capitalism [2,9]. As an administrator and guarantor of economic interests and the freedom of markets within the capitalistic order, the state has an interest to govern able-bodied citizens [3].

Civil society, in particular disabled persons and their organization, is in favor of vigorously demanding from the state that it adequately fulfils its obligation regarding the implementation [57]. It has the possibility to intervene as part of its function in the process of monitoring whether and how the state implements the Convention. Against the background of the discriminatory strategy of ableism, it must be noted that breaking down barriers and weakening the ableistic strategies benefits society overall.

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