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Reasonable Accommodation and Disability: a Comparative Analysis**

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1. *Introduction*

In the timeless 19th century classic, *Alice in Wonderland*, after falling down an endless rabbit-hole, the protagonist finds herself standing in front of a little door about fifteen inches high. She kneels down to see what lies behind the door and is ecstatic to see the loveliest garden that she ever saw. The author pens down Alice's thoughts in the following words:

> "How she longed to get out of that dark hall, and wander about among those beds of bright flowers and those cool fountains, but she could not even get her head through the doorway; 'and even if my head would go through,' thought poor Alice, 'it would be of very little use without my shoulders. Oh, how I wish I could shut up like a telescope! I think I could, if only I knew how to begin.'[1]".

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In our society, persons with disabilities are no different from Alice in many ways. The general social construct of a "normal person" leads to the creation of such high barriers for people with different physical or mental attributes, that they find themselves ostracized and neglected. Just like Alice, they are left to look from the sidelines at the marvelous world that humanity has created. But, as Alice is unable to go to the other side of that little door and play her heart out in that "loveliest" garden because the door is of a much smaller size than what she can fit into, similarly the persons with disabilities are unable to access the benefits that their society has to offer and utilize their full potential because the doors to these benefits haven't been structured considering their needs. They are also left to ponder, like Alice, if there was a way that would make it possible for them to contribute to the society and benefit from it equally as others do.

The story, however, has a much more hopeful solution to propose. Alice finds a little bottle of magical potion that helped her in crossing over to the other side of the door. The magical potion represents how society could come together to recognize their inherent bias towards "normalcy" and create suitable solutions to make itself more accessible to the differently-abled people. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), adopted on 12 December 2006, has been a remarkable step taken by the world community towards recognizing this issue.

The UNCRPD imposes the signatories to adopt the concept of "reasonable accommodation" to do away with the physical, mental or social barriers that hinder the ability of persons with disabilities from living a dignified life. Although the Convention has been ratified/acceded to by 188 countries, its implementation in its true spirit has presented a challenge that has even been acknowledged by the Committee on the Rights of the Persons with Disabilities.

The present paper is an effort in presenting a comparative analysis of the implementation of UNCRPD by countries around the world. The authors have compared the domestic laws, implemented in furtherance of the ratification of UNCRPD, in the United States, the European Union (EU), Italy, Spain and India. While the United States represents one of the largest economies of the world, the EU is generally known to adopt a more welfarist approach when it comes to the marginalized sections of the society. Analyses of the laws of Italy and Spain would

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L. CAROLL, *Alice in Wonderland*, New Delhi, 2019 (Reprint), p. 17.

help us better understand how EU directives are implemented on the ground in individual countries in Europe. India, on the other hand, is a prominent representative of the developing world and, thus, presents a good case study about the implementation of the rights of persons with disabilities in countries with *per capita* lesser resources.

The paper begins with a brief outline of the provisions of the UNCRPD followed by a detailed analysis of domestic laws in different jurisdictions. The last section presents the findings of the comparative study and proposes some important suggestions.

2. *The Pathway to the United Nation Convention on the Rights of Persons with Disabilities of 2006*

The first regulatory instrument that, at the international level and with binding provisions for signatory States, addressed the issue of disability within the employment context is Convention No. 159 adopted on 1 June 1985 by the General Conference of the International Labor Organization. Member States committed themselves to enable the person with disabilities to obtain and retain suitable employment as well as subsequent professional advancement through, in particular, the elimination of all discrimination (Art. 2). It was also reaffirmed that the principle of equality constitutes the cornerstone of the policy of employment (and, consequently, social) inclusion of the person with disabilities (Art. 4).

Subsequently, on 20 December 1993, the United Nations General Assembly introduced the Standard Rules on the Equalization of Opportunities for Persons with Disabilities[2] developed as a result of the United Nations Decade of Disabled Persons (1983-1992)[3]. According to Rule No. 7, concerning the field of employment, persons with disabilities must be enabled to fulfill their human rights. Consequently, it was stated that "laws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment".

Although the provisions contained in the 1993 Standard Rules included "important principles" and involved "strong commitment" both morally and politically for the signatory States, the provisions contained therein were not, indeed, binding. However, their adoption was a crucial step in leading to the adoption of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2006[4]. The UNCRPD binds States parties to "promote,

[2] *https://www.ohchr.org/en/instruments-mechanisms/instruments/standard-rules-equalization-opportunities-persons-disabilities.*

[3] *https://www.un.org/development/desa/disabilities/history-of-united-nations-and-persons-with-disabilities-united-nations-decade-of-disabled-persons-1983-1992.html.*

[4] The United Nations Conventions on the Rights of Persons with Disabilities (UNCRPD) was adopted on 12 December 2006 by the Sixty-first session of the General Assembly by resolution A/RES/61/106 (*https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities*).

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". Among the founding principles listed in Article 3 of the UNCRPD, Sub-paragraph (b) refers to the principle of non-discrimination. Regarding, in particular, the area of employment and the right to work, Article 27 (1) (a) stipulates that States are obliged to "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".

The greatest innovation that has resulted from the entry into force of the UNCRPD is the introduction of the so-called bio-psycho-social notion of disability. Indeed, Article 1 of the UNCRPD states that persons with disabilities are "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 new conception of disability marked the definitive change of perspective from the previous medical approach and represents a major challenge for many states that, even today, are still trying to adapt their national laws to the bio-psycho-social conception of disability.

The UNCRPD also introduced an obligation for member States to ensure the adoption of so-called reasonable accommodations for persons with disabilities. Article 2 provides a definition of reasonable accommodation, which are "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". States parties are therefore obliged to ensure that reasonable accommodations are provided (Art. 5 (3)), since the refusal of which constitutes discrimination on the basis of the disability factor (Art. 3, last part of the period concerning the concept of discrimination).

In order to understand what the structural features of reasonable accommodations are, it is necessary to refer to the General Comments of the Committee on the Rights of Persons with Disabilities (CRPD)[5]. The latter consists of a body of independent experts that monitors the implementation of the UNCRPD by the signatory States; the Committee also provides guidance to States Parties in interpreting the provisions of the UNCRPD. According to the Committee on the Rights of Persons with Disabilities, reasonable accommodation refers to an arrangement that originates and applies in a "particular situation" and in a "particular context" and, above all, that must necessarily be the result of "negotiation" with the individual person whose adoption it is intended to benefit. Specifically, in General Comment No. 6 on Equality and Non-discrimination of 9 March 2018, the Committee on the Rights of Persons with Disabilities explains

[5] *https://www.ohchr.org/en/treaty-bodies/crpd/general-comments.*

that the duty to provide reasonable accommodation is "an *ex nunc* duty, reasonable accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights. [...] Reasonable accommodation must be negotiated with the applicant(s). [...] The duty to provide reasonable accommodation is an individualized reactive duty that is applicable from the moment a request for accommodation is received. Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability" (Section 5, Lett. D, No. 24 (b)).

The Committee on the Rights of Persons with Disabilities also commented on the definition of "disproportionate or undue hardship" which is the limit beyond which the introduction of reasonable accommodation, although virtually possible, is not enforceable. In fact, again in General Comment No. 6, the Committee stated that the clause now under consideration "should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. Both terms should be considered synonyms insofar as they refer to the same idea: that the request for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party" (Section 5, Lett. D, No. 25 (b)). Therefore, among the key elements to be considered in order to provide reasonable accommodations there is the need to assess "whether the modification imposes a disproportionate or undue burden on the duty bearer [which means] the determination of whether a reasonable accommodation is disproportionate or unduly burden some requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned" (Section 5, Lett. D, No. 26 (d)).

The UNCRPD and the General Comments of the Committee on the Rights of Persons with Disabilities constitute, to date, the main supranational-level source on the protection and rights of persons with disabilities. These regulatory complexes of international law, however, provide a general level of discipline whose transposition within individual States has specific characteristics and, at times, significant differences because of the diversity of the national legal systems.

3. The EU legislation on Reasonable Accommodation, between Directive No. 2000/78/EC and European Case Law.

The European Union addresses the topics of disability and reasonable accommodation in several provisions[6]. According to Article 19 of Treaty on the

[6] For a comprehensive analysis, W. CHIAROMONTE, *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, in "Variazioni su Temi di Diritto del Lavoro", 2020, 4, p. 897 ss.; M. PASTORE, *Disabilità e lavoro: prospettive recenti della corte di giustizia dell'unione europea*, in "Rivista del Diritto della Sicurezza Sociale", 2016, 1, p. 199 ss.; A. BRODERICK, D. FERRI (eds.), *International and European Disability Law and Policy. Text, Cases, Materials*, Cambridge, Cambridge University Press, 2019. On Articles 21 and 26 of the CFR, respectively, C. FAVILLI, F. GUARRIELLO, *Art. 21*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milano, Giuffrè, 2017, p. 412 ss.; D.

Functioning of the European Union (TFEU), the EU is entitled to adopt provisions on the issue of discrimination on various grounds, including disability. In addition, several other articles of the Treaties deal with the issue, most notably Chapter III of the Charter of Fundamental Rights of the European Union (CFR), entitled "Equality". On the other hand, the most relevant secondary legislation is Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, which, after defining the concepts of direct and indirect discrimination based on various grounds including disability under art. 2, addresses the issue of reasonable accommodation under art. 5 and recitals 20 and 21.

Art. 5 of Dir. 2000/78/EC states that: "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned". Thus, the aforementioned provision imposes an obligation on employers to provide reasonable accommodation for persons with disabilities, emphasizing that the measures required of the employer should be reasonable and should not impose a disproportionate burden.

These concepts are developed in the two recitals quoted above. Recital 20 provides for some examples of reasonable accommodation, such as training and courses, the adjustments to premises, equipment or working hours and the distribution of tasks among staff. It also states that the means chosen must be effective and practical. Recital 21, on the other hand, clarifies the concept of disproportionate burden by stressing that the required assessment is based primarily on economic elements, such as the financial and other costs involved, the size and financial resources of the organization, or the possibility of obtaining public funding or other assistance.

However, it is worth noting that, in 2009, the EU ratified the UNCRPD, which entered into force in 2011. This event marked a turning point in the fight against disability discrimination, as the Convention became binding under Art. 216(2) TFEU[7]. As a result, the Court of Justice of the European Union (CJEU) reinterpreted Directive 2000/78/EC in line with the UNCRPD. On the one hand, the Court delved the original definition of a person with a disability by

IZZI, *Art. 26*, *ivi*, p. 498 ss.; About Directive 2000/78/EC, M. ROCCELLA, T. TREU, M. AIMO, D. IZZI, *Diritto del lavoro dell'Unione europea*, Milan, Wolters Kluwer-Cedam, 2019, p. 321 ss.

[7] The UN Convention was ratified by Council Decision 2000/43/EC of 26 November 2009, W. CHIAROMONTE, *L'inclusione sociale*, cit., p. 901 ss.; see also L. WADDINGTON, *The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Non-Discrimination Law*, in U. BELAVUSAU, K. HENRARD (eds.), *EU Anti- Discrimination Law Beyond Gender*, Oxford-Portland, Hart, 2020.

overcoming a medical approach to the bio-psycho-social one to emphasize the barriers that a person faces in society because of his or her condition[8]. On the other hand, it broadened the concepts of "reasonable accommodation" and "undue burden"[9].

In this sense, in the *HK Danmark* case the Court stated, firstly, that: in line with Art. 2(2) of the UN Convention, the concept of reasonable accommodation "must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers". Secondly, the European Court emphasized that the financial cost of the measures required of the employer is only one of the parameters of the assessment of reasonableness, which must therefore be carried out on a case-by-case basis[10].

As regards the consequence of Art. 5 of Dir. 2000/78/EC violation, in the *DW* case, the CJEU clarified that the dismissal of a worker with a disability for "objective reasons" on the grounds of his condition "constitutes indirect discrimination […] unless the employer has beforehand provided that worker with reasonable accommodation, within the meaning of Article 5 of that directive". Following the above rulings, it would be possible to affirm that, according to EU legislation, once the employer has failed to provide appropriate and reasonable accommodation to the disabled worker, the latter can claim the protection afforded by Directive 2000/78/EC, thereby affirming that s/he has suffered a form of discrimination[11].

The European regulation, as interpreted by the CJEU, has certainly contributed to the implementation of Member States' anti-discrimination legislation, as set out below.

4. *Reasonable Accommodation in Italy*

4.1. *Legislative Decree No. 216/2003 and Case Law Definitions of "Persons with Disabilities" and "Reasonable Accommodation"*

In Italy, the topic of disability falls between different laws, resulting in a

[8] It is worth noting that Directive 2000/78/EC does not provide for an autonomous definition of a person with a disability, which made moving from one approach to another easier for the CJEU.

[9] For a comprehensive analysis of the most relevant ruling of the Court see, among all, W. CHIAROMONTE, *L'inclusione sociale*, cit., p. 907 ss. Recently, CJEU 10 February 2022, Case C-485/20, *HR Rail SA* summarized the CJEU state-of-the-art.

[10] CJEU, Joined Cases C-335/11 and C-337/11 of 11 April 2013, *HK Danmark*, about which, among all, W. CHIAROMONTE, *L'inclusione sociale*, cit., p. 915 ss.; M. PASTORE, *Disabilità e lavoro*, cit., p. 199 ss. See also E. ALES, *Il benessere del lavoratore: nuovo paradigma di regolazione del rapporto*, in "Diritti Lavori Mercati", 2021, 1, p. 48, who places the concepts of "proportionality" and "reasonableness" used in the *HK Danmark* case in the context of what he sees as a 'two-way relationship' between anti-discrimination law and workers' health and safety.

[11] CJEU, Case C-397/18 of 11 September 2019, *DW*.

fragmented system of protection[12]. Although the UNCRPD was ratified with Law No. 18 of 3 March 2009, the explicit and general obligation for the employer to provide reasonable accommodation was introduced only after the CJEU condemned Italy for the absence of a specific provision, despite the existence of a system of incentives to promote reasonable accommodation in the workplace[13]. As a result, the Italian Parliament amended Legislative Decree No. 216 of 9 July 2003 – which transposed Directive No. 2000/78/EC – by introducing Art. 3(3-*bis*)[14]. The latter provision states that "in order to ensure compliance with the principle of equal treatment of persons with disabilities, public and private employers are required to provide reasonable accommodation in the workplace, as defined in the United Nations Convention on the Rights of Persons with Disabilities".

Neither Art. 3(3-*bis*) nor, in general, L.D. No. 216/2003 define the concepts of persons with a disability and reasonable accommodation.

Regarding the definition of a person with a disability, it should be noted that the Italian Laws which provide for the definition of the concept (L. No. 104/1992 and L. n. 68/1999), support a medical approach, as they focus only on the percentage of disability and do not consider the social barriers preventing the person from interacting with society. On the other hand, since L.D. No. 216/2003 transposes Dir. No. 2000/78/EC, the Italian Supreme Court has defined its scope in accordance with the latter. Thus, to identify the recipients of the reasonable accommodation under Art. 3(3-*bis*) of L.D. No. 216/2003, the Court adopts the bio-psycho-social approach already proposed by the CJEU[15].

With regard to the concept of "Reasonable Accommodation", Art. 3(3-*bis*) of L.D. No. 216/2003 refers to the UNCDPR and borrows its elements. Therefore, considering supranational coordinates, the Italian Supreme Court defines such accommodation as those organizational changes enabling the employee to work on an equal basis with his or her colleagues, to be determined

[12] See L. No. 104 of 5 February 1992 (Framework Law for assistance, social integration, and rights of people with disabilities), L. No. 68 of 12 March 1999 (Law on the targeted employment of people with disability), Legislative Decree No. 216 of 9 July 2003 (Decree transposing the European Directive 2000/78/EC on equal treatment in employment and working conditions). Without claiming to be exhaustive, about L.. No. 68/1999, A. RICCARDI, *Disabili e lavoro*, Bari, Cacucci, 2018; D. GAROFALO, *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, in "Argomenti di Diritto del Lavoro", 2019, 6, p. 1211 ss.; L. TORSELLO, *I ragionevoli accomodamenti per il lavoratore disabile nella valutazione del centro per l'impiego*, in "Variazioni su Temi di Diritto del Lavoro", 2022, 2, p. 209 ss.

[13] CJEU, Case C-312/11, 4 July 2013, *Commission vs. Italy*, commented by M. AGLIATA, *La Corte di Giustizia torna a pronunciarsi sulle nozioni di "handicap" e "soluzioni ragionevoli" ai sensi della direttiva 2000/78/CE*, in "Diritto delle Relazioni Industriali", 2014, 1, p. 263 ss.; M.C. CIMAGLIA, *«Niente su di noi senza di noi»: la Corte di Giustizia delinea il nuovo diritto al lavoro delle persone con disabilità*, in "Rivista Giuridica del Lavoro e della Previdenza Sociale", 2013, 3, p. 399 ss.; see also, L. TORSELLO, *I ragionevoli accomodamenti*, cit., pp. 211-214.

[14] See art. 9(4-*ter*) of D.L. No. 76 of 28 June 2013, converted with amendments by Law No. 99 of 9 August 2013.

[15] *Ex multis*, Cass. Civ., Sez. Lav., 19 March 2018, No. 6798, commented by M. AIMO, *Inidoneità sopravvenuta alla mansione e licenziamento: l'obbligo di accomodamenti ragionevoli preso sul serio dalla cassazione*, in "Rivista italiana di Diritto del Lavoro", 2019, 2, p. 145 ss.

with a case-by-case approach[16]. However, the measure chosen must be "reasonable" and not impose an "undue burden" on the employer. This assessment is made in the first instance by the employer itself and, in the event of a dispute between the employer and the employee, by the Court, which can decide whether the measure in question is in fact reasonable and proportionate. In this case, the judicial control is allowed because it is required by law to protect persons who present a special condition, although it interferes with the employer's choice regarding the organization of the company, which is normally unquestionable[17]. In recent decisions, the Italian Supreme Court has interpreted these concepts as separate and autonomous[18].

As in the EU Law, the concept of proportionality focuses on the economic cost of the accommodation and is based on the analysis of "subjective" and "objective" parameters. The former are inherent to the conditions of the employer and consist of the size of the company, the difference between invoices and costs, or the possible existence of an ongoing crisis. The objective parameters relate to the protected subject and include the employer's eligibility for public funding to mitigate the cost of the measure chosen[19].

On the other hand, the "reasonableness" assessment seems only to evaluate how the measure chosen by - or required of - the employer affects the organization of the company. More specifically, the Court sees the concept of reasonableness as a concrete application of the general principle of good faith between the parties to a legal relationship[20]. According to this principle, in addition to the principal obligation of the contract, the parties have the additional duty to take all actions needed, according to the circumstances of the case, to ensure the benefit that the other party derives from the agreement, within the limits of a reasonable sacrifice of their own. In the examined context, the employer should make the organizational changes that enable the person with disabilities to work in an environment compatible with his or her condition, within the limits of a tolerable sacrifice of the interest in productivity. The employer must also balance the

[16] Cass. Civ., Sez. Lav., 9 March 2021, No. 6497, commented by C. ALESSI, *Disabilità, accomodamenti ragionevoli e oneri probatori*, in "Rivista Italiana di Diritto del Lavoro", 2021, 4, p. 613 ss.; P. DE PETRIS, *L'obbligo di adottare accomodamenti ragionevoli nei luoghi di lavoro: approdi definitivi della Suprema Corte e questioni ancora aperte*, in "Argomenti di Diritto del Lavoro", 2021, 4, p. 1061 ss.

[17] On the relationship between reasonable accommodation and the judge's power to assess the employer's organizational choices, D. GAROFALO, *La tutela del lavoratore disabile*, cit., p. 1229, as well as S. D'ASCOLA, *Il ragionevole adattamento nell'ordinamento comunitario e in quello nazionale. Il dovere di predisporre adeguate misure organizzative quale limite al potere di recesso datoriale*, in "Variazioni su Temi di Diritto del Lavoro", 2022, 2, pp. 202-208, who believes that the judicial power to assess the employer's organizational choices on reasonable accommodation has its grounds in the new wording of Art. 41 of the Italian Constitution. About the issue in general, P. CAMPANELLA, *Clausole generali e obblighi del prestatore di lavoro*, in "Giornale di Diritto del Lavoro e di Relazioni Industriali", 2015, p. 89 ss.

[18] Cass. Civ., Sez. Lav., No. 6497/2021, cit.

[19] *Ex multis*, Cass. Civ., Sez. Lav., 26 October 2018, No. 27243, commented by M. AIMO, *Inidoneità*, cit., p. 145 ss.; see also S. D'ASCOLA, *Il ragionevole adattamento*, cit., p. 201.

[20] Arts. 1175 and 1375 of the Italian Civil Code. About the principle of good faith, *ex multis*, Cass. Civ., Sez. Un., 15 November 2007, No. 23726; Cass. Civ., Sez. Un., 25 November 2008, No. 28056, in "Dejure".

interests of other employees who may be affected by the organizational measures taken. The "reasonable" measure achieves this balance within the limits of socially acceptable tolerance[21].

4.2. Remedies and Sanctions for Failure to Provide Reasonable Accommodation

L.D. No. 216/2003 does not specify the consequences of failure to comply with the obligation of reasonable accommodation, nor do other laws provide for specific sanctions or establish bodies directly responsible for imposing them. Several questions therefore arise as to the protection to be applied. In this context, a distinction should be made between: a) the case where reasonable accommodation is not provided at the time of recruitment or during the execution of the contract; b) the case where a worker with a disability becomes incapable of performing his or her duties because of his or her condition and is dismissed by the employer who considers that reasonable and proportionate accommodation cannot be provided within the company[22].

With regard to the hypotheses under (a), there is a general debate as to whether the anti-discrimination regulation is applicable. Some authors consider it possible, as they qualify the breach of the obligation to provide reasonable accommodation as direct or indirect discrimination. The result is the application of the same remedies, such as, in case of an individual claim, the possibility to use the simplified procedure provided for in Art. 28 of Legislative Decree No. 150/2011, which, on the one hand, recognizes a partial reversal of the burden of proof and, on the other hand, empowers the judge to: i) order the employer to cease the discriminatory conduct; ii) adopt "any other appropriate measure to eliminate its effects"; iii) order the employer to compensate for pecuniary and non-pecuniary damages[23].

The case under (b) raises several problems relating to: (i) the procedure to be followed; (ii) the content of the burden of proof; (iii) the applicable protection.

As regards the issue under (i), Art. 441-*quater* of the Code of Civil Procedure, entitled "Discriminatory dismissal", allows the plaintiff to choose between the ordinary procedure and the so-called "special" procedures. Since the above-

[21] Cass. Civ., Sez. Lav., No. 6497/2021, cit., 5.4.

[22] The scope of Directive 2000/78/EC covers every stage of the relationship. Cf. M. BARBERA, *Le discriminazioni basate sulla disabilità*, in ID. (ed.), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Milano, Giuffrè, 2007, p. 122.

[23] As regards the case of the unfair refusal to employ a worker with a disability, it is being debated whether the latter can ask the Courts for the compulsory establishment of the employment relationship, in accordance with art. 2932 of the Italian Civil Code. For a more comprehensive analysis, Cf. D. GAROFALO, *La tutela del lavoratore disabile*, cit., p. 1232 ss. On the topic, Cf. also C. SPINELLI, *La sfida degli "accomodamenti ragionevoli" per i lavoratori disabili dopo il Jobs Act*, in "Diritti Mercati Lavori", 2019, p. 52. About procedural aspects, Art. 28 of L. No. 150/2011 was recently modified by Legislative Decree No. 149 of 10 October 2022, as amended by L. No. 197 of 29 December 2022 (s.c. "Cartabia Reform"). Cf. T. BIAGIONI, *I procedimenti in materia di Discriminazione*, in "Lavoro Diritti Europa", 2023, special issue, p. 1 ss.

mentioned Art. 441-*quarter* does not explicitly mention any special procedure, it is being debated whether among the latter it is possible to include the one referred to in Art. 28 of L.D. No. 150/2011, with some authors answering in the affirmative[24].

As regards the issue under (ii), it should be noted that the obligation to provide reasonable accommodation prior to dismissal is very similar to the employer's broader obligation to consider the possibility of reassigning the worker to other tasks, even if minor (obligation of "*repêchage*"). Thus, if the worker becomes physically or mentally incapable of performing his or her tasks due to an aggravation of his or her disability, it is being debated whether the two obligations have the same content or the first one imposes to the employer to carry out further assessments[25]. The Italian Supreme Court supports this second approach and allocates the burden of proof as follows. Since, under Italian Law, it is for the employer to prove that the dismissal is legit, the employee must demonstrate his disability, while the former has to offer evidence of: a) the employee's inability to perform his duties; b) the impossibility of redeploying him in other, even lower, areas of the organization; c) the impossibility, unreasonableness or disproportionality of alternative organizational solutions. If the employer does not provide the required evidence, the dismissal is considered unlawful[26].

Once the Judge establishes that the dismissal is unfair, the third question [under (iii)] concerns the applicable remedies. It should be noted that the Italian remedies for unlawful dismissal depend on the size of the company, the year in which the employee was hired and the reason why the dismissal is unfair, resulting in a system of protection which cannot be examined in detail for the purposes of this paper[27]. The main issue concerns the case where the employer dismisses the

[24] T. BIAGIONI, *I procedimenti,* cit., p. 12 ss.

[25] Cf. art. 42 of L.D. No. 81 of 9 April 2008, Art. 4(4) and art. 10(3) of L. No. 68/1999, about which C. GAROFALO, *La tutela del lavoratore disabile*, cit., p. 256 ss.; R. VOZA, *Sopravvenuta inidoneità psicofisica e licenziamento del lavoratore nel puzzle normativo delle ultime riforme*, in "Argomenti di Diritto del Lavoro", 2015, 4-5, p. 778; S. GIUBBONI, *Il licenziamento per sopravvenuta inidoneità alla mansione dopo la legge Fornero e il Jobs act*, in "WP C.S.D.L.E. "Massimo D'Antona".IT", n. 261/2015, p. 13.

[26] Cass. Civ., Sez. Lav., No. 6497/2021, 5.6.

[27] Without claiming to be exhaustive, for a general reconstruction of the topic, F. CARINCI, R. DE LUCA TAMAJO, P. TOSI, T. TREU (eds.), *Diritto del lavoro, 2. Il rapporto di lavoro subordinato*, II ed., Turin, Utet Giuridica, 2022. About L. No. n. 604/1966, D. NAPOLETANO, *Il licenziamento dei lavoratori*, Turin, Utet, 1966. About the discipline following L No. 300/1970 (Italian Statute for Workers), M. PERSIANI, *La tutela dell'interesse del lavoratore alla conservazione del posto*, in G. MANZONI, L. RIVA SAN SEVERINO (directed by), *Nuovo Trattato di Diritto del lavoro*, II, Padua, Cedam, 1971, p. 375 ss.; about the discipline following the L. No. 108/1990, P. SANDULLI, A. VALLEBONA, C. PISANI, *La nuova disciplina dei licenziamenti individuali*, Padua, Cedam, 1990; about the discipline following the Legislative Decree No. 92/2012, G. VIDIRI, *La riforma «Fornero»: la (in)certezza del diritto e le tutele differenziate del licenziamento illegittimo*, in "Rivista Italiana di Diritto del Lavoro", 2021, 1, p. 617 ss. About the discipline following the Legislative Decree No. 23/2015, E. GRAGNOLI (ed.), *L'estinzione del rapporto di lavoro subordinato*, in M. PERSIANI, F. CARINCI (directed by), *Trattato di diritto del lavoro*, Padua, Cedam, 2017; P. BELLOCCHI, P. LAMBERTUCCI, M. MARASCA (eds), *I danni nel diritto del lavoro*, Milan, Giuffrè, 2022; G. AMOROSO, *Art. 18 Statuto dei lavoratori: una storia lunga oltre cinquant'anni*, Bari, Cacucci, 2022; V. LUCIANI, *I licenziamenti individuali nel privato e nel pubblico*, Turin, Giappichelli, 2022; O. MAZZOTTA, *L'estinzione del rapporto di lavoro*, in P. SCHLESINGER, D. BUSNELLI, G. PONZANELLI (directed by), *Il Codice Civile - Commentario*, Milan, Giuffrè, 2023.

employee without providing the reasonable accommodation to which the employee should have been entitled. In such cases, the plaintiff can invoke two remedies that can potentially overlap: the remedy against discriminatory dismissal on the ground of disability; the remedy against dismissal on the ground of the worker's physical or mental incapacity to perform his or her tasks which proves to be unjustified. In the first case, the dismissal is always sanctioned by reinstatement in the job with full compensation. In the second case, the protection varies according to the parameters mentioned above, although reinstatement is still provided for in most cases[28].

4.3. Framework Law No. 227/2021 on Disability: Potential Effects on Labour Relations.

In this context, Law No. 227 of 22 December 2021 was enacted with the aim of simplifying the provisions on disability through several implementing legislative decrees, which are still in the process of being adopted[29]. Since the new Law focuses on the topic in general, it is likely to have only an indirect effect on the above-mentioned matters.

Among the various innovations, L. No. 227/2021 requires the implementing legislative decrees to establish a new definition of bio-psycho-social disability in line with the UNCRPD and EU Legislation. Specifically, Art. 2 of the new Law

[28] For a comprehensive analysis Cf. C. GAROFALO, *La tutela del lavoratore disabile*, cit., p. 263 ss.; I. BRESCIANI, *Le conseguenze sanzionatorie derivanti dalla violazione dell'obbligo di attuare i ragionevoli accomodamenti, fra licenziamento nullo o ingiustificato*, in "Variazioni su Temi di Diritto del Lavoro", 2022, 2, p. 292 ss.; R. VOZA, *Sopravvenuta inidoneità*, cit., p. 781 ss.; D. CASALE, *Malattia, inidoneità psicofisica e handicap nella novella del 2012 sui licenziamenti*, in "Argomenti di Diritto del lavoro", 2014, 2, p. 411. M. PERUZZI, *Diritto antidiscriminatorio e illegittimità del licenziamento per inidoneità psico-fisica: (ri)costruzione di una fattispecie*, in "Lavoro Diritti Europa", 2020, 2, p. 3; Cass. Civ., Sez. Lav., No. 6497/2021, cit. mentions the issue without addressing it, as it was outside the scope of the study.

[29] According to Art. 1(5) of L. No. 227/2021, the implementing legislative decrees will intervene in the following areas: a) definition of the condition of disability as well as revision, reorganization and simplification of sectoral legislation; b) assessment of the condition of disability and revision of its basic evaluation processes; c) multidimensional assessment of disability, implementation of the Individual, Personalized, Participatory Life Project (IPPLP); d) computerisation of assessment and archiving processes; e) redevelopment of public services with regard to inclusion and accessibility; f) establishment of a National Guarantor for persons with Disabilities. At the time of submitting this paper, only Legislative Decree No. 222 of 13 December 2023 was published in the Official Journal: it focuses on the improvement of public services for inclusion and accessibility. The Italian Government has provisionally approved several others implementing decrees, the texts of which have not yet been published by the institutional sources, as they still have to be submitted for consultation and possible amendment by the Council of State, the Unified State-Regions Conference and the Parliamentary committees, in accordance with the procedure under art. 1(2) of L. n. 227/2021. For further details, Cf. Ministero per la Disabilità, *Riforma accertamento invalidità civile e valutazione multidimensionale, approvati decreti attuativi*, 3 November 2023, in *www.disabilita.governo.it.*; Consiglio dei Ministri, press release No. 57 of 3 November 2023, in *www.governo.it*. For a comprehensive analysis of L. No. 227/2021, Cf. M. DE FALCO, *Ragionando attorno alla legge delega in materia di disabilità: una prospettiva giuslavoristica*, in *"Responsabilità Civile e previdenza"*, 2022, 5, p. 1738 ss.; E. DAGNINO, *La tutela del lavoratore malato cronico tra diritto vivente e (mancate) risposte di sistema*, in "Diritto delle Relazioni Industriali", 2023, 2, p. 336 ss.; L. TORSELLO, *I ragionevoli accomodamenti*, cit., p. 243 ss.; O. BONARDI, *Luci e ombre della nuova legge delega sulla disabilità*, in *www.italianequalitynetwork.it*.

clarifies that the condition of disability shall be determined by two procedures. The first one consists of a basic assessment, which - "under Art. 3 of L. No. 104/1992 as amended in accordance with the UN Convention on the Rights of Persons with Disabilities" - verifies the condition of the person concerned and his or her needs of support[30]. The assessment is now entrusted to a single competent body, INPS ("Istituto Nazionale della Previdenza Sociale" – National Institute for Social Services), which follows a single process, replacing the previous system of different bodies, processes and evaluations depending on the purpose of the request[31]. The second procedure may only be initiated upon the applicant's or their representative's request: it involves a multidimensional assessment based on the bio-psycho-social approach, which aims to identify the barriers that the person concerned may encounter while interacting with the society[32]. The multidimensional analysis is required to create the "Individualised, Personalized and Participatory Life Plan" (IPPLP), which, based on the barriers identified, ascertains the resources, means and experts needed to accomplish the person's life goals and aspirations[33]. To this end, the project identifies the "reasonable accommodations" […] needed […] to support the participation of people with disabilities in all aspects of life, […] including work"[34].

Such accommodations are a pivotal aspect of the L. No. 227/2021, which, in addition to what has been highlighted so far, entrusts the implementing legislative decrees with the task to revise L. No. 104/1992, by providing for the definition of "reasonable accommodation" and establishing "adequate means of protection" in compliance with the UNCRPD's regulations[35].

Finally, L. No. 227/2021 establishes the National Guarantor of Persons with Disabilities: an independent authority responsible for monitoring compliance with the legislation on disability. According to the latter Law, the authority will have the power to verify the existence of discrimination in public administrations and concessionaires, also by requesting supplementary documentation. The aim of the verification process is to develop recommendations and opinions for (only) the above-mentioned public entities: these proposals may suggest the adoption of appropriate accommodation to address the significant concerns detected while verifying.

In anticipation of the executive decrees, it is worth asking what impact the new legislation will have on labour relations.

In this sense, firstly, it will be necessary to verify whether the new definition of disability will effectively simplify the current legislation. In this regard, as mentioned above, case law has already determined the scope of application of Art. 3(3-*bis*) of L.D. No. 216/2003, using the bio-psycho-social approach,

[30] My translation. Cf. Art. 2(2)(a)(1) of L. No. 227/2021.
[31] My translation. Cf. Art. 2(2)(b)(2) of L. No. 227/2021.
[32] Cf. Art. 2(2)(a)(1) of L. No. 227/2021.
[33] My translation. Cf. Art. 2(2)(c)(1 and 8) of L. No. 227/2021.
[34] My translation. Cf. Art. 2(2)(c)(5) of L. No. 227/2021.
[35] My translation. Cf. Art. 2(2)(a)(5) of L. No. 227/2021.

independently of the (only) current legal definitions of persons with disabilities found in L. No. 104/1992 and L. No. 68/1999. On the other hand, however, the establishment of the bio-psycho-social approach could ensure coordination between the latter laws mentioned and the anti-discrimination regulation.

That said, L. No. 227/2021 seems to have some critical aspects, the most crucial of which is the fact that it runs the risk of offering a similar system to the previous one, as the Law does not clearly define the approach to be used for the basic assessment. In this regard, on the one hand, as mentioned above, L. No. 227/2021 mandates the implementing legislative decrees to amend the definition of person with a disability found in Art. 3 of L. No. 104/1992 "in accordance with the content of the Convention on the Rights of Persons with Disabilities", thus suggesting an overcoming of the traditional medical approach towards a bio-psycho-social one. On the other hand, L. No. 227/2021 specifies that this approach will be used (only) in the multidimensional assessment, which is optional and only useful for the development of the IPPLP. If the basic assessment, to which the main protections are linked, is based on a purely medical approach, there will be a twofold risk: the legal system will only be partially brought into line with the UNCRPD; the desired coordination between anti-discrimination and disability law will not be achieved.

Apart from the innovations on the definition of disability, it will be also necessary to assess whether - and how - the implementing legislative decrees will affect the employers' existing obligation to provide "reasonable accommodation". In this regard, the Italian Government has recently clarified that the decrees will provide for a definition of reasonable accommodation and guarantee the right to the latter through "the provision of a procedure consisting of modifications and adaptations deemed necessary, as long as they are not excessive or disproportionate, to ensure the enjoyment and exercise of civil and social rights by persons with disabilities"[36]. However, it is not certain that such a procedure will also be activated in the workplace. On the other hand, according to L. No. 227/2021, the IPPLP will likely indicate the reasonable accommodation needed to allow the person with a disability to work in the field he or she wishes. In most cases, the accommodation will be designed *a priori*, without involving the potential employer, who may not yet have been identified in the concrete case. It remains to be seen whether the latter, when recruiting or managing the working environment, will be obliged to follow the recommendations of the IPPLP, or he or she will simply have to take the latter into account, with the possibility of proposing accommodation more suitable to the company. In the most likely scenario, the employer will be free to decide if he or she can provide for the proposed accommodation, and his or her decision may be subject to judicial review. Otherwise, the parties could avoid litigation by using the negotiation procedure to which the Government refers to, if applicable to the labour field. In any case, the

[36] My translation. Cf. Consiglio dei Ministri, Press Release No. 57 of 3 November 2023, in *www.governo.it*.

employer's organizational autonomy and the courts' discretion will likely remain as broad as before Law No. 227/2021, unless the latter defines reasonable accommodation more precisely.

Finally, the impact of the National Guarantor for the Rights of Persons with Disabilities must also be assessed, given the limited scope of its powers. On the one hand, although L. No. 227/2021 entrusts the Authority with the general task of monitoring the compliance with disability legislation, it does not grant it any powers towards private entities, but only towards Public Administrations and concessionaires. On the other hand, the Guarantor does not seem to have any sanctioning power, or procedural legitimacy, in case the addressees do not comply with its proposals. It remains to be seen whether the Guarantor will exercise control over labour relations. If this is the case, the lack of sanctioning and procedural powers and the limited scope will result in a deficient protection, which the delegated decrees do not seem to be able to remedy without running into an excess of delegated powers.

5. *Spain*

5.1. *The regulation of the reasonable adjustments in Spain*

The Spanish Constitution establishes as an imperative for the public authorities the promotion of conditions in which the freedom and equality of the individual and of the groups to which he or she belongs, such as trade unions or business associations, are real and effective. They also have the obligation to remove obstacles that prevent or hinder their full realization, which brings us to the central question, the subject of this study. The meaning of this obligation is nothing other than to facilitate the participation and access of these groups to all areas of life, since they face greater difficulties than other citizens due to their circumstances. This is particularly true of access to employment.

This idea is in line with the provisions of Article 14 of the EC Treaty, which recognizes the importance of access to employment. Article 14 of the EC Treaty recognizes that we are all equal before the law, without discrimination on any grounds such as birth, race, sex, religion, opinion or any other personal or social condition or circumstance. In other words, any form of discrimination in relation to any of the circumstances listed in the above provision is prohibited.

In 1978, the legislator showed its concern to explicitly protect a number of subjects, although it left open the possibility that other types of situations could be included in this anti-discrimination protection. Thus, the expression "any other personal or social condition or circumstance" could be used to include situations other than those mentioned above.

Likewise, Art. 49 EC also includes among the guiding principles of social and economic policy the mandate for public authorities to implement a policy of

prevention, treatment, rehabilitation and integration of people with disabilities, which undoubtedly includes environmental adaptations and reasonable adjustments.[37]. This article contains an obsolete wording, the result of the political and social moment of the time, but which, at present, bears no relation to the provisions of the Convention on the Rights of Persons with Disabilities[38].

On the other hand, and continuing with the Spanish legal system, we should mention the transposition of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. This was done by means of Law 62/2003 of 30 December 2003 on fiscal, administrative and social measures, which for the first time introduced the concept of reasonable accommodation.[39].

This law was succeeded by Royal Legislative Decree 1/2013, of 29 November 2013, approving the Revised Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (hereinafter, RGLGPD)[40]. It is a regulation notoriously influenced by the Convention on the Rights of Persons with Disabilities, in which all provisions on disability were recast. In fact, it is a cross-cutting provision aimed at prohibiting discrimination against persons with disabilities.

This regulation contains the concept of reasonable accommodation from two different perspectives. The first, which is general, is contained in Article 2.m of the RGLGPD, which states that these are "necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities, which do not impose a disproportionate or undue burden, when required in an effective and practical manner in a particular case, in order to facilitate accessibility and participation and to ensure the enjoyment or exercise of all rights by persons with disabilities on an equal basis with others". The second, specific to the labour sphere, in art. 40.2 of the same regulation, which defines reasonable accommodation as the appropriate measures that companies are obliged to adopt to adapt the workplace and the accessibility of the company, according to the needs of each specific situation, in order to allow people with disabilities access to employment, performance of their work, professional advancement and access to training, unless these measures represent an excessive burden for the employer. However, despite the legislator's intention, there is currently no other provision that has developed or specified what we understand by reasonable accommodation, nor has it been established how to resolve disagreements between the employee and the employer about how reasonable accommodation should be provided. Furthermore, it should be noted that we also have no notion of the maximum or minimum time available to the company to carry out such adjustments.

[37] J.A. RUEDA, *La reserva de empleo para las personas con discapacidad en España*, Murcia, Ed. Laborum, 2021.

[38] Constitutional Court, 27 March 2023, No. 21.

[39] BOE No. 313, 31/12/2003.

[40] BOE No. 289, 03/12/2013.

On the other hand, it should be noted that in Spain reasonable accommodation is a multi-level obligation, as it includes, among other things, access to employment, the provision of services, progress in the workplace and training, which means talking about the vicissitudes of the employment relationship[41].

This means that the employer is obliged to adopt the necessary measures from the beginning of the employment relationship until it is terminated.

Finally, we would like to point out that recently, in July 2023, the White Paper on Employment and Disability was published, a document that serves to reflect, analyze, guide and propose legislative changes and public policies on employment and the right to work for people with disabilities in Spain[42]. It has been prepared by the Royal Board on Disability (Ministry of Social Rights and Agenda 2030), the Ministry of Labour and Social Economy, CERMI and the ONCE Foundation.

5.2. *The limitations of reasonable accommodation*

However, it is true that the adoption of reasonable accommodation cannot have an absolute or imperative value, but, on the contrary, it can be subject to interpretation or modulation. This is what the provision itself indicates when it states that a burden is excessive when the cost of implementing the necessary measures cannot be covered by the public measures, aids or subsidies offered by the State, and when this is not possible because of the size and total turnover of the burden[43].

The first difficulty with the rule requiring the company to make reasonable adjustments stems from the wording of the article itself, which uses the term "reasonable measures" and then indicates that they will be applied on a case-by-case basis[44]. Likewise, it is not defined for how long the worker or the person applying for a job can require the company to carry out reasonable accommodation. In this sense, it should be understood that this can be carried out for the entire duration of the employment relationship.

The second is the consequence of linking the implementation of reasonable accommodation to public "funding". In this sense, the correspondence with aid or subsidies, as well as bonuses, may have a negative and dissuasive effect. This circumstance makes compliance with art. 40.2 RDLGPD to the incentives established by public policy.

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[41] D. COLOMINAS, *La obligación de realizar ajustes razonables en el puesto de trabajo para personas con discapacidad: una perspectiva desde el Derecho comparado y el Derecho español*, Albacete, Bomarzo, 2019.

[42] Open access, *https://www.siis.net/documentos/ficha/586922.pdf*.

[43] V. CORDERO, *Los ajustes razonables: un instrumento clave en la tutela antidiscriminatoria de las personas con discapacidad en el trabajo, in Cielo Laboral* (versión digital). *https://www.cielolaboral.com/wp-content/uploads/2022/11/cordero_noticias_cielo_n11_2022.pdf*.

[44] D. COLOMINAS, *La obligación de realizar ajustes razonables del puesto de trabajo a personas con discapacidad en EE.UU. y España: una visión comparada*, in "Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo", 2015, p. 19.

5.3. *The sanctions that can be imposed on the company for non-compliance*

With regard to the company's obligation to make reasonable adjustments, the following should be analyzed. In this sense, the regulation obliges the company to make reasonable adjustments within the limits set by the applicable regulations. In this sense, any business conduct that is contrary to the constitutional mandate may lead to the commission of an offense. This is justified by a discriminatory act, insofar as it is the condition of a person with a disability that leads the company to take a particular decision without objective reasons[45].

Decisions or actions that involve discrimination on the grounds of disability will result in the imposition of the corresponding sanction on the company. In the Spanish labor system, the imposition of such a sanction is justified by the violation of the provisions of Art. 14 of the EC Treaty, which obliges public authorities to guarantee equal treatment and companies not to discriminate against workers on the grounds of disability.

This conduct is typified in art. 8.12 of Royal Legislative Decree 5/2000, of 4 August, approving the revised text of the Law on Offences and Penalties in the Social Order (hereinafter, LISOS)[46]. This provision does not address the specific situation of discrimination on the basis of disability, or in other words, it does not explicitly criminalize failure to provide reasonable accommodation. However, as we have said, the situation is channeled through the violation of the right to non-discrimination.

With regard to the sanction imposed, it should be noted that it can range from 6251 euros to 187.515 euros, in accordance with art. 70.1.c LISOS. Once again, this article penalizes unilateral decisions by the company, which is close to the concept of sui generis discrimination, so we are not talking about a specific classification.

All this, notwithstanding the fact that the decision taken by the company would be declared null and void by the court, with the imposition of the corresponding compensation, in addition to the need to carry out reasonable adjustments, we would be talking about discrimination. This is the case, for example, when the employment relationship is terminated due to the worker's incapacity, or in other words, when an objective dismissal is carried out, in accordance with art. 52, a ET[47].

6. *India*

6.1. *The Concept of "Reasonable Accommodation" in India*

The Census of 2011 brought to the fore some very pertinent questions relating

[45] Constitutional Court, 15 March 2021, No. 51.
[46] BOE No. 189, 08/08/2000.
[47] Supreme Court, 22 February 2018, No. 757.

to the employability of persons with disabilities in India[48]. It was found that out of the 26.8 mn disabled persons living in India, only about 9.7 mn were engaged in any type of work. While most of them were employed as cultivators (23%) and agricultural workers (31%), a meager 4% of the total number of persons with disabilities were employed in household industries. Their low participation in the economic activities could also be attributed to the low level of education amongst them. The literacy rate amongst persons with disabilities stands at 55%, while those with a graduation degree or above constitute only about 5% of their total population. These figures shed light on the large-scale apathy towards persons with disabilities at an institutional level.

A legal solution to the issue of inclusivity of persons with disabilities was proposed in 1996 when the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PwD Act 1995) was brought into effect. This legislation was adopted in furtherance of the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region passed at the meeting of the UN Economic and Social Commission for Asia and Pacific held at Beijing in 1992. It entitled persons with not less than forty per cent. disability to certain important kinds of rights like minimum 3% reservation in jobs[49], removal of architectural barriers[50] and provision of technological support at educational institutions[51], affirmative action[52] and non-discrimination in public transport[53] and other built environments[54]. However, the PwD Act, 1995 recognized only seven classes of disabilities and followed a medical-model approach that did not consider its societal effects. But more than that, its failure was mainly attributed to the poor implementation of its provisions[55].

6.2. *The Rights of Persons with Disabilities Act, 2016*

The PwD Act, 1995 was replaced by the Rights of Persons with Disabilities Act, 2016 (RPwD Act, 2016). The enactment of this statute was aimed to satisfy the obligations under the United Nations Convention on Rights of Persons with Disabilities (UNCRPD) that was signed and ratified by India in 2007. This section presents a brief exposition of the key provisions under the statute while analyzing them in light of the UNCRPD.

[48] *Disability in India*, Office of Chief Commissioner of Persons with Disabilities, Ministry of Social Justice and Empowerment, Government of India in *http://www.ccdisabilities.nic.in/resources/disability-india* (last visited on 20th Nov., 2023).

[49] S. 33 of the PwD Act, 1995.

[50] S. 30(b) of the PwD Act, 1995.

[51] S. 28 of the PwD Act, 1995.

[52] Ff. 42 & 43 of the PwD Act, 1995.

[53] Ff. 44 & 45 of the PwD Act, 1995.

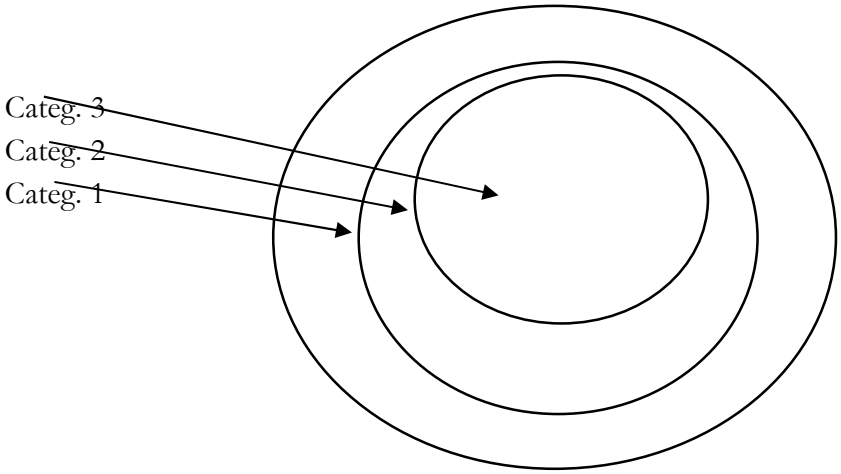
[54] S. 46 of the PwD Act, 1995.

[55] *Report on Implementation of the Persons with Disabilities Act, 1995: (PWD) – Some Glimpses*, National Human Rights Commission in *https://nhrc.nic.in/sites/default/files/Rpt_Imp_PWD_Some_Glimpses.pdf* (last visited on 20th Nov., 2023).

The RPwD Act, 2016 was a step forward in the right direction but not without some lacunas. As opposed to its predecessor, the scope of the RPwD Act, 2016 is much wider. It covers 21 disabilities as opposed to only 7 covered under the PwD Act, 1995[56]. Also, the list of disabilities, as enunciated under the Schedule to the RPwD Act, 2016, is an open-ended list and leaves the scope for the central government to add new kinds of disabilities in it[57]. It is to be noted that the RPwD Act, 2016 is different from the PwD Act, 1995 also in the sense that it extends the benefits under the statute to even such persons who have less than forty per cent. of a specified disability[58].

Another welcome step is the adoption of the concept of "person with disability", as has been proposed under the UNCRPD[59]. However, in addition to the concept of "person with disability", the statute also proposes two more classes of beneficiaries, i.e. "person with benchmark disability" and "person with disability having high support needs". While a "person with benchmark disability" is one who suffers from "not less than forty per cent. of a specified disability"[60], a "person with disability having high support needs" is one who has been so certified by the certifying authority designated by the appropriate government[61]. The Act thus creates three separate classes of persons with disabilities and endows upon them different kinds of rights.

The classification of persons with disabilities under the RPwD Act, 2016 is structured to work in a tiered system as is represented through the Venn diagram given below.



[56] C.L. NARAYAN AND THOMAS JOHN, *The Right of Persons with Disabilities Act, 2016: Does it address the needs of the persons with mental illness and their families*, in "Indian Journal of Psychiatry", 2017, p. 17.

[57] Entry 6 of the Schedule, RPwD Act, 2016.

[58] S. 2(t) of the PwD Act, 1995 defined "person with disability" as someone who suffers from not less than forty per cent. of any disability as certified by a medical authority.

[59] S. 2(s) of the RPwD Act, 2016 defines "persons with disabilities" on similar lines as Para 2 of Art. 1 of the UNCRPD.

[60] S. 2(r) of the RPwD Act, 2016.

[61] S. 2(t) of the RPwD Act, 2016.

In the above diagram, Category 1 represents "person with disability", Category 2 represents "person with benchmark disability" and Category 3 represents "person with disability having high support needs". The RPwD Act, 2016 provides general kinds of rights to all persons with disability. These rights include the right to reasonable accommodation in places of employment as well as education, equal opportunity policies in every establishment, provision of loans at concessional rates, disability pension, unemployment allowance and other healthcare and rehabilitation related rights. Then there are some special kinds of rights available only to persons with benchmark disability, that include categories 2 and 3[62]. These include the right to free education until the age of eighteen, five per cent. reservation in higher educational institutions, jobs, allotment of agricultural land and housing schemes. Additionally, these two categories would also benefit from poverty alleviation schemes, and schemes for housing, shelter, setting up of occupation and business designed exclusively for them. Finally, for those persons who fall only under Category 3, an Assessment Board is constituted that has the power of certifying the need and nature of the high support that the person so requires[63].

In order to avail of these benefits, the persons with disabilities are required to obtain a certificate from an authority so designated by the appropriate government[64]. The Central Government has published detailed guidelines for assessing the extent of the different kinds of disabilities as are covered under the RPwD Act, 2016[65]. The procedure for obtaining of such certification requires the individual so interested in availing of the benefits under the RPwD Act, 2016 to first apply to the certifying authority[66]. The certifying authority is then required to assess the disability of the applicant on the basis of the central government guidelines and issue or deny the applicant a disability certificate[67]. Thus, it can be observed that the RPwD Act, 2016, similar to its predecessor, is dependent on the medical model of disability as opposed to the human rights model, as has been envisioned under the UNCRPD. The UNCRPD Committee in its report on India, has also flagged the requirement of multiple assessments creating undue burden for applicants as a matter of concern[68].

For the proper implementation of its provisions, the statute establishes a separate and elaborate implementation mechanism. Every government establishment is required to appoint a grievance redressal officer (GRO), who has the power to investigate upon the complaints filed by employees with disability and

[62] Chapter VI of the RPwD Act, 2016.

[63] S. 38 of the RPwD Act, 2016.

[64] S. 56 of the RPwD Act, 2016.

[65] Guidelines for the Purpose of Assessing the Extent of Specified Disability in a Person included under the Rights of Persons with Disabilities Act, 2016 (49 of 2016).

[66] S. 58(1) of the RPwD Act, 2016 read with R. 17 of the RPwD Rules, 2017.

[67] S. 58(2) of the RPwD Act, 2016 read with R. 18 of the RPwD Rules, 2017.

[68] CRPD Committee, Concluding Observations on the Report of India, ["Concluding Observations"], GE. 19-18639[E], 24th September, 2019, para 7[b].

to recommend corrective measures to the employer[69]. An appeal against the decision of the GRO can be filed with the district-level committee[70]. The statute also makes provision for the constitution of advisory boards at the Central and State levels. Their functions include recommending steps for ensuring "accessibility, reasonable accommodation and non-discrimination of persons with disabilities"[71]. The Act further provides for the appointment of Chief Commissioners and Commissioners by the Central Government and State Commissioner by the State Governments. They can identify and inquire, suo moto or otherwise, deprivation of rights of persons with disabilities, take up the matter with appropriate authorities and recommend corrective steps to the establishments[72]. Thus, in addition to the GRO, the aggrieved person may also file her complaint with Central/State Commissioner[73]. Additionally, special courts have been set up for the speedy disposal of cases under the Act[74]. Special Public Prosecutors also have to be appointed by the State Government for the smooth functioning of such courts[75].

For the first contravention of the provisions of the Act, a person may be fined up to ₹10,000 and for subsequent contraventions the fine must not be less than ₹50,000 but may go up to ₹5,00,000[76]. Also, if a person has been found guilty of intentional humiliation, assault, sexual exploitation, denying food, performing abortion without consent or damaging support device of a person with disability, she can be sentenced to prison for a period of minimum six months that can go up to five years along with fine[77]. It is to be noted that if a person has been found guilty of availing, or even attempting to avail, of the benefits meant for persons with benchmark disabilities, she is to be punished with a prison term of up to two years and/or with fine that may extend to ₹1,00,000[78].

6.3. *Judicial Pronouncements on Reasonable Accommodation*

The principle of reasonable accommodation has been applied by the Indian courts even before the UNCRPD came into force. In two separate judgments passed by the Supreme Court of India in 1991 and 2003 with almost similar facts[79], it was held that the employer cannot retrench an employee merely on the ground

[69] S. 23 of the RPwD Act, 2016.
[70] Ff. 23 & 72 of the RPwD Act, 2016.
[71] Ff. 65(2)(e) & 71(2)(e) of the RPwD Act, 2016.
[72] Ff. 75 & 80 of the RPwD Act, 2016.
[73] R. 38 of the RPwD Act, 2016 lays out the procedure for filing of the complaint before the Chief Commissioner or State Commissioner appointed by the Central Government.
[74] S. 84 of the RPwD Act, 2016.
[75] S. 85 of the RPwD Act, 2016.
[76] S. 89 of the RPwD Act, 2016.
[77] S. 92 of the RPwD Act, 2016.
[78] S. 91 of the RPwD Act, 2016.
[79] Anand Bihari vs Rajasthan State Road Transport Corporation, (1991) 1 SCC 731; Kunal Singh vs Union of India, Civil Appeal No. 1789 of 2000 (SC).

that the employee has acquired a disability during her service which will interfere with the performance of her duties. In such cases, the court has held that the employee must be suitably accommodated in her employment.

Even after the enactment of the RPwD Act, 2016, the Indian courts applied the principles of UNCRPD by adopting a wider interpretation of fundamental rights. In the case of Ranjit Kumar Rajak vs. State Bank of India[80], the Bombay High Court read reasonable accommodation under UNCRPD into Art. 21 of the Constitution of India. It went on to hold that the right to employment of an otherwise qualified and successful candidate cannot be denied on "account of past or present medical problems if otherwise, a person is fit to work and can be reasonably accommodated and does not cause undue hardship"[81]. The case concerned the right to employment of a person who had successfully qualified for a job at a government bank. The applicant had undergone renal transplant but was declared fit for performing the duties at the job. The court gave a judgment in favor of the applicant dismissing the claim of the Bank that ₹13,000 per month of medical expenses to be borne by it towards the applicant, if allowed to join the employment, amounts to undue hardship. However, even after the judgment, the Bank did not allow the applicant to join and filed an appeal before the Supreme Court. Unfortunately, the Supreme Court had to dismiss the petition as it became infructuous due to a delay of more than 10 years[82].

The principle of reasonable accommodation under the RPwD Act, 2016[83] was analyzed in the landmark judgment of Vikas Kumar vs UPSC[84]. The case concerned the right of a candidate suffering from dysgraphia, also known as writer's cramp, to get a scribe during the civil services exam. The candidate was denied access to a scribe by UPSC on the ground that the right to a scribe was "limited to blind candidates and candidates having locomotor disability and cerebral palsy, where a minimum 40% impairment exists".

The court analyzed the concepts of "person with disability" and "person with benchmark disability" under the RPwD Act, 2016. It observed that the concept of disability under the legislation is "not only a function of a physical or mental impairment but of its interaction with barriers resulting in a social milieu which prevents the realization of full, effective and equal participation in society". It further said that the concept of disability "cannot be constricted by…measurable quantifications", as has been done in case of "benchmark disability". Thus, it went on to hold that it would be ultra-vires the essence of the RPwD Act, 2016, to conflate benchmark disability with disability and to deny rights and benefits to

[80] Ranjit Kumar Rajak vs State Bank of India, WP No. 576 of 2008 (Bom).

[81] *Ibid.*

[82] State Bank of India vs. Ranjit Kumar Rajak, Civil Appeal No. 1149 of 2010 (SC).

[83] S. 2(y) of the RPwD Act, 2016 defines "reasonable accommodation" to mean "necessary and reasonable modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others". The definition is, thus, very similar to what has been proposed under the UNCRPD.

[84] Vikas Kumar vs Union Public Service Commission, Civil Appeal No. 273 of 2021 (SC).

persons with disabilities on the ground that they do not satisfy the requirements of benchmark disability.

The court then went on to assess the concept of reasonable accommodation and opined that, "[r]easonable accommodation is the instrumentality…to enable the disabled to enjoy the constitutional guarantee of equality and non-discrimination". In this sense, the judgment in Vikas Kumar seems to have trodden the same path as was done in the case of Ranjit Kumar Rajak by bringing the concept of reasonable accommodation within the ambit of fundamental rights. The court further observed that it is a positive duty upon the members of the society to be accommodative of the differences and "actively create conditions conducive to the growth and fulfillment of the disabled in every aspect of their existence". In this sense, the requirement of reasonability would mandate the tailoring of the solutions to the specific needs of every individual, even if she is in a class of her own.

While considering whether the accommodation is reasonable, the test is that it must not impose undue hardship on the employer. However, the court pointed out that while assessing undue burden, regard must be had of the benefit that such a measure can bring to the person with disability and for others similarly situated. Thus, the court held in favour of the candidate and upheld his right to a scribe for appearing at the civil services examination.

6.4. *The Indian Scenario - Key Takeaways*

The Indian courts have adopted a progressive approach regarding the principle of reasonable accommodation. Not only have they held, time and again, that reasonable accommodation is a part of the golden triangle of fundamental rights, i.e. Arts. 14, 19 and 21, but they have also denounced the practice of provisioning of benefits based on a medical-model approach. More specifically, in the case of Vikas Kumar, the supreme court stressed upon the need for addressing the different kinds of barriers that deny equal participation to the persons with disabilities.

The current trend of judgments in India paints a hopeful picture. However, the need of the hour is to move away from the medical-model approach that still lurks in the legislations and guides the dominant thinking.

7. *The United States of America and the Americans with Disabilities Act (ADA)*

7.1. *Legal Framework: the Americans with Disabilities Act (ADA)*

In the United States, the legislation designed to protect people with disabilities

is enshrined in the Americans with Disabilities Act (ADA)[85], the final version of which was signed into law by President George H.W. Bush on 26 July 1990 and became effective on 26 July 1992[86]. The current text is the result of a number of subsequent amendments that, following President George W. Bush's signature in 2008, took effect on 1 January 2009[87].

The Americans with Disabilities Act is a civil rights law that provides discrimination protections to all U.S. citizens with disabilities and has a regulatory framework with similar features to the Civil Rights Act of 1964. Through the latter law, discrimination based on race, religion, sex, and ethnic origin had in fact been prohibited and sanctioned; later also discrimination based on sexual orientation and gender identity have been addressed by the provisions of the Civil Rights Act of 1964. The Americans with Disabilities Act is thus a regulatory instrument that complements the framework of anti-discrimination law sources found in the U.S. legal system.

Specifically, the Congress of the United States of America recognizes that under no circumstances may physical or mental disability result in the diminution of the right to full participation in the life of society for persons with disabilities or those who are deemed to have disabilities (Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (a) (1); ADA Amendments Act of 2008, Pub. L. 110-325, §2, Sept. 25, 2008, 122 Stat. 3553). This is what, however, happens as a result of discriminatory behavior that tends to marginalize people with disabilities by relegating them to the margins of society[88]. Although some Authors[89] assert that "fundamental and far-reaching social change will be necessary for people with disabilities to enjoy full access to American society", the provisions contained in the Americans with Disabilities Act are distinguished by their purpose consisting of establishing a "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (b) (2); ADA Amendments Act of 2008, Pub. L. 110-325, §2, Sept. 25, 2008, 122 Stat. 3553).

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[85] For a summary of the medical discussion on the Americans with Disability Act see D. ESSEX-SORLIE, *The Americans with Disabilities Act: I. History, Summary, and Key Components*, in "Academic Medicine", 1994, pp. 519-524.

[86] The Americans with Disabilities Act was approved by bipartisan majorities of 377-28 and 91-6 in the House of Representatives and the Senate (respectively) in 1990.

[87] Among Others: A.B. LONG, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, in "Northwestern University Law Review Colloquy", 2008-2009, pp. 217-229; S.F. BEFORT, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the Regarded as Prong of the Statutory Definition of Disability*, in "Utah Law Review", 2010, pp. 993-1028; C.J. MILLER, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does Substantially Limits Mean,* in "Missouri Law Review", 2011, pp. 43-80; T.L. ELLIOTT, *The Path to the Americans with Disabilities Act Amandements Act: U.S. Supreme Court Cases, Congressional Intent and Substantial Change,* in "Gonzaga Law Review", 2012, pp. 395-422.

[88] For a complete reconstruction of the segregation, isolation and degradation of persons with disabilities in the United States see T.M. COOK, *The Americans with Disabilities Act: the move to integration*, in "Temple Law Review", 1991, p. 399 ss.

[89] R.K. SCOTCH, *Models of Disability and Americans with Disabiliites Act*, in "Berkley Journal of Employement and Labour Law", 2000, p. 221.

Before proceeding to identify the subjective and objective scope of the Americans with Disabilities Act, it is appropriate to make a brief consideration in terms of semantics. The text of the law now being discussed does not, in fact, speak of U.S. citizens who are disabled but refers – right from the title – to U.S. citizens *with* disabilities. From this point of view, the Americans with Disabilities Act presents a conceptual approach that is uniform with that of the UN Convention, which similarly refers to "persons *with* disabilities": the person, or the U.S. citizen, assumes the central position, while disability is seen as a problem that the community must address to enable the full participation of the person with disabilities in social life. Consequently, it is particularly astonishing that the United States has not ratified the 2006 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which, at least in some respects, seemed to have already acquired those innovations introduced by the UNCRPD that have instead marked a clear paradigm shift in the consideration of the phenomenon of disability in other signatory States.

Returning, however, to an analysis of the positive *datum* of U.S. law, the Americans with Disabilities Act sets a definition of disability, which is useful for the purpose of identifying the subjective scope of the anti-discrimination provisions. The term "disability" referring to an individual consists of "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment[90]" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (1)).

The Americans with Disabilities Act, on the other hand, identifies what are the so-called "Major Life Activities" which, if prevented due to the individual's physical or mental impairments, imply the occurrence of the disabling condition relevant to the application of the provisions contained in the Americans with Disabilities Act. Thus, "Major Life Activities" are considered, among others, those consisting of "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (2) (A)); it also includes "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (2) (B)).

The notion endorsed by the Americans with Disabilities Act is based on a

[90] Subsection (C) defines a casuistry similar to what has been referred to by doctrine in our system as "discrimination by association" or "discrimination by perception". In the context of the Americans with Disabilities Act, it refers to cases in which "the individual establishes that he or she has been subjected to an action prohibited [...] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (3) (A)).

socio-political construction of the phenomenon of disability[91]. In fact, in the 1960's, a transformation of the federal disability policies began[92]: the result of this process was a shifting from the medical/clinical model of disability to a socio-political or "minority group model". Disability is not considered any longer as a physical or a mental impairment but as "a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations"[93].

Again, the proximity existing between the UNCRPD's bio-psycho-social conception of disability and the socio-political construction contained in the Americans with Disabilities Act is to be emphasized. In both cases, disability comes out of the purely individual dimension and gains relevance on the social level: therefore, it is no longer solely a matter of medical care but also (and predominantly) of integration and inclusion. The non-ratification of the UNCRPD by the United States is therefore less surprising when one considers that the American Legislator had achieved a similar result - in terms of protecting the persons with disabilities - more than fifteen years in advance.

The Americans with Disabilities Act then provides some "rules of construction" that relate to the interpretation of the normative notion of disability mentioned above (Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (4)). Indeed, the notion of disability is to be understood in such a way to embrace as many individuals as possible among those in need of protection against discrimination on the basis of disability (Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (4) (A)); the subsequent provisions contain further rules of interpretation with a similar purpose of expanding the scope of the notion of disability relevant to the Americans with Disabilities Act (Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (4) (B); Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (4) (C); Americans With Disabilities Act of 1990, 42 U.S.C. § 12102 (4) (D)). The expansive intention - with reference to the protected subjects - of the U.S. Legislator is particularly evident from the "Findings" preceding the amendments introduced in 2008[94]: the latter are a response to a restrictive jurisprudential orientation[95] on the identification of eligibility

[91] For an extended analysis of the socio-political construction of disability following the enactment of the Americans with Disabilities Act see J. West (edited by), *The Americans with Disabilities Act: From Policy to Practice*, New York, Milbank Memorial Fund, 1991.

[92] Indeed, the approval of the Americans with Disabilities Act was the result of a transformation in the federal disability policies. For a full detailed description of the transformation process see: R.K. SCOTCH, *From Good Will to Civil Rights: Transforming Federal Disability Policy*, Philadelphia, Temple University Press, 1984.

[93] R.K. SCOTCH, *Models*, cit., p. 214. The Author provides a critical description of the socio-political model adopted by the Americans with Disabilities Act since, what we may call, the "social impairment" is actually measured according to the expectations and attitudes of the larger society.

[94] T.L. ELLIOTT, K.A. CAMES, *The Americans with Disabilities Act Amendments Act: What about Reasonable Accommodation? Where Are We Now?,* in "Touro Law Review", 2022, p. 559.

[95] The note to Findings and Purposes (§ 12101) of ADA Amendments Act of 2008, Pub. L. 110-325, §2, Sept. 25, 2008, 122 Stat. 3553 refers, first of all, to the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). In these decisions, the Judges of the

requirements for the application of the protectionist discipline against discrimination based on disability that the Legislator has deemed to counter at the regulatory level.

Regarding the objective scope, the Americans with Disabilities Act is divided into four "Subchapters": Employment (Subchapter I)[96], Public Services (Subchapter II)[97], Public Accommodations and Services by Private Entities (Subchapter III)[98], Miscellaneous Provisions (Subchapter IV)[99]. Each section identifies specific rules of anti-discrimination law based on the characteristics of the sphere of social life to which these rules apply. Specific reference will now be made to the provisions in Subchapter I on employment conditions and the right to work of persons with disabilities[100]; these rules share the purpose of enabling the person with disabilities to carry out working life on equal treatment and conditions with other workers.

In the area of employment law, the Americans with Disabilities Act imposes a general prohibition on discrimination based on disability. In fact, it establishes a general rule that "no covered entity[101] shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (a)). Space is then given to an extensive descriptive list of behaviors that, if enacted, constitute discriminatory conducts based on disability and, consequently, are prohibited by the provisions of the Americans with Disabilities Act[102]. For the purposes of this discussion,

Supreme Court narrowly applied the provisions of the Americans with Disabilities Act and, consequently, restricted the number of people protected by its provisions. Subsequent case law decisions have since given continuity to this restrictive approach: the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) and in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the scope of protection afforded by the Americans with Disabilities Act. Therefore "lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities".

[96] Americans With Disabilities Act of 1990, 42 U.S.C. § 12111, ss.

[97] Americans With Disabilities Act of 1990, 42 U.S.C. § 12131, ss.

[98] Americans With Disabilities Act of 1990, 42 U.S.C. § 12181, ss.

[99] Americans With Disabilities Act of 1990, 42 U.S.C. § 12201, ss.

[100] A. MAYERSON, *Title I - Employment Provisions of the Americans with Disability Act*, in "Temple Law Review", 2000, pp. 499-520.

[101] "Covering entity" is to be understood as "an employer, employment agency, labor organization or joint labor-management committee" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 (2)).

[102] The Americans with Disabilities Act identifies the following discriminatory conduct: limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (1)); participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs) (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (2)); utilizing standards, criteria, or methods of administration (A) that have the

employer conduct consisting of the refusal or failure to make so-called reasonable accommodations is specifically considered.

7.2. *The Role of Reasonable Accommodations according to the Americans with Disabilities Act*

Reasonable accommodations are identified by the Americans with Disabilities Act as those employer actions or behaviors that consist of "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 (9) (A)) or in "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 (9) (B)). In short, these are adjustments to the work environment because of the characteristics of the worker with a disability that enable him or her to access, perform, and retain a particular job.

The work environment subject to adaptation with respect to the characteristics of the worker with disabilities must be understood in a broad sense so as to include in the meaning of the normative provision interventions on both material and immaterial aspects of work organization. The first refers to the hypotheses identified in § 12111 (9) (A), among which particular relevance acquires the building or infrastructural interventions that ensure the accessibility of workplaces (e.g., elevators, ramps, etc.); the same category includes some of the

effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (3)); excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (4)); not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity(Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (5) (A)); or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (5) (B)); using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (6)); and failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure) (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (b) (7)).

cases listed in § 12111 (9) (B) consisting of the purchase of work tools that enable the disabled person to perform his or her work (e.g.: glasses, hearing aids, etc.). However, the protection of the person with disabilities in the workplace would be unsatisfactory if the obligation to adapt the work environment did not also extend to immaterial aspects, such as the organization of working hours, reassignment to a vacant position[103] and the provision of training for the task or activity to be performed (the reference is now to the other cases listed in § 12111 (9) (B)).

It must be assumed that, given the open-ended clause with which the rule now under discussion ends, the listing made by the American Legislator is merely explanatory, as it may well be possible to identify additional reasonable accommodations to those expressly mentioned. Reasonable accommodations are, in fact, individual measures: they refer to the individual worker and require a case-by-case assessment to be made in order to identify the appropriate solution[104]. This characteristic makes it extremely difficult (if not impossible) to introduce a comprehensive and exhaustive listing of reasonable accommodations. Additionally, the impossibility of determining in advance the types and number of reasonable accommodations causes uncertainty regarding the content of the employer's obligation. The employer is thus required to adapt the organizational and production environment of the enterprise to the circumstances of the specific case without the possibility of pre-determining the related costs[105].

What is important to underline is that the reasonable accommodations are not remedial: in fact, they are not intended to restore the damage of a previous discrimination but they are meant to overcome the present obstacles to employment (or to the continuation of a certain job)[106]. This does not mean, however, that reasonable accommodations are not relevant for the anti-discrimination law. Denying or refusing the reasonable accommodations that the person with disabilities needs in order to perform work is the equivalent of placing him or her in the impossibility of obtaining or retaining employment and, ultimately, excluding him or her from one of the spheres of social life. Exclusion from work turns out to be of particular relevance in that it results in the impossibility for the person with disabilities to develop himself personally and

[103] R.K. MURPHY, *Reasonable Accommodation and Employment Discrimination under Title I of the Americans with Disabilities Act*, in "Southern California Law Review", 1991, p. 1618. According to the Author "the designation of reassignment as an accommodation is important, because under the Rehabilitation Act courts have particularly resisted this idea".

[104] P.S. KARLAN, G. RUTHERGLEN, *Disability, Discrimination, and Reasonable Accommodation*, in "Duke Law Journal", 1996, p. 15 ss.

[105] T.L. ELLIOTT, K.A. CAMES, *The Americans*, cit., p. 559 effectively claims that "the myriad of factors and circumstances that influence that determination will forever present a difficult decision for employers that will require balancing business and employee interests with workplace policies and human resources needs. This balancing act continues to leave many unanswered questions under the law, and at times, gives us an imprecise answer for what a reasonable accommodation is".

[106] J.O. COOPER, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodations and Undue Hardship in the Americans with Disabilities Act*, in "University of Pennsylvania Law Review", 1991, p. 1431. See also: C.A. BALL, *Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act*, in "Alabama Law Review", 2004, p. 973.

socially as well as in the impossibility of obtaining an income that allows him to provide for his or her needs.

Consequently, as anticipated, the Americans with Disabilities Act declares that "it is considered a discrimination (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee [...]; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodations to the physical or mental impairments of the employee or applicant" (Americans With Disabilities Act of 1990, 42 U.S.C. 12112 (5)). The attribution of the discriminatory nature to the behavior of the employer - involving the refusal or omission of reasonable accommodations - thus constitutes the sanction for cases in which such conduct represents a contribution to the phenomena of isolation and segregation of persons with disabilities through the preclusion of access to one of the main areas of social life, in open contrast to the objectives of the Americans with Disabilities Act.

7.3. *The Issue of Reasonableness and the Definition of "Undue Hardship"*

The employer's obligation to make reasonable accommodations is not unlimited, however. In fact, even in the U.S. legal system the problem has arisen of identifying the limit beyond which the introduction of a reasonable accommodation, even if abstractly possible, is not enforceable. The same rule that qualifies as discriminatory the conduct consisting of the refusal or denial of a reasonable accommodation admits that the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (5) (A)).

The criterion of "undue hardship" is the one that identifies the boundary of the employer's obligation to the introduction of reasonable accommodations; this clause thus plays a similar function to the provision under the UNCRPD that excludes the obligation to adopt reasonable accommodations in cases where doing so would impose a "disproportionate or excessive burden".

Nevertheless, the Americans with Disabilities Act dictates an express definition of "undue hardship" which, in general, consists of "an action requiring significant difficulty or expense when considered in light of the factors set forth [...]: the nature and cost of the necessary accommodation; the overall financial resources of the covered entity; the number of persons employed in the covered entity; the effect on expenses and resources or the impact on the operation of the covered entity; the overall financial resources of the covered entity; the overall size of the business; the number, type and location of its facilities; the type of operation or operations of the covered entity (composition, structure and functions of the personnel of the covered entity); the geographic separation, administrative or fiscal

relationship" (Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (10) (A) and (B)).

The concept of undue hardship - as well as the one of reasonable accommodation - is derived from the Rehabilitation Act Regulations[107]. However, the Americans with Disabilities Act thus lists a number of factors that allow the expression "undue hardship" to be filled with meaning and, consequently, make it possible to identify the boundaries of the employer's obligation to introduce reasonable accommodations for the employee with a disability. On closer inspection, these are factors that allow for an assessment of the economic impact of the introduction of reasonable accommodation on the employer's business organization. Such an assessment must not be reduced to a mere analysis related to the cost of accommodation: not only is there no monetary cap on the cost of the reasonable accommodation, but the proposal of introducing an amendment that would have fixed a ceiling of the ten percent of the employer's salary as the maximum cost of an accommodation was actually rejected by the House Judiciary Committee[108]. Therefore, the analysis that precedes the introduction of reasonable accommodations requires a comprehensive investigation of the entire business structure carried out by taking into consideration the factors listed by the Americans with Disabilities Act.

7.4. *Remedies and Authorities*

As briefly described above, the refusal or failure to make a reasonable accommodation constitutes discriminatory conduct under the provisions of the Americans with Disabilities Act. Nevertheless, it has come to light that both the definitions of "reasonable accommodation" and "undue hardship" leaves some room for uncertainty in their application because of the diversity of the individual situations involved. It is therefore not surprising that the application of these provisions has given rise to disability discrimination litigation.

Upon the occurrence of a discriminatory conduct by the employer, the US citizen has the choice of either obtaining judicial protection before the Department of Justice or seeking an out-of-court settlement through the so-called ADA Mediation Program[109]. In the former case, the individual who believes he or she has been harmed by the allegedly discriminatory conduct is required to fill a Charge of Discrimination at the Equal Employment Opportunity Commission, a body that handles cases of discrimination based not only on disability but also on other factors such as race, color, religion, sex (including pregnancy and related conditions, gender identity, and sexual orientation), national origin, age (40 or

[107] A. MAYERSON, *Title I*, cit., p. 514.

[108] B.A. LEE, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, in "Berkeley Journal of Employment and Labor, Law", 1993, p. 213.

[109] *https://archive.ada.gov/mediate.htm*.

older) or genetic information. In this case, therefore, the dispute will be resolved before the Court.

In the latter scenario, the U.S. citizen with a disability may choose to have recourse to the ADA Mediation Program, an important part of the Americans Disabilities Act compliance which does not involve the Courts. The process involves the participation of the employee, the employer, and an impartial third-party mediator with expertise in disability (and related regulation). Disputes over the refusal or failure to make reasonable accommodations can therefore also be resolved under the ADA Mediation Program, which, through the development of a completely free conciliatory procedure, helps to identify the best solution for the integration of the person with a disability into the work environment while complying with the undue hardship limit that cannot be required to the employer.

The possibility of using the mediation process just described is a peculiarity of the U.S. system with regard to the protection of persons with disabilities. It is, in fact, a tool that has undoubted advantages including that of being "helped" in the resolution of the dispute by a mediator experienced in disability matters. This statement acquires more relevance when considering the remarks made earlier about the broadness of the provision requiring the employer to introduce reasonable accommodations for the person with disabilities. Although uncertainty regarding the content of the employer's obligation cannot be eliminated *ex ante*, it is nevertheless true that the parties have at their disposal a path to find an agreed and satisfactory solution of their respective interests.

Once again, therefore, the Americans with Disabilities Act was ahead of its time. With the introduction of the ADA Mediation Program, the American Legislator has, in effect, put into practice what the Committee on the Rights of Persons with Disabilities later clarified in General Comment No. 6 of 2018[110], namely: "the duty to provide reasonable accommodation is an individualized reactive duty that is applicable from the moment a request for accommodation is received. Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability" (Section 5, Lett. D, No. 24(b)).

8. *Conclusions*

Laws must keep pace with the evolving norms of the society. With respect to the rights of the people with a disability, that has become crucial. With the adoption of UNCRPD in 2006, the world moved closer to recognizing the fact that more than their physical or mental impairments, people with disability are unable to live a life of dignity because of societal barriers. The EU has also adopted a similar model, especially with respect to the concept of person with disability. However, even after almost two decades of UNCRPD, some prominent nations

[110] General Comment No. 6 on Equality and Non-discrimination of 9 March 2018.

are yet to move away from the medical approach to disability which is ingrained in their legal system.

In the common law jurisdictions studied in this paper, the laws highly favour the medical understanding of disability. The USA, with the introduction of the Americans with Disabilities Act, has moved from a purely medical consideration of disability to a perspective that also takes into account the social dimension, although one cannot yet speak of a total abandonment of the medical conception. The RPwD Act, 2016 of India relates the provision of benefits to persons with disability based on medical evidence of disability. It is to be noted that both of these countries provide for the exclusion of certain kinds of disabilities, either through an exclusionary list (as in the USA) or by providing an inclusionary list of disabilities (as in India). Things are not much different even in the civil law countries that have been studied hereinbefore. Italy happens to be a prominent member of the European Union and it is still in the process of completely overcoming a medical approach to disability.

On the other hand, the analysis carried out shows that the legislation of almost all the countries examined provides a broad and general definition of the concept of "reasonable accommodation", without giving examples or clarifying specifically when the means required of the employer are reasonable or constitute an "undue burden". The latter assessment is left to case law, which follows the content of the UNCRPD or, in the EU Member States, the rulings of the CJEU to determine the criteria to be applied. This seems a remarkable example of a multi-level system of protection, where supranational sources fill the gaps in national law.

When it comes to the concepts of "reasonableness" and "proportionality", the view of the courts across jurisdictions seems to be similar. For a measure to be reasonable and proportionate, it must not impose undue burden on the employer. However, in this context, it is worth to note that India and Italy have gone a step ahead. In both countries, in order to satisfy the requirement of "reasonableness" and "proportionality", it is required to not only consider the costs for the employer but, more importantly, one must also consider the needs of the individual with disabilities. In this sense, the costs that the measure may impose on the person concerned becomes an important factor in the utilitarian calculation that the laws otherwise prescribe for.

Despite the differences highlighted, it can be noted that a more precise legal definition of reasonable accommodation and its limits could obviously assist judicial assessment by clarifying its criteria. However, the core of the latter preserves - as it must - a certain degree of inevitable discretion: indeed, as noted in General Comment No. 6 of the UNCRPD Committee, it is impossible to determine in advance whether an accommodation is reasonable and/or proportionate without comparing it with the worker's disability and the company's organization.

This inevitable core of discretion can lead to unpredictable costs for the employer, for example, if it is established in court that the employer failed to

provide accommodation when it should have done so, and the court awards compensation for all the damage suffered by the claimant. Consequently, the provision of instruments for out-of-court negotiations seems to be the more practical solution, both to ensure the best accommodation for the disabled worker and to avoid unpredictable costs for the company.

This path seems to have been taken by both the UNCRPD and the countries studied: as mentioned above, the mediation programme is crucial for the USA and will be for Italy, whose law, once implemented, will introduce a special informal procedure - hopefully applicable to the labour relations - that will allow the parties to sit down and decide on the best solution according to all the interests involved, without going to court.

It is the need of the hour to recognize the fact that a large part of the population in the world has been kept away from accessing even the most basic services of the society due to societal barriers. Even after the adoption and ratification of UNCRPD, some of the most prominent countries in the world are yet to imbibe its principles truly in their laws. Until that is achieved, the right to equality will hardly mean anything to persons with disabilities.

Abstract

In seguito ad un breve esame del contenuto della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, il presente contributo offre un'analisi comparata del diritto dell'Unione Europea, dei sistemi legali Italiano, Spagnolo, Indiano e Statunitense, in materia di ragionevoli accomodamenti. L'articolo si concentra principalmente sulla definizione di persona con disabilità, sul concetto di accomodamento "ragionevole" e "proporzionato", e sugli strumenti di tutela applicabili in caso di violazione degli obblighi del datore di lavoro.

After a brief overview of the content of the United Nations Convention on the Rights of Persons with Disabilities, the present paper provides a comparative analysis of European Union law, the Italian, Spanish, Indian and US legal systems on the subject of reasonable accommodation. The article focuses mainly on the definition of a person with disabilities, the concepts of "reasonable" and "proportionate" accommodation, and the remedies to be applied in case of infringement of the employer's obligations.

Parole chiave

Persona con disabilità, Accomodamento ragionevole, Onere finanziario sproporzionato, Discriminazione, Proporzionalità

Keywords

Person with a disability, Reasonable accommodation, Undue burden, Reasonableness, Discrimination, Proportionality