



UNIVERSITÀ  
di **VERONA**



**Maastricht University**



DEPARTMENT OF  
Law

GRADUATE SCHOOL OF  
of Legal and Economic Sciences / Behavioral Sciences & Humanities

DOCTORAL PROGRAM IN  
in International and European Law / Law

CYCLE / YEAR  
XXXIII / 2017

**ANTI-DISCRIMINATION, DISABILITY AND REASONABLE ACCOMMODATION IN  
HIGHER EDUCATION  
NATIONAL AND INTERNATIONAL LAW AND POLICY IN AN EU LAW  
PERSPECTIVE**

S.S.D. IUS/07

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## **Abstract**

The research mobilises a comprehensive approach to enquire the protection against discrimination on the ground of disability with particular attention to the context of higher education. To accomplish this, the research focuses on the provision of reasonable accommodations encompassing the general theoretical framework in which the duty to accommodate can be placed. Such a framework is composed by the capability approach applied to the context of education together with the process of inclusive education. Additionally, the research looks at the national context of Belgium and Italy, with specific regards to the system of quality assurance and the provision of reasonable accommodation. This theoretical framework, together with the duty to accommodate, aims to guarantee the access and participation of students to education, thus to combat discrimination against students with disabilities within universities following the principle of equal opportunities.

Accordingly, the focus of the research is EU anti-discrimination law in relation to disability and reasonable accommodations, and the right to education. However, it is only in the last three decades the disability has become a more relevant and central matter for the EU law, which creates a new challenge for non-discrimination law. Likewise, the concept of reasonable accommodation represents a new and innovative topic within equality and anti-discrimination, especially within the European Union. The research, then, extends its investigation to concepts and theories in other fields such as philosophy and sociology. Specifically, the research explores the capability approach considering notions such as social justice and social contract, in their application to the provision of reasonable accommodations in higher education. Moreover, the research considers international human rights law with specific attention to the Conventions and the decisions produced within the United Nations Organisation by its Committees as well as the European Convention on Human Rights and the European Social Charter, along with the decisions produced within the Council of Europe by its Committees. Finally, the research looks also at the labour law, since such a law provides the most advanced and

complete legislation on anti-discrimination with specific attention to the provision of reasonable accommodations.

The main conclusions of the research are the benefit of a general framework composed by a capability approach and an inclusive approach in which the duty to accommodate can be placed under the attempt to harmonise it at EU level. Such framework allows national law to have sufficient freedom in implementing such duty and to the duty bearer in assessing which exact adjustment to provide. Eventually, this also implies the significance of the recognition of disability as an essential element for the quality assurance in higher education within the European Union.

## Sommario

La ricerca concerne la protezione contro la discriminazione sulla base della disabilità con particolare attenzione al contesto dell'istruzione universitaria. A tal fine, la ricerca si concentra sullo strumento degli accomodamenti ragionevoli e sul quadro teorico generale in cui l'obbligo di fornire accomodamenti ragionevoli può essere collocato. Tale quadro comprende teorie e concetti più vicini alle scienze filosofiche e sociologiche. Inoltre, la ricerca si concentra sul contesto nazionale del Belgio e dell'Italia, con particolare riguardo al sistema dell'assicurazione di qualità e alla disposizione di accomodamenti ragionevoli. Il quadro teorico insieme all'obbligo di fornire accomodamenti ragionevoli mira a garantire l'accesso e la partecipazione allo studio, contrastando così la discriminazione nei confronti degli studenti con disabilità all'interno delle Università alla luce del principio delle pari opportunità. Di fatti, la ricerca si concentra principalmente sulla legge antidiscriminatoria dell'Unione Europea in relazione alla disabilità e agli accomodamenti ragionevoli e al diritto allo studio. Tuttavia, è solo negli ultimi tre decenni che la disabilità è diventata una questione più rilevante e centrale per il diritto dell'UE, rappresentando un nuovo campo e una nuova sfida per il diritto antidiscriminatorio. Allo stesso modo, il concetto di accomodamento ragionevole rappresenta un argomento nuovo e innovativo nell'ambito dell'uguaglianza e della lotta alla discriminazione, in particolare all'interno dell'Unione europea. Inoltre, la ricerca va oltre contemplando concetti e teorie più vicini ad altri campi come la filosofia e la sociologia. In particolare, la ricerca esplora l'approccio alle capacità considerando nozioni come quelli di giustizia sociale e di contratto sociale nella loro applicazione alla disposizione di accomodamenti ragionevoli nel contesto dell'istruzione universitaria. Ancora, la ricerca considera il diritto internazionale e i diritti umani con particolare attenzione agli atti prodotti dagli organi delle Organizzazione delle Nazioni Unite, nonché alla Convenzione europea dei diritti dell'uomo e alla Carta sociale europea insieme alle decisioni prese dai Comitati esistenti nell'ambito del Consiglio di Europa. Infine, la ricerca affronta il tema anche dal punto di vista puramente giuslavoristico, in quanto il diritto del lavoro presenta la legislazione più avanzata e completa alla luce di un approccio antidiscriminatorio con un'attenzione

specifica allo strumento degli accomodamenti ragionevoli. Le principali conclusioni della ricerca riguardano il beneficio di un quadro generale composto dall'approccio alle capacità e dalla teoria all'inclusione in cui l'obbligo di fornire accomodamenti ragionevoli può essere collocato nel tentativo di un'armonizzazione all'interno dell'Unione Europea, concedendo sufficiente libertà al diritto nazionale nell'attuazione di tale obbligo e riconoscendo a chi ha tale obbligo (es.: Università, datore di lavoro, etc) altrettanta libertà nella valutazione dell'esatto accomodamento da fornire. Inoltre, la ricerca incoraggia il riconoscimento della disabilità come elemento essenziale per l'assicurazione di qualità nell'ambito dell'istruzione universitaria all'interno dell'Unione Europea.

## **Introduction**

### **i. Foreword**

Discrimination has been a central topic within the European Union (EU) since its foundation,<sup>1</sup> and also within predecessor entities<sup>2</sup>. Indeed, after the end of the Second World War, the early European Economic Community (EEC)<sup>3</sup>, which was originally created to pursue peace and economic growth, first had to deal with discrimination mainly on the grounds of nationality and gender, which were the two major causes of discrimination at that time. However, the evolution from the early Community into the current European Union involved an expansion of competences. This steady and inevitable development has brought new topics and issues to the fore at European level, e.g. social rights, political representation, etc. In other words, the previous Community evolved into the subsequent Union, which expanded its interests and competences, moving from a solely economic sphere into a wider range of fields.

In this sense, the law represents a continuum of an evolutionary process, which mirrors what society was, is and should or can be in the future. Indeed, the early European Economic Community was focused on supporting national economies and creating a common market at European level with the goal of ensuring peace among the European countries. However, the later European Community (and the current European Union) turned into a complex entity founded on many bonds and commitments, from the legal and economic to the political and social, with competences increasingly being centralised at EU level.

With particular regard to discrimination, over the years the prohibition of discrimination enshrined within the Treaties of the European Union has been expanded to cover further grounds, and moreover specific provisions on related matters have been adopted, e.g. Article 157 of the Treaty on the Functioning of the European Union (ex Article 119 of the Treaty establishing the European

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<sup>1</sup> European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

<sup>2</sup> On EU non-discrimination law see Ellis, Evelyn and Philippa Watson. "EU Anti-Discrimination Law." Oxford University Press, 2012; Bell, Mark. "Anti-Discrimination Law and the European Union." Oxford, 2002, and Craig, Paul P. and Gráinne de Burca. Oxford University Press, 2011

<sup>3</sup> Treaty establishing the European Economic Community (Rome, 25 March 1957)

Economic Community) on equal pay between men and women,<sup>4</sup> and Directive 2006/54/EC concerning “the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”<sup>5</sup>.

Here, it is worth noting that it has only been in the last three decades that disability has become a more important matter for the EU, representing a new field to explore and also a new challenge for non-discrimination law to engage with.

Similarly, also (higher) education has recently become an important matter at European level following an initial initiative at international level resulting from intergovernmental activity, namely the Bologna Declaration of 1999<sup>6</sup>. This activity was initially launched outside the framework of the European Community (and the European Union) and was only later conducted as an internal process within the Community (and the Union)<sup>7</sup>.

As will be discussed below, education performs a fundamental role within nation states in terms of the formation of political and cultural identity. Nevertheless, education and especially higher education has supranational implications, embodying a new challenge for the Union to build a stronger and more united society based on inclusion and solidarity among its members (States and citizens)<sup>8</sup>. In addition, it must be pointed out that the EU has embraced other values and principles, such as solidarity, human dignity and equality, which as

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<sup>4</sup> European Union. Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 157

<sup>5</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

<sup>6</sup> Bologna Declaration of 19 June 1999: Joint declaration of the European Ministers of Education

<sup>7</sup> On the Bologna Process see Maassen, Peter and Johan Olsen P. (eds). “University Dynamics and European Integration.” Springer, 2007, Netherlands

<sup>8</sup> Biesta, Gert. “What Kind of Citizenship for European Higher Education? Beyond the Competent Active Citizen.” *European Educational Research Journal*, Vol. 8, No. 2, 2009

will be argued below are intertwined with disability and education, and more generally with non-discrimination law<sup>9</sup>.

Under these circumstances, disability and education display peculiar features, mirroring the evolution and the multifaceted pattern of EU law and society.

Specifically, this research concerns discrimination on the grounds of disability in the context of higher education under the perspective of EU law, including some specific comparisons between the Belgian and Italian systems.

The central research question enquires into the possibility of developing a new EU legal framework that is capable of making effective provision on reasonable accommodations within the European Union in order to guarantee the right to education under conditions of equality. To this end, the research will seek to analyse a wide range of legal issues as well as a number of different subjects, e.g. the capability approach, the theory of social justice, etc.

In addition, the research will need to adopt a general theoretical framework within which to embed its results. Therefore, the research will attempt to provide such a framework and, in doing so, will also move slightly beyond the strict boundaries of legal studies, exploring fields closer to philosophical and sociological studies.

First of all, education law and education policy will be considered in order to outline the creation and development of a common space at European level for building and maintaining dialogue among the actors involved. In addition, the research will assess the new and emerging role of education, both at national and European level, offering an innovative model of governance and original elements that can be linked to the evolution of society.

Likewise, equality and non-discrimination law in relation to disability will be mobilised in order to carry out an analysis of the current education law framework and its further development in the light of the concept of ‘reasonable accommodation’. For the time being, it is sufficient and appropriate to define a reasonable accommodation as an adjustment, adopted within a specific situation

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<sup>9</sup> European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5, Article 2

constituting discrimination, in order to enable a person to enjoy and exercise a particular right<sup>10</sup>.

In addition, attention will also be focused on labour law since it appears to be the most exhaustive and advanced area of the law that deals with the issue of reasonable accommodation and anti-discrimination.

The research will follow two main lines: it will first consider the role of EU law together with international law and then go on to focus on two national systems, specifically Belgium and Italy, to some extent from a comparative perspective.

In fact, pursuing the ambition of offering full and effective legal research, it is appropriate to broaden the analysis to various contexts, from national to international law. In this regard, the most important entities at international level are probably the United Nations (UN)<sup>11</sup>, through its conventions and committees, and the Council of Europe, through its Charter and the Court<sup>12</sup>.

Within the European context, EU law pays particular attention to non-discrimination and equality law<sup>13</sup>, which is still growing as the EU evolves. On the other hand, national systems hold important and exclusive competences, especially over education, and national law also has the task of implementing EU law<sup>14</sup>.

As regards higher education, the importance of universities appears to be self-evident. Specifically, universities play an essential role as policymakers, both on campus but also at local and national level, and perhaps also within the European Union. They also operate as fundamental social vehicle for enhancing education,

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<sup>10</sup> Lord, Janet and Rebecca Brown. "The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities." pp. 273-307 in Rioux, Marcia H. et al (eds). "Critical Perspectives on Human Rights and Disability Law." Martinus Nijhoff Publishers, 2011

<sup>11</sup> United Nations. Charter of the United Nations, 24 October 1945

<sup>12</sup> Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

<sup>13</sup> Generally on see Equality law and EU Bell, Mark. "Equality and the European Union Constitution." *Industrial Law Journal*, Vol. 33, No. 3, Industrial Law Society, September 2004

<sup>14</sup> Waddington, Lisa (ed). "Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice." Report. EU network of experts on disability discrimination 2004

i.e. knowledge and skills, and promoting the development of individuals together with their identity and *status* as citizens and members of society<sup>15</sup>.

Starting from this brief overview, it is now possible to outline a mutual influence, both bottom-up and top-down, on the one side between national and supranational entities and on the other side between universities and social organisations (e.g. representative organisations of persons with disabilities).

Pursuing further that observation, it seems important to analyse the role that people play within society and how they are considered within society itself in terms of holders of rights and abilities, paying particular attention to disability as will be discussed below.

In this sense, discriminatory behaviour may be related to the status of persons with disabilities (and those who are discriminated against) within society. Moreover, the mere perception that certain individuals have a certain position or condition can influence the way in which these individuals may be treated.

In addition, the research seeks to assess, and eventually propose, a comprehensive new approach to the matters at issue, including especially disability.

It is therefore necessary to extend the research to other fields such as philosophy and sociology, considering the concepts of social justice and the social contract, and in particular the capability approach<sup>16</sup>, but also delicate and ambiguous concepts such as oppression and vulnerability<sup>17</sup>.

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<sup>15</sup> Hackl, Elsa. "Towards a European Area of Higher Education/ Change and Convergence in European Higher Education." European University Institute (EUI) Working Papers, Robert Schuman Centre for Advanced Studies, RSC No. 2001/09

<sup>16</sup> E.g. Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006; Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009 and Mitra, Sophie. "The Capability Approach and Disability." *Journal of Disability Policy Studies* Vol. 16, No. 4, 2006, pp. 236–247

<sup>17</sup> Shakespeare, Tom and Nicholas Watson. "The social model of disability: an outdated ideology?." *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28; Shakespeare, Tom (ed). "The Disability Reader: Social Sciences Perspectives." London: Cassell, 1998 and Abberley, Paul. "The Concept of Oppression and the Development of a Social Theory of Disability." *Disability, Handicap & Society*, Vol. 2, No. 1, 1987 and Blanck, Peter and Eilionóir Flynn (eds). "Routledge Handbook of Disability Law and Human Rights." Routledge Handbooks, 2017

To sum up, it seems evident that, as regards the issue of non-discrimination on the grounds of disability, EU law together with national and international law are rather advanced, although not yet sufficiently, especially in relation to (higher) education.

ii. Research question

The main research question is whether it is appropriate within the European Union to establish a new and up-to-date legal framework which, combatting discrimination against persons with disabilities in the context of higher education, regulates the provision of reasonable accommodations in order to guarantee access to and participation in education.

Pursuing this main question and its response, the research will identify five issues, which can be summarised briefly as follows: (1) education law (2) disability rights (3) capability approach (4) reasonable accommodation (5) labour law.

Specifically, each sub-area corresponds to a sub-question, the answers to which will feed in to the answer to the main question. Each sub-question will then entail further, more specific analysis and consideration, which will be explained below. These sub-questions, which are linked to the sub-areas mentioned above, can be summarised as follows:

(1) What is the current status of education law within the European Union? Specifically, what is the status of education under EU law and how does quality assurance operate for (higher) education?

(2) Which is the current position under non-discrimination law, especially on the grounds of disability, within the European Union and how does international law influence that position? What is the relationship between disability rights and education law?

(3) Analysing the evolution from welfarism towards an equality approach, what is (or could be) the role of a capability approach in relation to disability? How can such an approach foster inclusive education and offer an adequate theoretical framework in relation to non-discrimination and reasonable accommodation?

(4) Is reasonable accommodation the most appropriate instrument for eradicating discrimination and enabling persons who have been discriminated against to enjoy their rights? How can this instrument be improved and applied in relation to education?

(5) How can labour law respond to the needs of workers with disabilities for reasonable accommodations? What features can be transferred from labour into (higher) education?

Eventually, a further question can be made, i.e. (6) How can the current legislation on the prohibition of discrimination on the grounds of disability be improved? Does the theoretical framework based on a capability approach fit in with the provision of reasonable accommodation and what improvements can it bring about?

In order to answer all of these questions, the research will follow the proposed layout, starting with the topic of education and subsequently disability rights, both representing the two main issues at stake. Subsequently, the research will engage with other topics more akin to sociology and philosophy, e.g. first and foremost the capability approach<sup>18</sup>. Afterwards, once the theoretical framework and the current position regarding disability and education have been outlined, it will be possible to consider the issue of reasonable accommodation<sup>19</sup>. The research will then conclude with an investigation into the issue of labour law, and to some extent the social movement of persons with disabilities. Finally, the research will draw conclusions, which will address and evaluate all of the topics presented throughout the discussion.

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<sup>18</sup> Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006; Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009 and Mitra, Sophie. "The Capability Approach and Disability." *Journal of Disability Policy Studies* Vol. 16, No. 4, 2006, pp. 236–247

<sup>19</sup> E.g. Karlan, Pamela S., and George Rutherglen. "Disabilities, Discrimination, and Reasonable Accommodation." *Duke Law Journal*, Vol. 46, No. 1, October 1996, pp. 1-42 and Waddington, Lisa and et al. "Disability law and reasonable accommodation beyond employment. A legal analysis of the situation in EU Member States." European Commission, November 2016, Brussels

As legal research, the research will focus on the law, encompassing judgements, decisions, legislation, treaties, etc. Nevertheless, the research will also go further, considering political acts and policies adopted at national and supranational level as well as modes of governance, exploring fields that are not strictly legal.

In addition, it must be stressed that, throughout the research, all terms requiring proper definition will be discussed and defined, such as for instance governance or disability. However, this is not the proper place to provide such definitions, and they will be provided where appropriate in the pages below.

As regards the content of the chapters, each chapter will attempt to address each sub-question and the related issue. However, the topics are rather intertwined with one another, and exert a reciprocal influence. Thus, throughout the research some elements will be addressed and discussed in different chapters.

Chapter one will deal with (higher) education within the European Union. Therefore, the chapter will start by considering EU primary law, i.e. the treaties, as the fundamental law on which secondary law is logically grounded, although also the policies and the acts adopted by the Union itself and its Member States<sup>20</sup>. Specifically, within the EU education seems to be regulated by only a few legal acts (belonging to *hard law*) although also by a various number of documents, agreements and policy instruments establishing governance at European level, which it will be necessary to consider and present<sup>21</sup>. In particular, the most important document at international level is indisputably the Bologna Declaration of 1999<sup>22</sup>, which launched the Bologna Process. This Declaration, and the subsequent Process, consists in intergovernmental dialogue on higher education, contemplating common reforms and policies in this area. Within the specific context of the EU, the most important process for the research topic is undoubtedly the Lisbon Strategy of 2000 which, whilst primarily having an economic goal, also expresses an interest in and competence over (higher)

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<sup>20</sup> E.g. European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Article 13 and 95 and Lisbon European Council 23 and 24 March 2000, Presidency conclusions, Lisbon strategy

<sup>21</sup> Corbett, Anne. "Universities and the Europe of Knowledge." Palgrave macmillan, 2005

<sup>22</sup> Bologna Declaration of 19 June 1999: Joint declaration of the European Ministers of Education

education<sup>23</sup>. In particular, the Lisbon Process introduces a new instrument, namely the Open Method of Coordination (OMC)<sup>24</sup>. The OMC was originally crafted within the context of employment; however, it has subsequently shifted towards other fields, e.g. (higher) education, offering a new mode of governance and a new forum in which achieve and adopt common goals and policies<sup>25</sup>. Last but not least, the chapter will finish by considering the scheme of quality assurance within higher education involving European agencies and structures as well as national bodies, focusing in particular on Belgium and Italy<sup>26</sup>.

Chapter two will address disability rights, mainly under EU anti-discrimination law<sup>27</sup>. The chapter will evidently focus mainly on EU law; however, anti-discrimination law and in particular the law prohibiting discrimination on the grounds of disability in terms of human rights, has become an important issue within international law, first of all within the context of the United Nations (UN)<sup>28</sup> but also within the Council of Europe<sup>29</sup>. In particular, the UN has been quite productive in the area of disability. Indeed, in relation to disability rights, the UN Convention (namely the Convention on the Rights of Persons with Disabilities of 2006 adopted by the General Assembly of the United

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<sup>23</sup> European Union. Lisbon European Council 23 and 24 March 2000, Presidency conclusions

<sup>24</sup> Ibid.

<sup>25</sup> Regent, Sabrina. "The Open Method of Coordination: A New Supranational Form of Governance." *European Law Journal*, Vol. 9, No. 2, April 2003, pp. 190–214

<sup>26</sup> E.g. Bernhard, Andrea. "Quality Assurance in an International Higher Education Area." Springer Fachmedien Wiesbaden GmbH, 2012 and Council Recommendation of 24 September 1998 on European cooperation in quality assurance in higher education, 98/561/EC,

<sup>27</sup> On EU non-discrimination law see: Ellis, Evelyn and Philippa Watson. "EU Anti-Discrimination Law." Oxford University Press, 2012, Bell, Mark. "Anti-Discrimination Law and the European Union." Oxford, 2002, and Craig, Paul P. and Gráinne de Burca. Oxford University Press, 2011

<sup>28</sup> E.g. UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>29</sup> E.g. Council of Europe, Committee of Ministers, Recommendation Rec(2006)5 of the Committee of Ministers to member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers' Deputies

Nations<sup>30</sup>) without any doubts constitutes the landmark instrument in this area both at international and European level. Especially with respect to education the Convention adopts an innovative approach and features, explicitly mentioning the duty to accommodate through the provision of reasonable accommodations under the right to education<sup>31</sup>.

Disabilities studies are characterised by innovative and evolving content encompassing theories, models, terms, etc.<sup>32</sup> In particular, terms as ‘disability’ and ‘handicap’ have been changing following the adoption and development of new models and theories. Indeed, originally disability studies were heavily influenced by a medical model focusing on the given individual’s traits and following a mere medical approach in order to define the causes of disability and disability itself, or alternatively a biomedical model<sup>33</sup>. Subsequently, disability studies adapted to a new model, i.e. social model, which shifts the focus from individuals’ traits and their medical conditions to factors within the social environment<sup>34</sup>. These factors influence the creation or formation of disability, encompassing physical barriers as well as attitudinal and behavioural barriers.

Furthermore, in the light of the research aims, the chapter will focus on the issue of disability in relation to education, in particular through the concept of ‘inclusive education’, which fosters the inclusion of persons with disabilities into education, seeking to guarantee access to and further participation in education by students with disabilities on an equal basis with their non-disabled peers<sup>35</sup>.

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<sup>30</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>31</sup> Ibid., Article 24

<sup>32</sup> E.g. Shakespeare, Tom and Nicholas Watson. “The social model of disability: an outdated ideology?.” *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28; Shakespeare, Tom (ed). “The Disability Reader: Social Sciences Perspectives.” London: Cassell, 1998 and Charlton, James I. “Nothing About Us Without Us: Disability Oppression and Empowerment.” University of California Press, 2000, p. 32-34

<sup>33</sup> Bryan, Turner S. “Vulnerability and Human Rights.” Penn State University Press, 2006

<sup>34</sup> Shakespeare, Tom and Nicholas Watson. “The social model of disability: an outdated ideology?.” *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28

<sup>35</sup> E.g. Moore, Michele and Roger Slee. “Disability studies, inclusive education and exclusion.” in Watson, Nick et al. (eds). “Routledge Handbook of Disability Studies.” Routledge, 2012 and UN

Here it is important to specify that the access to (and participation in) education encompasses both access to courses as well as curricula, which means taking exams, attending lectures, etc.

Furthermore, chapter three will slightly expand the scope of the research towards more philosophical and sociological themes. In fact, the chapter will focus mainly on the capability approach, covering various matters such as the social contract and social justice<sup>36</sup>, in order to provide a theoretical framework within which to enshrine the provision of reasonable accommodation and the outcome to this research on disability rights and education in the light of non-discrimination law and equality. In this sense, the capability approach will bring an added layer to the discussion, evaluating the role and position of persons with disabilities within society due to historical, cultural, economic, social and political causes. This added layer appears to be necessary in order to achieve a complete and exhaustive overview on the issue of disability. Taking further this reasoning, the chapter will disclose how people are treated and perceived by other members of society and how these situations can be changed and improved. The chapter will thus address the intersectionality of discrimination<sup>37</sup>, considering situations in which a person is discriminated against on the basis of several grounds at the same time. Furthermore, the chapter will address the topics of oppression and vulnerability, which are two concepts that have been raised in relation to persons with disabilities due to their marginalised and discriminated status within society<sup>38</sup>. These concepts support and complete a holistic approach towards

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Committee on the Rights of Persons with Disabilities, General comment No. 4 Article 24: Right to inclusive education, 2 September 2016, CRPD/C/GC/4

<sup>36</sup> Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006; Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009 and Mitra, Sophie. "The Capability Approach and Disability." *Journal of Disability Policy Studies* Vol. 16, No. 4, 2006, pp. 236–247

<sup>37</sup> E.g. Schiek, Dagmar. "Intersectionality and the Notion of Disability in EU discrimination law." *Common Market Law Review*, Vol. 53, No. 1, 2016, pp. 35-63

<sup>38</sup> Abberley, Paul. "The Concept of Oppression and the Development of a Social Theory of Disability." *Disability, Handicap & Society*, Vol. 2, No. 1, 1987 and Blanck, Peter and Eilionóir

discrimination and disability, providing a comprehensive study of the societal structure and how it functions.

Chapter four will deal specifically with the instrument of reasonable accommodation in relation to persons with disabilities, focusing particular attention on education. In order to understand fully and to further develop the concept of reasonable accommodation, it is essential to understand the origin and evolution of that instrument over the years. It must be noted that reasonable accommodations were introduced into EU law<sup>39</sup> and international law (e.g. UN Convention) during the 2000s<sup>40</sup>. Thus, the topic has been a novel and pioneering issue for scholars and legislators, particularly in Europe. The instrument of reasonable accommodation has been presented in relation to other instruments, which might be confused with one another, such as positive measures and specifically quotas<sup>41</sup>. In addition, due to a lack of legislation, national and supranational courts have been called upon to rule on the issue themselves, and therefore the most important cases will be discussed<sup>42</sup>. It must be stressed that there are not many judgements and decisions concerning this matter, in particular with regard to the context of (higher) education. Indeed, education has largely not

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Flynn (eds). "Routledge Handbook of Disability Law and Human Rights." Routledge Handbooks, 2017

<sup>39</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<sup>40</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>41</sup> Waddington, Lisa. "Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws." *Comparative Labor Law Journal* Vol. 18, No. 1, 1996, pp. 62–101; Bunt, Danielle et al. "Quotas, and Anti-discrimination Policies Relating to Autism in the EU: Scoping Review and Policy Mapping in Germany, France, Netherlands, United Kingdom, Slovakia, Poland, and Romania." *Autism Research*, Vol. 13, No. 8, 2020, pp. 1397-1417

<sup>42</sup> E.g. Court of Justice of the European Union. Judgment of the Court (Second Chamber), 11 April 2013. *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening*. Joined Cases C-335/11 and C-337/11 and European Court of Human Rights, *Gherghina v. Romania*, Application No. 42219/07, 9 July 2015

been considered in relation to reasonable accommodation by lawmakers within Europe, and hence only a few cases in this area are addressed in the research. Moreover, the chapter introduces concepts such as ‘integration’ and ‘inclusion’, which have a close connection to the issues at stake and generally to non-discrimination and equality<sup>43</sup>. It must be stressed that these two concepts will be discussed throughout the research along with other issues, as will be mentioned in the pages below.

Chapter five will examine reasonable accommodation within employment, although only to the extent necessary for this research<sup>44</sup>. In this sense, the chapter will not aim to provide a full and complete overview on the matter, as this would be infeasible and unproductive within the ambit of this research. Nevertheless, the chapter will introduce and to some extent analyse the issue of reasonable accommodation in the light of labour law, comparing it with other measures such as quotas, with which it can be confused. In addition, this chapter will also mention and discuss a few interesting cases under the two national legal systems focused on, namely Belgium and Italy<sup>45</sup>. Moreover, the chapter will mention social movements and their importance for disability studies. For instance, as will be shown below, the social model of disability has been sanctioned and broadcast thanks to social movements and their work<sup>46</sup>.

Last but not least, the final chapter will draw together the conclusions of the research, disclosing more explicitly the *fil rouge* connecting all of the issues considered throughout the research. It will also propose an evaluation in order to offer an *ad hoc* response to the issues at stake.

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<sup>43</sup> E.g. on inclusion and integration see UN Committee on the Rights of Persons with Disabilities. General comment No. 4 on the right to inclusive education, 2 September 2016, CRPD/C/GC/4

<sup>44</sup> E.g. Waddington, Lisa (ed). “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice.” Report. EU network of experts on disability discrimination 2004

<sup>45</sup> E.g. Tribunale Ascoli Piceno, 05/02/2014, R.G. 761/2013 and Cour du travail de Bruxelles du 07 Mai 2018. R.G. Nr. 2016/AB/133

<sup>46</sup> Union of the Physically Impaired Against Segregation (UPIAS). “Fundamental Principles of Disability: Being a Summary of the Discussion Held on 22nd November, 1975 and Containing Commentaries from Each Organisation.” UPIAS/Disability Alliance, 1976

In this sense, the research will need to adopt a general theoretical framework within which to embed its results. Such a framework will encompass theories on the ‘social contract and social justice’ and specifically the ‘capability approach’<sup>47</sup>. In particular, the capability approach broadens the studies contemplating society and how it functions from a more sociological and philosophical standpoint<sup>48</sup>.

In addition, the concept of ‘inclusion’ represents an essential step in moving towards the core of this project. In particular, the concept of ‘inclusive education’ will be presented and discussed<sup>49</sup>. This question is necessarily interrelated with the shift mentioned above from an ‘aid-dependency and welfarism approach’ to an ‘equal treatment and non-discrimination approach’. This assessment is essential in order to address the question concerning the status of persons with disabilities in society, and particularly in educational programs, in order to foster their capabilities and guarantee the full enjoyment of their rights.

Indeed, the provision of reasonable accommodations strives, following the principle of equality and an anti-discrimination approach, to foster education that is as inclusive as possible, with the aim of facilitating access to and participation in education by persons with disabilities

### iii. Research objectives

The main objective of the research is to provide a new and up-to-date legal framework for the European Union which, combatting discrimination against persons with disabilities in the context of higher education, regulates the provision of reasonable accommodations in order to guarantee access to and participation in (higher) education.

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<sup>47</sup> Nussbaum, Martha C. “Women and Human Development: The Capabilities Approach.” Cambridge University Press, 2000

<sup>48</sup> E.g. Terzi, Lorella. “Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs.” *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005 and Saito, Madoka. “Amartya Sen’s Capability Approach to Education: A Critical Exploration.” *Journal of Philosophy of Education*, Vol. 37, No. 1, 2003, pp. 17-34

<sup>49</sup> E.g. UN Committee on the Rights for Persons with Disabilities in its Comment on the right to inclusive education, CRPD/C/GC/4

In order to achieve this, the research will attempt to set out a clear and coherent analysis of the current legislation on anti-discrimination and equality law of the European Union (EU),<sup>50</sup> paying particular attention to education law and, insofar as necessary, also to labour law. The analysis will also encompass human rights and international entities, such as the United Nations<sup>51</sup> and the Council of Europe<sup>52</sup>.

Moreover, the case law of national courts and supranational courts, such as the Court of Justice of the European Union (CJEU)<sup>53</sup> and the European Court of Human Rights (ECtHR)<sup>54</sup>, will be taken into account. In particular, it must be stressed that these supranational courts play an essential role in providing influence and guidance, especially with regard to equal treatment and non-discrimination law as applied to labour law as well as to education law<sup>55</sup>.

In essence, the research will examine the current education law within the EU, but also the policy and related governance arrangements, focusing also on the national experiences of Belgium and Italy with specific regard to the quality assurance scheme<sup>56</sup>.

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<sup>50</sup> On EU non-discrimination law see Ellis, Evelyn and Philippa Watson. "EU Anti-Discrimination Law." Oxford University Press, 2012, Bell, Mark. "Anti-Discrimination Law and the European Union." Oxford, 2002 and Craig, Paul P. and Gráinne de Burca. Oxford University Press, 2011

<sup>51</sup> UN General Assembly. "Universal Declaration of Human Rights." Paris, 10 December 1948

<sup>52</sup> Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

<sup>53</sup> E.g. Court of Justice of the European Union, HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening, (2013) Joined Cases C-335/11 and C-337/11

<sup>54</sup> E.g. European Court of Human Rights, Gherghina v. Romania, Application no. 42219/07, 9 July 2015

1. our européenne des droits de l'homme, Sanlisoy v. Turkey, Requête no 77023/12, 8 novembre 2016

<sup>55</sup> E.g. Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 11 July 2006. Sonia Chacón Navas v Eures Colectividades SA, Case C-13/05 and our européenne des droits de l'homme, Sanlisoy v. Turkey, Requête no 77023/12, 8 novembre 2016

<sup>56</sup> E.g. Corbett, Anne. "Universities and the Europe of Knowledge." Palgrave macmillan, 2005 and Huisman, Jeroen, et al. "The Palgrave International Handbook of Higher Education Policy and Governance." Palgrave macmillan, 2015

Indeed, particular attention will be paid to the quality assurance scheme at national level, as well as the provision on reasonable accommodation in the context of both education and employment. Reaching beyond exclusively legislation and policies, the examination will broaden out to include an analysis of the current jurisprudence and the relevant case law in order to arrive at an exhaustive overview.

In relation to disability, the research will attempt to pursue a complete and comprehensive analysis of the issue, considering the position of persons with disabilities within society and how they are perceived and treated. As part of that examination, it will consider the development from an excessive ‘welfarism’ approach upheld by the state, and society itself, towards a more up-to-date ‘inclusive and equal’ approach towards persons with disabilities. The former approach regards persons with disabilities as persons needing help and assistance, while the latter endeavours to enhance the capabilities of each individual, pursuing equality and inclusion. In particular, the research will seek to provide a consistent overview of an ‘inclusive society’ and furthermore, with particular regard to the ‘core’ of the research, ‘inclusive education’ that is capable of guaranteeing access to and participation in education on the basis of the principle of equality<sup>57</sup>. In addition, the concept of disability will be examined paying particular attention to the evolution of the meaning of and the conceptualisation of the term ‘disability’, as well as other closely related terms such as ‘impairment’ and ‘handicap’<sup>58</sup>. In this sense, different models of disability will be discussed and evaluated, since each model entails its own interpretation and usage of the relevant terms<sup>59</sup>. Specifically, it is notable that there has been a shift from a medical model to a social model, mirroring changes and progress made, both

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<sup>57</sup> E.g. UN Committee on the Rights of Persons with Disabilities, General comment No. 4 on the right to inclusive education, 25 November 2016, CRPD/C/GC/4 and Peters, Susan J. “Education for All?: A Historical Analysis of International Inclusive Education Policy and Individuals With Disabilities.” *Journal of Disability Policy Studies*, Vol. 18, No. 2, 2007, pp. 98–108

<sup>58</sup> E.g. Waddington, Lisa. “Working Towards a European Definition of Disability.” *European Journal of Health Law*, Vol. 2, 1995, pp. 255-260

<sup>59</sup> E.g. Shakespeare, Tom and Nicholas Watson. “The social model of disability: an outdated ideology?.” *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28

medically and culturally, within society. In a nutshell, the former considers disability based on a mere medical method and terminology, whereas the latter considers also social environmental factors in order to define disability and its causes<sup>60</sup>.

A further objective of the research will be to compare the law of different EU Member States, specifically Belgium and Italy, with reference to an EU law perspective. Nevertheless, this comparison will also take into account, to some extent, other Member States' laws as well as rules adopted by various entities, such as international organisations and universities.

As mentioned above, the ultimate objective of the research is to draft a proposal to regulate the provision of reasonable accommodation within the context of (higher) education. In order to arrive at an *ad hoc* final proposal, it seems appropriate to assess which legal rules should be maintained and which rules should be discarded or altered, in order to establish a solid and valid legal framework on which the *ad hoc* proposal can be grounded. In order to perform such an evaluative assessment, it is necessary to devise a set of both internal and external criteria, depending upon whether those criteria belong to the same legal system, or to different systems<sup>61</sup>. As part of the evaluation process, the current legal scenario will be divided up into that which is suitable and that which is useful in order to achieve the inclusion of persons with disabilities within higher education, as well as what should be improved, changed or eliminated, both at EU and national level. In doing so, consideration will be given to the international context, such as the United Nations and the European Convention on Human Rights. Pursuing such reasoning further, the research will present some recommendations, with the aim of proposing a new framework on reasonable accommodations for persons with disabilities in the context of higher education in order to combat discrimination and guarantee access to education on an equal footing.

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<sup>60</sup> E.g. Bryan, Turner S. "Vulnerability and Human Rights." Penn State University Press, 2006

<sup>61</sup> Kestemont, Lina. "A meta-methodological study of Dutch and Belgian PhDs in social Security law: Devising a typology of research objectives as a supporting tool." *European Journal of Social Security*, Vol. 17, No. 3, 2015, p. 374-375

In order to provide a complete picture, the research will explore a new theory known as the ‘capability approach’, which offers an innovative theoretical framework that is to some extent compatible with the goals of and issues covered by this research<sup>62</sup>. In this regard, it must be noted that the capability approach takes into account topics such as the social contract and social justice, thus engaging with issues that are to some extent close to philosophy and sociology. As regards disability, such an approach offers an original schema regarding persons with disabilities that focuses on the capabilities of human beings, although also on the role of society, including in particular the societal structure and its influence on relationships between its members as well as the members themselves. Within the ambit of the research, the capability approach will be applied to the context of education, following recent developments in this area<sup>63</sup>. However, it must also be highlighted that this topic is rather new and unexplored, and hence the available material is fairly limited.

#### iv. Methodology

The research covers a wide range of theoretical approaches, and consequently requires a variety of methodologies, which must be linked to the main question and the resulting sub-questions.

Indeed, the research encompasses descriptive, comparative, evaluative and recommendatory methodologies. In this sense, the core task is comprised of a descriptive legal analysis, in relation to a comparative perspective. The project

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<sup>62</sup> E.g. Nussbaum, Martha C. “Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership.” Cambridge, MA: Harvard University Press, 2006, Sen, Amartya. “The Idea of Justice.” The Belknap Press of Harvard University Press Cambridge, 2009 and Mitra, Sophie. “The Capability Approach and Disability.” *Journal of Disability Policy Studies* Vol. 16, No. 4, 2006, pp. 236–247

<sup>63</sup> E.g. Unterhalter, Elaine. “Education, capabilities and social justice.” Background paper prepared for the Education for All Global Monitoring Report 2003/4 Gender and Education for All: The Leap to Equality, 2004/ED/EFA/MRT/PI/76 and Terzi, Lorella. “Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs.” *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005

will conclude with an evaluative step, and finally set out recommendations in order to submit an *ad hoc* proposal concerning the issues at stake.

The research will engage with the most appropriate methodology for each chapter, drawing on the most suitable and relevant material.

In particular, chapter one will focus on the status of higher education within the European Union, and will conduct an analysis and discussion of the most relevant legislative instruments, including the treaties and directives, as well as non-binding documents such as communications and international agreements<sup>64</sup>. Specifically, it must be noted that education and especially higher education within the European Union are essentially governed by a common policy and governance among the Member States and the EU itself<sup>65</sup>. There are various reasons for this arrangement, which date in time historically, politically, culturally, socially, economically, etc. Here it is sufficient to mention that it is only over the last twenty years that the European Union has increased its interest in and influence over the area of (higher) education, establishing the space for a common policy among its Member States and a new type of governance within the EU<sup>66</sup>. Therefore, the research relies on several acts of *soft law*, such as political acts, statements of intent, outcomes of summits and agreements among

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<sup>64</sup> E.g. European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a renewed EU agenda for higher education {SWD(2017) 164 final}, Brussels, 30.05.2017, COM(2017) 247 final

<sup>65</sup> On the topic see Hingel, Anders J. "Education Policies and European Governance: Contribution to the Interservice Groups on European Governance." European Journal for Education Law and Policy, Vol. 5, Kluwer Academic Publishers, 2003, Netherlands

<sup>66</sup> On the topic see Huisman, Jeroen and Marijk van der Wende. "The EU and Bologna: are supra- and international initiatives threatening domestic agendas?" European Journal of Education, Vol. 39, No. 3, 2004

European ministries and the EU institutions<sup>67</sup>. Pursuing further such an approach, the materials taken into account encompass books, articles and various publications, which sometimes fall slightly outside the mere legal field, touching on subjects such as sociology and political science, although always retaining their relevance for and coherence with the issue at stake<sup>68</sup>.

For instance, one of the most important elements within the scheme of higher education in the EU, with reference to the research goals, is undoubtedly Quality Assurance, which is characterised by a complex structure comprised of various agencies at regional, national and supranational level<sup>69</sup>. These agencies engage in constant dialogue among themselves and with the central core represented by the European agencies and institutions responsible for quality assurance in higher education, as will be discussed in greater detail below. As regards the regional and national context, the research self-evidently involves Belgium and Italy and their respective systems. In particular, Belgium has a peculiar configuration, being comprised of three different communities (speaking French, Dutch and German respectively), and hence, due to linguistic reasons and a scarcity of material, some areas may unfortunately lack sufficient information and detailed discussion<sup>70</sup>. Italy for its part has a more centralised and structured system. However, that system features inconsistencies and some lack of clarity and effectiveness<sup>71</sup>.

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<sup>67</sup> E.g. Resolution of the ministers for education of 16 November 1971 on cooperation in the field of education, Official Journal C098, 20/08/1974 and Resolution of the Ministers of Education, meeting within the Council, of 6 June 1974 on cooperation in the field of education

<sup>68</sup> E.g. Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006 and Nussbaum, Martha C. "Capabilities and Disabilities: Justice for Mentally Disabled Citizens." *Philosophical Topics*, Vol. 30, No. 2, University of Arkansas Press, 2002, pp. 133-165

<sup>69</sup> E.g. Recommendation of the Council on European cooperation in quality assurance in higher education 98/561/EC of 24 September 1998 and Bernhard, Andrea. "Quality Assurance in an International Higher Education Area." Springer Fachmedien Wiesbaden GmbH, 2012

<sup>70</sup> E.g. Jackson, Stephen et al. "ENQA agency review: Flemish Higher Education Council – Quality Assurance (VLUHR QA)." ENQA, 19 September 2019

<sup>71</sup> Fantoni, Stefano. "Il sistema di valutazione ANVUR." *Scuola democratica*, Fascicolo 3, settembre-dicembre 2015

In addition, also the judgements and decisions of the Court of Justice of the European Union will be taken into account<sup>72</sup> as well as the case law of another supranational court external to the European Union, namely the European Court of Human Rights, since its judgements on the right to education and disability are relevant to the issue at hand<sup>73</sup>.

It must be noted that education finally became an interesting and relevant topic not only within the EU and its Member States, but also among scholars, not so long ago. Therefore, in some areas the research can only draw on a small body of literature. Nonetheless, the selected literature has been chosen based on its importance for and consistency with the aims and issues of this research.

Chapter two will consider disability rights paying particular attention to the right to education. These chapters will focus in detail on non-discrimination law, and will study all of the relevant legislation in this area, from international human rights to EU law and its implementing legislation<sup>74</sup>. The chapter will hence discuss the legislation enacted by the European Union although will also, to some extent, analyse the political action of the Union through its strategies and plans on disability rights<sup>75</sup>. Moreover, the legal instruments adopted by other supranational entities such as the United Nations<sup>76</sup> and the Council of Europe will also be taken into account<sup>77</sup>. The research will also cover decisions made by non-judicial

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<sup>72</sup> E.g. Court of Justice of the European Union. Judgment of the Court (Second Chamber), 11 April 2013. HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)

<sup>73</sup> E.g. European Court of Human Rights, Gherghina v. Romania, Application no. 42219/07, 9 July 2015

<sup>74</sup> Ellis, Evelyn and Philippa Watson. "EU Anti-Discrimination Law." Oxford University Press, 2012; Bell, Mark. "Anti-Discrimination Law and the European Union." Oxford, 2002, and Craig, Paul P. and Gráinne de Burca. Oxford University Press, 2011

<sup>75</sup> E.g. European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, Brussels, 15.11.2010 COM(2010) 636 final

<sup>76</sup> E.g. UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>77</sup> E.g. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

authorities like as the United Nations Committee on the Rights of Persons with Disabilities<sup>78</sup> and the European Committee of Social Rights of the Council of Europe, specifically in relation to the European Social Charter<sup>79</sup>. In fact, through their comments and decisions, despite lacking any binding force, these committees seek to establish the clarity and effectiveness of the provisions at stake.

The chapter will also reach into a field that is not strictly related to a purely legal approach: indeed, disability raises a number of problems of interpretation, but also of perception, concerning various issues within society and its members. It therefore appears necessary to analyse and discuss theories and models which, despite having been shaped and theorised outside of the law, play an important and influential role also for the issues at stake<sup>80</sup>. In particular, the different models of disability will be analysed, focusing on their influence on the issue of disability, also from a legal perspective<sup>81</sup>.

The third chapter will be perhaps the boldest chapter of the research in that it will consider theories that are not strictly related to the law, namely the capability approach, and also explore issues as the social contract and social justice. The chapter will refer mainly to the works of Nussbaum and Sen, the former a philosopher and the latter an economist, in order to provide a complete and adequate overview of the issue of disability in relation to society and its structure, specifically the role of each member and group as well as the relationship among such social actors<sup>82</sup>. In addition, the chapter will also analyse concepts such as

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<sup>78</sup> E.g. UN Committee on the Rights of Persons with Disabilities Communication No. 21/2014 Views adopted by the Committee at its fourteenth session, 17 August - 4 September 2015, F. v Austria, 24 March 2014, CRPD/C/14/D/21/2014

<sup>79</sup> E.g. European Committee of Social Rights Comité européen des Droits sociaux, Autism-Europe against France, Complaint No. 13/2002

<sup>80</sup> E.g. Bryan, Turner S. "Vulnerability and Human Rights." Penn State University Press, 2006

<sup>81</sup> E.g. Shakespeare, Tom and Nicholas Watson. "The social model of disability: an outdated ideology?." *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28

<sup>82</sup> E.g. Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006 and Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009

intersectionality, oppression and vulnerability, all of which are related to the role and position of persons with disabilities within society and how these persons, or certain groups or members, have been treated<sup>83</sup>.

Due to the specificity and particular nature of the topics at stake, the chapter will draw on a limited range of publications, such as books and articles, including the works of the two authors mentioned above<sup>84</sup> as well as subsequent works published by other authors. However, the chapter will endeavour to maintain the approach established by the aim of the research, without drifting too far beyond the confines of legal studies.

Chapter four concerns mainly the issue of reasonable accommodation in relation to disability in the context of education<sup>85</sup>. In an effort to provide a full and complete understanding of the instrument at stake, it would appear necessary to investigate its origins and the theoretical legal framework in which it can be placed. The legal theoretical framework encompasses concepts such as equality and accessibility, which characterise non-discrimination law within the European Union<sup>86</sup> but also within international bodies such as the United Nations<sup>87</sup>.

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<sup>83</sup> E.g. Bullock, Jess, and Annick Masselot. "Multiple Discrimination and Intersectional Disadvantages: Challenges and Opportunities in the European Union Legal Framework." *Columbia Journal of European Law*, Vol. 19, No. 1, Winter 2012/2013, p. 57-82; Shakespeare, Tom and Nicholas Watson. "The social model of disability: an outdated ideology?." *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28; Shakespeare, Tom (ed). "The Disability Reader: Social Sciences Perspectives." London: Cassell, 1998; Abberley, Paul. "The Concept of Oppression and the Development of a Social Theory of Disability." *Disability, Handicap & Society*, Vol. 2, No. 1, 1987 and Blanck, Peter and Eilionóir Flynn (eds). "Routledge Handbook of Disability Law and Human Rights." Routledge Handbooks, 2017

<sup>84</sup> Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006 and Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 200

<sup>85</sup> E.g. Mégret, Frédéric. & D. Dianah Msipa. "Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality." *South African Journal on Human Rights*, Vol. 30, No. 2, 2014, pp. 252-274

<sup>86</sup> E.g. Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services

<sup>87</sup> E.g. UN Committee on the Rights of Persons with Disabilities, General comment No. 2, Article 9: Accessibility, 22 May 2014, CRPD/C/GC/2

Therefore, legislation and commentaries produced mainly within the two supranational entities mentioned above will be analysed. Moreover, the chapter will go further, analysing the position at national level with particular attention to Belgium and Italy, although also a few other States with some particular and specific features that are useful in order to fully understand and discuss in depth the issue of reasonable accommodations<sup>88</sup>.

In addition, the chapter will consider relevant case law formed within the European Union, along with the Council of Europe and the national courts affected by the research<sup>89</sup>. In this regard, due to the specificity but also novelty of the matter, the number of judgements is not that vast, and has an influence on the number of cases considered throughout the research.

Chapter five will address the issue of reasonable accommodation in the context of employment, but only to the extent necessary for the aims of the research<sup>90</sup>. In particular, some judgements will be selected among the copious case law on this issue, and the chapter will focus eventually on a small number of cases, due to linguistic reasons and also in order not to stray unduly beyond the aims and fields of the research, i.e. education<sup>91</sup>. Furthermore, the chapter will also

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<sup>88</sup> Waddington, Lisa (ed). "Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice." Report. EU network of experts on disability discrimination 2004

<sup>89</sup> E.g. Court of Justice of the European Union. Judgment of the Court (Second Chamber), 11 April 2013. HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening, (2013) Joined Cases C-335/11 and C-337/11 and European Court of Human Rights, Gherghina v. Romania, Application no. 42219/07, 9 July 2015

<sup>90</sup> E.g. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<sup>91</sup> E.g. Court of Justice of the European Union. . Judgment of the Court (Second Chamber), 11 April 2013. HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening, (2013) Joined Cases C-335/11 and C-337/11 and European Court of Human Rights, Gherghina v. Romania, Application no. 42219/07, 9 July 2015

consider the issue of social movements and their influence on the issue at stake<sup>92</sup>. In this sense, such movements, especially within the European Union, are not particularly well-established and are rather young. Hence, the literature and information mentioned by the research are not particularly abundant. The chapter will also dedicate a section to European integration, a recurring topic throughout the research, since such a phenomenon helps us understand general phenomena such as globalisation and internationalisation, as well as specific phenomena such as integration and inclusion within the EU, specifically within its societies<sup>93</sup>.

In the sixth and final chapter, the research will attempt to follow an evaluative and recommendatory path in order to offer an overall insight into the complex scenario set out by the research, which involves different topics and various new elements and theories.

In particular, the chapter will address the issues at stake by looking at three layers: first, disability rights, secondly, education and the capability approach and thirdly, the provision of reasonable accommodation. In other words, persons with disabilities and their rights are the main actors, education provides the context in which those actors act and cope with discrimination, while the capability approach offers the theoretical framework through which the situation can be read. Finally, the provision of reasonable accommodation constitutes the specific and practical response to discrimination and in order to seek to achieve a more inclusive society.

The following section will briefly introduce the topic of reasonable accommodation within the specific context of universities. In particular, the section will consider four Universities based in the two Member States of the European Union considered by the research, namely Belgium and Italy, in order to

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<sup>92</sup> E.g. Union of the Physically Impaired Against Segregation (UPIAS). "Fundamental Principles of Disability: Being a Summary of the Discussion Held on 22nd November, 1975 and Containing Commentaries from Each Organisation." UPIAS/Disability Alliance, 1976

<sup>93</sup> E.g. Haas, Ernst B. "International Integration: The European and the Universal Process." *International Organization*, Vol. 15, No. 03, 1961 and Dale, Roger and Robertson, Susan (eds). "Globalisation and Europeanisation in Education." Oxford: Symposium Books, 2009

offer a glimpse of the current situation regarding the provision of reasonable accommodation with the European Union.

v. Setting the scene: Universities and reasonable accommodation

This section will consider the services and provisions for persons with disabilities offered by four different Universities, specifically: the University of Hasselt (UHasselt), the University of Gent (UGent), the University of Foggia (Unifg) and the University of Verona (Univr).

The four universities are based in the two countries covered by this research, Belgium and Italy. Specifically, two of the universities chosen are the two universities at which this research has been carried out, namely the University of Hasselt and the University of Verona. The University of Gent has been chosen for two main reasons. First of all, part of the research has been carried at UGent, allowing the researcher to become acquainted with the structure and organisation of Gent University and secondly, because UGent offers an alternative picture within Belgium to that provided by University of Hasselt due to its size, thus impinging *inter alia* on available resources, and its different organisational structures. Similarly, the University of Foggia has been selected based on the researcher's familiarity with it and its alternative approach to the University di Verona within Italy, due to the differences in size and organisational structure. In this sense, the four universities have student numbers ranging between 5,000 ( Unifg has around 9,000 students, while UHasselt has around 6,000 students) to over 40,000 ( UGent has around 43,000 students, while Univr has around 25,000 students) and they also have different histories. Specifically, UGent (or its predecessor) was founded in the early years of the 1800s, while the other three, UHasselt, Univr and Unifg (or their predecessors), were founded in the late 1900s. Moreover, it is evident that the universities are influenced by the national or regional context in which they operate. In addition, it must be stressed that all of the universities, without exception, enjoy particular independence due to historical, cultural, social and legal reasons.

It is interesting to note that the terms 'reasonable accommodation' and 'disability' are not always mentioned and used within the universities.

At this stage it is appropriate to report the most significant features displayed by the universities selected. It has been stressed that the research does not claim to examine and present a complete and exhaustive study concerning this specific issue, which would otherwise require much more space and time.

On the contrary, this section of the research will seek to offer a brief overview of the current situation regarding this issue, namely reasonable accommodations for students with disabilities in the European Union. In other words, this section will attempt to set the scene that is directly relevant for this research, setting out the issues addressed by this research.

Specifically, the University of Hasselt (UHasselt) provides for “extra support and coaching in their studies and extra facilities during teaching and exams” addressing persons “functional impairment”. Moreover, the University’s website sets out a list of adjustments that can be taken into account, including:

- *“adapted (individual) study coaching (e.g. in terms of study methods, study planning, etc.)*
- *adapted (individual) study career coaching, for example the definition of an adapted study pathway (e.g. spreading out the study programme over multiple years)*
- *teaching facilities (depending on your needs and difficulties, e.g. in the selection of the tutorial group, etc.)*
- *facilities during evaluations (depending on your needs and difficulties, e.g. extra time to complete an exam, no penalties for spelling mistakes, choosing your position within the exam room, etc.) reading software”<sup>94</sup>.*

Furthermore, the University of Gent (UGent) invites students to make an appointment with the disability officer in order to evaluate “the impact of your disability on education activities and examinations for a discussion and “reasonable accommodations to compensate for these barriers”<sup>95</sup>. Furthermore, the University defines “Reasonable accommodations” as “a balance between the

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<sup>94</sup> <https://www.uhasselt.be/Functionalimpairment> - last visited 16.02.2021

<sup>95</sup> <https://www.ugent.be/prospect/en/administration/application/special-status/studydisability.htm> - last visited 16.02.2021

(dis)abilities of a student, the demands of an education program and the capacity of this program to meet the adjustments”. In addition, the University’s website provides a list of examples, specifying that the adjustments mentioned are only some examples:

- *“Extra time for an examination*
- *Making use of a laptop (with or without text-to-speech software)*
- *Choosing your own place in the examination room*
- *Getting a digital copy of your handbooks and courses (to use with text-to-speech software)*
- *Taking the exam on another date than originally planned”<sup>96</sup>.*

As regards the two Italian universities, neither the University of Verona (Univr) nor the University of Foggia (Unifg) explicitly mentions reasonable accommodations. By contrast, Univr mentions rights available to applicants for admission tests whilst Unifg lists the services offered to students with disabilities.

On the one hand, the University of Verona provides for”

- *“Extra time up to a maximum of 50%, upon specific request.*
- *Other compensatory instruments tailored to the specific pathology”<sup>97</sup>.*

In particular for applicants with specific learning disorders (or a learning disability), the University proposes:

- *“Extra time up to a maximum of 50%, irrespective of whether specifically requested;*
- *Upon specific request, other compensatory instruments, such as a non-scientific calculator, video magnifier, or support of a reader chosen by the University”<sup>98</sup>.*

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<sup>96</sup> <https://www.ugent.be/prospect/en/administration/application/special-status/studydisability.htm> - last visited 16.02.2021

<sup>97</sup> <https://www.univr.it/it/i-nostri-servizi/inclusione-e-accessibilita-supporto-a-studenti-con-disabilita-e-dsa/supporto-per-le-prove-di-ammissione> - Last visited 16.02.2021

Personal translation:

“Le candidate e i candidati con disabilità hanno diritto:

- a tempo aggiuntivo rispetto a quello previsto per lo svolgimento della prova nella misura massima del 50% e solo se ne formulino specifica richiesta;
- a strumenti compensativi ulteriori necessari in ragione della specifica patologia”

On the other hand, the University of Foggia provides a long list of services in favour of students with disabilities. Specifically, the Unifg mentions:

- “Assistance in the completion of the admission test or further examinations in itinere”<sup>99</sup>.
- “Technical and IT equipment”<sup>100</sup>.
- “Interpreting services for deaf students”<sup>101</sup>.

In addition, it must be stressed that, in Italy, the Ministerial Decree no. 477 of 2017 states that persons with learning disabilities can have the 30% extra time for admission tests. Hence, such accommodation operates automatically according to law.

Based on this brief overview, and having regard to the research perspective, some observations can be proposed. First, it can be noted that expressions such as ‘reasonable accommodations’ and ‘students with disabilities’ are not always used.

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<sup>98</sup> <https://www.univr.it/it/i-nostri-servizi/inclusione-e-accessibilita-supporto-a-studenti-con-disabilita-e-dsa/supporto-per-le-prove-di-ammissione> - Last visited 16.02.2021

Personal translation:

“Le candidate e i candidati con DSA hanno diritto:

- a tempo aggiuntivo nella misura del 30% a prescindere da specifica richiesta;
- su esplicita richiesta, a ulteriori strumenti compensativi, quali calcolatrice non scientifica, video ingranditore, affiancamento di un lettore scelto dall’Ateneo”

<sup>99</sup> <https://www.unifg.it/unifg-comunica/studenti-con-disabilita-e-dsa/carta-dei-servizi-unifg> - Università degli studi di Foggia, Disabilità, Carta dei servizi, Articolo 5 Servizi – last visited 16.02.2021

Personal translation: “Assistenza durante l’espletamento delle prove d’esame in ingresso e in itinere”

<sup>100</sup> <https://www.unifg.it/unifg-comunica/studenti-con-disabilita-e-dsa/carta-dei-servizi-unifg> - Università degli studi di Foggia, Disabilità, Carta dei servizi, Articolo 5 Servizi – last visited 16.02.2021

Personal translation: “Attrezzature tecniche e informatiche specifiche”

<sup>101</sup> <https://www.unifg.it/unifg-comunica/studenti-con-disabilita-e-dsa/carta-dei-servizi-unifg> - Università degli studi di Foggia, Disabilità, Carta dei servizi, Articolo 5 Servizi – last visited 16.02.2021

Personal translation: “Servizio di interpretariato per studenti non udenti”

Nonetheless, universities address the issue of students facing impediments during their educational path, from the admission tests and further examinations through to the attendance of lectures and the conclusion of studies.

Secondly, the procedures show some similarities, such as for instance the requirement for a formal application of enrolment as a student with a disability or the need for a formal certificate stating the medical condition of the student in order to obtain certain services or adjustments, i.e. certain reasonable accommodations.

Thirdly, all universities offer some predetermined and qualified adjustments in relation to common situations such as learning disabilities, and feature some similarities. However, also the scarcity of provisions and regulations concerning reasonable accommodations is also apparent.

It is now necessary to start with the analysis and discussion at issue in the research. The following chapter will start by addressing the topic of the right to education within the context of the European Union.

## **I. The European Union and Higher Education**

### **1. Introduction and the right to education**

This first chapter will analyse the current position regarding the right to education within the European Union (EU), dedicating particular attention to the issue of disability which, together with education, is one of the two major issues covered by this research. As disability will be the central issue covered in the following chapter, it is appropriate to highlight the connection between disability and education in the discussion in this chapter.

Since the legal framework is not sufficiently detailed and legal sources are somewhat scarce, the issue of education and especially the right to education within the European Union is mainly addressed by policies settled and adopted at various levels, including at national and, in particular, supranational level (e.g. European Union), as will be shown below. Specifically, the EU higher education policy and *governance* has been and still is strongly influenced by an international agreement adopted in 1999 known as the ‘Bologna Declaration’, which started on the construction of the European Higher Education Area (EHEA) involving not only the EU Member States but also non-EU countries beyond Europe's borders.

Furthermore, within the European Union higher education policy is influenced by the Lisbon Agenda, which has permitted the EU and in particular the European Commission to take the lead, to some extent, on education and in particular in the Bologna Process within the EU, creating a new *governance* framework for higher education at European level. Such a development has been possible thanks to the use of *soft law* instruments, which the related benefits and drawbacks, which means on the one hand flexibility but on the other hand non-binding force.

Besides, an entire system comprised of both national and supranational agencies enriches the scenario characterised by *soft law* instruments and policy actions. These agencies perform various important activities, such as intense monitoring and reporting. Above all the European Association for Quality Assurance in Higher Education (ENQA) occupies a central position at European level.

However, these agencies also make considerable efforts to achieve some kind of harmonisation, especially in terms of the quality of education, through the adoption of common guidelines, objectives and parameters. Moreover, as part of these processes education has been an area characterised by significant spillover for further integration among the EU Member States fostered by the Union itself and its Member States.

As mentioned above, the legal instruments are quite limited and in particular within the European Union the most important legal acts, i.e. the Treaties, only started to mention education as a European matter with the Maastricht Treaty in 1992. The period prior to this has been characterised by a lack of legislation, but conversely the adoption of numerous political acts and declarations of intent.

In fact, the issue of higher education seems to be characterised by an intense policy making activity, which it is appropriate to analyse deeply and in full, in tandem with a more limited presence of *hard law*. In particular, the path leading up to the Maastricht Treaty, and also following its adoption, must be analysed in order to obtain a full overview of the current position. The path leading up to the signature of the Maastricht Treaty and its provisions on education and vocational training will now be outlined, insofar as relevant for this research.

This Treaty represents a milestone in terms of EU higher education policy as it lays down the first formal legal basis on which the governance on higher education within the European Union was grounded, and subsequently developed. Pre-Maastricht, a number of actors and elements of influence played a role, from the political acts of the EU institutions to the judgements of the European Court of Justice.

It must be added that, due to the lack of legislation and the limited number of significant acts (and perhaps also due to hindrances imposed by the Member States on speeding up development and integration in the field of education), this topic has not been analysed by many authors. In particular, resistance by Member States to deep and invasive integration may be found in the various national traditions and national identities, which are firmly rooted in education. In fact, education and especially universities in Europe have been considered historically as instruments for constructing a State through “building a national consciousness

and identity, integrating national elites, and providing a national research capacity for economic and social development”<sup>102</sup>.

The importance of education at national level is thus clear, specifically from a historical perspective, as a provider of cultural, economic and social meaning.

Likewise, for the same reasons, it is understandable that Member States may generally be reluctant to lose or relax their sovereignty, especially with regard to education. Furthermore, after a period marked by an intense generation of acts, declarations of political intent, legislation and agreements, which have been properly analysed and commented on, this dynamic has started to slow down, which may be why various authors have disregarded the issue. Nonetheless, it must be pointed out that the creation of common policies and of the EHEA and its development has not stopped. However, it is likely that it has lost its newness and innovative force.

For the above reasons, the research will follow the red line traced by the limited number of authors who have explored the issue, and will rely on a limited number of references and literature.

## **2. The right to education and the European Union**

The 1992 Treaty of Maastricht<sup>103</sup> gave the European Union a direct role in education<sup>104</sup> for the first time through an *ad hoc* provision on quality education and education systems, formally establishing the basis for the most important law within the European Union as well as EU competence over education.

The provision introduced by the Maastricht Treaty was subsequently incorporated without any changes into the Lisbon Treaty in Article 165.

Paragraph 1, phrase 1 provides that:

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<sup>102</sup> Maassen, Peter and Johan Olsen P. Chapter 1 “European Debates on the Knowledge Institution: The Modernization of the University at the European Level.” in Maassen, Peter and Johan Olsen P. (eds). “University Dynamics and European Integration.” Higher Education Dynamics, Springer, 2007, Netherlands, p. 5

<sup>103</sup> European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5

<sup>104</sup> Dale, Roger and Robertson, Susan (eds). “Globalisation and Europeanisation in Education.” Oxford: Symposium Books, 2009, p. 69

*The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity [...]*<sup>105</sup>.

It then goes on to stipulate in paragraph 2 *inter alia* that:

*Union action shall be aimed at:*

- *developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,*
- *encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,*
- *promoting cooperation between educational establishments [...]*<sup>106</sup>

This Article enshrines on the one hand, for the first time, a formal and preeminent role for the European Union in pursuing cooperation on education at European level, whilst on the other hand stressing the importance of the principle of subsidiarity.

As regards subsidiarity, Hingel stresses that education has to be governed at national, or even sub-national level, since it seems to be the best and most suitable level, in Hingel's opinion, for guaranteeing the quality of education within the Community and its Member States<sup>107</sup>.

On the one hand, the provision contained in the Maastricht Treaty represents a start, as being the first legal basis for primary law on education within the European Union, thus creating a framework for subsequent legal developments.

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<sup>105</sup> European Union. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, Article 165 (1)

<sup>106</sup> Ibid., Article 165 (2)

<sup>107</sup> Hingel, Anders J. "Education Policies and European Governance: Contribution to the Interservice Groups on European Governance." *European Journal for Education Law and Policy*, Vol. 5, Kluwer Academic Publishers, 2003, Netherlands, p. 7

On the other hand, the provision represents the final result of a long political and also legal development.

It has been noted that, as early as 1991, the “Memorandum on Higher Education showed that [higher education] had become part of the Community’s broader agenda of economic and social coherence”<sup>108</sup>. This Memorandum<sup>109</sup> is just one of the various political acts adopted in this area during the early European Community and the present-day European Union.

Moreover, between the approval of the Maastricht Treaty and the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (CFREU or simply Charter) was also adopted. The Charter follows the path traced by the two Treaties, involving the acknowledgement of the right to education for all, as enshrined in Article 14<sup>110</sup>. Furthermore, the Charter specifies in Article 51, under the general provisions, in particular in defining the scope of the Charter, that the European institutions and also the Member States shall act in accordance with the principle of subsidiarity when implementing Union law<sup>111</sup>.

In addition, it is also appropriate to mention the Convention on the Rights of Persons with Disabilities (CRPD) adopted by the UN General Assembly during the 2000s<sup>112</sup>. This instrument undoubtedly represents a landmark for persons with disabilities and their rights. Interestingly, the Convention establishes a special connection between disability and education. However, a deeper and fuller analysis of the Convention and its link to education will be provided in the next chapter.

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<sup>108</sup> Huisman, Jeroen and Marijk van der Wende. “The EU and Bologna: are supra- and international initiatives threatening domestic agendas?” *European Journal of Education*, Vol. 39, No. 3, 2004, p. 350

<sup>109</sup> European Commission. Memorandum on higher education in the European community, COM(91) 349 final. Brussels, 5 November 1991

<sup>110</sup> Charter of Fundamental Rights of the European Union, Official Journal of the European Union C83, Vol. 53, European Union, 2010, Article 14

<sup>111</sup> *Ibid.*, Article 51

<sup>112</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106

i. Education: a pioneering right, or a social or civil right?

The right to education is controversial in nature, but also has a pioneering potential. In order to analyse these features, it is appropriate to introduce briefly the Charter of Fundamental Rights of the European Union of 2000 (CFREU or Charter). In addition to the Maastricht Treaty, the European Union has also adopted various instruments, including other Treaties and the Charter, concerning education and in particular guaranteeing specifically the right to education. Among these, the most interesting and innovative text is probably the Charter.

Article 14(1) CFREU, entitled “Right to education”, provides that:

*“1. Everyone has the right to education and to have access to vocational and continuing training”<sup>113</sup>.*

It must be stressed that the Charter has had the status of primary law since the entry into force of the Lisbon Treaty, Article 6(1) of which recognises the CFREU as having the same status as the EU Treaties. Nevertheless, the Charter does not, broadly speaking, confer any new competences upon the EU. Notably, the same Article of the Lisbon Treaty goes on to provide in the following paragraph for access to the European Convention on Human Rights (ECHR) and, in the same terms, the CFREU states in Article 52 (3) that the rights contained in the Charter “correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms”<sup>114</sup>.

Such a reference creates a formal reliance and connection between the Charter and the ECHR, establishing a parallelism between the EU and the Council of Europe. Moreover, the provision suggests that the Charter should be interpreted in the light of the ECHR, encompassing extensive interpretations, decisions, comments and all the material which is useful for interpreting the provisions of the Charter.

Following the pattern of the two main Treaties adopted by the Council of Europe, namely the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), the Chapter will seek to list all of the rights that EU citizens

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<sup>113</sup> Ibid., Article 14

<sup>114</sup> Ibid., Article 52 (3)

are entitled to, even though neither of these two instruments was adopted under the auspices of the EU<sup>115</sup>.

In addition, it must be pointed out that the Charter represents an important attempt within the European Union to bring social, economic, civil and political rights together as a single whole. Indeed, under the traditional theory, it is accepted that there is a dichotomy between first generation human rights, i.e. civil and political, and second generation rights, i.e. economic, social and cultural rights<sup>116</sup>. Such distinction generates further dichotomies, *inter alia*, for instance the contrast between positive freedoms, which are supposed to be linked to socio-economic rights, entailing an obligation upon the State to take action, and negative freedoms, which are linked to civil and political rights, and require States merely to refrain from acting<sup>117</sup>.

In addition, it has been stressed that the ‘artificiality’ of these dichotomies, which entails potential contrasts and clashes among them, may be somehow overcome<sup>118</sup>.

As regards the juxtaposition between first and second generation of rights, the Convention on the Rights of the Persons with Disabilities (CRPD) makes its own contribution.

The CRPD was adopted by the United Nation’ General Assembly in 2006 and represents an innovative tool in setting out together all rights, from civil to social

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<sup>115</sup> Lawson, Anna. “The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?.” in Arnardóttir, Oddný. M. and Gerard Quinn (eds). “The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives.” International Studies in Human Rights, Martinus Nijhoff Publishers, Vol. 100, 2009, p. 83

<sup>116</sup> Stein, Michael A. “Disability Human Rights.” California Law Review, Vol. 75, No. 75, 2007, p. 77

<sup>117</sup> O’Cinneide, Colm. “Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities.” in Arnardóttir, Oddný. M. and Gerard Quinn (eds). “The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives.” International Studies in Human Rights, Martinus Nijhoff Publishers, Vol. 100, 2009, p. 170

<sup>118</sup> Ibid., p. 170

rights, in the light of a holistic and comprehensive approach<sup>119</sup>. However, the Convention imposes some limits on the realisation of the economic, social and cultural rights since according to Article 4(2), the realisation of these rights is linked to the “available resource”<sup>120</sup> of the State<sup>121</sup>.

Furthermore, the CRPD again seems to display another dichotomy, introducing civil and political rights as negative rights and social, economic and cultural rights as positive rights<sup>122</sup>. This approach suggests that negative rights should be interpreted as rights that are easy to realise since they seem to be free from any cost, requiring only non-action by the State. Conversely, positive rights demand practical and material action by the State, which entails the need to transfer resources and funds in order to pursue and realise the rights at stake.

Following such a framework, the right to education seems to belong to the second-generation of rights, i.e. social, economic and cultural rights, since it is self-evident that education requires some action in order to be realised, such as premises, teaching staff, resources, etc.

This assertion has been challenged by the Council of Europe through its two major Conventions, the European Social Charter (ESC) and the European Convention on Human Rights (ECHR). Indeed, in spite of the fact that the ESC provides for economic, social and cultural rights and the ECHR provides for civil

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<sup>119</sup> Cera, Rachele. “National Legislations on Inclusive Education and Special Educational Needs of People with Autism in the Perspective of Article 24 of the CRPD.” in Della Fina, Valentina. and Rachele Cera. “Protecting the Rights of People with Autism in the Fields of Education and Employment International, European and National Perspectives.” Springer Open, 2015, p. 89

<sup>120</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 4(2)

<sup>121</sup> Cera, Rachele. “National Legislations on Inclusive Education and Special Educational Needs of People with Autism in the Perspective of Article 24 of the CRPD.” in Della Fina, Valentina. and Rachele Cera. “Protecting the Rights of People with Autism in the Fields of Education and Employment International, European and National Perspectives.” Springer Open, 2015, p. 89

<sup>122</sup> Koch, Ida Elisabeth. ”From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities.” in Arnardóttir, Oddný. M. and Gerard Quinn (eds). “The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives.” International Studies in Human Rights, Martinus Nijhoff Publishers, Vol. 100, 2009, p. 69

and political rights, they both mention the right to education, featuring an interesting overlap<sup>123</sup>.

On the one hand Article 15 ESC provides that measures shall be taken in order to give an education to persons with disabilities<sup>124</sup>, while Article 10 (Vocational training) refers to university education.<sup>125</sup> On the other hand, Article 2 of Protocol 1 to the ECHR provides that the right to education shall not be denied to anyone<sup>126</sup>.

Having provided this short introduction of the right to education with specific regard to its nature and position within the European Union and the international context, it is now possible to outline in detail the process which led to the current scenario for the right to education and the related policy within the European Union.

ii. Creating a common policy on education at European level

The 1957 Treaty of Rome<sup>127</sup> establishing the European Economic Community, together with the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom), created a new community in Europe with a primarily economic interest, although also wider interests, binding together its Member States. The European countries were emerging out of the Second World War and were seeking to achieve peace and renewed economic growth throughout the whole continent. Under such a scenario, as discussed by Corbett,

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<sup>123</sup> Lawson, Anna. "The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?." in Arnardóttir O. M. and Quinn (eds) G., *The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives*, Martinus Nijhoff Publishers 2009, P. 106

<sup>124</sup> Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, Article 15

<sup>125</sup> *Ibid.*, Article 10

<sup>126</sup> Council of Europe, *Protocol 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Conferring Upon the European Court of Human Rights Competence to Give Advisory Opinions*, 6 May 1963, ETS 44, Article 1

<sup>127</sup> European Union. *Treaty Establishing the European Community (Consolidated Version)*, Rome Treaty, 25 March 1957

education was not a major issue for the national Governments, and as affirmed by Neave and reported by Corbett herself amounted to a kind of ‘taboo’<sup>128</sup>.

During the 1960s and early 1970s, under pressure from and thanks to the dynamism of certain figures, including in particular Altiero Spinelli<sup>129</sup> and after multiple meetings between the six Ministers of Education of the Member States, a common agreement for the promotion of cooperation between the Member States in the field of education<sup>130</sup> was reached in 1971, in the shape of a Resolution on cooperation in the field of education.

It is important to stress that this first agreement was a mere Resolution adopted among Ministers of education as a result of intergovernmental relations and bargains. Therefore, it does not represent a formal act approved within the Council of the Community<sup>131</sup>. This provides clear proof of the resistance coming from the Member States and the resulting difficulties for the European institutions in creating a common policy on this issue and adopting acts of *hard law*.

The 1971 Resolution was formally recalled upon the adoption of a subsequent Resolution within the Council in 1974, in which it was stated at point II that:

*“this cooperation will relate mainly to the following priority spheres of action:*

- better facilities for the education and training of nationals and the children of nationals of other Member States of the Communities and of non-member countries,*
- promotion of closer relations between educational systems in Europe,*
- compilation of up-to-date documentation and statistics on education,*
- increased cooperation between institutions of higher education,*

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<sup>128</sup> Corbett, Anne. “Universities and the Europe of Knowledge.” Palgrave macmillan, 2005, p. 10 referring to Neave, G. “Education and the EEC.” Trentham Books, 1984

<sup>129</sup> Ibid., p. 66-67

<sup>130</sup> Resolution of the Ministers for Education of 16 November 1971 on cooperation in the field of education, Official Journal C098, 20/08/1974

<sup>131</sup> European Commission. The history of European cooperation in education and training Europe in the making — an example, European Commission, 2006, p. 63

- *improved possibilities for academic recognition of diplomas and periods of study,*
- *encouragement of the freedom of movement and mobility of teachers, students and research workers, in particular by the removal of administrative and social obstacles to the free movement of such persons and by the improved teaching of foreign languages,*
- *achievement of equal opportunity for free access to all forms of education”<sup>132</sup>.*

It was only in 1976 that the Action Programme in the Field of Education<sup>133</sup> was adopted within the formal framework of the Community. In this occasion, the Ministers of education agreed to promote and achieve “cooperation in the field of education” and “equal opportunity for free access to all forms of education”<sup>134</sup>.

Here again, Corbett observes that the agreement states that the Community held a certain position within the field of education and that, at that stage, the resulting question was simply what measures should be taken and how such cooperation should be carried further<sup>135</sup>. In particular, in order to specify further the content of cooperation and related competences, the 1976 Resolution indicated those actions that pertained to the national level and those that pertained to the Community owing to the “mixed nature of the cooperation”<sup>136</sup>. This “mixed” feature and the influence of the European Community (and later European Union) grew and became more predominant over the following decades.

In particular, paragraph 13, point 1 of the Resolution provides that:

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<sup>132</sup> Resolution of the Ministers of Education, meeting within the Council, of 6 June 1974 on cooperation in the field of education, point II

<sup>133</sup> Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of education, par. 13, point 1

<sup>134</sup> *Ibid.*, par. 12 and 20

<sup>135</sup> Corbett, Anne. “Universities and the Europe of Knowledge.” Palgrave macmillan, 2005, p. 95

<sup>136</sup> European Commission. “The history of European cooperation in education and training Europe in the making — an example.” European Commission, 2006, p. 69

*“While respecting the independence of higher education institutions, the following action will be undertaken at Community level in order to increase contacts between them:*

*- the encouragement of the development of links with and between organizations representing higher education institutions<sup>137</sup>”.*

In the light of European governance, the Resolution at issue recognised the need to develop an awareness and knowledge of other educational systems throughout all Member States within the Community, and to encourage constant mutual evaluation and consideration of policies, opinions and projects<sup>138</sup>, although also adding as a core objective a ‘European dimension’ for education systems<sup>139</sup>. In the intention of the actors, this European dimension to education was clearly characterised by reciprocal influence between national governments and the European institutions, but also among the national States themselves through the comparison of their policies. Such an arrangement seems to suggest an intention to arrive at an agreed solution on the matter at European level.

Moreover, this structure shows how the EU education policy was already characterised by the principle of non-harmonisation and subsidiarity, due to the reluctance of Member States to grant strong and broad competence to European institutions over education. This gave rise to what Walkerhorst defines as an ‘intergovernmental’ configuration, seeking to preserve national sovereignty in the field of education<sup>140</sup>.

However, it must be stressed that national governments have traditionally had full and complete competence over education. This competence entails on the one hand the power to decide what to teach, as well as how to organise teaching and

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<sup>137</sup> Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of education, par. 13, point 1

<sup>138</sup> Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of education, par. 3

<sup>139</sup> European Commission. “The history of European cooperation in education and training Europe in the making — an example.” European Commission, 2006, p. 69

<sup>140</sup> Walkerhorst, Heiko. “Explaining change in EU education policy.” *Journal of European Public Policy*, Vol. 15, No. 4, 2008, p. 578

access to education. On the other hand, it implies the possibility to increase employment in the country by hiring teachers, professors and other staff members, but also to influence research and its development.

These statements, if true, show not only a strong connection with the national economy and status, but also a deep connection with the cultural, social and political affairs of the State. Along these lines, such a connection entails the control and evolution of society.

However, the sovereignty and hesitancy of States has been challenged by a European effort to create a European action plan on education, as well as the judgements of the Court of Justice of the European Union. In this regard, Ertl notes that, from the 80s and later onwards, the decisions of the CJEU have encouraged the European Institutions, i.e. the Council and Commission, to take action in the field of education<sup>141</sup>.

At this stage it is appropriate to identify and analyse the most relevant and noteworthy judgements of the Court of Justice of the European Union (CJEU) on the right to education. For these reasons, the period of time covered will be limited, as well as the judgements chosen.

### **3. The Court of Justice of the European Union and the Right to Education**

The Court of Justice was called upon to rule on a matter related to education for the first time in 1974, when there was no explicit legal basis, under either primary or secondary law, to rule on education. Generally speaking, in order to rule on cases, the Court linked education to labour law and economic interests. Specifically, the Court referred to the functioning of the labour market, which includes the four freedoms and in particular the free movement of workers and

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<sup>141</sup> Ertl, Hubert. "European Union policies in education and training: the Lisbon agenda as a turning point?." *Comparative Education*, Vol. 42, No. 1, 2006, p. 7

services as well as derived rights<sup>142</sup>. In fact, the Court connected the right to education with the right of free movement of workers and, in broader terms, linked education policy with the EU labour market.

Indeed, in the *Casagrande* case of 1974, the Court had to rule on the failure to provide educational grants to the children of Italian workers in Germany which, in the opinion of the plaintiff, constituted discrimination based on nationality and a hindrance to the free movement of workers. Relying on the Treaty provisions and Regulation 1612/68<sup>143</sup>, the Court held that the persons from an EU Member State different from the host EU Member State “shall be admitted to educational courses 'under the same conditions as the nationals' of the host State”<sup>144</sup>.

Fundamentally, this judgement recognised that Regulation 1612/68 attempts to establish a link between higher education and the labour market, specifically construing free movement of workers as a foundation for EU higher education<sup>145</sup>.

As strictly regards the case law at stake, it appears clear that the right to education should be guaranteed to EU workers and their families in the light of the principle of free movement of workers. Additionally, some authors point out that Member States acknowledge the potential effect and influence of EU law on national higher education, further highlighting that the Member States have not prevented integration between higher education systems, and have moreover conferred more power on the Commission within the ambit of the Bologna Process<sup>146</sup>.

As regards the right to education, the Court has noted the absence of a specific provision on education and of an *ad hoc* common policy in this area. However,

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<sup>142</sup> van Wageningen, Anne C. Chapter 6 “The Legal Constitution of Higher Education Policy and Governance of the European Union.” in Huisman, Jeroen, et al. (eds). “The Palgrave International Handbook of Higher Education Policy and Governance.” Palgrave macmillan, 2015, p. 99

<sup>143</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community

<sup>144</sup> Court of Justice of the European Union. Judgment of 3 July 1974, *Casagrande v. Landeshauptstadt München*, July 1974, C-9/74, par. 3

<sup>145</sup> van Wageningen, Anne C. Chapter 6 “The Legal Constitution of Higher Education Policy and Governance of the European Union.” in Huisman, Jeroen, et al. (eds). “The Palgrave International Handbook of Higher Education Policy and Governance.” Palgrave macmillan, 2015, p. 100

<sup>146</sup> *Ibid.*, p. 100

the Court has declared that, although the Treaty does not vest the Community with competence over vocational training and education policy, the Community cannot be restricted in exercising its power even when, in so doing, it affects the field of vocational training and education policy<sup>147</sup>.

It must be said that most cases concerning education and EU citizens have been assessed by the Court. Nonetheless, for the purposes of this research, it is necessary to skip over a few years until the 1980s before finding another relevant case related to the issues at stake in this research. Indeed, most cases concern the recognition of academic titles, the children of workers who moved to a country other than the Member State of origin or applications for grants and allowances. However, for the purposes of the question at stake, which concerns the competence and influence of the EU over education, it is appropriate to focus on some specific cases.

Indeed, almost ten years after the *Casagrande* case, the Court had to consider a case involving an Italian national who had moved to Belgium and started to study at a higher education institute, i.e. the *Forcheri* case of 1983<sup>148</sup>. In the specific case, the institute had asked the plaintiff, as a foreign student, to pay a higher tuition fee compared to Belgian students. The Court held that this constituted discrimination and declared that the situation fell within the scope of the Treaty and the Community, linking vocational training to the Community's internal market.

In particular, the Court stated that educational policy fell within the scope of Community action and of the Treaties, even though the Treaty did not vest the Community with any specific competence over vocational training and education policy<sup>149</sup>.

In this sense, the *Gravier* judgment is of paramount importance within this evolution. The case concerned a French national who had moved to Belgium to

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<sup>147</sup> Court of Justice of the European Union. Judgment of 3 July 1974. *Casagrande v. Landeshauptstadt München* (9/74, ECR 1974 p. 773), July 1974, C-9/74, par. 12

<sup>148</sup> Court of Justice of the European Union. Judgment of 13 July 1983. *Forcheri v. Belgian State* (152/82, ECR 1983 p. 2323)

<sup>149</sup> *Ibid.*, par. 17

study<sup>150</sup>. The Court held that the student had been discriminated against on the grounds of nationality and that the relevant actions constituted a hindrance to the movement of workers under Regulation 1612/68 and the Treaty. In the judgment, the Court attempted to find a legal basis that could also embrace the right to education. The only legal basis offered by the Treaties was the provision on vocational training, which in the Court's view could include the concept of education if interpreted broadly. Pursuing that reasoning further, the Court recognised that the Council had the task of setting out general principles in order to develop a harmonised vocational training policy for the Member States<sup>151</sup>. A common policy would indeed foster not only the European Single Market but also the national economies.

Essentially, here the Court stated that attending a course at a higher education institute falls within the concept of vocational training, and consequently falls within the scope of the Treaty and Community competence.

This judgement has been recognised as the case that pointed towards a basis for a regulatory power of the Community over education, since the *Gravier* case demonstrated that education represents a common field of interest for policy at European Community level<sup>152</sup>.

Similarly, the *Blaizot* case showed that the terms of the debate concerning special tuitions fee for foreign students were the same<sup>153</sup>. In this case the Court reiterated its ruling in the *Gravier* case, this time explicitly recognising that a university course in veterinary medicine may be included within the concept of vocational training<sup>154</sup>.

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<sup>150</sup> Court of Justice of the European Union. Judgment of 13 February 1985. *Gravier v. Ville de Liège* (293/83, ECR 1985 p. 593)

<sup>151</sup> *Ibid.*, par. 21

<sup>152</sup> Beerkens, Eric. "The Emergence and Institutionalisation of the European Higher Education and Research Area." *European Journal of Education*, Vol. 43, No. 4, 2008, p. 411

<sup>153</sup> Court of Justice of the European Union. Judgment of 2 February 1988. *Blaizot v. Université de Liège and others* (24/86, ECR 1988 p. 379)

<sup>154</sup> Court of Justice of the European Union. Judgment of 2 February 1988. *Blaizot v. Université de Liège and others* (24/86, ECR 1988 p. 379) and Court of Justice of the European Union. Judgment of 13 February 1985. *Gravier v. Ville de Liège* (293/83, ECR 1985 p. 593)

In making this finding, the Court declared that academic studies, and broadly the field of higher education, fell within Community competence and hence the scope of the Treaty.

All of these judgements show that the Court has been called upon to deal with inertia on the part of the EU institutions, providing answers to various delicate matters, such as education. For instance, Alter reports how the Court, and EU law, influences national law and, in particular within the context of education, how the Court has intervened primarily on the matter of education grants in favour of foreign students<sup>155</sup>. Such condition shows also how some needs and changes are faster and inevitable compared to policy and political debates.

Until now we have focused on the debate and the steps taken within the European Union as well as its own evolution from a legal and historical perspective with regard to the creation of a common policy on higher education and on how to conceptualise the right to education. This evolution and its internal processes have taken place within an entity that is now called European Union. However, that entity was and is still influenced by social and legal events that are in turn both internal and external to the EU itself, as will be shown below.

Among such influential entities one of the most interesting and respected is the European Court of Human Rights (ECtHR), including its body of case law. These cases will be analysed below, insofar as they concern the right to education and the prohibition on discrimination.

#### **4. The European Court of Human Rights and the right to education**

Before embarking upon a discussion of the cases of the European Court of Human Rights (ECtHR), it is appropriate to introduce the framework in which the ECtHR performs its duties and tasks. This framework is composed by the European Convention on Human Rights (ECHR) and its Protocols approved within the Council of Europe.

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<sup>155</sup> Alter, Karen J. "The European Court's Political Power: Selected Essays." Oxford University Press, 2009

In relation to education, in Article 2 of Protocol No. 1, the ECHR recognises the right to education, stating that such right shall not be refused to anyone<sup>156</sup>. Regarding the right to education, Schabas highlights that, in the light of the Convention, the right to education can undoubtedly be encompassed among the economic, social and cultural rights, noting further that the framers dedicated particular attention to the right to education<sup>157</sup>.

The first case brought in relation to education under Article 2 of Protocol No. 1 in connection with the principle of non-discrimination was the case '*relating to certain aspects of the laws on the use of languages in education in Belgium*' of 23 July 1968<sup>158</sup> involving the discrimination on the ground of language.

The case is important to mention because, despite its 'age', it represents a pioneer case in relation to education and discrimination. In particular, it asserts a right to education for everyone, but also a duty for the State to guarantee such a right through a positive action.

The issue was raised by six different individual complaints, which will not all be discussed in detail as they are not strictly related to the subject matter of this research. Specifically, the general complaints concern the education system in Belgium in relation to French-speaking parents and their children living in Dutch-speaking municipalities. The applicants complained that, in those municipalities, the State did not provide education in French or that such education was provided inadequately. Moreover, no grants were offered or families were forced to send their children to a school situated within the municipality of Brussels, which caused various difficulties and concerns<sup>159</sup>.

To this regard, the Court construed the right to education in conjunction of Article 14 of the Convention, which enshrines the prohibition of discrimination. In the

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<sup>156</sup> Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 2

<sup>157</sup> Schabas, William A. "The European Convention on Human Rights A commentary." Oxford University Press, 2015, p. 986

<sup>158</sup> European Court of Human Rights. Case '*relating to certain aspects of the laws on the use of languages in education in Belgium*' of 23 July 1968

<sup>159</sup> Ibid., par. 1-3

light of the prohibition on discrimination, the Court affirmed that Article 2 to Protocol No.1 recognises the right to education as having some positive content.

Buergenthal specifies in fact that Article 2 does not entail the right for individuals to obtain the creation of a particular education establishment; however, once such an establishment exists the State must prevent any kind of discrimination<sup>160</sup>.

As regards to the right to education, the Court declared that, despite its negative formulation “*no person shall be denied the right to education*”, the provision entails a positive obligation for the State to act. The Court stressed that, although it is formulated in negative terms, the provision enshrines a right<sup>161</sup>. As a right, the right to education requires not only a lack of interference but also some positive content and duties.

The Court went on to specify the content of the right to education, explaining that a person who receives an education should take advantage of such education because it is only where this occurs that the right to education can achieve some effectiveness<sup>162</sup>. The Court seemed to affirm here a positive right of the individuals to exercise and enjoy their right to education, and in turn a duty for States to take positive action in order to guarantee such a right to those persons who suffer from discrimination and are excluded from the enjoyment of such a right.

As regards this matter, the applicants argued specifically that, since the right to education is enshrined in Article 2 of Protocol no. 1, it requires some positive action by the State in order to guarantee the operation of such a service<sup>163</sup>.

In its reasoning, the Court evaluated the justification, which should be objective and reasonable, that is necessary for any different and unequal treatment. This evaluation consists in assessing whether such treatment complies with the

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<sup>160</sup> Buergenthal, Thomas. “European Court of Human Rights 23rd July 1968: case relating to certain aspects of the laws on the use of languages in education in Belgium, International Legal Materials.” Vol. 8, No. 4, Cambridge University Press, 1969, p. 834

<sup>161</sup> European Court of Human Rights. Case ‘*relating to certain aspects of the laws on the use of languages in education in Belgium*’ of 23 July 1968, Sec. A, p. 27

<sup>162</sup> Ibid., Sec. B, para. 3-4, p. 28

<sup>163</sup> Ibid., Sec. A, p. 17

Convention's provisions and in particular with the principle of equality and the prohibition on discrimination.

In the case at issue, the prohibition on discrimination related to language and the possibility for children belonging to the French-speaking community to receive an education in their native-language also in municipalities in which the official language was Dutch. In its decision, for five out of the six complaints the Court did not find any breach of the Article 2 of the Protocol or Article 8 of the Convention, which enshrines the right to respect for private and family life, in conjunction with Article 14 on prohibition of discrimination: on the facts, the Court held that "the necessary balance between the collective interest of society and the individual rights guaranteed" had been respected<sup>164</sup>. However, for one question only the Court did find that a breach had occurred of Article 14 in conjunction with the final provision of Article 2 of the Protocol as the relevant circumstances prevented children belonging to the French-speaking group from receiving an education in French merely on the grounds of their residence<sup>165</sup>.

On the basis of the above analysis, it is arguable that the right to education, in conjunction with the principle of non-discrimination, does not require merely refraining from discriminatory behaviour and acts, but also entails a positive content in order to guarantee the enjoyment of the right provided for. Indeed, discriminatory effects also arise out of a failure to act, and therefore positive action is required to prevent discrimination.

Now, in order to provide a complete and appropriate overview that is capable of offering a full understanding of the analysis conducted in this research, it is necessary to consider some broader events, or phenomena, namely: Globalisation, Europeanisation and Internalisation.

These phenomena have some direct and indirect influence, i.e. as action and reaction, and the impulse to build a new common policy in different fields, such as for example in education, and in particular the construction of a new *governance* at European level

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<sup>164</sup> Ibid., Sec. A, p. 47

<sup>165</sup> Ibid., Sec. A, p. 83

Here, it is appropriate to offer a definition of *governance* in advance. It can be defined as an expression of power through different channels in order to endorse and enforce policies in a certain field. The concept of governance and the evolution of such concept will be considered briefly below.

## **5. Europeanisation, Globalisation and Internationalisation in Education**

The three phenomena, Globalisation, Europeanisation and Internalisation, are presented as separate and independent dynamics. However, they are so deeply interconnected and essentially intertwined that it is barely possible to properly distinguish one from the others. Furthermore, the way in which these phenomena are understood will help us gain a fully overview and understanding of the process within the European Union which, as a supranational entity, is strongly influenced by these also supranational phenomena. Precisely for this reason, the chapter will focus on the relationship between Europeanisation and Globalisation along with Internationalisation.

In analysing the relationship between Globalisation and Europeanisation, some authors such as Dale and Robertson<sup>166</sup> refer to the so-called ‘Castells paradox’, which states that “European integration is, at the same time, a reaction to the process of globalization and its most advanced expression”<sup>167</sup>. This assertion implies that the European Union plays an important role in relation to the process of globalisation. In particular, on the one hand the EU fosters it whilst on the other hand globalisation in turn influences the European economy, society, etc.<sup>168</sup>

There is also a third term that must be taken into account, which is closely related to Globalisation and Europeanisation, namely Internationalisation. In particular, Internationalisation in higher education takes on its visible shape through international agreements and processes, including *inter alia* as the most important

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<sup>166</sup> Dale, Roger and Susan Robertson (eds). “Globalisation and Europeanisation in Education.” Oxford: Symposium Books, 2009, p. 25

<sup>167</sup> M. Castells, *End of Millennium*, 2000, Oxford: Blackwell, p. 352

<sup>168</sup> Dale, Roger and Susan Robertson (eds). “Globalisation and Europeanisation in Education.” Oxford: Symposium Books, 2009, p. 25-26

and meaningful the Bologna Declaration, which gave rise to the related Bologna Process.

Indeed, the Bologna Declaration from 1999 offers a paramount example of Internationalisation and its special relationship with Europeanisation<sup>169</sup>. The Bologna Declaration sets out a list of common objectives and reforms to be implemented at national level, whilst keeping an international perspective. In this sense, the Bologna Declaration aims to promote the mobility of students, researchers and teachers throughout the Member States that have adhered to the Declaration. Originally, the States involved in the Bologna Process were limited to EU Member States and few other European countries, although subsequently other States outside the geographic borders of Europe, e.g. Kazakhstan, have also adhered to it<sup>170</sup>.

In the report commissioned from it in 2005 on Higher Education Institutions' Responses to Europeanisation, Internationalisation and Globalisation, the European Commission already noticed how “often countries have used the Declaration as a ‘lever’ for national policy and to solve more national problems” because national governments find in a European policy an opportunity to increase their level of internationalisation<sup>171</sup>. This statement highlights how national governments use international agreements in order to introduce into their own legal orders various important internal reforms that are or could be obstructed by internal hindrances<sup>172</sup>. Particularly in the field of higher education, it has been noted that, despite the initial hindrance based mainly on the well-rooted accreditation of higher education holding a “national and cultural role”, subsequently “the economic rationale” increasingly pervaded also higher

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<sup>169</sup> Bologna Declaration of 19 June 1999: Joint declaration of the European Ministers of Education

<sup>170</sup> <http://www.ehea.info/pid34250/members.html> - last visited 08.03.2021

<sup>171</sup> Higher Education Institutions' Responses to Europeanisation, Internationalisation and Globalisation. Developing International Activities in a Multi-Level Policy Context, HEIGLO, final report, 2007, European Commission, p. 55

<sup>172</sup> Lazetic, Predrag. “Managing the Bologna Process at the European Level institution and actor dynamics.” *European Journal of Education*, Volume 45 No. 4, 2010, p. 554-559

education, boosting international cooperation and its influence on national matters and issues<sup>173</sup>.

Therefore, with specific regard to education, in order to address such internal obstructions, the national government relies on the persuasive power, in some cases political and in other cases legal, of international agreements to enact such reforms, pursuing an increase in their international competitiveness and in the renown of their national education systems, and especially their universities.

As regards specifically the European Union and education, it must be added that there are two particularly important processes involving higher education at supra-national and European level. Aside from the Bologna Process mentioned above, the other major process is the Lisbon Strategy of 2000, which represents an action programme created purely within the context of the European Union by its Council<sup>174</sup>. Specifically, the Lisbon Strategy concerns the growth and development of European Union and its Member States, estimating the need to face the changes brought about by globalisation, in particular in the economic sphere.

It can hence be affirmed that these two major processes, namely the Bologna Process and Lisbon Strategy, which are deeply connected to education, in some sense constitute the outcome of phenomena such as Internationalisation and Europeanisation, as shown above. However, the third phenomenon should also be mentioned and briefly discussed, i.e. Globalisation, as it influences education both directly and indirectly.

Several authors have analysed the role and the condition of the modern State within the new age of Globalisation. Among these authors, Grande asserts that nation States have lost the exclusive power to solve collective problems due to the increasing number of societal actors involved in the making-process and due also

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<sup>173</sup> Huisman, Jeroen and Marijk van der Wende. "The EU and Bologna: are supra- and international initiatives threatening domestic agendas?" *European Journal of Education*, Vol. 39, No. 3, 2004, p. 349-352

<sup>174</sup> Lisbon European Council 23-24 March 2000. Presidency conclusions

to the scale of certain problems, which can no longer be borne by national governments alone<sup>175</sup>.

Grande's argument suggests that these broad phenomena are playing a growing influence in our societies and fall beyond the control of national governments or even supranational organs. In addition, these phenomena appear to corrode the sovereignty of Member States, inducing States to either simply acknowledging them or even to foster them in an attempt to lead them to favour their own national benefits and developments.

As regards in particular Internationalisation in higher education, for instance, the increasing mobility of students, researchers and professors is a social factor that transcends any national programme on education policy or economic growth plan. The phenomena mentioned above have had noticeable effects in Europe. In particular within the European Union, Member States have responded by fostering the European integration process and creating a new structure of *governance*, widening the range of action and influence.

As regards specifically the context of the European Union, Haas may be considered as a pioneer in the study of regional integration and in particular European integration. In order to explain these processes, the author introduces the theory of neo-functionalism, which is based on the assumption that national governments shift their competences and powers to a supranational entity in order to address matters that Member States are not able to deal with efficiently<sup>176</sup>. Such a shift in competence and powers gives rise to a kind of *governance* characterised by the pre-eminent use of acts of policymaking and *soft law* (i.e. non-binding) instruments, as well as slow but constant efforts to achieve harmonisation and amalgamation of policies, e.g. on higher education. Such activities appear as a natural, internal stream within the European integration process.

Based on this short introduction, *governance* can be described as an expression of power through traditional and non-traditional channels in order to enforce policies

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<sup>175</sup> Grande, Edgar. "Cosmopolitan political science." *The British Journal of Sociology*, Vol. 57, No. 1, 2006, p. 92

<sup>176</sup> H Haas, Ernst B. "The Uniting of Europe: Political, Social, and Economic Forces 1950–57." Stanford, CA: Stanford University Press, 1958

and regulations common to all actors involved, which may be national and international<sup>177</sup>.

## **6. European integration and EU education *governance***

As mentioned above, in the absence of any legal provisions or of any clear and strong political will to enact *ad hoc* legislation on higher education, the EU Member States have started, whether unconsciously or not, to build up a new *governance* within the European Union.

The concept of *governance* is not a strictly legal one. However, it must be discussed in order to have an accurate idea and view on the current situation of higher education and education law which, within the European Union, is influenced ‘willy-nilly’ by an EU *governance* and policy.

Before analysing the concept of *governance* and EU governance on education, it is appropriate to identify the path towards the integration at European level encompassing the driving forces behind and the means leading to such integration. For the purposes of this research, as far it concerns integration within the European Union, it is possible to endorse the definition of (political) integration proposed by Haas, who states that: “*Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing ones*”<sup>178</sup>. Therefore, EU integration can be defined as a shift towards a supranational entity, increasing its competence and power at the expense of Member States. However, it can be claimed that a closer and deeper interdependency and connection between the EU and the Member States from a legal and political perspective also entails a social and cultural change, fostering a full and complete integration (from political to social).

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<sup>177</sup> Lange, Bettina. & Nafsika Alexiadou. “Policy learning and governance of education policy in the EU.” *Journal of Education Policy*, Vol. 25, No. 4, 2010

<sup>178</sup> Haas, Ernst B. “The Uniting of Europe: Political, Social, and Economic Forces 1950–57.” Stanford, CA: Stanford University Press, 1958, p. 16

In addition, it must be noted that neo-functionalism and spillovers have been playing a fundamental role within the integration process. It is therefore appropriate to set out this theory and its related concepts.

It should be noted that neo-functionalism has been theorised and developed by Haas, whose definition of political integration has been embraced by this research due to its appropriateness, but also in order to maintain some degree of coherence and fluidity within the analysis at issue.

i. The path of European integration: neo-functionalism and spillovers

Neo-functionalism was theorised by Haas while studying and trying to explain regional integration with particular attention to the European area, which was characterised at the time by the European Coal and Steel Community (ECSC) and the European Economic Community (EEC)<sup>179</sup>. Haas affirms that regional integration arises “when societal actors, in calculating their interests, decided to rely on the supranational institutions rather than their own governments to realize their demands. These institutions, in turn, would enjoy increasing authority and legitimacy as they became the sources of policies meeting the demands of social actors”<sup>180</sup>. As part of this process, integration grows further under the increasing demands of social actors, but also of national governments, shifting more and more trust and competences in favour of the supranational entity, which proves to be more capable of satisfying the interests at stake<sup>181</sup>.

Furthermore, commenting on Haas’ theory, Schmitter highlights that, as national governments shift more competences to the supranational entity, their citizens in turn place more and more trust in the supranational entity, but also place more demands on it. This implies that closer political integration will follow from the economic-social integration<sup>182</sup>. This assumption is based on the observation that

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<sup>179</sup> Haas, Ernst B. “International Integration: The European and the Universal Process.” *International Organization*, Vol. 15, No. 03, 1961, p. 366-392

<sup>180</sup> Haas, Ernst B. “The Uniting of Europe: Political, Social, and Economic Forces 1950–57.” Stanford, CA: Stanford University Press, 1958, p. xiv

<sup>181</sup> *Ibid.*, p. xv

<sup>182</sup> Schmitter Philippe C. “Ernst B. Haas and the legacy of neofunctionalism.” *Journal of European Public Policy*, Vol. 12, No. 2, 2005, p. 257

European integration started, as noted above, with the creation of an entity at supranational level with merely economic objectives and interests, which then evolved into a more political aggregation.

In other words, the enhancement of economic and social integration is more likely to result in closer political integration due to the increasing demands arising from the economic and social sphere, which call for a political response, i.e. coordination of policies and/or new provisions.

In addition, the neo-functional theory is anchored in the presence that spillovers will lead towards closer and deeper integration, and indeed specifically education has been indicated as one of these spillovers<sup>183</sup>. According to Caporaso's definition: "Spillover is commonly thought of as a process whereby integrative activity in one societal sector leads to integrative activity in other related sectors"<sup>184</sup>. Furthermore, Schmitter specifies that members that have committed to pursuing communal goals may decide to expand cooperation, and thus integration, to a related sector or to increase it within an existing sector because they are unsatisfied of their achievements<sup>185</sup>.

However, education policy seems to have been restrained to the mere economic interests of the European Union, and in particular to have been bound to the Single Market's relevance<sup>186</sup>, at least at the outset.

Nevertheless, the pattern outlined here shows how even mere economic integration and cooperation can stimulate wider integration, e.g. social and political integration.

In this sense, analysing the theory of Haas on the European Coal and Steel Community (ECSC) and its subsequent evolution, Rosamond notes that a first

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<sup>183</sup> Corbett, Anne. "Universities and the Europe of Knowledge." Palgrave macmillan, 2005, p. 13

<sup>184</sup> Caporaso, James A. "Encapsulated Integrative Patterns vs. Spillover: The Cases of Agricultural and Transport Integration in the European Economic Community." *International Studies Quarterly*, Vol. 14, No. 4, Wiley on behalf of The International Studies Association, 1970, p. 365

<sup>185</sup> Schmitter, Philippe C. "Three Neo-Functional Hypotheses About International Integration." *International Organization*, Vol. 23, No. 1, 1969, p. 162

<sup>186</sup> Blitz, Brad K. "From Monnet to Delors: educational co-operation in the European Union." *Contemporary European History*, Vol. 12, No. 2, 2003, p. 211

step towards European integration leads to another step and then another, ultimately resulting in closer and stronger integration<sup>187</sup>. Indeed, Haas himself observes that the representatives of national governments in the ECSC constantly agree on the need to achieve a harmonisation in various areas in order to enhance the functioning of certain sectors that were at that point irreversibly interdependent, without any implicitly pledging to build a new political and social entity at European level<sup>188</sup>.

The neo-functional theory envisages on the one hand an incessant growth in the predominant position of supranational entities<sup>189</sup> and on the other hand increasing support and trust on the part of social actors in the supranational entities stimulated by the spillover effect<sup>190</sup>. Such an approach highlights how different policy fields are not permanently independent but may conversely influence one another.

Later in 2015, proposing an advanced theory of neo-functionalism, Gideon argues that “an integrated area will ‘spill over’ into other areas [so-called ‘functional spillover’] potentially fostered by European institutions [so-called ‘cultivated spillover’]”<sup>191</sup>.

At the same time, the functional, or technical, spillover boosts the further integration and development of sectors that are technically and functionally correlated to a sector that is already integrated (e.g. the development of common standards on health and security within the integrated area of the Single

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<sup>187</sup> Rosamond, Ben. “The uniting of Europe and the foundation of EU studies: Revisiting the neofunctionalism of Ernst B. Haas.” *Journal of European Public Policy*, Vol. 12, No. 2, 2005, pp. 237-254

<sup>188</sup> Haas, Ernst B. “The Uniting of Europe: Political, Social, and Economic Forces 1950–57.” Stanford, CA: Stanford University Press, 1958, p. 297

<sup>189</sup> Risse, Thomas. “Neofunctionalism, European identity, and the puzzles of European integration.” *Journal of European Public Policy*, Vol. 12, No. 2, 2005, p. 300

<sup>190</sup> Rosamond, Ben. “The uniting of Europe and the foundation of EU studies: Revisiting the neofunctionalism of Ernst B. Haas.” *Journal of European Public Policy*, Vol. 12, No. 2, 2005, pp. 237-254, p. 244

<sup>191</sup> Gideon, Andrea. “The position of Higher Education Institutions in a Changing European Context: An EU Law Perspective.” *Journal of Common Market Studies*, UACES, Vol. 53, No. 5, 2015, p. 1049

Market)<sup>192</sup>. In other words, members may decide to expand their cooperation and common goals into areas that are related and closely interdependent, following a logical and physiological development of cooperation and integration.

The spillovers cultivated result from a supranational institution that tends to foster further integration in areas that are not closely and necessarily intertwined, in this case from a European perspective<sup>193</sup> (e.g. a common policy on transport infrastructure<sup>194</sup> and the construction of a pan-European transport system). Specifically, the supranational entity, created on the basis of a common will of the members to cooperate and pursue collective goals, expands its influence to matters falling outside the formal competences conferred, thereby inducing the members to expand and increase their cooperation and hence the integration process.

The conclusions reached by Gideon are relevant in this regard. Specifically, the author argues that “The (limited) integration of policies influencing HEIs [Higher Education Institution] later on could then in itself be regarded as cultivated spillover [...]”<sup>195</sup>.

In addition, it is possible to identify another kind of spillover, which can be defined as a sort of ‘individual spillover’ generated by individual claims before the Court of Justice of European Union (CJEU) that rely on the direct application of EU law, especially where there is a lack of legislation or a lack of any specific policy of or action by the Commission or the Member States.

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<sup>192</sup> Cini, Michelle and Nieves Perez-Solorzano Borragan. “European Union Politics.” Oxford University Press, Fifth Edition, 2016, p. 57

<sup>193</sup> Scholten, Miroslava and Daniel Scholten D. “From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?.” *Journal of Common Market Studies*, Vol. 55, No. 4, 2017, p. 927

<sup>194</sup> Stephenson, Paul. “Let's get physical: the European Commission and cultivated spillover in completing the single market's transport infrastructure.” *Journal of European Public Policy*, Vol. 17, No. 7, 2010, pp. 1039-1057

<sup>195</sup> Gideon, Andrea. “The position of Higher Education Institutions in a Changing European Context: An EU Law Perspective.” *Journal of Common Market Studies*, UACES, Vol. 53, No. 5, 2015, p. 1049

Indeed, Gideon acknowledges that a spillover effect may be observed either when a law in a certain field influences another apparently unconnected field, e.g. economic law promoting social law, or when the Court of Justice of the European Union, through its judgements, applies EU provisions to a field that was not directly or intentionally regulated by those EU provisions<sup>196</sup>.

Thus far, it appears clear that spillovers can be generated within the process of integration by individuals, by the supranational entity or also by its members, following the individual or collective aspiration which believes that a greater and deeper collaboration will bring more wealth. It could be argued that such an aspiration may be rooted in dissatisfaction or by contrast in the assumption that, as cooperation works well in one particular field, it will also work in others, irrespective of whether or not they are connected.

According to the neo-functionalism theory and the concept of spillover, education can be regarded as a spillover. However, since the early years of the Community, education has been treated with caution and, as will be discussed below, some difficulties have been encountered during attempts to bring it under the full influence and control of the European Union, due to the hesitancy of the Member States.

In this sense, when analysing the history of the European Community and its integration process, Blitz affirms that “Although education crept in as a spillover, it was not able to break free from the economic area to enter the political realm, a necessary condition for supranational integration”<sup>197</sup>. Indeed, the author notes that education was only introduced into those fields that were directly related to the Single Market Plan<sup>198</sup>.

In other words, the author acknowledges the role of education as spillover, despite its limited range. Still, as neo-functionalism and the spillover effect sustain, this initial narrow introduction of education at EU level could develop into broader and deeper integration among the Member States, leading to an increase in the

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<sup>196</sup> Ibid.

<sup>197</sup> Blitz, Brad K. “From Monnet to Delors: educational co-operation in the European Union.” *Contemporary European History*, Vol. 12 No. 2, 2003, pp. 197-212, p. 200

<sup>198</sup> Ibid., p. 222

competence and power of the EU in this area. Indeed, in recent decades the European Union has increased its interest in and influence over education, especially higher education, due to the connection between higher education and the labour market. Such a connection will be revealed throughout the research.

Moreover, the growth in the competence and influence of the European Union into the field of (higher) education has been conveyed in several ways, which will be analysed in the following pages.

ii. European Union and Higher Education governance

As regards the present-day European Union and the current education law, in order to achieve such spillover effects the EU and the Member States have slowly built up, and are still working on, a common policy on higher education at European level.

In particular, in the field of education the settled position, which will be examined here, can be described as a system of *governance*. Engaging with the concept of ‘*governance*’, it can be defined here as an “exercise of power through networks that are composed of both traditional public institutional actors [...] as well as private individuals”<sup>199</sup>.

Such a common policy on education and the related *governance* were not created abruptly according to a formal and a single act, but rather resulted from a long and complex path, which was fostered, but also hindered, by the EU and its Member States. Reluctance to accept broader competence or influence for the EU can be found in the historically and culturally absolute dominance of the Member States over education. Such dominance has been challenged in the last two decades through “an organised multi-level system” which will be considered below<sup>200</sup>. Among the various layers and instruments that constitute this *governance*, the Open Method of Coordination (OMC) deserves particular attention due to its utility as an instrument of soft law and also because it can be fully understood

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<sup>199</sup> Lange, Bettina. and Nafsika Alexiadou. “Policy learning and governance of education policy in the EU.” *Journal of Education Policy*, Volume 25, No. 4, 2010, p. 444

<sup>200</sup> Gornitzka, Åse. “The Open Method of Coordination as practice - A watershed in European education policy?.” *Arena Working Paper*, No. 16, December 2006, p. 8

only if analysed in the light of this peculiar structure of *governance*<sup>201</sup>. The OMC will be analysed and considered within a dedicated section below.

In order to explore the relationship between education and legal competence, and in particular to understand the reason why States are still so ‘protective’ and attached to education policy, it is worthwhile focusing on the Yerevan Communiqué of 2015<sup>202</sup>.

This Communiqué contains a small and slightly innovative hint consisting in linking “educational opportunities” with European citizenship, implicitly recognising that the rights recognised to European citizens also include the right to education<sup>203</sup>. This recognition clearly connects the right to education with citizenship. Such a connection is significant because citizenship, and the citizen’s status as a holder of rights, is deeply rooted in national identity and in national competences both culturally and historically. It must also be recalled that European citizenship is complementary and does not replace national citizenship. Indeed, European citizenship results as a direct consequence of national citizenship of one of the Member States of the European Union. Moreover, citizenship and the related legislation defines participation in the political life and in the community itself<sup>204</sup>, and linked in other ways to the concept of identity and nationality, e.g. passport<sup>205</sup>.

It is possible to identify a number of elements and significant developments in the evolution towards closer integration in the area of education. However, one of the peaks was reached with the Lisbon Strategy and the creation of an *ad hoc* framework in which the common policy on education at European level was enshrined.

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<sup>201</sup> Ibid., p. 10

<sup>202</sup> Yerevan Communiqué. Yerevan Communiqué. Conference of Ministers responsible for higher education, Yerevan, 14–15 May 2015

<sup>203</sup> Ibid., p. 1-2

<sup>204</sup> Ross, Alistair. “Multiple identities and education for active citizenship.” *British Journal of Educational Studies*, Vol. 55, No. 3, 2007, p. 293

<sup>205</sup> Jenson, Jane. “The European Union’s citizenship regime/ creating norms and building practices.” *Comparative European Politics*, Palgrave Macmillan Ltd, Vol. 5, 2007, p. 56

The Lisbon summit managed to introduce “a common European approach” in accordance with the principle of subsidiarity, which absolutely dominates competence over education, through a “template for cooperation” in the field of education<sup>206</sup>. Furthermore, the link established between the Lisbon Strategy and the Bologna Process is also fundamental, due to the importance that the Bologna Process itself holds among the European countries and also due to the stronger and increasing importance that the Bologna Process is playing within the European Union itself and its policy on higher education.

The strongest signal of such a connection and its importance for EU policy is the full participation by the European Commission of the European Union in the Bologna Process, and particularly within the Bologna Follow-Up Group<sup>207</sup>. As regards the role of the European Commission, Hingel notes that cooperation in relation to education and, in particular, the integration process relating to education has increased to such a level that the central position of the Commission has been questioned<sup>208</sup>. It can be assumed that, when an institution reaches a dominant role, that position starts to be challenged for a variety of reasons. For instance, the EU Commission may be challenged by the Member States themselves or by the Parliament or the Council out of fears that such a predominant position may affect or restrict their own powers. Nevertheless, despite the various doubts and qualms, all of the acts, agreements and initiatives from different institutions and actors are all directed towards enhancing cooperation in the area of education<sup>209</sup>.

These political initiatives and acts adopted by the Commission include the so-called ‘Jacques Delors White Paper’<sup>210</sup>, which was recognised as one of the most

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<sup>206</sup> Gornitzka, Åse. “The Open Method of Coordination as practice - A watershed in European education policy?.” Arena Working Paper, No. 16, December 2006, p. 49

<sup>207</sup> <http://www.ehea.info/cid101754/bfug.html> - visited on 08.03.2021

<sup>208</sup> Hingel, Anders J. “Education Policies and European Governance: Contribution to the Interservice Groups on European Governance.” European Journal for Education Law and Policy, Vol. 5, Kluwer Academic Publishers, 2003, Netherlands, p. 7

<sup>209</sup> Ibid.

<sup>210</sup> White Paper, Growth, Competitiveness, Employment, 1994, European Commission

influential, at least until late 1990s<sup>211</sup>. In that document, the Commission acknowledges the central role of education in connection with the labour market and employment, and thus in terms of economic growth and competitiveness<sup>212</sup>. The Commission also admits that, whilst difficulties will be faced, nonetheless the main goal remains ensuring the accessibility and development of vocational training<sup>213</sup>.

The number of activities undertaken by the EU institutions, such as the Commission and the Council with the aim of building a common framework and policy on education, and particularly on higher education, is indeed significant.

This pattern points to the emergence of a new structure, which differs from the state governmental organ that proposes policies in relation to specific matters. Such a new and unusual structure may be referred to as ‘*governance*’ over higher education. This latter notion is linked to the new scenario characterised by multi-level interactions, such as for instance the “interference of supranational agencies in higher education”<sup>214</sup> and the lack of “efficiency and effectiveness of the traditional state model” to cope with certain issues<sup>215</sup>.

As regards the definition of governance, it is appropriate to stress that, although the notions of government and *governance* can be perceived of as being synonymous or similar, the concept of *governance* takes on further features in addition to responsibility for governmental policies. Such added features may be identified not only within the policies, but also in particular the methods of influence over various stakeholders within the field of education and the further combination of plans and strategies in the context of higher education<sup>216</sup>.

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<sup>211</sup> Hingel, Anders J. “Education Policies and European Governance: Contribution to the Interservice Groups on European Governance.” *European Journal for Education Law and Policy*, Vol. 5, Kluwer Academic Publishers, 2003, Netherlands, p. 8

<sup>212</sup> White Paper, Growth, Competitiveness, Employment, 1994, European Commission, p. 16

<sup>213</sup> *Ibid.*, p. 16-17

<sup>214</sup> Huisman, Jeroen. Chapter 1 “Coming to Terms with Governance in Higher Education.” In Huisman, Jeroen (ed.). “International Perspectives on the Governance of Higher Education Alternative Frameworks for Coordination.” Routledge, 2009 p. 3

<sup>215</sup> *Ibid.*, p. 2

<sup>216</sup> *Ibid.*, p. 13

Within this schema characterised by the involvement of various actors and multi-level interactions, the role of the Universities has been analysed and discussed.

In this sense, it is interesting to consider the seminal work of Olsen, which is still topical and important, although may be considered a little ‘aged’. In Olsen’s opinion, universities play an important role first of all from two different perspectives: as instruments and as institutions. Specifically, universities must be considered “as instrument of the policies and intentions of different external stakeholder” and also “as institutions mainly driven by internal requests and aims”<sup>217</sup>.

In the field of education, a number of authors consider *meta-governance*<sup>218</sup>, relying on the definition devised by Balzer and Martens, which defines *governance* in education as “*governance* by opinion formation” which relies on “the capacity of the EU to initiate and influence national discourses about educational issues”<sup>219</sup>.

At this stage, it is important to focus on the two major processes within Europe concerning education, namely the Bologna Process and the Lisbon Strategy. Both create a common space in which a European policy and *governance* on education was and is still being shaped and enforced. These two processes will be analysed individually and eventually also together, as it will be shown how and to what extent they are intertwined, especially within the European Union.

It is sufficient here to stress at the outset that the Bologna Process is an international agreement concluded outside the European Union, which nevertheless involves all EU Member States, creating a common space where EU

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<sup>217</sup> Olsen, Johan P., Chapter 2, The institutional dynamics of the European university in Maassen, Peter and Johan Olsen P. (eds). “University Dynamics and European Integration.” Springer, 2007, Netherlands, p. 26

<sup>218</sup> Magalhaes, Antonio, et al. “Creating a Common Grammar for European Higher Education Governance.” Higher Education: The International Journal of Higher Education and Educational Planning, Vol. 65, No. 1, 2013, p. 98

<sup>219</sup> Balzer, Carolin and Kerstin Martens. “International higher education and the Bologna process: What part does the European commission play?.” Paper presented at the epsNET 2004 plenary conference, Charles University Prague

institutions and EU Member States can exercise their power and influence. In other words, the Bologna Process can be identified as a layer of *governance* at EU level.

## **7. The Bologna Process: An Internationalisation of Higher Education policy**

### **i. The path towards a common education policy**

As is the case for every broad project, also the Bologna Process results from a long and complicated path featuring various declarations and acts.

The Bologna process takes its name from the Bologna Declaration<sup>220</sup> adopted in 1999 by the European Ministers of Education. Its first aim is to “harmonize higher education policies on an international scale”<sup>221</sup>. In particular, in order to achieve such harmonisation or coordination, the Member States agreed on the creation of a common space for policy on Higher Education at European level, called European Higher Education Area, which was officially launched with the Budapest-Vienna Declarations in 2010<sup>222</sup>.

Within the perimeter of the Bologna Process, the Sorbonne Declaration can be identified as a major precursor<sup>223</sup>. In fact, before the Bologna Declaration was adopted the Sorbonne Declaration was drafted in 1998. This involved four European countries (namely France, Italy, Germany and United Kingdom), and was entitled the “Joint declaration on harmonisation of the architecture of the European higher education system”<sup>224</sup>. It should be noted first of all that it started as an agreement among national governments negotiated outside a homogeneous and comprehensive EU framework. Nonetheless, in order to fully understand the Sorbonne Declaration and the subsequent Bologna Declaration and Process, it is

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<sup>220</sup> Bologna Declaration of 19 June 1999: Joint declaration of the European Ministers of Education

<sup>221</sup> Vögtle Eva M. “Higher Education Policy Convergence and the Bologna Process A Cross-National Study.” Palgrave macmillan, 2014, p. 4

<sup>222</sup> Budapest-Vienna Declaration on the European Higher Area of 12 March 2010

<sup>223</sup> Joint declaration on harmonisation of the architecture of the European higher education system by the four Ministers in charge for France, Germany, Italy and the United Kingdom in Paris, the Sorbonne, 25 May 1998

<sup>224</sup> Ibid., p. 1

necessary to consider how they are correlated with the EU as well as further developments (e.g. the Erasmus programme was based in a composite background of this type)<sup>225</sup>.

In 1999, the Ministers for Higher Education of 29 European countries met in Bologna to sign the Bologna Declaration. The Declaration evoked the Magna Charta Universitatum<sup>226</sup> of 1988, acknowledging the important role played by universities and the academic community<sup>227</sup>.

The Bologna Declaration's aim was to promote "co-operation in quality assurance" and a "European dimensions in higher education"<sup>228</sup> and furthermore, to create a European Higher Education Area (EHEA) by 2010, which was later announced in 2010 with the Budapest-Vienna Declaration<sup>229</sup>. However, before the final declaration on the establishment of the EHEA, in 2001 the Ministers for Higher Education met in Prague and, besides adding some new objectives, stressed the need to strengthen the "European dimensions of Higher Education" and "to collaborate in establishing a common framework of reference and to disseminate best practice"<sup>230</sup>.

In addition, with the Prague summit of 2001 the Commission of the European Union officially joined the Bologna Process<sup>231</sup>, showing the increasing interest of the European Union as such in educational matters.

Within the specific context of the European Union, a responsibility and duty to create and foster cooperation in the area of quality assurance was recognised, *inter alia*, for the Universities and agencies, both at national level and at higher levels.

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<sup>225</sup> Pépin, Luce, The History of EU Cooperation in the Field of Education and Training: how lifelong learning become a strategic objective, European Journal of Education, Vol. 42, No. 1, 2007 p. 127

<sup>226</sup> Magna Charta Universitatum Europaeum, Bologna, 18 September 1988

<sup>227</sup> Hackl, Elsa. "Towards a European Area of Higher Education: Change and Convergence in European Higher Education." EUI working paper RSC No. 2001/09, San Domenico, p. 26

<sup>228</sup> Bologna Declaration of 19 June 1999: Joint declaration of the European Ministers of Education, p. 4

<sup>229</sup> Budapest-Vienna Declaration on the European Higher Area of 12 March 2010

<sup>230</sup> Communiqué of the meeting of European Ministers in charge of Higher Education in Prague on 19 May 2001, p. 2

<sup>231</sup> Ibid., p. 1

In this scenario, one of the most important actors is probably the European Association for Quality Assurance in Higher Education (ENQA), which was founded in the 2000 following the Recommendation of the Council of the European Union on European cooperation in quality assurance in higher education<sup>232</sup>. Furthermore, also the ENQA officially adhered to the Bologna Process at the Bergen summit in 2005<sup>233</sup>.

The Bologna Declaration can be defined as an “intergovernmental declaration”, which can be classified under the category of “public international soft law”<sup>234</sup>, which means that it is a free voluntary agreement without any hierarchical structure or coercive authority. The non-binding status of the Bologna Declaration, at least insofar it concerns the European Union, is mirrored by the limited competence vested in the European Commission and the European institutions in the field of higher education policy<sup>235</sup>.

Despite a lack of coercive capacity, the declaration and the following acts show a strong political will for and commitment to closer and more effective cooperation on higher education policy at European level. Indeed, the Bologna Process represents the first effort at higher education policy harmonisation within the European context, which was and still is an area that is strongly governed by the principle of subsidiarity<sup>236</sup>.

In this sense, it can be noted that education policy is a sensitive topic for States and national governments for several reasons. The main reason concerns universities and the fact that universities provide high-skilled manpower and

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<sup>232</sup> Recommendation of the Council on European cooperation in quality assurance in higher education 98/561/EC of 24 September 1998

<sup>233</sup> Communiqué of the meeting of European Ministers in charge of Higher Education in Bergen on 19-20 May 2005

<sup>234</sup> Hackl, Elsa. “Towards a European Area of Higher Education: Change and Convergence in European Higher Education.” EUI working paper RSC No. 2001/09, San Domenico, p. 28

<sup>235</sup> Huisman, Jeroen J., & Marijk van der Wende. “On Cooperation and Competition. National and European Policies for the Internationalisation of Higher Education.” Bonn: Lemmens, 2004, p. 24

<sup>236</sup> Vögtle Eva M. “Higher Education Policy Convergence and the Bologna Process A Cross-National Study.” Palgrave macmillan, 2014, p. 9-10

especially that they foster the building of a national identity<sup>237</sup>. As previously mentioned, such a connection between universities, national identity and the economy explains the reluctance of national governments to loosen their sovereignty and competence over education. Precisely due to the connection between education competence and Member States, several authors have observed that States try to resolve their own internal national issues through the Bologna Process, shifting accountability for various reforms from the national level to a supranational level<sup>238</sup>.

Furthermore, it can be argued that the Bologna Process was originally created as a new structure resulting from the conjunction of the various European higher education systems in order to act as a counterweight to the power of the Commission. However, such an attempt remained unsuccessful, as the European Commission has slowly gained a prominent role within the Bologna Process. In fact, in its 2004 report on the Lisbon Strategy and the programme 'Education & Training 2010 (E&T2010)<sup>239</sup> the Commission expressly endorsed the link between the Bologna Process and the achievement of the Lisbon Agenda's objectives<sup>240</sup>.

From the EU's perspective, the attractive feature of the Bologna Process lies in the creation of a common space, where it is possible for national governments to communicate and negotiate, without stipulating any specific content for higher education<sup>241</sup>.

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<sup>237</sup> Maassen, Peter and Johan Olsen P. (eds). "University Dynamics and European Integration." Springer, 2007, Netherlands, p. 5

<sup>238</sup> Vögtle Eva M. "Higher Education Policy Convergence and the Bologna Process A Cross-National Study." Palgrave macmillan, 2014, p. 10

<sup>239</sup> Council and Commission 2004, Education & Training 2010, The Success of the Lisbon Strategy Hinges on Urgent Reforms. Joint interim report of the Council and the Commission on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe. Adopted by the Council on 26 February 2004

<sup>240</sup> Maassen, Peter and Johan Olsen P. (eds). "University Dynamics and European Integration." Springer, 2007, Netherlands, p. 9

<sup>241</sup> Vögtle Eva M. "Higher Education Policy Convergence and the Bologna Process A Cross-National Study." Palgrave macmillan, 2014, p. 19

Again, within such a structure, the influence and role of the Commission as a stakeholder or, better, as advocate for particular content and matters, appears to be substantial.

Indeed, some authors have described the Bologna Process as “formal requirements for an intergovernmental organization”<sup>242</sup> in which the Commission occupies a central position<sup>243</sup>. Furthermore, Vögtle notes that, since the Bologna Process is a non-binding and voluntary agreement, States have made significant efforts and have been consistently determined to comply with the commitment taken on. Such a commitment is particularly visible in relation to quality assurance as the importance of quality assurance in building and sustaining confidence in and reliance on the EHEA was acknowledged at the Bucharest meeting in 2012<sup>244</sup>.

Quality assurance formally became part of the Bologna Process at the Berlin meeting in 2003 where summit participants, recalling the previously Prague Communiqué, agreed “to enhance the quality of European higher education at institutional and national levels”<sup>245</sup>. In other words, the Ministers of Education recognised the quality of higher education as a milestone of the EHEA<sup>246</sup>. Therefore, in order to achieve a common standard on quality assurance within the European context, States invite the so-called E4, representing the stakeholder organisations for quality assurance in higher education, to draft an agreement on common guidelines and standards on quality assurance<sup>247</sup>. These E4 are specifically the European Association for Quality Assurance in Higher Education (ENQA), the European University Association (EUA), the European Association

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<sup>242</sup> Reinalda, Bob, “Teaching and Training – the ongoing Bologna Process and political science.” *European Political Science*, Vol. 7, 2008, p. 388

<sup>243</sup> Vögtle Eva M. “Higher Education Policy Convergence and the Bologna Process A Cross-National Study.” Palgrave macmillan, 2014, p. 19-20

<sup>244</sup> Communiqué of the Conference of Ministers responsible for Higher Education in Bucharest on 26 and 27 April 2012

<sup>245</sup> Communiqué of the Conference of Ministers responsible for Higher Education in Berlin on 19 September 2003, p. 3

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

of Institutions in Higher Education (EURASHE) and the National Unions of Students in Europe (ESU)<sup>248</sup>.

Once again, the Bologna Process fosters a kind of dialogue among States, agencies and institutions in order to define common structures and contents.

ii. Transnational communication

The Bologna Process has been defined by some authors as a ‘*transnational communication*’ that stimulates changes in policy among Member States, even if the Member States are not obliged to comply with it<sup>249</sup>. Such communication delineates a “bottom-up” process, which gains some degree of mandatory force through agreements concluded among ministers<sup>250</sup>.

The scenario outlined is characterised by a multi-actor policy governance, where informal and formal communications intertwine across national and supranational levels<sup>251</sup>. Indeed, within this context various entities and actors, such as national ministries or EU institutions, communicate and debate through formal agreements and regulations, but also through mere documents setting out common aims or goals. Furthermore, other actors are involved within this framework, such as agencies, national bodies and supranational bodies, which may have both public and also private features.

In order to coordinate this complex structure and to prepare work and meetings, a so-called ‘Bologna Follow-Up Group’ (BFUG) with consultative and preparatory powers has been established. The BFUG includes a smaller group comprised of the country holding the EU Presidency, the European Commission, the

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<sup>248</sup> <https://www.eqar.eu/about/e4-group/?cn-reloaded=1> – last visited 08.03.2021

<sup>249</sup> Vögtle Eva M. “Higher Education Policy Convergence and the Bologna Process A Cross-National Study.” Palgrave macmillan, 2014, p. 66

<sup>250</sup> Van Damme, Dirk. “The Search for Transparency: Convergence and Diversity in the Bologna Process.” in van Vught, Frans A. “Mapping the Higher Education Landscape.” Dordrecht: Springer, 2009 p. 40

<sup>251</sup> Lazetic, Predrag. “Managing the Bologna Process at the European Level institution and actor dynamics.” European Journal of Education, Volume 45, No. 4, 2010, p. 449

Confederation of EU Rectors' Conferences and the Association of European Universities<sup>252</sup>.

Once again, there has been a clear attempt to create dialogue and a collegial leading role among the three different actors involved, in other words the States, the European Union and the Higher Education Institutions (HEIs).

The Bologna Process considers a policy to be a 'moving target'<sup>253</sup> where it is possible to discern two separate perspectives: one relies on the political agenda and the other refers to the implementation system. The former seems to run at a fast speed and the latter at a slow speed, creating an unbridgeable gap between those two realities<sup>254</sup>. In fact, the political agenda is constantly adding goals and pledges, while the implementation pattern shows dissimilarities among the countries due to structural, political, legal and/or cultural reasons.

In addition, the Bologna Process is characterised by vague and multiple objectives, which means that the objectives are numerous and in some cases differ considerably from one another. Moreover, on some issues the participants do not outline accurately and in detail what to pursue and especially how to reach it. Indeed, it has been argued that the Bologna Process has been implemented differently from country to country, producing different effects and consequences<sup>255</sup>. Since the Bologna Process endures in its free commitment structure, it leaves the eventual implementation of the agreement and its goals to political decisions in the various countries.

Moreover, a monitoring system has been put in place in order to observe and examine implementation at national levels. It fundamentally involves a steady and continuous production of reports and meetings both at academic level by

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<sup>252</sup> Bologna Declaration of 19 June 1999: Joint declaration of the European Ministers of Education, p. 5

<sup>253</sup> Neave, Guy and Peter Maassen. Chapter 7 "The Bologna Process: An Intergovernmental Policy Perspective." in Maassen, Peter and Johan Olsen P. (eds). "University Dynamics and European Integration." Springer, 2007, Netherlands, p. 136

<sup>254</sup> *Ibid.*, p. 135-137

<sup>255</sup> Tomusk, Voldemar Chapter 1 "Introduction COM(91) 349 final and the Peripheries of European Higher Education" in Tomusk, Voldemar. (ed). "Creating the European Area of Higher Education: Voices from the Periphery." Dordrecht: Springer, 2006

universities but also at agencies, and also at political-institutional level by the ministries and administration staff. However, this monitoring system still needs to be enhanced. In this regard, for instance, not all countries submit complete reports concerning their quality assurance position, or in general concerning their education system.

The report prepared for the Bucharest summit in 2012 pointed out that most countries within the European Higher Education Area (EHEA) have a monitoring system that offers an overview of all enrolled students, identifying their various several traits (e.g. gender, disability, age, social status, etc.), and hence assessing the effectiveness of the actions directed at broadening students' participation in higher education<sup>256</sup>.

Within the Bologna Process, in the meeting held in Paris in 2018 twenty years after the Sorbonne Declaration, the ministers of the Bologna Process' Member States stated that "progress has been made while implementation remains uneven, both between policy areas and between countries" recognising, however, quality assurance as the "key in developing mutual trust"<sup>257</sup>. Indeed, already at the Yerevan summit in 2015 ministers declared that the EHEA holds the predominant task to boosting quality of education, which includes both learning and teaching<sup>258</sup>. Moreover, in the same communiqué the ministers agreed that, in order to cope with hindrances resulting from the Member States, e.g. due to incomplete or totally absent implementation, a solution may be found in constant discussion concerning policies and good practices in order to help to encourage Member States that are reticent in realising goals<sup>259</sup>. Hence, the uneven implementation and the lack of harmonisation is a significant issue, which needs to be addressed adequately within the Bologna Process.

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<sup>256</sup> The European Higher Education Area in 2012: Bologna Process Implementation Report, 2012, Education, Audiovisual and Culture Executive Agency, p. 82

<sup>257</sup> Paris Ministerial Communiqué on May 25<sup>th</sup> of 2018, p. 1-2

<sup>258</sup> Yerevan Communiqué. Yerevan Communiqué. Conference of Ministers responsible for higher education, Yerevan, 14–15 May 2015, p. 2

<sup>259</sup> Ibid., p. 3

It has been noted that ministers were absent from the Yerevan summit, displaying a lack of dynamism and interest<sup>260</sup>. However, at the same time, the Bologna Process was becoming an instrument closer to the European Union, through the adoption of the Lisbon Strategy<sup>261</sup>.

This connection between the Bologna Process and the Lisbon Agenda will be discussed in detail below.

Until this point, the Bologna Process has been discussed in general terms. Now, in the light of the aims of this research, is it necessary to analyse the Bologna Process in relation to the issue of disability, as it will be done in the following section.

However, it must be stressed that disability has not been a central matter within the Bologna Process and related documents and processes. Nevertheless, the intention of creating a common framework and a common policy might offer some scope for triggering and enhancing effective action in favour of disability, and specifically students with disabilities.

### iii. The Bologna Process and disability

The Bologna Process has evolved slowly and steadily towards a common policy and common goals among the participating States. The Yerevan communiqué clearly stated the objective of pursuing and boosting an inclusive society as well as inclusive education<sup>262</sup>. Simply put, in order to achieve greater inclusion, especially in education, it is necessary to enhance the opportunities for all students and to guarantee them fair and equal treatment. The target groups of such action are usually minority and marginalised groups. Among such marginalised groups, it is possible to mention persons with disabilities, which is one of the core focuses of this research. Specifically, with regards to students with disabilities, the

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<sup>260</sup> Sin, Cristina et al. "European Policy Implementation and Higher Education. Analysing the Bologna Process." Palgrave Macmillan, 2016, p. 2

<sup>261</sup> Ibid.

<sup>262</sup> Yerevan Communiqué. Yerevan Communiqué. Conference of Ministers responsible for higher education, Yerevan, 14–15 May 2015

Bologna Process Implementation Report of 2012, recognised that universities' systems offer measures and solutions for students with certain conditions, including students with disabilities<sup>263</sup>.

Within the context of higher education in Europe, it is possible to identify an important network which shows some concern for the issue of disability. This network was established by the Commission under the name of 'Eurydice Network'. It involves all EU Member States plus many other countries, mostly also from the EHEA, and its mission is to describe national education systems<sup>264</sup>. Based on the Bologna Process Implementation Report of 2012, the Eurydice states that, although many countries have adopted specific measures and provisions in favour of minority groups, such as students with disabilities, these measures and provisions do not perform a central role within their higher education policies<sup>265</sup>. Within the same report, the BFUG declared that, in half of EHEA member countries, "students with disabilities are the most common group targeted by specific measures [in order] to adapt their study environment so that they could integrate into the higher education system on the same footing as other students"<sup>266</sup>.

At this stage it is appropriate to analyse the content and structure of the Lisbon Agenda and to evaluate the so-called 'Lisbonisation of the Bologna Process'. In addition, it is necessary to consider to what extent the Lisbon Agenda and the EU influence and shape the Bologna Process, the education policy and the legal framework within Europe composed of both *hard law* and (mainly) *soft law* in relation to the matter at issue.

## **8. Lisbon Agenda: a common space for an EU policy on Higher Education**

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<sup>263</sup> The European Higher Education Area in 2012: Bologna Process Implementation Report, 2012, Education, Audiovisual and Culture Executive Agency, p. 88

<sup>264</sup> [https://eacea.ec.europa.eu/national-policies/eurydice/about\\_en](https://eacea.ec.europa.eu/national-policies/eurydice/about_en) - last visited on 08.03.2021

<sup>265</sup> The European Higher Education Area in 2012: Bologna Process Implementation Report, 2012, Education, Audiovisual and Culture Executive Agency, p. 71

<sup>266</sup> Ibid., p. 81

The Lisbon Strategy launched in 2000 by the European Council fixes as an objective for the European Union “to become the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment”<sup>267</sup>.

The Lisbon Strategy takes its name from the Lisbon Action Plan<sup>268</sup> adopted by the EU Member States in 2000 with the main aim launching a new political strategy combining labour, education and social policies<sup>269</sup>. By recognising the intertwined relationship between labour and education, leaders of EU Member States recognise that some factors, such as knowledge and skills, and therefore education, connected with labour market and the development of human resources had become of crucial importance for the EU’s future, both economically and socially<sup>270</sup>.

The main instrument launched by the Lisbon Strategy is certainly the Open Method of Coordination (OMC), which has been defined by the Council itself “as the means of spreading best practice and achieving greater convergence towards the main EU goals”<sup>271</sup>.

In this regard, Pépin highlights that the Ministers of Education describe the OMC as the instrument created in order to develop a consistent strategy under Articles 149 and 150 TEC (now Articles 165 and 166 of the Treaty on the European Union) on education and vocational training<sup>272</sup>.

In particular, Article 165 TEU (formerly Article 149 TEC) provides that:

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<sup>267</sup> Lisbon European Council 23 and 24 March 2000 presidency conclusions, Lisbon strategy

<sup>268</sup> Ibid.

<sup>269</sup> van Wageningen, Anne C. Chapter 6 “The Legal Constitution of Higher Education Policy and Governance of the European Union.” in Huisman, Jeroen, et al. “The Palgrave International Handbook of Higher Education Policy and Governance.” Palgrave macmillan, 2015, p. 101

<sup>270</sup> Pépin, Luce, The History of EU Cooperation in the Field of Education and Training: how lifelong learning become a strategic objective, European Journal of Education, Vol. 42, No. 1, 2007, p. 128

<sup>271</sup> Lisbon European Council 23-24 March 2000. Presidency conclusions, par. 37

<sup>272</sup> Pépin, Luce. “Education in the Lisbon Strategy: assessment and prospects.” European Journal of Education, Vol. 46, No. 1, 2011, Part I, p. 26

*1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.*

*2. Union action shall be aimed at:*

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,*
- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,*
- promoting cooperation between educational establishments,*
- developing exchanges of information and experience on issues common to the education systems of the Member States, - encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,*
- encouraging the development of distance education,*
- developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.*

*3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.*

*4. In order to contribute to the achievement of the objectives referred to in this Article: - the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, -*

*the Council, on a proposal from the Commission, shall adopt recommendations*<sup>273</sup>.

And moreover, Article 166 TEU (formerly Article 150 TEC) states that:

*1. The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.*

*2. Union action shall aim to:*

- facilitate adaptation to industrial changes, in particular through vocational training and retraining,*
- improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,*
- facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,*
- stimulate cooperation on training between educational or training establishments and firms,*
- develop exchanges of information and experience on issues common to the training systems of the Member States*<sup>274</sup>.

At this stage it is appropriate to stress that, also within the European Union, education remains a delicate issue governed mainly by *soft law* and the policymaking process. Nevertheless, European *governance* shows several positive features.

Indeed, it seems that the European Union has preferred and still prefers a *soft law*'s approach to education, as well as in other fields, most likely because, thanks to its vagueness, it facilitates the attainment of consensus on common objectives and goals, although there is an issue of implementation.

The most important instrument made and used within the EU for such purposes is the Open Method of Coordination. In spite of the fact that such an instrument has

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<sup>273</sup> European Union. Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01, Article 165

<sup>274</sup> *Ibid.*, Article 166

been created in relation to mere economic interests, it has some relevance for education.

In this sense, the Lisbon Strategy formally asserts, on the one hand, the connection between employment and education and, on the other hand, the connection between the Bologna Process and the Lisbon Strategy itself. The latter link was previously boosted by the incorporation of the European Commission into the BFUG as well as the increasing influence of the Commission within the Bologna Process. This influence and leading role can be explained by the high level of ‘funding and technical expertise’ of the Commission and its ability to take advantage of that aspect in order to expand its influence on higher education<sup>275</sup>.

The Lisbon Agenda marks a shift from a national government towards a European *governance* in the field of education, creating the so-called European Education Space (EES) and specifically a European Education Policy (EEP) in order to increase the role of Europe Institutions, which entails an attempt to influence national education policy<sup>276</sup>.

In the light of the Commission’s intense activity, in addition to the European relevance that education had previously gained, Keeling declares that “Higher education is thus depicted as quintessentially European”<sup>277</sup>.

As Dale and Robertson report, in Hingel’s view the European Education Space is comprised formally by the EU Treaties and substantively by the Lisbon Agenda, and can also be defined historically by the pre-Lisbon activities of the Commission<sup>278</sup>. Indeed, also Gornitzka highlights that the EU and its Treaties

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<sup>275</sup> Ibid., p. 57

<sup>276</sup> Dale, Roger and Susan, Robertson (eds). “Globalisation and Europeanisation in Education.” Oxford: Symposium Books, 2009, p. 26-28

<sup>277</sup> Keeling, Ruth. “The Bologna Process and the Lisbon Research Agenda: the European Commission’s expanding role in higher education discourse.” *European Journal of Education*, Vol. 41, No. 2, 2006, p. 211

<sup>278</sup> Dale, Roger and Robertson, Susan (eds). “Globalisation and Europeanisation in Education.” Oxford: Symposium Books, 2009, p. 32

foster the role of and cooperation between EU institutions and the EU Member States<sup>279</sup>.

In addition, Gornitzka argues that the Lisbon Process shows that “the education sector is linked to and influenced by developments in other policy areas – as when education is in the interface between the economic, cultural and social policy”<sup>280</sup>. This belief is fostered by the assumption that education is essential in order to grow economically according to an environmentally and socially sustainable approach<sup>281</sup>.

At this stage it is worth mentioning the definition of ‘education *governance*’. Indeed, it has been defined as “the means of bringing about the relation between the multiple goals of education and the ways that education can bring about change”<sup>282</sup>. Such education *governance* is hence conceived of as a way of bringing together the programme setting out aims and goals in the field of education as well as the instruments suitable for creating them. In this sense, the Lisbon Strategy provides for the Open Method of Coordination as a mode of *governance*, which is “based on setting common objectives, establishing indicators and benchmarks for comparing best practices and performance, and translating the common objectives into national and regional policies”<sup>283</sup>.

#### i. The Open Method of Coordination: implementation and *soft law*

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<sup>279</sup> Gornitzka, Åse. “The Open Method of Coordination as practice - A watershed in European education policy?.” Arena Working Paper, No. 16, December 2006, p. 9

<sup>280</sup> Ibid., p. 10

<sup>281</sup> Gornitzka, Åse. Chapter 8 “The Lisbon Process: A supranational policy perspective. Institutionalizing the open method of coordination.” In Maassen, Peter and Johan Olsen P. (eds). “University Dynamics and European Integration.” Springer, 2007, Netherlands, p. 155

<sup>282</sup> Dale, Roger. “Contexts, Constraints and Resources in the Development of European Education Space and European Education Policy,” pp. 23-43 in Dale, Roger and Susan, Robertson (eds). “Globalisation and Europeanisation in Education.” Oxford: Symposium Books, 2009, p. 37

<sup>283</sup> Gornitzka, Åse. Chapter 8 “The Lisbon Process: A supranational policy perspective. Institutionalizing the open method of coordination.” in Maassen, Peter and Johan Olsen P. (eds). “University Dynamics and European Integration.” Springer, 2007, Netherlands, p. 155

The Open Method of Coordination (OMC) can be defined as an instrument of *soft law* introduced by the Lisbon Strategy characterised by a mild degree of commitment. It is voluntary in nature and involves both the Council, which defines objectives and instruments in order to evaluate performance in the light of guidelines and indicators, as well as the Commission, which has the task of monitoring<sup>284</sup>. As is highlighted by de la Rosa, the OMC created a new “institutional equilibrium”, which puts the Council at the heart of the decision-making process and envisages the Commission as providing support for such a scheme, whilst limiting the role of the Parliament<sup>285</sup>.

What the OMC offers, according to Regent, is “a soft framework for hard law interventions”<sup>286</sup>. Indeed, the aim of the OMC is to induce national and regional governments to introduce new policies and legislation with the aim of achieving the same goals. These goals are defined within the OMC’s pattern.

Within this context, a monitoring system needs and also uses benchmarks in order to influence the development and adoption of certain policies and laws. These benchmarks work not only as indicators of performance but also as tools for identifying good or best practice<sup>287</sup>.

This system calls for a “naming and shaming between Member States”<sup>288</sup> based on the outcomes of evaluation and monitoring activities. Essentially, Member States are expected to follow certain actions and policies in the light of the indicators taken into account, on the basis of which Member States are divided between countries with poor performance and countries with good performance.

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<sup>284</sup> Sin, Cristina, et al. “European Policy Implementation and Higher Education. Analysing the Bologna Process.” Palgrave Macmillan, 2016, p. 5

<sup>285</sup> de la Rosa, Stéphane. “The Open Method of Coordination in the New Member States—the Perspectives for its Use as a Tool of Soft Law.” *European Law Journal*, Vol. 11, No. 5, September 2005, pp. 618–640, p. 627

<sup>286</sup> Regent, Sabrina. “The Open Method of Coordination: A New Supranational Form of Governance.” *European Law Journal*, Vol. 9, No. 2, April 2003, p. 191

<sup>287</sup> Sin, Cristina, et al. “European Policy Implementation and Higher Education. Analysing the Bologna Process.” Palgrave Macmillan, 2016, p. 32

<sup>288</sup> Büchs, Milena. “How Legitimate is the Open Method of Co-ordination?.” *Journal of Common Market Studies*, Vol. 46, No. 4 p. 765-786, p. 765

In other words, in order to avoid being labelled as bad performers, i.e. being shamed, and in order to acquire a good and positive reputation, Member States adopt certain provisions or endorse certain policies to achieve the targeted goals, and thereby also influencing the policies and goals of others.

Nevertheless, as a *soft law*'s instrument, Szyszczak stresses that the OMC displays its weakness in the lack of an effective sanctions system<sup>289</sup>. Nevertheless, the OMC introduced what has been defined as a “third way of governance”<sup>290</sup> based on the “naming and shaming between the Member States” mentioned above. Indeed, the OMC conveyed a new type of coordination, keeping its distance from the “traditional harmonisation techniques” centred on the adoption of directives<sup>291</sup>.

The core elements of the OMC are founded, as has been highlighted by several authors<sup>292</sup>, in the Amsterdam Treaty under the chapter dedicated to employment where it asserts the need for coordination within the European Union by establishing common objectives and policies, as well as national implementation under the supervision of the European Union<sup>293</sup>. Indeed, employment was the first issue for which the OMC was originally conceived and developed<sup>294</sup>. Moreover, as is argued by Scott and Trubek, recognising the OMC as a mode of a new *governance*, the OMC is following the pattern of the European Employment Strategy, the aim of which is to achieve coordination among the Member States

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<sup>289</sup> Szyszczak, Erika. “Experimental Governance: The Open Method of Coordination.” *European Law Journal*, Vol. 12, No. 4, July 2006, pp. 486–502, p. 499

<sup>290</sup> *Ibid.*, p. 488

<sup>291</sup> de la Rosa, Stéphane. “The Open Method of Coordination in the New Member States—the Perspectives for its Use as a Tool of Soft Law.” *European Law Journal*, Vol. 11, No. 5, September 2005, pp. 618–640, p. 619

<sup>292</sup> Sin, Cristina, et al. “European Policy Implementation and Higher Education. Analysing the Bologna Process.” Palgrave Macmillan, 2016, p. 29

<sup>293</sup> European Union. Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, Article 109n – 109s

<sup>294</sup> Regent, Sabrina. “The Open Method of Coordination: A New Supranational Form of Governance.” *European Law Journal*, Vol. 9, No. 2, April 2003, pp. 190–214, p. 191

and to “create conditions for mutual learning” fostering a confluence in terms of policy action<sup>295</sup>.

The European Employment Strategy (EES), referring to the content of the Essen Council<sup>296</sup>, restates as priorities of the European Union the combatting of unemployment, although not at the expense of equal opportunities<sup>297</sup>.

The EES and the related acts will be analysed below in the chapter dedicated to employment. Here it is sufficient to mention it insofar as necessary in order to gather together those elements that may be relevant in the area of education.

As noted by Radaelli, the European Employment Strategy displays an “ideal-typical sequence of guidelines-indicators-national plans-evaluation”<sup>298</sup>, which it seeks to transpose into education.

In addition, it is worth mentioning that Garben notes that the Member States recognise EU competence over this matter, on the basis of Article 165 TFEU, thus recognising the legitimacy to the OMC<sup>299</sup>.

In other words, the States refuse to recognise the Bologna Process as an instrument for harmonisation, falling outside the prohibition of harmonisation of Article 165(4) TFEU, which could hinder the application of the whole Article itself, and consequently implicitly admit the competence provided for under Article 165 TFEU<sup>300</sup>.

Specifically, Article 165(4) provides that the European Parliament and the Council have the power to embrace measures in order to develop quality

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<sup>295</sup> Scott, Joanne and David M. Trubek. “Mind the Gap: Law and New Approaches to Governance in the European Union.” *European Law Journal*, Vol. 8, Blackwell Publishers Ltd, 2002, p. 4-5

<sup>296</sup> Essen European Council, Essen 9-10 December 1994, Reproduced from the Bulletin of the European Communities No. 12/1994

<sup>297</sup> European Commission, *The European Employment Strategy. recent progress and prospects for the future*, COM(95) 465 final, Brussels, 11.10.1995

<sup>298</sup> Radaelli, Claudio M. “The Open Method of Coordination: A new governance architecture for the European Union?.” *Swedish Institute for European Policy Studies*, 2003, p. 53

<sup>299</sup> Garben, Sacha. “The Future of Higher Education in Europe: The Case for a Stronger Base in EU Law.” *LSE 'Europe in Question' Series, LEQS Paper No. 50/2012*, July 2012, p. 11-12

<sup>300</sup> *Ibid.*

education “excluding any harmonisation of the laws and regulations of the Member States”<sup>301</sup>. This exclusion implies that any attempt at harmonisation is not permitted within the field concerned. Therefore, by rejecting the Bologna Process as an instrument for harmonisation, the Union maintains its scope for action within the field of quality education, allowing Article 165 to apply.

At this stage, it is appropriate to point out the benefits and the peculiar features of the OMC, paying specific attention to a conceivable transfer into the area of (higher) education.

ii. OMC: a new *governance* from labour to education

The Lisbon summit provided an opportunity to introduce the Open Method of Coordination (OMC) as a new instrument of cooperation at European level into “an area of national sensitivity and legitimate diversity” such as education<sup>302</sup>. The OMC is based on indicators and benchmarks together with a monitoring system, which operates according to guidelines and objectives established jointly by the Council and the Commission<sup>303</sup>. Both of these institutions thus perform a significant role in relation to outcomes as a result of the monitoring system embedded in the OMC scheme.

As regards the OMC, Dehousse recognises it as a good compromise between two opposing interests of States, including on the one hand the inclination towards a common strategy and, on the other hand, the wish to retain some form of control<sup>304</sup>.

The OMC performs a central role within the implementation of EU higher education policy. Indeed, this instrument mirrors the provision contained in the

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<sup>301</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 165(4)

<sup>302</sup>Gornitzka, Åse. “The Open Method of Coordination as practice - A watershed in European education policy?.” Arena Working Paper, No. 16, December 2006, p. 10

<sup>303</sup> Sin, Cristina, et al. “European Policy Implementation and Higher Education. Analysing the Bologna Process.” Palgrave Macmillan, 2016, p. 63-64

<sup>304</sup> Dehousse, Renaud. “The Lisbon Strategy: The Costs of Non-delegation.” Paper presented at the workshop on “Delegation and Multi-level Governance”, Science Po, Paris, 11 May 2005, p. 7

European Council's decision of 1994 establishing a monitoring system for the Delors' White Book development<sup>305</sup>. Schäfer defines it as "new soft law procedure [that] it is more intergovernmentalist and neo-voluntaristic"<sup>306</sup>. The author identifies one of the historical causes and roots of the OMC in the crisis of legitimacy within European integration, embodied *inter alia* in Denmark's rejection of Treaty amendments in a referendum<sup>307</sup>. Fundamentally, the OMC represented a compromise between the perceived need for EU regulation and the lack of both competences and consensus on how to achieve it<sup>308</sup>.

Successively, in 2000 the European Council in Lisbon launched a new Open Method of Coordination and a new approach towards education<sup>309</sup>. This put in place a new system of EU *governance* that, through the OMC, aims to influence national policies on higher education by setting guidelines and common goals to be achieved according to an established timetable<sup>310</sup>.

Therefore, thanks to the OMC's status as a *soft law* instrument, the Council attempted "to overcome the restrictions placed by the constitutional framework of the EU"<sup>311</sup>. Indeed, the OMC offers an appropriate framework for a common policy in the European Union that is suited to multi-level *governance* without entailing any transfer of legal competence<sup>312</sup>. This scheme enables the lack of

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<sup>305</sup> Veiga, Amélia and Alberto Amaral "The open method of coordination and the implementation of the Bologna Process." Springer, 2006, p. 284-285

<sup>306</sup> Schäfer, Armin. "Beyond the Community Method: Why the Open Method of Coordination Was Introduced to EU Policy-making." European Integration online Papers (EIoP), Vol. 8, No. 13, 2004, p. 1

<sup>307</sup> Ibid., p. 8

<sup>308</sup> Szyzyczak, Erika. "Experimental Governance: The Open Method of Coordination." European Law Journal, Vol. 12, No. 4, July 2006, pp. 486–502, p. 487

<sup>309</sup> Lisbon European Council 23-24 March 2000. Presidency conclusions

<sup>310</sup> Lange, Bettina. & Nafsika Alexiadou. "Policy learning and governance of education policy in the EU." Journal of Education Policy, Vol. 25, No. 4, 2010, p. 443-444

<sup>311</sup> Ibid., p. 444

<sup>312</sup> Gornitzka, Åse. Chapter 8 "The Lisbon Process: A supranational policy perspective. Institutionalizing the open method of coordination." in Maassen, Peter and Johan Olsen P. (eds). "University Dynamics and European Integration." Springer, 2007, Netherlands, p. 155

competence and the unfruitful attempt at legislating to be bypassed through the creation of common targets and policies.

It has been noted that the OMC shows “the flexibility of European multilevel governance” providing EU institutions with a mechanism for influencing national and regional entities despite the lack of EU competences<sup>313</sup>.

It must be stressed that the OMC scheme lacks a system of sanctions. However, this is not essential since it is offset by “a governance architecture based on incentives for learning” that operates as a “radar” for improvements and further “cooperation and imitation”<sup>314</sup>. To this effect, the monitoring system is based on the activity of the Member States, which are supposed to produce reports for submission to the Commission and the Council. Subsequently, both the Commission and the Council must write a report on progress in the light of the predetermined objectives<sup>315</sup>. Such a scheme, on the one hand, enables absolute compliance with the principle of subsidiarity and fosters convergence on common goals between the Members States. On the other hand, it suffers from a low degree of influence, which is limited to the threat of receiving a low score in the event of a negative outcome to the monitoring and evaluation procedure<sup>316</sup>. Indeed, the system of “naming and shaming” based on the Members States’ reputations and the monitoring system of the Commission shows its own weakness. In particular, the Commission’s power appears to be too limited and too conditioned, since it relies on the information provided by the Member States themselves, which may not submit a full and complete report concerning their internal situation<sup>317</sup>.

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<sup>313</sup> Benz, Arthur. “Accountable Multilevel Governance by the Open Method of Coordination?.” *European Law Journal*, Vol. 13, No. 4, July 2007, pp. 505–522, p. 505

<sup>314</sup> Radaelli, Claudio M. “The Open Method of Coordination: A new governance architecture for the European Union?.” *Swedish Institute for European Policy Studies*, 2003, p. 8

<sup>315</sup> Gornitzka, Åse. “The Open Method of Coordination as practice - A watershed in European education policy?.” *Arena Working Paper*, No. 16, December 2006, p. 37

<sup>316</sup> Sin, Cristina, et al. “European Policy Implementation and Higher Education. Analysing the Bologna Process.” *Palgrave Macmillan*, 2016, p. 71-76

<sup>317</sup> *Ibid.*, p. 32

Within the context of the OMC, the Education and Training 2020 framework (E&T2010) plays an important role. Specifically, the E&T2010 has been defined as “the EU framework for cooperation in the fields of education and training”<sup>318</sup>. In other words, the Education & Training programme (E&T2010) represents a work programme setting out goals and objectives. Specifically, the E&T2010 states as objectives the construction of a quality assurance scheme in the context of a common framework at European level<sup>319</sup>. Such a framework is linked to a functional and competitive labour market and broadly to society as a whole, where citizens have equal opportunities primarily as students in order to improve their skills and secondly as high-skilled workers.

In addition, it is necessary to mention the involvement of stakeholders within the OMC’s pattern and the importance of such involvement in relation to the input-legitimacy of the OMC itself<sup>320</sup>. Specifically, Büchs reminds us that such stakeholders are represented by “interest groups, NGOs, regional and local authorities and experts”<sup>321</sup>.

Such openness can be seen as acknowledgement by the EU of the importance of social and civic movement. However, this issue will be addressed briefly in the following chapters.

### iii. Education & Training programs

Within the Lisbon Strategy’s framework, important steps towards closer and more advanced convergence and cooperation are achieved through the Education & Training programmes. These programs are approved by the Council within the European Union, and set out common objectives and plans with related instruments in order to achieve them according to a precise political approach.

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<sup>318</sup> <https://ec.europa.eu/education/node/60> - last visited 08.03.2021

<sup>319</sup> European Commission. Communication from the Commission Education & Training 2010, Brussels, 11.11.2003 COM(2003) 685 final, p. 3 and 15

<sup>320</sup> Büchs, Milena. “How Legitimate is the Open Method of Co-ordination?.” Journal of Common Market Studies, Vol. 46, No. 4 p. 765-786, p. 772-773

<sup>321</sup> Ibid., p. 773

The first one was launched in 2002 under the name of ‘Education & Training 2010’ and was adopted in 2004<sup>322</sup>. The next one was entitled ‘Education & Training 2020’ and was adopted in 2009<sup>323</sup>. However, the E&T2010 holds a symbolic place since, through it, the Lisbon and the Bologna processes were emphatically intertwined<sup>324</sup>.

The connection between the E&T2010 and the Lisbon Strategy has been explicitly highlighted by the Commission. In its Communication from 2003, the Commission expressly enshrined the work programme ‘Education & Training 2010’ within the process that started with the Lisbon Council in 2000<sup>325</sup>. Likewise, the Council stresses the pivotal role of policies on education and training in order to achieve the goals set out in the Lisbon Strategy<sup>326</sup>.

Both the Commission and the Council go further, stating the necessity for and the relevance of using the OMC as a crucial instrument for achieving the objectives indicated by the E&T work programme and by the Lisbon Process.

As recognised by Gornitzka, starting from 2004 in the context of education the OMC process was identified with the Education and Training 2010<sup>327</sup>.

In addition, the OMC and E&T work programme have been connected to the Bologna Process enhancing the convergence between the Bologna Process and the Lisbon Process together with its instruments. Such convergence also stresses the influence of the EU on the delineation and implementation of the Bologna Process. In fact, in the Copenhagen Declaration of 2002 the European Ministers of Vocational Education and Training and the European Commission rely

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<sup>322</sup> Council of the European Union. Education and Training 2010, 2004/C/104/1

<sup>323</sup> Council of the European Union. Education and Training 2020

<sup>324</sup> Gornitzka, Åse., Bologna in Context: a horizontal perspective on the dynamics of governance sites for a Europe of Knowledge, 2010, European Journal of Education, Vol. 45, No. 4, p. 542

<sup>325</sup> European Commission. Communication from the Commission Education & Training 2010, Brussels, 11.11.2003 COM(2003) 685 final, p. 5

<sup>326</sup> Council of the European Union. Detailed work programme on the follow-up of the objectives of Education and training systems in Europe (2002/C 142/01), p. 3

<sup>327</sup> Gornitzka, Åse. “The Open Method of Coordination as practice - A watershed in European education policy?.” Arena Working Paper, No. 16, December 2006, p. 12

expressly on the E&T2010 work programme together with the two major processes<sup>328</sup>.

The general framework delineated by the E&T2010 work programme incorporates the so-called Standing Group on Indicators and Benchmarks, which is comprised of EU member experts with the task of validating and evaluating indicators and benchmarks in the education field<sup>329</sup>.

Furthermore, the Council states in its conclusion for the work programme Education and Training 2020 (E&T2020) that it will follow up compliance with a further improvement in quality assurance in order to develop the EHEA in synergy with the Bologna Process<sup>330</sup>.

A common element to all the documents analysed until now is a constant and coherent monitoring system, which refers to the so-called Open Method of Coordination (OMC).

Paying a particular focus on quality, the E&T2020 has updated the benchmarks on education in relation to the quality improvement<sup>331</sup>.

Again, given the significance that disability holds for this research, it is important to stress that these programmes do not make any kind of reference to disability, not even in connection to the issue of quality in the context of higher education. However, this issue and in particular the relationship between disability and quality assurance will be discussed further.

Nevertheless, in relation to quality assurance and the circumstances of persons with disabilities, it is noteworthy that, under the objective on “supporting active citizenship, equal opportunities and social cohesion” the European Council

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<sup>328</sup> Declaration of the European Ministers of Vocational Education and Training, and the European Commission, convened in Copenhagen on 29 and 30 November 2002, on enhanced European cooperation in vocational education and training

<sup>329</sup> Gornitzka, Åse. “The Open Method of Coordination as practice - A watershed in European education policy?.” Arena Working Paper, No. 16, December 2006., p. 35

<sup>330</sup> Council of the European Union. Conclusions on a strategic framework for European cooperation in education and training (“ET 2020”), Brussels, 13 May 2009, 9845/09, p. 9 (d)

<sup>331</sup> Sin, Cristina, et al. “European Policy Implementation and Higher Education. Analysing the Bologna Process.” Palgrave Macmillan, 2016, p. 33

subjects Member States to a duty to take the appropriate action in favour of people with disabilities in order to guarantee equal access to education<sup>332</sup>. For its part, the European Commission does not mention ‘disability’ explicitly, although entitles a paragraph ‘Target efforts at the disadvantaged groups’. This paragraph mentions “people with learning difficulties [and] marginalised population groups or those living in disadvantaged areas or outlying regions” as groups that are unacquainted with the world of education<sup>333</sup>.

Now it is possible and appropriate to disclose more explicitly the connection between the Bologna Process and the Lisbon Strategy, investigating the response provided by the European Union on the issue of higher education. After this, the issue of quality assurance will be analysed in greater detail, paying particular attention to the national situations in Belgium and Italy.

## **9. The Europeanisation of Higher Education**

The two main processes, mentioned above, namely the Bologna Process and the Lisbon Strategy, are intertwined and overlap with each other. As has been observed by several authors, this overlap can be detected “in terms of the mode of multi-level governance these processes represent”<sup>334</sup>.

The relationship between these two major processes has been described, using the words of Scharpf<sup>335</sup>, in terms of ‘mutual adjustment’<sup>336</sup>. The author portrays a “Europeanized policy response”, which means that national policies are always adopted by the respective national governments. However, in order to outline their

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<sup>332</sup> European Council. Detailed work programme on the follow-up of the objectives of Education and training systems in Europe, 14.6.2002, (2002/C 142/01), p. 12

<sup>333</sup> European Commission. Communication from the Commission Education & Training 2010, Brussels, 11.11.2003 COM(2003) 685 final, p. 14

<sup>334</sup>Huisman, Jeroen and Marijk van der Wende. “On Cooperation and Competition. National and European Policies for the Internationalisation of Higher Education.” Bonn: Lemmens, 2004, p. 34

<sup>335</sup> Scharpf, Fritz W. “Notes towards a Theory of Multilevel Governing in Europe.” Scandinavian Political Studies, Volume 24, No. 1, 2001

<sup>336</sup> Huisman, Jeroen and Marijk van der Wende. “On Cooperation and Competition. National and European Policies for the Internationalisation of Higher Education.” Bonn: Lemmens, 2004, p. 34

own policies, national governments take into account the choices made by other national governments<sup>337</sup>. Furthermore, according to Scharpf's reasoning, in order to cope with the persistent challenge between themselves and to remove the constraints resulting from such a system, national governments could agree on cooperation at supranational level, i.e. at European level<sup>338</sup>. In other words, States realise that, instead of struggling against each other in an effort to overtake others, it would be preferable to cooperate and work together on common objectives in order to achieve a shared policy.

Within the European Higher Education Area, in 2003 through the Berlin Communiqué<sup>339</sup> a formal connection was created between the Bologna Process and the Lisbon Strategy's aims, showing convergence between the two processes and therefore between the European Union and the Bologna Process<sup>340</sup>.

In particular, the Ministers of Higher Education agreed to start from the Barcelona and Lisbon Council's intentions in order to make further progress towards closer and deeper cooperation within the framework of the Bologna Process<sup>341</sup>.

Specifically, the Barcelona Council recognised the importance of enhancing "closer cooperation" in relation to universities and to focus on lifelong learning<sup>342</sup>. In the light of Scharpf's words, it may be asserted that the European Union decided to link itself to the Bologna Process in order to create some leeway for cooperation instead of working against it. Moreover, both the Bologna Process and the main instrument of the Lisbon Agenda, i.e. the OMC, are voluntary means of cooperation. However, several authors, such as Garben, consider adherence by

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<sup>337</sup> Scharpf, Fritz W. "Notes towards a Theory of Multilevel Governing in Europe." *Scandinavian Political Studies*, Volume 24 No. 1, 2001, p. 11

<sup>338</sup> *Ibid.*, p. 12-13

<sup>339</sup> Communiqué of the Conference of Ministers responsible for Higher Education in Berlin on 19 September 2003

<sup>340</sup> Huisman, Jeroen and Marijk van der Wende. "On Cooperation and Competition. National and European Policies for the Internationalisation of Higher Education." Bonn: Lemmens, 2004, p. 26

<sup>341</sup> Communiqué of the Conference of Ministers responsible for Higher Education in Berlin on 19 September 2003, p. 2

<sup>342</sup> European Council, Barcelona Conclusions, 15 and 16 March 2002, point 31 and 44

Member States to these processes to be a national subjective reason alongside the objective ambition to create an EU-wide higher education system<sup>343</sup>.

Indeed, Moravcsik reminds us that, within a national context, by shifting the issue to a supranational platform, the executive, i.e. the national government, gains greater legitimacy and a predominant initiative over the matter concerned within the national context, thus overcoming national hindrances and possible constraints imposed by national parliaments or other societal actors<sup>344</sup>. Furthermore, Ravinet highlights that, in the context of the current global climate, where the development and the economic growth of a State is founded on knowledge and the evolution of goods and services, and where international competitiveness is linked to the mobility of knowledge itself, higher education plays a fundamental role, in particular at international level and within the European Union<sup>345</sup>. As regards the European context, Fejes stresses that States can cope with competition from other States only by educating their citizens<sup>346</sup>, underlining the closer connection between the State and the citizen and in particular the *status* of the citizen.

In addition, Garben mentions the OMC as a means of achieving the Europeanisation of higher education, referring to the OMC as an expression of a positive integration, which aims to establish common objectives and concrete

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<sup>343</sup> Garben, Sacha. “The Bologna Process and the Lisbon Strategy: Commercialisation of Higher Education through the Back Door?.” *Croatian Yearbook of European Law and Policy*, Vol. 6, pp. 209 – 230, p. 222

<sup>344</sup> Moravcsik, Andrew. “Why the European Union Strengthens the State: Domestic Politics and International Cooperation.” *Centre for European Studies Working Paper Series No. 52*, Harvard University, 1994

<sup>345</sup> Ravinet, Pauline. “From Voluntary Participation to Monitored Coordination: why European countries feel increasingly bound by their commitment to the Bologna Process.” *European Journal of Education*, Vol. 43, No. 3, 2008, p. 356

<sup>346</sup> Fejes, Andrea. “The Bologna process – Governing higher education in Europe through standardization.” Paper presented at the third conference on Knowledge and Politics – the Bologna Process and the Shaping of the Future Knowledge Societies, 2005, p. 210

goals, inducing actors to act rather than negative integration that aims merely to remove obstacles, and relies mainly on the inactivity of actors<sup>347</sup>.

The following pages will address the issue of quality assurance within higher education in the context of the European Union, with specific attention to the issue of disability. Afterwards, the chapter will conclude briefly by discussing the current position in relation to the quality assurance scheme within the two EU Member States covered by the research, namely Belgium and Italy.

### **10. Quality Assurance and Disability in Education**

Following the *fil rouge* laid down primarily by the Bologna Declaration and subsequently by the E&T programmes (2010 and 2020), although also by the Commission's acts during the early 2000s, it is possible to identify some common objectives. Such objectives can be identified as: "quality and effectiveness of education, access to education and the goal to open up national education and training system to society and the wider world"<sup>348</sup>.

In particular, quality in higher education means setting and achieving certain standards, and specifically quality assurance refers to the system of monitoring and controlling, which fundamentally has the task of assessing whether or not these standards are satisfied<sup>349</sup>. Indeed, thanks to the quality assurance scheme it is possible to control, to some degree, the development of higher education throughout all European Union Member States and the implementation of a common policy and common targets. In this regard, 'control' means influence and, by exerting functional influence, it is possible to guide the evolution of some processes towards desired standards. More specifically, quality at an international

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<sup>347</sup> Garben, Sacha. "The Future of Higher Education in Europe: The Case for a Stronger Base in EU Law." LSE 'Europe in Question' Series, LEQS Paper No. 50/2012, July 2012, p. 3-4

<sup>348</sup> Gornitzka, Åse., Bologna in Context: a horizontal perspective on the dynamics of governance sites for a Europe of Knowledge, 2010, European Journal of Education, Vol. 45, No. 4, p. 541

<sup>349</sup> Bernhard, Andrea. "Quality Assurance in an International Higher Education Area." Springer Fachmedien Wiesbaden GmbH, 2012, p. 43

level aims to guarantee transparency and common standards among different countries, such as the Member States of the European Union<sup>350</sup>.

Diversity between the States implies different schemes to ensure that quality. However, this diversity can hinder the adoption of a common approach as to what ‘quality’ is and how to ensure such quality. In fact, every country operates its own system, which may be suited to certain policies or instruments, although may also face some complications in adapting to them.

The following sections will set out the attempt to achieve a European approach to quality assurance and also briefly compare the Belgian and Italian systems.

#### i. Quality Assurance in EU law

Historically, before quality assurance in higher education became a European common issue with the entry into force of the Maastricht Treaty and the establishment of quality education as a European Union competence, the pioneer countries of evaluation quality in higher education were, as has been proposed by various authors, the Netherlands, the United Kingdom and France<sup>351</sup>. In particular, the last two countries have been recognised as the exponents of the two main models in Europe: the British model characterised by a “self-governing community of scholars” that relies on a “peer review” system, and the French model, which can be evoked as expression of the European continental tradition, characterised by an “external authority” that relies on “accountability”<sup>352</sup>. Generally speaking, quality assurance aims to guarantee a certain level of quality through established mechanisms and procedures<sup>353</sup>.

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<sup>350</sup> Ibid.

<sup>351</sup> Kohoutek, Jan. Chapter 2 “Quality Assurance in higher education: a contentious yet intriguing policy issue.” in Kohoutek, Jan (ed). “Implementation of standards and guidelines for quality assurance in higher education of Central and East-European countries: agenda ahead.” Studies on higher education, UNESCO-CEPES, 2009, p. 28-29

<sup>352</sup> Ibid., p. 27; in the same sense, Bernhard, Andrea. “Quality Assurance in an International Higher Education Area.” Springer Fachmedien Wiesbaden GmbH, 2012, p. 40

<sup>353</sup> Harvey, Lee and Diana Green. “Defining Quality.” Assessment & Evaluation in Higher Education, Vol. 18, No. 1, 1993, p. 19

Within the European context, the leading impetus came from the Bologna Process and its drive towards an “accountability rationale” together with an “accreditation scheme”<sup>354</sup>.

Specifically, Capano and Piattoni define the Bologna Process and its quality assurance scheme as an endless process to encourage continuous renewal within something that was deep-rooted in the national tradition, i.e. the universities<sup>355</sup>. In addition, with the Lisbon Strategy the EU fostered a convergence between the Bologna Process and the Lisbon Strategy, establishing a process that was constantly changing and incessantly adjusting<sup>356</sup>, especially in relation to quality education. As has been argued by the same authors, on the one hand the Bologna Process promotes a convergence in order to “facilitate student, scholar and staff circulation”<sup>357</sup> through the creation of the so-called European Higher Education Area (EHEA), which is a space without barriers hindering the mobility of students, scholars and staff<sup>358</sup>. On the other hand the Lisbon Strategy aims to modernise the higher education system in Europe<sup>359</sup>. In their work, Capano and Piattoni specify that, as modernisation, they focus on “the two-tier structure of academic curricula [...], the provision of quality assurance [...], the promotion of universities’ institutional autonomy and accountability”<sup>360</sup>.

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<sup>354</sup> Kohoutek, Jan. Chapter 2 “Quality Assurance in higher education: a contentious yet intriguing policy issue.” In Kohoutek, Jan (ed). “Implementation of standards and guidelines for quality assurance in higher education of Central and East-European countries: agenda ahead.” Studies on higher education, UNESCO-CEPES, 2009, p. 31

<sup>355</sup> Capano, Giliberto and Simona Piattoni. “From Bologna to Lisbon: the political uses of the Lisbon ‘script’ in European higher education policy” *Journal of European Public Policy*, Vol. 18, No. 4, 2011, p. 585

<sup>356</sup> *Ibid.*, p.587

<sup>357</sup> *Ibid.*, p.588

<sup>358</sup> Maassen, Peter and Bjørn Stensaker. “The knowledge triangle, European higher education policy logics and policy implications”, *Higher Education* Vol. 61, Springer, 2011, p. 761

<sup>359</sup> Capano, Giliberto and Simona Piattoni. “From Bologna to Lisbon: the political uses of the Lisbon ‘script’ in European higher education policy” *Journal of European Public Policy*, Vol. 18, No. 4, 2011, p.588

<sup>360</sup> *Ibid.*

Within the European Union, the primary legal act concerning quality assurance is the Council Recommendation of 1998. Indeed, the European Council stated that it was of pre-eminent importance, within education, to “safeguard the quality assurance in higher education institutions and the exchanges of information”<sup>361</sup>.

Within the Bologna Process, a cornerstone of quality assurance in higher education is represented by the Berlin Declaration of 2003. In this document, the Ministers recognised the importance of quality assurance as “the heart of the setting up” of the EHEA<sup>362</sup>. In Berlin, the Ministers of Education relied on the Prague Declaration of 2001, which promoted the enhancement of the quality of higher education<sup>363</sup>. As has been highlighted by Hingel, the Prague summit did not aim to provide a definition of quality but instead to search for a common method and area in order “to identify good practice [...] and define main policy challenges”<sup>364</sup>. On both occasions, the ministers noted the position of the Association for Quality Assurance in Higher Education (ENQA), together with its members and other agencies, at the core of the quality assurance system, as they are called upon “to develop an agreed set of standards, procedures and guidelines on quality assurance”<sup>365</sup>.

In 2005, the Ministers of Higher Education met in Bergen, where the ministers launched the ‘social dimension’ to the Bologna Process dedicating an entire section to the issue. In this section, the ministers recognised that Member States were subject to a duty to take appropriate measures to facilitate and to widen

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<sup>361</sup> Council Recommendation of 24 September 1998 on European cooperation in quality assurance in higher education, 98/561/EC

<sup>362</sup> Communiqué of the Conference of Ministers responsible for Higher Education in Berlin on 19 September 2003, p.3

<sup>363</sup> Communiqué of the meeting of European Ministers in charge of Higher Education in Prague on 19 May 2001, p. 2

<sup>364</sup> Hingel, Anders J. “Education Policies and European Governance: Contribution to the Interservice Groups on European Governance.” *European Journal for Education Law and Policy*, Vol. 5, Kluwer Academic Publishers, 2003, Netherlands, p. 11

<sup>365</sup> Communiqué of the Conference of Ministers responsible for Higher Education in Berlin on 19 September 2003, p. 3

access to education for students coming from “socially disadvantaged groups”<sup>366</sup>. At the same meeting, within the context of the European Higher Education Area, the Standards and Guidelines for Quality Assurance of 2005 (ESG) were adopted<sup>367</sup>. This document has been considered as “part of the regulative infrastructure of the EHEA”<sup>368</sup>.

The ESG 2005 was authorised by the European Association for Quality Assurance in Higher Education (ENQA), the European Students’ Union (ESU), the European University Association (EUA) and the European Association of Institutions in Higher Education (EURASHE)<sup>369</sup>.

As may be noted, the actors involved in the drafting process are not simply the usual formal institutions but also include actors from the private sector and civil society. Fundamentally, the document was proposed in practice by the associations created within the European Union in order to bring about cooperation on quality assurance and a network involving the various stakeholders, e.g. students<sup>370</sup>. These stakeholders include the Universities (through the above mentioned EUA), the students (via the ESU) and the European Association for Quality Assurance in Higher Education (ENQA), which has a peculiar *status* which will be examined below.

Thus far, we have briefly outlined the creation of a quality assurance system within the European Union. However, this system only sets out a framework within which various actors operate. This framework still requires further work and development.

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<sup>366</sup> Communiqué of the Conference of Ministers responsible for Higher Education in Bergen on 19-20 May 2005, p. 4

<sup>367</sup> Standards and Guidelines for Quality Assurance in the European Higher Education Area, 2005, Brussels, Belgium

<sup>368</sup> Eggins, Heather. “Drivers and Barriers to Achieving Quality in Higher Education.” Sense Publishers, 2014 p. 1

<sup>369</sup> Standards and Guidelines for Quality Assurance in the European Higher Education Area, 2005, Brussels, Belgium

<sup>370</sup> *Ibid.*, p. x

## ii. Defining Quality

A definition of ‘quality’ is not provided by any legal act or document, either within the European Union or within the Bologna Process. Moreover, defining quality entails not only identifying quality itself but also determining criteria for assessing quality<sup>371</sup>.

In order to define the nature of quality, Harvey and Green construe it in relative terms, which means on the one hand in relation to stakeholders, considering the question “whose quality?”, and on the other hand in relation to the relevant benchmarks, based on a sort of “absolute threshold” that must be met in order to achieve a certain level of quality<sup>372</sup>.

In using the term “whose quality?”, the authors highlight that the term ‘quality’ takes on different meanings and contents depending on the subject to whom it refers<sup>373</sup>.

Moreover, Bernhard even relies on the philosophical background in order to define the ‘quality’, recalling Aristotle’s definition of quality that refers to the “essential feature of a matter that makes it to what it is and differentiates it from others” and also deploys an etymological argument, pointing to the Latin origin of *qualitas* as meaning ‘character’ or ‘consistence’<sup>374</sup>.

So far, the question concerning quality entails that it must be defined and assured. These two elements are deeply intertwined, since on the one hand quality assurance seeks to achieve and maintain those standards incorporated into the definition of quality; however, on the other hand, through its monitoring and control authority it has the power to influence the definition of new standards and the achievement of certain standards and criteria to the detriment of others.

Moreover, these two elements reflect the double face of ‘quality’ in higher education. Quality does not perform merely a static role, but indeed shows

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<sup>371</sup> Bernhard, Andrea. “Quality Assurance in an International Higher Education Area.” Springer Fachmedien Wiesbaden GmbH, 2012, p. 46

<sup>372</sup> Harvey, Lee and Diana Green. “Defining Quality.” *Assessment & Evaluation in Higher Education*, Vol. 18, No. 1, 1993, p. 10

<sup>373</sup> Ibid.

<sup>374</sup> Bernhard, Andrea. “Quality Assurance in an International Higher Education Area.” Springer Fachmedien Wiesbaden GmbH, 2012, p. 44

dynamism through processes that introduce changes in higher education through new standards and criteria and new implementation and monitoring systems.

Following this dynamism, the term ‘quality’ can be perceived in different ways: as exceptional, consistency, transformation, or fitness for purpose:

- *“as exceptional, quality is translated as fulfilling either of high standards that are set or further of minimum standards;*
- *as consistency, quality means perfection or better complete fulfilment of high standards;*
- *as transformation, is related to the conceiving as fitness for purpose;*
- *finally, as fitness for purpose, which stays as the most used and supported by the scholars regarding quality education, the quality evaluates how the service fit for its purpose, answering the question “whose purpose and how is fitness assessed?”<sup>375</sup>.*

In this regard, the Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG) of 2015 state that: “Quality assurance should ensure a learning environment in which the content of programmes, learning opportunities and facilities are fitness for purpose”<sup>376</sup>. The ESG do not to provide content for the term ‘quality’, due to their inherent unsuitability, or perhaps due to lack of will.

Nevertheless, it is possible to state that quality can be perceived as fitness for purpose, which means that quality is accomplished when the product or service is able to perform the task or utility that it was supposed to satisfy<sup>377</sup>. The fitness for purpose conception can be defined as a ‘relative’ one, since the perception may be different depending on who or what the reference element is, i.e. for instance a

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<sup>375</sup> Harvey, Lee and Diana Green. “Defining Quality.” *Assessment & Evaluation in Higher Education*, Vol. 18, No. 1, 1993, p. 9-29

<sup>376</sup> Standards and Guidelines for Quality Assurance in the European Higher Education Area, 2015, Brussels, Belgium, p. 7

<sup>377</sup> Harvey, Lee and Diana Green. “Defining Quality.” *Assessment & Evaluation in Higher Education*, Vol. 18, No. 1, 1993, p. 16

product can be perceived as fit for the provider's purpose but not for the customer's purpose, and vice versa<sup>378</sup>.

iii. European Association for Quality Assurance in Higher Education (ENQA)

The European Union decided to support the development of quality assurance through the creation of an agency, the so-called ENQA (European Association for Quality Assurance in Higher Education), which started to operate in 2000, in order to create a network of all national quality assurance agencies<sup>379</sup>.

Specifically, ENQA's mission is to promote "the enhancement of quality and the development of a quality culture in higher education [and] to drive the development of quality assurance by representing agencies internationally, supporting them nationally"<sup>380</sup>. Moreover, the ENQA states that it performs an important role in policymaking, with particular attention to quality assurance, at European level and in the context of the Bologna process<sup>381</sup>.

In addition, in line with Furlong<sup>382</sup>, Garben identifies the ENQA as an institution belonging to the OMC's framework due to the ENQA's task of adopting standards, guidelines and best practices<sup>383</sup>. A significant document issued by the ENQA in this regard is the Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG), which were drafted in 2015 in order "to contribute to the common understanding of quality assurance"<sup>384</sup>. Specifically, the

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<sup>378</sup> In this sense Harvey, Lee and Diana Green. "Defining Quality." *Assessment & Evaluation in Higher Education*, Vol. 18, No. 1, 1993, p. 16-21

<sup>379</sup> Kohoutek, Jan. Chapter 2 "Quality Assurance in higher education: a contentious yet intriguing policy issue." in Kohoutek, Jan (ed). "Implementation of standards and guidelines for quality assurance in higher education of Central and East-European countries: agenda ahead." *Studies on higher education*, UNESCO-CEPES, 2009, p. 30

<sup>380</sup> <https://enqa.eu/index.php/about-enqa/enqa-mission-statement/> - visited on 08.03.2021

<sup>381</sup> <https://enqa.eu/index.php/work-policy-area/> - visited on 08.03.2021

<sup>382</sup> Furlong, Paul. "British Higher Education and the Bologna Process: an Interim Assessment." *Politics*, Vol. 25, No. 1, 2005, p. 55

<sup>383</sup> Garben, Sacha. "The Future of Higher Education in Europe: The Case for a Stronger Base in EU Law." LSE 'Europe in Question' Series, LEQS Paper No. 50/2012, July 2012, p. 15

<sup>384</sup> Standards and Guidelines for Quality Assurance in the European Higher Education Area, 2015, Brussels, Belgium, p. 6

ESG 2015 is composed of three parts relating to (1) internal quality assurance (2) external quality assurance and (3) quality assurance agencies<sup>385</sup>. Furthermore, while the ESG recognises the difficulties in defining what ‘quality’ is, it also confirms the deep connection between quality assurance with accountability and enhancement<sup>386</sup>. Furthermore, although the ESG does not have any mandatory effects, which means that States and their national agencies do not experience any legal consequences in the event of non-compliance, they still suffer “unwanted consequences”, e.g. a lack of full ENQA membership or the omission of any mention in the European Quality Assurance Register for Higher Education (EQAR)<sup>387</sup>. This was created in 2008 in order to cope with concerns raised by European ministers, who were calling for further transparency. Indeed, it is task of the EQAR to record all agencies dealing with quality assurance that comply with the ESG’s requirements<sup>388</sup>. This means that the EQAR, which was the first entity with legal status created directly within the Bologna Process<sup>389</sup>, constitutes an impartial and reliable list of quality assurance agencies<sup>390</sup>.

The creation of such an entity offers noticeable evidence of the essential role and importance that quality assurance has within the Bologna Process and for Higher Education Institutions.

In addition, the E4 (ENQA, ESU, EUA and EURASHE), which are *inter alia* founders of EQAR<sup>391</sup> as well as members of Bologna Process, agree whether it is appropriate to achieve a common level of quality in higher education through an external assurance mechanism that uses an evaluation and “comparability and

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<sup>385</sup> Ibid., p. 9

<sup>386</sup> Ibid., p. 7

<sup>387</sup> Kohoutek, Jan. Chapter 1 “Setting the stage: quality assurance, policy change, and implementation.” in Kohoutek, Jan (ed). “Implementation of standards and guidelines for quality assurance in higher education of Central and East-European countries: agenda ahead.” Studies on higher education, UNESCO-CEPES, 2009, p. 17-18

<sup>388</sup> Szabo, Melinda. “International Quality Reviews with an EQAR-Registered Agency.” in Curaj, Adrian et al. (2015) “The European Higher Education Area.” Springer, 2015, p. 660

<sup>389</sup> Ibid., p. 639

<sup>390</sup> Huisman, Jeroen and Westerheijden Don F. “Bologna and Quality Assurance: Progress Made or Pulling the Wrong Cart?.” Quality in Higher Education, Vol. 16, No. 1, 2010 p. 64

<sup>391</sup> <https://www.eqar.eu/about/e4-group/?cn-reloaded=1> – visited 08.03.2021

compatibility” system<sup>392</sup>. The last two aspects refer to the comparability and compatibility of higher education systems but also, in a stricter and more practical manner, to good practices.

Indeed, within the Bologna Process and even within the narrower context of the European Union, there is still a considerable diversity among systems, methodologies and national policies.

#### iv. Disability in Quality Assurance terms

Until now the research has established that disability is not, or is only marginally, contemplated within formal documents regarding quality assurance in higher education.

In the context of the European Union, it is possible to identify acts that set out political intentions and strategies concerning inclusive education and also disability. For instance, in 2010 the Commission launched a new strategy concerning persons with disabilities, expressly committing to “promote inclusive education and lifelong learning for pupils and students with disabilities”<sup>393</sup>. Indeed, the Commission recognises that the segregation of pupils with disabilities within mainstream general education results in segregation and the failure of integration<sup>394</sup>.

Furthermore, within the context of the Bologna Process, the Yerevan communiqué of 2015 provides an example of the connection between quality assurance, disability and social development<sup>395</sup>. In Yerevan ministers committed to establishing a more socially inclusive higher education system as well as an inclusive society, and it has been argued that higher education institutions play an important role in pursuing the construction of an inclusive society<sup>396</sup>. In particular,

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<sup>392</sup> Huisman, Jeroen and Westerheijden Don F. “Bologna and Quality Assurance: Progress Made or Pulling the Wrong Cart?.” *Quality in Higher Education*, Vol. 16, No. 1, 2010, p. 64

<sup>393</sup> European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, Brussels, 15.11.2010 COM(2010) 636 final, p. 8

<sup>394</sup> *Ibid.*, p. 7

<sup>395</sup> Yerevan Communiqué. Yerevan Communiqué. Conference of Ministers responsible for higher education, Yerevan, 14–15 May 2015

<sup>396</sup> *Ibid.*, p. 1-5

they undertook to support higher education institutions and to pursue the goal of achieving a more inclusive system, which entails mobility of teachers and learners as well as the recognition of qualifications as well also as “common quality assurance standards”<sup>397</sup>. Specifically, the ministers explicitly declared that “Study programmes should enable students to develop the competences that can best satisfy personal aspirations and societal needs” endorsing an environment which should be “student-centred”<sup>398</sup>. Here, two aspects are particularly important: first the connection established between universities and students, and secondly the link between (again) universities and society. The former recognises that universities have the task of enhancing students’ abilities in order to support them in realising themselves as human beings, identifying the student as ‘ends (or objectives)’. The latter on the other hand states that universities should foster students’ abilities in order to cope with the needs of society, viewing the students as ‘means (or instruments)’. These two elements can be interconnected with each other by enhancing “the quality and relevance of learning and teaching”<sup>399</sup> which can be otherwise named as ‘Quality Assurance’.

In addition, it must be stressed that disability is not mentioned in the Yerevan Communiqué. However, ministers do mention “students from disadvantaged backgrounds” and state that they “will enhance the social dimension of higher education, improve gender balance and widen opportunities for access and completion, including international mobility, for students from disadvantaged backgrounds”.

The term ‘disadvantaged’ has been used several times and in different contexts in relation to people suffering discrimination, and specifically to persons with disabilities. However, this term will be discussed in-depth below within the appropriate paragraph.

In the next chapter the legal framework for disability rights will be set out and analysed. Here it is sufficient to note that disability has become a pioneering field,

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<sup>397</sup> Ibid., p. 2-3

<sup>398</sup> Ibid., p. 2

<sup>399</sup> Ibid., p. 2

encompassing new legislation and conventions but also new theories and approaches, especially at supranational level, both in the context of the European Union as well as the United Nations. In the light of these new approaches and studies it is possible to identify principles and therefore commitments outlining specific paths and intentions.

Within the context of the UN, the most innovative legal instrument concerning disability is indisputably the UN Convention on the Rights of the Persons with Disabilities (CRPD). Following the adoption of the Convention by the European Union itself, the CRPD gained a primary position in the European legal order, being ranked above directives. This UN Convention is certainly a pioneering legal act, which subjects States to a duty to consider persons with disabilities as holders of the right to education “without discrimination and on the basis of equal opportunity”<sup>400</sup>.

Moreover, in its Comment on the right to inclusive education, the UN Committee on the Rights of Persons with Disabilities affirms that “inclusion and quality are reciprocal: an inclusive approach can make a significant contribution to the quality of education”<sup>401</sup>.

UN international agreements usually enshrine general provisions that need to be ratified and implemented by national governments in order to be enforced and to become operative. Hence, such agreements may not be immediately applicable and may lack direct effect. However, they may set out principles and ideologies that influence the evolution of law and of society over the long run. In fact, in order to attain direct effect within the EU legal order, an international agreement signed by the European Union must feature clear and precise provisions without

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<sup>400</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 24 (1)

<sup>401</sup> UN Committee on the Rights for Persons with Disabilities in its Comment on the right to inclusive education, CRPD/C/GC/4, p. 7-8

any need for implementation or action by the EU or its Member States<sup>402</sup>, as was also clarified by the Court of Justice in the Van Gend & Loos case<sup>403</sup>.

As regards to UN agreements, and specifically the CRPD, which is strictly related to the subject matter of this research, in the Z case the Opinion of the Advocate General stated that the Convention was ‘programmatic’<sup>404</sup>. In this sense, AG Wahl argued that the European Union has the freedom to choose how to realise the rights enshrined in the Convention<sup>405</sup>.

From these minimal considerations it is clear how intertwined disability rights and quality assurance are. As such, the desirable further evolution of quality assurance should be linked with the embodiment of the disability as an element of quality assurance policy.

Within the European Union, various acts have been adopted for the purpose of implementing these political guidelines and strategies. These acts are enshrined in a specific legal framework comprised of various regulations, directives and, overall, the Treaties, which represent the cornerstone of the European Union legal order.

## **11. Quality Assurance Systems: the national experiences of Italy and Belgium**

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<sup>402</sup> Mohay, Ágoston. “The Status of International Agreements Concluded by the European Union in the EU Legal Order.” PRAVNI VJESNIK GOD. 33 BR. 3-4, 2017, p. 155

<sup>403</sup> Court of Justice of the European Union. Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie - Netherlands. C-26-62

<sup>404</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber), 18 March 2014 Z. v A Government department and The Board of management of a community school, C-363/12, par. 88

<sup>405</sup> Opinion of Advocate General Wahl delivered on 26 September 2013 on the Judgment of the Court of Justice of the European Union (Grand Chamber), 18 March 2014 Z. v A Government department and The Board of management of a community school, C-363/12, par. 118

The previous sections have discussed the quality assurance framework at the European level. However, as mentioned above, an essential part of this framework is composed of the various national quality assurance systems and agencies.

The national systems provide a necessary linkage between higher education institutions and the European framework on quality assurance. Indeed, only a national agency and a national system have the competence and the authority to establish, monitor and evaluate the local and national conditions for the higher education system as a whole and specifically higher education institutions.

This research focuses on two specific national situations, namely Italy and Belgium. Therefore, the research will focus on these systems, briefly outlining the national quality assurance scheme within these countries.

It must be stressed that the Italian system seems to be more centralised and homogeneous, while the Belgian one appears more fragmented and multifaceted.

#### i. Quality Assurance in Italy

The Italian Quality Assurance system has experienced far-reaching changes over the last 20 years, also thanks to supranational influence, e.g. the Bologna Process. Indeed, during the 2010s a new agency was established in Italy, namely the National Agency for the Evaluation of the University and Research System (Agenzia nazionale di valutazione del sistema universitario e della ricerca - ANVUR), which supervises the public national system for evaluating quality in universities<sup>406</sup>. In other words, the ANVUR has the task of supervising the quality evaluation system in universities<sup>407</sup> and, in order to carry out that activity, the ANVUR relies on the parameters and rules harmonised at European level. In particular, the ANVUR has applied to the ENQA for EQAR accreditation<sup>408</sup>.

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<sup>406</sup> <http://www.anvur.it/anvur/missione/> - visited on 08.03.2021

<sup>407</sup> <http://www.anvur.it/anvur/missione/> - visited on 08.03.2021

<sup>408</sup> <http://www.anvur.it/anvur/accreditamento-enqa/> - visited on 08.03.2021

The law and its implementing ministerial decrees define the activities of the ANVUR and essentially use the ANVUR as an instrument for establishing and settling a coherent and steady quality accreditation and evaluation system<sup>409</sup>.

Before the ANVUR was established there were other kinds of entity in Italy. First, the National Committee for the Evaluation of the University System (CNVSU) had the task of collecting and filing a considerable amount of data concerning the performance and circumstances of universities and the higher education system as a whole<sup>410</sup>. In addition, the National Committee for the Evaluation of Research (CIVR) produced an evaluation report in the early 2000s based on a three-year research process, which for the first time provided a complete overview of the quality of research in universities<sup>411</sup>.

In accordance with its supervisory task, the ANVUR created a system for self-evaluation, periodic evaluation and accreditation (Sistema di Autovalutazione – Valutazione periodica – Accreditamento - AVA) with the aim of enhancing the quality of teaching and research in universities<sup>412</sup>, which is necessary in order to obtain EQAR-ENQA accreditation.

In this sense, the ANVUR and the ENQA are strongly intertwined not only because the ANVUR has submitted an application to the ENQA, but also because the ANVUR's internal procedure within the Italian system must follow ESG standardisation and requirements, which have been adopted and revised by the ENQA itself<sup>413</sup>.

Alongside this scheme, it must be stressed that, although each university is independent, it must comply with the limitations imposed by the law and the

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<sup>409</sup> Fantoni, Stefano. "Il sistema di valutazione ANVUR." *Scuola democratica*, Fascicolo 3, settembre-dicembre 2015, p. 696-697

<sup>410</sup> Minelli, Eliana, et al., "How Can Evaluation Fail? The Case of Italian Universities." *Quality in Higher Education*, Vol. 14, No. 2, 2008, pp.157-173, p. 158

<sup>411</sup> Ibid.

<sup>412</sup> <http://www.anvur.it/attivita/ava/> - visited on 08.03.2021

<sup>413</sup> Squarzoni, Alfredo. "Qualità, Assicurazione della Qualità, Valutazione della Qualità, Accreditamento della Formazione universitaria." *Scuola democratica*, Fascicolo 2, Maggio-Agosto 2013

needs of all stakeholders<sup>414</sup>. Specifically, within the Italian legal order this independence and autonomy is enshrined in Article 33 of the Constitution<sup>415</sup>.

In particular, the last paragraph of Article 33 provides that:

*“Higher education institutions, universities and academies, have the right to establish their own regulations within the limits laid down by the law”*<sup>416</sup>.

The Article is located in the Title II (ethical and social relations), which encompasses provisions on family, children’s status, health as well as school and education.

With specific regard to the higher education evaluation system, which is influenced by national and supranational elements, at European level the ESG outlines an evaluation system founded on three levels:

- (1) internal quality evaluation within each university
- (2) national external evaluation, and finally
- (3) a European level operated by the European entities and guidelines (ENQA, EQAR and ESG), involving the accreditation of the national agencies<sup>417</sup>.

This system is reliant on a constant and steady relationship between the national and the supranational levels, exerting mutual influence.

The following pages will focus in particular on the Italian internal quality system for evaluating universities.

In 2012, the ANVUR became full operative and in 2013 the AVA system was implemented, becoming compulsory for all universities in Italy<sup>418</sup> according to Law no. 240 of 2010 and Legislative Decree no. 19 of 2012<sup>419</sup>. Law no. 240

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<sup>414</sup> Decataldo, Alessandra. “Valutare la didattica universitaria: considerazioni sui principi ispiratori e sui processi.” *Rivista trimestrale di scienza dell'amministrazione*, Fascicolo 1/2018, p. 1-2

<sup>415</sup> Costituzione della Repubblica Italiana, Articolo 33

<sup>416</sup> *Ibid.*, article 33 (6)

<sup>417</sup> *Standards and Guidelines for Quality Assurance in the European Higher Education Area*, 2015, Brussels, Belgium

<sup>418</sup> Murmura, Federica, et al. “Seven keys for implementing the self-evaluation, periodic evaluation and accreditation (AVA) method, to improve quality and student satisfaction in the Italian higher education system.” *Quality in Higher Education*, Vol. 22 No. 2, 2016, 167-179, p.168

<sup>419</sup> Legge del 30 dicembre 2010, n. 240 and Decreto Legislativo del 27 gennaio 2012, n. 19

concerns the organisation of universities and also authorises the government to improve the quality and efficiency of the university system<sup>420</sup>. Legislative Decree no. 19 concerns specifically quality assurance and the creation of a periodic evaluation scheme<sup>421</sup>.

Fundamentally, under the AVA procedure the evaluation system fulfils the task of verifying whether the minimum requirements have been met and assessing which quality assurance procedure must be adopted<sup>422</sup>. Within the context of the AVA, the ANVUR has competence to establish the parameters, methods and criteria necessary in order to carry out AVA accreditation and for its further development<sup>423</sup>. Moreover, Turri highlights the deep connection between the ANVUR and the Ministry since, through its decrees, the Ministry can influence the conduct of evaluation and the organisational and financial structure of the ANVUR, creating a form of overlap between evaluation and policy<sup>424</sup>. In this regard, Reborà and Turri apply the theoretical model proposed by Olsen to universities, concluding that in today's Italy, the university can be defined as "instrument of public policies"<sup>425</sup>.

In particular, as is clearly described in the ANVUR Guidelines, Legislative Decree no. 19/2012<sup>426</sup>, in tandem with Ministerial Decree no. 987/2016<sup>427</sup>,

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<sup>420</sup> Legge del 30 dicembre 2010, n. 240

<sup>421</sup> Decreto Legislativo del 27 gennaio 2012, n. 19

<sup>422</sup> Turri, Matteo. "The new Italian agency for the evaluation of the university system (ANVUR): a need for governance or legitimacy?." *Quality in Higher education* Vol. 20, No. 1, January 2014, pp. 64-82, p. 70

<sup>423</sup> Murmura, Federica, et al. "Seven keys for implementing the self-evaluation, periodic evaluation and accreditation (AVA) method, to improve quality and student satisfaction in the Italian higher education system." *Quality in Higher Education*, Vol. 22 No. 2, 2016, 167-179, p. 169

<sup>424</sup> Turri, Matteo. "The new Italian agency for the evaluation of the university system (ANVUR): a need for governance or legitimacy?." *Quality in Higher education* Volume 20, No. 1, January 2014, pp. 64-82, p. 69

<sup>425</sup> Reborà, Gianfranco and Matteo Turri. "La governance del sistema universitario in Italia: 1989-2008." *Liuc Papers* N. 221, Serie Economia aziendale 32, ottobre 2008, p. 4

<sup>426</sup> Decreto Legislativo del 27 gennaio 2012, n. 19

<sup>427</sup> Decreto Ministeriale del 12 dicembre 2016, n. 987

specifies that accreditation must involve an evaluation of whether universities are complying with the requirements laid down *ex ante* by the ANVUR, which must in turn comply with the standards set by the ENQA<sup>428</sup>.

ii. Quality Assurance and Disability in Italy

Analysing the Guidelines for the accreditation of academic courses approved in 2017 by the National Agency for the Evaluation of Universities and Research Institutes (ANVUR), it can be observed that disability is mentioned in relation to admission to the courses and study programmes and also in relation to flexibility of courses and methods.

More specifically, requirement R1.B1. concerns student admission and study programmes and stresses, with regard to persons with disabilities, that universities must give special attention to the needs of certain groups of students. Moreover, requirement R3.B3 also demands calls for flexible courses and methods that are capable of supporting certain students, including students with disabilities, in order to foster those students' autonomy and independence<sup>429</sup>. These requirements are set out and regulated by a Ministerial Decree on self-evaluation, evaluation and accreditation of courses of the Ministry of Education, Universities and Research, which lists quality requirements in appendix C. This document requires universities to put in place strategies and policies aimed at guaranteeing quality education and research, i.e. requirement R1, and the requirement on quality of the courses, i.e. requirement R3, and also mentions the European Approach for Quality Assurance of Joint Programmes October 2014 approved by EHEA ministers in May 2015<sup>430</sup>. This last-mentioned document relies in turn on the Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG) as a “common denominator” for the different approaches of the EHEA to Quality Assurance.

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<sup>428</sup> ANVUR, Linee Guida per l'Accreditamento Periodico, L'accreditamento periodico delle Sedi e dei corsi di studio universitari of the 10/08/2017

<sup>429</sup> ANVUR, Linee Guida per l'Accreditamento Periodico, L'accreditamento periodico delle Sedi e dei corsi di studio universitari of the 10/08/2017

<sup>430</sup> Decreto Ministeriale del Ministero dell'Istruzione Ministero dell'Università e della Ricerca del 7 gennaio 2019, n. 6

It is clearly apparent from this framework that, thanks to its regulations, agencies, acts and provisions, the European Union influences and coordinates the Member States along with the national agencies, strategies, policies and legislation.

Notably, the Guidelines approved in 2020 restate requirement R3, which refers to the AVA system already set out above, as well as the previous Guidelines approved in 2017<sup>431</sup>.

As regards the current Italian legislation on universities and, specifically, concerning persons with disabilities, Law no. 17 of 1999, amending Law no. 104 of 1992, recognises the particular circumstances of students with disabilities, providing for support and forms of tutoring. In addition, the law also provides for specific measures in order to enable these students to have full access to the courses and subsequent exams, e.g. extra time for written exams or the presence of an assistant<sup>432</sup>.

As regards the issue of students with disabilities, the interface between the policymaker, i.e. the Ministry of Education, University and Research, and the universities occurs via the National Conference of Delegates for Disability (Conferenza Nazionale Universitaria dei Delegati per la Disabilità – CNUDD), created within the Conference of Rectors of Italian Universities. In its 2014 Guidelines, the CNUDD asserts that it is the most significant entity for liaison with the Ministry of Education as regards any implementation of law and policy<sup>433</sup>. These Guidelines also refer amongst the guiding principles the Convention for the Rights of Persons with Disabilities and more broadly the inclusion and full participation of students<sup>434</sup>.

In addition, it is interesting to read through the reports drafted by ANVUR for more than 25 Universities throughout Italy. It must be stressed that only six reports address disability as an issue. It is worth briefly outlining three of these

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<sup>431</sup> Linee guida per la progettazione in qualità dei corsi di studio di nuova istituzione per l'a.a. 2021-2022 Approvate dal Consiglio Direttivo con Delibera n. 167 del 09/09/2020

<sup>432</sup> Legge del 28 gennaio 1999, n. 17, Articolo 1 modifying Legge del 5 febbraio 1992, n. 104, Articolo 16

<sup>433</sup> Conferenza Nazionale Universitaria dei Delegati per la Disabilità (CNUDD). Linee Guida 2014, p. 2

<sup>434</sup> Ibid., p. 5

reports. The reports were approved between 2017 and 2018 and concern the Turin Polytechnic, the University of Cagliari and the University of Foggia.

Specifically, the Turin Polytechnic presents initiatives concerning the social integration and rights of persons with disabilities<sup>435</sup>. Furthermore, the University of Cagliari dedicates special attention to the issue of disability, offering sources and services in order to facilitate the admission and orientation of students with disabilities, albeit with some difficulties and shortcomings<sup>436</sup>. Finally, the report concerning the University of Foggia emphasises that the University fosters the autonomy of students together with their specific individual characteristics and facilitates access to teaching materials<sup>437</sup>.

At this stage, the Belgian system for accreditation and its quality assurance framework will be analysed. It must be noted that Belgium is characterised by a complex system, comprised of three communities: the Dutch speaking, the French speaking and the German speaking communities. These communities are independent and each has its own quality assurance system, which should be discussed briefly. It must be noted that more room will be dedicated to the Flemish and Walloon systems due to their greater complexity, while only a briefer section will be dedicated to Ostbelgien's system, due also to the limited sources and materials available.

### iii. Quality Assurance in Flanders

In Flanders, the Vlaamse universiteiten en hogescholen raad (VLUHR) which is the Flemish Board of Universities and University Colleges, performs an essential role in the quality assurance system<sup>438</sup>. In connection to the European system, the

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<sup>435</sup> ANVUR report on Polytechnic Torino, approved by the Executive Council on the 08/03/2017, p. 10

<sup>436</sup> ANVUR report on University of Cagliari, approved by the Executive Council on the 10/10/2018, p. 13

<sup>437</sup> ANVUR report on University of Foggia, approved by the Executive Council on the 10/10/2018, p. 18

<sup>438</sup> <https://www.qualityassurance.vluhr.be/> - last visited 08.03.2021

VLUHR has been registered since 2013 with both EQAR and ENQA<sup>439</sup>. As regards the Belgian legislation on quality assurance and higher education, Article 3 of the Decree of 19 June 2015 states that the accreditation body, together with the VLUHR, shall draft a Code of Quality in accordance with ESG<sup>440</sup>. The Code of Quality Assurance produced by the NVAO in 2018 for the period 2019-2025 states that the NVAO is the Accreditation Organisation for the Netherlands and Flanders and is therefore registered with the EQAR performing its tasks in accordance with the criteria set out in ESG 2015<sup>441</sup>. In particular, the Quality Assurance Unit (VLUHR QA) has been established, which is structurally independent from the VLUHR<sup>442</sup>. Its mission is to foster “the development and implementation of internal and external quality assurance processes”, performing the evaluation task in the light of the European Approach<sup>443</sup>.

It must be mentioned that, by 2022, the VLUHR QA will perform fewer tasks. However, at the moment the VLUHR QA has the following tasks: “1) assessments of new programmes, 2) programmes that had a reduced period of accreditation, 3) international joint programmes as well as for 4) assessments of all study programmes in institutions that are not subject to an institutional review”<sup>444</sup>. In addition, the VLUHR QA, as is also the VLUHR, is member of the ENQA, is registered with the EQAR and complies with the ESG. However, the

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<sup>439</sup> Jackson, Stephen et al. “ENQA agency review: Flemish Higher Education Council – Quality Assurance (VLUHR QA)” 19 September 2019, p. 10

<sup>440</sup> Décret du 19 juin 2015 modifiant le Code de l'Enseignement supérieur en ce qui concerne le système de gestion de la qualité et d'accréditation dans l'enseignement supérieur, MB 21 août 2015, Article 3

<sup>441</sup> Kwaliteitszorgstelsel Vlaanderen 2019-2025, Nederlands-Vlaamse Accreditatieorganisatie (NVAO), Juli 2018, p. 7

<sup>442</sup> Jackson, Stephen et al. “ENQA agency review: Flemish Higher Education Council – Quality Assurance (VLUHR QA)” 19 September 2019, p. 16

<sup>443</sup> [http://www.vluhr.be/default\\_EN.aspx?PageId=536](http://www.vluhr.be/default_EN.aspx?PageId=536) – last visited 08.03.2021

<sup>444</sup> Jackson, Stephen et al. “ENQA agency review: Flemish Higher Education Council – Quality Assurance (VLUHR QA)” 19 September 2019, p. 3

VLUHR QA is not recognised as accreditation body in terms of the Manual for the European Approach for Quality Assurance of Joint Programmes<sup>445</sup>.

Pursuing this analysis further, it must be specified that it is the Dutch-Flemish Accreditation Organisation - Nederlands-Vlaamse Accreditatieorganisatie (NVAO) that takes the formal decision on the accreditation of programmes and institutions<sup>446</sup>. Furthermore, the NVAO prepares the guidelines to be used by the Committees within the VLUHR<sup>447</sup>.

Moreover, the NVAO has the task of monitoring the quality of higher education institutions operating in Flanders in Belgium<sup>448</sup>, besides performing its work in the Netherlands too, and it has the power to decide on the accreditation of programmes approved by higher education institutions<sup>449</sup>.

It must be stressed in relation to the above-mentioned European approach that its aim is to set out common standards, within the various approaches composing the EHEA framework, in order to remove any hindrances to the development of programmes and encourage operators to pursue a common approach to quality assurance<sup>450</sup>.

In the 2020 Manual for the European Approach for Quality Assurance of Joint Programmes the VLUHR QA mentions, in accordance with ESG Standard 1.3, that among the standards for quality assurance under Learning, Teaching and Assessment it is necessary to consider the “diversity of students and their needs”<sup>451</sup>.

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<sup>445</sup> Vlaamse Universiteiten en Hogescholen Raad Kwaliteitszorg KZ (VLUHR QA). “Manual for the European Approach for Quality Assurance of Joint Programmes.” January 2020

<sup>446</sup> Broucker, Bruno and Kurt De Wit. “What Europe Wanted and What Flanders Achieved.” Higher Education Policy No. 29, 2016, pp. 315-334, p. 320-321

<sup>447</sup> Ibid., p. 321

<sup>448</sup> <https://www.nvao.net/en/the-quality-assurance-system-of-flanders> - last visited 08.03.2021

<sup>449</sup> Broucker, Bruno and Kurt De Wit. “What Europe Wanted and What Flanders Achieved.” Higher Education Policy No. 29, 2016, pp. 315-334, p. 320

<sup>450</sup> <https://www.qualityassurance.vluhr.be/our-services/european-approach/> - last visited 08.03.2021

<sup>451</sup> Vlaamse Universiteiten en Hogescholen Raad Kwaliteitszorg KZ (VLUHR QA). “Manual for the European Approach for Quality Assurance of Joint Programmes.” January 2020

In addition, in its Self-assessment report the VLUHR QA states, commenting on the ESG Standard 1.3, that as element for a “student-centred approach” it is necessary to consider the opportunity for “flexible learning paths and programme options that are attuned to the student’s needs or interests” and notably that this element is enshrined within the issue of “learning environment”<sup>which</sup> is intended to support students in achieving certain outcomes<sup>452</sup>.

#### iv. Quality Assurance in Wallonia

In Wallonia and in the Brussels-Capital Region, the Quality Assurance system is centred on the Agency for Quality Evaluation in Higher Education (AEQES), which has the task of planning the evaluation procedure for universities and higher education institutions<sup>453</sup>. The AEQES was established by the Décret du 22 février 2008, which was amended in 2015 and supplemented in 2017, and specifies the role of the AEQES as an evaluation and accreditation agency as well as the function of the ESG as a set of criteria and requirements to comply with<sup>454</sup>. The AEQES indicates the evaluation methodology which encompasses three phases: a first concerning an self-evaluation performed by the institution involved on the basis on the criteria set by the Référentiel et guide d’accompagnement pour les évaluations initiales, a second requiring an external evaluation by experts selected by the AEQES and finally a third requiring the drafting of an action plan and its implementation<sup>455</sup>. Specifically, in its Évaluations de programmes for the period 2019-2022 the AEQES lays down the criteria that must be followed in

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<sup>452</sup> Vlaamse Universiteiten en Hogescholen Raad (VLUHR). Self-assessment report 2019, External review for the reconfirmation of VLUHR QA as a full member of the European Association for Quality Assurance in Higher Education, [www.vluhr.be/kwaliteitszorg](http://www.vluhr.be/kwaliteitszorg), Brussels, March 2019, p. 43

<sup>453</sup> <http://www.aeqes.be/index.cfm> - last visited on 08.03.2021

<sup>454</sup> Décret du 22 février 2008 portant diverses mesures relatives à l'organisation et au fonctionnement de l'Agence pour l'évaluation de la qualité de l'enseignement supérieur organisé ou subventionné par la Communauté française, MB 23 avril 2008

<sup>455</sup> [http://www.aeqes.be/agence\\_methodologie.cfm](http://www.aeqes.be/agence_methodologie.cfm) - last visited on 08.03.2021

order to perform its evaluation task, mentioning the ESG including standard 1.3 on student-centred learning, teaching and assessment<sup>456</sup>.

As regards the objectives of this research, it is worth noting that the AEQES does not mention disability in the *Évaluations de programmes 2019-2022*. Nevertheless, the *Référentiel AEQES et guide d'accompagnement pour les évaluations initiales de programmes*, which was approved following the adoption of the Décret of 7 Novembre 2013<sup>457</sup> and the ESG 2015, sets out four criteria. In particular the fourth is dedicated to the policies adopted by institutions in order to guarantee equality within their programmes and courses<sup>458</sup>. Specifically, paragraph 4.3.5 is entitled 'Students with particular needs' and contains evaluation questions in order to establish what measure have to be taken in favour of such students<sup>459</sup>.

#### v. Quality Assurance in Ostbelgien

In Ostbelgien, Quality Assurance is mainly a matter for the local university, the Autonome Hochschule Ostbelgien (AHS), according to the Dekret of 27 June 2005<sup>460</sup>. Title IV of the Decree regulates the quality assurance scheme, providing on the one hand that the University must carry out internal and external evaluations and quality controls and on the other hand that the local government must monitor the activities of and reports filed by the local university<sup>461</sup>.

In addition, in the report drafted by the AHS in 2019, the AHS mentions cooperation with the Agentur für Qualitätssicherung durch Akkreditierung von

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<sup>456</sup> Agence pour l'évaluation de la qualité de l'enseignement supérieur (AEQES). *Évaluations de programmes, AEQES 2019-2022 Guide à destination des établissements*, Octobre 2018

<sup>457</sup> Décret, 7 Novembre 2013 définissant le paysage de l'enseignement supérieur et l'organisation académique des études, MB 18 décembre 2013

<sup>458</sup> *Référentiel AEQES et guide d'accompagnement pour les évaluations initiales de programmes*, Version actualisée (2.1) du 12 octobre 2018, p. 35

<sup>459</sup> *Ibid.*, p. 41-42

<sup>460</sup> Dekret vom 27. Juni 2005 zur Schaffung einer autonomen Hochschule, Title IV

<sup>461</sup> *Ibid.*

Studiengängen e.V. (AQAS), i.e. the Agency for Quality Assurance registered under German law which performs its activity in accordance with the ESG<sup>462</sup>.

vi. Quality Assurance and Disability in Belgium and the European Dimension

Based on the system outlined above, it is self-evident that the situation in Belgium is fragmented. However, due to the framework provided by the European Union, which involves mainly the ENQA and the ESG, quality assurance eventually appears to be coordinated and compliant with the same standards.

Despite these attempts at coordination, it is conceivable that there may be differences between the various systems. Particularly regarding disability, this issue is rarely mentioned or satisfactorily implemented by the accreditation body.

Particularly the last paragraphs point towards an overarching framework at EU level, which coordinates and influences the national schema for quality assurance and education policy, stimulating the enactment of legislation and the quality assurance schema at national level. Furthermore, it is also self-evident that national outcomes and patterns differ from country to country and specifically, as regards our present purposes, between Belgium and Italy.

Pursuing this analysis further with particular regard to the issue of disability, even among institutions in the same country, it seems that this matter has been easily bypassed without any consequences or has been addressed differently, even though the ESG refers explicitly to the issue of students with disabilities or broadly to students with particular needs.

It could be argued that the lack of legislation, both European and national, facilitates such a muddled and inadequate system, which does not address the issue of disability within higher education properly and in full.

Since the main focus of this research is on persons with disabilities within the context of higher education, the next chapter will therefore analyse not only the evolution of the non-discrimination law and international human rights law

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<sup>462</sup> Tätigkeitsbericht 2018-2019, AHS of 2019-06-19

related to disability but also the development of the right to education in connection with persons with disabilities.

## **II. Disability Rights and the European Union**

### **1. Introduction: disability and the European Union**

Disability became a matter of specific attention for the European Union during the late 1990s, leading to the adoption of numerous significant acts. In particular, one of the most important acts of *hard law* was the Amsterdam Treaty from 1999,<sup>463</sup> and the acts of *soft law* included the introduction, through a Commission Communication, on an innovative strategy on disability<sup>464</sup>.

The Treaty recognises, within the current Article 19 TFEU, disability as one of the grounds for discrimination and vests the European Union's institutions with

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<sup>463</sup> European Union, European Council, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997

<sup>464</sup> European Commission. COM(96) 406 Final, Brussels, 30.07.1996 - 96/0216 (CNS): Communication of the Commission on Equality of Opportunity for People with Disabilities

legislative power to combat discrimination and to promote the harmonisation among the Member States<sup>465</sup>. The Communication notes, in particular in paragraph 3, a change of approach, acknowledging that various barriers need to be removed in order to foster the participation of persons with disabilities in society<sup>466</sup>.

Moreover, on the issue of disability rights, the acts of other entities than the European Union, i.e. the United Nations and the Council of Europe, are significant and have had a particular impact on the evolution of disability rights both at international and at European level.

As has been noted by Vanhala, disability raises three particular issues, first the exclusion of persons with disabilities based on prejudice and context, as social barriers, secondly the introduction of the unique instrument of the reasonable accommodation, and thirdly the difficulties in providing a precise definition of persons with disabilities and of disability itself<sup>467</sup>. Unsurprisingly, also in the field of disability the Court of Justice of the European Union has held an important position in the evolution of EU law and in particular with regard to the definition of disability. Above all, the innovative landmark case is the *HK Danmark* judgement<sup>468</sup>, which marked a paradigm shift from a pure medical model of disability towards a social model. In addition, the case law shows how the definition of disability can influence the scope of a provision as it affects the extent of its application *ratione personae*.

In broader terms, the endorsement of a specific type of approach influences not only the law and policymaking procedure but also integration, inclusion and

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<sup>465</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 19

<sup>466</sup> European Commission. Communication of the Commission on Equality of Opportunity for People with Disabilities, COM(96) 406 Final, Brussels, 30.07.1996 - 96/0216 (CNS), par. 3

<sup>467</sup> Vanhala, Lisa. "The Diffusion of Disability Rights in Europe." *Human Rights Quarterly*, No. 37, Johns Hopkins University Press, 2015, pp. 831–853, p. 833-834

<sup>468</sup> Court of Justice of the European Union. Judgment of the Court (Second Chamber), 11 April 2013. *HK Danmark*, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and *HK Danmark*, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)

changes within the society. The concept of ‘inclusive education’ has recently been asserted in relation to education. This notion is distinct especially from integration, a concept that might be confused and might overlap with the concept of inclusion.

In this regard, at international level, the Convention on the Rights of Persons with Disabilities has been the first legally binding UN convention to mention the concept of ‘inclusive education’<sup>469</sup> and the provision on ‘reasonable accommodation’ in the context of education.

The following section will set out and analyse the importance of international law and in particular of the UN Convention for the evolution of disability rights also within the European Union.

## **2. Disability under Human Rights and Non-Discrimination Law**

### **i. The United Nations and Disability**

Within the context of international law and in particular in terms of human rights, the most important and influential entity is the United Nations (UN). This organisation was founded in 1945 with the signature of the Charter of the United Nations (UN Charter)<sup>470</sup>, to which many States around the world have adhered. The original intention shortly after the end of the Second World War was that the UN should keep peace and build up a network worldwide among the States. Subsequently, the UN grew further and started to broaden its actions and interests, and nowadays it is the primary promoter of human rights around the world.

As human beings, persons with disabilities should formally and logically be treated equally with all the other persons, which means *inter alia* as holders of rights. Nevertheless, persons with disabilities have been, and are still now, discriminated against, and it has only been recently, in the last 20 years, that they have been covered by *ad hoc* conventions and specific documents. The rise of the issue of persons with disabilities as a self-standing and independent issue entails an acknowledgement of discrimination against them and the recognition of the

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<sup>469</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 4 on the right to inclusive education, 25 November 2016, CRPD/C/GC/4

<sup>470</sup> <https://www.un.org/en/sections/about-un/overview/index.html> - last visited on 08.03.2021

need for positive action, which means Conventions and agreements, as well as promoting a new approach to the issue.

In relation to disability, the UN adopted several acts since its foundation. However, the Convention on the Rights of Persons with Disabilities (CRPD) of 2006 holds a paramount position. In this regard, Della Fina, Cera and Palmisano have edited a precious commentary on the CRPD, in which they divide the evolution of disability, in the context of human rights, into four periods<sup>471</sup>. The first ran from 1945 to 1970 when the disability was not taken into account; during the second from 1970 to 1980, disability was considered as a condition from which persons had to be cured; after this, during a third period from 1980 to 2000 disability was contemplated as an object of human rights; finally the fourth period ongoing since around 2000 starts to view disability and persons with disabilities as subjects of human rights<sup>472</sup>. The most interesting periods, due to their innovative content and influence, are the last two, i.e. from the 1970s to the 2010s.

a. Towards a human rights model

Starting from the 1970s, disability began to be an issue within the international community and a matter of legal study and policymaking. Furthermore, during the 2000s the UN Convention on the Rights of Persons with Disabilities was adopted, which marks a remarkable shift in approach<sup>473</sup> in several respects.

The CRPD was preceded by other relevant acts, which however did not have the same authority as it. Nonetheless, they represented essential steps towards the CRPD and the current position.

In order to discuss the evolution of the UN's acts, it is necessary to mention the Universal Declaration of Human Rights (UDHR) of 1948, which represents the cornerstone of the UN legal framework<sup>474</sup>. Article 1 of the Declaration recognises

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<sup>471</sup> Della Fina, Valentina et al. (eds.). "The United Nations Convention on the Rights of Persons with Disabilities A Commentary." Springer International Publishing, 2017

<sup>472</sup> Ibid., p. 2

<sup>473</sup> <https://ec.europa.eu/social/main.jsp?langId=en&catId=1138> visited on 08.03.2021

<sup>474</sup> UN General Assembly, Universal Declaration of Human Rights." Paris, 10 December 1948

that all human beings have both equal dignity and equal rights, and Article 25 recognises the right to a certain standard of living for all, referring also to disability as a situation requiring special attention, albeit as a condition that calls for medical care and social services<sup>475</sup>.

The Declaration on the Rights of Mentally Retarded Persons of 1971 operates along similar lines, adding that mentally retarded persons must be able to participate in the community's life<sup>476</sup>. Indeed, the first paragraph of this Declaration states that a "mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings", although then goes on to state in the second paragraph that "mentally retarded person has a right to proper medical care and physical therapy"<sup>477</sup>. Such a structure confirms a biased approach that is still influenced by the conception of persons with disabilities as persons needing primarily rehabilitation and medical care.

Furthermore, the Declaration on the Rights of Disabled Persons of 1975 attempts to define the meaning of 'disabled persons' as a "person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency"<sup>478</sup>, thus identifying the root cause in their impairments only.

These acts embraced an approach that was focused on the impairment, construed as a limitation and something from which the person needed to be cured as it hinders his or her ability to perform any kind of work or activity, to attend any kind of mainstream (high-level) education or simply to exercise rights independently and fully.

Furthermore, the World Programme of Action Concerning Disabled Persons of 1982 highlights the need to foster the participation of persons with disabilities in the social life. Specifically, the text mentions "[...] the goals of full participation

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<sup>475</sup> Ibid., Article 1 and Article 25

<sup>476</sup> UN General Assembly, Declaration on the Rights of Mentally Retarded Persons, 20 December 1971, A/RES/2856, par. 4

<sup>477</sup> Ibid., par. 1-2

<sup>478</sup> UN General Assembly. Declaration on the Rights of Disabled Persons, 9 December 1975, A/RES/3447, par. 1

of disabled persons in social life and development and of equality [...]”<sup>479</sup>. This statement offers an initial basis for acknowledging that persons with disabilities can participate in social life, as others do, and that positive measures are needed in order to ensure this occurs.

Later, in 1993 the Standard Rules on the Equalization of Opportunities for Persons with Disabilities was adopted. This represented a clear step forward in identifying a ‘handicap’, as “the encounter between the persons with disability and the environment”<sup>480</sup>, providing a first hint towards a social construction of disability.

In addition, the Standard Rules conducted a critical review of terms, and consequently of the approach, having been historically based on a medical approach focusing on impairment and the individual<sup>481</sup>. The Standard Rules mention, as a paradigm for the previous anachronistic approach, the International Classification of Impairments, Disabilities, and Handicaps of the World Health Organization<sup>482</sup>, which applies a medical model. By contrast, an up-to-date and modern approach considers both the individual’s impairments and social hindrances, tending towards a social approach<sup>483</sup>. However, some authors as Kayess and French highlight the criticisms against the innovative content of the Standard Rules, which nevertheless still appear to be influenced by the medical model in failing to acknowledge human diversity and dignity<sup>484</sup>.

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<sup>479</sup> UN General Assembly. World Programme of Action Concerning Disabled Persons, 3 December 1982, A/RES/37/52, p. 2

<sup>480</sup> UN General Assembl., Standard rules on the equalization of opportunities for persons with disabilities: resolution adopted by the General Assembly, 20 December 1993, A/RES/48/96, par. 18

<sup>481</sup> *Ibid.*, par. 19-20

<sup>482</sup> World Health Organization. (1980). International classification of impairments, disabilities, and handicaps : a manual of classification relating to the consequences of disease, published in accordance with resolution WHA29.35 of the Twenty-ninth World Health Assembly, May 1976

<sup>483</sup> Gordon, John-Stewart and Felice Tavera-Salyutov. "Remarks on disability rights legislation." *Equality, Diversity and Inclusion: An International Journal*, Vol. 37, No. 5, 2018, p. 515

<sup>484</sup> Kayess, Rosemary and Phillip French. “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities.” *Human Rights Law Review*, Vol. 8, No. 1, Oxford University Press, 2008, p. 16

As regards the World Health Organization (WHO), it must be recalled that the WHO is an international agency created within the United Nations, which started to operate in 1948 and has several missions<sup>485</sup>. For the purposes of this research, the most important missions of the WHO are the “setting of norms and standards” and “monitoring the health situation”, which have some influence over the definition of what is an impairment and what is a disability<sup>486</sup>.

This brief overview of the period falling prior to the adoption of the Convention on the Rights of Persons with Disabilities shows a gradual but constant evolution of disability rights from a mere perception of persons with disabilities as objects towards recognition as subjects under the law. This evolution has affected persons with disabilities, who are no longer treated as persons needing cure, welfare and social care but are now perceived as holders of rights in the same way as everyone else, even though the road towards the full achievement of this status has not yet been completed.

Furthermore, Nussbaum has developed the so-called “capabilities approach”, which will be discussed in depth in the following chapter, focusing on the abilities and capabilities of persons instead of their impairments and hardships. This approach is grounded in the inherent dignity common to all human beings, as the author herself theorises when affirming that “on the intuitive idea of human dignity, that the capabilities in question should be pursued for each and every person”<sup>487</sup>. Along the same lines, although with some criticisms and further developments, Stein offers “disability as universal variation rather than as an aberration” highlighting the importance of focusing on abilities and human dignity, common to all human beings, rather than impairments and exclusion<sup>488</sup>.

As regards the status of persons with disabilities as holders of rights, Gordon and Tavera-Salyutov argue that the human rights model of disability was originally

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<sup>485</sup> <https://www.who.int/about/history/en/> - last visited on 08.03.2021

<sup>486</sup> <https://www.who.int/about/what-we-do/en/> - last visited on 08.03.2021

<sup>487</sup> Nussbaum Martha C. “Frontiers of Justice.” First Harvard University Press paperback edition, 2007, p. 70

<sup>488</sup> Stein, Michael A. “Disability Human Rights.” California Law Review, Vol. 95, No. 75, p. 77

introduced by the UN Standard Rules and then fully embraced by the UN CRPD<sup>489</sup>. This argument may be regarded as overly bold, since the Standard Rules follow, on the one hand, the WHO's Classification, which embraces a medical model but, on the other hand, stresses the necessity to take into account also the "imperfections and deficiencies of the surrounding society"<sup>490</sup>, starting to identify the root cause of disability also outside the person.

Furthermore, the UN Standard Rules quote the "equalisation of opportunities", which implies a substantive equality approach aimed at guaranteeing the same rights and the same duties for all persons since also a person with disabilities, in the same way as any other holders of rights,, has equal rights and equal duties to everyone else<sup>491</sup>. Harpur argues that adherence to the social model conveys a policy that promotes participation by people in removing societal and environmental barriers<sup>492</sup>. On the other hand, the author specifies that the endorsement of the medical approach leads to a policy that seeks to relieve persons with disabilities from their conditions<sup>493</sup>.

Finally, 2006 was the adoption of the CRPD, the first convention concerning human rights in the 21st century<sup>494</sup>, by the General Assembly<sup>495</sup>. It was successively signed by many States and also by the European Council on behalf

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<sup>489</sup>Gordon, John-Stewart and Felice Tavera-Salyutov. "Remarks on disability rights legislation." *Equality, Diversity and Inclusion: An International Journal*, Vol. 37, No. 5, 2018, p. 507-508

<sup>490</sup> UN General Assembly. Standard rules on the equalization of opportunities for persons with disabilities : resolution / adopted by the General Assembly, 20 December 1993, A/RES/48/96, par. 19

<sup>491</sup> *Ibid.*, par. 24-27

<sup>492</sup> Harpur, Paul. "Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities." *Disability & Society*, Vol. 27, No. 1, 2012, pp. 1-14, p. 3-4

<sup>493</sup> *Ibid.*, p. 1-2

<sup>494</sup> Ferri, Delia. "The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC /EU: A Constitutional Perspective". *European Yearbook of Disability Law*, Vol. 2, 2010, pp. 47-71, p. 51

<sup>495</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106

of the European Union itself<sup>496</sup>, representing the first convention to have been signed by the European Union as such<sup>497</sup>.

As has been highlighted by the UN Committee on the Rights of Persons with Disabilities, the Convention embraces a human rights model which acknowledges disability as a ‘social construction’ and as only ‘one of the several layers of identity’, aiming to achieve an equalisation of opportunities in terms of *de facto* equality<sup>498</sup>. Moreover, the CRPD is the first Convention to recognise persons with disabilities as a “social group”<sup>499</sup>.

Moreover, the CRPD is the first Convention to have been adopted by the UN General Assembly that recognises explicitly a certain number of rights, as already stated in several previous conventions, including first and foremost the International Covenant on Civil and Political Rights (ICCPR)<sup>500</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>501</sup>. These two covenants, together with the Universal Declaration, form a so-called International Bill of Human Rights<sup>502</sup>, which sets out the hard core rights recognised for all human beings without any kind of discrimination or difference. Quinn and Degener provide a clear and outstanding definition of the human rights model, stating that:

*“The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person’s medical*

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<sup>496</sup> <https://ec.europa.eu/social/main.jsp?langId=en&catId=1138> – last visited on 08.03.2021

<sup>497</sup> Vanhala, Lisa. “The Diffusion of Disability Rights in Europe.” *Human Rights Quarterly*, No. 37, Johns Hopkins University Press, 2015, pp. 831–853, p. 843

<sup>498</sup> UN Committee on the Rights of Persons with Disabilities Eleventh, General comment No. 6 on equality and non- discrimination, 26 April 2018, CRPD/C/GC/6, par. 9-10

<sup>499</sup> Seatzu, Francesco. “La Convenzione delle Nazioni Unite sui diritti delle persone disabili: i principi fondamentali.” *Diritti Umani e Diritto Internazionale*, Fascicolo 3, 2008, pp. 535-559, p. 536

<sup>500</sup> UN General Assembly. International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171

<sup>501</sup> UN General Assembly. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3

<sup>502</sup> <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> - last visited 08.03.2021

*characteristics. It places the individual center stage in all decisions affecting him/her and, most importantly, locates the main 'problem' outside the person and in society”*<sup>503</sup>.

In the light of the particular features, the Convention on the Rights of Persons with Disabilities should be analysed in full.

b. The UN Convention on the Rights of Persons with Disabilities and the right to education

Above all, as mentioned above, the Convention on the Rights of Persons with Disabilities represents a fundamental shift in approach, embracing fully the social model of disability and setting out the basis on which to develop a so-called human rights model.

This approach considers persons with disabilities as holders of rights and no longer as persons requiring rehabilitation or medical treatment. Conversely, the medical model focuses on the individual and impairment specific to the person, which results in the limitation, and consequently the disability<sup>504</sup>.

The Convention firmly restates the status of persons with disabilities as holders of rights without adding anything new to the existing body of rights and provisions comprised of the Universal Declaration of Human Rights (UDHR) and subsequent covenants and protocols. However, this restatement of persons with disabilities as persons vested with human rights seems to be necessary in order to reinforce a human rights-based approach<sup>505</sup>.

In addition, the Convention introduces novelties in terms of values and instruments in order to foster and empower persons with disabilities and the exercise of their rights.

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<sup>503</sup> Quinn, Gerard and Theresia Degener. “Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability.” New York and Geneva: United Nations, 2002, p. 14

<sup>504</sup> Schiek, Dagmar. “Intersectionality and the Notion of Disability in EU discrimination law.” Common Market Law Review, Vol. 53, No. 1, 2016, pp. 35-63, p. 44

<sup>505</sup> Vanhala, Lisa. “The Diffusion of Disability Rights in Europe.” Human Rights Quarterly, No. 37, Johns Hopkins University Press, 2015, pp. 831–853, p. 843

Indeed, following the format of traditional human rights treaties, the CRPD starts with Article 1, which promotes the inherent dignity of persons with disabilities<sup>506</sup>. Furthermore, Article 3 provides general principles, setting out the values and aims of the Convention, which should guide the application and pursuit of the Convention's objectives and purposes<sup>507</sup>. Alongside inherent dignity, mentioned above, these principles also include: combatting discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; and equality of opportunity and accessibility. Finally, the last two points are dedicated to women and children<sup>508</sup>.

Notably, the most prominent position is occupied by inherent dignity and non-discrimination, which stresses their importance and the deep link between these two concepts. In addition, the position reserved to dignity and non-discrimination also stresses the linkage with the following principles and objectives that can be achieved through respect for inherent dignity and non-discrimination.

Significantly, the principle of full and effective participation and inclusion in society encompasses all types of right, from civil to cultural rights, displaying the broad scope of the Convention itself. This principle may be considered as one of the most innovative since it presents disability merely as one of the innumerable characteristics that a human being can have.

The next point endorses a substantive equality approach under the principle of equal opportunities, which will be analysed in detail below. It requires the impairments or particular conditions of individuals to be addressed in order to assure that all persons have the same opportunities on an equal basis with others.

A related concept to equality of opportunity is the concept of accessibility, as restated in Article 9, which will be discussed in greater detail below as well. This represents a general, preliminary objective to be fulfilled through specific further

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<sup>506</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 1

<sup>507</sup> Della Fina, Valentina et al. (eds.). "The United Nations Convention on the Rights of Persons with Disabilities A Commentary." Springer International Publishing, 2017, p. 120

<sup>508</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 3

intervention under the principles of equality and non-discrimination<sup>509</sup>. Another innovative provision is Article 8 on ‘awareness-raising’ which aims, specifically, “to raise awareness throughout society” on the one hand combatting stereotypes and prejudices and on the other hand promoting the capabilities of persons with disabilities<sup>510</sup>. Throughout the following Articles, the Convention simply reaffirms rights that have already been recognised and are firmly established at international level amongst the common principle endorsed by most States, such as right to life (Article 10), freedom from torture (Article 11), freedom of movement and nationality (Article 18), freedom of expression and opinion (Article 21), respect for privacy (Article 22) and respect for the home and the family (Article 23).

These restatements are not meaningless since a restatement of a right in connection to a specific group or category of persons corroborates the recognition of those rights for such persons, instilling new approaches, theories and action towards them.

A fundamental Article for the purposes of this research is Article 24, which sets out the right to education as well as the duty to provide reasonable accommodation, issues that will be discussed in greater depth during this research. It is appropriate here to stress that the right to education is a well-established right at international level, e.g. Article 26 UDHR, and also at European level, e.g. Article 14 CFREU. However, for the first time a legally binding international treaty has covered inclusive education and the duty to provide reasonable accommodation for persons with disabilities<sup>511</sup>.

It is worth mentioning Articles 25 and 26 because they appear to represent a sort of legacy of the previous approach towards persons with disabilities, perceiving them as persons needing only medical care and assistance. These Articles provide for health, habilitation and rehabilitation, although Article 26 specifies that such

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<sup>509</sup> Ibid., Article 9

<sup>510</sup> Ibid., Article 8

<sup>511</sup> Della Fina, Valentina et al. (eds.). “The United Nations Convention on the Rights of Persons with Disabilities A Commentary.” Springer International Publishing, 2017, p. 451-452

services must be guaranteed in order to enable persons with disabilities to participate and to be included fully in all aspects of life<sup>512</sup>.

With specific regard to the duty to accommodate, it must be stressed that the CRPD is the first legally binding document to have established the instrument of reasonable accommodation in connection with the right to education, specifically in Article 24(2)(c).

However, the provision concerning reasonable accommodation will be discussed in detail below in a dedicated chapter.

Here it is appropriate to cite Article 24 of the Convention:

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

*a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*

*b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*

*c. Enabling persons with disabilities to participate effectively in a free society.*

*2. In realizing this right, States Parties shall ensure that:*

*a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;*

*b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;*

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<sup>512</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 26

c) Reasonable accommodation of the individual's requirements is provided;

d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end,

*States Parties shall ensure that reasonable accommodation is provided to persons with disabilities*<sup>513</sup>.

As regards the innovative feature of the Convention, over and above the “rights-based approach toward disability”<sup>514</sup> mentioned above, the CRPD embraces a so-called ‘holistic approach’ towards these rights<sup>515</sup>.

The holistic approach proposes a new way of conceiving of the rights specifically within the context of international human rights. This new approach considers rights as a whole single entity, instead of creating dichotomies between them. Mégret set out such a holistic theory as applied to the CRPD, showing that the Convention overcomes the traditional approach, which divides rights into positive and negative rights, or political and civil rights as against economic, social and cultural rights, or indeed public rights as against private rights<sup>516</sup>. Conversely, the Convention introduces these rights as a whole and in a complementary fashion, taking the stance that negative rights (i.e. refraining from doing something) entail positive rights (i.e. requiring practical measures and actions). It also considers that political and civil rights entail economic, social and cultural rights in turn. Finally, it views the public and private spheres as being necessarily intertwined and reciprocally influenced<sup>517</sup>. Moreover, the CRPD expresses such a holistic approach toward human rights as a whole, instead of distinguishing between civil and political rights on one hand and economic, social and cultural rights on the other, through the provision on reasonable accommodation. Indeed, Rioux, Basser and Jones restate Lawson’s suggestion, affirming that “reasonable accommodation in the CRPD serves a ‘peculiar bridging role’. In this sense, its

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<sup>513</sup> Ibid., Article 24

<sup>514</sup> Gordon, John-Stewart and Felice Tavera-Salyutov. "Remarks on disability rights legislation." Equality, Diversity and Inclusion: An International Journal, Vol. 37, No. 5, 2018, p. 516

<sup>515</sup> Frédéric Mégret (2008) The Disabilities Convention: Towards a Holistic Concept of Rights, The International Journal of Human Rights, 12:2, pp. 261-278

<sup>516</sup> Ibid.

<sup>517</sup> Ibid.

application across all rights – civil, political, economic, social and cultural – draws together and thus re-aggregates human rights law”<sup>518</sup>.

In addition, the CRPD represents a unique agreement due also to the negotiation process, which alongside delegates, governments and negotiators also involved the organisations of persons with disabilities. As such, it shifted the perspective of them from subjects to authors capable at least of seeking to influence the decision-making process<sup>519</sup>. In fact, negotiations concerning the CRPD featured the largest involvement of representative organisations ever<sup>520</sup>. In this regard, the UN Committee on the Rights of Persons with Disabilities reports and stresses in its General Comment No. 7 that organisations of persons with disabilities performed an important influencing role during negotiations concerning the draft convention<sup>521</sup>. As explained by the UN Office of the High Commissioner, general comments are important documents drafted by the bodies provided for under a treaty (or convention), which in the case of the CRPD is the UN Committee on the Rights of the Persons with Disabilities, which is tasked with offering recommendations and interpretative guidance on the relevant instrument<sup>522</sup>.

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<sup>518</sup> Rioux, Marcia H. et al (eds). “Critical Perspectives on Human Rights and Disability Law.” Martinus Nijhoff Publishers, 2011, p. 277 reporting Lawson, Anna. “The UN convention on the Rights of Persons with Disabilities and European disability law: A catalyst for cohesion?.” in Arnardóttir, Oddný. M. and Gerard Quinn (eds). “The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives.” International Studies in Human Rights, Martinus Nijhoff Publishers, Vol. 100, 2009

<sup>519</sup> Della Fina, Valentina et al. (eds.). “The United Nations Convention on the Rights of Persons with Disabilities A Commentary.” Springer International Publishing, 2017, p. 19

<sup>520</sup> Kayess, Rosemary and Phillip French. “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities.” Human Rights Law Review, Vol. 8, No. 1, Oxford University Press, 2008, p. 3

<sup>521</sup> UN Committee on the Rights of Persons with Disabilities. General Comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, 9 November 2018, CRPD/C/GC/7, par. 1

<sup>522</sup> <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> - last visited 08.03.2021

As regards the representative organisations of persons with disabilities and their influence on disability rights, Kanter highlights that NGOs and other representative organisations of persons with disabilities have adopted as their own motto “nothing about us without us”<sup>523</sup>. This means that social movements aim to participate fully and actively in the private and public spheres, especially when the relevant issue concerns them directly.

In its Strategy against Poverty, the High Commissioner recalls that a human rights-based approach requires that those directly affected and involved must take part in the “conduct of public affair”<sup>524</sup>, which means that all persons should be able to participate at all levels. Indeed, the Committee highlights that involvement in negotiations concerning the Convention reflects the shift of persons with disabilities from being the objects to the subjects of human rights<sup>525</sup>.

With regard to the negotiation and drafting of the Convention, persons with disabilities were, for the first time, actors who were able to shape and propose arguments and observations concerning this matter. This change is witnessed and reported in the Commentary on the Convention edited by Della Fina, Cera and Palmisano, where the authors note that number of the seats for organisations of persons with disabilities was increased in order to guarantee fair representation for all organisations from around the world and that the State Parties themselves, in particular New Zealand, as the Chair, made it clear that the participation of the representative organisations was an essential prerequisite for progressive further with drafting<sup>526</sup>.

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<sup>523</sup> Kanter, Arlene. “The Promise and Challenge of the United Nations Convention on the Right of Persons with Disabilities.” *Syracuse Journal of International Law and Commerce*, Vol. 34, No. 287, 2007, p. 308

<sup>524</sup> Office of the United Nations High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, par. 64

<sup>525</sup> Committee on the Rights of Persons with Disabilities. General comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention of 9 November 2018, CRPD/C/GC/7, par. 6

<sup>526</sup> Della Fina, Valentina et al. (eds.). “The United Nations Convention on the Rights of Persons with Disabilities A Commentary.” Springer International Publishing, 2017, p. 19

In particular, during preliminary discussions over which kind of approach the Convention should follow, the organisation ‘International Disability Caucus’ supported the arguments of those countries that favoured a “comprehensive or holistic Convention”, over than a narrow one<sup>527</sup>. Moreover, representative organisations also presented their arguments strongly in relation to inclusion and segregation in the context of education. In this regard, Inclusion International highlighted that a segregated education dooms those affected to “a pattern of moving from one segregated environment to the next”. In addition, the World Federation of the Deaf stressed that a specialised education is different from a segregated education<sup>528</sup>.

These are examples of the importance of the contributions provided by organisations of persons with disabilities, which would not have been addressed and assessed otherwise.

In addition, these organisations are specifically mentioned in the text of the CRPD, i.e. Article 33(3), which states that the organisations representing the persons with disabilities shall be involved in the monitoring process. Similarly, Article 4(3) imposes an obligation to consult with organisations of persons with disabilities in relation to policies and the implementation of legislation<sup>529</sup>. The UN Committee on the Rights of Persons with Disabilities in its General Comment No. 7 **also** stresses such a duty of consultation in relation to reasonable accommodation, but also in relation to education<sup>530</sup>.

The engagement of organisations of persons with disabilities is noteworthy because their activities represent essential social movements, not only within the policy and law-making process or the drafting process, but also away from

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<sup>527</sup> Ibid., p. 18

<sup>528</sup> Della Fina, Valentina et al. (eds.). “The United Nations Convention on the Rights of Persons with Disabilities A Commentary.” Springer International Publishing, 2017, p. 27

<sup>529</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 33(3)

<sup>530</sup> UN Committee on the Rights of Persons with Disabilities. General comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, 9 November 2018, CRPD/C/GC/7, par. 39 and 85

institutional and official settings in order to bring about the necessary changes within society and the private sphere, as well as within public life. In this sense, such social movements are essential in order to achieve a shift in approach towards the rights-based model and towards a full and complete change in how persons with disabilities are viewed as well as their position and perception within society. As is shown also by the holistic approach of the CRPD, this change requires a cultural and social development, in addition to legal and political development.

c. The monitoring system and the CRPD

The CRPD has another important feature, namely an innovative monitoring system. It is appropriate to examine it now in order to provide a full overview of the CRPD's provisions and the changes introduced by it.

In this regard, Bickenbach specifies that, as an international treaty, the Convention obliges the State Parties to monitor the implementation of its provisions and furthermore that the monitoring process entails five different elements which are (1) rights, (2) goals, (3) targets, (4) indicators and (5) data sources<sup>531</sup>. Every international human rights treaty establishes rights (and duties). In turn, these rights call for policy goals, even though rights and policy goals tend to be rather vague and unspecific, especially in international treaties on human rights. In order to define operating objectives both quantitatively and qualitatively, in the light of the above-mentioned goals and rights, targets help to indicate more precise and practical goals to pursue<sup>532</sup>.

As regards the focus of this research, i.e. education, the CRPD states in Article 24 that persons with disabilities have the right to education and to develop human potential and a sense of dignity<sup>533</sup>. These provisions are laudable and desirable. However, they do not establish any practical or operational content and such

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<sup>531</sup> Bickenbach, Jerome E. "Monitoring the United Nation's Convention on the Rights of Persons with Disabilities: data and the International Classification of Functioning, Disability and Health." *BMC Public Health*, Vol. 11 No. S8, 2011, p. 2-3

<sup>532</sup> *Ibid.*, p. 3-4

<sup>533</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 24

vagueness may hamper their realisation. In fact, these provisions enact not only proper legislation but also a new educational policy seeking to achieve an inclusive system. In order to identify the progress made and to provide a kind of measurement of the issue, the last two elements, i.e. indicators and data, supply the monitoring system with statistics, benchmarks and any information that furnishes qualitative and quantitative indications concerning the implementation of rights and compliance with preset objectives<sup>534</sup>. The rights and goals, as set out above, are laid down by the Convention and its provisions. Subsequently, as noted by Bickenbach, the CRPD does not mention any targets, which implies that the States have to specify in practical and concrete terms the contents of the goals set by the Convention<sup>535</sup>. At this stage, indicators are the most important elements in evaluating the progress made by States in the realisation and implementation of the Convention's content and objectives.

In this regard, Lawson and Priestley present the framework established by the Office of the High Commissioner for Human Rights (OHCHR)<sup>536</sup> in order to monitor progress made on implementing international treaties on human rights<sup>537</sup>. In particular, the OHCHR endorses reliance on three different indicators, referring respectively to structure, process and outcome. This means that the first indicators evaluate domestic law and current State legislation including, for instance, the adoption of other legal instruments; the second evaluate the efforts made by the

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<sup>534</sup> Bickenbach, Jerome E. "Monitoring the United Nation's Convention on the Rights of Persons with Disabilities: data and the International Classification of Functioning, Disability and Health." *BMC Public Health*, Vol. 11 No. S8, 2011, p. 5

<sup>535</sup> *Ibid.*, p. 4-5

<sup>536</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR). "Human Rights Indicators: A Guide to Measurement and Implementation." New York; Geneva: UN, 2012, HR/PUB/12/5; Office of the United Nations High Commissioner for Human Rights (OHCHR). "Report on Indicators for Promoting and Monitoring the Implementation of Human Rights." New York; Geneva: UN, 2008, HRI/MC/2008/3 and Office of the United Nations High Commissioner for Human Rights (OHCHR). "Report on Indicators for Monitoring Compliance with International Human Rights Instruments." New York; Geneva: UN, 2006, HRI/MC/2006/7

<sup>537</sup> Lawson, Anna and Mark Priestley. "Potential, principle and pragmatism in concurrent multinational monitoring: disability rights in the European Union." *The International Journal of Human Rights*, Vol. 17, No. 7-8, 2013, pp. 739-757, p. 739

State to fulfil its pledges, which may consist in the adoption of certain policies, allocating specific financial resources or setting up governmental programmes; the final indicators evaluate the progress made and the results achieved on the basis of information, statistics and any other data available<sup>538</sup>.

As regards the monitoring system provided for under the Convention, Lawson and Priestley emphasise the innovative role of a new multinational monitoring system, which the authors define as ‘concurrent’ or ‘consecutive’ due to the involvement of several countries at the same time and due to the involvement of a supranational body, i.e. the UN Committee on the Rights of Persons with Disabilities, which evaluates the reports issued by different countries simultaneously on a rotating basis<sup>539</sup>. The multinational monitoring is characterised by five features: (1) first, the involvement of persons with disabilities, and as already shown above the CRPD pays particular attention to this aspect, (2) secondly the focus on social barriers, which is typical of the social model mentioned above, (3) thirdly, data comparability and (4) fourthly the dissemination of data, which seem to be essential elements for a system involving many countries, and finally (5) fifthly attention to intersectionality, which is an important sensitive factor for the CRPD<sup>540</sup>.

The first feature has already been discussed adequately at this stage of the research; here it is sufficient to recall that Article 33(3) of the CRPD requires the involvement of the civil society also in the monitoring process<sup>541</sup>. Furthermore, the second feature mentioned above will be analysed in greater depth in the

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<sup>538</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR). “Human Rights Indicators: A Guide to Measurement and Implementation.” New York; Geneva: UN, 2012, HR/PUB/12/5, p. 34-38

<sup>539</sup> Lawson, Anna and Mark Priestley, “Potential, principle and pragmatism in concurrent multinational monitoring: disability rights in the European Union.” *The International Journal of Human Rights*, Vol. 17, No. 7-8, 2013, pp. 739-757, p. 739-742

<sup>540</sup> Lawson, Anna and Mark Priestley. “Potential, principle and pragmatism in concurrent multinational monitoring: disability rights in the European Union.” *The International Journal of Human Rights*, Vol. 17, No. 7-8, 2013, pp. 739-757, p. 743-753

<sup>541</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 33 (3)

following sections and chapters. Here, is it appropriate to specify that social barriers encompass physical and non-physical obstacles, such as inadequate building structure but also attitudes, stereotypes and misconceptions towards persons with disabilities that consciously or unconsciously hinder the participation of persons with disabilities in society.

Regarding comparability and dissemination, it is necessary to stress that progress comparisons have to be carried out constantly in order to perform a proper assessment of progress and ensure an efficient monitoring system and also to ensure that the dissemination of data represents an important stage in ensuring accountability and providing adequate information to policymakers<sup>542</sup>. As regards the last point on intersectional discrimination between disability and other grounds, the discussion is deferred until the ensuing chapter, which will carry out a broader analysis of the issue in the light of the capability theory and the *status* of persons with disabilities with regard to the social contract and social justice.

For the purposes of this section, it is appropriate to focus on the system for collecting data, provided for under Article 31 of the CRPD, and also on the monitoring mechanism, required under Article 33. These two elements are functionally intertwined since the data and the information are gathered and analysed first by the national monitoring institutions, so it is necessary to analyse further the role of these institutions and the related mechanisms.

Focusing on the provisions of the text, Articles 31 and 33 are intertwined due to their content. Particularly, Article 31 requires State Parties to collect data and information on compliance with the obligation to implement the Convention having regard to data protection requirements, which means ensuring respect for privacy and the confidential status of the information<sup>543</sup>. Of particular interest is the additional purpose of the collection of information and data, which consists in

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<sup>542</sup> Lawson, Anna and Mark Priestley. "Potential, principle and pragmatism in concurrent multinational monitoring: disability rights in the European Union." *The International Journal of Human Rights*, Vol. 17, No. 7-8, 2013, pp. 739-757, p. 745-746

<sup>543</sup> UN General Assembly. *Convention on the Rights of Persons with Disabilities: resolution*, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 31 (1) and (2)

detecting the barriers that hamper the exercise of rights by persons with disabilities, although the Convention does not specify how in practical terms to pursue such an objective.

Furthermore, Article 33 requires State Parties on the one hand, to provide for a national implementation and coordination mechanism, in order to assure efficient and complete implementation involving all affected sectors and levels, and on the other hand to provide for a national monitoring mechanism<sup>544</sup>.

With particular regard to the Article 33(2) on national monitoring systems, it is worth commenting on de Beco's work in which the author highlights that the CRPD indirectly mentions the Paris Principles contained in the related UN General Assembly Resolution<sup>545</sup> and that the CRPD is the second international treaty on human rights to do so after the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) adopted in 2002 and entered into force in 2006<sup>546</sup>.

Specifically, the Convention does not explicitly refer to those Principles but refer to principles on national human rights institutions (NHRI)<sup>547</sup>. As de Beco reports, the Paris Principles recognise independence and the pluralism as the two fundamental features of a NHRI<sup>548</sup>. In short, this means on the one hand that these institutions must be independent from any pressure from the Government or other State bodies and must be financially self-sufficient, and on the other hand that the national institutions must be composed of members from different areas of civil society, for instance NGOs, parliaments, universities, etc<sup>549</sup>.

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<sup>544</sup> Ibid., Article 33(1) and (2)

<sup>545</sup> United Nations General Assembly. General Assembly resolution 48/134 of 20 December 1993, Principles relating to the Status of National Institutions (The Paris Principles)

<sup>546</sup> de Beco, Gauthier. "Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions." *Netherlands Quarterly of Human Rights* Vol. 29, No. 1, 2011, p. 86

<sup>547</sup> Ibid., p. 84-87

<sup>548</sup> Ibid., p. 89

<sup>549</sup> United Nations General Assembly. General Assembly resolution 48/134 of 20 December 1993, Principles relating to the Status of National Institutions (The Paris Principles)

This observation shows, once again, the peculiar nature of the CRPD and the special attention focused on drafting and setting up a system that, in terms of content and form, is as efficient as possible.

The following pages will focus particularly on the European dimension and specifically on the action and policies proposed by the European Union.

## ii. The European Union and Disability

The European Union has an advanced and innovative non-discrimination law, which encompasses disability as a ground for discrimination and as a matter for legal action. However, it also has a pioneering and evolving policy, which recognises disability as an important matter. This pattern started with the Amsterdam Treaty, which introduced a prohibition on discriminating on the grounds of disability<sup>550</sup>. However, it goes further, incorporating documents pertaining to other entities, such as the UN Convention on the Rights of Persons with Disabilities<sup>551</sup>, the European Action Plan within the Council of Europe<sup>552</sup>, the EU Disability Strategy<sup>553</sup>, and the new EU Disability Strategy<sup>554</sup>.

Therefore, it can be argued that EU law keeps evolving thanks to incentives that may be internal, such as judgments of CJEU or acts of EU institutions, but also

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<sup>550</sup> European Union, Council of the European Union. Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997

<sup>551</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>552</sup> Council of Europe. Committee of Ministers, Recommendation Rec(2006)5 of the Committee of Ministers to member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers' Deputies

<sup>553</sup> European Commission. Communication of the Commission on Equality of Opportunity for People with Disabilities, COM(96) 406 Final, Brussels, 30.07.1996 - 96/0216 (CNS)

<sup>554</sup> European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final

external, such as judgements or decisions of supranational courts (and committees) or acts adopted by international entities. Among these international entities, the most influential is undoubtedly the United Nations and its CRPD, so it now seems appropriate to analyse the relationship between that Convention and EU law.

Afterwards, the analysis will focus on the action taken and the policies proposed by the EU institutions in the area of disability.

a. The European Union and United Nations' Disability Rights

Generally speaking, UN Conventions and documents occupy an important position, irrespective of whether or not they are legally binding, thanks to their significant impact as instruments of policy at international level as well as at European level.

A landmark example is the Commission's Communication on the Disability Strategy of 1996 which, referring to the UN Standard Rules, endorses a new approach that seeks to detect and remove barriers hindering the equal opportunities and full participation by persons with disabilities<sup>555</sup>. Furthermore, the Commission recognises the negative role of stereotypes that are strengthened by the invisibility of persons with disabilities within the mainstream policy, which involves assisting persons with disabilities in participating fully social life<sup>556</sup>.

The European Union, through a Council Decision, adopted the CRPD in 2009<sup>557</sup> meaning that for the first time the European Union as such had become a party to an international agreement. The Council introduced the Convention into EU law based on Article 13 and Article 95 of Treaty establishing the European

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<sup>555</sup> European Commission. Communication of the Commission on equality of opportunity for people with disabilities A New European Community Disability Strategy, Brussels, 30.07.1996 COM (96) 406 final 96/0216, par. 3

<sup>556</sup> *Ibid.*, par. 17-19

<sup>557</sup> Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 2010/48/EC

Community<sup>558</sup> as evoked by the Council Decision itself<sup>559</sup>. The former Article calls for combating discrimination and the latter concerns the functioning of the internal market.

The CRPD represents a so-called ‘mixed’ agreement, as recalled by the Commission itself<sup>560</sup>, since it falls within the competence of both the EU and the Member States<sup>561</sup>. As regards this particular feature and the relationship between the EU institutions and the Member States, a Code of conduct was adopted by the Council, the Member States and the Commission, in which they agreed to implement the CRPD under the “principle of sincere cooperation”<sup>562</sup>.

In particular, the Convention occupies a significant position within EU law since, as an international agreement adopted by the EU itself, its status is directly below primary law, i.e. the Treaties, but is higher than secondary law, i.e. directives and regulations<sup>563</sup>. Moreover, Ferri highlights that the CRPD is an international human rights treaty, which stresses the common constitutional traditions among

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<sup>558</sup> European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Articles 13 and 95

<sup>559</sup> European Council. Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities

<sup>560</sup> Commission Staff Working Document, SWD (2014) 182 final, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union

<sup>561</sup> On mixed agreement see Cremona, Marise. “External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law.” EUI Working Paper, 2006/22 and Holdgaard, Rass. “External Relations Law of the European Community: Legal Reasoning and Legal Discourses.” Kluwer, 2008

<sup>562</sup> European Union. Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, 2010/C 340/08, par. 2

<sup>563</sup> Rosas, Allan. “The Status in EU Law of International Agreements Concluded by EU Member States.” *Fordham International Law Journal*, Volume 34, No. 5, 2011, p. 1310 and with particular regard to the Convention on the Rights of Persons with Disabilities see Ferri, Delia. “The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective” *European Yearbook of Disability Law*, Vol.2, 2010, pp. 47-71., p. 64

the Member States and reaffirms principles and rights already enshrined in other provisions, as the EU Charter of Fundamental Rights (EUCFR), has the status of primary law within EU law<sup>564</sup>. Specifically, in order to back the constitutional value of certain principles and acts, it is worth recalling that the TEU recognises, at Article 6, as general principles of the law of the European Union those fundamental rights that are, first of all, contained in the EUCFR and secondly those resulting from the common constitutional traditions of the Member States<sup>565</sup>. Furthermore, at Article 2 of the Treaty mentions as foundations of the EU human dignity, equality, the rule of law and non-discrimination. These are principles and values, especially human dignity, that form the hard core of the human rights and the United Nations system<sup>566</sup>.

At this stage, the CRPD can be clearly identified as an important act within EU law, which influences not only the EU legal framework on non-discrimination law and disability rights but also the policies and theories related to disability.

As regards to the relationship between the EU and the UN CRPD, the Court of Justice has considered this matter. In particular, in the *Z* case the CJEU stated that the Convention does not have direct effect<sup>567</sup>. Specifically, the Convention does not have direct effect due to its programmatic value and since its provisions are not unconditionally and sufficiently precise<sup>568</sup>.

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<sup>564</sup> Ferri, Delia. "The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective." *European Yearbook of Disability Law*, Vol. 2, 2010, pp. 47-71., p. 64-65

<sup>565</sup> European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Article 6

<sup>566</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 2

<sup>567</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 18 March 2014. *Z. v A Government department and The Board of management of a community school*, Case C-363/12, par. 90

<sup>568</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 18 March 2014. *Z. v A Government department and The Board of management of a community school*, Case C-363/12, par. 88-90

However, thanks to the provision contained in Article 216 TFEU<sup>569</sup> the CRPD occupies a special position, which is higher than secondary EU legislation but lower than the Treaties. Thus, in this case the Court clearly declared that EU provisions of secondary law must be interpreted in accordance with the UN CRPD<sup>570</sup>.

In addition, it is worth recalling Ferri's words arguing that the Convention has a 'sub-constitutional' position<sup>571</sup>.

It is now appropriate to point out that the cases mentioned will be analysed in greater detail below. However, for the purposes of the research it is appropriate to mention them now in order to elucidate as best as possible the status and applicability of the CRPD under EU law.

As noted above, over the years the EU has built and developed a particular approach and policy to disability, which will be disclosed below.

#### b. EU Action and Disability

The most recent and important policy act, which was adopted, perhaps not accidentally, in 2010 (thus a few years after the adoption of the CRPD) is the new Disability Strategy for the period 2010-2020. The Strategy mentions as guiding principles: the TFEU, in particular Article 10 and Article 19 setting out the prohibition of discrimination, which includes also discrimination on the grounds of disability, and the task of the Union and its institutions to take action in this area; the EUCFR, specifically Article 26 on the rights of persons with disabilities and their right to participate fully in society as well as Article 21 on anti-

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<sup>569</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390, Article 216

<sup>570</sup> Court of Justice of the European Union. Judgment of the Court (Second Chamber), 11 April 2013. HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening, Joined Cases C-335/11 and C-337/11, par. 30-33

<sup>571</sup> Ferri, Delia. "L'Unione europea e i diritti delle persone con disabilità: brevi riflessioni a vent'anni dalla prima 'Strategia'." *Politiche sanitarie*, Vol. 17, No. 2, Aprile-Giugno 2016, p. 121

discrimination and disability; and finally also the CRPD, stressing that the Convention requires protection for all human rights for the persons with disabilities<sup>572</sup>. In addition, Clifford emphasises the fundamental influence of the CRPD on EU disability policy, showing its effect on the drafting of the Disability Strategy 2010-2020<sup>573</sup>.

The main objective of the Commission and its Strategy is the removal of barriers in specific areas, the most interesting of which as regards this research are accessibility, participation, equality and education<sup>574</sup>. In particular, the first three concepts are closely intertwined since accessibility is defined as a precondition for enabling persons with disabilities to participate in social life and to have access to services on an equal basis with others<sup>575</sup>.

These issues are also mentioned in the CRPD and the related committee provided comments on each issue, which appear to be worth discussing.

In its comment on Article 9 of the CRPD on accessibility, the Committee stresses that the duty to ensure accessibility to facilities, goods and services is essential in order to guarantee full participation and an independent life for persons with disabilities on an equal basis with others<sup>576</sup>. Specifically, as regards equality, the Committee notes that the Convention embraces a new conception of equality defined as ‘inclusive equality’. This aims to achieve an inclusive society where diversity between persons is accepted and the same dignity is recognised for all human beings. However, according to a substantive approach, it also endorses

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<sup>572</sup> European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final, p. 3

<sup>573</sup> Clifford, Jarlath. “The UN Disability Convention and Its Impact on European Equality Law.” *The Equal Rights Review*, Vol. 6, 2011, p. 19

<sup>574</sup> European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final, p. 4

<sup>575</sup> *Ibid.*, p. 5

<sup>576</sup> UN Committee on the Rights of Persons with Disabilities Eleventh, Session, 31 March–11 April 2014 General comment No. 2, CRPD/C/GC/2, par. 15-23

redistributive action in order to address social and economic disadvantages encountered by persons with disabilities<sup>577</sup>. Under this objective, a mere formal approach to equality that is limited only to combatting direct discrimination, ensuring similar treatment for similar situations and vice versa, is not sufficient because does not adequately take into consideration the dissimilarities between specific situations and the existence of structural and indirect discrimination<sup>578</sup>. In particular, the Committee identifies stereotypes and intersectional discrimination as causes of discrimination, and its persistence<sup>579</sup>. A substantive form of equality, going beyond mere formal equality, considers the specific circumstances of a group or an individual, providing a special measure in order to guarantee the same opportunities and removing structural and social aspects of discrimination.

Already in 2003, the Commission launched as a central aim the enhancement of equality of opportunities through the improvement of non-discrimination law, mainstreaming and accessibility<sup>580</sup>.

The Committee also explains that full accessibility can only be achieved by removing all barriers. As specifically regards education, it refers not only to environmental and physical hindrances, such as access to buildings and information, but also to access to reasonable accommodations, stressing in addition that while accessibility refers to groups reasonable accommodation refers to individuals<sup>581</sup>.

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<sup>577</sup> UN Committee on the Rights of Persons with Disabilities Eleventh, General comment No. 6 on equality and non- discrimination, 26 April 2018, CRPD/C/GC/6, par. 11

<sup>578</sup> *Ibid.*, par. 10

<sup>579</sup> *Ibid.*, par.. 31-32

<sup>580</sup> European Commission. Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, Brussels, 2.12.2015, COM (2015) 615 final 2015/0278 (COD) and European Commission. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Equal opportunities for people with disabilities: A European Action Plan, COM (2003) 650 final, p. 13-15

<sup>581</sup> UN Committee on the Rights of Persons with Disabilities Eleventh, Session, 31 March–11 April 2014 General comment No. 2 (2014), CRPD/C/GC/2, par. 14-39

In the light of the complex issue of reasonable accommodation and education, these issues will be analysed in greater detail below in a separate chapter. At this stage of the analysis, it is necessary and sufficient to stress the intertwined connection between the concept of accessibility and the concept of reasonable accommodation, together with education.

In order to illustrate in an optimum manner the value of the policy acts adopted by the EU, as recalled by Ferri, the Strategy identifies some areas that need to be developed further, invoking legislative initiatives<sup>582</sup>. Indeed, the Strategy relies on the Commission in order to assess a potential future proposal for a European Accessibility Act. Such a proposal was eventually drafted in 2015<sup>583</sup> and the Directive on accessibility was finally approved in 2019<sup>584</sup>. The Proposal stresses that accessibility is deeply connected with the principles enshrined in the CRPD, promoting the enjoyment of fundamental rights. It also specifies that accessibility will foster various rights mentioned in the Charter of Fundamental Rights of the European Union, aiming to prevent and remove barriers<sup>585</sup>. Moreover, the Proposal adds that accessibility shall not hinder the adoption of reasonable accommodation<sup>586</sup>. The references to the CRPD and reasonable accommodation have been maintained in Directive 2019/882 on accessibility<sup>587</sup>.

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<sup>582</sup> Ferri, Delia. “L’Unione europea e i diritti delle persone con disabilità: brevi riflessioni a vent’anni dalla prima ‘Strategia’.” *Politiche sanitarie*, Vol. 17, No. 2, Aprile-Giugno 2016, p. 122

<sup>583</sup> European Commission. “Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services.” Brussels, 2.12.2015, COM (2015) 615 final 2015/0278 (COD)

<sup>584</sup> Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services

<sup>585</sup> European Commission. “Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services.” Brussels, 2.12.2015, COM (2015) 615 final 2015/0278 (COD), p. 1-9

<sup>586</sup> *Ibid.*, p. 4

<sup>587</sup> Directive No. 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services

Again, it appears evident that there is a connection between accessibility and reasonable accommodation, in particular with regard to persons with disabilities. However, the issue of reasonable accommodation will be analysed in greater depth in a dedicated chapter below.

At this stage it is appropriate to continue to discuss the evolution of EU law in the area of disability and in particular the influence of international law and entities, specifically the Council of Europe, on EU law.

### iii. The European Convention on Human Rights

In 1950, Members of the Council of Europe, following the example of the UN Declaration of Human Rights, adopted the European Convention of Human Rights (ECHR) in order to guarantee and realise human rights and fundamental freedoms<sup>588</sup>.

Almost ten years later, the European Court of Human Rights (ECtHR) was established with the task of ruling on complaints brought by individuals against their own governments concerning breaches of the Convention<sup>589</sup>.

Last but not least, in 1961 the European Social Charter (ESC) was adopted, introducing various social and economic rights in order to complement the ECHR, which sets out civil and political rights<sup>590</sup>. Both the ESC and the ECHR as international agreements, together with the ECtHR as a supranational court, perform important roles, especially in relation to the European Union. In particular, there is competition but also convergence and mutual influence between the CJEU and the ECtHR and also between the EU and the Council of Europe<sup>591</sup>.

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<sup>588</sup> Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, p. 5

<sup>589</sup> Schabas, William A. "The European Convention on Human Rights: A Commentary." Oxford commentaries on international law, Oxford University Press, 2016, Part On: Introduction, p. 1-10

<sup>590</sup> <https://www.coe.int/en/web/european-social-charter/-european-social-charter-and-european-convention-on-human-rights> - last visited 08.03.2021

<sup>591</sup> Dzehtsiarou, Kanstantsin at al. (eds). "Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR." Routledge, 2014, London

The following section will analyse the relationship between the above-mentioned entities and reciprocal influence, paying particular attention to the ECtHR, as regards the Convention and discrimination against the persons with disabilities, and also the ESC with its provision on disability and the collective complaints procedure.

a. The European Court of Human Rights and disability rights

In the light of the goal of this research, it is important to focus on the rights of persons with disabilities in the context of the ECHR due to the position occupied by the ECHR itself in the European context. In fact, although the ECHR incorporates fairly long-standing provisions, since it was approved back in the 1950s, its provisions maintain their authority and validity due to the ECHR's features.

In particular, Loucaides reports that, within the case law of the Court, the ECHR has been recognised as a “living instrument”<sup>592</sup>, which means that it is an instrument that keeps evolving as a ‘living being’. In this regard, the ECtHR states that the ECHR must be interpreted in light of contemporary law<sup>593</sup>. As far as discrimination based on disability is concerned, the Court has had the opportunity to rule on the issue, upholding the prohibition on discrimination on the grounds of disability, despite the fact that the ECHR does not explicitly mention disability among the prohibited grounds for discrimination.

Regarding the issue of disability, during the 1990s the Court received complaints relating to disability and discrimination, which induced the Court to take a stronger approach in favour of persons with disabilities and their inclusion in society. Later on, during the 2000s and 2010s, the Court started to rule on cases involving discrimination on the grounds of disability in the context of education and, especially after the adoption of the CRPD, on cases involving the concept of

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<sup>592</sup> Loucaides, Loukis G. “The European Convention on Human Rights: Collected Essays.” Martinus Nijhoff Publishers, 2007, p. 95

<sup>593</sup> E.g. European Court of Human Rights. *Tyrer v. The United Kingdom*, Application No. 5856/72, 15 March 1978, par. 31

reasonable accommodation. The cases concerning education and reasonable accommodations will be analysed below in the dedicated chapter on reasonable accommodations.

Here it is appropriate to outline the most interesting cases concerning persons with disabilities also outside the context of education in relation to Article 14 ECHR on the prohibition on discrimination. These cases are relevant because they show the Court's aspiration to move towards more effective and positive instruments aimed at realising the principle of non-discrimination. Furthermore, these cases show how the principle of non-discrimination was originally applied and how it evolved. Indeed, in these cases the principle of non-discrimination was always interconnected with other rights or principles, on which it relied for content. Moreover, they show how the issue of inequality and non-discrimination was handled at the time.

An interesting case brought before the ECHR in the 1990s is the *Botta* case, in which an Italian citizen complained that he had suffered from discrimination under the Article 14 ECHR in conjunction with Article 8 on respect for private life due to the absence of adequate facilities to enable persons with disabilities to reach the beach and the sea, as prescribed under Italian law<sup>594</sup>. The applicant stated that he had reported the issue to the public authorities, asking them to comply with national law and seeking legal remedies in order to guarantee the access to the beach for persons with disabilities. However, but he was not successful and eventually gained access to the beach and the sea after asking for special permission to drive directly onto the beach with his own vehicle<sup>595</sup>. In relation to the case, the Court declared that neither Article 8 nor Article 14 applied, arguing that Article 8 was not pertinent because it does not cover inertia on the part of the State as claimed by the applicant, but merely aims to prevent interference by the State<sup>596</sup>. Furthermore, the Court clarified that Article 14 does not have "independent existence", but rather applies in conjunction with other substantive provisions of the Convention or the Protocol, and therefore Article 14

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<sup>594</sup> Council of Europe. *Botta v. Italy*, No. 153/1996/772/973, 24 February 1998

<sup>595</sup> *Ibid.*, par. 1-13

<sup>596</sup> *Ibid.*, par. 27-39

was also not applicable to the case at issue<sup>597</sup>. However, it is significant that the Court highlighted that, even though there was no *de jure* different treatment giving rise to discrimination, there was nonetheless a disparity. The case is interesting, as is highlighted also by Emberland, because here the Court recognised a positive obligation for the State to assure the substantive right at issue, even though in the specific case at stake no such obligation was found to exist and therefore the application was rejected<sup>598</sup>. In this regard, the Court specifies that such obligation arises “where it has found a direct and immediate link between the measure sought by an applicant and the latter’s private and/or family life”<sup>599</sup>, which as explained by Emberland means that “the ECtHR required *causality* (necessary steps) and not merely *intention* (design to secure respect)”<sup>600</sup>. In addition, the Court stressed the existence of *de facto* inequality, as if the Court were wondering about possible scope for action by the State or other actors involved in order to deal with that inequality<sup>601</sup>. The existence of a positive obligation to pursue a substantive right provided for under the Convention and the Protocol has been restated in subsequent cases such as *Marzari v Italy*<sup>602</sup>, *Sentges v Netherlands*<sup>603</sup> and *Zehnalov and Zehnal v Czech Republic*<sup>604</sup>.

This last case is worth noting briefly since, in the *Zehnalov and Zehnal* case the Court referred to the European Social Charter, in particular Article 15 entitled ‘The right of persons with disabilities to independence, social integration and participation in the life of the community’. However, it specified that the Charter

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<sup>597</sup> Ibid., par. 27-39

<sup>598</sup> Emberland, Marius. “Corporations as “Third Parties” in ECHR Law.” *European Business Law Review*, Vol. 13, No. 5, 2002, p. 399-401

<sup>599</sup> Council of Europe. *Botta v. Italy*, No. 153/1996/772/973, 24 February 1998, par. 34

<sup>600</sup> Emberland, Marius. “Corporations as “Third Parties” in ECHR Law.” *European Business Law Review*, Vol. 13, No. 5, 2002, p. 400-401

<sup>601</sup> Council of Europe, *Botta v. Italy*, No. 153/1996/772/973, 24 February 1998, par. 37

<sup>602</sup> European Court of Human Rights. *Marzari v Italy*, Application No. 36448/97, 4 May 1999

<sup>603</sup> European Court of Human Rights. *Sentges v Netherlands*, Application No. 27677/02, 8 July 2003

<sup>604</sup> European Court of Human Rights. *Zehnalov and Zehnal v Czech Republic*, Application No. 38621/97, 14 May 2002

may play a role merely as a “source of inspiration” and it cannot be the object of an application brought before the Court itself<sup>605</sup>.

These cases show the Court’s strict approach, rejecting broad scope for action by the State and by the Court itself in relation to the principle of non-discrimination, and in particular in relation to disability. Nonetheless it seems that the Court may be open to potentially becoming involved when it identifies a case involving inequality and discrimination. In addition, the cases also show a reluctance to promote any positive obligation for States under a substantive equality approach that aims to assure *de facto* equality between persons with disabilities and persons without.

After the CRPD was adopted, the Court for the first time recognised protection under the principle of non-discrimination on the grounds of disability, relying on the Convention on the Rights of Persons with Disabilities in the *Glor v. Switzerland* case<sup>606</sup>. In that case a Swiss citizen suffering from diabetes was declared ineligible to join the military and hence was asked to pay the exemption tax, since only persons who suffer from major disabilities were excluded from paying that tax<sup>607</sup>. The applicant thus complained that he had been discriminated since he had not declared his intention to avoid obligatory service, and had rather expressed a willingness to perform civil service instead of military service<sup>608</sup>.

In interpreting the ECHR, the Court held that there had been a violation of the prohibition of discrimination, i.e. Article 14 ECHR. Although it does not mention disability as prohibited ground for discrimination, the Court draw on the consensus at both European and international level on protection against discrimination and the promotion of the social inclusion of persons with disabilities, citing in particular, among other acts, the United Nations Convention

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<sup>605</sup> Ibid., section B

<sup>606</sup> Della Fina, Valentina et al. (eds.). “The United Nations Convention on the Rights of Persons with Disabilities A Commentary.” Springer International Publishing, 2017, p. 114

<sup>607</sup> European Court of Human Rights. *Glor v. Switzerland*, Application No. 13444/042009, 30 April 2009, par. 10-26

<sup>608</sup> Ibid. 10-26

on the Rights of Persons with Disabilities<sup>609</sup>. Specifically, the Court noted that the Swiss authorities had “failed to strike a fair balance between the protection of the interests of the community and respect for the Convention rights and freedoms of the applicant”<sup>610</sup>. Furthermore, the Court stressed that the difference in treatment provided for under the national legislation “between people declared unfit for service and exonerated from paying the tax and those declared unfit for service but nevertheless obliged to pay it” was not reasonable<sup>611</sup>.

Commenting the case, it has been suggested that the Court’s inclination to provide applicants with an alternative solution for the matter appears akin to embracing the duty to accommodate, offering an adjustment that is suitable for both parties to the dispute<sup>612</sup>. Indeed, in order to assess the existence of a valid justification for the treatment reserved to the applicant, the Court assessed whether there were any alternative solutions for the applicant due to his particular circumstances, such as a different form of mandatory civil service, as is required in other countries<sup>613</sup>.

A recent case concerning a person with a disability in the context of education was the *Dupin* case from 2018. The case concerned the refusal of a request made by a mother of a child with a disability to allow her son to participate in mainstream education<sup>614</sup>. On the merits, the Court ruled the application unfounded due to a lack of supporting argument by the applicant. The Court also held that the right of access to education was guaranteed *de jure* in France<sup>615</sup>. However, the Court stressed the importance of promoting an inclusive education and the role of the national authorities which, in pursuing such objective, must evaluate each individual situation and also consider the interest of the pupil and the benefits that

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<sup>609</sup> Ibid., par. 52-98

<sup>610</sup> Ibid., par. 96

<sup>611</sup> Ibid., par. 97

<sup>612</sup> Stavert, Jill. "Glor v. Switzerland: Article 14 ECHR, Disability and Non-Discrimination." *Edinburgh Law Review*, Vol. 14, No. 1, 2010, pp. 141-146, p. 145

<sup>613</sup> European Court of Human Rights. *Glor v. Switzerland*, Application No. 13444/042009, 30 April 2009, par. 94

<sup>614</sup> Cour Européenne des Droits de l’Homme, *Dupin c. France*, Requête no 2282/17, 18 décembre 2018

<sup>615</sup> Ibid., par. 28 and 35

the pupil will receive once he or she has been incorporated into mainstream education<sup>616</sup>.

It must be highlighted that the Court suggests that the national authorities are best placed to take a decision on the matter<sup>617</sup>. Furthermore, it has been stressed that that, in the *Dupin* case, the Court seems to have taken a step back from its previous case law, which treated inclusive education as “a favour to the child”<sup>618</sup>.

Again, it appears that the Court, on the one hand, decided not to take the opportunity to make a breakthrough in the field of education, asserting the right of students with disabilities to be incorporated into mainstream education whilst, on the other hand, quietly affirming the necessity for inclusive education and the existence of an obligation for States and national authorities to pursue it. Under these circumstances, it would appear that the Court tried to avoid encroaching boldly on a delicate and sensitive area, such as education, which involves political choices and economic charges, thereby opening itself to accusations of judicial activism or interference in internal affairs, which lie beyond the Court’s range of action<sup>619</sup>.

As has been noted, the Court’s role lies essentially in the development process, once treaties and *soft law* have addressed the matter, keeping the discussion active between the actors involved<sup>620</sup>.

It is appropriate to analyse an important document drafted within the Council of Europe, namely the European Social Charter.

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<sup>616</sup> Ibid., par. 27-31

<sup>617</sup> Lievens, Johan and Marie Spinoy. “Inclusive education: is the Strasbourg Court on the right track?” *Revue trimestrielle des droits de l’homme*, Vol. 30, No. 119, 2019, pp. 707-718, p. 709

<sup>618</sup> Ibid., p. 711

<sup>619</sup> Generally, on judicial activism and self-restraint of the European Court of Human Rights: Popovic, Dragoljub. “Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights.” *Creighton Law Review*, Vol. 42, 2009 and Viljanen, Jukka. “The Role of the European Court of Human Rights as a Developer of International Human Rights Law.” *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* No 62/63, 2008

<sup>620</sup> Jukka Viljanen, *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, 2008, *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* no 62/63, p. 264

## b. The European Social Charter

As mentioned above, the European Social Charter (ESC) was adopted in order to provide social and economic rights, alongside civil and political rights laid down by the European Convention on Human Rights (ECHR).

Originally, in its version of 1961 the ESC provided, in Article 15, for the right to vocational training and rehabilitation for persons with disabilities<sup>621</sup>. This Article shows the influence of the previous traditional approach towards persons with disabilities, conceiving of them as persons in need of rehabilitative treatment and training to be provided, where necessary, in special institutions as well as special positions in the workplace dedicated exclusively to them, keeping them away outside the mainstream.

In the revised text from 1996, Article 15 was entitled “The right of persons with disabilities to independence, social integration and participation in the life of the community”, and referred to the right to education and access to an “ordinary working environment”<sup>622</sup>. Moreover, in 1995, the Council of Europe adopted a Protocol introducing a collective complaints procedure, which can be triggered by (specifically listed) non-governmental organisations, in addition to trade unions and other representative organisations<sup>623</sup>.

The main change between the two versions of the ESC involves the shift in approach and language from “rehabilitation” to “integration and participation”, hastening the innovation of disability rights at international level in terms of human rights.

It has been stressed that the ESC is the only document within the European context that is so explicit in providing for concerning persons with disabilities<sup>624</sup>.

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<sup>621</sup>Council of Europe. European Social Charter, 18 October 1961, ETS 35, Article 15

<sup>622</sup> Council of Europe. European Social Charter (Revised), 3 May 1996, ETS, Article 15

<sup>623</sup> Churchill, Robin R. and Urfan Khaliq, “The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?.” *European Journal of International Law*, Vol. 15, No. 3, 2004, pp. 417–456

<sup>624</sup> Arnardóttir, Oddný and Gerard Quinn (eds). “The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives.” *International Studies in Human Rights*, Martinus Nijhoff Publishers, Vol. 100, 2009, p. 172

According to Article 15:

*With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:*

*1 to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;*

*2 to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services;*

*3 to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure<sup>625</sup>.*

In particular, it is worth highlighting the provisions of the first paragraph, which call on States to take action in order to provide education for persons with disabilities, as well as the third paragraph, which requires the promotion of full integration and participation within the societal life through positive measures aimed at facilitating it.

In the light of the goal of the research, it is appropriate to briefly outline the relationship between the ESC and the EU and the role of the ESC within the EU area.

The Treaty on the Functioning of the European Union (TFEU) expressly refers to the ESC in Article 151, under the Title on Social Policy, asserting that

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<sup>625</sup> Council of Europe. European Social Charter (Revised), 3 May 1996, ETS 163, Article 15

consideration must be given to instruments such as the ESC in order to realise objectives such as “promotion of employment, improved living and working conditions [and] combating exclusion”<sup>626</sup>.

Furthermore, Article 6 of the Treaty on European Union (TEU) recognises the CFREU as having the same status as the Treaties<sup>627</sup>, and the CFREU in turn explicitly mentions the ESC in its preamble. Moreover, it explicitly mentions the ECHR in Article 52(3) on the scope of guaranteed rights<sup>628</sup> and in Article 53 on the level of protection for rights and freedoms recognised by international law<sup>629</sup>.

Moreover, Khaliq questions whether it is appropriate for the CFREU to concede the same authority to the ESC as it does to the ECHR, since they are both documents promoted by the Council of Europe and have been adopted by the all Member States, although the author stresses that the CFREU dedicates less attention and relevance to the ESC compared to the ECHR<sup>630</sup>.

This difference in treatment may be accounted for by the status of the ECHR due to its historical path and position. Indeed, the ECHR was adopted in 1950 and has been amended several times<sup>631</sup>, while the ESC was adopted in 1961 and has been amended three times<sup>632</sup>. It therefore seems that the ECHR has been a focus of greater attention over the years compared to the ESC, due to its symbolic adoption and position, alongside the broad convergence of intentions and substantive aims around the ECHR.

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<sup>626</sup>European Union. Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390, Article 151

<sup>627</sup> European Union. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Article 6

<sup>628</sup> European Union. Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 52(3)

<sup>629</sup> European Union. Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 53

<sup>630</sup> Khaliq, Urfan. “The European Union and the European Social Charter: Never the twain shall meet?.” *Cambridge Yearbook of European Legal Studies*, Vol. 15, 2013, pp. 169-196, p. 177-178

<sup>631</sup> Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

<sup>632</sup> Council of Europe. European Social Charter (Revised), 3 May 1996, ETS 163

It must be highlighted that, in order to be member of the Council of Europe, it is necessary to ratify the ECHR<sup>633</sup>. Indeed, all 47 members of the Council have ratified the Convention, whereas the ESC has been ratified by 43 members<sup>634</sup>.

Moreover, in Article 19 the ECHR establishes a full-time judicial body functioning on a “permanent basis”. i.e. the European Court of Human Rights<sup>635</sup>, which has the task of supervising the interpretation of and compliance with the rights enshrined by the Convention. Moreover, individuals have the right to apply directly to the Court when certain conditions are met<sup>636</sup> seeking judicial protection and a response in cases involving violations<sup>637</sup>, as provided for in Article 34<sup>638</sup>.

In order to underscore the peculiar and important role of the European Court of Human Rights (ECtHR) with specific reference to the European Union (EU) and the Court of Justice of the European Union (CJEU) it is opportune to note that even the CJEU has stated, e.g. in the case *J. McB v. L.E.*<sup>639</sup>, that when same rights are recognised both by the ECHR and the CFREU it is necessary to follow the interpretation and the case law laid down by the ECtHR<sup>640</sup>.

By contrast, the European Social Charter (ESC) does not display the same features. Indeed, the European Committee of Social Rights (ECSR) has been

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<sup>633</sup> Eckes, Christina. “EU Accession to the ECHR Between Autonomy and Adaptation.” *The Modern Law Review Limited*, Vol. 76, No. 2, 2013, pp. 254–285, p. 256-257

<sup>634</sup> <https://www.coe.int/en/web/european-social-charter/the-evolution-of-the-charter-and-the-convention-within-the-council-of-europe-a-comparative-overview> - last visited 08.03.2021

<sup>635</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 19

<sup>636</sup> Practical Guide on Admissibility Criteria, Council of Europe/European Court of Human Rights, 2020

<sup>637</sup> Gerards, Janneke. “General Principles of the European Convention on Human Rights.” Cambridge University Press, 2019, p. 32

<sup>638</sup> Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 34

<sup>639</sup> Court of Justice of the European Union. Judgment of the Court (Third Chamber) of 5 October 2010. *J. McB. v L. E.*, Case C-400/10 PPU

<sup>640</sup> Eckes, Christina. “EU Accession to the ECHR Between Autonomy and Adaptation.” *The Modern Law Review Limited*, Vol. 76, No. 2, 2013, pp. 254–285, p. 278

established in order to supervise the interpretation and application of the Charter, which does not enjoy the status and tasks of a full judicial body<sup>641</sup>. In addition, the ESC only provides for a collective complaint procedure, and only a limited number of entities are entitled to lodge a complaint<sup>642</sup>.

From this brief comparative overview, it is possible to discern a slight difference of position regarding the ECHR and the ESC within the Council of Europe itself, but also in within the European Union, which is indeed tied and influenced by the Council of Europe<sup>643</sup>.

In addition to treaties and charters as well as judgements, the Council of Europe also produces other kinds of documents and acts, which will be analysed below insofar as they concern disability and the issues relevant to this research.

### c. The Disability Strategy of the Council of Europe

In 2017 the Council of Europe launched a new Strategy on disability encompassing the period from 2017 to 2023, recalling first the previous Disability Action Plan 2006-2015, which marked a significant paradigm shift towards a human rights-based approach to disability<sup>644</sup>. The Action Plan 2006-2015 was launched by Recommendation (2006)5 adopted by the Committee of Ministers of the Member States. The Recommendation recognises that persons with disabilities have been treated as patients, i.e. people needing medical cure and assistance, and declares that it is necessary to rely on a social and human rights based approach that considers persons with disabilities as citizens in the same way as everyone else, identifying the hindrances to the full participation of persons with disabilities

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<sup>641</sup> Quesada, Jimena L. "Protection of refugees and other vulnerable persons under the European Social Charter." *Revista de Derecho Político* No 92, enero-abril 2015, pp. 245-272, p. 250-251

<sup>642</sup> Council of Europe. *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, ETS No.158

<sup>643</sup> Gragl, Paul. "The Accession of the European Union to the European Convention on Human Rights." Hart Publishing Ltd, 2013

<sup>644</sup> Council of Europe. "Human Rights: A reality for all, Council of Europe Disability Strategy 2017-2023." Council of Europe, March 2017, p. 9

in social, legal and environmental barriers but also in attitudes<sup>645</sup>. The Recommendation stresses the importance of education and its mainstreaming for social inclusion, highlighting the benefits not only for persons with disabilities but also for persons without disabilities<sup>646</sup>.

In addition, Recommendation (92)6 “on a coherent policy for people with disabilities” was adopted in 1992<sup>647</sup>, relying on the WHO’s definitions distinguishing between impairment, disability and handicap. Under this schema, the first derives from a loss of psychological or physical functions, the second consists in a restriction on the ability “to perform an activity in the manner of or within the range considered normal for a human being” and the third is a disadvantage caused by an impairment or disability that precludes “the fulfilment of a role that is normal (depending on age, sex and social and cultural factors) for that individual”<sup>648</sup>. Moreover, Recommendation (92)6 states that persons with disabilities have the right to education and that education shall empower such persons, entailing an acceptance of their disabilities but also the enhancement of their abilities, removing the obstacles that interfere with that process<sup>649</sup>.

As regards the Disability Strategy 2017-2023, this latest Strategy has five focal points which are: participation, reasonable accommodation, gender equality, multiple discrimination and education<sup>650</sup>. The added value brought by the new Strategy is based on the assessment that “individual barriers can further be overcome by individually tailored reasonable accommodation” according to the

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<sup>645</sup> Council of Europe. Committee of Ministers, Recommendation Rec(2006)5 of the Committee of Ministers to member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers' Deputies, p. 8

<sup>646</sup> Ibid., p. 16

<sup>647</sup> Council of Europe. Recommendation No. R (92) 6 of the Committee of Ministers to Members States on a coherent policy for people with disabilities (Adopted by the Committee of Ministers on 9 April 1992)

<sup>648</sup> Ibid., p. 4

<sup>649</sup> Ibid., p. 10

<sup>650</sup> Council of Europe. Human Rights: A reality for all, Council of Europe Disability Strategy 2017-2023, Council of Europe, March 2017, p. 10-11

assumption that a disability is caused by interaction between the individual impairment and the social and environmental barriers and attitudes<sup>651</sup>. In addition, the Strategy stresses the particular circumstances of persons with disabilities who are at risk of suffering from multiple discrimination especially on the ground of gender<sup>652</sup>. Finally, a further focal point is placed on education and its quality, which is recognised as a precondition for realising and exercising all human rights, as well as the issue of the inclusion of persons with disabilities within the context of education<sup>653</sup>. In particular, the Strategy indicates five fields as being of high priority: (1) Equality and non-discrimination, (2) Awareness raising, (3) Accessibility, (4) Equal recognition before the law and (5) Freedom from exploitation, violence and abuse<sup>654</sup>. Among them the most significant at this stage of the discussion are equality, which is recognised as a fundamental principle underpinning all human rights, and awareness raising and freedom from exploitation and violence, both of which are connected to the struggle against stereotypes and attitudes towards persons with disabilities<sup>655</sup>.

In particular, the cross-cutting issues identified by the Strategy 2017-2023 are full and effective participation in society, reasonable accommodation and education, all of which are intertwined with the others<sup>656</sup>. Indeed, in order to guarantee the full and effective participation of persons with disabilities it is necessary to prevent those barriers that hinder it and this aim may be achieved by providing tailored measures, in other words reasonable accommodations. It seems that this is the only instrument capable of overcoming the individual barriers faced by persons with disabilities. Furthermore, education is a prerequisite for enabling people to enjoy and exercise their rights and freedoms, which would not otherwise have been possible at all, or would only have been possible in part, without the correct knowledge, skills and awareness. Moreover, in her studies for the Council of Europe on freedom from exploitation, violence and abuse, Schulze underlines

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<sup>651</sup> Ibid., p. 14

<sup>652</sup> Ibid., p. 15

<sup>653</sup> Ibid., p. 15

<sup>654</sup> Ibid., p. 5

<sup>655</sup> Ibid, p. 11-19

<sup>656</sup> Ibid., p. 13-15

the essential role of raising awareness in line with the social approach (also enshrined in Article 8 of the Convention on the Rights of Persons with Disabilities) in order to combat stereotypes and attitudes against persons with disabilities and to set them free from exploitation, especially in the context of education<sup>657</sup>. Moreover, the author stresses that under the medical approach persons with disabilities are marginalised and treated as persons to be used and abused in the light of their deficit and alleged incapacity, strengthened by a “welfarist prism” that brands persons with disabilities as persons needing cure and mere assistance<sup>658</sup>.

At this stage, it is possible to assert that the only way to combat such an outcome is, on the one hand, to develop and implement non-discrimination law and, on the other hand, to boost the fight against social barriers, attitudes and stereotypes under a social and human rights-based approach, extending this fight from the legal and institutional sphere to the social and cultural sphere. This issue will be discussed in greater depth in the following chapter, which calls for a broader approach, involving also sociological and philosophical elements. Such an approach shows that, in order to bring changes into society, and in particular changes that affect prejudices and attitudes, it is necessary not only to make provision in some law or convention, but also to bring about a change in mindset and culture, which cannot be modified simply through the adoption of an act or a law.

### **3. Social model (and Human rights-based model)**

The evolution in policies and theories on disability includes a change in approach, and more specifically in model. As mentioned shortly above, an important change is represented by the passage from a medical to a social or human rights-based model. A model embodies various features, including first and foremost a model

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<sup>657</sup> Schulze, Marianne. “Freedom from exploitation, violence and abuse of persons with disabilities Contribution to the Council of Europe Strategy on the Rights of Persons with Disabilities.” Council of Europe, June 2017, p. 33-34

<sup>658</sup> Ibid., p. 7-10

that influences the way in which disability is conceptualised and, in broader terms, the approach to disability within society.

Furthermore, as already demonstrated above, changes in theories and policies influence and facilitate the evolution of the law and the drafting of new legislation and policies. In this sense, Drake notes that policies take shape on the basis of conceptions of disability. This means that a medical model of disability would most likely result in support for medical treatments for persons with disabilities involving a policy of welfare and assistance. Conversely, a social model would be more focused on eradicating the social barriers experienced by persons with disabilities, entailing a policy directed at equality and inclusion<sup>659</sup>. Notably, Imrie stresses that “disability theory tends to revolve around the dichotomy of medical and social conceptions of disability”<sup>660</sup>.

The medical model, as recalled by Waddington, identifies the disability with the physical or mental impairment, without taking any account of the surrounding environment<sup>661</sup> and such a medical model has been the dominant reference model for some time.

Under the social model on the other hand, barriers are not only individual but also societal and environmental. This entails that these barriers have to be removed through the adoption and rigorous implementation of certain policy and law in the light of a principle of equality that points towards substantive equality<sup>662</sup>. In other words, this model promotes adaptations and changes the external environment that persons with disabilities have to deal with rather than requiring that these persons remove their impairments, do not fully exercise and enjoy their rights, or pursue certain paths or make certain choices. As Waddington highlights: “The

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<sup>659</sup> Drake, Robert. “Understanding Disability Policies.” Macmillan Press Ltd., 1999, p. 13

<sup>660</sup> Imrie, Rob. “Demystifying disability a review of the International Classification of Functioning, Disability and Health.” *Sociology of Health & Illness*, Vol. 26, No. 3, 2004, pp. 287–305, p. 287

<sup>661</sup> Waddington, Lisa. “Working Towards a European Definition of Disability.” *European Journal of Health Law*, Vol. 2, 1995, pp. 255-260, p. 255

<sup>662</sup> Arneil, Barbara. Chapter 1 “Disability in Political Theory versus International Practice: Redefining Equality and Freedom.” in Arneil, Barbara and Nancy J. Hirschmann (eds). “Disability and Political Theory.” Cambridge University Press, 2016, p. 39-40

social model is based on a socio-political approach which argues that disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the in-ability of people with impairments to adapt to the environment”<sup>663</sup>.

In the context of disability studies, one organisation of persons with disabilities, the Union of the Physically Impaired Against Segregation (UPIAS), made a remarkable proposal. In 1976, this British organisation wrote a document entitled ‘Fundamental Principles of Disability’ in which it declared that “Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society”<sup>664</sup>. Analysing the experience of the social model and the movement of representative organisations in Britain, Shakespeare and Watson observe that the social model had a meaningful effect on the one hand because it influenced policy, which started to pursue the removal of barriers, and on the other hand because it gave a new consciousness to persons with disabilities who began to feel themselves not as ‘wrong’. Rather, society was seen to be at fault for picturing them as ‘abnormal’ and as ‘marginalised’ persons<sup>665</sup>. Furthermore, they stress the link between disability and poverty. Poverty is not indicated as a cause but rather as a symptom of the oppression suffered by persons with disabilities, thus providing an initial indication concerning a discussion on intersectional discrimination suffered by persons with disabilities. This acknowledgement is meaningful in order to develop a full discussion of disability as a concomitant cause for discrimination, but also as an element of a complex schema that encompasses symptoms and consequential disadvantages connected with disability. However, the analysis on intersectionality and oppression will be developed further in the following

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<sup>663</sup> Waddington, Lisa. “Case C-13/05, Chacón Navas v. Eurest Colectividades SA, judgment of the Grand Chamber of 11 July 2006, nyr.” *Common Market Law Review*, Vol. 44, Kluwer Law International, 2007, Netherlands, pp. 487–499, p. 491

<sup>664</sup> Union of the Physically Impaired Against Segregation (UPIAS). “Fundamental Principles of Disability: Being a Summary of the Discussion Held on 22nd November, 1975 and Containing Commentaries from Each Organisation.” UPIAS/Disability Alliance, 1976, p. 3

<sup>665</sup> Shakespeare, Tom and Nicholas Watson. “The social model of disability: an outdated ideology?.” *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28, p. 4-5

chapter. Above all, the most important innovation introduced by the Fundamental Principles of Disability concerns the development of a new approach, contrasting with the traditional medical and individual model, in favour of the social model, which shifts the focus from the impairment and the individual to social barriers, which may be environmental or attitudinal.

Moreover, in reporting the definition asserted by the non-governmental organisation in 1994, which rejects the medical model, Waddington stresses that the condition of a person with disability is generated by “the failure of the social environment to adjust to the needs and aspirations of disabled people”<sup>666</sup>. It is worth recalling this definition, which states that persons with disabilities are individuals who, due to their impairments, are not able to overcome the environmental, economic and social barriers generating the “disabling situation”<sup>667</sup>.

In addition, as has been remarked by Barnes, the social model introduces disability as a policy issue in terms of human rights, focusing on the rights of persons with disabilities but also on disadvantages. This in turn promotes the enactment of new legislation and policies to address “the various economic and social deprivations encountered by disabled people across the world”<sup>668</sup>.

These models, such as the social model and particularly the human-rights based model, influence the definition of disability and therefore the definition of a person with a disability.

In an effort to provide a definition of disability, it is likely to involve not only definitions but also elements that are not identical or semi-identical. Moreover, social constructions and theories influence the perception and the use of certain terms, for instance based on requirements of political correctness or due to scientific developments.

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<sup>666</sup> Waddington, Lisa. "Working Towards a European Definition of Disability." *European Journal of Health Law*, vol. 2, no. 3, September 1995, p. 255-260, p. 256

<sup>667</sup> Marchbank, Julie (ed) and Rapporteur-Paulfagan. "Report of the Human Rights Plenary meeting." European Parliament building, Brussels, 17-18 October 1994

<sup>668</sup> Barnes, Colin. "Understanding the social model of disability: past, present and future." in Watson, Nick et al. (eds). "Routledge Handbook of Disability Studies." Routledge, 2012, p. 23

Indeed, the social model provides a new interpretation of disability that goes beyond the mere presence of an impairment. An impairment that is identified as a physical or mental condition may be medically diagnosed. Furthermore, it seems that the term ‘handicap’ is more controversial since expressions such as ‘handicapped’, and likewise ‘disabled’, are commonly regarded as ‘not politically correct’ or ‘misleading’ because they focus attention on the specific condition of people, whilst neglecting the people themselves. The term ‘disability’ seems to include, under one theory, impairment alone and, under another theory, also other factors such as social barriers, etc. In this sense, it is essential to establish a clear and distinct definition of disability since it can refer to different elements, theories, and so on.

i. The Concept of Disability

The definition of disability has been a matter of discussion not only among scholars and representative organisations, but also for legislators and courts, and a clear and common definition has yet to be achieved. Moreover, terminology and in particular how terminology is conceived and used influence the related concepts, and even studies and theories, beside engendering stereotypes and attitudes.

As noted by Maliszewska-Nienartowicz, it is important to provide a clear definition of disability “for determining the scope of the prohibition of discrimination based on this criterion”<sup>669</sup>. Therefore, it is essential to provide a definition of disability in order to ensure the functional and effective application and enforcement of anti-discrimination law.

With regard to the issue of disability, the usage of terms such as impairment and handicap has caused some confusion. In the light of this research, the term ‘handicap’ denotes a negative attitude towards a person since it expresses a deficiency of the person instead of presenting the person’s trait as one trait, and as an alternative to any other, which may have negative and positive features.

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<sup>669</sup> Maliszewska-Nienartowicz, Justyna. “Discriminatioon based on disability: comment on HK Danmark v. Dansk almennyttigt Boligselskab and Dansk Arbejdsgiverforening (cases C 335/11 and C 337/11).” *Polish Review of International and European Law*, Vol. 2, No. 4, 2013, p. 83

Furthermore, as a result of the above discussion, it can be argued that the term ‘impairment’ refers to the mere physical and medical conditions of the person, displaying a neutral approach.

In light of this situation, in order to assess how the term ‘disability’ is conceived of, in particular within the context of the European Union, it will be necessary to analyse the current legislation and case law concerning the issue.

The definition of disability is heavily influenced by the particular model embraced. As has been shown above, the first model used was the medical one, although it was later criticised and was finally replaced by the social model and the human rights-based model. It must be noted how the last two models are deeply intertwined; however, the human rights model can be considered as a later evolution of the social model. Hence the two models are closely related, but are not precisely the same despite the fact that the human rights model is based and developed on the social model.

Terminology must not be underestimated since it plays an important role in the perception of and the approach to the issue at stake. More recently, the definition “persons with disabilities” has been preferred over “disabled persons or handicapped persons”. This is because the latter has been perceived of as negative, stressing and reducing the person to only one personal trait associated with the disability or handicap. On the other hand, the definition “person with disability” puts ‘person’ first, stressing the importance of the individual as a human being, with the disability as a mere additional element.

The change in terminology can be observed within the shift from a pure medical model to the social model.

In 1980, the World Health Organization approved the International Classification of Impairments, Disabilities and Handicaps (ICIDH) which took into account the “social environmental factors” in creating a disability<sup>670</sup>.

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<sup>670</sup> Bickenbach, Jerome E. et al. ‘Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps.’ *Social Science & Medicine*, Vol. 48, 1999. Pp. 1173-1187 p. 1175

Nevertheless, Bickenbach notes that, according to the documents produced by the WHO, it appears that the disadvantaged position stems only from the disability and that the disability and the impairment cause the handicap<sup>671</sup>. Indeed, various activists have criticised the ICIDH due to its adoption of a medical model of disability instead of the social one<sup>672</sup>. Moreover, Rimmerman reports that the central criticism concerns the individual and personal approach endorsed by the ICIDH. In other words, this model interprets physical and even social environmental factors through the eyes of the individual, and yet is focused essentially on the deficit of the individual<sup>673</sup>.

In addition, a broad criticism concerns the “the overlapping of levels and the ambiguous definition of handicap” due on the one hand to the “linear link” among the three concepts (impairment - disability - handicap) and on the other hand to the connection established between the disadvantage and the illness<sup>674</sup>

Specifically, the ICIDH states that:

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

*(b) Disabilities reflecting the consequences of impairment in terms of functional performance and activity by the individual; disabilities thus represent disturbances at the level of the person.*

*(c) Handicaps concerned with the disadvantages experienced by the individual as a result of impairments and disabilities; handicaps thus reflect interaction with and adaptation to the individual's surroundings”<sup>675</sup>.*

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<sup>671</sup> Ibid.

<sup>672</sup> Bury, Mike. “A comment on the ICIDH2.” *Disability & Society*, Vol. 15, No. 7, 2000, pp. 1073-1077, p. 1074

<sup>673</sup> Rimmerman, Arie. “Social Inclusion of People with Disabilities National and International Perspectives.” Cambridge University Press, 2013, p. 27

<sup>674</sup> Masala, Carmelo and Donatella Rita Petretto. “From disablement to enablement Conceptual models of disability in the 20th century.” *Disability and Rehabilitation*, Vol. 30, No. 17, 2008, pp. 1233-1244, p. 1235

<sup>675</sup> World Health Organization. (1980). *International classification of impairments, disabilities, and handicaps: a manual of classification relating to the consequences of disease*, published in

It may be noted that a handicap stems directly from impairments and disabilities, which seem to coincide with each other, comprising a disadvantage that merely mirrors interaction with the surroundings. Hence, under the ICIDH it appears that impairments stem from the person and only represent “abnormalities of body structure and appearance”, i.e. a merely biological trait. Furthermore, disabilities stem from the impairment affecting the “functional performance” of the individual. Here the ICIDH seems to differentiate between impairment, as biological trait, and disability, as a functional trait. However, there is no mention of any external factor such as social environmental elements. Ultimately, handicaps stem from impairments and disabilities that cause disadvantages for the person, mirroring the “interaction with and adaptation to the individual's surroundings”. Ultimately, this definition appears to consider external factor such as the social environment in which the individual resides which, coupled with the intrinsic trait of the person, namely impairment and disability, gives rise to a handicap. However, in mentioning the “adaptation to the individual's surroundings” this definition seems to suggest that the person must adapt to the surroundings, whereas the surroundings need not make any effort to receive the person. In particular, this attitude clashes with the idea of inclusion, which aims to embrace all persons also by fostering an active role for society and the environment in order to cope with the circumstances of its members.

With the introduction of the social model and its growing dissemination and adoption, the definition and meaning of certain terms has been changing.

First and foremost, disability has been recognised as the result of the interaction between an intrinsic trait of a person, i.e. an impairment, and external factors, i.e. the social environmental; this definition can be founded in the Convention on the Rights of Persons with Disabilities, which provides a different definition of disability compared to the previous medical model and the ICIDH.

As mentioned above, the social model slightly influenced the International Classification of Impairments, Disabilities, and Handicaps (ICIDH), issued by the

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accordance with resolution WHA29.35 of the Twenty-ninth World Health Assembly, May 1976, p. 14

UN agency the World Health Organisation (WHO)<sup>676</sup> in 1980, which is strongly influenced by the medical model<sup>677</sup>. Later, in 2001 again the WHO adopted a new document entitled the International Classification of Functioning, Disability and Health (ICF)<sup>678</sup>, which refers to a biopsychosocial model, acknowledging the existence of social factors that contribute to creating disabilities<sup>679</sup>. However, Barnes and Mercer stress that this biopsychosocial model focuses on the individual, referring to the traditional medical model<sup>680</sup>. Nevertheless, Hurst notes that the ICF proposes an integrative model which takes into account also the interaction with social and environmental factors<sup>681</sup>. Similarly, Venchiarutti stresses that the ICF introduces disability as a result of interactive factors and as continuously evolving notion<sup>682</sup>.

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<sup>676</sup> Favalli S. and Delia Ferri. *Defining Disability in the European Union Non-discrimination Legislation: Judicial Activism and Legislative Restraints*, European Public Law 22, No. 3, 2016, pp. 541–568, Kluwer Law International BV, The Netherlands p. 546

<sup>677</sup> World Health Organization. (1980). *International classification of impairments, disabilities, and handicaps : a manual of classification relating to the consequences of disease*, published in accordance with resolution WHA29.35 of the Twenty-ninth World Health Assembly, May 1976

<sup>678</sup> World Health Organization. (2001). *International classification of functioning, disability and health : ICF*. World Health Organization

<sup>679</sup> Favalli, Silvia and Delia Ferri. “Defining Disability in the European Union Non-discrimination Legislation: Judicial Activism and Legislative Restraints.” *European Public Law*, Vol. 22, No. 3, Kluwer Law International BV, 2016, The Netherlands, pp. 541–568, p. 546

<sup>680</sup> Barnes, Colin and Geof Mercer. Chapter 1 “Theorising and Researching Disability from a Social Model Perspective.” in Barnes, Colin and Geof Mercer (eds). *Implementing the Social Model of Disability: Theory and Research* Leeds: The Disability Press, 2004, pp. 1-17, p. 8

<sup>681</sup> Hurst, Rachel. Chapter 5 “Disabled Peoples’ International: Europe and the social model of disability.” in Barnes, Colin and Geof Mercer (eds). *The Social model of disability: Europe and the majority of the world.* The Disability Press, 2005, Leeds, p. 69-70

<sup>682</sup> Venchiarutti, Angelo. “Sistemi multilivello delle fonti e divieto di discriminazione per disabilità in ambito europeo.” *La Nuova Giurisprudenza Civile Commentata*, Vol. 9, No. 409, 2014, p. 6

As noted by Imrie, it seems that the ICF offers a bridge between the pure medical model and the new social approach towards disability, adopting a biopsychosocial theory that encompasses biological factors as well as social factors<sup>683</sup>.

Specifically, the ICF delineates three domains: (1) body functions and structure, which means the physiological functioning of the body or a part of it, (2) activities, which means the performance of an action or a task referring to the person as a whole, (3) participation, which means a life situation concerning a person as a whole placed in a particular environment<sup>684</sup>. Within this framework, a disability delineates a reduction in these domains, which means an “impairment, an activity limitation and a participation restriction”<sup>685</sup>.

Finally, in the context of the UN, the social model was fully embraced by the above-mentioned Convention on the Rights of Persons with Disabilities (CRPD) which provides a definition of disability in recital (e) of its preamble:

*“Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”<sup>686</sup>.*

This definition is of landmark importance, aside from the fact that is contained in a legal binding Convention, due to its acknowledgement of disability as an evolving concept, implicitly recognising the role of social, attitudinal and theoretical changes and due to the acknowledgement that disability arises from the interaction between individual impairment and social barriers.

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<sup>683</sup> Imrie, Rob. “Demystifying disability a review of the International Classification of Functioning, Disability and Health.” *Sociology of Health & Illness*, Vol. 26, No. 3, 2004, pp. 287–305, p. 296-297

<sup>684</sup> Jette, Alan M. “Toward a common language for function, disability, and health.” *Physical Therapy* Vol. 86, 2006, pp. 726–34, p. 730

<sup>685</sup> Rimmerman, Arie. “Social Inclusion of People with Disabilities National and International Perspectives.” Cambridge University Press, 2013, p. 30

<sup>686</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Preamble (e)

Finally, it is worthy to mention Hahn' proposal and the minority group theory as applied to the issue of disability. Specifically, Hahn proposes a paradigm shift towards a minority group model, emphasising the role of attitudinal discrimination against persons with disabilities and the role of the law in preventing discrimination and guaranteeing equal rights also for persons with disabilities<sup>687</sup>.

This paradigm is based on a socio-political definition of disability, which defines disability as the result of the interaction between the individual and the environment, three postulates for which are: (a) the main barriers faced by persons with disabilities are adverse attitudes; (b) public policy outlines the environment; (c) social attitude and values influence policies<sup>688</sup>.

In addition, it is appropriate to recall that Hahn detected paternalistic attitudes within the law that hinder equal treatment for persons with disabilities<sup>689</sup>. However, this paternalistic approach towards disability will be analysed in greater detail in the chapter three, which is dedicated to providing a broader overview of disability and society as well as the relationship between the two.

## ii. The Definition of Disability and Court of Justice of the European Union

European Union law does not provide a definition of disability, and the only legal act that currently provides the most complete and advanced framework for disability, albeit limited to employment and occupation, is Directive 2000/78. Given the absence of a clear provision of EU law that defines disability accurately, the Court of Justice of the European Union (CJEU) has been called upon to rule on the matter.

By coincidence, or perhaps not, the first case related to the Directive that was brought before the Court of Justice concerns the concept of disability. In this first case, i.e. the *Chacón Navas* judgement, the Court was required to decide, as

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<sup>687</sup> Hahn, Harlan. "Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective." Behavioral Sciences and the Law, Vol. 14, 1996, pp. 41-59, p. 41

<sup>688</sup> Ibid., p. 45-53

<sup>689</sup> Ibid., p. 42-44

mentioned by Advocate General Geelhoed in his opinion, how to interpret the term ‘disability’ and specifically whether, in the light of the Directive, the concept of disability also covers sickness, taking into account the fact that the Directive does not provide a definition of ‘disability’<sup>690</sup>. The case concerned an employee of a catering company who had been absent from work due to sickness, documented by a medical certificate stating that she was unfit for work. Nonetheless, Ms Chacón Navas was dismissed for this reason.

It is appropriate to stress that only judgements have legal and binding force. Nonetheless, it is interesting to consider the opinions of Advocates General because they usually contain a broader analysis of the issue, from time to time some providing interesting and fruitful input.

With regard to the case at issue, AG Geelhoed started his Opinion by saying that Article 13 EC (now Article 19 TFEU), which confers legislative competence on the Council to take action in order to combat discrimination based on disability, among other grounds, requires not only formal equality but also substantive equality and calls for a clear definition of disability in order to identify the scope and the extent of that legislation<sup>691</sup>. On this matter, the AG Geelhoed recognised the need to provide a uniform interpretation of a Community provision in order to guarantee the consistent application of the law throughout its Member States. In particular the AG stated that “a uniform Community interpretation of 'disability' is needed for substantive reasons, if only to ensure a minimum of the necessary uniformity in the personal and substantial scope of the prohibition of discrimination”<sup>692</sup>. Moreover, the AG added that the Community does not have to provide a “fixed definition” in order to avoid compromising the scope for action of national courts but simply that “the Court's interpretation of the term must provide the national court with Community law criteria and points of reference with whose aid it can find a solution to the legal problem it faces”<sup>693</sup>. Furthermore,

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<sup>690</sup> Opinion Advocate General Geelhoed on the Judgement of the Court of Justice of the European Union (Grand Chamber) of 11 July 2006. *Sonia Chacón Navas v Euresť Colectividades SA*, Case C-13/05, Introduction

<sup>691</sup> *Ibid.*, par. 50

<sup>692</sup> *Ibid.*, par.. 64-65

<sup>693</sup> *Ibid.*, par. 67

the AG made a first innovative step by declaring that, as an evolving concept open of several interpretations, disability cannot be limited to a mere medical understanding but must also take account of its social understanding<sup>694</sup>. In particular, the AG specified that “the concept of 'disability' is an indeterminate legal concept, which is susceptible to many different interpretations in its application”<sup>695</sup>. In his reasoning, the AG underlined the influence of the “social environment” and the role of “society’s perception” in identifying a person with a disability, regardless of their actual condition<sup>696</sup>. Finally, as regards the practical aspect to the case, the AG concluded that sickness cannot be equated with disability<sup>697</sup>.

For its part, the Court started its reasoning asserting primarily that, owing to the principle of equality and the need to ensure a consistent application of EU law throughout its Member States, it required an autonomous and uniform interpretation<sup>698</sup>.

In order to provide such an autonomous and uniform interpretation, as stressed by Bell, the Court tried to identify a common basis<sup>699</sup> suitable to all of the national legal systems, declaring that “the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”<sup>700</sup>.

Furthermore, in response to the national court’s application, the Court stated that the EU Directive uses the term disability and not sickness, which means that the

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<sup>694</sup> Ibid., par.. 58

<sup>695</sup> Ibid., par. 57

<sup>696</sup> Ibid., par. 62-66

<sup>697</sup> Ibid., par. 76-79

<sup>698</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 11 July 2006. *Sonia Chacón Navas v Eurest Colectividades SA*, Case C-13/05, par. 40

<sup>699</sup> Bell, Mark. “The Implementation of European Anti- Discrimination Directives: Converging towards a Common Model?.” *The Political Quarterly*, Vol. 79, No. 1, January-March 2008, p. 39

<sup>700</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 11 July 2006. *Sonia Chacón Navas v Eurest Colectividades SA*, Case C-13/05, par. 43

two terms cannot be regarded as identical. Thus, sickness cannot be added to the grounds based on which discrimination is prohibited<sup>701</sup>.

It is unequivocally clear from this judgement that, despite the point raised by the Advocate General, the Court endorsed a medical model of disability in order to define disability, focussing only on the impairment that causes a hindrance on such a scale as to impair the full participation in the world of employment.

As stressed by Waddington, in the *Chacon Navas* case the Court found the impairment that prevented full participation in employment to lie with the individual and that consequently the impairment had caused the disadvantage or limitation. By contrast, it declined to consider the response of the social environment to that impairment, which thus caused the disability<sup>702</sup>. In the words of Hosking, in this decision the Court “sets that minimum standard very low and anchors the protection provided by the directive in the medical model”<sup>703</sup>. With that endorsement of the medical model, Waddington stresses that the Court did not facilitate the achievement of the Directive’s objectives, but actually hampered it<sup>704</sup>.

In a later case, again concerning Directive 2000/78 and disability, the Court of Justice started with a small attempt to change the approach towards disability and its definition. However, must also be stressed that a crucial element driving innovation within the international and European legal framework between the first case and the second came with the adoption by the European Union of the Convention on the Rights of Persons with Disabilities. Indeed, the first judgement brought before the Court after the adoption of the CRPD by the EU was the *HK*

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<sup>701</sup> *Ibid.*, 55-57

<sup>702</sup> Waddington, Lisa. “Saying all the right things and still getting it wrong: The Court of Justice’s definition of disability and non-discrimination law.” *Maastricht Journal of European and Comparative Law*, Vol. 22, No. 4, 2015, p. 576-591, p. 579

<sup>703</sup> Hosking, David L. “A High Bar for EU Disability Rights.” *Industrial Law Journal*, Vol. 36, No. 2, Industrial Law Society, June 2007, p. 233

<sup>704</sup> Waddington, Lisa. “Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006, nyr.” *Common Market Law Review*, Vol. 44, Kluwer Law International, 2007, Netherlands, pp. 487–499, p. 496

*Danmark (Ring and Werge)* case, which represents a landmark decision in making a clear step towards a social model, reflecting a paradigm shift.

In the *HK Danmark (Ring and Werge)* case, two employees, Ms. Ring and Ms. Werge, who were represented before the courts by the trade union HK, challenged their dismissal by their employer. The dismissals were based on their absence from work, although that absence had been certified by appropriate medical documents. Furthermore, the dismissals were subject to a reduced notice period, which was permitted under the national law in cases involving absence due to illness.

In analysing the case, the AG Kokott started her Opinion by stressing that the CRPD had been adopted by the European Union since the *Chacón Navas* case and that, under Article 216(2) TFEU, the international agreements form an integral part of EU law and are binding for the Union and its Member States<sup>705</sup>. In particular, the AG highlighted the most significant feature of the Convention's definition of disability, which consists in identifying the hindrance in the "interaction with various barriers", but without discussing the social barriers that might exist in the case at hand<sup>706</sup>. However, AG Kokott was open to the possibility that a disability might stem from various causes and that the Directive covers hindrances to participation in employment, which may be caused by sickness<sup>707</sup>.

In making these statements, the AG appeared to acknowledge that disability and sickness are not the same thing, that the disability results from a hindrance, and furthermore that the hindrance arises in response to different barriers. This means that disability cannot be identified only under a medical approach.

Following the approach of the AG, in its judgement the Court of Justice stressed the introduction of the CRPD into EU law and the fact that it was consequently binding on secondary law, which must be interpreted in accordance with such

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<sup>705</sup> Opinion of Advocate General Kokott of the 6 December 2012 on the Judgement of the Court of Justice of the European Union *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening*, (2013) Joined Cases C-335/11 and C-337/1, par. 25-26

<sup>706</sup> *Ibid.*, par. 27

<sup>707</sup> *Ibid.*, par. 32-33

international agreements<sup>708</sup>. Therefore, the Court held that, under the CRPD's definition of disability which refers to the interaction between impairment and barriers, disability must "be understood as referring to a hindrance to the exercise of a professional activity"<sup>709</sup>.

In particular, Waddington remarks that the Court observed in this case that complete exclusion from professional life is not necessary, and that a hindrance is sufficient<sup>710</sup>. Moreover, again Waddington emphasises that the HK Danmark represents a noteworthy step forward, leaving behind the medical model and embracing the social model enshrined in the CRPD<sup>711</sup>.

Another important judgment of the Court of Justice came in the *Z* case, where the Court confirmed the position that the Convention is an integral part of EU law and hence has binding force, stressing that the CRPD must be used in order to interpret the concept of 'disability' and other concepts contained in the Directive 2000/78<sup>712</sup>.

The Opinion of the AG Wahl is particularly interesting. After having outlined the two opposite models, the medical and social models, he went on to analyse the definition of disability provided by the CRPD in the context of Directive 2000/78. He specified that the scope of the Directive at issue was employment, which means that the disability arising out of the interaction between the impairment and the social barrier must entail a hindrance on full participation in professional life

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<sup>708</sup> Court of Justice of the European Union. Judgment of the Court (Second Chamber), 11 April 2013. *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11)* and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)*, par. 28-32

<sup>709</sup> *Ibid.*, par. 41-44

<sup>710</sup> Waddington, Lisa. "Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law." *Maastricht Journal of European and Comparative Law*, Vol. 22, No. 4, 2015, p. 576-591, p. 582

<sup>711</sup> Waddington, Lisa. "HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities." *Anti-discrimination Law Review* No. 17, 2013, European Commission, p. 21

<sup>712</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber), 18 March 2014 *Z. v A Government department and The Board of management of a community school*, Case C-363/12, par. 68-76

and performance of the job, rather than participation in the society as stated in the Convention<sup>713</sup>. The AG Wahl observed that, in that case, which concerned a woman who had been unable to have child due to the lack of a uterus, Ms. Z could have been considered to have a disability that hindered her full participation in society. However, within the narrow scope of the Directive, which was limited to employment and professional activities, Ms. Z was not prevented from carrying out her job as the lack of a uterus did not affect her ability to perform her job<sup>714</sup>. Similarly, the Court restated that conclusion, holding that the limitation affecting Ms. Z, consisting in her inability to give birth, did not constitute a disability within the meaning of Directive 2000/78 because did not hinder her participation in professional life, even though the Court stressed once again that need not entail full exclusion, as a simple hindrance on performing professional activities is sufficient<sup>715</sup>.

In this regard, Waddington argues that the Court failed to apply the prohibition of discrimination enshrined in the Directive, which states in Article 3(1)(c) that its scope covers “employment and working conditions”<sup>716</sup> following strictly a medical approach based on which Ms. Z was not experiencing any hindrance in performing her tasks due to her inability to give birth<sup>717</sup>. In other words, it seems that the Court disregarded the fact that social and environmental factors contribute to constructing a disability<sup>718</sup>.

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<sup>713</sup> Opinion of Advocate General Wahl delivered on 26 September 2013 on the Judgment of the Court of Justice of the European Union (Grand Chamber), 18 March 2014 *Z. v A Government department and The Board of management of a community school*, C-363/12, par. 87-93

<sup>714</sup> *Ibids.*, par. 93-98

<sup>715</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber). 18 March 2014 *Z. v A Government department and The Board of management of a community school*, Case C-363/12, par. 75-82

<sup>716</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 3(1)(c)

<sup>717</sup> Waddington, Lisa. “Saying all the right things and still getting it wrong: The Court of Justice’s definition of disability and non-discrimination law.” *Maastricht Journal of European and Comparative Law*, Vol. 22, No. 4, 2015, p. 576-591, p. 585

<sup>718</sup> *Ibid.*, p. 583

As O'Brien argues, the Court missed an opportunity to affirm a “classic example of the social construction of disability” since infertility did not prevent Mrs. Z from performing her tasks, although does engage the issue of disability when engaging with the rules on maternity leave. In this sense, she was prevented from enjoying her rights and put in a disadvantaged position<sup>719</sup>. In addition, Cousins emphasises the high likelihood that such a scenario would have been recognised as a disability following the adoption of the CRPD<sup>720</sup>, which endorses the social model of disability.

Similarly, in the *Glatzel*<sup>721</sup> case the Court again failed to apply the social model of disability, following the same approach as that laid down in the Z case<sup>722</sup>. In this case, Mr. Glatzel’s application for a special driving license was refused due to his unilateral amblyopia, which caused a loss of vision in only one eye<sup>723</sup>. Specifically, Mr. Glatzel did not comply with national and European legislation, i.e. the Directive 2006/126, regulating driving licences<sup>724</sup>. The main question was whether that legislation violated Articles 20, 21(1) and 26 of the Charter of Fundamental Rights of the European Union on equality, anti-discrimination and the integration of persons with disabilities<sup>725</sup>. In the end, the Court of Justice held

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<sup>719</sup> O'Brien, Charlotte R. “Driving down disability equality? Case C-356/12 Wolfgang Glatzel v Freistaat Bayern judgment of 2 May 2014.” *Maastricht Journal of European and Comparative Law*, Vol. 21, No. 4, 2014, pp. 723-738, p. 728

<sup>720</sup> Cousins, Mel. "Surrogacy Leave and EU Law." *Maastricht Journal of European and Comparative Law*, Vol. 21, No. 3, 2014, pp. 476-486, p. 486

<sup>721</sup> Court of Justice of the European Union. Judgment of the Court (Fifth Chamber). 22 May 2014, *Wolfgang Glatzel v. Freistaat Bayern*, Case C-356/12

<sup>722</sup> O'Brien, Charlotte R. “Driving down disability equality? Case C-356/12 Wolfgang Glatzel v Freistaat Bayern judgment of 2 May 2014.” *Maastricht Journal of European and Comparative Law*, Vol. 21, No. 4, 2014, pp. 723-738, p. 727-728

<sup>723</sup> Court of Justice of the European Union. Judgment of the Court (Fifth Chamber). 22 May 2014, *Wolfgang Glatzel v. Freistaat Bayern*, Case C-356/12, par. 27

<sup>724</sup> Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences

<sup>725</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Articles 20, 21(1) and 26

that it was not possible to give a proper response on the merits due to a lack of information<sup>726</sup>.

However, O'Brien argued that, if the reason for the imposition of such eyesight requirements in the legislation lay in the risk of suddenly losing the ability to see, the risk of losing eyesight in both eyes is not higher than that of losing eyesight in only one eye. As such, the exclusion of Mr. Glatzel on the basis of the legislation in question might appear disproportionate<sup>727</sup>. When addressing that observation, the Court might have taken the opportunity to apply the social model of disability, stressing that the “hampering disability” of Mr. Glatzel arose out of the interaction of his impairment with the legislation and the reasoning behind it.

In a later case, the Court was again faced with another question concerning a condition that did not fully impair the ability to perform one’s job, but where that condition still affected the worker through (alleged) discriminatory outcomes. The case was the *FOA (Kalkoft)* case, in which the Court was specifically asked concerning the relationship between obesity and disability<sup>728</sup>. Specifically, Mr. Kalkoft complained that he had been dismissed because of his weight, even though his condition did not prevent him from performing his job and complying with his duties as a childminder. For its part, the Court recalled that EU law does not recognise disability as a prohibited ground for discrimination. However, the Court specified that was up to the national court to evaluate whether obesity fulfilled the conditions laid down by Directive 2000/78 in order to identify obesity as a disability<sup>729</sup>.

As analysed by Waddington, dismissal due to obesity entails a discriminatory act because the employee has been dismissed even though his obesity has not caused

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<sup>726</sup> Court of Justice of the European Union. Judgment of the Court (Fifth Chamber). 22 May 2014, Wolfgang Glatzel v. Freistaat Bayern, Case C-356/12, p. 86

<sup>727</sup> O'Brien, Charlotte R. “Driving down disability equality? Case C-356/12 Wolfgang Glatzel v Freistaat Bayern judgment of 2 May 2014.” *Maastricht Journal of European and Comparative Law*, Vol. 21, No. 4, 2014, pp. 723-738, p. 735

<sup>728</sup> Court of Justice of the European Union. Judgement of the Court (Fourth Chamber). *Fag og Arbejde (FOA)*, acting on behalf of Karsten Kaltoft, v *Kommunernes Landsforening (KL)*, acting on behalf of the Municipality of Billund, C-354/13

<sup>729</sup> *Ibid.*

any hindrance. However, such a condition, considered in conjunction with social barriers, constituted by prejudice and negative attitude, gave rise to discrimination based on disability<sup>730</sup>.

In its decision the Court did not address the issue of barriers formed by prejudices or negative attitudes but rather, after recalling the definition of disability provided by the CRPD, the Court took into consideration the reduction in mobility and medical conditions that may prevent a person from performing his or her job and from participating in professional life<sup>731</sup>.

Drawing a parallel between a concrete case and models of disability, Schiek notes that, had the social model been applied in the case at issue, the prejudice displayed by the employer in not continuing to employ a person due to that person's weight would have raised a social barrier which, in conjunction with the person's condition, would have created a disability, with discrimination hence lying in the prejudicial attitude<sup>732</sup>. In addition, Schiek recalls<sup>733</sup> the example used by the AG who affirmed that a wheelchair-bound worker dismissed due to that impairment would be able to rely on the prohibition on discrimination provided for under Directive 2000/78<sup>734</sup>.

Here, both the author and the AG seems to suggest that there are some conditions that are generally and undisputedly acknowledged as 'disabilities', e.g. paraplegia, and others that are not, e.g. obesity. Pursuing that assumption further, it could be argued that disabilities are indeed generated by the perception of certain

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<sup>730</sup> Waddington, Lisa. "Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law." *Maastricht Journal of European and Comparative Law*, Vol. 22, No. 4, 2015, p. 576-591, p. 587

<sup>731</sup> Court of Justice of the European Union. Judgment of the Court (Fourth Chamber). *Fag og Arbejde (FOA)*, acting on behalf of Karsten Kaltoft, v *Kommunernes Landsforening (KL)*, acting on behalf of the Municipality of Billund, C-354/13, par. 53-60

<sup>732</sup> Schiek, Dagmar. "Intersectionality and the Notion of Disability in EU discrimination law." *Common Market Law Review*, Vol. 53, No. 1, 2016, pp. 35-63, p. 58

<sup>733</sup> *Ibid.*

<sup>734</sup> Opinion of Advocate General Jääskinen on the Judgment of the Court of Justice of the European Union (Fourth Chamber). *Fag og Arbejde (FOA)*, acting on behalf of Karsten Kaltoft, v *Kommunernes Landsforening (KL)*, acting on behalf of the Municipality of Billund, C-354/13, par. 39

conditions, which means in other words that society itself may generate disabilities out of the interaction between an individual's impairment on the one hand and its rules, uses and customs on the other hand.

It is important to stress the Opinion in the *FOA (Kalkoft)* case of AG Jääskinen who recalled that, in the previous case of *Coleman*, the Court had not established any link between the disability and the work to be performed, stressing that the Directive not only covers persons with a disability and professional life in general, but also outlaws discrimination based on disability<sup>735</sup>. The case concerned Ms. Coleman, who had a child with a disability and complained that she was being treated and was subsequently dismissed on the basis of the circumstances of her son which, in the view of her employer, were affecting her professional life<sup>736</sup>. Such schema claims that the prohibition on discrimination on the grounds of disability encompasses also those situations in which the person with a disability is not being discriminated against but nonetheless suffers from a discriminatory act or behaviour due to the disability of a different person.

These observations, along with those of AG Jääskinen, may not have any practical effect on the judgement since AG opinions are not binding and do not form part of the Court's judgments. However, the analysis of the AG is often deeper and broader and the Court is not always inclined to embrace the words and reasoning of the AG. Nevertheless, these observations are still worthy or note since, on the one hand, they stress the contradiction within the decisions of the Court and on the other hand point to potential innovative content within the judgements.

Along the same lines, in the *Daouidi*<sup>737</sup> case the Court was once again reticent to fully embrace the social model<sup>738</sup>. The case concerned Mr Daouidi, who was working as a kitchen assistant and had an accident at the workplace which prevented him from working.

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<sup>735</sup> Ibid., par. 36-38

<sup>736</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 17 July 2008. *S. Coleman v Attridge Law and Steve Law*, C-303/06

<sup>737</sup> Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 1 December 2016. *Mohamed Daouidi v Bootes Plus SL and Others*, C-395/15

<sup>738</sup> Ferri, Delia. "Daouidi v Bootes Plus SL and the Concept of 'Disability' in EU Anti-Discrimination Law." *European Labour Law Journal*, Vol. 1, No. 16, 2019, p. 4

The Court focused its reasoning on the concept of ‘long-term impairment’. In particular the Court stated that a “long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and if that limitation is long-term, it may come within the concept of disability”<sup>739</sup>. Pursuing that reasoning further, the Court stressed that the concept of long-term is not defined by the UN Convention on the Rights of Persons with Disabilities and therefore must be evaluated “on the basis of current medical and scientific knowledge and data on documents and certificates relating to that person’s condition, established on the basis of current medical and scientific knowledge and data”<sup>740</sup>.

As highlighted by Waddington, in this case the Court relied heavily on medical evidence, and was reluctant to accept the social model<sup>741</sup>. As regards the latter model, Degener persuasively argues that disability stems from prejudices, attitudes and treatments, pointing out that the crucial point lies not in the impairment itself but rather in the response to it<sup>742</sup>. In addition, Titchkosky emphasises that disability is nowadays conceived of as “more than merely biological and that it is also social”<sup>743</sup>. The author identifies disability with the “societal response” to a specific physical and medical condition, rather than with the impairment itself on its own<sup>744</sup>. Such an approach supports the identification of humans not only with their own biological bodies and potential impairments but also with the response of society to these impairments.

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<sup>739</sup> Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 1 December 2016. *Mohamed Daouidi v Bootes Plus SL and Others*, C-395/15, p. 42

<sup>740</sup> *Ibid.*, p. 57

<sup>741</sup> Waddington, Lisa. “The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Non-Discrimination Law.” Published in *Uladzislau Belavusau & Kristin Henrard (eds.) “EU Anti-Discrimination Law Beyond Gender”*, Hart, 2018, p. 9

<sup>742</sup> Degener, Theresia. “The definition of disability in German and foreign discrimination law.” *Disability Studies Quarterly*, Vol. 26, No. 2, 2006, p. 4

<sup>743</sup> Titchkosky, Tanya. Chapter 7 “Monitoring Disability: The Question of the ‘Human’ in Human Rights Projects.” in Gill, Michael, and Cathy J. Schlund-Vials. “Disability, Human Rights and the Limits of Humanitarianism.” Routledge, 2016, p. 128

<sup>744</sup> *Ibid.*, p. 122

Following this approach, the concept of disability expresses more than a deficiency or a mere physical or mental impairment. On the contrary, disability comprises the social sphere, which is made up of barriers, environmental and societal, attitudes, culture, etc. Hence, disability conveys a failure by society to provide a proper response to a specific individual condition.

#### **4. Disability and inclusive education**

The right to education is recognised as a fundamental human right, which means that the right to education embodies an essential requirement of human dignity<sup>745</sup>. In particular, the right to education has been interpreted as the right to be educated<sup>746</sup> in the light of the recognition of the right to education as an empowerment right. This entails that education enable people to live to the best of their capacities, participating in the social, cultural, political and economic spheres<sup>747</sup>. Indeed, as de Beco stresses, education is conducive to the realisation of other rights, including economic, social and cultural rights on one hand and civil and political rights on the other hand, which entails enhancing self-respect and dignity<sup>748</sup>. As a fundamental human right, the right to education was already enshrined in 1948 in Article 26(1) of the UDHR<sup>749</sup> and later in 1966 in the Article 13 of the ICESCR<sup>750</sup>.

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<sup>745</sup> Beiter, Klaus D., “The Protection of the Right to Education by International Law,,” *International Studies in Human Rights*, Vol. 82, Martinus Nijhoff Publishers, 2005, p. 28

<sup>746</sup> Lonbay, Julian. “Implementing the right to education in England”. in Beddard, Ralph and Dilys M. Hill (eds.), “Economic, Social and Cultural Rights. Southampton Studies in International Policy.” Palgrave Macmillan, 1992, p. 121-133

<sup>747</sup> Beiter, Klaus D., “The Protection of the Right to Education by International Law,,” *International Studies in Human Rights*, Vol. 82, Martinus Nijhoff Publishers, 2005, p. 28

<sup>748</sup> de Beco, Gauthier. “The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions.” *Netherlands Quarterly of Human Rights*, Vol. 32, No. 3, 2014, Netherlands, pp. 263–287, p. 265

<sup>749</sup> UN General Assembly. Universal Declaration of Human Rights, 10 December 1948, Article 26(1)

<sup>750</sup> UN General Assembly. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Article 13

Within the UN context, the right to education has been described by the UN Special Rapporteur on the right to education Katarina Tomasevski<sup>751</sup>, and also restated by the UN Committee on Economic, Social and Cultural Rights (CESCR)<sup>752</sup>, as the result of four different elements, namely availability, accessibility, acceptability and adaptability.

Availability focuses on infrastructure and teaching materials; accessibility concerns the obstacles that students may face in accessing education, with particular regard to vulnerable groups; acceptability considers the various features of educational content; and adaptability focuses on the needs of particular students<sup>753</sup>.

In particular, the UN Committee on Economic, Social and Cultural Rights specifies that availability relates to the quantity and the condition of buildings but also programme courses and teachers' salaries; accessibility must be conceived (a) in physical terms, which includes safety but also the possibility of distance learning, (b) economically, in other words the affordability of education, and (c) in terms of non-discrimination, in the sense that everyone must be treated equality and without any discrimination, with particular attention to vulnerable groups; acceptability entails that curricula and teaching methods must be appropriate and of sufficient quality; finally adaptability requires flexibility in order to deal with the needs of students and their social and cultural backgrounds<sup>754</sup>.

The right to education has been established and developed as a right specifically for persons with disabilities over the last two decades following the European and

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<sup>751</sup> UN High Commissioner for Refugees (UNHCR) UNCHR, 'Preliminary report of the Special Rapporteur on the right to education' (1999) UN Doc E/CN.4/14999/49, pp. 15–25

<sup>752</sup> UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The right to education (art. 13)' (1999) UN Doc E/C.12/1999/10, par. 6

<sup>753</sup> de Beco, Gauthier. "The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions." *Netherlands Quarterly of Human Rights*, Vol. 32, No. 3, 2014, Netherlands, pp. 263–287, p. 267

<sup>754</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to education (art. 13)' (1999) UN Doc E/C.12/1999/10, par. 6

international trend towards a social and human rights approach to disability. According to these approaches, disability has become a matter of inclusion and, especially as far as this research is concerned, of inclusive education. Therefore, at this stage of the research, it is appropriate to discuss the right to education with regard to persons with disabilities in the light of the principle of non-discrimination together with the concept of inclusive education, which directly influence the integration of persons with disabilities in social life, especially within the context of higher education.

The UN has adopted the most fruitful and significant acts concerning the right to education and persons with disabilities, promoting an inclusive educational approach. In particular, UN conventions and acts feature a strong and persistent connection with EU law, which will be analysed below.

Furthermore, several documents have been produced regarding this matter within the context of the Council of Europe. Specifically, the judgements of the European Court of Human Rights and the comments of the European Committee on Social Rights, which present interesting features and hints, will be discussed.

Last but not least, some space will be dedicated to the European Union, which has a special position within the ambit of this research.

#### i. The United Nations and inclusive education

At international level, persons with disabilities started to be seen as holders of rights during the 1970s, especially as regards the right to education. In particular, the United Nations (UN) raised the question of inclusive education and empowerment of persons with disabilities.

Originally, the right to education was affirmed in the light of the principle of non-discrimination within the Convention Against Discrimination in Education of 1960, albeit without mentioning disability as a ground<sup>755</sup>. In particular, Article 4(a) provides that higher education must be accessible to all on an equal basis and also with reference to individual capacity<sup>756</sup>. Subsequently, the Declaration on the

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<sup>755</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education, 14 December 1960

<sup>756</sup> Ibid., Article 4(a)

Rights of Disabled Persons, adopted by the General Assembly in 1975, states that persons with disabilities have the right to education, but also to medical and social rehabilitation<sup>757</sup>.

Such statements suggest that, in this Declaration, the UN was still relying on the traditional medical model of disability, which leads to special education, segregation and exclusion from universities and mainstream education.

In this sense, Peters highlights that this Declaration, in line with the Universal Declaration, acknowledges “the rights and the needs for all persons with disabilities for the first time”, representing a landmark document albeit still bound to the medical approach<sup>758</sup>.

Furthermore, in 1982 the General Assembly (GA) adopted the World Programme of Action concerning Disabled Persons, in which the GA did not name the right to education but called for the need to realise the rights of persons with disabilities (referred to in the text as disabled persons) in the same way as all other citizens in order to foster full participation in social life<sup>759</sup>.

As part of this process, the above-mentioned UN Standard Rules from 1993 play a significant role since these rules represent a noteworthy endeavour in favour of a social model of disability, as noted by Peters<sup>760</sup>. Moreover, the document recognises that persons with disabilities have the right to equal educational opportunities also within tertiary education, or in other words as university<sup>761</sup>.

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<sup>757</sup> UN General Assembly. Declaration on the Rights of Disabled Persons, 9 December 1975, A/RES/3447 (XXX)

<sup>758</sup> Peters, Susan J. “Education for All?: A Historical Analysis of International Inclusive Education Policy and Individuals With Disabilities.” *Journal of Disability Policy Studies*, Vol. 18, No. 2, 2007, pp. 98–108, p. 101

<sup>759</sup> UN General Assembly. World Programme of Action concerning Disabled Persons, 3 December 1982, A/RES/37/52

<sup>760</sup> Peters, Susan J. “Education for All?: A Historical Analysis of International Inclusive Education Policy and Individuals With Disabilities.” *Journal of Disability Policy Studies*, Vol. 18, No. 2, 2007, pp. 98–108, p. 104

<sup>761</sup> UN General Assembly. Standard rules on the equalization of opportunities for persons with disabilities: resolution adopted by the General Assembly, 20 December 1993, A/RES/48/96, Rules

One year later, in 1994 the Salamanca statement was approved by the World Conference on Special Needs Education: Access and Quality in the context of the United Nations Educational, Scientific and Cultural Organization (UNESCO), acquiring an important position among the various UN conventions and declarations.

In this regard, Vislie asserts that the Salamanca statement established inclusive education on the global policy agenda and a linguistic shift from integration, describing the policy during the 1970s and 1980s, towards inclusion<sup>762</sup>. In fact, the Salamanca statement affirms that States should ensure inclusion of adults also in the context of higher education and furthermore should aim for equalisation of opportunities for all persons with disabilities<sup>763</sup>. Although the Salamanca statement is focused mainly on children, it represents an important document in boosting the concept of inclusive education. In this regard, it can be assumed that the most important act is the Convention on the Rights of Persons with Disabilities which, in line with the Salamanca statement and the Standard Rules, reaffirms the right to education and the inclusion in education of all persons with disabilities.

Aside from the documents mentioned above, another relevant act is the World Declaration on Education for All (EFA) of 1990 on which the CRPD itself is based<sup>764</sup>. The Declaration on EFA, as underlined by Peters, emphasizes universal access to education and equity in education, leaning towards a social model of disability<sup>765</sup>. Moreover, the UNESCO acknowledges that EFA established an

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<sup>762</sup> Vislie, Lise. "From integration to inclusion: Focusing global trends and changes in the western European societies." *European Journal of Special Needs Education*, Vol. 18, No. 1, 2003, pp. 17–35

<sup>763</sup> UNESCO (1994). *The Salamanca Statement and Framework for Action on Special Needs Education*. Adopted by the World Conference on Special Needs Education: Access and Quality. Salamanca, Spain: UNESCO, par. 19

<sup>764</sup> UNESCO (1990). *World Declaration on Education for All and its companion Framework for Action to Meet Basic Learning Needs*, adopted by the World Conference on Education for All, Jomtien, Thailand, March 1990

<sup>765</sup> Peters, Susan J. "Education for All?: A Historical Analysis of International Inclusive Education Policy and Individuals With Disabilities." *Journal of Disability Policy Studies*, Vol. 18, No. 2, 2007, pp. 98–108, p. 103-104

initial connection between inclusive education and quality education, stressing that these two elements influence and depend on each other<sup>766</sup>.

Since quality education consists also in meeting the needs of persons with disabilities, when such needs are met participation into mainstream education is fostered. Furthermore, if mainstream education starts to involve more and more people, e.g. persons with disabilities, both quality and inclusion will increase.

In this regard, Ferri stresses that the CRPD represents the first legally binding instrument within international law to mention “quality inclusive education”<sup>767</sup>.

On the matter, the UN Committee on the Rights of Persons with Disabilities specified in its General Comment No. 4 that an inclusive education is key in accomplishing a high quality of education<sup>768</sup>. In addition, Palmer highlights, following the holistic approach, that the concept of inclusive education under the CRPD aims not only to provide “the best learning environment” but also to remove barriers and “challenge stereotypes”<sup>769</sup>. Moreover, de Beco underlines that the CRPD aspires to safeguard human dignity but also to cope with the exclusion of persons with disabilities<sup>770</sup>.

Article 24 of the CRPD recognises the right to education for persons and obliges States to ensure inclusive education systems in the light of the “development of human potential and sense of dignity and self-worth”<sup>771</sup>.

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<sup>766</sup> UNESCO (2009). Policy Guidelines on Inclusion in Education, France, p. 10

<sup>767</sup> Ferri, Delia. “Inclusive Education in Italy: A Legal Appraisal 10 Year after the Signature of the UN Convention on the Rights of Persons with Disabilities.” *Journal of Theories and Research in Education*, Vol 12, No. 2, 2017, p. 5

<sup>768</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 4 on the right to inclusive education, 25 November 2016, CRPD/C/GC/4, par. 2

<sup>769</sup> Palmer, Jason S. “The Convention on the Rights of Persons with Disabilities: Will Ratification Lead to a Holistic Approach to Postsecondary Education for Persons with Disabilities?.” *Seton Hall Law Review*, Vol. 43, No. 551, 2013, p. 581

<sup>770</sup> de Beco, Gauthier. “The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions.” *Netherlands Quarterly of Human Rights*, Vol. 32, No. 3, 2014, Netherlands, pp. 263–287, p. 269-270

<sup>771</sup> UN General Assembly: Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 24(a)

Specifically, Article 24 provides that:

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

*(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*

*(b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*

*(c) Enabling persons with disabilities to participate effectively in a free society.*

*2. In realizing this right, States Parties shall ensure that:*

*(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;*

*(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;*

*(c) Reasonable accommodation of the individual’s requirements is provided;*

*(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;*

*(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.*

*3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:*

*(a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;*

*(b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;*

*(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.*

*4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.*

*5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities”<sup>772</sup>.*

Paragraph 5 explicitly extends the right to access education under the principle of equality to tertiary education and, in conjunction with paragraph 1, calls for an inclusive education system at all levels, including tertiary education. Furthermore, the provision establishes a duty to accommodate.

Although the meaning of ‘inclusion’ is not defined by the CRPD<sup>773</sup>, it is commonly identified as contrasting with exclusion and oppression and as being

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<sup>772</sup> Ibid., Article 24

<sup>773</sup> Ferri, Delia. “Inclusive Education in Italy: A Legal Appraisal 10 Year after the Signature of the UN Convention on the Rights of Persons with Disabilities.” *Journal of Theories and Research in Education*, Vol 12, No. 2, 2017, p. 5

consistent with the promotion of participation in and access to education<sup>774</sup>. In this regard, the Office of the High Commissioner for Human Rights (OHCHR) has declared that an inclusive education aims to eradicate barriers hindering participation and encourages changes in policy, culture and practise within mainstream education in order to cope with the needs of students. The OHCHR has also declared that, within society, an inclusive education is essential in combatting stigmatisation and discrimination<sup>775</sup>.

At this stage, it can be claimed that an inclusive education on one hand fosters the empowerment of persons with disabilities, enabling individuals to safeguard their dignity and to exercise their rights, from the civil to the economic, thus increasing the quality of their life and on the other hand fosters the growth of society as a whole, which benefits from the growth of each individual citizen in building a society that is more open, fair and strong. Indeed, de Beco stresses that education fosters self-esteem and that it is fundamental in acknowledging our humanity<sup>776</sup>. In addition, in its comment on Article 24 on education, the UN Committee on the Rights of Persons with Disabilities asserts that an inclusive education that enhances the abilities of each individual will facilitate their contribution to society<sup>777</sup>. Similarly, the General Assembly stresses the importance of inclusive education for respecting the dignity of each person<sup>778</sup>.

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<sup>774</sup> Armstrong, Derrick at al. "Inclusion: by choice or by chance?." *International Journal of Inclusive Education*, Vol. 15, No. 1, 2001, pp. 29-39, p. 30

<sup>775</sup> UN General Assembly. Office of the High Commissioner for Human Rights (OHCHR), Thematic study on the right of persons with disabilities to education Report of the Office of the United Nations High Commissioner for Human Rights, 18 December 2013, A/HRC/25/29, par. 7 and 8

<sup>776</sup> de Beco, Gauthier. "The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions." *Netherlands Quarterly of Human Rights*, Vol. 32, No. 3, 2014, Netherlands, pp. 263–287, p. 265

<sup>777</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 4 (2016) Article 24: Right to inclusive education, CRPD/C/GC/4, par. 10(b)

<sup>778</sup> UN General Assembly, Report of the Office of the United Nations High Commissioner for Human Rights, Thematic study on the right of persons with disabilities to education, A/HRC/25/29, par. 7

It has been shown in chapter one that the European Union is significantly influenced by international law and supranational processes. In particular, as regards higher education and inclusion, acting through the Commission, which plays an essential role in the field of education, the EU has established as the main objectives at European level the “building inclusive and connected higher education systems”<sup>779</sup>. The Commission goes further, specifying that inclusion entails “the right conditions for students of different backgrounds to succeed”, also beyond mere funding<sup>780</sup>.

However, as has been shown above, the EU is influenced by other entities, such as the Council of Europe, and it is hence appropriate to identify the position within the Council of Europe in relation to education and disability.

ii. Council of Europe: disability and right to education

Within the Council of Europe, the right to education is enshrined in Article 10 of the European Social Charter (ESC), on the right to vocational training, which seeks to guarantee access to university education, mentioning in particular persons with disabilities (referred to in the text as ‘handicapped’)<sup>781</sup>. In addition, the Secretariat of the ESC notes that, within the development of domestic systems, the concept of vocational training also encompasses higher education<sup>782</sup>. Moreover, as already mentioned above, the Article 15 of the ESC recognises the right to social integration and participation, including in education, for persons with disabilities, and further embraces a new approach towards disabilities, which

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<sup>779</sup> European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – on a renewed EU agenda for higher education {SWD(2017) 164 final}, p. 4

<sup>780</sup> Ibid., p. 6

<sup>781</sup> Council of Europe. European Social Charter (Revised), 3 May 1996, ETS 163, Article 10

<sup>782</sup> Information Document prepared by the Secretariat of the ESC 17 November 2006, The right to education under the European Social Charter, p. 4

entails integrating services and combatting the exclusion of persons with disabilities<sup>783</sup>.

a. The European Committee of Social Rights: Autism-Europe  
v. France

The European Committee of Social Rights has been established under the aegis of the European Social Charter. Its task is to assess compliance by national legislation with the Charter. However, the Committee cannot issue legally binding decisions as it has not been recognised as a supranational court. Nonetheless, its decisions are important and influential. The first and so far only collective complaint that is interesting and useful for the purposes of this research is the complaint No. 13/2002 between Autism-Europe and France, concerning disability and education. In that case, the French organisation Autism-Europe argued that France was not complying with the obligation to guarantee the right to education for persons with disabilities, thereby violating Article 15(1) on the right of persons with disabilities to integration and participation into social life, and Article 17(1) on the right of children and young with disabilities to social, legal and economic protection<sup>784</sup>. In particular, on the one hand Autism-Europe based its argumentation on the lack of financial resources, the lack of capacity on the part of the administration and the inadequacy of the national provisions on special education and support, and especially on attempts to draw the students with autism into mainstream education by reporting data and percentages for students with autism within the national education system<sup>785</sup>. On the other hand, the French Government replied pointing to the legislation approved in order to support students with disabilities, declaring mainstreaming as a priority for the State and mentioning the funding reserved for such measures<sup>786</sup>.

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<sup>783</sup> Ibid., p. 7

<sup>784</sup> European Committee of Social Rights Comité européen des Droits sociaux, Autism-Europe against France, Complaint No. 13/2002

<sup>785</sup> Ibid., par. 16-46

<sup>786</sup> Ibid., par. 16-46

In its response, the Committee started first by clarifying that Article 15 entails a shift in approach towards persons with disabilities, considering at them as equal citizens, and also that the introduction of Article E, enshrining the principle of non-discrimination, as a separate Article highlights the importance of that principle in fostering rights<sup>787</sup>. Within this framework, the Committee answered that France had violated Article 15 due to the insufficient progress made in relation to the education of persons with disabilities and due to the narrow definition of disability embraced by France compare to the WHO definition.

It has been noted that, in its decision on the *Autism-Europe v. France* case, the Committee promoted the principle of non-discrimination, fostering the endorsement of a mainstreaming approach<sup>788</sup>.

Taking that reasoning further, it can be argued that this case attempted to establish a deep link between the principle of non-discrimination and the integration of persons with disabilities. Such integration must be realised, in the context of education, through the inclusion of students with disabilities into mainstream education.

In addition, the Committee's decision seems to endorse the definition of inclusive education and mainstream education as an evolving one, as a work in progress constantly requiring minor adjustment.

Among the supranational bodies it is important to mention the European Court of Human Rights, and in particular it is important to discuss the few cases concerning education and disability.

b. The European Court of Human Rights on education and disability

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<sup>787</sup> Ibid., par. 47-51

<sup>788</sup> Lawson, Anna. "The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?." in Arnardóttir, Oddný and Gerard Quinn (eds). "The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives." *International Studies in Human Rights*, Martinus Nijhoff Publishers, Vol. 100, 2009, p. 91

The European Court of Human Rights (ECtHR) was the first supranational court that was called upon to rule on the right to education of persons with disabilities. The first and most important cases were *Kalkanli v. Turkey*<sup>789</sup> and *Sanlisoy v. Turkey*<sup>790</sup>.

Only these two cases will be discussed due to their importance as pioneering cases and due to their proximity to the subject matter of this research.

The Kalkanli case concerned a blind child who was rejected by a private school which refused to accept the child and stated that the child should apply to a better school with more appropriate services and specialist expertise in order to cope with the situation<sup>791</sup>. Although the Kalkanli case does not appear to be particularly innovative, either in terms of the content of the decision or the Court's reasoning, it is still worthy of mention. In the judgement, the Court mentioned Article 2 of Protocol 1, which asserts the right to education of everyone, and Article 14 of ECHR, which lays down the prohibition on discrimination. However, it must also be noted that, although Article 14 of Convention does not mention disability as a ground, such a ground may nonetheless be included under the notion of "other status". Moreover, the Court specified that Article 14 ECHR allows for different or special treatment where there is a reasonable and objective justification in order to combat *de facto* inequality<sup>792</sup>. The Court concluded on the one hand that the application was inadmissible due to its inadequate motivation, adding that one single refusal does not entail a systematic rejection from the entire education system. On the other hand it recognised that the right to education was safeguarded *de jure* within national legislation and in particular in the Constitution<sup>793</sup>. In addition, the Court highlighted that the right to education in

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<sup>789</sup> Cour Européenne des Droits de l'Homme, *Kalkanli c. Turkey*, Requête No. 2600/04, 13 janvier 2009

<sup>790</sup> Cour Européenne des Droits de l'Homme, *Sanlisoy c. Turkey*, Requête No. 77023/12, 8 novembre 2016

<sup>791</sup> Cour Européenne des Droits de l'Homme, *Kalkanli c. Turkey*, Requête No. 2600/04, 13 janvier 2009, p. 1-2

<sup>792</sup> *Ibid.*, p. 10

<sup>793</sup> *Ibid.*, p. 11

conjunction with the principle of non-discrimination entails the possibility of inclusive education that promotes the mainstreaming of students with disabilities, or otherwise specialist education on mainstream premises<sup>794</sup>.

From this first case and this brief analysis it appears evident that the Court's scope for action is restricted to the evaluation of systematic, serious and absolute violations of rights and that it is unable to decide on a specific individual event.

The Sanlisoy case concerned again the rejection of a child by a school due to a lack of appropriate infrastructure. However, the parents claimed that the rejection had been based merely on the autism of their child<sup>795</sup>. The judgement is noteworthy because, in this case, the Court referred not only to the European Convention of Human Rights and its Protocol but also to the Convention on the Rights of Persons with Disabilities as Treaties enshrining the principle of non-discrimination and the right to education<sup>796</sup>. In particular, the Court recognised the fundamental importance of the right to education contained in Article 2 of Protocol 1 adding that it must be read in the light of other international provisions and treaties, such as the European Social Charter and the CRPD<sup>797</sup>. In particular, the UN Convention recognises specifically the right to education of persons with disabilities. In its reasoning, the Court acknowledged the evolution of international and European law on education and non-discrimination recognising 'inclusive education' as the best means of realising those rights and principles, quoting its previous judgment in the *Cam* case<sup>798</sup>, which will be discussed below in greater detail, as well as the duty to provide reasonable accommodation in order to eradicate *de facto* inequality<sup>799</sup>.

However, as in the previous judgement, the Court declared that the case before it did not involve any systematic rejection of the right to education since the right to

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<sup>794</sup> Ibid., p. 10

<sup>795</sup> Cour Européenne des Droits de l'Homme, *Sanlisoy c. Turkey*, Requête No. 77023/12, 8 novembre 2016, par. 1-11

<sup>796</sup> Ibid., par. 30

<sup>797</sup> Ibid., par. 56-57

<sup>798</sup> *Cam v. Turquie*

<sup>799</sup> Cour Européenne des Droits de l'Homme, *Sanlisoy c. Turkey*, Requête No. 77023/12, 8 novembre 2016, par. 59-60

education and the related access to education was provided for under national law and the State was under a discretionary duty to regulate and assure those rights<sup>800</sup>. Furthermore, the Court specifies that its competence was limited to assessing whether or not that right had been systematically denied. That condition was not satisfied in either of the two above-mentioned cases on the grounds that one refusal by only one school or university does not entail the systematic denial of a right. Moreover, the Court did not find that the situation at stake constituted a form of discrimination due to the denial of reasonable accommodation, but merely mentioned the reasonable accommodations in its reasoning without any further references.

Following this brief analysis of the most relevant cases on disability in the context of education within the Council of Europe it is important to outline the current position within the European Union as regards education and particularly inclusive education.

### iii. The European Union and inclusive education

During the early 2000s, the European Union started to adopt the most significant acts on inclusive education for persons with disabilities within mainstream education, although those acts were limited to young students and were non-binding.

Specifically, it is worth mentioning the Resolution on equal opportunities for pupils and students with disabilities in education and training of 2003<sup>801</sup> as well as the Communication on Improving Competences for the 21st Century: An Agenda for European Cooperation on Schools of the Commission of 2008<sup>802</sup>. Through these acts, the EU has promoted the full inclusion and integration of students,

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<sup>800</sup> Ibid., par. 69

<sup>801</sup> Council of the European Union. Council Resolution on equal opportunities for pupils and students with disabilities in education and training, 5 May 2003, 2003/C 134/04

<sup>802</sup> European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Improving competences for the 21st Century: an Agenda for European Cooperation on Schools (COM/2008/0425 final), 3 July 2008

providing for instance for an exchange of best practice and the mainstreaming of students with disabilities<sup>803</sup>.

Pursuing this trend, several years later in Communication 247 of 2017 the Commission restated the priority of an inclusive (higher) education system, stressing the importance of building and enhancing cooperation between higher education institutions and the ineluctable link between education, in particular higher education, and society and its challenges<sup>804</sup>.

Moreover, as stressed by Della Fina and Cera<sup>805</sup>, the EU established as its specific objectives the promotion of an inclusive education in the Disability Strategy 2010-2020, specifying the need “to remove legal and organisational barriers for people with disabilities to general education”<sup>806</sup>. In addition, another important policy act is the programme Education and Training 2020 (ET 2020), already mentioned in the previous chapter, which outlines a framework under which it is possible to enshrine a European common policy towards equity, social cohesion and active citizenship, in particular fostering full inclusion and the integration of students<sup>807</sup>.

In particular, the ET2020 states that:

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<sup>803</sup> Della Fina, Valentina and Rachele Cera. “Protecting the Rights of People with Autism in the Fields of Education and Employment International, European and National Perspectives.” Springer Open, 2015, p. 84-85

<sup>804</sup> European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a renewed EU agenda for higher education {SWD(2017) 164 final}, Brussels, 30.05.2017, COM(2017) 247 final

<sup>805</sup> Della Fina, Valentina and Rachele Cera. “Protecting the Rights of People with Autism in the Fields of Education and Employment International, European and National Perspectives”. Springer Open, 2015, p. 85

<sup>806</sup> European Commission. Communication for the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe (COM(2010) 636 final), 15.11.2010, p. 7-8

<sup>807</sup> Council of the European Union. Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (ET 2020), 2009/C 119/02

*“Education should promote intercultural competences, democratic values and respect for fundamental rights and the environment, as well as combat all forms of discrimination, equipping all young people to interact positively with their peers from diverse backgrounds”*<sup>808</sup>.

The use of *soft law* reflects the difficulties experienced by the EU institutions in taking action in the field of education and disability due to a lack of EU competence and obstructionism on the part of the Member States, seeking to block the concession of further to the EU, although this motion shows the growing awareness of and concern for the issue within the EU.

In the meantime, alongside the *soft law* and policy acts, a *hard law* instrument has also been adopted, which dedicates some of its provisions to persons with disabilities. This is specifically the Charter of Fundamental Rights of the European Union, Article 26 of which is explicitly entitled ‘Integration of persons with disabilities’ and provides that:

*“The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”*<sup>809</sup>.

Although integration and inclusion do not have exactly the same meaning<sup>810</sup>, it is significant that a document of *hard law*, and even more so of primary law, includes such a provision that is expressly dedicated to persons with disabilities, including their integration into work and their participation in society.

From this short overview of acts of policy and legislation, i.e. instruments of *soft law* but also *hard law*, it is possible to outline a specific approach towards the inclusion of persons with disabilities into education, i.e. inclusive education, under which learners can have access to the mainstream education system,

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<sup>808</sup> Ibid., Strategic objective 3: Promoting equity, social cohesion and active citizenship

<sup>809</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 26

<sup>810</sup> UN Committee on the Rights of Persons with Disabilities. General comment No. 4 on the right to inclusive education, 2 September 2016, CRPD/C/GC/4, par. 11

receiving appropriate adjustments from the system itself. In this sense, inclusion differs slightly from integration, which requires that all the learners must have access to the mainstream without any modifications<sup>811</sup>. In other words, within an integration process, individuals have to adapt to the surroundings receiving them. In order to provide a complete overview on the definition of inclusive education, it is opportune to report the UNESCO's definition:

*“Inclusive education for all should be ensured by designing and implementing transformative public policies to respond to learners’ diversity and needs, and to address the multiple forms of discrimination and of situations, including emergencies, which impede the fulfilment of the right to education”*<sup>812</sup>.

In the light of the above discussion, as completed by the UNESCO definition, it is evident that an inclusive education encompasses broad action, ranging from the purely legal to the social and the philosophical.

Interestingly, the UNESCO definition refers to ‘transformative public policies’ which seek infrastructural and permanent changes in the institutions and in the society and also acknowledges the existence of ‘multiple forms of discrimination’, which implicitly requires not a merely one-dimensional approach but a holistic approach that includes all the causes, symptoms and consequences related to discrimination, disadvantage and marginalisation<sup>813</sup>.

The next chapter will be discussed, to the extent necessary for this research, theories on the social contract and social justice, even though such matters are closer to philosophical and sociological studies. The exploration of broader matters is needed in order to set out a complete framework which will help to better understand how the disability is conceptualised in society and the status of persons with disabilities within society itself and, in addition, it will help to better

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<sup>811</sup> Lawson, Anna and Caroline Gooding (eds). “Disability Rights in Europe: From Theory to Practice.” Hart, 2005, p. 164-165

<sup>812</sup> UN Educational, Scientific and Cultural Organization (UNESCO). Education 2030 Framework for Action, General Conference at UNESCO headquarters, Paris on 4 November 2015

<sup>813</sup> Ibid.

conceive of and develop possible future changes for society and for persons with disabilities.

Here, following on from the discussion set out above, it is appropriate to briefly recall that disability has been considered as a negative trait and, due to their circumstances, persons with disabilities have been marginalised and hampered in their social life. Hence, the change in how ‘diversities’ and, insofar as this research is concerned, ‘disabilities’ are conceptualised will not only foster social evolution and will also mirror that evolution. In this sense, it has been established in this research, for example, that individual claims before the courts cannot tell us much about the law and the society and also that international cooperation may bring about changes and developments in individual countries. Moreover, the social model and the human rights model is anchored firmly within such a framework, entailing a different conceptualisation of disability and changes within the society in terms of mindset and approach.

Along these lines, it can be argued that, in order to combat discrimination, it is necessary not only to adopt provisions and rules but also to bring about social and cultural changes resulting in a change in mindsets, attitudes, approaches, etc. An example of this is the Convention on the Rights of Persons with Disabilities, which calls for such changes and approaches.

### **III. From a Welfarism approach to an Equal approach: empowerment**

A society is composed of persons who are members of that society, and each member holds a specific position and performs a specific function within society itself, showing both negative and positive features. The status of persons, in particular of those persons who display specific characteristics, has been contemplated by theories that analyse society and how it functions, and in particular the relationship of power and control within society and its members, and how members who can be ascribed to a certain group are treated and considered.

As discussed in the previous chapter, within a society the members can be divided into two main categories: one comprised of those persons who enjoy a dominant and advantageous position and the other comprised of those persons who suffer from disadvantages and discrimination. Since according to the usual and common understanding, disability is considered as a characteristic, it is frequently assumed that disability entails negative side-effects that prevent abilities and capacities from being realised to the full. Hence, as an aspect pertaining to a marginalised and disadvantaged group within society, this condition needs to be analysed and discussed.

In this sense, disability has been covered by theories of the social contract and social justice that study the status of persons with disabilities in society and how persons with disabilities are, or should be, treated by society based on their ability to contribute to society and what they need or demand from society itself. Such an analysis thus embraces a broad approach to persons with disabilities, encompassing philosophical and social theories which will be evaluated as far as necessary in the light of the aims of the research. In this regard, theories of social justice address the issue of advantages or disadvantages that are associated with personal traits, but also with the social matrix. In addition, in order to determine what is 'just', these theories enquire whether and how such personal traits should, or should not, be considered<sup>814</sup>.

Along the same lines, the human rights model and the social model of disability will be assessed since such models show some consonance as suitable models to be included within the theoretical framework established by this research, and in particular in this chapter.

In addition, it may be presumed that the evolution from the medical model to the social model and the human rights model mirrors the evolution from a 'welfarism approach' to an 'equal approach'. The aim of this chapter is, in fact, to outline this evolution and in particular the main features of an equal approach, which seeks to

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<sup>814</sup> Terzi, Lorella. "A capability perspective on impairment, disability and special needs Towards social justice in education." *Theory and Research in Education*, Vol. 3, No. 2, 2005, pp. 197-223, p. 198

achieve equal treatment among all citizens without any discrimination, in the light of the principle of equality.

Furthermore, it will consider the consonance between that ‘equal approach’ framework and the social model of disability, together with the human rights model. In this sense, the social model of disability has been defined as a new and original approach, promoting the development and implementation of non-discrimination law rather than medical treatment and welfare<sup>815</sup>. In other words, the social model attempts to explain the root cause of disability in order to remove obstacles and oppression that affects certain persons<sup>816</sup>. In particular, the reference to non-discrimination law can be coupled with an ‘equal approach’ thanks to the deep and close connection, already disclosed above, between non-discrimination law and the principle of equality. In fact, an equal approach seeks to recognise and guarantee the same rights to all persons irrespective of their circumstances. In this sense, in order to be equal, an approach must follow and apply non-discrimination law, which seeks to achieve the same aim.

Conversely, the welfarism approach is based on the assumption that certain people, as persons with disabilities, cannot contribute to society in the same way as everyone else. Therefore, these persons are regarded as persons needing cure and pure assistance, and as burden and cost for society. A further corollary of this reasoning comes in the form of exclusion and marginalisation.

Discussing the position of persons with disabilities as a marginalised group, Fredman observes that persons with disabilities have traditionally been considered as not capable of coping with social activities<sup>817</sup>. Among these societal activities,

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<sup>815</sup> Degener, Theresia. Chapter 3 “A human rights model of disability.” in Blanck, Peter and Eilionóir Flynn (eds). “Routledge Handbook of Disability Law and Human Rights.” Routledge Handbooks, 2017, p. 33

<sup>816</sup> Lawson, Anna and Mark Priestley, Chapter 1 “The social model of disability Questions for law and legal scholarship?” in Blanck, Peter and Eilionóir Flynn (eds). “Routledge Handbook of Disability Law and Human Rights.” Routledge Handbooks, 2017, p. 5-6

<sup>817</sup> Fredman, Sandra. “Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?.” in Lawson, Anna and Caroline Gooding (eds). “Disability Rights in Europe: From Theory to Practice.” Hart, 2005, p. 202

the most significant in the light of this research are clearly education although, to some extent, also employment.

It can be observed that these two activities, namely education and employment, are closely linked. In addition, as shown above, employment has largely dealt with the issue of disability, and currently features the most advanced and complete legislation concerning this matter. Nevertheless, within the context of employment and social policy, persons with disabilities are often regarded as persons requiring ‘special protection’ and recipients of ‘welfare’, as handouts from the State, at the expense of inclusion and self-determination, which results in exclusion and a loss of self-determination<sup>818</sup>.

The labour market and employment will be taken into account, insofar as necessary and appropriate in the light of the aim of this research, especially in the following chapters. The workplace provides a good example and offers a point of reference as it has for a long time been the first and core issue for both national and European lawmakers. Hence, labour law features the most developed legislation and theories on discrimination, disability and equality.

Within this framework, the reasoning will be developed in the light of the specific subject matter of this research, namely education and the inclusion of persons with disabilities into mainstream education, but also social movements involving persons with disabilities and their contribution to these processes.

i. Theories of social contract and social justice

At this stage of the research, theories of social contract will be discussed in order to analyse the correlation among members of society and between society itself and its members. In order to take the discussion further, this chapter will analyse the fundamental principles and values of society, which arrange and coordinate the structure of society and its internal relationships and activities.

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<sup>818</sup> Ibid.

Following the traditional approach, people decide to leave the state of nature and start living together as a society for their mutual advantage<sup>819</sup>. In this sense, the social contract defines the position of each person within society. This means that the position stated in the social contract and during its drafting process will be reflected accordingly by the person's societal position. Thus, those excluded from the social contract's bargaining will be marginalised and excluded from the advantageous position based on the assumption that anyone who is not perceived of as being capable of contributing to societal activities in the same way as everyone else, or as most others, cannot take benefit from the advantages.

Moreover, the issue of social contract has also been linked to the issue of social justice. In particular, the distribution and redistribution of advantages, resources, rights, and so on raise the issue of justice among members of society. The concept of justice and distribution (and redistribution) relies on the principle of equality. Therefore, in order to achieve the aim of balancing the wealth, status and capabilities of disadvantaged members, such as persons with disabilities, these theories assess whether it is appropriate to stipulate a new allocation of resources<sup>820</sup>. In this sense, the principle of equality, specifically according to a substantive approach, will also address resources or measures that favour disadvantaged people in preference to others, who do not experience hindrances or obstacles, without resulting in discrimination. On the contrary, this approach leads society towards a condition of equality, and therefore of justice among its citizens, focusing especially on certain (discriminated and marginalised) persons or groups through specific initiatives and provisions.

a. The capability approach as a matter of social justice

One of the most important innovators on social contract and social justice is Martha Nussbaum, whose early writings focus on the condition of women and

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<sup>819</sup> Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006, p. 3

<sup>820</sup> Terzi, Lorella. "A capability perspective on impairment, disability and special needs Towards social justice in education." *Theory and Research in Education*, Vol. 3, No. 2, 2005, pp. 197-223, p. 220-221

feminist theories, and who later moved into disability studies and the condition of persons with disabilities in present-day society. This chapter will thus introduce and analyse Nussbaum's theory. However, Nussbaum specifies that her theory does not claim to be a complete theory of justice<sup>821</sup>. Nussbaum develops her theory of disability by engaging with one of the unsolved issues associated with justice, namely the exclusion of persons with impairments from society and from the social contract as well as their equal treatment with other members of society. According to Nussbaum: "There is the problem of doing justice to people with physical and mental impairments. These people are people, but they have not as yet been included, in existing societies, as citizens on a basis of equality with other citizens"<sup>822</sup>.

Notably, Nussbaum theorises a new approach known as the 'Capability approach', which originally focused on women and was later expanded also to persons with disabilities.

Beside Nussbaum, another important exponent of the capability approach is Amartya Sen, as has been stressed by Terzi<sup>823</sup>, whose theory introduces disability as a human variety as well as disability in terms of justice<sup>824</sup>.

Focusing first on Nussbaum's theory, the cornerstone of her theory is the belief that human beings' lives are based on cooperation, reciprocity and sociability<sup>825</sup>. Her approach is based on the assumption that there are central capabilities for human lives and that these capabilities have to be developed in human terms<sup>826</sup>. In addition, Nussbaum develops Marx's idea founded on human dignity (or worth) and its inviolability, together with the sociability of human beings, following

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<sup>821</sup> Nussbaum, Martha C. "Women and Human Development: The Capabilities Approach." Cambridge University Press, 2000, p. 75

<sup>822</sup> Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006, p. 1-2

<sup>823</sup> Terzi, Lorella. "Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs." *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005, p. 451

<sup>824</sup> Sen, Amartya. "Inequality Reexamined." Oxford, Clarendon Press, 1992

<sup>825</sup> Nussbaum, Martha C. "Women and Human Development: The Capabilities Approach." Cambridge University Press, 2000, p. 72

<sup>826</sup> *Ibid.*, p. 71-72

Aristotle<sup>827</sup>. In this sense, the theory recognises a human being as a “bearer of value and, an end”<sup>828</sup>. As a corollary, the capabilities identified are not only instruments but also goals<sup>829</sup>. These capabilities are necessary in order for human beings to live, and specifically to live a life that is fully human.

In order to explain what a capability is, Nussbaum argues that capabilities answer the question “What is this person able to do and to be?” essentially by referring to “opportunities to choose and to act”<sup>830</sup>. The subsequent questions that may arise are ‘Who provides and guarantees such capabilities?’ and ‘Which capabilities have to be considered as essential?’.

Under Nussbaum’s theory, society has the task of providing the “social basis for these capabilities”<sup>831</sup>, stressing that, on the one hand human beings should display capabilities by themselves and on the other hand that society should guarantee a minimum basis for persons in order to perform and develop these capabilities. Nussbaum identifies three different types of capability: basic capabilities existing from birth; internal capabilities, which develop and grow during the lives of the persons themselves, or most likely with input from the external environment; and finally, combined capabilities, which are internal capabilities combined with external circumstances<sup>832</sup>. Indeed, material and social circumstances play a significant role in the development of internal capabilities and also in the expression of those capabilities<sup>833</sup>. This statement claims that the social and material circumstances in which persons find themselves heavily influence the

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<sup>827</sup> Nussbaum, Martha C. “Capabilities and Disabilities: Justice for Mentally Disabled Citizens.” *Philosophical Topics*, Vol. 30, No. 2, University of Arkansas Press, 2002, pp. 133-165, p. 158

<sup>828</sup> Nussbaum, Martha C. “Women and Human Development: The Capabilities Approach.” Cambridge University Press, 2000, p. 73

<sup>829</sup> *Ibid.*, p. 74

<sup>830</sup> Nussbaum, Martha C. “Creating capabilities: The Human Development Approach.” The Belknap Press of Harvard University Press, 2011, p. 20

<sup>831</sup> Nussbaum, Martha C. “Women and Human Development: The Capabilities Approach.” Cambridge University Press, 2000, p. 81

<sup>832</sup> *Ibid.*, p. 84-85

<sup>833</sup> *Ibid.*, p. 86

development of the internal capabilities and the creation of adequate conditions for expressing these capabilities.

It has been noted that the theory follows an equality and anti-discrimination approach, since it identifies discrimination as a humiliation and a violation of human dignity<sup>834</sup>. In fact, in asserting capabilities as goals, this theory promotes material equality for all members of society. Following this aim of achieving equality, the theory charges society with the task of bringing all members up to a minimum capability threshold. Furthermore, it can be argued that this threshold could be achieved through an appropriate policy of redistribution<sup>835</sup>. In particular, Nussbaum specifies that, until that threshold has been reached, “truly human functioning is not available to citizens”<sup>836</sup>.

In the light of these assumptions, capabilities can be understood as factors for evaluating quality of life<sup>837</sup>, besides being considered as elements for constructing a theory of social justice<sup>838</sup>.

Fundamentally, in order to list the following capabilities, the author asks as a matter of social justice “What does a life worthy of human dignity require?”<sup>839</sup>. Nussbaum identifies those capabilities that maintain the trait of ‘humanity’ of persons’ lives, which enable persons to pursue and achieve further goals<sup>840</sup>, essentially what is necessary in order to ensure a life worthy of human dignity.

The central capabilities are:

1. “Life: Being able to live to the end of a human life of normal length;
2. Bodily Health: Being able to have good health;
3. Bodily Integrity: Being able to move freely from place to place; having one’s bodily boundaries treated as sovereign;

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<sup>834</sup> Ibid., p. 86

<sup>835</sup> Ibid., p. 86

<sup>836</sup> Ibid., p. 6

<sup>837</sup> Ibid., p. 82

<sup>838</sup> Nussbaum, Martha C. “Creating capabilities: The Human Development Approach.” The Belknap Press of Harvard University Press, 2011, p. 19

<sup>839</sup> Ibid., p. 32

<sup>840</sup> Nussbaum, Martha C. “Women and Human Development: The Capabilities Approach.” Cambridge University Press, 2000, p. 74

4. Senses, Imagination, and Thought: Being able to use the senses, to imagine, think, and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education;
5. Emotions: Being able to have attachments to things and people outside ourselves;
6. Practical Reason: Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life;
7. Affiliation: Being able to live with and toward others and Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others;
8. Other Species: Being able to live with concern for and in relation to animals, plants, and the world of nature;
9. Play: Being able to laugh, to play, to enjoy recreational activities;
10. Control over One’s Environment: Political. Being able to participate effectively in political choices that govern one’s life and Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity”<sup>841</sup>.

Moreover, Nussbaum stresses the relationship between rights and capabilities. In her first argument in favour of the capability approach, the author provides the example of women in the context of employment. The author explains that a woman who seeks an employment but has been systematically rejected because of her gender has practically no right to seek and hold employment, which means that she has no opportunity to express her capabilities and functions<sup>842</sup>. Hence, the recognition of and protection for the right to seek and hold employment will put women in a condition to exercise and improve their capabilities and grant them the opportunity to choose and perform the functions that they would prefer<sup>843</sup>.

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<sup>841</sup> Nussbaum, Martha C. “Women and Human Development: The Capabilities Approach.” Cambridge University Press, 2000, p. 78-80

<sup>842</sup> Nussbaum, Martha C. “Capabilities and Human Rights.” *Fordham Law Review*, Vol. 66, No. 2, 1997, p. 293

<sup>843</sup> *Ibid.*

At this stage, it is necessary to distinguish between capabilities and functionings. The author explains that functionings are basically “outgrowths or realizations of capabilities”<sup>844</sup>.

As is apparent from the short example mentioned above, Nussbaum initially applies her theory to the condition of women and their rights. She starts from the assumption that there is a threshold comprised of a minimum level of capabilities and that, based on this threshold, the capability can be considered as “truly human functioning”<sup>845</sup>. Furthermore, she recognises that each person is an end, refusing the conception that some persons may be seen only as an instrument for others’ own ends or goals<sup>846</sup>. In this sense, she argues that women have been seen, historically, as supporters of others’ ends, rather than as ends themselves. The author then goes on to promote as a goal of society the task of raising all citizens above the threshold of capability<sup>847</sup>. With regard to rights, Nussbaum stresses that rights are not mere written provision on paper, but that they require something more. Analysing the condition of women, the author argues that women may have a right enshrined formally and abstractly in some law or provision but that in material and practical terms women do not enjoy same rights as men and are not in a condition to perform their capabilities and functions in the same way as men<sup>848</sup>.

b. The capability approach and disability

Pursuing her theory further, Nussbaum then considers the condition of persons with disabilities. These persons have traditionally been considered as persons needing care and assistance, who are unproductive and incapable of bringing any benefits to the society and its members. In this sense, justice became a sensitive

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<sup>844</sup> Nussbaum, Martha C. “Creating capabilities: The Human Development Approach.” The Belknap Press of Harvard University Press, 2011, p. 25

<sup>845</sup> Nussbaum, Martha C. “Women and Human Development: The Capabilities Approach.” Cambridge University Press, 2000, p. 6

<sup>846</sup> *Ibid.*, p. 5

<sup>847</sup> *Ibid.*, p. 6

<sup>848</sup> Nussbaum, Martha C. “Capabilities and Human Rights.” *Fordham Law Review.*” Vol. 66, No. 2, 1997, p. 293-294

topic, particularly in connection with the perception and treatment of persons with disabilities within the social contract process and society itself.

As regards the social contract and its drafting process, Nussbaum notes that people start bargaining and living together in society for mutual advantage with the aim of receiving some benefits and positive outcome from cooperation among members<sup>849</sup>. Conversely, members refuse to bargain and cooperate with those people who cannot contribute as much as the members concerned do, or who demand much more than their own contribution to society<sup>850</sup>.

Pursuing this reasoning further, and in the light of the aims of this research, disability raises issues concerning cooperation with other members of society and the contribution of persons with disabilities to society and the social good. In this regard, as already argued, persons with disabilities have been historically regarded as persons needing care who are incapable of contributing to society on a similar scale to the benefits they receive from society.

In this sense, Silvers and Stein restate Nussbaum's idea, asserting that, under her theory of justice, persons with disabilities and persons without disabilities must be treated equally. This means that, in order to be just, a society must guarantee those resources that are needed by all citizens in order to achieve the threshold of capabilities required in order to live a life that is humanly worthy<sup>851</sup>.

At this stage of the discussion, it must be highlighted that Nussbaum bases her reasoning on Rawls' theory of justice and social contract. Indeed, it can be argued that Rawls is a pioneer, offering the most exhaustive and well-developed thinking on the social contract.

However, Nussbaum highlights how Rawls differs from the tradition that asserts that human beings do not have any rights in the state of nature<sup>852</sup>. This theory will

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<sup>849</sup> Nussbaum, Martha C. "Capabilities and Disabilities: Justice for Mentally Disabled Citizens." *Philosophical Topics*, Vol. 30, No. 2, University of Arkansas Press, 2002, pp. 133-165, p. 137

<sup>850</sup> *Ibid.*

<sup>851</sup> Silvers, Anita and Michael A. Stein. "Disability and the Social Contract." *The University of Chicago Law Review*, Vol. 74, 2007, p. 1621-1623

<sup>852</sup> Nussbaum, Martha C. "Frontiers of Justice. Frontiers of Justice: Disability, Nationality, Species Membership." Cambridge, MA: Harvard University Press, 2006, p. 11-12

be discussed in detail below. Here it is sufficient to highlight that, under Rawls' theory, persons with disabilities are not encompassed within the social contract process. Specifically, Rawls explicitly states that in order to focus on the main question addressed in his research, he calls out "for the time being these temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating member of the society in the usual sense"<sup>853</sup>. The statement is based on "the idea of society as a fair system of cooperation" in which a person is defined as a citizen "that is, a normal and fully cooperating member of society over a complete life"<sup>854</sup>. Therefore, it is apparent that, in Rawls' theory, due to their conditions persons with disabilities are not capable of cooperating within society normally and fully on an equal footing with their able-bodied peers.

On the other hand, in Nussbaum's theory, under the capability approach, persons with disabilities must be treated as persons without disabilities. In other words, persons with disabilities must enjoy and participate equally into society's activities. Moreover, society must foster disadvantaged persons in order to enable them to participate fully in social life and to develop their personality.

a. The capability approach and theory of justice

With regard to theories of justice, Rawls has been recognised as the greatest political philosopher of recent times. However, his theory has been criticised by several authors, e.g. Amartya Sen, who theorises and develops further the capability approach<sup>855</sup>.

In particular, in his book "*A Theory of Justice*" Rawls links the creation of a just and well-ordered society with the concept of justice, which derives from social cooperation, i.e. the sharing of duties and rights but also benefits and disadvantages<sup>856</sup>. According to his theory, Rawls conceives of justice as fairness,

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<sup>853</sup> Rawls, John. "Political Liberalism." Columbia University Press, p. 20

<sup>854</sup> Ibid., p. 18

<sup>855</sup> Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009, p. 52

<sup>856</sup> Rawls, John. "A Theory of Justice.", The Belknap Press of Harvard University Press Cambridge, 1999, p. 4-10

featuring two principles: the first demands equality for duties and rights whilst the second requires that inequalities, whether social or economic, be offset against benefits in order to be just<sup>857</sup>. Later, Rawls develops his theory further in *“Political Liberalism”*, specifying two principles. The first states that “each person has an equal right to a fully adequate scheme of equal basic liberties” and the second requires that “social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged member of society”<sup>858</sup>. In other words, the second principle demands equal opportunity for all citizens and also hint at a redistribution principle in suggesting that benefits should be provided that are capable of offsetting the disadvantages of certain persons. A fundamental idea in Rawls’ theory focuses on the concept of justice as fairness in which “the original position of equality corresponds to the state of nature in the traditional theory of the social contract”<sup>859</sup>. It must be specified that the state of nature does not correspond to an actual situation, but rather a hypothetical condition.

According to the author’s theory, during the process of drafting the social contract and the principles of justice on which society will be founded, the members do not know their social status. Hence, when choosing principles of justice they will not be influenced by their own advantages or disadvantages. In this way, Rawls aims to achieve a fair and just society.

In addition, Rawls also addresses the conception of person within a fair society. Specifically, the author states that members of the society must be capable of cooperating on a full and normal basis throughout their entire lives<sup>860</sup>. The author also attributes two different “powers”. The first consists in the ability to hold a sense of right and justice whilst the second consists in the ability to adhere to a conception of good, which means determining and pursuing what makes a human

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<sup>857</sup> Ibid., p. 13

<sup>858</sup> Rawls, John. “Political Liberalism.” Columbia University Press, p. 291

<sup>859</sup> Rawls, John. “A Theory of Justice.”, The Belknap Press of Harvard University Press Cambridge, 1999, p. 11

<sup>860</sup> Rawls, John. “Political Liberalism.” Columbia University Press, p. 301

life worthy<sup>861</sup>. As regards personal conditions and traits, Rawls deals with the issue of “natural gifts and abilities” stating that these elements do not affect full and complete membership of and participation in society, but only where certain requirements might be demanded for specific positions in the society<sup>862</sup>. Pursuing his theory further, Rawls gives particular importance to ‘primary goods’ which are “what persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life”<sup>863</sup>. These goods are identified as rights, opportunities but also income and wealth and can be identified in the Constitution or in ordinary laws<sup>864</sup>.

It is worth stressing here that, in relation to primary goods, Rawls mentions ‘equal citizens’ but also ‘fully cooperating members of society’, implying that such goods relate only to citizens who are equal<sup>865</sup>. The author seems to argue that persons who are members of society have equal and fair duties and rights and also in turn that society needs members that are capable of contributing to society itself on a fully and average basis.

As regards the ethical aspect to his theory, Rawls explicitly contrasts theory with the utilitarian theories that aim to achieve the maximum profit, as human beings seek to achieve the maximum benefit whilst society also aspire to the greatest fulfilment possible. Such a utilitarian approach, in Rawls’s opinion, ignores the diversities among people without paying adequate attention to these differences<sup>866</sup>.

In particular, Rawls defines his theory of justice as fairness as a deontological theory, and the utilitarian theory as a teleological theory<sup>867</sup>. A deontological theory argues that an action can be morally right irrespective of the right or evil

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<sup>861</sup> Ibid., p. 302

<sup>862</sup> Ibid., p. 302

<sup>863</sup> Rawls, John. “A Theory of Justice.” The Belknap Press of Harvard University Press Cambridge, 1999, p. 54

<sup>864</sup> Rawls, Political Liberalism, Columbia University Press, p. 188

<sup>865</sup> Rawls, John. “A Theory of Justice.” The Belknap Press of Harvard University Press Cambridge, 1999, p. xiii

<sup>866</sup> Ibid., p. 22-24

<sup>867</sup> Ibid., p. 26

caused as a result. On the other hand, a teleological theory derives what is good from a moral theory and identifies right with the maximisation of good.

In his theory of justice as fairness, Rawls affirms that the right is prior to the good<sup>868</sup>. In other words, justice and the right are not good or bad, or right or evil, which means that they are free from any moral path. A deontological theory identifies what has to be done in the light of certain principles and rules, without contemplating the consequences in advance, whereas a teleological theory considers the results of an action.

The theory of Rawls is a focus of Sen's attention, who as mentioned above adopts an innovative position in relation to the capability approach and the theory of justice.

In particular, Sen criticises Rawls' theory based on primary goods, which are introduced as parameter for evaluating equity and redistribution, in the light of the theory of justice, within a society. Indeed, Sen stresses that the capability approach acknowledges that the means for living are not the ends of a good life and connects his approach to the ability of a person to perform those activities and things that the person independently chooses to do<sup>869</sup>. The author explains that the capability approach focuses on the advantages attributable to each individual in the light of principle of opportunity and in terms of the freedom to choose what to do and how to do it<sup>870</sup>.

Furthermore, Sen disagree with Rawls' theory of social justice and specifically with the adoption of primary goods in order to evaluate the situation and position of each individual within society. This evaluation is necessary in order to assess and implement the redistribution of goods and resources in order to support and assist disadvantaged persons, e.g. persons with disabilities. Specifically, Sen identifies the primary good as a means for life, mentioning *inter alia* income,

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<sup>868</sup> Ibid., p. 28

<sup>869</sup> Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009, p. 253-254

<sup>870</sup> Ibid., p. 232

wealth and self-respect<sup>871</sup>. These elements do not constitute values, but rather represent the means by which members of society pursue what they regard as valuable<sup>872</sup>. Alongside the assumption that primary goods are considered as means for achieving what is worth pursuing as an end for an individual's life, they are identified as indicators based on what can be assessed as 'distributional equity' under Rawls' conception of the principle of justice<sup>873</sup>. In *Justice: Means versus Freedom*, Sen defines primary goods as the means or resources used by individuals to pursue their good and to live their lives as they wish<sup>874</sup>.

The author also connects the capability approach with the idea of justice, arguing that capabilities must be distinguished from primary goods and chosen lives<sup>875</sup>. The difference lies in the fact that a capability focuses on the ability to convert resources into practical results, which means lifestyle, personal goals and the way to live one's life, while primary goods as stated above are mere means for pursuing personal goals.

Hence, in order to assess the right idea of justice it is necessary to take account of the freedom of the individual to make choices and to pursue them as well as the ability of the same individual to translate resources, i.e. income and wealth, into a combination of functionings. Put differently, the capability approach proposes a shift from focusing on the means of living, namely income and wealth, to focusing on the "actual opportunities" that a person has<sup>876</sup>.

In this regard, Sen offers the example of a person with a disability who can enjoy great wealth and income, which means a high level of primary goods, whilst

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<sup>871</sup> Sen, Amartya. "Justice: Means versus Freedoms." *Philosophy and Public Affairs*, Vol. 19, No. 2, 1990, pp. 111-121, p. 114

<sup>872</sup> Ibid.

<sup>873</sup> Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009, p. 254

<sup>874</sup> Sen, Amartya. "Justice: Means versus Freedoms." *Philosophy and Public Affairs*, Vol. 19, No. 2, 1990, pp. 111-121, p. 114

<sup>875</sup> Ibid., p. 116

<sup>876</sup> Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009, p. 253

however experiencing reduced capability due to the disability<sup>877</sup>. In other words, a person with a disability might have high amount of primary goods and a wealthy lifestyle although at the same time might experience limitations on the freedom to choose and to act.

As regards the condition of disadvantaged people, including persons with disabilities, Rawls proposes specific action in order to deal with the special needs of these people<sup>878</sup>. However, these recommendations may be implemented during a subsequent legislative stage building on the principle of justice, which results in the development of society and its basic institutions.

Furthermore, Sen broadens the focus of the capability approach, stating that such an approach need not focus only on activities carried out and the lifestyle chosen but also on what the individual can potentially do as well as the individual's range of opportunities that can be preferred<sup>879</sup>. The author states that the justice is a matter of freedoms rather than of primary goods. Freedom results from the conversion of resources achieved by persons through their capabilities<sup>880</sup>. These capabilities differ from person to person.

Furthermore, Sen acknowledges that the capability approach is based on an individual methodology since the approach focuses on the personal situation of each individual with the related abilities<sup>881</sup>. In addition, individuals are influenced by society and environmental conditions<sup>882</sup>.

The author relies on the observation put forward by Karl Marx who argues, in his *Critique of the Gotha*<sup>883</sup>, that individuals are members of several groups within

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<sup>877</sup> Sen, Amartya. "Justice: Means versus Freedoms." *Philosophy and Public Affairs*, Vol. 19, No. 2, 1990, pp. 111-121, p. 116

<sup>878</sup> Sen, Amartya. "The Idea of Justice." *The Belknap Press of Harvard University Press Cambridge*, 2009, p. 260

<sup>879</sup> *Ibid.*, p. 235

<sup>880</sup> Sen, Amartya. "Justice: Means versus Freedoms." *Philosophy and Public Affairs*, Vol. 19, No. 2, 1990, pp. 111-121, p. 121

<sup>881</sup> Sen, Amartya. "The Idea of Justice." *The Belknap Press of Harvard University Press Cambridge*, 2009, p. 244-246

<sup>882</sup> *Ibid.*, p. 244-246

<sup>883</sup> Karl, Marx. "Critique of the Gotha Programme." *Dodo Press*, 2009, p. 10

society and that the analysis of each individual cannot be reduced to one dimension only, e.g. membership or identity<sup>884</sup>.

Pursuing further his analysis of the position of disadvantaged persons, Sen focuses on the condition of persons in poverty in the light of the capability approach.

Sen identifies four elements that influence the ability to convert income into kinds of lives. These elements are:

- (1) personal heterogeneities
- (2) diversities in the physical environment
- (3) variation in social climate
- (4) differences in relational perspectives<sup>885</sup>.

The last three in particular relate to the social and environmental circumstances, while the first is connected to personal characteristics, e.g. impairment.

Again, the influence on the one hand of personal traits and on the other hand of society on individuals and the position that each individual has in society is undoubtedly clear. This observation redirects our focus on society and social phenomena and moreover on those theories and approaches that identify society as a source of disability, without disregarding the individual circumstances of each individual.

#### b. The capability approach and the social model of disability

At this stage, it can be argued that there is a plausible consonance between the capability approach and the social model of disability, as well as the human rights model.

As shown above, the capability approach follows an individual methodology, but is also deeply influenced by the role of society and its members. Hence, the capability approach on the one hand pays attention to individual characteristics and on the other hand takes into account societal effects. Similarly, the social model of disability, considering the disability as the construction generated by the

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<sup>884</sup> Sen, Amartya. "The Idea of Justice." The Belknap Press of Harvard University Press Cambridge, 2009, p. 247

<sup>885</sup> Ibid., p. 245

interaction between the social environment and individual impairment, stresses the impact of society on the creation of disability.

In this sense, Burchardt argues that a common feature to the social model of disability and the capability approach is “the recognition of societal barriers to equality, and the central role accorded to discrimination”<sup>886</sup>. In addition, Baylies stresses that the capability approach has a complementary feature to the human approach and the social model of disability insofar as it identifies society itself as a hindrance to the enjoyment of all functionings<sup>887</sup>.

Under Sen’s theory, the ability to convert resources into kinds of lives and freedoms depends on the social environment and also on the position held by the individual as well as the personal condition. Therefore, a person who suffers from an economic, social or political disadvantage is subject to a hindrance and limitation. Such a hindrance and limitation may relate to the opportunities that the person has or could potentially choose.

Furthermore, applying the capability approach in order to define what a ‘disability’ is, Mitra argues that a disability may be conceived of as a deprivation of capabilities or of functionings, and therefore that such “deprivation results from the interaction among the resources available to the person, the personal characteristics (e.g., impairment, age, gender), and the environment”<sup>888</sup>. Likewise, in stating that disability is the result of interaction between social barriers and personal impairments, the social model of disability recognises on the one hand the role of society in raising barriers, and therefore disability, but also on the other hand the undeniable presence and condition of impairments.

According to the social model, the human rights model focuses on the rights and circumstances of individuals as holders of rights, promoting a duty to provide all citizens with equal rights, despite their personal condition. In this sense, in the light of the previous discussion, the opportunity and the freedom of individuals to

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<sup>886</sup> Burchardt, Tania. “Capabilities & Disability: The capabilities framework and the social model of disability.” *Disability & Society*, Vol. 19, No. 7, 2004, pp. 735-751, p. 744

<sup>887</sup> Baylies, Carolyn. “Disability and the Notion of Human Development- Questions of rights and capabilities.” *Disability & Society*, Vol. 17, No. 7, 2002, pp. 725-739, p. 735

<sup>888</sup> Mitra, Sophie. “The Capability Approach and Disability.” *Journal of Disability Policy Studies*, Vol. 16, No. 4, 2006, pp. 236–247, p. 240-241

choose and express their capabilities is closely connected with the rights and condition of members of society as holders of rights.

It is plausible to assert that the set of rights of each person corresponds to the expression of their capabilities. Hence, the capability approach requires society and its members to raise all members, especially the disadvantaged ones, above the minimum threshold of capability in order to provide them with the full range of opportunities, including rights, on an equal footing with others.

c. The capability approach and education

Following the aim of this research, it is appropriate to consider a plausible consonance between education and the capability approach. Since education is the primary focus of this research, it is worth stressing the possible application of the capability approach to education.

In support of such an idea, Unterhalter points to the usefulness of the capability approach in identifying the significant role of education, e.g. education can be conceived of as a form of functioning, or further education can be evaluated in terms of expansion of capabilities<sup>889</sup>.

Moreover, starting from Sen's theory and the capability approach, Saito establishes a link between the capability approach and education. Saito highlights that, based on Sen's theory, two assertions can be made. First, the capability approach may be linked to the Human Development Index (HDI), and secondly, the capability can be applied directly to education<sup>890</sup>. In particular, Saito notes that the HDI mentions as parameters 'educational attainment' (alongside life expectancy and per capita GDP). However, Saito also criticises the combination of the HDI with the capability approach due to the inappropriateness of the parameters used by the HDI itself<sup>891</sup>.

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<sup>889</sup> Unterhalter, Elaine. "Education, capabilities and social justice." Chapter prepared for UNESCO EFA Monitoring Report, 2004/ED/EFA/MRT/PI/76, 2003, p. 5-9

<sup>890</sup> Saito, Madoka. "Amartya Sen's Capability Approach to Education: A Critical Exploration." *Journal of Philosophy of Education*, Vol. 37, No. 1, 2003

<sup>891</sup> *Ibid.*, p. 22

Due to the inappropriateness and dearth of research into and theories on the development of the HDI under the capability approach, it has been decided not to analyse this issue in this research.

Conversely, it would appear fruitful and interesting to analyse further the possible connections between the capability approach and education, and the application of the former to the latter.

In this sense, Saito argues that education broadens the abilities and opportunities of students, thanks to the education received<sup>892</sup>.

Moreover, Terzi also argues that there is a connection between education and the capability approach, maintaining that the capability approach promotes the development of freedoms and achievements that can be achieved through education<sup>893</sup>. Nevertheless, although Terzi focuses especially on capability approach and education in relation to young pupils, i.e. children and their education, due to the low number of sources and the small volume of research in this field, and in particular in the area of higher education, it is appropriate to mention and analyse her studies and the related research.

Indeed, by way of example, Terzi addresses dyslexia as an issue of justice under the capability approach, due to the potential limitations caused by this impairment consisting in a form of limited functioning in writing or reading<sup>894</sup>. The author hence identifies the impairment as a personal characteristic that hampers functioning and disability as the limitation of a capability, taking into account the social and environmental circumstances as influential factors<sup>895</sup>.

In addition, Turner identifies deafness as a hearing impairment that, as a social disability, causes further side-effects such as the denial of social rights, for instance right to education or to employment, and of social status<sup>896</sup>. These

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<sup>892</sup> Ibid., p. 27

<sup>893</sup> Terzi, Lorella. "A capability perspective on impairment, disability and special needs Towards social justice in education." *Theory and Research in Education*, Vol. 3, No. 2, 2005, pp. 197-223, p. 219

<sup>894</sup> Terzi, Lorella. "Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs." *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005, p. 455

<sup>895</sup> Ibid., p. 453

<sup>896</sup> Turner, Bryan S. "Vulnerability and Human Rights." Penn State University Press, 2006, p. 98

limitations result in disadvantages which, under a theory of justice, raises issues concerning equality and the redistribution of resources and functioning.

Therefore, a functioning consists in what a person can actually do or be, and such functioning may be compromised, and a capability may consist in, the opportunity to choose among the several functionings that a person can potentially hold<sup>897</sup>. Under these conditions, the theory of justice and the principle of equality aim to provide the same range of opportunities, or at least to balance the limitation of functionings. Moreover, Unterhalter and Walker affirm that the capability approach endorses on the one hand human rights and on the other hand capabilities and functionings<sup>898</sup>.

Specifically, applying the capability approach to education, Terzi restates Sen's argument that education should be acknowledged among the fundamental capabilities as well as the role of education in broadening the capabilities of a person and improving their living standards<sup>899</sup>.

To complete the discussion, Terzi lists "the basic capabilities for educational functionings:

- Literacy: to be able to read and write;
- Numeracy: to be able to count;
- Sociality and participation: to be able to build and maintain social relationship;
- Learning dispositions: to be able to concentrate and comply with task and work;
- Physical activities: to be able to perform sportive activities;
- Science and technology: to be able to understand phenomena and use the technology;

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<sup>897</sup>Terzi, Lorella. "Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs." *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005, p. 449

<sup>898</sup> Unterhalter, Elaine and Melanie Walker. "Conclusion: Capabilities, Social Justice, and Education." in Walker, Melanie and Elaine Unterhalter (eds). "Amartya Sen's Capability Approach and Social Justice in Education." Palgrave Macmillan, 2007, New York, p. 240

<sup>899</sup> Terzi, Lorella. "The Capability to Be Educated." in Walker, Melanie and Elaine Unterhalter (eds). "Amartya Sen's Capability Approach and Social Justice in Education." Palgrave Macmillan, 2007, New York, p. 25

- Practical reason: to hold a critical reasoning and mind<sup>900</sup>.

Pursuing this reasoning further, on the one hand an impairment may affect one of the functionings of an individual; on the other hand a disability, which arises out of the interaction between the impairment and the social environment, may affect the rights and the opportunities of an individual. In the specific case, these rights encompass the right to be educated, which includes the right to access and participate in education, and the related functionings.

At this stage, the social model of disability helps to localise the cause of the disability in the interaction between the physical or mental impairment and social barriers, which the social model recognises as essential factor in creating a disability. These barriers include material barriers but also non-material barriers, such as biased attitudes or behaviours, deep-rooted mindsets and mechanisms, etc. Furthermore, the human rights model adds further interpretative leeway in focusing on the rights that must be recognised and guaranteed to each individual. Under such a pattern, it may be observed that it is a question of equality and justice to provide equal opportunities and to ensure equal rights. Furthermore, it is for non-discrimination law to cope with those barriers that hamper the full enjoyment and exercise of rights, entailing prejudices, stereotypes, physical obstacles, loss of claims and entitlements, etc.

Thus far this chapter has addressed and discussed the theories on the social contract and social justice, then considering the capability approach in relation to the first two theories. In particular, at this stage it can be argued that there is a correlation between non-discrimination law, and the bases for it, and the capability approach together with issues relating to social justice and social cooperation.

Within such theoretical framework, in order to obtain a full understanding of the position of disability within society, it is appropriate to analyse further the interaction between disability and the other grounds for discrimination and further categories. Pursuing that reasoning further, the discussion will turn to an analysis

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<sup>900</sup> Ibid., p. 37

of disability in the light of other societal concepts such as oppression and vulnerability.

This research focuses on disability as a ground for discrimination. However, there are also other grounds, and these grounds can intersect with each other. Thus, it appears appropriate to analyse the dynamics of this intersection between grounds and how it has been addressed. In particular, it is appropriate to analyse the relationship that can arise between disability and the other grounds, since they might interfere and prevent the proper and effective application of a provision outlawing discrimination.

## ii. Intersectionality

There are various grounds for discrimination and these grounds inevitably intersect with one another since persons may have different characteristics, with reference to which they may suffer from different forms of discrimination at the same time.

For instance, a woman may have a disability and thus may be discriminated against due both to her gender and to her disability. Such a situation may raise an issue of intersectional discrimination.

Interestingly, it can be observed that the concept of intersectionality was initially developed in relation to women and has been developed within further studies. Indeed, the term ‘intersectionality’ was coined and used for the first time in the late 1980s by Crenshaw in relation to African American woman suffering from intersectional discrimination based both on their gender and their ethnicity<sup>901</sup>.

Within the European Union, the concept of intersectionality is not defined or contained in any *hard law*, although it has been analysed and addressed further by *soft law*, policy documents and scholars<sup>902</sup>. However, in EU law the concept of ‘multiple discrimination’ has been used, e.g. in the recitals to Directive 2000/43

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<sup>901</sup> Crenshaw, Kimberle. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." University of Chicago Legal Forum, Vol. 1989, No. 1, Article 8

<sup>902</sup> Bullock, Jess, and Annick Masselot. "Multiple Discrimination and Intersectional Disadvantages: Challenges and Opportunities in the European Union Legal Framework." Columbia Journal of European Law, Vol. 19, No. 1, Winter 2012/2013, p. 57-82, p. 68

and Directive 2000/78. In fact, it has been recognised that “women are often the victims of multiple discrimination”<sup>903</sup>.

In point of fact, the first grounds tackled by EU law were gender and ethnicity, or rather nationality, as part of the strategy to build a Single Market and boost cooperation among Member States and their citizens based on the Four Freedoms. Once again, the issue of multiple and/or intersectional discrimination started from gender, addressing the discrimination suffered by women due to the combined application of gender together with other grounds.

It must be specified that multiple discrimination and intersectional discrimination cannot be identified as synonymous, as will be explained in the following pages.

The lack of any *hard law* definition and the divergent uses of various terms, including multiple discrimination and intersectional discrimination, create confusion and leads to the misuse of the concept of intersectionality<sup>904</sup>.

In order to shed some light on the issue, Burri and Schiek explain that intersectionality arises when the grounds for discrimination cannot be untangled<sup>905</sup>.

With regard to the concept of intersectionality, international law and especially the Convention on the Rights of Persons with Disabilities, offer a fruitful resource and a basis on which develop further reasoning and theories on the application and organisation of grounds of discrimination, and in particular multiple and intersectional discrimination.

Following the UN Covenants, Schiek and Lawson introduce the notion of ‘nodes’ as an organisational parameter for grounds for discrimination, in contrast with the

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<sup>903</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Recital and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

<sup>904</sup> Fredman, Sandra. “Intersectional discrimination in EU gender equality and non-discrimination law.” European Commission, 2016, p. 27

<sup>905</sup> Burri, Susanne and Dagmar Schiek (eds). “Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?.” European Commission, 2009, p. 3

concept of hierarchy, identifying three different nodes: race, gender and disability<sup>906</sup>

The disability node is undoubtedly the most difficult to define and analyse, whereas by contrast the first two have a well-established historical long path and tradition. As early as 1950, the Treaty of Rome mentions equal pay for men and women, and also prohibits discrimination based on nationality<sup>907</sup>.

Furthermore, many studies and authors have written both on gender and on racial discrimination. As discussed above, one of the most influential authors is Nussbaum, who started her studies into discrimination in connection with gender discrimination, developing feminist theories, and only later started to focus on disability, applying her capability approach.

On the concept of disability nodes, after recalling that disability encompasses an heterogeneous group of people and that the social model runs up against the limits of the narrow definition of disability that is largely adopted, Schiek states that “Under the node perspective, the main characteristic, the centre of the discrimination ground, would be any physical, psychological or mental difference resulting in diminished opportunities for participation in social life because those differences are not accommodated”<sup>908</sup>. In addition, the author notes that, understandably and logically, ‘old age’ should be included amongst the disability nodes since elderly people usually show a reduction in their abilities<sup>909</sup>. In Schiek’s opinion, the concept of node explains intersectionality as one of the grounds for discrimination, rejecting a hierarchical approach towards discrimination, and also fosters the improved application of the various grounds

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<sup>906</sup> Schiek, Dagmar and Anna Lawson (eds). “European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination.” Routledge, 2011, Introduction

<sup>907</sup> European Union. Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957

<sup>908</sup> Schiek, Dagmar. “Organizing EU Equality Law around the nodes of ‘Race’, Gender and Disability.” in Schiek, Dagmar and Anna Lawson (eds). “European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination.” Routledge, 2011, p. 25-26

<sup>909</sup> Ibid., p. 26

by applying the different grounds in conjunction rather than in competition with one another<sup>910</sup>. Moreover, Schiek argues that EU disability rights engage intersectionality among the grounds for discrimination also due to the influence of international law<sup>911</sup>. Moreover, the author calls for the reorganisation of non-discrimination law in the light of the potential intersection between grounds entailing a socio-legal approach to the three nodes at stake<sup>912</sup>.

At international level, as already mentioned above, it can be claimed that one of the first international conventions to endorse an intersectional/multiple discrimination approach was the Convention on the Rights of Persons with Disabilities (CRPD). In actual fact, the CRPD mentions ‘multiple discrimination’. Specifically, the CRPD is the first binding text to have mentioned multiple discrimination, although only in relation to gender<sup>913</sup>. Indeed, the CRPD refers to the special condition of women (Art. 6) and children (Art. 7), and specifically Article 6 states that women “are subject to multiple discrimination”<sup>914</sup>.

Moreover, recital (p) of the preamble recognises “the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status”<sup>915</sup>. Here again the term ‘multiple’ is used. However, in its General Comment on the Article at issue, the UN Committee on the Rights of Persons with Disabilities distinguishes between ‘multiple discrimination’ and ‘intersectional discrimination’. In the former case, discrimination is merely

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<sup>910</sup> Ibid., p. 26-27

<sup>911</sup> Schiek, Dagmar. “Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis –a critical legal studies perspective.” *Sociologia del Diritto*, Vol. 2016, No. 2, 2016, p. 29

<sup>912</sup> Schiek, Dagmar. “Intersectionality and the Notion of Disability in EU discrimination law.” *Common Market Law Review*, Vol. 53, No. 1, 2016, pp. 35-63, p. 51

<sup>913</sup> Degener, Theresia. “Intersections between Disability, race and Gender in Discrimination Law in Dagmar, Schiek. “European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination.” Routledge, 2011, p. 36

<sup>914</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 6 and 7

<sup>915</sup> Ibid., Preamble (p)

“aggravated” by the presence of two or more grounds whereas in the second case the grounds interact inseparably<sup>916</sup>. In addition, the Committee states that intersectionality results from the “multidimensional layers of identities” that individuals display in relation to status, conditions, personal characteristics, memberships, etc<sup>917</sup>.

Hence, multiple and intersectional discrimination are undeniably interconnected, and this interconnection is matter of discussion also among scholars. In fact, in their commentary to the CRPD, Della Fina, Cera and Palmisano state, relying on Degener’s studies, that “intersectionality is a form of multiple discrimination”<sup>918</sup>. In the same sense, it has been highlighted that multiple discrimination relies on a mathematical conception of a ground that is added to one or more other grounds in relation to a single person at the same time<sup>919</sup>. By contrast, intersectional discrimination has a narrower meaning, referring to the concurrent application of different grounds at the same time<sup>920</sup>.

Moreover, since the concept of intersectionality is rooted in an interdisciplinary approach, encompassing different studies such as legal, sociological, economic, gender and disability studies, etc. it requires broader action that detects the various factors at play in a situation involving discrimination<sup>921</sup>.

As a matter related to intersectionality, the concept of substantive equality has also been considered. Indeed, a substantive approach to equality requires an assessment of those differences and similarities that must be taken into account and in the relevant situation.

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<sup>916</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 3 on women and girls with disabilities, 25 November 2016, CRPD/C/GC/3, par. 4 (c)

<sup>917</sup> Ibid., par. 16

<sup>918</sup> Della Fina, Valentina et al. (eds.). “The United Nations Convention on the Rights of Persons with Disabilities A Commentary.” Springer International Publishing, 2017, p. 181-182

<sup>919</sup> Makkonen, Timo. “Multiple, compound and intersectional discrimination: bringing the experiences of the most marginalized to the fore.” Institute for Human Rights, Åbo Akademi University, 2002, p. 10-11

<sup>920</sup> Ibid.

<sup>921</sup> Bullock, Jess, and Annick Masselot. "Multiple Discrimination and Intersectional Disadvantages: Challenges and Opportunities in the European Union Legal Framework." *Columbia Journal of European Law*, Vol. 19, No. 1, Winter 2012/2013, p. 57-82, p. 64

In this sense, Fredman presents a substantive approach which encompasses four different dimensions: (1) redistributive, which considers the material disadvantages; (2) recognition, which deals with stereotypes, prejudices and biased attitudes; (3) participative, which fosters participation; and (4) transformative, which aims to introduce structural changes in order to address differences<sup>922</sup>. In any case, the issue of equality will be discussed in detail in the following chapter.

Here it need only be stressed that intersectionality is consistent with substantive equality, requiring a holistic approach which encompasses all of the factors in play. On the one hand, it aims to enhance permanent changes and to achieve a redistribution of resources and opportunities. On the other hand, it detects not only legal and economic disadvantages but also social and psychological ones such as biased attitudes, stereotypes and prejudices.

With specific regard to disability in the context of higher education, Liasidou stresses the need for an intersectionality approach towards persons with disabilities in higher education due to their experiences of social disadvantages on the basis of different and concurrent grounds, such as for instance class, racial, cultural, etc<sup>923</sup>. In addition, the author emphasizes that, in order to combat such disadvantages, broad action aiming to achieve and guarantee social justice is required<sup>924</sup>. Particularly, Liasidou argues that students with disabilities often experience social but also economic disadvantages, adding that a negative attitude towards persons with disabilities creates “elitism”, enforced by an artificial concept of “normalcy”<sup>925</sup>. Since this concept is tailored to the traits and

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<sup>922</sup> Fredman, Sandra. “Intersectional discrimination in EU gender equality and non-discrimination law.” European Commission, 2016, p. 37

<sup>923</sup> Liasidou, Anastasia. “Critical disability studies and socially just change in higher education.” *British Journal of Special Education*, Vol. 41, No. 2, 2014, p. 124-125 and Liasidou, Anastasia. “Intersectional understandings of disability and implications for a social justice reform agenda in education policy and practice.” *Disability and Society*, Vol. 28, No. 3, 2013, pp. 299–312

<sup>924</sup> *Ibid.*

<sup>925</sup> Liasidou, Anastasia. “Critical disability studies and socially just change in higher education.” *British Journal of Special Education*, Vol. 41, No. 2, 2014, p. 125-126

characteristics of those persons that hold a dominant position, those (i.e. persons with disabilities) who do not fall within the common understanding are marginalised and discriminated against, experiencing different types of disadvantage.

In other words, various factors are in play in a context such as education. These are not only legal and social but also economic and psychological, and may give rise to corresponding disadvantages reinforced by the positions held by persons with disabilities.

At this stage it is possible to outline a further aspect to the condition of persons with disabilities within society.

Indeed, persons with disabilities as a discriminated group occupy a position at the margins of society, with its related disadvantages. It is notable that all disadvantages, e.g. economic, political, social, etc., affect one another and are hence strongly intertwined.

In order to fully and completely understand the position of persons with disabilities, and in particular how they are treated and how their *status* is perceived by society, is it helpful to analyse briefly two different concepts: oppression and vulnerability.

These two concepts might fall slightly outside a pure legal approach and may be open to criticism. However, in the light of the complexity of the subject matter it is still worth conducting a brief analysis in order to obtain a full overview of the issue.

### iii. Disability as oppression

As mentioned above, society is the result of interpersonal relationships, which means a certain number of persons who interact with one another. As with every relationship and interaction, it is possible to identify dynamics of power. This assumption is corroborated by the above reasoning, which proves how certain (advantaged) groups prevail over the other (disadvantaged) groups. This prevalence is expressed through a dynamic of oppression.

A situation of oppression against a disadvantaged group may likely affect a person with a disability.

In his book *“Nothing About Us Without Us”*, Charlton discusses extensively the condition of persons with disabilities, recognising the oppression suffered by many societal groups, included persons with disabilities due to their impairments<sup>926</sup>. This oppression is maintained through various channels and in various ways due to economic, social, political and historical reasons. In particular, Charlton mentions the educational situation of students with disabilities, who suffer from marginalisation and differences in treatment throughout their academic careers<sup>927</sup>.

Moreover, it is worth stressing that, while proposing a new social model for disability, the Union of the Physically Impaired Against Segregation (UPIAS) recognises persons with disabilities as “an oppressed group in society”, which is prevented from fully participating in social life due to the barriers erected by society itself<sup>928</sup>.

A situation of oppression involves a dominant group seeking to maintain its dominant position over an oppressed group through deep-rooted structures, including treatments, social *status*, stereotypes, etc. It is already apparent at a first glance how close the connection is between oppression and discrimination as expressions of the same phenomenon. Indeed, both discrimination and oppression feature a social matrix that generates or reinforces situations involving discrimination and oppression as well as situations involving disadvantage and marginalisation.

In this sense, it has been recognised that the social model of disability identifies disability as a social construct involving not only discrimination but also

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<sup>926</sup> Charlton, James I. *“Nothing About Us Without Us: Disability Oppression and Empowerment.”* University of California Press, 2000, p. 30

<sup>927</sup> *Ibid.*, p. 32-34

<sup>928</sup> Union of the Physically Impaired Against Segregation (UPIAS). *“Fundamental Principles of Disability: Being a Summary of the Discussion Held on 22nd November, 1975 and Containing Commentaries from Each Organisation.”* UPIAS/Disability Alliance, 1976, p. 3-4

oppression<sup>929</sup>. Following the social model, it has been argued that, as the social barriers constructing disability can be eradicated, so too oppression deriving from the social context can be contested<sup>930</sup>.

The oppression theory seems to be in keeping with the multiple discrimination theory due to their social basis. In this sense, Roseberry notes that individuals feature several “socially constructed identities”, which are used as grounds for discrimination by hierarchically superior categories of people, who seek to maintain and further justify a particular form of control and oppression to the detriment of the oppressed group<sup>931</sup>.

At this stage, it would appear that the social model of disability is consistent with the theory of disability as oppression and can help to explain it, since both theories are based on the assumption that society creates barriers and hindrances.

In particular, it can be assumed that the advantaged members of society who belong to the dominant societal group use social barriers to hinder disadvantaged persons, who are discriminated against and oppressed as a result, in order to maintain the power and influence of the dominant group over the others.

The theory of disability as oppression goes one step further by adding some historical background along with a more sociological and political connotation to the social barriers.

Despite its age, the theory of disability as oppression described by Abberley at the end of the 1980s appears to be the most accurate and still in step with the times. Specifically, Abberley’s theory of disability as oppression (1) recognises the social origin of impairments (2) recognises the social, financial, environmental

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<sup>929</sup> Degener, Theresia. Chapter 3 “A human rights model of disability.” in Blanck, Peter and Eilionóir Flynn (eds). “Routledge Handbook of Disability Law and Human Rights.” Routledge Handbooks, 2017, p. 33

<sup>930</sup> Lawson, Anna and Mark Priestley, Chapter 1 “The social model of disability Questions for law and legal scholarship?” in Blanck, Peter and Eilionóir Flynn (eds). “Routledge Handbook of Disability Law and Human Rights.” Routledge Handbooks, 2017, p. 5

<sup>931</sup> Roseberry, Lynn. Chapter 2 “Multiple Discrimination.” in: Sargeant, Malcolm (ed) “Age discrimination and diversity: multiple discrimination from an age perspective.” Cambridge University Press, Cambridge, 2011, pp 16–40

and psychological disadvantages (3) recognises the historical origins of the previous two elements (4) asserts the value of modes of living of persons with disabilities (5) promotes a political perspective involving the transformation of state health and welfare provision<sup>932</sup>. This theory links in with the disadvantages associated with economic, social and psychological derivations, together with the ideological and material basis that produces and reinforces disadvantages<sup>933</sup>.

Ultimately, it can be assumed that a theory of oppression logically entails on the one hand an oppressed group and on the other hand an oppressor group, which relies on a dynamic of power and control over the former based on political, economic, and social hierarchies<sup>934</sup>.

Hence, it seems plausible to affirm that the condition of oppression suffered by the oppressed group, in this case persons with disabilities, results from social, economic and political disadvantages. In turn, the situation of oppression and the disadvantages are intertwined and moreover mutually reinforcing. Therefore, since a situation of oppression is characterised by a dynamic of power and control, it appears likely to be the case that the dominant group's aim is to maintain this situation of oppression and subordination in order to maintain their power and control, including the related wealth and privileges. One way in which some objectives can be achieved and retained by the dominant group is to hinder, either intentionally or unintentionally, the subordinate group's progression and growth, encompassing social, economic and political aspects.

Following the capability approach and the oppression theory mentioned above, it is possible to posit a connection between these two theories under an anti-discrimination approach. Thus, in order to outline the connection between oppression and capabilities, it can be plausibly claimed that an oppressed group,

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<sup>932</sup> Abberley, Paul. "The Concept of Oppression and the Development of a Social Theory of Disability." *Disability, Handicap & Society*, Vol. 2, No. 1, 1987, p. 17

<sup>933</sup> *Ibid.*, p. 17-18

<sup>934</sup> Charlton, James I. "Nothing About Us Without Us: Disability Oppression and Empowerment." University of California Press, 2000, p. 30

in other words a discriminated group, will see its opportunities, capabilities and rights jeopardised.

Indeed, Roesler argues that the capability approach shows that “forms of structural oppression [...] affect people's well-being”<sup>935</sup>. This argument arises out of the assumption that deprivation of capabilities and functionings are caused by the social environment, which includes oppression by society and more specifically by advantaged groups.

Pursuing this reasoning further, although it has been challenged and debated within scholarly discussion, it is appropriate to examine a further concept, i.e. ‘vulnerability’.

#### iv. Vulnerability

Vulnerability derives from the Latin word “vulnus” which means “wound” and, as stated by Turner, such vulnerability is commonly applied to all humanity<sup>936</sup>.

In his theory developed during the 2000s, based on the assumption of vulnerability as an ontological condition of human beings, Turner asserts that human beings decide to establish a society in order to pursue a wealthy life and to protect themselves<sup>937</sup>. This theory claims firstly that vulnerability may potentially affect all human beings and secondly that human beings originally and historically formed societies in order to help and support one another. This also reinforces the theory of social contract discussed above.

In the present-day, vulnerability has been developed not as a condition pertaining to all human beings but rather as a condition affecting only certain persons or certain groups. Indeed, ‘vulnerability’ may be interpreted in two different ways: the first as a condition that attaches to all human beings and the second as a

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<sup>935</sup> Roesler Shannon M. “Addressing Environmental Injustices: A Capability Approach to Rulemaking.” *West Virginia Law Review*, Vol. 114, No. 1, 2011, p. 77

<sup>936</sup> Turner, Bryan S. “Vulnerability and Human Rights.” Penn State University Press, 2006, p. 28

<sup>937</sup> *Ibid.*, p. 26

condition that affects certain members or groups of society due to societal structures and constructions<sup>938</sup>.

In the light of the aim of this research, it is important to note that some scholars have recently started to introduce the concept of ‘vulnerability’ in relation to ‘disability’.

In this regard, Turner identifies disability as a social construction created by an “ableist culture” starting from an impairment of a person who, due to this condition, experiences a deprivation of rights<sup>939</sup>. Nonetheless, Turner recognises the existence of vulnerability as a condition that affects persons with impairments just as much as it potentially affects all human beings in general<sup>940</sup>. In particular, Turner refuses an extreme and radical social constructionist approach towards disability and especially vulnerability due to the fact that it is impossible to deny the existence of a real and phenomenological dimension to impairments, both physical and mental, that cause discomfort and pain<sup>941</sup>.

However, in a similar manner to the approach towards disability and oppression, a moderate social constructionist approach may help to explain the origins of the condition of vulnerability and also show the connection between these three concepts: vulnerability, disability and oppression.

Indeed, del Carmen Barranco highlights the connection between oppression and disability and in addition between oppression and vulnerability. The author argues that a disability is identified on the basis of what is “normal” and what is “not normal” although in turn normality is defined by those who hold the power imposing the norm<sup>942</sup>. Likewise, vulnerability depends on the contextual environment, which means that a person in one specific context may be

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<sup>938</sup> del Carmen Barranco Avilés, Maria. “La disabilit ; intellettiva e la disabilit ; psicosociale come situazioni di vulnerabilit .” *Rivista di filosofia del diritto*, Fascicolo 2, dicembre 2018, p. 312

<sup>939</sup> Turner, Bryan S. “Vulnerability and Human Rights.” Penn State University Press, 2006, p. 101

<sup>940</sup> *Ibid.*, p. 101

<sup>941</sup> *Ibid.*, p. 103

<sup>942</sup> del Carmen Barranco Avilés, Maria. “La disabilit ; intellettiva e la disabilit ; psicosociale come situazioni di vulnerabilit .” *Rivista di filosofia del diritto*, Fascicolo 2, dicembre 2018, p. 312

vulnerable and may be a victim of discrimination, but in another context may not be<sup>943</sup>.

Both situations, namely disability and vulnerability, are heavily determined by deep-rooted structures established within society by a relationship of oppression and both are implemented through discriminatory acts and behaviour.

In addition, the social model of disability has been applied to the concept of vulnerability. Following this approach, vulnerability turns into ‘oppression’ as a result of society and in particular due to how society and power relationships are established<sup>944</sup>.

Arguing along the same lines, in the context of disability Shakespeare and Watson recognise a universal and general condition of impairments common to all human beings, which requires medical and social interventions. Thus, not only persons with disabilities may be identified as vulnerable<sup>945</sup>. This assumption is based on the social model of disability in connection with a Marxist theoretical framework, which represents society as a relationship between the majority and the minority where the former is dominant over the oppressed group.

Whilst such an assertion may be questioned, it is useful in recognising a universal condition of potential vulnerability due to the social structure and dynamics of power and control. When applied to persons with disabilities, this approach represents persons with disabilities as a group oppressed by the majority of society, which excludes the minority group and its members. Following such schema, it is possible to claim that the eradication of discrimination against and the exclusion of a societal group will require not only legal and political changes, but also broader cultural changes. These must aim to achieve an inclusive society

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<sup>943</sup> Ibid., p. 312-313, and also Bernardini, Maria Giulia and Orsetta Giolo (eds). “Le teorie critiche del diritto.” Quaderni de L’altro diritto, No. 4, Pisa: Pacini, 2017

<sup>944</sup> del Carmen Barranco Avilés, Maria. “La disabilità; intellettuale e la disabilità; psicosociale come situazioni di vulnerabilità.” *Rivista di filosofia del diritto*, Fascicolo 2, dicembre 2018, p. 311

<sup>945</sup> Shakespeare, Tom and Nicholas Watson. “The social model of disability: an outdated ideology?.” *Research in Social Science and Disability*, Vol. 2, 2002, pp. 9-28, p. 29

and a new perception of persons with disabilities, and to combat stereotypes, negative attitudes and prejudices.

Under this theoretical perspective, it seems that the concept of vulnerability has been used *a priori* in relation to one specific social group irrespective of the specific condition of any given person. Conversely, it can be assumed that the specific condition of a person is a central and decisive factor in determining whether a person (with or without a disability) is characterised by vulnerability. Hence, everyone is (or can be) vulnerable.

In addition, it can be observed that, as is the case for disability, vulnerability is a condition that can affect (potentially) anyone and moreover, just as disability, vulnerability too is influenced by the social environment and its social factors.

It is thus possible to consider and apply the framework outlined above to the condition of persons with disabilities in the context of education, which can be contemplated as a fundamental aspect of the lives of individuals but also of society. Indeed, as theories are applied and used in order to explain societal relations, such as the relationship of oppression or power and control, these theories may likewise be used in order to explain and study the position of certain persons within a specific context and activities, such as education.

Particularly, Moore and Slee refer to the neo-liberal ideology in order to describe the context of education, where competition among individuals is promoted, thus perpetuating the exclusion of persons who are not successful in that competition, generating disadvantages for these persons<sup>946</sup>.

In the light of these theories and the discussion set out above, including in particular the application of the capability approach within education, it can be argued that persons with disabilities must be treated equally compared to their peers without disabilities and that efforts must be made to enable students with disabilities to access education. This includes not only access to courses but also access to classes and exams, eradicating those obstacles or barriers that hinder their participation in education as students on an equal footing with others. Such

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<sup>946</sup> Moore, Michele and Roger Slee. "Disability studies, inclusive education and exclusion." in Watson, Nick et al. (eds). "Routledge Handbook of Disability Studies." Routledge, 2012, p. 228

actions should aim merely to put students in a condition to enjoy their right to education, without establishing any preferential path or causing any disadvantages or non-constructive side-effects for their peers.

One instrument that could shape this action is the reasonable accommodation. This tool has already been used and well-defined in the context of labour law and the Single Market within the European Union.

However, before analysing this instrument in greater detail it is appropriate to briefly outline the integration process of the European Union, which started with the creation of a mere economic community and then turned into a social and political union. This evolution resulted in the introduction and the further development of anti-discrimination law, which enshrined the concept of reasonable accommodation.

In the light of this reasoning, the following chapter will set out the European integration process as distinct from its broader terms, i.e. as a regional social and political phenomenon, as well as in its narrower terms, i.e. specifically in relation to education and employment. Employment will be considered insofar as necessary for this research, a complete overview of this instrument and will gather together those elements that are useful for the aims of this research, namely shaping and enhancing the reasonable accommodation in the context of education.

#### **IV. Reasonable accommodations and disability**

##### **1. Reasonable accommodation and the European Union**

###### **i. Reasonable accommodations and disability in the European Union**

The aim of this chapter is to analyse the current position on the adoption and development of the concept of reasonable accommodation in the light of non-discrimination law in conjunction with the right to education in the context of the European Union, with some focus on national experiences. In addition, it will also consider to some extent employment law as far as it relates to the conditions of workers with disabilities and the provisions on reasonable accommodation.

In particular, the analysis will start from EU law, namely EU directives and national implementing provisions from a comparative perspective, with a specific

focus on Belgium and Italy. However, other countries will also be considered briefly insofar as necessary and appropriate in the light of the aim of the research. In addition, international human rights law will be incorporated into the discussion due to its importance for and influence on EU law.

Moreover, attention will be dedicated to the judicial activity of the Court of Justice of the European Union which is tasked with providing a uniform interpretation for EU law throughout the whole European Union and its Member States, e.g. the provisions and the concepts concerning ‘disability’ and ‘reasonable accommodation’.

Pursuing this analysis further, the judgements of the European Court of Human Rights (ECtHR) will also be considered insofar as the judgements influence EU law or could be taken as models. In particular, it is interesting to note that the ECtHR was the first supranational Court to rule on reasonable accommodation and education.

## ii. The origins of reasonable accommodation

Before analysing in detail and in full the concept of reasonable accommodation in the present day it is appropriate to briefly present the origins of this concept.

The concept of reasonable accommodation was introduced for the first time, as reported by Ferri<sup>947</sup>, in North America. This occurred specifically in the United States of America with the enactment of the US Equal Employment Opportunity Act of 1972, which amended the Civil Rights Act of 1964<sup>948</sup>. Shortly afterwards, the concept also appeared in Canada during the 1980s<sup>949</sup>.

As noted by Waddington, the reasonable accommodation was introduced in relation to the prohibition on discrimination on the grounds of religion within

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<sup>947</sup> Ferri, Delia. “Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg.” *Social Inclusion*, Vol. 6, No. 1, 2018, p. 40–50

<sup>948</sup> Jolls, Christine. “Antidiscrimination and Accommodation.” *Harvard Law Review*, Vol. 115, No. 2, 2001

<sup>949</sup> Banks, Kevin. “Reasonable accommodation as equal opportunity in Canadian employment law.” in Blanpain, Roger & Frank Hendrickx (eds.). “Reasonable accommodation in the modern workplace. Potential and Limits of the Integrative logics of Labour law.” *Kluwer Law International*, 2016

employment<sup>950</sup>. Indeed, in Canada the leading case on the matter is the *O'Malley* case from 1985, concerning a worker who did not wish to work on Saturdays due to her religious beliefs, and was forced to accept to work as a part-time worker<sup>951</sup>. In this case, the Supreme Court allowed the appeal, stating that, due to the absence of valid arguments establishing that it would entail a disproportionate burden, the provision of reasonable accommodation for the worker by the employer would not be unreasonable<sup>952</sup>.

Subsequently, the same Court ruled on the *Meiorin* case concerning discrimination based on the medical condition and physical ability of a worker<sup>953</sup>. On the merits, the Court recognised that the application of the “aerobic standard” in use constituted discrimination<sup>954</sup>. In particular, it is interesting to cite from the Court’s judgment, which stated that “The individual must be tested against a realistic standard that reflects his or her capacities and potential contributions. Having failed to establish that the aerobic standard constitutes the minimum qualification required to perform the job safely and efficiently [...]”. Indeed, the Court suggested that adjustment should be tailored to the individual’s condition, since the ruled applied had not been reasonably established to be essential for the purposes of the job at issue<sup>955</sup>. In her comment on the judgement, Waddington discusses the so-called “unified test”, which states that an act that at first glance may appear to be discriminatory can only be justified if the provision of reasonable accommodation would entail a disproportionate burden for the

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<sup>950</sup> Waddington, Lisa. “Reasonable accommodation, Time to Extend the Duty to Accommodate Beyond Disability?.” *Nederlands Tijdschrift voor de Mensenrechten NTM|NJCM-Bulletin*, Vol. 36, No. 2, 2011, pp. 186-198, p. 189

<sup>951</sup> Supreme Court of Canada. *Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 S.C.R. 536 (*O'Malley's case*)

<sup>952</sup> *Ibid.*

<sup>953</sup> Supreme Court Judgements. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU ('Meiorin')*, 1999, 3 S.C.R. 3, par. 54

<sup>954</sup> *Ibid.*, par. 83

<sup>955</sup> *Ibid.*, par. 82-83

employer<sup>956</sup>. This unified test is considered by Waddington as an interesting and useful tool because it appears to be sufficiently flexible in order to be applied to all grounds of discrimination, even though it impinges upon the distinction typical of EU law, and widespread throughout the Member States, between direct and indirect discrimination and the related legislation on justification<sup>957</sup>.

In order to start the discussion of reasonable accommodation, it is appropriate to recall two preliminary issues already mentioned above: equality and accessibility. It is worth mentioning these concepts due to their close connection with the concept of reasonable accommodation and its further development.

### iii. Equality

Equality has been the object of a long and deep-seated evolution, starting from a mere formal approach through to more advanced models that follow a substantive approach, which entails equality of opportunity and equality of results.

As Aristotle taught, as an embryonic concept of equality, “equality consists of treating equals equally and unequals unequally”<sup>958</sup>. This proposition lays the foundation for the concept of formal equality. Formal equality is strongly based on neutrality which means primarily that everyone must receive identical treatment where their circumstances are similar. However, it also means that no attention will be paid to the specific circumstances of each individual<sup>959</sup>. In other words, equality is identified with equality of treatment, irrespective of the specific circumstances of any given individual.

Moving beyond this formal approach of ‘sameness’, substantive equality considers the structural causes and concrete differences of each individual, although also addresses situations of disadvantage by taking positive steps to

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<sup>956</sup> Waddington, Lisa. “Reasonable accommodation, Time to Extend the Duty to Accommodate Beyond Disability?.” *Nederlands Tijdschrift voor de Mensenrechten NTM|NJCM-Bulletin*, Vol. 36, No. 2, 2011, pp. 186-198, p. 189-197

<sup>957</sup> *Ibid.*

<sup>958</sup> Warrington, John A. “The Ethics Book III.” London: Dent, 1963

<sup>959</sup> Rioux, Marcia H. et al (eds). “Critical Perspectives on Human Rights and Disability Law.” Martinus Nijhoff Publishers, 2011, p. 42

remove those barriers that hinder the achievement of equal opportunities or results<sup>960</sup>.

Specifically, examining formal and substantive equality, Lord and Brown explain that: “Substantive equality is, by contrast, less concerned with equal treatment and more focused on equal access and equal benefits”<sup>961</sup>. Moreover, it has been specified that substantive equality focuses on the specific condition of persons seeking “to compensate for social or historical disadvantages suffered by certain groups”<sup>962</sup>. In addition, the authors specify that it is possible to develop substantive equality into equality of opportunity and equality of results<sup>963</sup>.

Furthermore, Howard argues that equality of opportunity operates in relation to the starting point, seeking to equalise it on the assumption that historical discrimination could result in a less favourable starting position for disadvantaged groups, whereas the equality of results operates in relation to outcomes or results, endorsing a redistribution of goods and resources within the society<sup>964</sup>. In the light of this substantive approach, as a further step equality of opportunity raises awareness concerning legal and institutional barriers affecting certain groups, which can be defined as disadvantaged groups. The aim of this approach is to remove these barriers in order to foster the inclusion and participation of discriminated people in societal life. According to such reasoning, once these

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<sup>960</sup> Bell, Mark. “Equality and the European Union Constitution.” *Industrial Law Journal*, Vol. 33, No. 3, September 2004, pp. 242–260, p. 247

<sup>961</sup> Lord, Janet and Brown, Rebecca. “The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities.” pp. 273-307 in Rioux, Marcia H. et al (eds). “Critical Perspectives on Human Rights and Disability Law.” Martinus Nijhoff Publishers, 2011, p. 275

<sup>962</sup> Koldinská, Kristina. Chapter 15 “EU non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe.” in Schiek, Dagmar and Anna Lawson (eds). “European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination.” Routledge, 2011, p. 244

<sup>963</sup> *Ibid.*, p. 245

<sup>964</sup> Howard, Erica. “The European year of equal opportunities for all – 2007: is the EU moving away from a formal idea of equality?.” *European Law Journal*, Vol. 14, No. 2, pp. 168–85, 2008, p. 171-172

historical barriers have been removed the members of those groups should be able to enjoy and exercise their rights and freedoms on an equal basis with others<sup>965</sup>. In addition, Howard mentions “positive measures” and “positive action”, such as instruments for coping with such a disadvantaged position<sup>966</sup>.

At this stage, due to the likely consonance and confusion that might arise between positive action and reasonable accommodation, it is appropriate to briefly specify the difference between these two concepts. In a nutshell, some authors argue that reasonable accommodation differs from positive action due to its “individualized character”, since positive actions “are aimed at members of a ‘vulnerable’ or ‘underrepresented’ group”<sup>967</sup>, while reasonable accommodation considers only the individual affected and the specific condition of the person in the case at hand.

However, the analysis of the distinction between positive action and reasonable accommodation will be discussed in greater detail below.

Pursuing the above reasoning further, the substantive approach is clear that the root-causes of discrimination, and the related disadvantages, must be identified in historical and structural barriers created within society. These historical and structural barriers are also maintained and enforced by legal and institutional barriers. However, such an approach based on equality of opportunity focuses on the most evident and palpable barriers impeding affected groups; however, it fails to identify other barriers such as “social and attitudinal barriers” in terms of human rights<sup>968</sup>. For its part, equality of results or outcomes aims not simply to

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<sup>965</sup> Marcia H., Rioux and Christopher A. Riddle. “Values In Disability Policy And Law: Equality.” in Marcia H. Rioux at al. “Critical Perspectives on Human Rights and Disability Law.” Martinus Nijhoff Publishers, 2011, p. 44-48

<sup>966</sup> Howard, Erica. “The European year of equal opportunities for all – 2007: is the EU moving away from a formal idea of equality?.” *European Law Journal*, Vol. 14, No. 2, pp. 168–85, 2008, p. 171

<sup>967</sup> Waddington, Lisa and Aart Hendriks. “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination.” *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, No. 3, 2002, pp. 403–427, p. 410

<sup>968</sup> Marcia H., Rioux and Christopher A., Riddle. “Values In Disability Policy And Law: Equality.” in Marcia H. Rioux at al. “Critical Perspectives on Human Rights and Disability Law.” Martinus Nijhoff Publishers, 2011, p. 49

remove structural barriers, including social and attitudinal ones, but also to address and eradicate the resulting disadvantages through a proper policy that combats systematic discrimination and improves the position of disadvantaged groups<sup>969</sup>.

This type of approach is more akin to a human rights approach because, as highlighted by Rioux, Basser and Jones, it shows that “despite the elimination of actual environmental barriers, societal and attitudinal barriers are nevertheless present and in need of attention”<sup>970</sup>. In addition, Fredman claims that the aims of substantive equality should also be to “break the cycle of disadvantage associated with out-groups”, to “promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping” as well as the “celebration of identity within community”, and to “facilitate full participation in society”<sup>971</sup>.

In this sense, substantive equality seems to be the most suitable approach for eradicating not only past and present discrimination but also for enhancing future developments in society.

At this stage, it is appropriate to stress that the Convention on the Rights of Persons with Disabilities, which represents the landmark convention on disability human rights, refers to equality of opportunity as one of its general principles.

It is appropriate to mention the CRPD due to the central role that this convention and its provisions have under EU law, and in particular in relation to reasonable accommodation and persons with disabilities in the context of education. Specifically, the CRPD mentions equality of opportunity in Article 3 (e), which lists the “General principles” of the Convention<sup>972</sup>, acknowledging a close connection with the principle of substantive equality.

It can hence be argued that equality of opportunity aims to ensure that all persons have equal access to and can enjoy all political, civil, social, cultural and

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<sup>969</sup> Ibid., p. 49-51

<sup>970</sup> Ibid., p. 52

<sup>971</sup> Fredman, Sandra. “Providing Equality: Substantive Equality and the Positive Duty to Provide.” *South African Journal on Human Rights*, Vol. 21, No. 2, 2005, pp. 163–90, p. 167

<sup>972</sup> UN General Assembly. *Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 3(e)*

economic rights, without suffering any negative influence due to their individual characteristics or conditions. To this end, it is necessary to remove all barriers that impair the achievement of substantive equality, recognising that these barriers result from discrimination and situations of disadvantage, with historical, social and attitudinal origins<sup>973</sup>. Likewise, it has been incisively asserted that those differences that necessarily exist among human beings must be accommodated in order to neutralise them and to ensure a full and complete participation in society<sup>974</sup>.

Indeed, as Aristotle affirmed and as has been reported<sup>975</sup>, formal equality means treating similar situations in a similar manner and dissimilar situations differently. For its part, substantive equality works by identifying the specific conditions and elements that pertain to the concrete situation.

In addition, Fredman proposes a multi-dimensional approach to equality featuring four different dimensions: (1) the recognition dimension linked to human dignity, (2) the redistributive dimension addressing disadvantage, (3) the transformative dimension seeking to accommodate difference, and (4) the participatory dimension pursuing social inclusion<sup>976</sup>. The author argues that the CRPD mirrors this multi-dimensional approach, in particular by means of the duty to accommodate, in other words the provision on reasonable accommodation, thus reflecting the transformative dimension, which also entails the acceptance of diversities including disabilities<sup>977</sup>. This transformative dimension requires an acknowledgement of differences and calls for changes to social structures that are detrimental for certain persons<sup>978</sup>.

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<sup>973</sup> Marcia H., Rioux and Christopher A. Riddle. "Values In Disability Policy And Law: Equality." in Marcia H. Rioux et al. "Critical Perspectives on Human Rights and Disability Law." Martinus Nijhoff Publishers, 2011, p. 44-49

<sup>974</sup> Ibid., p. 51-52

<sup>975</sup> Warrington, John A. "The Ethics Book III." London: Dent, 1963

<sup>976</sup> Fredman, Sandra. "Discrimination Law." Oxford University Press, 2011, p. 98

<sup>977</sup> Ibid., p. 99

<sup>978</sup> Ibid., 2011, p. 30

This brief and short analysis of the evolution of equality clearly shows the close link between the concept of substantive equality and the instrument of reasonable accommodation since, in aiming to ensure equal opportunities for all persons, substantive equality goes beyond mere formal equality, which aims simply to treat everybody neutrally in the same manner. Likewise, as will be discussed in greater detail below, the reasonable accommodation addresses the personal traits and characteristics of a given individual, providing a tailored adjustment in order to enable that person to exercise and enjoy the rights that he or she is supposed to hold. As noted by de Beco, reasonable accommodations do not rely on formal equality but rather on substantive equality, aiming to guarantee the same opportunities equally to all persons, with or without disability<sup>979</sup>.

Accessibility, which is related to equality but also to reasonable accommodation, is the primary means for achieving substantive equality and for introducing the provision of reasonable accommodation.

#### iv. Accessibility

The concept of accessibility has been introduced together with the concept of universal design. However, these two terms have been recognised as being different from each other. As Iwarsson and Ståhl report, the term universal design, introduced for the first time by Mace, can be defined as: “an approach to design that incorporates products as well as building features which, to the greatest extent possible, can be used by everyone”<sup>980</sup>. The authors specify that “universal design is about social inclusion while accessibility measures implemented after the basic design of a building or a product represents exclusion”<sup>981</sup>. In addition, Lawson

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<sup>979</sup> de Beco, Gauthier. “The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions.” *Netherlands Quarterly of Human Rights*, Vol. 32, No. 3, 2014, Netherlands, pp. 263–287, p. 278

<sup>980</sup> Iwarsson Susanne and Agneta Ståhl. “Accessibility, usability and universal design— Positioning and definition of concepts describing person-environment relationships.” *Disability and Rehabilitation*, Vol. 25, No. 2, 2003, pp. 57-66, p. 61

<sup>981</sup> *Ibid.*

and Gooding stress that universal design applies “not just for buildings and transportation, but also for housing, workplaces and all other aspects of human activity, so that environments and tools are suitable to as many as possible”<sup>982</sup>.

Within the European Union, the so-called Accessibility Act approved in 2019 defines “universal design” as “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design”<sup>983</sup>. In doing so, the Act seems to acknowledge a connection between accessibility and universal design.

In addition, it is self-evident that all definitions display a steady and common understanding of the meaning of universal design.

The Accessibility Act itself does not provide a definition of ‘accessibility’, but rather recognises that “Accessibility prevents or removes barriers to the use of mainstream products and services”<sup>984</sup>. Based on such an assertion, it can be argued that accessibility, and moreover reasonable accommodation as will be discussed below, is an important requirement for achieving the inclusion of as many persons as possible (i.e. also persons with disabilities) into the mainstream system.

Furthermore, Iwarsson and Ståhl specify that accessibility results from interaction between the personal element, i.e. the ability of a person, and the environmental element, i.e. the physical surroundings that the person has to engage with. Here, the environment includes access to and the use of goods but also services<sup>985</sup>, as is

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<sup>982</sup> Lawson, Anna and Caroline Gooding (eds). “Disability Rights in Europe: From Theory to Practice.” Hart, 2005, p. 207

<sup>983</sup> Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, point (50) quoting Article 2 (2) of the UN CRPD

<sup>984</sup> European Commission. Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, Brussels, 2.12.2015, COM (2015) 615 final 2015/0278 (COD), p. 2

<sup>985</sup> Iwarsson Susanne and Agneta Ståhl. “Accessibility, usability and universal design— Positioning and definition of concepts describing person-environment relationships.” *Disability and Rehabilitation*, Vol. 25, No. 2, 2003, pp. 57-66

also stated in the European Accessibility Act in order to guarantee “more inclusion and participation of citizens in society”<sup>986</sup>.

In order to complete the scenario, it must be recalled that also the UN Convention on the Rights of Persons with Disabilities mentions ‘accessibility’ among the general principles in Article 3.

For the purposes of this research, which focuses on persons with disabilities in the context of higher education, it can be argued that accessibility affects access to and participation in education, as a service like any other.

v. Reasonable accommodation, positive measures and equality

Thus far, it has been shown how a formal approach to equality has evolved into a substantive approach. Moreover the general framework in which the reasonable accommodation operates and into which it is possible also to incorporate positive measures has been set out. However, these two instruments differ from each other. Nonetheless, some authors such as Lord and Brown affirm that the “reasonable accommodation requires positive measures to address the unique needs of persons with disabilities in order to ensure the equal right to work, education, [...]”<sup>987</sup>.

Under the substantive equality approach, in order to achieve its objectives and changes, Fredman highlights that “the state should act positively to promote equality”<sup>988</sup>, referring in other words to the positive duty for the State to take action in order to promote and achieve equality.

Pursuing this analysis further, it is appropriate to introduce the concept of reasonable accommodation in the light of substantive equality and in particular

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<sup>986</sup> European Commission. Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, Brussels, 2.12.2015, COM (2015) 615 final 2015/0278 (COD), p. 2

<sup>987</sup> Lord, Janet and Rebecca Brown. “The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities.” pp. 273-307 in Rioux, Marcia H. et al. “Critical Perspectives on Human Rights and Disability Law.” Martinus Nijhoff Publishers, 2011, p. 273

<sup>988</sup> Fredman, Sandra. “Providing Equality: Substantive Equality and the Positive Duty to Provide.” South African Journal on Human Rights, Vol. 21, No. 2, 2005, pp. 163–90, p. 166

equality of opportunity. Indeed, Waddington argues that a disavowal of reasonable accommodation, by declining to assess and cater to an impairment, is tantamount to a disavowal of equal opportunity<sup>989</sup>.

It is important to stress that the purpose of this evolution and consequently of these instruments is to “develop a concept of equality which requires adaptation and change”<sup>990</sup>. In order to bring about this adaptation and change, scholars and legislators originally theorised and adopted positive measures, which may be described as temporary specific and practical instruments intended to assist people belonging to a certain group who have suffered discrimination (e.g. persons with disabilities, women, and so go on), in particular contexts in which discrimination continues and persists<sup>991</sup>, e.g. the workplace.

At this stage, it is appropriate to clarify the distinction between positive duties, positive action and reasonable accommodation, even though this distinction is still blurry also among scholars. As Bell and Waddington explain, “positive duties aim to incorporate the promotion of equality into decision-making and service delivery”<sup>992</sup>. In other words, it is recognised that the State is subject to a general duty to promote equality through new and updated policies and legislation. In this sense, a positive duty may come in the shape of positive action or other measures intended to foster equality. As regards positive action, Bell and Waddington state

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<sup>989</sup> Waddington, Lisa. “Reasonable accommodation, Time to Extend the Duty to Accommodate Beyond Disability?.” *Nederlands Tijdschrift voor de Mensenrechten NTM|NJCM-Bulletin*, Vol. 36, No. 2, 2011, pp. 186-198, p. 187

<sup>990</sup> Fredman S., ‘Disability Equality, A Challenge to the Existing Anti-Discrimination Paradigm?’, in Lawson, Anna and Caroline Gooding (eds). *Disability Rights in Europe. From Theory to Practice*, Oxford: Hart Publishing, 2005, p. 203

<sup>991</sup> Waddington, Lisa. “Fine-tuning non-discrimination law: Exceptions and justifications allowing for differential treatment on the ground of disability.” *International Journal of Discrimination and the Law*, Vol. 15, No. 1-2, 2015, pp. 11–37, p. 13-14

<sup>992</sup> Bell, Mark and Lisa Waddington. “Exploring the boundaries of positive action under EU law: A search for conceptual clarity” *Common Market Law Review*, Vol. 48, 2011, United Kingdom, pp. 1503–1526, p. 1521

that “positive action is primarily concerned with actions that seek to confer benefits on a disadvantaged group”<sup>993</sup>.

Considering the example of gender equality within EU law, Article 154(7) TFEU states in relation to equality among men and women in employment that “the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”<sup>994</sup>. This provision allows EU Member States to adopt positive measures, i.e. measures that have the explicit and specific aim of facilitating and fostering the incorporation of women into labour market and their career advancement.

It can thus be observed that the main difference between positive action and reasonable accommodation lies in the specific individual feature of the reasonable accommodations rather than the general nature of the positive action<sup>995</sup>. In other words, positive action is directed at a group as such, whereas reasonable accommodation is directed at a specific person, focusing on that individual’s condition. Indeed, the duty to accommodate entails a requirement “specifically to take disability into account”<sup>996</sup>.

Furthermore, as noted by Meenan, positive measures do not establish any “subjective rights” whereas reasonable accommodations create “legal standing for the person to challenge the manner by which they are being accommodated”<sup>997</sup>. In addition, it has been largely acknowledged that the denial of reasonable accommodation constitutes discrimination. However, it is not undisputed whether

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<sup>993</sup> Ibid., p. 1520-1521

<sup>994</sup> European Union. Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 154(7)

<sup>995</sup> Meenan, Helen (ed). “Equality Law in an Enlarged European Union. Understanding the Article 13 Directives” Cambridge University Press, 2007, p. 245

<sup>996</sup> Bell, Mark and Lisa Waddington. “Exploring the boundaries of positive action under EU law: A search for conceptual clarity” *Common Market Law Review*, Vol. 48, 2011, United Kingdom, pp. 1503–1526, p. 1517

<sup>997</sup> Meenan, Helen (ed). “Equality Law in an Enlarged European Union. Understanding the Article 13 Directives” Cambridge University Press, 2007, p. 245

such denial causes direct or indirect discrimination, or indeed a third form of discrimination, as noted by Lawson and Gooding in their analysis of Dutch and Belgian implementation legislation<sup>998</sup>. Nevertheless, other authors assert the existence of a close affinity between reasonable accommodation and positive action or affirmative action.

In particular, Doyle affirms that the duty to accommodate “is an example of legally mandated positive action rather than a requirement of reverse or positive discrimination”<sup>999</sup>.

In addition, Tucker argues that reasonable accommodation seeks to remove immediate discrimination, while affirmative action seeks to cope with past discrimination. In this sense, reasonable accommodation does not aim to establish a preferential status for persons with disabilities, but simply to achieve equality in a specific and concrete situation. However, despite these differences, Tucker still perceives the reasonable accommodation as a form of affirmative action due to the implicit requirement to take positive steps in order to achieve equality and to overcome discrimination<sup>1000</sup>. Similarly, Poposka highlights that reasonable accommodation differs from affirmative action since the duty to accommodate does not aim “to increase the participation of persons with disabilities in social life” but merely responds to current discrimination, seeking adjustments that are tailored to the specific individual’s condition<sup>1001</sup>.

Indeed, considering as an example a comparison between quotas and anti-discrimination legislation, Waddington asserts that: “Unlike quotas systems, which are a form of positive action, and which seek to put disabled people in a better position than their non-disabled peers, anti-discrimination legislation merely

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<sup>998</sup> Lawson, Anna and Caroline Gooding (eds). “Disability Rights in Europe. From Theory to Practice.” Oxford: Hart Publishing, 2005, p. 126

<sup>999</sup> Doyle, Brian. “Enabling Legislation or Disassembling Law? The Disability Discrimination Act 1995.” *Modern Law Review*, Vol. 60, 1997, pp. 64-74, p. 74

<sup>1000</sup> Tucker, Bonnie P. “The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm.” *Ohio State Law Journal*, Vol. 62, No. 1 2001, pp. 335-390, p. 345

<sup>1001</sup> Poposka, Zaneta. “Idea behind Reasonable Accommodation as a Way Forward to Achieving Equality.” *Balkan Social Science Review*, Vol.7, June 2016, pp. 7-31, p. 11

seeks to create a level playing field”<sup>1002</sup>. However, the quota system will be analysed in greater detail in the chapter dedicated to employment.

Here, is it appropriate to stress that, whereas positive action aims simply to facilitate persons with disabilities by creating a preferential path simply in order to increase the rate of employment of persons with disabilities, non-discrimination law, and specifically reasonable accommodation, aims to eradicate current discrimination by removing those barriers that impair full participation by persons suffering from discrimination on an equal basis with others.

In addition, in particular through the duty to accommodate, disability non-discrimination law proves to be asymmetric in nature.

Indeed, the duty to accommodate requires that persons with a disability be treated differently from their peers who do not have any disability<sup>1003</sup>. In other words, disability non-discrimination law protects only persons with disabilities and not also persons without any disability, due to the goal of the State of implementing certain measures in favour of specific groups, without such measures amounting to discrimination<sup>1004</sup>. Drawing on a more tangible example, Karlan and Rutherglen stress that the legislation enacted to protect women, blacks and older workers enables them to “complain of discrimination against them, but they cannot insist upon discrimination in their favor”, even though persons with disability can<sup>1005</sup>. This observation implies that persons with a disability are allowed, on the basis of their disability, to ask for positive action to be taken in order to achieve certain objectives, whereas similar demands cannot legitimately

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<sup>1002</sup> Waddington, Lisa. “Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws.” *Comparative Labor Law Journal* Vol. 18, No. 1, 1996, pp. 62–101, p. 73

<sup>1003</sup> Waddington, Lisa (ed). “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice.” Report. EU network of experts on disability discrimination 2004, p. 7

<sup>1004</sup> Waddington, Lisa. “Fine-tuning non-discrimination law: Exceptions and justifications allowing for differential treatment on the ground of disability.” *International Journal of Discrimination and the Law*, Vol. 15, No. 1-2, 2015, pp. 11–37, p. 20-21

<sup>1005</sup> Karlan, Pamela S., and George Rutherglen. “Disabilities, Discrimination, and Reasonable Accommodation.” *Duke Law Journal*, Vol. 46, No. 1, October 1996, pp. 1-42, p. 3

be made on other grounds. In other words, it can be argued that the duty to accommodate entails the right to demand positive action in order to overcome discrimination.

Before analysing in detail, the implementation legislation of some EU Member States in the area at issue, it is appropriate to start with EU law, and also with the relevant judgements of the CJEU, in order to outline the basis for current EU legislation on disability rights and non-discrimination law, focusing in particular on reasonable accommodation.

vi. Directive 2000/78 and a general framework for equal treatment

Within the European Union, noteworthy progress within non-discrimination law and related policy was achieved with the adoption of the Amsterdam Treaty in 1997<sup>1006</sup> and the subsequent Directive 2000/78/EC, thanks to which the European Union has become a “world leader in developing appropriate anti-discrimination law on the ground of disability in the employment context”<sup>1007</sup>. In particular, the Amsterdam Treaty provided a new legal basis for subsequent legislations and political acts with an innovative pattern at EU level, and also represented a new development for non-discrimination law. This pattern, which originally involved the introduction of new competences at the European level, outlines a new legal framework which is intended to provide a basis for new legislation as well as modern policy in relation to disability.

Indeed, Article 13 EC vested the Community with competence to act in relation to discrimination<sup>1008</sup> and specifically introduced ‘disability’ as one of the grounds for discrimination<sup>1009</sup>.

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<sup>1006</sup> Bell, Mark. “Article 13 EC: The European Commission’s Anti-discrimination Proposals.” *Industrial Law Journal*, Vol. 29, No. 1, March 2000, p. 79

<sup>1007</sup> Meenan, Helen (ed). “Equality Law in an Enlarged European Union. Understanding the Article 13 Directives.” Cambridge University Press, 2007, p. 242

<sup>1008</sup> Waddington, Lisa. “Testing the Limits of the EC Treaty Article on Non-discrimination.” *Industrial Law Journal*, Vol. 29, No. 2, June 2000, p. 133

Accordinging Article 13 of the EC Treaty:

*“1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

*2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251”<sup>1010</sup>.*

Following the path indicated, following the Commission’s proposal<sup>1011</sup>, on November 2000 the Council adopted Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which includes a unique provision concerning ‘reasonable accommodation’<sup>1012</sup>.

Specifically, Article 5 of Directive 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*

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<sup>1009</sup> European Union. Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997

<sup>1010</sup> Ibid., Article 13

<sup>1011</sup> European Commission. Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (2000/C 177 E/07) COM(1999) 565 final 1999/0225 (Submitted by the Commission on 6 January 2000)

<sup>1012</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

*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*<sup>1013</sup>.

Moreover, recital 20 of the preamble to the Directive lists possible measures that may constitute reasonable accommodations:

*“Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources”*<sup>1014</sup>.

Moreover, it is also important to recall recital 17, which states that:

*“This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities”*<sup>1015</sup>.

It has been highlighted that recital 17 is important due to the reference to ‘the essential functions’, which implies that a reasonable accommodation must result from dialogue between the employer and the employee, as well as the need to identify essential functions, distinguishing them from marginal functions<sup>1016</sup>.

The Directive offers an initial hint at an innovative approach towards persons with disabilities, recognising the duty to accommodate in order to eradicate those barriers, created by society, environments and prejudices, that hinder access to and participation in the labour market. Indeed, there is still a particular

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<sup>1013</sup> Ibid., Article 5

<sup>1014</sup> Ibid., Recital 20

<sup>1015</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Recital 20

<sup>1016</sup> Quinn, Gerard. “Disability discrimination law in the European Union.” in Meenan, Helen (ed). “Equality Law in an Enlarged European Union. Understanding the Article 13 Directives.” Cambridge University Press, 2007, p. 264

requirement for employers to focus more on the disabilities of a particular person than on abilities<sup>1017</sup>.

The crucial point concerns the fact that the reasonable accommodation is not intended to confer special advantages but rather to introduce those adjustments that, in fostering the abilities of the individual concerned, enable persons with disabilities to act as any other person without any disability does. Indeed, the aim of reasonable accommodation is ensure that persons with disabilities can gain access and participate under the same conditions as persons without disabilities, eliminating those hindrances that do not permit such access and participation.

The concept of reasonable accommodation has also been contemplated under international law, specifically by the United Nations, incorporating some innovative features and developments. Therefore, insofar as international law and EU law are intertwined, the provision on reasonable accommodation within the UN will be discussed below.

## **2. The United Nations and ‘reasonable accommodation’**

### **i. The United Nations and reasonable accommodation**

The landmark document at international level in relation to disability and specifically reasonable accommodation, is the Convention on the Rights of Persons with Disabilities adopted in December 2006 by the General Assembly of the United Nations<sup>1018</sup>. With specific regard to reasonable accommodation, the Convention states that “reasonable accommodation means 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”<sup>1019</sup>.

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<sup>1017</sup> Whittle, Richard. “The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective.” *European Law Review*, Vol. 27, No. 3, 2002, p. 303-326

<sup>1018</sup> UN General Assembly. *Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106*

<sup>1019</sup> *Ibid.*, Article 2

Hence, a reasonable accommodation seems to be an adjustment that must be necessary and appropriate, which means capable of addressing the societal barriers by neutralising their negative effects. Moreover, the adjustment must not entail a disproportionate or undue burden, which means an excessive cost that should not be borne by the person who is under a duty to accommodate. However, the method for assessing whether a burden is disproportionate or undue features its own difficulties and is debated, in particular as regards the parameters and elements that should be taken into account (or not). As regards specifically the objective of the research, it is fundamental to mention that the Convention recognises the States Parties as being under a duty to accommodate also in the field of education in order to enable persons with disabilities to access tertiary education.

Article 24 (5) provides that:

*“States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities”*<sup>1020</sup>.

It is appropriate to stress that the provision mentioning reasonable accommodations at the end of the paragraph seems to suggest that the reasonable accommodation is the most appropriate instrument for pursuing and guaranteeing equality and non-discrimination in the context of education. Furthermore, education encompasses tertiary education, vocational training and adult education as a whole.

## ii. Accessibility and the United Nations

Within the United Nations (UN) and in particular under the Convention on the Rights of Persons with Disabilities, the ‘reasonable accommodation’ is presented as an individual instrument that is “complementary to the accessibility duty”

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<sup>1020</sup> Ibid., Article 24

inserted in broader terms into the framework of the “obligation to develop an inclusive education system”<sup>1021</sup>.

As explained by Mégret and Msipa, the reasonable accommodation entails an individual approach since it consists in a tailored measure directed at one individual person placed within a specific situation in order to enable that person to enjoy and exercise a right; on the other hand, accessibility entails a general approach since it requires broader structural changes calling for a general and preliminary duty to make all the services, goods and so go on accessible to everyone, or as far as possible<sup>1022</sup>. In addition, it must be stressed that accessibility is features as one of the general principles under the Convention in Article 3, together with the respect for inherent dignity, non-discrimination, effective participation and inclusion, although also alongside acceptance of persons with disabilities and likewise equality of opportunity<sup>1023</sup>.

With regard to accessibility, in its General Comment No. 2 of 2014 the UN Committee on the Rights of Persons with Disabilities calls for the need to remove “barriers to access to existing objects, facilities, goods and services” and additionally that “accessibility is precondition for persons with disabilities to live independently and participate fully and equally in society”<sup>1024</sup>. According to these statements, it appears self-evident that accessibility embodies a framework that enshrines the duty to accommodate and the instrument of reasonable accommodation. Even in lexical terms, the connection between accessibility and reasonable accommodation is undeniable. Indeed, in its report the Higher Commissioner for Human Rights highlights that the reasonable accommodation is an instrument capable of guaranteeing access to education for persons with

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<sup>1021</sup> UN Committee on the Rights of Persons with Disabilities. General comment No. 4 on the right to inclusive education, 2 September 2016, CRPD/C/GC/4, par. 28 and 29

<sup>1022</sup> Mégret, Frédéric. & Dianah Msipa. “Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality.” *South African Journal on Human Rights*, Vol. 30, No. 2, 2014, pp. 252-274, p. 258

<sup>1023</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 3

<sup>1024</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 2, Article 9: Accessibility, 22 May 2014, CRPD/C/GC/2, p. 1-2

disabilities that is equal to the access enjoyed by their peers who do not have any disability<sup>1025</sup>, also emphasising the connection with the principle of equality and the right to education.

At this stage, it is appropriate to briefly set out the most relevant decision and comment made by the UN Committee on the Rights of Persons with Disabilities regarding the matter at stake. Specifically, in the case of *F. v Austria*, concerning a complaint brought by a blind citizen concerning the lack of real-time information on public transport<sup>1026</sup>, as stated in the General Comment No. 2<sup>1027</sup>, the UN Committee noted that accessibility refers to a group whereas reasonable accommodation refers to an individual, which means that accessibility constitutes a duty “*ex ante*”<sup>1028</sup>. In addition, in its General Comment No. 2 the Committee highlighted that accessibility encompasses goods and services available to everyone and that such accessibility must be guaranteed having regard to effectiveness and equality of accessibility as well as the dignity of the users<sup>1029</sup>, which means that access pertains not only to physical environments but also to information and how-know.

It is possible to conclude from the above that accessibility provides a general structure within which reasonable accommodation may be put in place. In this sense, accessibility constitutes preventive action aimed at providing an environment that is accessible for as many persons as possible. On the other hand, the reasonable accommodation constitutes a corrective action that is tailored to the

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<sup>1025</sup> UN General Assembly. Thematic study on the right of persons with disabilities to education – Report of the Office of the United Nations High Commissioner for Human Rights, 18 December 2013, A/HRC/25/29

<sup>1026</sup> UN Committee on the Rights of Persons with Disabilities Communication No. 21/2014 Views adopted by the Committee at its fourteenth session, 17 August - 4 September 2015, *F. v Austria*, 24 March 2014, CRPD/C/14/D/21/2014, par. 1-3.3

<sup>1027</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 2, Article 9: Accessibility, 22 May 2014, CRPD/C/GC/2

<sup>1028</sup> UN Committee on the Rights of Persons with Disabilities Communication No. 21/2014 Views adopted by the Committee at its fourteenth session, 17 August - 4 September 2015, *F. v Austria*, 24 March 2014, CRPD/C/14/D/21/2014, par. 8.4

<sup>1029</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 2, Article 9: Accessibility, 22 May 2014, CRPD/C/GC/2

individual's condition and intended to redress a distortion, in other words discrimination, within that environment.

For the purposes of this research, it is appropriate to introduce the concept of inclusive education, and subsequently to move further with the analysis of the concept of reasonable accommodation within the United Nations.

### iii. Inclusive education and the United Nations

Under the principle of non-discrimination and the principle of equality, access to and participation in education invoke the concept of 'inclusive education'.

Indeed, the conclusion contained in the annual report of the United Nations High Commissioner for Human Rights firmly declares that: "Inclusive education is essential to achieving universality of the right to education, including for persons with disabilities. Only inclusive education systems can provide both quality of education and social development for persons with disabilities"<sup>1030</sup>. Furthermore, in its General Comment on the Right to Inclusive Education, the UN Committee on the Rights of Persons with Disabilities recognises inclusive education as a "fundamental human right of all learners" and acknowledges the various types of constraint impeding it, from social and attitudinal barriers to financial and legal barriers<sup>1031</sup>.

It is worth citing paragraph 4 of the General Comments including its first three points on barriers to inclusive education and discrimination in education in general.

*"Barriers that impede access to inclusive education for persons with disabilities can be attributed to multiple factors, including:*

- a) the failure to understand or implement the human rights model of disability, in which barriers within the community and society, rather than personal impairments, exclude persons with disabilities;*

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<sup>1030</sup> UN Committee on the Rights of Persons with Disabilities. General comment No. 4 on the right to inclusive education, 2 September 2016, CRPD/C/GC/4, par. 2

<sup>1031</sup> Ibid., par. 10 and 13

- b) *persistent discrimination against persons with disabilities, compounded by the isolation of those still living in long-term residential institutions, and low expectations about those in mainstream settings, allowing prejudices and fear to escalate and remain unchallenged;*
- c) *lack of knowledge about the nature and advantages of inclusive and quality education, and diversity, including regarding competitiveness, in learning for all; lack of outreach to all parents and lack of appropriate responses to support requirements, leading to misplaced fears, and stereotypes, that inclusion will cause a deterioration in the quality of education, or otherwise impact negatively on others*<sup>1032</sup>.

It is important to stress that the paragraph refers not only to the human rights model and but also to prejudices, fears and stereotypes, explicitly asserting the need to endorse a comprehensive approach. In other words, it seems to suggest that a human rights model, which focuses on guaranteeing all rights to everyone, also requires a wide social and cultural approach encompassing attitudes, prejudices and biased behaviours.

Furthermore, the UN Committee also states that the right to inclusive education must be premised on transformative action touching upon policy, practice and culture<sup>1033</sup>.

The concept of inclusive education will be considered again in the concluding part of this research together with the capability approach. For now, it is appropriate to examine reasonable accommodation further in the light of the decision of the UN Committee on the Rights of Persons with Disabilities.

iv. Reasonable accommodation and the UN Committee on the Rights of Persons with Disabilities

The introduction to the United Nations Convention on the Rights of Persons with Disabilities asserts the concept of reasonable accommodation at international

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<sup>1032</sup> Ibid., par. 4

<sup>1033</sup> Ibid., par. 9

level, and it has also been endorsed at national level by the Member States that have adopted the Convention. However, it must be stressed that the implementation of this provision has been slowed down a little, perhaps due to the unfamiliarity of States with the concept at issue.

The Convention mentions the concept of reasonable accommodation in Article 5, entitled ‘Equality and non-discrimination’, which calls on all Member States to take the necessary measures to ensure reasonable accommodation to persons with disabilities in order to combat discrimination on the ground of disability. On the other hand, in Article 24, on the right to education, the Convention expressly requires Member States to ensure reasonable accommodation tailored to the needs of the individual.

The Convention provides a definition of “reasonable accommodation” in Article 2, which provides that reasonable accommodation:

*“means 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”<sup>1034</sup>.*

However, the Convention does not specify what should be considered as ‘reasonable’ and how the notion of ‘a disproportionate or undue burden’ should be construed.

On the matter, the UN Committee on the Rights of Persons with Disabilities expressly asserts in its General Comment No. 6 on ‘equality and non-discrimination’ that “the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made and if it is tailored to meet the requirements of the

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<sup>1034</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 2

person with a disability”<sup>1035</sup>. Again, the Committee emphasises that the reasonable accommodation must be tailored to individual needs and traits but also that such measures must be effective. Specifically, it is necessary to assess whether the measure is effective, which means that the measure must be appropriate for achieving the ultimate goal of neutralising the barriers identified in order to enable persons to exercise the right at stake. In addition, it is also necessary to assess whether or not the accommodation at stake constitutes an undue or disproportionate burden<sup>1036</sup>.

As regards the notion of ‘reasonableness’, the General Assembly has approved a report of the Office of the United Nations High Commissioner for Human Rights containing a thematic study on the right of persons with disabilities to education in which it is specified that: “Reasonableness is understood as the result of an objective test that involves an analysis of the availability of resources, as well as the relevance of the accommodation, and the expected goal of countering discrimination”<sup>1037</sup>. However, the concept of reasonableness and its conceptualisation at national level will be discussed in the following section. Interestingly, the report relies on the jurisprudence of the Committee on the Rights of Persons with Disabilities in order to develop such test.

The United Nations has never been called upon, through its UN Committee on the Rights of Persons with Disabilities, to rule on cases involving reasonable accommodation in the context of education, although it has in other contexts. Nevertheless, it is beneficial to discuss these cases, even though they relate to contexts different from education as they may raise and address common points and issues.

The *HM v Sweden* case is the first case in which the UN Committee on the Rights of Persons with Disabilities dealt with the issue of reasonable accommodations, albeit not in relation to education. Specifically, the Committee asserted that the

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<sup>1035</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 6 on equality and non-discrimination, 26 April 2018, CRPD/C/GC/6, par. 25 (a)

<sup>1036</sup> *Ibid.*, para. 25

<sup>1037</sup> Thematic study on the right of persons with disabilities to education Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/25/29, par. 43

States also violate the prohibition on discrimination when “without objective and reasonable justification, [they] fail to treat differently persons whose situations are significantly different”<sup>1038</sup>. The case concerned a Swedish citizen who had applied for building permission in order to construct a hydrotherapy pool for rehabilitation purposes, seeking a waiver of the applicable regulations, since the applicant was affected by chronic connective tissue disorder. The national and local courts rejected the application on the basis of existing regulation and in particular the related Planning and Building Act, which did not permit such variation<sup>1039</sup>.

In their analysis of the effects of the concept of reasonable accommodation on equality law, Mégret and Msipa take as an example the case *HM v Sweden* brought before the UN Committee. The authors define the reasonable accommodation as “any modification or adjustment that is necessary or appropriate to allow a particular individual with a disability the equal enjoyment of all human rights and fundamental freedoms”<sup>1040</sup>, highlighting the importance of focusing on the specific individual and the related needs. Such a modification or adjustment, as a specific and personal measure, addresses these inequalities by removing the barriers hindering equal opportunities. Furthermore, the authors refer to Rioux and Riddle who, identifying the link between reasonable accommodation and substantive equality, state that the removal of the barriers allows persons who have historically been discriminated against due to their personal traits to achieve substantive equality<sup>1041</sup>. Moreover, Mégret and Msipa stress that in the *HM v Sweden* case the discrimination arose from a neutral provision and that its formal and indeed neutral application, and the subsequent

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<sup>1038</sup> UN Committee on the Rights of Persons with Disabilities, Communication No. 3/2011 Views adopted by the Committee at its 7th session, 16 to 27 April 2012, *HM v Sweden* case, 21 May 2012, CRPD/C/7/D/3/2011, par. 8.3

<sup>1039</sup> *Ibid.*, par. 1-3.1

<sup>1040</sup> Mégret, Frédéric. and Dianah Msipa. “Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality.” *South African Journal on Human Rights*, Vol. 30, No. 2, 2014, pp. 252-274, p. 263

<sup>1041</sup> Rioux, Marcia H. & Christopher A. Riddle. “Values in Disability Policy and Law: Equality.” in Rioux, Marcia H. at al. (eds) “Critical Perspectives on Human Rights and Disability Law.” Boston: Martinus Nijhoff Publishers, 2011, p. 44

denial of reasonable accommodation, in itself amounted to discrimination<sup>1042</sup>. This statement relies on the belief that, in some cases, the principle of equality calls for different treatment from that provided for under the formal or general rule<sup>1043</sup>. Furthermore, Megrét and Msipa remark that the case endorsed a two-stage test, considering firstly the effectiveness of the reasonable accommodation and secondly whether it was disproportionate or constituted an undue burden<sup>1044</sup>. This approach stresses the need to focus primarily on the needs of the individual and on how to cope with the inequalities raised and secondly to assess whether the measure constitutes a disproportionate or undue burden for the provider.

In addition, in its Communication on the *HM v Sweden* case the UN Committee unquestionably concluded that, in the particular situation, the State had failed to address “the specific circumstances” and the individual needs associated with the applicant’s disability<sup>1045</sup>. Subsequently, the UN Committee declared that the refusal by the State to provide the reasonable accommodation sought the applicant was disproportionate, and therefore constituted a violation of the non-discrimination principle<sup>1046</sup>.

A couple of years later, in another case brought against Sweden in 2014, the *Jungelin v Sweden* case, some members of the UN Committee drafted a dissenting opinion asserting the discriminatory effect of the Swedish court’s judgement<sup>1047</sup>.

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<sup>1042</sup> Megrét, Frédéric. and Dianah Msipa. “Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality.” *South African Journal on Human Rights*, Vol. 30, No. 2, 2014, pp. 252-274, p. 264

<sup>1043</sup> Bouchard, Gérard and Charles Taylor. “Building the Future: A Time for Reconciliation.” *Abridged Report*, 2008, p. 22

<sup>1044</sup> Megrét, Frédéric and Dianah Msipa. “Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality.” *South African Journal on Human Rights*, Vol. 30, No. 2, 2014, pp. 252-274, p. 267

<sup>1045</sup> UN Committee on the Rights of Persons with Disabilities, Communication No. 3/2011 Views adopted by the Committee at its 7th session, 16 to 27 April 2012, *HM v Sweden* case, 21 May 2012, CRPD/C/7/D/3/2011, par. 8.8

<sup>1046</sup> *Ibid.*

<sup>1047</sup> UN Committee on the Rights of Persons with Disabilities, Communication No. 5/2011, Marie-Louise Jungelin (represented by the Swedish Association of Visually Impaired Youth (US) and the

In the *Jungelin v Sweden* case, a woman with a sight impairment applied for a post as an assessor/investigator at the Social Insurance Agency. However, the application was denied by the employer because, according to its assessment, it was not feasible to provide a computer system which could cope with her impairment and enable her to work<sup>1048</sup>. Specifically, the UN Committee held that this did not amount to a violation of Article 5 (equality and non-discrimination) or Article 27 (work and employment). The UN Committee recognised that Member States have some freedom in assessing whether the accommodation is reasonable and proportional<sup>1049</sup>, specifying further that the national judgement must carry out an objective evaluation before concluding that the potential adjustment would constitute an undue burden for the employer<sup>1050</sup>.

In their dissenting joint opinion, the members of the UN Committee restated the essential feature of the reasonable accommodation, which is determined “on a case-by-case basis and the reasonableness and proportionality of the measure”. This means that the measure must have the aim of promoting employment and that it must be reasonable to expect the company to adopt the measure requested<sup>1051</sup>.

The UN Committee seems to affirm that the evaluation of a reasonable accommodation entails a twofold assessment concerning both reasonableness and proportionality. These two elements are necessary in order to assess whether the adjustment achieves the goal of promoting the right at stake and whether the adjustment constitutes an undue burden in the light of the resources available. Moreover, Ferri considers the *Jungelin v. Sweden* case and the *Michael Lockrey v. Australia* case, where the UN Committee specified that “reasonableness” refers to

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Swedish Association of the Visually Impaired (SRF) v. Sweden, 14 November 2014, CRPD/C/12/D/5/2011, par. 1

<sup>1048</sup> Ibid., par. 2.1-2.5

<sup>1049</sup> Ibid., par. 10.5

<sup>1050</sup> Ibid., par. 10.6

<sup>1051</sup> Ibid., par. 4

the relevance and effectiveness of the measure for eradicating the situation of disadvantage suffered by the person with a disability<sup>1052</sup>.

In particular, in the *Jungelin* case the UN Committee clarified that the reasonable accommodation must be decided upon on a case-by-case basis and that, in order to assess the reasonableness and proportionality of the accommodation, it is necessary to take account of several factors<sup>1053</sup>. Furthermore, in the *Lockrey* case, the UN Committee stressed that Member States have a certain margin of discretion in assessing reasonableness and proportionality and that such assessments must be carried out in a careful and objective manner in order to be able to conclude that the measure represents a disproportionate or undue burden<sup>1054</sup>.

As already mentioned above, the reasonable accommodation was introduced into EU law by Directive 2000/78, and was hence implemented by each Member State within the context of employment. On the other hand, international documents and in particular the Convention on the Rights of Persons with Disabilities extend the reasonable accommodation to other fields, such as education. Similarly, as will be pointed out below, some States have extended the duty to accommodate to other fields as well.

As regards the national context, in particular in Italy (although the same is also the case elsewhere), it may be noted that the reasonable accommodation is seldom applied or recognised, although supranational acts, such as EU directives and especially the UN Convention (which is however part of EU law following its

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<sup>1052</sup> Ferri, Delia. "Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg." *Social Inclusion*, Vol. 6, No. 1, 2018, p. 43

<sup>1053</sup> UN Committee on the Rights of Persons with Disabilities, Communication No. 5/2011, Marie-Louise Jungelin (represented by the Swedish Association of Visually Impaired Youth (US) and the Swedish Association of the Visually Impaired (SRF)) v. Sweden, 14 November 2014, CRPD/C/12/D/5/2011, par. 4

<sup>1054</sup> UN Committee on the Rights of Persons with Disabilities Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 13/2013, Michael Lockrey (represented by the Australian Centre for Disability Law) v. Australia, 30 May 2016, par. 8.4

adoption by the EU), have been requiring more effective and more frequent recourse to this instrument.

Within the international context, as regards the issue of reasonable accommodations under the European Convention on Human Rights, the European Court of Human Rights has adopted meaningful judgements on the right to education and the duty to accommodate in connection to the rights of persons with disabilities.

In particular, the European Court of Human Rights was the first supranational court that was asked to rule on the issue of reasonable accommodation in the context of education. However, this issue will be discussed below.

At this stage it is appropriate to discuss how the concepts of ‘reasonable’ and ‘accommodation’ have been conceived of within the European Union, drawing specifically on some national examples from Belgium and Italy.

### **3. The concepts of ‘reasonable’ and ‘accommodation’ within European Union**

The European Union is a *sui generis* legal order, comprised of a number of Member States, each with its own different legal system and its own language, rules, mechanisms and traditions.

Indeed, multilingualism is one of the various unique features that characterise the European Union. Undoubtedly there are other unique, major features within the Union, particularly in relation to legal issues. Here it is interesting and appropriate to mention multilingualism as the primary manifestation of the various perceptions of one and the same term throughout the Member States. On this basis, in relation to the legal issue it is possible to identify different interpretations of the same EU provision, e.g. the provision on ‘reasonable accommodation’. In this regard, a paramount contribution is provided by the judgements of the Court of Justice of the European Union, which have recently performed an important role in fulfilling the lack of specific provisions and the lack of a uniform interpretation throughout the European Union.

Under EU law, Article 5 of the Directive 2000/78 provides a definition of ‘reasonable accommodation’ and the related criteria for assessing whether or not the measure should be provided. This provision contains two words, which are interpreted differently by the Member States within their own legal orders; these are, the two terms: ‘accommodation’ and ‘reasonable’.

The analysis will now carry out an overview of the national implementing legislation in order to provide some examples of differences in the interpretation and implementation of an EU provision within domestic law, with particular regard to ‘reasonable accommodation’.

Until now the importance and the leading position of EU law and international law have been shown and discussed; however, national law too plays an essential role. The national implementing legislation and also the national judges required to apply the law (both supranational and national) are in the most appropriate position to give proper effect to the provision on reasonable accommodation.

Indeed, such a general and broad concept as the reasonable accommodation must be enshrined within the specific framework of each national legal system, in each instance subject to the appropriate adaptations and specifications.

i. ‘Reasonableness’ in national implementation legislation

Pursuing further previous research performed by Waddington<sup>1055</sup> regarding the interpretation of ‘reasonableness’ and the related test carried out by the Member States, it is possible to distinguish between two main approaches: a merged approach and a two-stage approach. However, it is possible to identify significant differences even within the same group.

The two approaches involve several countries, although for reasons of space only a few of them will be mentioned. The selection has been operated on the basis of the available material, since not all the countries have been analysed and studied, and further preference has been given to those countries in which access to primary sources is feasible, mainly due to linguistic considerations.

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<sup>1055</sup> Waddington, Lisa. “When it is reasonable for Europeans to be confused: understanding when a disability accommodation is reasonable from a comparative perspective.” *Comparative Labor Law & Policy Journal*, Vol. 29, 2008

The essential difference between the two approaches is whether the legislation, which regulates the duty to accommodate when defining the criteria that are suitable for assessing the ‘disproportionate burden’ and the ‘reasonableness’ of the accommodation, classifies those elements under only one requirement, or whether it subdivides the requirement into two different elements, which in turn correspond to one stage or two stages within the evaluation process.

Indeed, the merged approach is characterised by the presence of only one requirement, which consequently entails one step only of testing in order to evaluate whether the accommodation is reasonable or not. In particular, various legal orders do not mention the ‘disproportionate burden’ or ‘reasonableness’, but rather refer to only one of these criteria.

Conversely, other legal orders establish two different requirements, necessarily entailing two different steps. Such a schema requires that it first be verified whether the accommodation is, for instance, ‘reasonable’ or ‘effective’ following which it must be assessed whether the accommodation involves a ‘disproportionate burden’.

Moreover, each criterion implies a certain number of elements when carrying out the evaluation, which must be considered in order to assess whether or not the requirement has been met. Therefore, each step may be distinguished from the other and even the constituent elements can differ from a legal order to another.

The approach called as ‘merged approach’ is typical of States such as Finland and Belgium. On the other hand, the approach called the ‘two stage approach’ is typical of States such as Germany and the Netherlands.

Under Finnish law, the merged approach<sup>1056</sup> involves only one requirement, which means that no reference is made to a ‘disproportionate burden’ but rather only to ‘reasonableness’. Specifically, Section 15(2)<sup>1057</sup> of the Non-Discrimination Act sets out four factors in assessing the ‘reasonableness’ of the accommodation: the needs of the individual, the financial position of the activity,

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<sup>1056</sup> Non-Discrimination Act, 2004, c. 21/3004, § 5 (Fin.)

<sup>1057</sup> Ibid., Section 15(2)

the estimated costs and any support available for the adjustments<sup>1058</sup>. Aside from the elements provided for under the Finnish Non-Discrimination Act<sup>1059</sup>, the preparatory works also mention further elements<sup>1060</sup>, such as whether any excessive changes are needed as well as compliance with safety legislation<sup>1061</sup>.

The reasonableness test is therefore a substitute for the disproportionate burden defence, which can be found in most other legal orders<sup>1062</sup>.

Furthermore, the Belgian law, which belongs to the merged approach group, albeit with some peculiar features, does not mention ‘reasonableness’ as a criterion. On the contrary, in order to describe that concept it only mentions the ‘disproportionate burden’<sup>1063</sup>. Indeed, the Belgium’s legislation is unusual due to the system involving different regions, with high levels of independence. For this reason, in 2008 a Cooperation Agreement was concluded with the aim of providing a common and indisputable definition of ‘reasonable accommodation’. In particular, Article 2 of the Agreement is of core significance as it provides a definition of ‘reasonable accommodation’. It is evident from this Article how the legislator emphasises the concept of ‘participation’<sup>1064</sup> by linking it to four elements: effectiveness, equality, autonomy and security<sup>1065</sup>.

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<sup>1058</sup> Waddington, Lisa and Andrea Broderick with the assistance of Anne Poulos. “Disability law and reasonable accommodation beyond employment. A legal analysis of the situation in EU Member States.” European Commission, November 2016, Brussels, p. 103

<sup>1059</sup> Finnish Non-Discrimination Act 21/2004, HE 44/2003, Government proposal 44/2003, Section 5

<sup>1060</sup> Preparatory Works to the Finnish Non-Discrimination Act, HE 44/2003, Government proposal 44/2003, Section 5

<sup>1061</sup> Waddington, Lisa. “When it is reasonable for Europeans to be confused: understanding when a disability accommodation is reasonable from a comparative perspective.” *Comparative Labor Law & Policy Journal*, Vol. 29, 2008, p. 324

<sup>1062</sup> *Ibid.*

<sup>1063</sup> Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l’égalité des chances et la lutte contre le racisme, MB 17 mars 2003

<sup>1064</sup> Waddington, Lisa and Andrea Broderick with the assistance of Anne Poulos. “Disability law and reasonable accommodation beyond employment. A legal analysis of the situation in EU Member States.” European Commission, November 2016, Brussels, p. 92-93

<sup>1065</sup> Belgium, Protocol between the Federal State, the Flemish Community, the French Community, the German-speaking Community, the Walloon Region, the Brussels- Capital

Specifically, the Article provides as follows:

*Description du concept des aménagements raisonnables.*

*Art. 2. § 1er. Un aménagement est une mesure concrète pouvant neutraliser l'impact limitatif d'un environnement non adapté sur la participation d'une personne handicapée.*

*§ 2. L'aménagement doit:*

- être efficace afin de permettre à la personne en situation de handicap de participer effectivement à une activité;*
- permettre une participation égale de la personne en situation de handicap;*
- permettre une participation autonome de la personne en situation de handicap;*
- assurer la sécurité de la personne en situation de handicap.*

*Une réalisation uniquement partielle au niveau de la participation égale ou autonome ne peut être un alibi pour la non réalisation de l'aménagement raisonnable.*

*§ 3. Le caractère raisonnable de l'aménagement est évalué à la lumière des indicateurs suivants entre autres:*

- l'impact financier de l'aménagement, compte tenu:*
  - \* d'éventuelles interventions financières de soutien;*
  - \* de la capacité financière de celui qui est obligé de réaliser l'aménagement;*
- l'impact organisationnel de l'aménagement;*
- la fréquence et la durée prévues de l'utilisation de l'aménagement par la personne handicapée;*
- l'impact de l'aménagement sur la qualité de vie d'un (des) utilisateur(s) effectif(s) ou potentiel(s) handicapé(s);*
- l'impact de l'aménagement sur l'environnement et sur d'autres utilisateurs;*
- l'absence d'alternatives équivalentes;*
- la négligence de normes évidentes ou légalement obligatoires.*

The Agreement states which standards the accommodation should aim to achieve, highlighting the main role of 'participation'. Essentially, the accommodation

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Region, the Joint Community Commission, the French Community Commission in favour of people experiencing disability, 19 July 2007, Article 2

should effectively enable persons with disabilities to participate equally in the same manner as all other persons in full autonomy and without any threat to their security. In order to assess the reasonableness, the accommodation must be tested with reference to the related expenses and financial impact. The crucial parameter when evaluating the reasonableness of the accommodation is evidently the financial effort, as it is the only common element that can be found in all countries' legislation on reasonable accommodation analysed until now. This financial effort must be sustainable and must not exceed the real capacity of the body that is under an obligation to provide such accommodation.

By contrast, Germany and the Netherlands adhere to a two-stage test, under which the second step concerns the 'disproportionate burden' and the first step focuses on 'reasonableness' under German law and 'effectiveness' under Dutch law<sup>1066</sup>. Contrary to the previous merged approach, the two-stage approach refers separately to the element of reasonableness (or a different element) and to other elements, such as expense or cost, without referring to disproportionate burden as an expression of reasonableness. Indeed, the two elements ('reasonableness' and 'disproportionate burden') are mentioned and applied separately.

In particular, the Article 81 (4) of the German Social Law recognises first of all that persons with severe disabilities have the right to obtain several accommodations, such as maintaining employment or completing vocational training. Secondly, the legislator subjects employers to a duty to provide such accommodations. However, at the end of the paragraph the legislator states that this right cannot be claimed in cases involving unreasonableness or disproportionate expense or in cases involving a contrast with health or safety provisions. Significantly, the book, which is part of the Social Law Code, is entitled 'Rehabilitation and participation of persons with disabilities'.

Article 81 (4) provides specifically that:

*(4) Die schwerbehinderten Menschen haben gegenüber ihrem Arbeitgeber Anspruch auf*

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<sup>1066</sup> Waddington, Lisa. "When it is reasonable for Europeans to be confused: understanding when a disability accommodation is reasonable from a comparative perspective." *Comparative Labor Law & Policy Journal*, Vol. 29, 2008, p. 324-326

1. Beschäftigung, bei der sie ihre Fähigkeiten und Kenntnisse möglichst voll verwerten und weiterentwickeln können,  
 2. bevorzugte Berücksichtigung bei innerbetrieblichen Maßnahmen der beruflichen Bildung zur Förderung ihres beruflichen Fortkommens,  
 3. Erleichterungen im zumutbaren Umfang zur Teilnahme an außerbetrieblichen Maßnahmen der beruflichen Bildung,  
 4. behinderungsgerechte Einrichtung und Unterhaltung der Arbeitsstätten einschließlich der Betriebsanlagen, Maschinen und Geräte sowie der Gestaltung der Arbeitsplätze, des Arbeitsumfeldes, der Arbeitsorganisation und der Arbeitszeit, unter besonderer Berücksichtigung der Unfallgefahr,  
 5. Ausstattung ihres Arbeitsplatzes mit den erforderlichen technischen Arbeitshilfen  
 unter Berücksichtigung der Behinderung und ihrer Auswirkungen auf die Beschäftigung. Bei der Durchführung der Maßnahmen nach Nummern 1, 4 und 5 unterstützt die Bundesagentur für Arbeit und die Integrationsämter die Arbeitgeber unter Berücksichtigung der für die Beschäftigung wesentlichen Eigenschaften der schwerbehinderten Menschen. Ein Anspruch nach Satz 1 besteht nicht, soweit seine Erfüllung für den Arbeitgeber nicht zumutbar oder mit unverhältnismäßigen Aufwendungen verbunden wäre oder soweit die staatlichen oder berufsgenossenschaftlichen Arbeitsschutzvorschriften oder beamtenrechtliche Vorschriften entgegenstehen.

this approach, especially when considered in the light of the German legal order, implies that “the concept of reasonableness is therefore used as a limitation on the action that can be expected of the employer. [...] The concept is distinct from two other defences to the requirement to make an accommodation - namely that this would result in a disproportionate burden for the employer or breach health and safety rules. The implication is that an accommodation might not result in a disproportionate burden or pose a threat to health and safety standards, but could still not be required of the employer on the grounds that it would be

unreasonable”<sup>1067</sup>. It must be stressed that the provision starts at point (1) by stating that the right to obtain an accommodation is directed at employment and developing as far as possible the knowledge and skills of the worker.

Under Dutch law, the two-stage approach entails two separate assessments: “one must first establish whether any effective accommodation is possible and then, quite separately, consider whether making such an accommodation would amount to a disproportionate burden”<sup>1068</sup>. The Dutch Equal Treatment Commission has taken the opportunity to clarify that, in the light of this “dual test, consisting of the elements of appropriateness and necessity [a measure can be declared] appropriate if it could eliminate impediments to participation in social life [and] necessary if the same objective could not be achieved with another, possibly less expensive”<sup>1069</sup>.

Following this overview of national legislation, it is appropriate to analyse within specific, dedicated sections the two national legal orders that constitute the special focus of this research, namely Belgium and Italy.

## ii. Belgium and reasonable accommodation

Pursuing further the analysis of Belgian legislation on reasonable accommodation, Belgium has a special structure comprised of the Federal State with three different regions, namely the Flemish Region, the Brussels Region and the Walloon Region, and three Communities, namely the Flemish-speaking Community, the French-speaking Community and the German-speaking Community.

Both the Flemish Region/Community, with the Decreet van de Vlaamse Raad van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt, and the German-speaking Community, with its Dekret vom 17. Mai 2004 bezüglich der

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<sup>1067</sup> Ibid., p. 326

<sup>1068</sup> Ibid., p. 331

<sup>1069</sup> Ibid., p. 332

Sicherung der Gleichbehandlung auf dem Arbeitsmark<sup>1070</sup>, simply restated Article 5 of Directive 2000/78.

In particular, Article 13 of the Dekret provides that:

*„Um die Anwendung des Grundsatzes der Gleichbehandlung für Personen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass die zwischengeschalteten Dienstleister und die Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreifen, um den Personen mit Behinderung den Zugang zur Berufsorientierung, zur Berufsberatung die Teilnahme an Aus-, Weiterbildungs- und Umschulungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden diesen zwischengeschalteten Dienstleister oder diesen Arbeitgeber unverhältnismäßig belasten. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch existierende Maßnahmen ausreichend kompensiert wird“<sup>1071</sup>.*

It should be noted that the provision states that a measure that may involve a disproportionate or undue burden for the employer can be allowed if the burden is sufficiently offset by current measures, without stipulating any specific parameters.

Moreover, there is a difference in that only the Flemish Region/Community's Decree fails to mention disability or persons with a disability, as reported by Waddington<sup>1072</sup>.

Similarly, also the Walloon Region<sup>1073</sup> and the French-speaking Community<sup>1074</sup> merely restate in French the text of Directive 2000/78, with the sole exception

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<sup>1070</sup> Decreet van de Vlaamse Raad van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt, MB 26 jullet 2002

<sup>1071</sup> Dekret vom 17. Mai 2004 bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmark

<sup>1072</sup> Waddington, Lisa (ed). "Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice." Report. EU network of experts on disability discrimination 2004, p. 22-23

<sup>1073</sup> Décret du 27 mai 2004 relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle, MB 23 Juin 2004, Article 6

<sup>1074</sup> Décret du 19 mai 2004 relatif à la mise en oeuvre du principe de l'égalité de traitement, MB 7 juin 2004, Article 8

being the specific reference to training or education in the legislation. As is highlighted by Waddington<sup>1075</sup>, this particular feature may suggest a narrow application of the duty to accommodate that is limited only to the educational sphere.

Specifically, Article 8 of the Décret du 19 mai 2004 relatif à la mise en oeuvre du principe de l'égalité de traitement and Article 6 of the Décret du 27 mai 2004 relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle (subsequently replaced by the Décret du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination which restates the same provision in Article 13<sup>1076</sup>) provide that:

*“Afin de garantir le respect du principe de l'égalité de traitement à l'égard des personnes handicapées, des aménagements raisonnables sont effectués. La personne responsable prend les mesures appropriées, en fonction des besoins dans une situation concrète, pour permettre à une personne handicapée de se voir dispenser une formation, sauf si ces mesures imposent à la personne responsable une charge disproportionnée”<sup>1077</sup>.*

Furthermore, also the Federal Law and the decrees adopted by the Communities state that the undue burden associated with a reasonable accommodation does not entail a disproportionate burden if the employer requests public funding.

Indeed, by a specific decree on the integration of persons with disabilities into the labour market, Brussels Region provides for compensation employers that adopt reasonable accommodations<sup>1078</sup>.

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<sup>1075</sup> Waddington, Lisa (ed). “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice.” Report. EU network of experts on disability discrimination 2004, p. 24-25

<sup>1076</sup> Décret du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination, MB 19 décembre 2008, Article 13

<sup>1077</sup> Décret du 19 mai 2004 relatif à la mise en oeuvre du principe de l'égalité de traitement, MB 7 juin 2004, Article 8 and Décret du 27 mai 2004 relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle, MB 23 Juin 2004, Article 6

<sup>1078</sup> Décret relatif à l'intégration sociale et professionnelle des personnes handicapées, Article 26,

In particular, Article 26 (4) of the Décret relatif à l'intégration sociale et professionnelle des personnes handicapées, adopted on 4 March 1999 by the the Commission Communautaire française de la Région de Bruxelles-Capitale states that:

*“d'accorder à l'employeur une intervention dans les frais d'adaptation du poste de travail justifiée par la déficience du travailleur en vue, soit d'engager une personne handicapée, soit de favoriser l'accession du travailleur à une fonction qui répond mieux à ses capacités, soit de maintenir au travail une personne qui devient handicapée”*<sup>1079</sup>.

Here, the provision mentions adjustment of the workplace for the purpose of hiring or facilitating access to employment that is better suited to a person with a disability, or in order to remain in the same job.

In addition, Lawson and Gooding report that the preparatory text for the Belgian statute adopted to implement the Directive 2000/78 on reasonable accommodation mentions three criteria for assessing reasonableness, including whether it consists in a disproportionate burden, although only two criteria were incorporated into the statute and Belgian law<sup>1080</sup>. The first requires an assessment as to whether the accommodation entails a disproportionate burden and secondly an evaluation as to whether it is possible to identify another accommodation involving a lower burden<sup>1081</sup>.

The following section will analyse the provision of reasonable accommodation within Italy, and in particular the legislation adopted regarding this matter and the new rules adopted following the infringement procedure before the Court of Justice of the European Union.

### iii. Italy and reasonable accommodation

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<sup>1079</sup> Décret relatif à l'intégration sociale et professionnelle des personnes handicapées, adopted on 4 March 1999 by the Commission Communautaire française de la Région de Bruxelles-Capitale, Article 26, 4°

<sup>1080</sup> Lawson, Anna and Caroline Gooding (eds). “Disability Rights in Europe. From Theory to Practice.” Oxford: Hart Publishing, 2005, p. 127

<sup>1081</sup> Ibid.

Regarding the issue of reasonable accommodation, the Italian legislator made provision in Decree Law no. 76 of 28 June 2013, successively converted into law by Act no. 99 of 9 August 2013<sup>1082</sup>, which lays down in Article 9 paragraph 4-ter, modifying Legislative Decree no. 216 of 9 July 2003<sup>1083</sup>, a duty for all public and private sector employers to provide reasonable accommodation<sup>1084</sup>. These acts set out complex legislation on worker employment, social cohesion and equal treatment within the labour market. The provision highlights that the legislation requires compliance with the principle of equality for persons with disabilities and that it must be read in line with the provisions of the United Nations Convention on the Rights of Persons with Disabilities, adding that such a duty must not entail any new or increased expenses<sup>1085</sup>.

The new feature introduced by Decree Law 76/2013 was necessary following the launch of an infringement procedure against the Italian Republic by the Commission of European Union before the Court of Justice of the European Union, which ruled that the Italian government was not properly implementing Directive 2000/78<sup>1086</sup>. Specifically, in the Commission's view the obligation to implement Directive 2000/78 was not fulfilled by the Italian State in relation to Article 5, which establishes the obligation for all employers to make reasonable accommodations in favour of all workers with disabilities<sup>1087</sup>. For its part, the Italian government replied quoting two national laws<sup>1088</sup> which, in its view, by setting out various operational obligations and broad protections on the grounds of disability, delineate a general but effective legal framework providing for sufficient protection and obligations similar to those required under Article 5 of

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<sup>1082</sup> Legge del 9 agosto 2013 n. 99

<sup>1083</sup> Decreto legislativo del 9 luglio 2003, n. 216

<sup>1084</sup> Decreto-legge del 28 giugno 2013, n. 76, Articolo 9 comma 4-ter convertito in Legge 9 agosto 2013, n. 99

<sup>1085</sup> Ibid.

<sup>1086</sup> Court of Justice of the European Union. Judgment of the Court (Fourth Chamber) of 4 July 2013. European Commission v Italian Republic, 2013, C-312/11

<sup>1087</sup> Ibid., par. 31

<sup>1088</sup> Legge 12 marzo 1999, n. 68 and Legge 5 febbraio 1992, n. 104

Directive 2000/78<sup>1089</sup>. In particular, the Italian State argued that its law relies on international instruments, showing the flexibility and potential of the Italian law<sup>1090</sup>. In particular, the Italian government referred to Act no. 104/1992, which lays down provisions on the social integration of persons with disabilities, adopting specific detailed provisions in order to pursue integration<sup>1091</sup>. It should be stressed that Article 12 of Act no. 104/1992 recognises the right to education, including higher education<sup>1092</sup>. Furthermore, the Italian government argued that the obligation to adopt and implement the Directive had been complied with by putting in place various incentives and mechanisms to foster employment, e.g. Act no. 68/1999, which subjects employers with more than 15 employees to a duty to hire persons with disabilities, or Legislative-Decree no. 216/2003, which ensures full and equal judicial protection for all persons with disabilities<sup>1093</sup>.

The Commission disputed the Italian government's arguments, claiming that the duty provided for under Article 5 of Directive 2000/78 could not be considered to have been complied with through the provision of mere incentives or beneficial arrangements for persons with disabilities on the labour market<sup>1094</sup>.

Indeed, in its judgement the Court endorsed the position of the Commission, stating that the Italian legislation was limited only to facilitating and fostering the insertion into the labour market of persons with disabilities, without any explicit duty for employers to accommodate<sup>1095</sup>. In its reasoning, the Court relied on the previous *HK Danmark* case, reiterating that the duty to accommodate aims to “remove the barriers of different nature that hinder the full and effective

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<sup>1089</sup> Court of Justice of the European Union. Judgment of the Court (Fourth Chamber) of 4 July 2013. *European Commission v Italian Republic*, 2013, C-312/11, par. 42-43

<sup>1090</sup> *Ibid.*, par. 41

<sup>1091</sup> *Ibid.*, par. 43

<sup>1092</sup> Legge 5 febbraio 1992, n. 104, Art. 12

<sup>1093</sup> Court of Justice of the European Union, Judgment of the Court (Fourth Chamber) of 4 July 2013. *European Commission v Italian Republic*, 2013, C-312/11, par. 44-50

<sup>1094</sup> *Ibid.*, par. 52-53

<sup>1095</sup> *Ibid.*, par. 63-65

participation of persons with disabilities into professional life on an equal basis as the other workers”<sup>1096</sup>.

In this sense, commenting on the above-mentioned case, Agliata highlights that the so-called reasonable accommodations are “all those measures practical, tailored on a case-by-case basis and based on concrete needs, necessities to make the environment and the organisation of the work suitable for persons with disabilities”, subject to the limit of the disproportionate and undue burden for the employer<sup>1097</sup>. The author specifies that the reasonableness of the accommodation must be assessed on the one hand as the effectiveness of the measure in achieving its objective and on the other hand as protection for all stakeholders. These cover those directly involved, in other words the person with a disability, but also those is indirectly involved, such as the other workers without any disability and the enterprise itself<sup>1098</sup>.

When defining reasonable accommodation, the Italian legislation simply refers to the wording of the UN Convention on the Rights of Persons with Disabilities, although this approach is criticised by Agliata as it is indicative of the unwillingness of the Italian to intervene, especially with regard to interpretative matters<sup>1099</sup>.

In its judgement the Court quoted the *HK Danmark (Ring v Dansk)* case, which will be discussed in greater detail in the following pages. At this stage it is sufficient to note that, in this case, the Court held that Article 2 of the UN Convention “prescribes a broad definition of the concept of reasonable accommodation”<sup>1100</sup>. Furthermore, the Court declared that, in terms of reasonable

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<sup>1096</sup> Ibid., par. 59

<sup>1097</sup> Agliata, Maria. “La Corte di giustizia torna a pronunciarsi sulle nozioni di “handicap” e “soluzioni ragionevoli” ai sensi della direttiva 2000/78/CE.” *Diritto delle Relazioni Industriali*, fasc.1, 2014, p. 267

<sup>1098</sup> Ibid., p. 270

<sup>1099</sup> Ibid., p. 269

<sup>1100</sup> Court of Justice of the European Union. Judgment of the Court (Second Chamber), 11 April 2013. *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11)* and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)*, par. 53

accommodation, “with respect to Directive 2000/78, that concept 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”<sup>1101</sup>. Here, the Court stressed, bringing the concept of reasonable accommodation under the umbrella of the equality principle, that it is appropriate to evaluate the measure in terms of the effectiveness of the provision on reasonable accommodation in removing the barriers that hamper the full participation of persons with disabilities. In this sense, the CJEU held that the Italian legal system does not stipulate a duty to accommodate for all employers in favour of all persons with disabilities<sup>1102</sup>. Moreover, the Luxembourg court considered the arguments put forward by the Italian government insufficient in arguing that a combined reading of currently applicable legislation is sufficient in order to subject all employers to a duty to accommodate<sup>1103</sup>. As conclusion, the Court held that it was not sufficient for the law to establish a framework of “incentive and support”, but that it was necessary for the State to make explicit provision to impose an obligation on all employers in order to guarantee the implementation of reasonable accommodation, where appropriate and necessary<sup>1104</sup>.

Here, it would appear that the conclusion reached by the Court seeks to clarify the difference between the intention of the Directive on reasonable accommodation, which follows an anti-discrimination approach, and the intention of the legislation previously enacted and the measures previously implemented. The Directive aims to eradicate any existing discrimination that is hindering the full and effective participation of a person with a disability, while the latter seeks to alleviate and perhaps to counteract a negative trend, where any specific group features a poor level of participation. However, the distinction between reasonable

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<sup>1101</sup> Ibid., par. 54

<sup>1102</sup> Court of Justice of the European Union. Judgment of the Court (Fourth Chamber) of 4 July 2013. *European Commission v Italian Republic*, 2013, C-312/11, par. 67

<sup>1103</sup> Ibid., par. 42-50

<sup>1104</sup> Ibid., par. 62-67

accommodation and other measures (e.g. quotas) will be discussed in greater detail in the dedicated chapter on reasonable accommodation and employment.

Following this analysis of the judgements of the Court of Justice in relation to the Italian legislation, the following section will discuss the most interesting decisions of the CJEU in individual cases concerning specifically the definition of 'reasonable accommodation'

Subsequently, insofar as necessary in order to define the concept of 'reasonable accommodation', the judgements of the European Court of Human Rights will be considered in the following section.

#### **4. The case law of the Court of Justice of the European Union**

At this stage of the research, it will be apparent that the most controversial terms at issue in this study are 'disability' and 'reasonable accommodation', both at national and at EU level. Specifically, the European Union has a unique *status* and, among its various several characteristics, an important one is the existence of different domestic legal orders. These legal orders have different provisions, customs, cultures and also different languages, which create a multilingualism within the EU.

Therefore, it is necessary to guarantee autonomous and uniform interpretation for provisions created at EU level. Such a role is performed, due also to the inactivity or incapability on the part of the European legislator, by the Court of Justice of the European Union.

With these premises in mind, it is essential to analyse the judicial activity of this Court in the area of disability, and notably the effort to provide a common 'European' definition of 'reasonable accommodation'.

In particular, the *Chacon Navas* case from 2006 represents a milestone judgement on disability rights within the European Union, and especially on the effort to provide a common definition of disability and reasonable accommodation within the EU. In this case, the Court of Justice was requested to rule, for the first time, on disability in relation to Directive 2000/78. With regard to the concept of 'reasonable accommodation', in *Chacon Navas* case the Court analysed the plain

wording of recital 17 in the preamble to Directive 2000/78, which states that: “*This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities*”<sup>1105</sup>.

The Court went on to specify that, following the duty to accommodate under Article 5 of the Directive, such a duty must be complied with in order to ensure an equal treatment between persons with disabilities and persons without<sup>1106</sup>. The Court concluded by stating that “this means that employers are to 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, unless such measures would impose a disproportionate burden on the employer”<sup>1107</sup>. In other words, the Court intertwined the concept of reasonable accommodation with the concept of the effectiveness of the measure, which must be proportionate with the objective of guaranteeing full access to and/or participation in employment for persons with disabilities. In addition, the Court stipulated, as a negative limitation, the notion of undue burden as an additional criterion for evaluation.

Furthermore, in *Mangold* case the Court brought the duty to accommodate under the umbrella of the principle of equal treatment. The principle of equal treatment is recognised as a general principle of law. In this regard, Ellis and Watson describe the general principles of law effectively, declaring that “First and foremost, they are a standard of review of the legality of Union measures”<sup>1108</sup>. This means that the general principle of law serves as a legal instrument in order to assess and audit the validity of the legal acts of EU institutions. Indeed, pursuing its obligation under Article 19 TEU, the Court of Justice must “ensure

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<sup>1105</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Recital 17 in the Preamble

<sup>1106</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 11 July 2006. *Sonia Chacón Navas v Eurest Colectividades SA*, Case C-13/05, par. 50

<sup>1107</sup> *Ibid.*

<sup>1108</sup> Ellis, Evelyn and Philippa Watson. “EU Anti-Discrimination Law.” Oxford University Press, 2012, p. 100

that in the interpretation and application of the Treaties the law is observed”<sup>1109</sup>. When carrying out this activity, the Court follows general principles of law, which “form part of what the CJEU views as the ‘constitution’ of the Union”<sup>1110</sup>. In particular, as stated also in the judgement in *Mangold*, Directive 2000/78 provided a legal framework, laying down the principle of equal treatment “whose ‘source’ was to be found in the non-discrimination provisions of international human rights law and the constitutional traditions common to the Member States”<sup>1111</sup>. This case law is noteworthy because, although it does not provide a clear or innovative interpretation of ‘reasonable accommodation’, it does offer a steady general framework within which it is possible to place the duty to accommodate in connection with the principle of equal treatment under the umbrella of the prohibition on discrimination. Moreover, the Court took the general principle of law of equal treatment to embrace all of the non-discrimination clauses laid down by Directive 2000/78. In addition, in the *Chacón Navas* case the Court argued that, in the light of the prohibition on discrimination and the duty to accommodate, the dismissal “is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post”<sup>1112</sup>.

An important judgement, related to the issue on the application of Directive 2000/78 and its provisions on discrimination, was issued by the Court few years later the *Coleman* case, in which the Court clarified that “the purpose of the directive [...] is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in

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<sup>1109</sup> European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Article 19

<sup>1110</sup> Ellis, Evelyn and Philippa Watson. “EU Anti-Discrimination Law.” Oxford University Press, 2012, p. 99

<sup>1111</sup> O’Cinneide, Colm. “The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC.” European Commission, 2012, p. 16

<sup>1112</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 11 July 2006. *Sonia Chacón Navas v Eurest Colectividades SA*, Case C-13/05, par. 51

Article 1. That interpretation is supported by the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78”<sup>1113</sup>. In other words, the Court held that the provision of the Directive is not aimed exclusively at persons with disabilities, but is rather intended to combat and eliminate discriminatory actions and situations that are based on disability, which may affect persons other than exclusively those who actually have disabilities.

The innovative content of this judgement consists in the extension of the prohibition on discrimination to other stakeholders in addition to persons with disabilities themselves, for instance the parents of a child with a disability.

As regards with reasonable accommodation in particular, the core judgment is the *HK Danmark* case from 2013, in which the Court attempted to specify the content of the provision of reasonable accommodation and moreover also relied on the UN Convention on the Rights of Person with Disabilities. In the judgement, the Court started its reasoning by referring to the UN Convention on the Rights of Persons with Disabilities, Article 2 of which recognises that the “provision prescribes a broad definition of the concept of reasonable accommodation”<sup>1114</sup>. Furthermore, the Court specified that, in accordance with Directive 2000/78, the reasonable accommodation must be conceived of as a means of removing the hindrance to “the full and effective participation of persons with disabilities in professional life on an equal basis with other workers”<sup>1115</sup>. Moreover, the Court stressed that the accommodation must be reasonable, which means that it must not impose a disproportionate or undue burden on the employer<sup>1116</sup>.

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<sup>1113</sup> Court of Justice of the European Union. Judgment of the Court (Grand Chamber) of 17 July 2008. *S. Coleman v Attridge Law and Steve Law*, Case C-303/06, par. 38

<sup>1114</sup> Court of Justice of the European Union. Judgment of the Court (Second Chamber) of 11 April 2013. *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11)* and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)*, par. 53

<sup>1115</sup> *Ibid.*, par. 54

<sup>1116</sup> *Ibid.*, par. 58

In addition, Betsch highlights that, in the case at issue, the Court held that the concept of reasonable accommodation is a broad one encompassing both material and immaterial features<sup>1117</sup>.

It is also important to note the opinion of Advocate General Kokott who, with regard to the need for special assistance, answered that it irrelevant whether the hindrance results from an illness, but only whether the disability gives rise to a long-term impairment<sup>1118</sup>. Furthermore, even a long-term impairment that does not require special assistance but does cause a reduction in the worker's capability to work full-time must be considered as a disability in line with the definition contained in Directive 2000/78<sup>1119</sup>. AG Kokott argued that the provision at issue is not directed to those workers who are unable to perform the work, but seeks to guarantee access to and particularly participation in the labour market for the worker, in some instances through the adoption of specific accommodations<sup>1120</sup>. In other words, the AG stated that a duty to accommodate applies in relation to a worker who is capable of performing the essential functions of the job, but who still has special needs requiring a particular measure in order to remove the barrier that hinders participation in professional life. It is interesting to note how AG Kokott associates the provision of reasonable accommodations with the assertion concerning the existence of a disability<sup>1121</sup>. Indeed, she stressed that "the need for special adaptations and aids is therefore a *consequence* of the establishment of the disability and does not form part of the definition of the concept of disability"<sup>1122</sup>. The argument made by AG Kokott is intended to highlight the point that the legislation at stake and the duty to accommodate aim to achieve "not only the

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<sup>1117</sup> Betsch, Nathalie. "The Ring and Skouboe Werge Case: A Reluctant Acceptance of the Social Approach of Disability." *European Labour Law Journal*, Vol. 4, No. 2, 2013, p. 141

<sup>1118</sup> Opinion of Advocate General Kokott of the 6 December 2012 on the Judgement of the Court of Justice of the European Union *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening*, (2013) Joined Cases C-335/11 and C-337/1, par. 46

<sup>1119</sup> *Ibid.*, par. 46

<sup>1120</sup> *Ibid.*, par. 45

<sup>1121</sup> *Ibid.*, par. 41

<sup>1122</sup> *Ibid.*, par. 41

equal treatment but also the equal status” for persons with disabilities in order to guarantee their participation in the labour market<sup>1123</sup>. Furthermore, AG Kokott referred to recital 20 of the preamble to the Directive, which presents some practical suggestions clarifying that the measures mentioned do not comprise an exhaustive list, but constitute mere examples. This makes it clear that the accommodations must focus on the adaptation of the workplace to persons with disabilities, taking account of the disability itself<sup>1124</sup>.

In the more recent *Conejero* case, AG Sharpston provided a detailed analysis of Article 5 and Article 2 of Directive 2000/78<sup>1125</sup>. The case concerned an employer that had dismissed a worker who suffered from an illness, namely “degenerative joint disease and polyarthrosis, aggravated by [...] obesity”<sup>1126</sup>, which forced the worker to be absent from work. The central question in the case was whether Directive 2000/78 prevents national legislation from permitting an employer to dismiss a worker who is absent from work due to an illness caused by a disability which that person has<sup>1127</sup>. Indeed, when it is recognised and protected, a disability justifies the absence from work, thus invalidating the dismissal. This question raises the issue as to whether obesity forms part of the concept of disability, and touches on the relationship between Article 2 and in part Article 5. Specifically, the latter lays down the obligation of reasonable accommodation and the former is dedicated to the concept of discrimination, describing what amounts to direct discrimination and what amounts to indirect discrimination. In detail, in clarifying when indirect discrimination occurs, the provision states two exceptions: Article 2(2)(b)(i) and (ii).

It seems appropriate to cite the provision at stake in Article 2 of the Directive:

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<sup>1123</sup> Ibid., par. 49

<sup>1124</sup> Ibid., par. 51

<sup>1125</sup> Opinion of Advocate Sharpston, on the Judgment of the Court of Justice of the European Union, Judgement of the Court (Third Chamber) of 18 January 2018 *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, C-270/16

<sup>1126</sup> Court of Justice of the European Union. Judgment of the Court (Third Chamber) of 18 January 2018. *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, C-270/16, par. 16

<sup>1127</sup> Ibid., par. 25

*“(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:*

*(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or*

*(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice”<sup>1128</sup>.*

The first condition obtains when a provision that seems to cause indirect discrimination is however “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”<sup>1129</sup>. The second stipulates a further precondition of justification in relation to indirect discrimination, subject to the obligation to provide a reasonable accommodation as described in Article 5 of Directive 2000/78 with the aim of removing the barrier resulting from the allegedly neutral provision that is hindering the full performance of the worker’s tasks with specific reference to a “particular disability”<sup>1130</sup>.

For her part, Advocate General Sharpston offered a new reading of the two conditions (i) and (ii). Indeed, she argued that they should be read in conjunction instead of as being “mutually exclusive”, since in the AG’s opinion the second condition operates as clarification and specification for the first, based on a proportionality test<sup>1131</sup>. In particular, the AG observed that “It cannot, moreover, be said that Article 2(2)(b)(ii) should be applied to disabled persons to the

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<sup>1128</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2 (2)(b)(i) and (ii)

<sup>1129</sup> Ibid., Article 2 (2)(b)(i)

<sup>1130</sup> Ibid., Article 2 (2)(b)(ii)

<sup>1131</sup> Opinion of Advocate General Sharpston. Court of Justice of the European Union. Judgment of the Court (Third Chamber) of 18 January 2018 *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, C-270/16, par. 30-34

exclusion of Article 2(2)(b)(i)”<sup>1132</sup>. Since the former provision does not apply to all persons with disabilities but only to those persons with a ‘particular’ disability, the latter will encompass all persons, thus including those who do fall and who do not fall within the category enshrined in Article 2(2)(b)(ii). In the Advocate General’s view the provision contained in Article 2(2)(b)(ii) together with Article 5 of Directive 2000/78 make specific provision in relation to indirect discrimination, “both as regards the positive duties they impose and the limitations thereon”<sup>1133</sup>.

According to a combined reading of the three provisions, this reasoning leads to the conclusion that, on one hand, Article 2(2)(b)(i) applies in general to all categories of disabilities and, on the other hand, Article 5 combined with Article 2(2)(b)(ii) applies to specific categories of disabilities; indeed, in accordance with its wording, the latter provision applies to “persons with a particular disability”.

A significant corollary of the above is that, when an alleged case of indirect discrimination has occurred, in the light of Directive 2000/78 it is first necessary to consider the application of the second condition contained in Article 2(2)(b)(ii) together with Article 5 of the Directive<sup>1134</sup>.

It is noteworthy that AG Sharpston observes, referring to the judgement in *HK Danmark*<sup>1135</sup>, that: “the Court has held that the expression ‘reasonable accommodation’ must be given a broad construction having regard, inter alia, to Article 2 of the United Nations Convention on the Rights of Persons with

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<sup>1132</sup> Ibid., par. 33

<sup>1133</sup> Ibid., par. 49

<sup>1134</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(2)(b)(ii)

<sup>1135</sup> Court of Justice of the European Union. Judgment of the Court of justice of the European Union. Judgement of the Court (Second Chamber) of 11 April 2013. *HK Danmark*, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and *HK Danmark*, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11), par. 53

Disabilities”<sup>1136</sup>. Nonetheless the judgement of the Court of Justice does not refer to this reasoning.

On the one hand, the Court conducts an analysis based solely on Article 2(2)(b)(i) in the light of the legitimate aim clause in order to evaluate whether dismissal by the employer amounts to indirect discrimination<sup>1137</sup>. On the other hand, in response to the question as to whether the concept of disability includes obesity, the Court answered that “the obesity of the worker concerned entails a limitation of capacity such as that referred to in the preceding paragraph of this judgment, such a state is covered by the concept of ‘disability’ within the meaning of Directive 2000/78”<sup>1138</sup>.

A more recent case is the *DW* case from September 2019, which concerned a worker suffering from epicondylitis, a musculoskeletal disorder, and an anxiety disorder, who was dismissed by the employer due to a lack of productivity and high rate of absence from work. In the case at issue the Court restated what the previous ruling from the *HK Danmark* case that “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”<sup>1139</sup>. Furthermore, the Court specified that it is for the national court to assess whether the measure provided by the employer can be regarded as a reasonable accommodation<sup>1140</sup>.

## **5. European Court of Human Rights on education and reasonable accommodation**

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<sup>1136</sup> Opinion of Advocate Sharpston on the Judgment of the Court of Justice of the European Union. Judgement of the Court (Third Chamber) of 18 January 2018. Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal, C-270/16, par. 34

<sup>1137</sup> Court of Justice of the European Union. Judgment of the Court (Third Chamber) of 18 January 2018. Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal, C-270/16, par. 44

<sup>1138</sup> *Ibid.*, par. 29

<sup>1139</sup> Court of Justice of the European Union, Judgment of the Court (First Chamber) of 11 September 2019 *DW v Nobel Plásticos Ibérica SA*, Case C-397/18, par. 64

<sup>1140</sup> *Ibid.*, par. 69

The European Court of Human Rights has been involved in various cases concerning discrimination and, to some extent, both implicitly and explicitly, reasonable accommodations.

As Lawson and Gooding note, the case *Thlimmenos v. Greece* of 2000 “is not a case about indirect discrimination, despite the fact that this is how it is usually presented [...] It is, rather, a case about reasonable accommodation”<sup>1141</sup>. The case concerned Mr. Thlimmenos, a Jehovah's Witness, who was rejected for a position as a chartered accountant due to his criminal conviction for refusing to wear military uniform owing to his religious beliefs<sup>1142</sup>. The Court started its reasoning taking into account the prohibition on discrimination laid down by Article 14 in conjunction with freedom of religion in Article 9 specifying that, under Article 14, “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”<sup>1143</sup>. The Court then went on to assess the proportionality of the objective aim and the means used in order to pursue it. In this regard, the Court argued that it did not appear to be proportionate to reject the applicant from consideration for a professional post based on a conviction due to religious belief that he should not wear a military uniform, for which he had already been punished and had spent some time in prison<sup>1144</sup>. In particular, the judgement highlighted the point that the violation of the prohibition on discrimination arose due to the failure “to introduce appropriate exceptions to the rule preventing persons convicted of a serious crime from the profession of chartered accountants”<sup>1145</sup>. In other words, the failure to provide an exception to a general

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<sup>1141</sup> Lawson, Anna and Caroline Gooding (eds). “Disability Rights in Europe. From Theory to Practice.” Oxford: Hart Publishing, 2005, p. 53

<sup>1142</sup> European Court of Human Rights. *Thlimmenos v. Greece*, Application No. 34369/97, 6 April 2000, par. 2

<sup>1143</sup> *Ibid.*, par. 44

<sup>1144</sup> *Ibid.*, par. 46-47

<sup>1145</sup> *Ibid.*, par. 48

rule may constitute discrimination<sup>1146</sup>. In addition, the *Thlimmenos* case is worth mentioning as it was decided only in 2000, years before the CRPD was adopted and reasonable accommodation was accepted internationally within the framework of non-discrimination law.

During the same period, the Court decided on the *Botta* case and the *Zehnalová and Zehnal* case, already mentioned previously in this research. At this stage it is appropriate to cite the words of Lawson and Gooding who, analysing these cases in relation to the labour market context, state that “the scope of what an accommodation requires in order to be effective is well-defined in such cases: it must create the conditions which will make it possible for a competent individual with an impairment to perform the essential functions of the job”<sup>1147</sup>.

During the 2000s, other cases were decided on by the ECHR according to the same approach, which required an assessment as to whether the means employed were proportionate with the legitimate aim. Specifically, two cases also concerned the right to education, enshrined in Article 2 of Protocol No. 1, namely *Leyla Sahin v. Turkey*<sup>1148</sup> and *D.H. and others v. Czech Republic*<sup>1149</sup>.

In *Leyla Sahin*, the applicant complained that her right to education had been violated due to internal university rules concerning Islamic headscarves, which prevented the applicant from fully enjoying her right to education as she was not permitted to attend lessons or to sit exams<sup>1150</sup>. In the case at issue the Court held that the means used was proportionate with the legitimate aim pursued, and furthermore that the right to education had not been effectively impaired or compromised. The Court also noted that the refusal to enrol the applicant for

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<sup>1146</sup> Lawson, Anna and Caroline Gooding (eds). “Disability Rights in Europe. From Theory to Practice.” Oxford: Hart Publishing, 2005, p. 53

<sup>1147</sup> *Ibid.*, p. 62

<sup>1148</sup> European Court of Human Rights. *Leyla Sahin v. Turkey*, Application No. 44774/98, 10 November 2005

<sup>1149</sup> European Court of Human Rights. *D.H. and others v. The Czech Republic*, Application No. 57325/00, 13 November 2007

<sup>1150</sup> European Court of Human Rights. *Leyla Sahin v. Turkey*, Application No. 44774/98, 10 November 2005, par. 1-17

lectures and examination was foreseeable<sup>1151</sup>. In the light of this reasoning the Court held that no violation had been committed of Article 2 of Protocol No. 1, or any other violation as alleged by the applicant<sup>1152</sup>. This case does not offer the most suitable example for discussion, since it involves delicate issue of religious belief, which falls outside the scope of this research. However, the case offers the opportunity to stress the lack of any reference to reasonable accommodation, even though it dates back to 2005, thus before the adoption of the CRPD.

The case of *D.H. and others* concerned a broad phenomenon of special school provision involving especially Roma children. In the case at stake, the data provided by the applicants, but also by the European Union Agency for Fundamental Rights, showed that Roma children represented the majority of pupils in special schools<sup>1153</sup>, indicating a systematic mechanism or tendency to put pupils of Roma origin into special schools, leading to marginalisation and hindering their educational pathways. The Court held that this violated Article 14 in conjunction with Article 2 of Protocol No. 1<sup>1154</sup>. The circumstances of the case were peculiar as it involved a large-scale phenomenon, which would not be counteracted adequately through the provision of reasonable accommodation. However, it is still noteworthy how the Court concluded that a violation had occurred of the prohibition on discrimination in relation to the right to education. This decision seems to reinforce the link between education and discrimination as well as the need to prevent and eradicate discriminatory behaviours also within education, based specifically on prejudices and stereotypes.

An interesting case is that of *Gherghina v. Romania* in which, although the Court rejected the application due to the failure by the applicant to exhaust all internal remedies, it mentioned the instrument of reasonable accommodations<sup>1155</sup>. The case concerned a student who complained about building inaccessibility, which

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<sup>1151</sup> Ibid., par. 157-161

<sup>1152</sup> Ibid., par. 162-163

<sup>1153</sup> European Court of Human Rights, *D.H. and others v. The Czech Republic*, Application no. 57325/00, 13 November 2007, par. 15-18

<sup>1154</sup> Ibid., par. 210

<sup>1155</sup> European Court of Human Rights. *Gherghina v. Romania*, Application No. 42219/07, 9 July 2015

did not enable students with disabilities to continue their studies<sup>1156</sup>. In particular, the Court held that the remedies offered to students should be “effective”, which means “capable, primarily, of preventing or putting a swift end to the alleged violations” and also cited the reasonable accommodation in order “to enable him [the applicant] to continue his studies”<sup>1157</sup>.

A more recent case brought before the ECtHR is *Ever Sahin v. Turkey*, in which the Court drew on international law as a source in considering Article 14 ECHR in conjunction with the CRPD and its provision on reasonable accommodation<sup>1158</sup>. The Court held that a violation had been committed of Article 14 in conjunction of Article 2 of Protocol No. 1 due to the failure by the national authorities to ensure that the applicant, who was paralysed in his lower limbs, would be able to continue his studies in the same manner as other students, based on the failure “to strike a fair balance between the competing interests at stake”<sup>1159</sup>. The case is remarkable due to the reference to the CRPD, including especially its duty to provide reasonable accommodation, and the resulting discrimination against the denial of reasonable accommodation<sup>1160</sup>. Specifically, the Court used the provisions of the CRPD to interpret Article 14 ECHR and to evaluate whether any discrimination had occurred and whether the provisions at issue had been violated. The Court argued that the Government failed to prove that “the national authorities, including, in particular, the academic and judicial authorities, reacted with the requisite diligence to ensure that the applicant could continue to exercise his right to education on an equal footing with other students”<sup>1161</sup>.

In a later judgement in the *Stoian* case, concerning a student with a physical impairment in Romania, the Court restated the same reasoning but came to a different decision, i.e. no violation was found to have occurred. Nevertheless, the

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<sup>1156</sup> Ibid., par. 31

<sup>1157</sup> Ibid., par. 91-92

<sup>1158</sup> Cour Européenne des Droits de l'Homme, *Affaire Enver Sahin c. Turquie*, Requête No. 23065/12, 30 Janvier 2018, par. 60

<sup>1159</sup> Ibid., par. 68

<sup>1160</sup> Ibid., par. 19

<sup>1161</sup> Ibid., par. 68

case is still worth analysing<sup>1162</sup>. The Court first reaffirmed that, in order to comply with Article 14 on the prohibition on discrimination, the duty to accommodate must be considered. Secondly it then assessed whether the actions proposed would be sufficient to satisfy such a duty, taking into account the limit of the undue or disproportionate burden<sup>1163</sup>. In this case, referring to the *Cam* and *Enver Şahin* cases, the Court reiterated the position that inclusive education appears to be “the most appropriate means of guaranteeing inclusion and non-discrimination in the field of education”<sup>1164</sup>. Again, the Court quoted from the *Cam* case, listing the types of reasonable accommodations that could be adopted, such as for instance “physical or non-physical, educational or organisational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities”<sup>1165</sup>. Moreover, the Court reiterated the corollary that, where accessibility is not guaranteed, the provision of reasonable accommodation must be considered<sup>1166</sup>.

The *Cam* case is indeed a landmark judgement, which concerned the refusal by a music academy to accept a blind girl as a student<sup>1167</sup>. This case was also cited in the cases analysed above due to its innovative features. First of all, in the *Cam* case the Court held that the right to education is “indispensable to the furtherance of human rights and plays a fundamental role” and also that Article 2 of Protocol No. 1 has to be interpreted in the light of the current international law, i.e. European Social Charter and the Convention on the Rights of Persons with Disabilities, but also in the light of the current context at European level in relation “to any emerging consensus as to the standards to be achieved”<sup>1168</sup>. Furthermore, the Court held that Article 14 ECHR allows certain groups to be treated in a different manner compared to others “in order to correct factual

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<sup>1162</sup> European Court of Human Rights. *Stoian v. Romania*, Application No. 289/14, 25 June 2019

<sup>1163</sup> *Ibid.*, par. 98

<sup>1164</sup> *Ibid.*, par. 102

<sup>1165</sup> *Ibid.*, par. 103

<sup>1166</sup> *Ibid.*, par. 102

<sup>1167</sup> European Court of Human Rights. *Çam v. Turkey*, Application No. 51500/08, 23 May 2016

<sup>1168</sup> *Ibid.*, par. 52-53 and 64

inequalities”<sup>1169</sup>. Pursuing that reasoning further, the Court went into greater detail, analysing the provision on reasonable accommodations. The Court specified that Article 14 ECHR must be interpreted as entailing a duty to accommodate in the light of the above-mentioned aim of correcting factual inequalities<sup>1170</sup>. In addition, the Court lists the various forms that a reasonable accommodation can take, including physical and non-physical, and highlighted that the Court itself does not have the power, or indeed any duty, to determine the resources available to the local provider<sup>1171</sup>. In the case at issue the Court held that a violation had been committed of Article 14 in conjunction with Article 2 of Protocol No. 1 because the refusal to accept the applicant was based solely on her blindness and due to the failure by the national authorities to consider the duty to provide reasonable accommodation<sup>1172</sup>.

The next chapter will consider the issue of non-discrimination law, and specifically reasonable accommodation compared with other instruments in the field of employment. In addition, some space will be dedicated to a brief discussion of social movements of representative organisations of persons with disabilities.

Before discussing all of these issues, the chapter will start by introducing the phenomenon of European integration, encompassing the issue of social inclusion and participation, which set out the framework within which it is appropriate to consider the topics mentioned.

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<sup>1169</sup> Ibid., par. 54

<sup>1170</sup> Ibid., par. 65

<sup>1171</sup> Ibid., par. 66

<sup>1172</sup> Ibid., par. 69

## **V. EU integration: employment and social movements**

This chapter will address the process of European integration among EU countries and their populations insofar it concerns the inclusion of marginalised persons, in particular persons with disabilities.

This issue will be considered in the following pages. For now, it must be recalled that, originally, the process of EU integration aimed to create a common economic space in order to build a common market and to promote the harmonisation of legislation and policy. Pursuing this process further, EU Members started to incorporate into this ‘common space’ increasingly broad competences, objectives and matters, in other words a growing body of commitments and obligations.

This process involves major actors, such as EU institutions, national governments, universities and employers, as well also as more minor actors such as citizens, students and employees. In particular, some actors are promoting and becoming involved in this integration process, although others have been excluded from it. This chapter will analyse some manifestations of this tension between participation/inclusion and exclusion, as these phenomena play an important role within the integration process itself. Specifically, it will consider the example of civil movements which, as mentioned above, played a significant role in the process of drafting the CRPD as well as bringing about changes in how disability is perceived. Furthermore, another example is provided by the workplace, which has been regulated under advanced legislation on non-discrimination and inclusion, with specific regard to persons with disabilities.

Before considering these examples it is appropriate to briefly outline the framework within which these examples can be located, which is comprised of the EU integration process and its expression in societal terms. Essentially, it is necessary to ask how society and its members respond to this call for integration, and ultimately for inclusion, into specific social contexts such as employment and

education. As already mentioned in this research, merely enacting legislation is not sufficient. It must in addition be implemented and also accompanied by additional support, including behaviours, attitudes and theories that are capable of promoting and enhancing the law.

### **1. European Integration: social inclusion and participation**

The integration process of the European Union has been already discussed in the previous chapters. Now it is appropriate to analyse EU integration from the perspective of social inclusion and participation.

The adjective ‘social’ stems from the term ‘society’ itself, and furthermore refers to social policy and social rights. Indeed, Kelemen highlights the connection between European integration and the rights-based approach, due to their shared assumption that social rights first empower the EU citizens and secondly shape the status of the citizens themselves<sup>1173</sup>. As already mentioned, the European integration process was originally focused on merely economic interests, although subsequently started to focus on social rights together with an anti-discrimination approach<sup>1174</sup>. In particular, it may be observed that the anti-discrimination approach mirrors the evolution from a negative obligation, which involves refraining from any conduct or behaviour that has discriminatory effects, towards a positive obligation, which requires States and all actors involved to take specific, appropriate steps to prevent and eradicate discrimination.

With specific regard to EU integration and the enhancement of the Single Market, Crespy shows that, along the same lines, whereas ‘negative integration’ involves the eradication of national regulations and rules that hinder the construction of a common market, ‘positive integration’ fosters the development of shared policies and legislation with distributive and regulatory aims<sup>1175</sup>.

Moreover, considering the enforcement of the law and the legitimacy of authority within the European context, the provisions on social rights of the European

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<sup>1173</sup> Kelemen, Daniel R. “Eurolegalism: The Transformation of Law and Regulation in the European Union.” Harvard University Press, April 2011, p. 236

<sup>1174</sup> Schiek, Dagmar. “European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law.” Routledge-Cavendish Taylor & Francis Group, 2008, pp. 3-27

<sup>1175</sup> Crespy, Amandine. “Welfare Markets in Europe: The Democratic Challenge of European Integration.” Palgrave Macmillan, 2017, p. 9

Union not only enable EU citizens to seek protection for their rights before the national courts, relying on EU law, but also reinforce the legitimacy of the EU with citizens<sup>1176</sup>. However, due to the purely economic goals of the original European Economic Community and the lack of representation (e.g. the first direct election of the European Parliament dates back to 1979), the existence of a ‘democratic deficit’ has been recognised<sup>1177</sup>, which manifests itself, *inter alia*, in the lack of rights for EU citizens provided for directly under EU law, as well as the low level of interventions by EU institutions outside the merely economic sphere.

For its part, European integration entails an increase in rights and a tightening of cooperation and bonds among the EU Member States, institutions and citizens. Moreover, according to the principle of solidarity it can be asserted that European integration should provide support for those who are not in a position to enjoy all rights that are available to others. Therefore, it is appropriate to briefly illustrate the position of solidarity under EU law. Although solidarity has a status as a common value and a principle of European Union law, it is not expressly implemented in EU secondary legislation, or is only implemented to a limited extent. However, the principle of solidarity provides the basis for EU action and further legislation. As regards EU primary legislation, the Treaty on European Union mentions solidarity in Article 2 as one of the common values of the Member States<sup>1178</sup>. Furthermore, the Charter of Fundamental Rights of the European Union entitles the Chapter IV as ‘Solidarity’, even though the chapter is dedicated only to labour and market-related issues, such as ‘Fair and just working conditions’ (Article 31) or ‘Social security and ‘social assistance’ in case of loss of employment (Article 34)<sup>1179</sup>.

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<sup>1176</sup> Kelemen, Daniel R. “Eurolegalism: The Transformation of Law and Regulation in the European Union.” Harvard University Press, April 2011, p. 236

<sup>1177</sup> Crespy, Amandine. “Welfare Markets in Europe: The Democratic Challenge of European Integration.” Palgrave Macmillan, 2017, p. 12

<sup>1178</sup> European Union. Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01, Article 2

<sup>1179</sup> European Union. Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Chapter IV, Articles 27-38

As mentioned above, it is possible to identify consistency between integration and inclusion, and it is therefore appropriate to introduce the concept of social inclusion, following on from the above reasoning on integration and citizens.

Social inclusion commonly aims to guarantee equal opportunities to individuals within the essential social activities<sup>1180</sup>. However, this definition has been criticised and considered as inadequate. As a result, social inclusion has been defined as the opposite of social exclusion and in turn social exclusion as marginalisation and divergence from society<sup>1181</sup>. So far, social inclusion has only had positive effects and features. Nonetheless negative side-effects can be identified, as noted by Rimmerman, in the standardisation and even withdrawal of differences at the expense of social uniformity<sup>1182</sup>.

Moreover, Rimmerman asserts that social exclusion, and thus also social inclusion, goes hand in hand with the concept of social capital and social participation<sup>1183</sup>. Regarding this matter, Putnam defines social capital “as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions”<sup>1184</sup>. Fundamentally, social capital helps individuals to broaden their opportunities and fosters their functions within society.

Hence, it would appear conceivable that social exclusion concerns members of society, entailing a situation of disadvantage due to the limited access to opportunities and resources.

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<sup>1180</sup> Rimmerman, Arie. “Social Inclusion of People with Disabilities National and International Perspectives.” Cambridge University Press, 2013 and Repper, Julie and Rachel Perkins. “Social inclusion and recovery: A model for mental health practice.” Bailliere Tindall, 2003

<sup>1181</sup> Rimmerman, Arie. “Social Inclusion of People with Disabilities National and International Perspectives.” Cambridge University Press, 2013, p. 35

<sup>1182</sup> Turner, Bryan S. “Vulnerability and Human Rights.” Penn State University Press, 2006, p. 98

<sup>1183</sup> Rimmerman, Arie. “Social Inclusion of People with Disabilities National and International Perspectives.” Cambridge University Press, 2013, p. 34

<sup>1184</sup> Putnam, Robert D. “Making democracy work: Civic traditions in modern Italy.” Princeton University Press, 1994, p. 167

Some authors persist in the assumption that social inclusion is linked to justice. According to Collins, “social inclusion is an aim or principle of justice”<sup>1185</sup>. In turn, following the principle of justice, it can be argued that the aim of social inclusion is to cope with the disadvantages of specific groups within society, providing equal outcomes for its members<sup>1186</sup>. In particular, Collins asserts that social inclusion aims to improve “well-being”, which encompasses material but also non-material elements such as education<sup>1187</sup>. Despite the subjective nature of the concept of well-being, it is still possible to set a minimum level of elements of well-being that, with a social inclusion aim in mind, should be guaranteed to everyone<sup>1188</sup>.

These notions, combined with the capability approach, enable it to be assumed that all members of society must be guaranteed a certain amount of goods at a minimum level, including non-material goods, e.g. education.

It seems plausible to argue that the major process of EU integration operates in parallel with the process of social inclusion in favour of all members of society, especially the marginalised and disadvantaged ones, such as persons with disabilities.

In order to be set in motion, these processes require action by the institutions on all levels, from legislators to higher education institutes, as well as private and civic actors, such as representative organisations. Therefore, it is appropriate to briefly outline and analyse social movements and the action taken by representative organisation of persons with disabilities and their influence on the creation of new policy not only worldwide but also at national and regional level, such as within the European Union. These social movements represent an example of active participation, in other words a social movement that influences and acts in order to modify and promote certain changes.

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<sup>1185</sup> Collins, Hugh. “Discrimination, Equality and Social Inclusion.” *The Modern Law Review*, Vol. 66, No. 1, Jan. 2003, pp. 16-43, p. 22

<sup>1186</sup> *Ibid.*, p. 22-23

<sup>1187</sup> *Ibid.*, p. 23

<sup>1188</sup> *Ibid.*

Conversely, within the workplace it is possible to identify instances of passive participation by workers in accordance with disability and anti-discrimination law. Passive participation must be conceived of as a situation in which an external entity (i.e. an employer, the legislator, etc.) may be expected to take some action in order to include and enable participation on an equal basis for a person in a disadvantaged situation, in this case a person with a disability.

Hence, although they might appear to be absolute opposites, social movements and inclusion within employment represent two different aspects of the same broad phenomenon of EU integration.

## **2. Disability organisations, e.g. the European Disability Forum (EDF)**

As discussed above, organisations of persons with disabilities play a prominent role in the development of new approaches, but also in the enactment of innovative legislation concerning persons with disabilities. For instance, during the 1970s these organisations promoted the introduction and diffusion of the social model of disability as against the medical model<sup>1189</sup>. Eventually, this new model influenced not only legislators but also society at large and private actors.

Within the European Union, new policies on persons with disabilities and representative organisations were introduced. In particular, the European Union announced the HELIOS projects in order to promote cooperation with representative organisations of persons with disabilities<sup>1190</sup>. Implicitly, the EU recognises the role of these representative organisations and the importance of their involvement in the process of drafting, as well as in enforcement.

Within the EU, the most important platform for promoting disability rights is the European Disability Forum (EDF), which encompasses all organisations of persons with disabilities, representing about 100 million people<sup>1191</sup>. Its motto is the famous and well-known ‘Nothing About Us Without Us’, which expresses the

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<sup>1189</sup> Turner, Bryan S. “Vulnerability and Human Rights.” Penn State University Press, 2006, p. 100

<sup>1190</sup> HELIOS programme, The Council Resolution of 27 June 1974 (Official Journal No C 80 of 9.7.1974), Council Decision 63/266/EEC of 2 April 1963, Resolution of 11 March 1981, Official Journal No C 77 of 6.4.1981

<sup>1191</sup> <http://www.edf-feph.org/> - last visited 09.03.2021



It is now appropriate to evaluate the more specific issue of employment and the measures adopted in order to combat discrimination and also to promote the inclusion of persons with disabilities into the workplace, i.e. reasonable accommodations for workers with disabilities but also other instruments such as quotas.

The connection between education and labour as two closely correlated fields has already been stressed above. This is due for instance, *inter alia*, to the fact that education provides highly skilled persons who will enter into the labour market, as well as the fact that labour law features the most advanced legislation on anti-discrimination, from which it is possible to draw inspiration and reflection.

The next section will briefly consider the context of employment, with specific reference to the instrument of reasonable accommodation, in an attempt to provide a comprehensive overview of the EU legal framework for employment in the light of the principles of equality and inclusion, stressing a connection and consistency of approach between labour and education.

### **3. Employment: reasonable accommodation and inclusion**

Before analysing and assessing the labour market and specifically the individual taken in favour of workers with disabilities, *in primis* reasonable accommodations, it is appropriate to briefly introduce the general background against which individual concrete measures and policies have been adopted in the context of employment within the European Union.

Drawing on Nussbaum's work, Barbera underlines the consistency between legal and philosophical theories and deductions. Specifically, applying Nussbaum's theory on labour law, Barbera notes that persons with disabilities have been treated according to a paternalistic approach, on the assumption that the capacities or skills of workers with disabilities are limited or are not comparable with those of their peers without disabilities<sup>1195</sup>.

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<sup>1195</sup> Barbera, Marzia. "Le discriminazioni basate sulla disabilità" in Barbera, Marzia. (ed.). "Il nuovo diritto antidiscriminatorio." Il quadro comunitario e nazionale, Giuffrè, 2007, Milano, p. 77-79

Moreover, as regards the social capital mentioned above, i.e. resources, goods and networks, Rimmerman notes that in the context of employment persons with disabilities do not have access to such social capital in order to develop their careers<sup>1196</sup>.

Before considering the measures that have been proposed and used in order to combat discrimination and promote the employment of persons with disabilities, it is appropriate to outline the background to these measures. This background is composed of policy elements as well as a complex legal framework, both at European and national level.

i. EU law on employment and equality

Since the first treaty and the creation of the first communities, i.e. the Treaty of Rome of 1957<sup>1197</sup> establishing the European Economic Community (EEC), it has been apparent that the main aim has been economic, boosting the national economies and the employment sector.

Employment thus became a supranational matter, with competence increasingly shifting to the EU level (e.g. pay, working hours, benefits, etc.), although national governments retained considerable interest and competence. Employment has followed a long and complex path since the 1950s, which has seen the adoption of various treaties and directives, but also policies acts and summits. Indeed, in order to bypass hindrances imposed by national governments and the difficulties in achieving unanimity concerning certain matters, the EU relies on policies and intergovernmental agreements rather than *hard law* in order to encourage the Member States to embrace common objectives and to foster certain changes and evolutions, including also the introduction of new legislation and provisions.

Although the Treaty of Rome and the creation of the EEC were mentioned above, in the light of its particular focus, this chapter will take into account the period

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<sup>1196</sup> Rimmerman, Arie. "Social Inclusion of People with Disabilities National and International Perspectives." Cambridge University Press, 2013, p. 100

<sup>1197</sup> European Union. Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957

starting from the 1990s until the present day, since the most notable acts and provisions on employment have been adopted since the early 1990s.

Specifically, the breakthrough point came with the Maastricht Treaty and the Edinburgh Summit in 1992. Indeed, Article 2 of the Maastricht Treaty established as one of the main tasks of the Community “*a high level of employment and of social protection*”<sup>1198</sup>. Moreover, the Edinburgh Summit agreed on “*the establishment of a plan of action by the Member States and the Community to promote growth and to combat unemployment*”<sup>1199</sup>.

In addition, two other important documents need to be mentioned, namely the White Paper<sup>1200</sup> and the Essen process<sup>1201</sup>.

Moreover, Goetschy emphasises that these acts represent preparatory steps leading to the European employment strategy (EES), which was subsequently formalised in 1997 by the Amsterdam Treaty and the Luxembourg Summit<sup>1202</sup>. The European Employment Strategy launched in 1995, following the Essen process which started the previous year, recognises as priorities of the European Union the fight against unemployment and ensuring equal opportunities, calling for reforms to national legislation and convergence within a European framework<sup>1203</sup>. Indeed, since the late 1990s several acts have been adopted at EU level in order to foster such changes. On the one hand, new principles were introduced into the EU Treaties, whilst on the other hand new provisions were

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<sup>1198</sup> European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, Article 2

<sup>1199</sup> European Council in Edinburgh, 11-12 December 1992 Conclusions of the Presidency, Introduction 2.

<sup>1200</sup> European Commission. “Growth, competitiveness, and employment. The challenges and ways forward into the 21st century.” COM (93) 700 final. Brussels: 05.12.1993

<sup>1201</sup> Essen European Council, Essen 9-10 December 1994, Reproduced from the Bulletin of the European Communities No. 12/1994

<sup>1202</sup> Goetschy, Janine. “The European Employment Strategy Genesis and Development.” European Journal of Industrial Relations, Vol. 5, No. 2, 1999, pp. 117–137

<sup>1203</sup> European Commission, The European Employment Strategy. Recent progress and prospects for the future, COM(95) 465 final, Brussels, 11.10.1995

introduced into EU secondary law, e.g. Directive 2000/78/EC on employment and equal treatment, which will be analysed in next section<sup>1204</sup>.

At this stage it is sufficient to briefly outline the current position under EU primary law on employment. Specifically, the Amsterdam Treaty introduced a chapter dedicated only to employment<sup>1205</sup> and the Luxembourg Summit outlined ‘employment guidelines’ in order to give effect to the provisions of the Amsterdam Treaty<sup>1206</sup>. In particular, Ferrera and Rhodes emphasise that the new chapter of the Amsterdam Treaty provides scope for coordination by the EU institutions through implementation and monitoring schemes<sup>1207</sup>.

To complete the overview of the EU legal framework on employment in order to develop further the discussion focusing on workers with disabilities and the link between employment and education, it must be noted that, at present, the Treaty on European Union states among its fundamental principles “human dignity” in Article 2<sup>1208</sup> and the “well-being of its peoples” as well as “a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment” in Article 3<sup>1209</sup>. In addition, the EU Charter of Fundamental Rights restates dignity in relation to workers in Article 31<sup>1210</sup>. Moreover, the Treaty on the Functioning of the European Union recalls in Article 9 that in its activities the EU must take into account “the promotion of a high level of employment, the guarantee of

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<sup>1204</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<sup>1205</sup> European Union. Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997

<sup>1206</sup> Extraordinary European Council meeting on employment, Luxembourg, 20-21 November 1997

<sup>1207</sup> Ferrera, Maurizio and Martin Rhodes. “Building a sustainable welfare state.” *West European Politics*, Vol. 23, No. 2, 2000, pp. 257-282, p. 278

<sup>1208</sup> European Union. Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01, Article 2

<sup>1209</sup> *Ibid.*, Article 3

<sup>1210</sup> European Union. Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 31

adequate social protection, the fight against social exclusion, and a high level of education”<sup>1211</sup>.

Under such a framework, it is arguable that the EU aims to link human dignity to the most important activities within society, namely employment and education. Furthermore, it links these activities with the possible hardship associated with exclusion, which must be prevented and eradicated in the light of the protection of human dignity.

From this brief overview it is possible to note an evolution in the law and policy of the European Union in the light of the evolution of non-discrimination law.

ii. EU action on employment (and education) and disability

The European Employment Strategy mentioned above endorses a coordinated approach based on two axes which are, on the one hand, the enhancement of macro-economic policy in order to foster economic and business growth and, on the other hand, the introduction of an active labour market policy (ALMP)<sup>1212</sup>. The ALMP forms an “active help for the integration of people in the labour market”<sup>1213</sup>. The ALMP was previously endorsed by the Essen Council of 1994 together with the promotion for new measures to support those groups that are mostly unemployed<sup>1214</sup>. Along the same lines, other more specific acts and provisions have been drafted in order to combat discrimination and to foster the equality and inclusion of workers, in particular in relation to persons with disabilities. Indeed, the Luxembourg Summit of 1997 called on the Member States to “give special attention to the problems people with disabilities may

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<sup>1211</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 9

<sup>1212</sup> European Commission. The European Employment Strategy. recent progress and prospects for the future, COM(95) 465 final, Brussels, 11.10.1995

<sup>1213</sup> Agovino, Massimiliano and Agnese Rapposelli. “Does flexicurity promote the employment of disabled people? A panel analysis for Italian regional data.” *Quality & Quantity*, Vol. 50, No. 5, 2015, p. 2088

<sup>1214</sup> European Council meeting on 9 and 10 December 1994 in Essen, Presidency conclusions, points 4 and 5

encounter in participating in working life"<sup>1215</sup>. Ten years later in 2007, the Commission approved an important document introducing the concept of flexicurity<sup>1216</sup>, and few months later in relation to the Communication on flexicurity the Commission approved the European Action Plan 2008-2009 explicitly linking the concept of flexicurity to persons with disabilities<sup>1217</sup>. When defining 'flexicurity', the Commission Communication on flexicurity states that the new concept encompasses flexibility and security<sup>1218</sup>. In particular, flexibility involves various 'transitions' including "from school to work, from one job to another, between unemployment or inactivity and work"<sup>1219</sup>. Pursuing this policy further, the Commission approved the European Action Plan 2008-2009, setting out the objective of increasing the employment of persons with disabilities by enhancing flexibility and security<sup>1220</sup>. Moreover, the Commission has called for a 'comprehensive approach', encompassing the new policy together with non-discrimination law<sup>1221</sup>.

Several acts have been adopted by the EU on employment and equality with particular regard to disability, in particular the directives analysed in the following section. However, despite having been adopted more recently compared to other acts, e.g. Directive 2000/78, it is appropriate to complete the overview of this scenario within the EU by presenting the European Pillar of Social Rights, due to its interesting and significant content and intent.

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<sup>1215</sup> Extraordinary European Council meeting on employment, Luxembourg, 20-21 November 1997, par. 79

<sup>1216</sup> European Commission. Communication Towards Common Principles of Flexicurity: More and better jobs through flexibility and security COM(2007) 359 final, Brussels, 27.6.2007

<sup>1217</sup> European Commission. Communication "Situation of disabled people in the European Union: the European Action Plan 2008- 2009." COM(2007) 738 final, Brussels, 26.11.2007

<sup>1218</sup> European Commission. Communication Towards Common Principles of Flexicurity: More and better jobs through flexibility and security COM(2007) 359 final, Brussels, 27.6.2007

<sup>1219</sup> *Ibid.*, p. 4

<sup>1220</sup> European Commission. Communication "Situation of disabled people in the European Union: the European Action Plan 2008- 2009." COM(2007) 738 final, Brussels, 26.11.2007, p. 8

<sup>1221</sup> *Ibid.*

The Pillar has been recognised as a way of offering “guidance to meet the basic needs of people”<sup>1222</sup>. The European Pillar of Social Rights was adopted in 2017 with the Commission Recommendation setting out 20 principles<sup>1223</sup>. These principles include in particular, insofar as relevant for this research, the following:

- Education, training and life-long learning:

*“Everyone has the right to quality and inclusive education, training and life-long learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market”;*

- Equal opportunities:

*“Regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public. Equal opportunities of under-represented groups shall be fostered”;*

- Secure and adaptable employment:

*“Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered.*

*In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured.*

*Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated.*

*Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration”*

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<sup>1222</sup> Jakab, Nóra “Social Dimension of the EU, The Pillar's Impact on European Labour Law.” *Lex ET Scientia International Journal Lex et Scientia International Journal*, Vol. 2, No. 26, 2019, p. 56

<sup>1223</sup> European Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European Pillar of Social Rights

- Inclusion of people with disabilities:

*“People with disabilities have the right to income support that ensures living in dignity, services that enable them to participate in the labour market and in society, and a work environment adapted to their needs”*<sup>1224</sup>.

Again, reading through these four principles, it is clear that the EU has drawn a red line around its aims to foster the equal rights of citizens from education to employment, with particular attention to persons with disabilities.

It must be noted that, as a Commission Recommendation, this act does not have binding force, but is rather a non-binding instrument of *soft law* which, as has been argued, still has a role to play as a “source of interpretation of EU law”<sup>1225</sup>. Furthermore, Garben stresses the existence of other acts setting out the same principles and rights, such as for instance the EU Charter of Fundamental Rights, which has the same status as the Treaties<sup>1226</sup>. Nevertheless, the author argues that this Pillar is important as a leading political act towards the development of the European Union, specifically towards the action of new legislation but also towards closer integration and changes in economic, political and social terms, especially in the wake of the crisis affecting the Union and the reforms desired<sup>1227</sup>. In addition, Gaber stresses that the Pillar encompasses education within its chapter on the labour market, and moreover that the principle on education goes further than the EU Charter of Fundamental Rights in calling for quality and inclusive education<sup>1228</sup>.

This is hence another EU act that explicitly links education to the labour market, highlighting the close connection between education and employment as well as the importance of quality and inclusion in education.

### iii. Employment and disability in international law

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<sup>1224</sup> Ibid.

<sup>1225</sup> Garben, Sacha. “The European Pillar of Social Rights: Effectively Addressing Displacement?.” *European Constitutional Law Review*, Vol. 14, No. 1, 2018, pp. 210–230, p. 218

<sup>1226</sup> Ibid.

<sup>1227</sup> Ibid., p. 224-230

<sup>1228</sup> Ibid., p. 215-221

Within the international context, numerous provisions address disability in the context of employment, and it hence seems fruitful to consider and discuss briefly this context.

Alongside the Convention on the Rights of Persons with Disabilities adopted by the United Nations, mentioned above, other important documents have also been adopted by various international organisations. Specifically, with particular regard to employment an important one is the International Labour Organization (ILO), which was founded in 1919 with the aim of promoting “social justice and internationally recognized human and labour rights”<sup>1229</sup>. In particular, the ILO has adopted various Recommendations, which are worth discussing. In fact, some authors argue that Recommendation No. 99 of 1955 “was quite forward-looking for its time and prefigured the spirit of the CRPD in some respects”<sup>1230</sup> since the Recommendation promotes training for persons with disabilities in order to enable them to acquire “the skill necessary for working normally on an equal basis with non-disabled workers if he is capable of doing so”<sup>1231</sup>. Moreover, it must be stressed that the Recommendation also promotes sheltered employment for persons with disabilities and vocational rehabilitation, in addition affirming that persons with disabilities are persons whose expectation of employment is diminished due to their impairments<sup>1232</sup>. Hence, it appears that Recommendation No. 99 is still deeply influenced by a medical model of disability, and therefore an approach that perceives a person with a disability as a person needing assistance who is not capable of competing on the open market. Subsequently, in 1983, the ILO produced several relevant documents, namely Convention No. 159<sup>1233</sup> and

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<sup>1229</sup> <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> - last visited 09.03.2021

<sup>1230</sup> Waddington, Lisa et al. “Equality of opportunity in employment? Disability rights and active labour market policies.” in Blanck, Peter and Eilionóir Flynn (eds). “Routledge Handbook of Disability Law and Human Rights.” Routledge Handbooks, 2017, p. 78

<sup>1231</sup> General Conference of the International Labour Organisation, R099, Vocational Rehabilitation (Disabled) Recommendation, No. 99, 1955 par. 6 (c)

<sup>1232</sup> Ibid., par. VIII and par. 1 (b)

<sup>1233</sup> General Conference of the International Labour Organisation, C159, Vocational Rehabilitation and Employment (Disabled Persons) Convention, No. 159, 1983

Recommendations No. 167<sup>1234</sup> and 168<sup>1235</sup>. It has been stressed that Convention No. 159, accompanied by Recommendation No. 167, maintains a “discourse of rehabilitation and adopted an individual impairment-related definition of disability”<sup>1236</sup> restating the same definition of ‘disabled people’<sup>1237</sup> as that contained in the previous Recommendation No. 99. Furthermore, Recommendation No. 168 refers widely to Recommendation No. 55 promoting vocational rehabilitation, sheltered employment but also special positive measures to enhance equality of opportunities<sup>1238</sup>.

With regard to sheltered employment, the other relevant document that promotes this concept within the European context (specifically within the Council of Europe, i.e. the European Social Charter) has already been mentioned, highlighting that, in contrast to the first version of the ESC of 1961, the Revised Charter of 1996 considers sheltered employment as an exception to be proposed when ‘open employment’ is not suitable<sup>1239</sup>.

Sheltered employment is a concept that it is worth analysing since it is useful in assessing whether a law relies on a welfarism approach or on a mainstreaming and equality approach. In fact, sheltered employment seems to classify a person with a disability as a person who needs assistance and preferential treatment, instead of empowering the person and enabling the individual to compete on the open market. In particular, with specific reference to the Revised European Social

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<sup>1234</sup> General Conference of the International Labour Organisation, R167, Maintenance of Social Security Rights Recommendation, No. 167, 1983

<sup>1235</sup> General Conference of the International Labour Organisation, R168, Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, No. 168, 1983

<sup>1236</sup> Waddington, Lisa et al. Chapter 5 “Equality of opportunity in employment? Disability rights and active labour market policies.” in Blanck, Peter and Eilionóir Flynn (eds). “Routledge Handbook of Disability Law and Human Rights.” Routledge Handbooks, 2017, p. 79

<sup>1237</sup> General Conference of the International Labour Organisation, C159, Vocational Rehabilitation and Employment (Disabled Persons) Convention, No. 159, 1983, Article 1

<sup>1238</sup> General Conference of the International Labour Organisation, R168, Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, No. 168, 1983

<sup>1239</sup> Waddington, Lisa et al. Chapter 5 “Equality of opportunity in employment? Disability rights and active labour market policies.” in Blanck, Peter and Eilionóir Flynn (eds). “Routledge Handbook of Disability Law and Human Rights.” Routledge Handbooks, 2017, p. 81

Charter of 1996, which is also mentioned in the EU Treaties, Article 15 states that the social integration of and participation by persons with disabilities must be promoted and supported<sup>1240</sup>. In this sense, employment and competition on the open market must be fostered and thus, if this is not possible, sheltered employment must be created<sup>1241</sup>. It has been highlighted that sheltered employment arises when integration into the open labour market cannot be achieved, while supported employment aims to foster employment on the open labour market aimed at integration<sup>1242</sup>.

Furthermore, the CRPD dedicates Article 27 to work and employment, in relation obviously to persons with disabilities. In particular, Article 27 states that, in order to seek a “work environment that is open, inclusive and accessible”, various steps must be taken including the provision of reasonable accommodation and the promotion of the employment of persons with disabilities via “affirmative action programmes, incentives and other measures”<sup>1243</sup>. However, it has been stressed that the Article does not specify what “open, inclusive and accessible” means, although ‘open’ has been generally conceived of as ‘ordinary’ in contrast to ‘segregated’<sup>1244</sup>.

Specifically, Article 27 of the Convention provides as follows:

*“1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those*

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<sup>1240</sup> Council of Europe. European Social Charter (Revised), 3 May 1996, ETS 163, Article 15

<sup>1241</sup> Ibid., Article 15 (2)

<sup>1242</sup> Liisberg, Maria Ventegodt. “Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective.” in Waddington, Lisa et al. (eds). “European Yearbook of Disability Law.” Intersentia, Vol. 4, 2013, p. 154

<sup>1243</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 27 (1) and (h) and (i)

<sup>1244</sup> Liisberg, Maria Ventegodt. “Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective.” in Waddington, Lisa et al. (eds). “European Yearbook of Disability Law.” Intersentia, Vol. 4, 2013, p. 149

*who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:*

*a) 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;*

*b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;*

*c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;*

*d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;*

*e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;*

*f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;*

*g) Employ persons with disabilities in the public sector;*

*h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;*

*i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;*

*j) Promote the acquisition by persons with disabilities of work experience in the open labour market;*

*k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.*

2. *States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour*".

At this stage of the discussion, it is possible to focus on provisions and measures that have been adopted at European and national level in order to combat discrimination against persons with disabilities and to foster their inclusion into the labour market, and subsequently to analyse the instrument of reasonable accommodation.

#### iv. Positive action and quotas

As mentioned above, the inclusion and anti-discrimination measures are embraced in order to obtain the inclusion of persons with disabilities into the labour market and to empower them, in accordance with the principle of equality.

It is appropriate to recall that, as outlined above, the equality pursued can be formal when it aims merely to treat everyone equally, providing for certain some rights and treatments. Alternatively, it can be substantive when it evaluates the specific circumstances of the individual worker in order to achieve a *de facto* equality and equality of opportunities. Therefore, substantive equality requires not only "negative" action to eliminate discrimination but also goes further in requiring "positive" action targeting the promotion of equality through concrete and practical measures<sup>1245</sup>.

In order to achieve substantive equality through positive action, scholars and legislators have theorised and adopted various measures in the context of employment to boost the hiring of persons with disabilities and their inclusion into the workplace, far before providing reasonable accommodations.

In addition, it has been argued that employment represents an essential step for a person in order to become incorporated into society "being seen as part of a

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<sup>1245</sup> Prechal, Sacha. "Equality of treatment, non- discrimination and social policy: Achievements in three themes." *Common Market Law Review* Vol. 41, Kluwer Law International, 2004, Netherlands pp. 533–551, p. 537

society, therefore increasing an individual's social status"<sup>1246</sup>. Hence, the empowerment of persons can be achieved through employment since it enhances the inclusion of persons within the workplace as well as within society as such, following the principle of equality.

Various strategies and measures have been implemented in order to support and foster access and the participation of persons with disabilities in the labour market. Among the most common Waddington lists: special assistance, training or educational courses to prevent unemployment, specialised equipment, job coaching, permission for physical adaptations of the workplace, subsidies or tax credits and supplementary legislative protection<sup>1247</sup>. The author also specifies that these measures pursue mainly the aim of facilitating and supporting those employers that are already inclined to employ, or that have already employed, workers with disabilities and that in addition such measures are difficult to evaluate<sup>1248</sup>.

It can be noted that most of the measures mentioned are intended to foster the employment of persons with disabilities and their inclusion into the workplace indirectly. In other words, legislators try to boost employment by encouraging employers through taxation or other incentives. This approach might be effective to a certain extent, but it does not focus on the persons with disabilities themselves and the inclusion of such persons under their specific situations.

As one of the most radical and invasive measures, probably the most emblematic to have been adopted is the 'quota' system, which has become a focus of discussion among policymakers, experts and scholars. First of all, it must be stressed that scholars, courts and lawmakers have not reached a full consensus on the definition of positive action, although quotas are commonly encompassed within the concept of positive action, due to their aim of promoting and achieving

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<sup>1246</sup> Bunt, Danielle et al. "Quotas, and Anti-discrimination Policies Relating to Autism in the EU: Scoping Review and Policy Mapping in Germany, France, Netherlands, United Kingdom, Slovakia, Poland, and Romania." *Autism Research*, Vol. 13, No. 8, 2020, pp. 1397-1417

<sup>1247</sup> Waddington, Lisa. "Changing Attitudes to the Rights of People with Disabilities in Europe." in Cooper, Jeremy (ed.) "Law, Rights and Disability." London; Jessica Kingsley Publishers, 2000, p. 35-36

<sup>1248</sup> *Ibid.*, p. 36

substantive equality<sup>1249</sup>. Furthermore, Waddington argues that, as a means of taking positive action, a quota differs from non-discrimination law because a quota system facilitates persons with disabilities by providing a preferential pathway<sup>1250</sup>. However, the issue of positive action will be analysed further in the following section. For the moment, it is appropriate to briefly introduce and present the issue of quotas, with particular regard to Belgium and Italy.

Succinctly put, the quota system obliges employers to reserve a certain percentage of worker positions to a certain group of persons, which is perceived of as being disadvantaged due to the difficulties and barriers that they face in accessing and participating in the labour market, such as persons with disabilities. However, this kind of system has its disadvantages and gives rise to prejudices. On this basis, it can be argued that quotas represent a well-established system, both historically and culturally, which offers a good reference for discussion and comparison against the instrument of reasonable accommodation.

Analysing this issue, Waddington points out two assumptions: first, employers are not inclined to hire a high number of persons with disabilities and secondly, persons with disabilities are not able to compete with their peers without disabilities equally and fairly<sup>1251</sup>. In her analysis of the quota system, the author highlights that workers with disabilities hired under the quota requirement become part of a “separate labour market” reserved for persons with disabilities, where competition among jobseekers is restricted or even non-existent<sup>1252</sup>. In addition, the quota system requires that persons disclose their disabilities in order to be recognised as a person with a disability, and that this be registered as part of the enrolment procedure, as this is necessary in order for the employer to comply

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<sup>1249</sup> Ellis, Evelyn and Philippa Watson. “EU Anti-Discrimination Law.” Oxford University Press, 2012, p. 420

<sup>1250</sup> Waddington, Lisa. “Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws.” *Comparative Labor Law Journal*, Vol. 18, No. 1, 1996, pp. 62–101, p. 73

<sup>1251</sup> Waddington, Lisa. “Changing Attitudes to the Rights of People with Disabilities in Europe.” in Cooper, Jeremy (ed.) “Law, Rights and Disability.” London; Jessica Kingsley Publishers, 2000, p. 40

<sup>1252</sup> *Ibid.*, p. 35

with the quota obligation<sup>1253</sup>. However, such an arrangement has been criticised as discriminatory<sup>1254</sup>. Insofar as this measure has been considered, the quota system shows its disadvantages and limits due to its inability to introduce a new approach to the labour market that is capable of establishing a new perception of disability and of persons with disabilities. In other words, the quota system fails to acknowledge workers with disabilities as workers with the same skills and abilities as their peers without disabilities. Indeed, it has been noted that the quota system is based on the premise that persons with disabilities are not capable of withstanding the competition of their peers without disabilities, thus focusing on the “limitation of abilities” rather than on “capability”<sup>1255</sup>.

On the other hand, a new different approach would entail broader action and could be referred to as ‘holistic’ since its aim would not only be to facilitate access and participation by persons with disabilities in the labour market, for instance through financial benefits or subsidies, but also to eradicate prejudices and stereotypes against persons with disabilities and to introduce new attitudes towards them.

Action should be taken not only to increase the percentages and the absolute numbers of employed workers with disabilities or of students with disabilities at universities. In addition, initiatives should seek to bring about structural changes and achieve equal opportunities. In addition, the legislative novelties should establish and embrace a new approach towards and perception of disability in the light of the principle of equality. The main examples are the social model or the human rights model of disability, which does not aim to establish a preferential route but by contrast aims to provide equal opportunities for everyone and a fair condition within (professional and/or educational) competition.

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<sup>1253</sup> Vornholt, Katharina et al. “Disability and employment - overview and highlights.” *European Journal of Work and Organizational Psychology*, Vol. 27, No. 1, 2018, p. 5

<sup>1254</sup> Fuchs, Michael. “Quota systems for disabled persons: Parameters, aspects, effectivity.” *Policy Brief*, March 2014, p. 4

<sup>1255</sup> Pennings, Frans and Gijsbert Vonk (eds). “Research Handbook on European Social Security Law.” Edward Elgar Publishing Limited, 2015, p. 305

The following sections will briefly consider the situation in Italy and in Belgium in relation of the adoption of a quota system to the extent necessary in order to conduct a comparison with the adoption of reasonable accommodations.

Afterwards, reasonable accommodation in employment will be considered and analysed in the following section, again drawing on national experiences in Italy and Belgium.

a. Quotas: Italy

Quotas were introduced in Italy by Act no. 68 of 1999, the main aim of which is to promote the employment and integration into the workplace of persons with disabilities<sup>1256</sup>. In particular, the law requires that employers, both private and public, with more than 50 employees must reserve a quota of 7% for workers with disabilities, while if the employer has between 36 and 50 employees the quota is fixed at 2 employees (with disabilities) and if the employer has between 15 and 35 employees the quota is only 1 employee (with a disability)<sup>1257</sup>. Moreover, as has been noted the law is founded on what is known as “targeted employment”, which is based first of all on a compulsory quota and secondly on the enhancement of the abilities of persons with disabilities<sup>1258</sup>. Specifically, the Act no. 68/1999 provides that, in order to hire a person with a disability, the employer must take into account the abilities and capabilities of that person as well as “supporting measures, positive actions and solutions for issues related to the environment, instruments and interpersonal relations in the workplace”<sup>1259</sup>. In addition, Article 13 provides for a number of incentives, and letter c) in particular establishes a

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<sup>1256</sup> Legge 12 marzo 1999, n. 68, Art. 1

<sup>1257</sup> *Ibid.*, Article 3

<sup>1258</sup> Agovino, Massimiliano and Agnese Rapposelli. “Does flexicurity promote the employment of disabled people? A panel analysis for Italian regional data.” *Quality & Quantity*, Vol. 50, No. 5, 2015, p. 2087

<sup>1259</sup> Legge 12 marzo 1999, n. 68, Art. 2, personal translation of “forme di sostegno, azioni positive e soluzioni dei problemi connessi con gli ambienti, gli strumenti e le relazioni interpersonali sui luoghi quotidiani di lavoro e di relazione”

system of fixed reimbursements for any employer that modifies the workplace in order to adapt it to the abilities and conditions of workers with disabilities<sup>1260</sup>.

As regards the recognition of persons with disabilities for the purposes of the law at issue, Act no. 68/1999 refers to Act no. 104/1992, Article 4 of which provides that a medical commission of experts must certify disability<sup>1261</sup>.

It is appropriate to point out that some authors, such as Agovino, Marchesano and Garofalo, observe that Act no. 68/1999 represents a landmark act, introducing into Italian law a new approach to disability through the provision of quotas as well as the principle that the employer must place a worker with a disability in a position that is commensurate with the abilities of the worker and promotes the efficiency of the enterprise<sup>1262</sup>. In their view, ‘targeted employment’ and adaptation to the “social-working profile” of the worker will eradicate discrimination and foster worker productivity<sup>1263</sup>.

#### b. Quotas: Belgium

In Belgium quotas are provided for in relation to the public sector only under the Arrêté royal du 5 mars 2007, Article 3(1) of which requires that certain federal public services must reserve a quota of 3% for persons with disabilities<sup>1264</sup>. The Arrêté royal du 5 mars 2007<sup>1265</sup> refers to the Arrêté royal du 11 août 1972<sup>1266</sup> and the later Arrêté royal du 6 octobre 2005<sup>1267</sup>, as amended by the Loi du 3

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<sup>1260</sup> Legge 12 marzo 1999, n. 68, Art. 13

<sup>1261</sup> Legge 5 febbraio 1992, n. 104, Art. 4

<sup>1262</sup> Agovino, Massimiliano et al. “Quotas and Italy, Policies based on mandatory employment quotas for disabled workers: the case of Italy.” *Modern Italy*, Vol. 24, No. 3, 2019, pp. 295–315, p. 298

<sup>1263</sup> *Ibid.*

<sup>1264</sup> Arrêté royal du 5 mars 2007 organisant le recrutement des personnes handicapées dans la fonction publique administrative fédérale, MB 16 mars 2007, Article 3(1)

<sup>1265</sup> *Ibid.*

<sup>1266</sup> Arrêté royal du 11 août 1972 stimulant l'emploi de handicapés dans les administrations de l'Etat, MB 29 août 1972

<sup>1267</sup> Arrêté royal du 6 octobre 2005 portant diverses mesures en matière de sélection comparative de recrutement et en matière de stage, MB 26 octobre 2005

septembre 2017<sup>1268</sup>, in order to identify those persons who qualify as persons with disabilities for the purposes of the law. Specifically, the Arrêté royal du 6 octobre 2005 lists the persons who qualify as persons with disabilities, e.g. the provision recognises *inter alia* as persons with disabilities for the purposes of the provision those persons who are registered with one of the agencies operating in Belgium. These include specifically the Vlaams Agentschap voor Personen met een Handicap (VAPH), the Service bruxellois francophone des Personnes handicapées, the Dienststelle für Personen mit Behinderung, or the Agence wallonne pour l'intégration des personnes handicapées (AWIPH) which has now merged with the Agence pour une Vie de Qualité (AVIQ)<sup>1269</sup>.

For the purposes of this research, it is not necessary to discuss or analyse these agencies in greater depth. However, it is worth stressing that the Décret of 6 avril 1995<sup>1270</sup> establishing the AWIPH, which regulates the integration of persons with disabilities<sup>1271</sup>, states that “any person who is affected by an important minor or major limitation in capacity for social or professional integration due to an alteration of mental, sensorial or physical ability requiring intervention by society shall be deemed to be disabled”<sup>1272</sup>. The Décret of 6 avril 1995 has now been replaced by the Arrêté of the Walloon government of 29 September 2011, which lays down legislation on health and social action, and maintains the same definition of persons with disability<sup>1273</sup>. In addition, it is worth noting that the

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<sup>1268</sup> Loi du 3 septembre 2017 relative à la publication d'informations non financières et d'informations relatives à la diversité par certaines grandes sociétés et certains groupes, MB 11 septembre 2017

<sup>1269</sup> <https://www.aviq.be/> - last visited 17.10.2020

<sup>1270</sup> Décret du 6 avril 1995 relatif à l'intégration des personnes handicapées, MB 25 mai 1995

<sup>1271</sup> [https://www.aviq.be/handicap/AWIPH/handicap\\_Belgique/histoire/index.html](https://www.aviq.be/handicap/AWIPH/handicap_Belgique/histoire/index.html) - last visited 09.03.2021

<sup>1272</sup> Décret du 6 avril 1995 relatif à l'intégration des personnes handicapées, MB 25 mai 1995, Article 2: “est considérée comme handicapée toute personne mineure ou majeure présentant une limitation importante de ses capacités d'intégration sociale ou professionnelle suite à une altération de ses facultés mentales, sensorielles ou physiques, qui engendre la nécessité d'une intervention de la société”

<sup>1273</sup> Arrêté du Gouvernement wallon du 29 septembre 2011 portant codification de la législation en matière de santé et d'action sociale, MB 21 décembre 2011

AVIQ mentions the Convention on the Rights of Persons with Disability and its definition of disability<sup>1274</sup>.

v. Employment and reasonable accommodations

At this stage it is important to consider the issue of reasonable accommodations within the context of employment. This instrument seems to be the most appropriate in achieving the goals mentioned above. These goals involve embracing the principle of substantive equality in terms of opportunities as well as adopting a holistic approach encompassing the combatting and eradication of discriminatory acts and behaviours, including prejudices and stereotypes resulting from an anachronistic and unfair approach towards persons with disabilities. Indeed, reasonable accommodation requires specific individual measures that are tailored to the individual's condition. As such, this instrument relies on a new theoretical approach and reasoning, which endorses the perception of impairment as a personal trait (among others) and the recognition of disability as a result of the interaction between the impairment and the barriers raised by society.

It has already been pointed out that, as is the case under primary and secondary EU legislation, reasonable accommodations have been introduced in relation to employment and are limited to this area only.

Therefore, insofar as necessary for the purposes of this research, the following pages will consider labour law in relation to disability and reasonable accommodation. Indeed, as far as EU law is concerned, some issues raised in relation to employment are useful and applicable also in the context of higher education.

Particularly, acting on the basis of Article 13 of the Treaty establishing the European Community, which vests the EU with competence to combat discrimination, in 2000 the Council approved Directive 2000/78/EC “establishing a general framework for equal treatment in employment and occupation”<sup>1275</sup>.

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<sup>1274</sup>[https://www.aviq.be/handicap/AWIPH/handicap\\_Belgique/ONU/index.html](https://www.aviq.be/handicap/AWIPH/handicap_Belgique/ONU/index.html) - last visited 09.03.2020

<sup>1275</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Consequently, Directive 2000/78 has been implemented within national law, specifically in Belgium through the Law of 10 May 2007 combatting all forms of discrimination<sup>1276</sup> and in Italy through the Decree of 9 July 2003 implementing Directive 2000/78 for an equal treatment in employment<sup>1277</sup>. Both legal systems largely copy-paste the provisions of the Directive from the relevant national language, merging the provisions with national law.

Analysing the provisions of the Directive, it is clear that a reasonable accommodation is comprised of two elements, namely “appropriate measure” and “disproportionate burden”<sup>1278</sup>.

The Directive specifies the meaning of appropriate measure in recital 20 and provides some examples.

In particular, it states that:

*“Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources”*<sup>1279</sup>.

Successively, the recital 21 specifies that, in order to assess whether a burden is disproportionate:

*“account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance”*<sup>1280</sup>.

Therefore, the Directive specifies that, in order to be appropriate, the measure must be effective and practical.

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<sup>1276</sup> Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination, MB 30 mai 2007

<sup>1277</sup> Decreto Legislativo 9 luglio 2003 n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro

<sup>1278</sup> Ferri, Delia. and Anna Lawson. “Reasonable accommodation for disabled people in employment, A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway.” European Commission, 2016, Brussels, p. 52

<sup>1279</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Recital 20

<sup>1280</sup> Ibid., Recital 21

As regards the burden, the Directive states that, when assessing whether a measure entails a disproportionate burden, the cost must be related to the resources of the operator that is subject to the duty.

In addition, it should be noted that the Directive does not explicitly identify the failure to provide reasonable accommodation as a form of discrimination<sup>1281</sup>.

Alongside the European framework and the national implementing legislation, the issue of reasonable accommodation for workers with disabilities has been brought to the attention also of the national judicial authorities.

In the light of the aims of this research, the following pages will consider several national judgements from Belgium and Italy.

The cases selected are not numerous due to the limited volume of case law at national level as well as the fact that cases have been selected based on their relevance for the aims of this research.

#### vi. Belgium: reasonable accommodation and employment

At this stage it is appropriate to analyse briefly a few Belgian judgements dealing with the issue of disability and reasonable accommodation in employment. The cases have been selected from the available judgments of French-speaking courts (due to linguistic constraints) and have been chosen based on the level of interest in their content in relation to the issue at stake.

The first case is a Labour Court judgement from January 2013, which is worth analysing due to the reasoning followed by the court in relation to reasonable accommodation<sup>1282</sup>. In the case before the court, an employee had become unable to perform her job as warehouseman as previously following two surgical operations on her hands and, therefore, she that she be reassigned<sup>1283</sup>. The employer responded that, since the employee was entirely unable to perform her

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<sup>1281</sup> Ferri, Delia. and Anna Lawson. "Reasonable accommodation for disabled people in employment, A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway." European Commission, 2016, Brussels, p. 84

<sup>1282</sup> Cour du travail de Bruxelles du Janvier 2013. R.G. Nr. 2011/AB/668

<sup>1283</sup> Ibid., par. IIA

tasks, this constituted a case of force majeure and the contract had to be terminated<sup>1284</sup>. However, the court did not agree with the assumption that the worker was entirely unable to perform her duties, and also acknowledged that she could perform her tasks, or other tasks, following the adoption of reasonable accommodations<sup>1285</sup>. Indeed, the Labour Court held that the employer had committed an act of discrimination by refusing to adopt any reasonable accommodations, and by contrast instigating dismissal procedures in relation to the employee<sup>1286</sup>. Along the same lines, the Labour Court argued, referring to Directive 2000/78 and CJEU case law, including in particular the *Chacon Navas* case, that due to her physical impairments the employee was not entirely unable to perform her tasks, but was simply hampered in doing so, and also held that the employer was under a duty to accommodate the worker with a disability<sup>1287</sup>. In the end, the Labour Court held that, since the employer had not proven that it was impossible to provide any reasonable accommodations, in the light of the Law of 10 May 2007 an act of discrimination had been committed<sup>1288</sup>.

Furthermore, in relation to the concept of disability it is worth mentioning a more recent case involving a man who was rejected by a potential employer due to his obesity after applying for a job as driving school instructor<sup>1289</sup>. The court ruled that obesity did not constitute a ground for protection, but that it may however constitute a disability as a result of the interaction between a physical or mental impairment and barriers establishing obstacles to the full and effective participation of a person with a disability in professional life<sup>1290</sup>. Pursuing its reasoning, the court declared that the claimant had suffered direct discrimination due to this condition as he had been treated less favourably compared to another person in a similar situation. Moreover, the court acknowledged that a refusal to accommodate constitutes a form of discrimination, specifying that the concept of

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<sup>1284</sup> Ibid., par. IIA

<sup>1285</sup> Ibid., par. 8

<sup>1286</sup> Ibid., par. 11

<sup>1287</sup> Ibid., par. 19

<sup>1288</sup> Ibid., par. 22

<sup>1289</sup> Tribunal du travail de Liège du 20 Juin 2016, R.G. 15/167/A CIV. 914/15, par. II

<sup>1290</sup> Ibid., par. 1

reasonable accommodation encompasses not only material adjustments but also non-material adjustments<sup>1291</sup>.

With particular regards to the concept of reasonable accommodation and the applicable procedures, an interesting decision was reached by the Labour Court of Brussels in 2018 in which the Court held, with specific regard to the duty to accommodate, that the question was not well-founded, stressing that the examination concerning potential accommodations was still ongoing and moreover that the worker was not fully cooperating<sup>1292</sup>. Indeed, the Court noted that the employer had asked to the employee to attend a precautionary examination with occupational physicians in order to evaluate the request for reasonable accommodation from a medical viewpoint; specifically, despite acknowledging that such a visit was not mandatory, the Court held that this request by the employer was not ‘unreasonable’<sup>1293</sup>.

Moreover, the Labour Court of Liège had the opportunity to specify the content of the duty to accommodate when deciding on the case of a woman affected by endometriosis, a long-term disease with chronic consequences<sup>1294</sup>. The court highlighted that a reasonable accommodation must be tailored to the personal, concrete and specific circumstances of an individual and also that a request for a reasonable accommodation may be supported by a medical certificate<sup>1295</sup>. In the end, the court held that there was a close link between the dismissal and the refusal of reasonable accommodation<sup>1296</sup>. Indeed, the dismissal had been ordered following the refusal by the employer to adopt any reasonable accommodations, and both acts had been based on the worker’s condition.

As per the focus of the research, the next section will analyse various judgements handed down by Italian courts.

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<sup>1291</sup> Ibid., par. 1-3

<sup>1292</sup> Cour du travail de Bruxelles du 07 Mai 2018. R.G. Nr. 2016/AB/133

<sup>1293</sup> Ibid., par. 3.2

<sup>1294</sup> Tribunal du travail de Liège du 24 Septembre 2019

<sup>1295</sup> Ibid., par. 2.1.3

<sup>1296</sup> Ibid., par. 2.2

vii. Italy: reasonable accommodation and employment

As mentioned above, the provision of reasonable accommodations has been considered by the courts also in Italy. The cases have been selected from the available judgements based on the level of interest in their content in relation to the issue at stake.

An interesting judgement was issued by the Court of Ascoli Piceno in 2014 concerning administrative protection for persons with disabilities in relation to the acts of the local administration<sup>1297</sup>. Specifically, it was observed that the local administration had refused to provide certain services, such as direct and indirect assistance at home, and was entirely indifferent to the needs of the applicant, as was clear from the failure to communicate and to reach an agreement<sup>1298</sup>. The court highlighted that certain acts carried out by the administration within areas falling under its discretion may still feature discriminatory aspects<sup>1299</sup>.

Notably, the innovative content of the judgement consisted in the fact that the court referred expressly to the UN Convention on the Rights of Persons with Disabilities and the related duty to accommodate. The Court of Ascoli Piceno stressed that such a concept is an unfamiliar one for the Italian legal order<sup>1300</sup>. In its conclusion the court held that the administration had discriminated against the applicant, adding that the adoption of reasonable accommodation would have resolved the matter in the most dignified manner for the applicant, and would have prevented the discrimination from continuing<sup>1301</sup>. It is useful to recall here that Article 2 CRPD provides that the denial of reasonable accommodation amounts to a form of discrimination.

Subsequently, in 2017 the Court of Vicenza heard an application brought by an association responsible for promoting the rights of persons with disabilities against a local administration and the company in charge of the public transport system. The case concerned the disadvantage created by the fact that it was

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<sup>1297</sup> Tribunale di Ascoli Piceno, 05/02/2014, R.G. 761/2013, p. 1-2

<sup>1298</sup> Ibid.

<sup>1299</sup> Ibid., p. 3

<sup>1300</sup> Ibid.

<sup>1301</sup> Ibid., p. 7-8

impossible for persons with disabilities to use the public transport service due to a lack of proper adjustments. In its judgement, the court referred to the CRPD, which recognises that all persons with disabilities have the right to “participate fully in all field of life”<sup>1302</sup>, a right that in the view of the court had not been guaranteed in the case before it. In addition, the court also referred to reasonable accommodations, as had already been mentioned by all of the parties to the proceedings. However, the Tribunal held that, in the case before it, taking account of all of the factors involved, including organisational, temporal and financial considerations, it was not possible to achieve resolve the problem entirely in a manner that could guarantee full accessibility and enjoyment for all persons with disabilities. Nonetheless, in its decision the court ordered the company managing the public transport to arrange “a plan to remove all the discrimination”, pointing out that the disadvantage had not been created by the persons with disabilities themselves but rather by external factors<sup>1303</sup>.

Aside from the judgments mentioned above, also the Supreme Court has issued judgments of its own concerning reasonable accommodation. In particular, in 2018 the Supreme Court issued two different judgements with similar content, namely no. 6798<sup>1304</sup> and no. 27243<sup>1305</sup>.

In the former the court held on the one hand that proportionality had been correctly assessed on the basis of the cost for the employer and the consequences for other workers’ jobs, and on the other hand that reasonableness may be evaluated to the extent of the related justification<sup>1306</sup>. Here, the court appeared to endorse, whether intentionally or not, a two-stage approach as it analysed separately the proportionality of the burden from the reasonableness of the accommodation. Furthermore, in the latter decision, the Supreme Court took a more cautious approach, asserting reasonableness as a parameter but also as a limit in order to evaluate the accommodation. Specifically, the Court held that the

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<sup>1302</sup> Tribunale di Vicenza, 13/09/2017, n. 572, p. 7

<sup>1303</sup> *Ibid.*, p. 12

<sup>1304</sup> Corte Suprema di Cassazione. Sentenza 19 marzo 2018, n. 6798

<sup>1305</sup> Corte Suprema di Cassazione. Sentenza 26 ottobre 2018, n. 27243

<sup>1306</sup> Corte Suprema di Cassazione. Sentenza 19 marzo 2018, n. 6798, p. 11

parameters that should be taken into account included constitutional values, other workers' jobs and the financial stability of the employer<sup>1307</sup>.

Thus far, judgments have been concerned with the instrument of reasonable accommodation in relation to employment. However, the courts have also been called upon to decide on the issue of reasonable accommodations in relation to the right to education. Therefore, having regard to the objectives of this research, it seems appropriate to briefly discuss these judgements, addressing the issue of reasonable accommodation in the context of education.

vii. Reasonable accommodation and education at national level

Only a few judgements have been issued concerning reasonable accommodation and right to education, probably due to the lack of applicable legislation as well as the novelty of and low familiarity with the issue.

Within Italy, the most remarkable judgement on this issue was that given by the Court of Milan in 2017<sup>1308</sup>, which should therefore be discussed briefly. In the case at issue, the claimant asserted that the provision of a lower number of hours of assistance for the pupil concerned as well as the failure to adopt an adequate educational plan amounted to discrimination<sup>1309</sup>. For its part, the court relied first on Act no. 104/1992, which recognises the right to education for all persons with disabilities, including expressly higher education and universities. It also referred to the CRPD, Article 24 of which recognises the right to education and the reasonable accommodation as a tool to be used by the State in order to ensure the right to education on an equal footing with other persons<sup>1310</sup>. Once again, a court recognised as discriminatory the denial of adjustments, i.e. reasonable accommodation, that could have avoided the perpetuation of discriminatory conduct and would have permitted to the parties to enjoy their rights on an equal footing with others.

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<sup>1307</sup> Corte Suprema di Cassazione. Sentenza 26 ottobre 2018, n. 27243, par. 8

<sup>1308</sup> Tribunale di Milano, 04/07/2017, R.G. 24374/2016

<sup>1309</sup> Ibid.

<sup>1310</sup> Ibid., p. 6-7

With regard to Belgium, an interesting case is the decision of the Conseil d'État on the suspension of an administrative act ordering the continuation of studies at the Haute École for an applicant who had appealed against that order, claiming that the inadequate spelling was caused by his dyslexia and dysorthography<sup>1311</sup>. Specifically, it was noted that, due to the decision taken by the exam board concerning the continuation of studies, the applicant was prevented from obtaining his diploma and starting his professional life<sup>1312</sup>. The Conseil noticed on the one hand that the applicant had never submitted a formal request for a reasonable accommodation to the Haute École, although the applicant had mentioned the duty to accommodate and the CRPD in his claim before the Conseil d'État, and on the other hand that teaching staff were aware of the student's condition<sup>1313</sup>. In the end, the Conseil acknowledged that, despite being aware of the applicant's condition, the respondent had not taken into account the disability, thus putting the applicant in a different position compared to others and disregarding the specific circumstances of the persons involved<sup>1314</sup>. In this sense, the Conseil d'État argued that the prerequisites for a suspension had been met<sup>1315</sup>.

This chapter shows the slow but constructive spread of the provision on reasonable accommodation from an employment law context into education. However, it appears that education still represents a rather marginal and unexplored issue, and moreover that certain theoretical approaches and reasoning could be transferred from employment into education.

It is now time to move to the conclusions of this research. The conclusions will go consider the main issues addressed in the research, namely disability, education and the capability approach and finally also reasonable accommodations.

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<sup>1311</sup> Conseil d'État du 25 Octobre 2018. Arrêt Nr. 242.794, par. 1-4

<sup>1312</sup> *Ibid.*, par. 8

<sup>1313</sup> *Ibid.*, par. 11-12

<sup>1314</sup> *Ibid.*, par. 12

<sup>1315</sup> *Ibid.*, par. 13

## **VI. Conclusions**

Following the *fil rouge* of the research, this chapter will bring together all of the issues discussed throughout the research. Specifically, the chapter will go through the concept of disability, but also all of the concepts that have been developed

alongside it during the discussion set out above. It will then assess whether it is appropriate and feasible for the capability approach to be applied to higher education. After this, the chapter will enquire into the evaluation of the provision on reasonable accommodation within the universities, in an attempt to harmonise the issue from an EU perspective.

Specifically, the chapter will start by evaluating the concept of disability and the models mentioned throughout this research, considering the *status* of persons with disabilities within society and the role of society itself towards its members and in particular the persons with disabilities. Furthermore, concepts as ‘vulnerability’ and ‘disadvantaged’ will be considered, as well as dignity and equality. Moreover, the capability approach in relation to persons with disabilities will be applied in the context of (higher) education. Finally, the provision of reasonable accommodation within education and its harmonised and homogeneous application will be assessed, along with the framework outlined.

## **1. Disability, Rights and Society**

It has become clear during the research that the concept of disability has been changing and evolving, and has even switched features and meaning with other concepts, e.g. handicap. Alongside the concept of disability, from the perspective of the law it is essential to consider the *status* of persons with disabilities, encompassing the rights vested in them but also the aspects and categories that are applied in relation to disability.

### **i. Universalism, vulnerability and disadvantage**

Following the discussion developed until now, it is possible to claim that the class of persons with disabilities is a heterogeneous group. This heterogeneity refers to impairments in two different ways since on the one hand impairments differ from one another (e.g. mental versus physical) and on the other hand the severity of any given impairment, and hence its impact on individuals and their abilities, can vary from individual to individual. In addition, the spectrum of disabilities is continuously evolving and its boundaries are rather blurry and undefined. It is not always clear and predetermined what a disability is and what falls within that

category. Moreover, it must be noted that disability is a condition that can potentially affect any person, implying a universalism of disability. In this regard, Zola and his universalism in relation to disability policy and the process of disablement provides an important point of reference<sup>1316</sup> which may be juxtaposed with the view of Hahn and the minority group theory<sup>1317</sup>.

Under the universalist approach, it can be argued that “disablement is a universal human phenomenon”<sup>1318</sup>, and hence a policy concerning the process of disablement must be conceived of as a “policy for all”<sup>1319</sup>. By contrast, a policy based on a minority group theory will be a policy focused on and limited to a minority<sup>1320</sup>. In this regard, Zola argues that a minority group approach still corroborates the specialness and abnormality of disability, and also some features of the medical approach, asserting the categoricity and dichotomy of disability in contrast to persons without disabilities, which adopts *inter alia* a short-term outlook<sup>1321</sup>. In other words, the minority group approach seems to recognise and reinforce the labels of ‘person with disability’ and ‘person without disability’. Hence, the conflict between the two groups, along with its competitiveness and perhaps also its negative attitudinal and behavioural consequences, are corroborated by this minority group approach. While acknowledging the universality of disability, the universalism approach recognises disability as one of the many features of humanity.

According to the authors, it has been stated that: “Universal disability policy, in other words, merely expands the range of human normality to more realistically

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<sup>1316</sup> Zola, Irving K. “Toward the Necessary Universalizing of a Disability Policy.” *The Milbank Quarterly* Vol. 67, No. 2, 1989, pp. 401-428

<sup>1317</sup> Hahn, Harlan. “The Politics of Physical Differences: Disability and Discrimination.” *Journal of Social*, Vol. 44, No. 1, 1988, pp. 39-47

<sup>1318</sup> Bickenbach, Jerome E. et al. ‘Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps.’ *Social Science & Medicine*, Vo. 48, 1999. pp. 1173-1187, p. 1179

<sup>1319</sup> *Ibid.*, p. 1182

<sup>1320</sup> *Ibid.*, p. 1182

<sup>1321</sup> Zola, Irving K. “Toward the Necessary Universalizing of a Disability Policy.” *The Milbank Quarterly* Vol. 67, No. 2, 1989, pp. 401-428

include empirically-grounded human variation”<sup>1322</sup>. Developing that statement further, it appears that this universalist view has positive implications in seeking to eradicate conflict based on disability by recognising disability as an element pertaining to the lives of everyone (potentially), rather than as an external alien element that needs to be marginalised or cured. In addition, the minority group view provides an interesting and useful interpretation of the perpetration of discrimination against persons with disabilities and the role of society in order to maintain such a position, both in the past and in the present-day.

Moving to the issue of ‘vulnerability’, in a paper on disability studies Finkelstein observes that: “Able-bodied people have deposited their own natural ‘vulnerability’, and genuine social dependency, into us as if this was unique to being disabled. Our ‘vulnerability’ is then seen as an attribute that separates us from the essentially normal - we are not quite human”<sup>1323</sup>.

Along these lines, it would that some categories or conditions attributable to everyone, including persons with and without disabilities, take on different meanings and interpretations depending upon which group they refer to, whether persons with disabilities or persons without disabilities.

However, under a universal approach applied to the concept of ‘vulnerability’ it can be argued that, in certain conditions, a person without any disability might be recognised as ‘vulnerable’, while a person with disability might not, and vice versa. In other words, having a disability does not inevitably entail a situation of vulnerability, and hence such a condition can be displayed by anyone.

Thus, recognition (as a vulnerable person) would not (or should not) imply any difference in terms of content and meaning when related to one group or another.

Moreover, within the framework of reasonable accommodation, it can be argued that vulnerability constitutes an additional comprehensive category, which could help to evaluate whether the person concerned is vulnerable and hence whether

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<sup>1322</sup> Bickenbach, Jerome E. et al. ‘Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps.’ *Social Science & Medicine*, Vo. 48, 1999. pp. 1173-1187, p. 1183

<sup>1323</sup> Finkelstein, Vic. “Emancipating Disability Studies.” in Shakespeare, Tom (ed). “The Disability Reader: Social Sciences Perspectives.” London: Cassell, 1998, p. 30

the person needs any reasonable accommodation to be adopted. However, such an issue requires further study and investigation, which cannot be conducted here. The research only aims to offer a new view and interpretation in relation to this issue, in other words the application of the category of vulnerability as comprehensive category that is capable of evaluating whether a person is entitled to a reasonable accommodation.

Alongside ‘vulnerability’, which is still matter of debate among scholars, another concept that is generally associated with the category of persons with disabilities is ‘disadvantage’. In fact, the European Union has been using this term explicitly and indisputably in relation to disability, e.g. Directive 2000/78, which is the most important act of secondary legislation on discrimination and disability, mentions ‘disadvantage’ and persons with disabilities<sup>1324</sup>.

In particular, the Directive states recital 26 of the Preamble that:

*“The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, [...]”*<sup>1325</sup>.

Moreover, Article 2 (2) (b) states:

*“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless [...]”*<sup>1326</sup>.

In assessing these provisions, it seems self-evident that, under EU law, discrimination causes a disadvantage, in the sense of a loss or a negative effect, for the person suffering from the discrimination. Similarly, within the ambit of United Nations, in its General Comment No. 6 on equality and non-discrimination, the Committee on the Rights of Persons with Disabilities refers to “discriminatory practices and patterns of disadvantage”, which must be identified

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<sup>1324</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<sup>1325</sup> Ibid., Preamble, (26)

<sup>1326</sup> Ibid., Article 2(2)(b)

and eradicated, promoting equality<sup>1327</sup>. In addition, the Committee further develops its reasoning, declaring that: “Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantage”<sup>1328</sup>. Indeed, the Committee identifies disadvantage with social and economic deprivation, which needs to be tackled by redistributive initiatives pursuing substantive equality<sup>1329</sup>.

If the concepts of ‘disadvantage’ and ‘vulnerability’ are compared with each other, it can be argued that, whilst a disadvantage consists in some kind of social and economic deprivation, vulnerability refers to a vaguer non-material condition of those persons who might be easily harmed and cannot efficiently defend or take care of themselves. Despite the fact that both the terms, namely disadvantage and vulnerability, do not belong to the legal domain, it may be observed that the former is commonly used and accepted within that context while there is no scope for agreement and clarity concerning the latter.

However, it may be asserted that ‘vulnerability’ could be used in order to identify those persons requiring protection from the law, specifically under non-discrimination law. Moreover, it must be specified that this category should be applied without any bias, which means that any person may be identified as ‘vulnerable’, regardless of whether that person has, or does not have, a disability. By contrast, disadvantage can be still used to identify the losses and deprivations suffered by a person who has suffered discrimination in order to ensure correct and effective redistribution action with the aim of achieving substantive equality.

In addition, as far as the definitions of these terms is concerned, it is interesting and worthwhile to note the definitions drafted within the Rome Ministerial Communiqué of 2020, adopted within the EHEA framework, which mentions ‘disadvantaged students’ and ‘vulnerable students’ but also ‘underrepresented

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<sup>1327</sup> UN Committee on the Rights of Persons with Disabilities, General comment No. 6 on equality and non-discrimination, 26 April 2018, CRPD/C/GC/6, par. 34

<sup>1328</sup> *Ibid.*, par. 11

<sup>1329</sup> *Ibid.*

students'<sup>1330</sup>. These definitions obviously do not have any legal status, but they do apply within the ambit of the Communiqué itself and the related Principles and Guidelines.

Furthermore, the research has already pointed to the importance and the influence of this agreement and these documents within legal studies. Hence, it is important to set out these definitions. The definitions are as follows:

- *“Underrepresented students: A group of learners is underrepresented in relation to certain characteristics (e.g. gender, age, nationality, geographic origin, socio-economic background, ethnic minorities) if its share among the students is lower than the share of a comparable group in the total population. This can be documented at the time of admission, during the course of studies or at graduation. Individuals usually have several underrepresented characteristics, which is why combinations of underrepresented characteristics (“intersectionality”) should always be considered. Furthermore, underrepresentation can also impact at different levels of higher education – study programme, faculty or department, higher education institution, higher education system. This definition is complementary to the London Communiqué, “that the student body entering, participating in and completing higher education at all levels should reflect the diversity of our populations”, but does not fully cover it.*
- *Disadvantaged students: Disadvantaged students often face specific challenges compared to their peers in higher education. This can take many forms (e.g. disability, low family income, little or no family support, orphan, many school moves, mental health, pregnancy, having less time to study because one has to earn one’s living by working or having caring duties). The disadvantage may be permanent, may occur from time to time or only for a limited period. Disadvantaged students can be part of an underrepresented group, but do not have to be. Therefore, disadvantaged and underrepresented are not synonymous.*

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<sup>1330</sup> Rome Ministerial Communiqué, 19 November 2020

- *Vulnerable students: Vulnerable students may be at risk of disadvantage (see above) and in addition have special (protection) needs. For example, because they suffer from an illness (including mental health) or have a disability, because they are minors, because their residence permit depends on the success of their studies (and thus also on decisions made by individual teachers), because they are at risk of being discriminated against. These learners are vulnerable in the sense that they may not be able to ensure their personal well-being, or that they may not be able to protect themselves from harm or exploitation and need additional support or attention*<sup>1331</sup>.

ii. Defining disability and the Nagi model

Pursuing the above reasoning further, it is essential within disability studies to discuss and evaluate the definition of disability according to a model of disability. In fact, it can be asserted that arriving at a definition of disability that answers questions over ‘how disability is perceived?’, and subsequently ‘how a person with disability is identified?’, depends fundamentally on the particular model that is relied on.

The main models have already been discussed above, along with the evolution from the medical model to the social model<sup>1332</sup>. However, the research has not yet mentioned the Nagi model, which it is now worth discussing briefly as it has been analysed and referred to by various authors, and also because various features may be beneficial and constructive for the discussion at issue<sup>1333</sup>.

Saad Z. Nagi was a sociologist whose work had a major impact on disability studies starting from the 1960s/1970s. In fact, it has been reported that he was the first to argue that the social context plays an important role in understanding and defining disability<sup>1334</sup>. Moreover, his model influenced disability policy in the

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<sup>1331</sup> Rome Ministerial Communiqué, 19 November 2020, Annex II, p. 9

<sup>1332</sup> See Chapter II

<sup>1333</sup> Nagi, Saad Z. “The Disabled and Rehabilitation Services: A National Overview.” *American Rehabilitation*, Vol. 2, No. 5, 1979, pp. 26–33

<sup>1334</sup> Albrecht Gary L. (ed). “Encyclopedia of Disability” SAGE, Publications, 2006, p. 1483

U.S.A. (e.g. the Americans with Disabilities Act relied on the Nagi model), although also the statistical methods used in Europe and within the United Nations (e.g. the ICF is influenced by the Nagi model)<sup>1335</sup>. Essentially, Nagi defines a disability as “a form of inability or limitation in performing roles and tasks expected of an individual within a social environment”<sup>1336</sup>. In other words, Nagi defines disability as an “expression of a physical or a mental limitation in a social context”<sup>1337</sup>.

Starting from the Nagi model as basis for their work, Verbrugge and Jette identify disability as “a gap between personal capability and the activity’s demand” and further it “can be alleviated at either side, by increasing capability or by reducing demand”<sup>1338</sup>. Therefore, the authors list four ways of reducing environmental demands: (1) modifying activities (2) bringing about changes within the environment (3) psychosocial interventions and (4) external supports<sup>1339</sup>. As reported by Masala and Petretto, the Nagi model provides a definition of disability that recognises disability as “a gap between the individual’s capabilities and the demands created by the physical and social environment”, acknowledging the influence of social environmental factors<sup>1340</sup>. Essentially, these authors sustain that disability stems from the interaction between a personal trait and the social environment, and therefore in order to cope with disability is it possible to intervene either on the personal condition or directly on the environment.

Therefore, disability can be defined as ‘gap between the personal condition and social and environmental demands’. Specifically, it must be pointed out that the

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<sup>1335</sup> Ibid., p. 997

<sup>1336</sup> Nagi, Saad Z. “The Disabled and Rehabilitation Services: A National Overview.” *American Rehabilitation*, Vol. 2, No. 5, 1979, pp. 26–33

<sup>1337</sup> Nagi, Saad Z. “Some Conceptual Issues in Disability and Rehabilitation.” in Marvin, Sussman B. (ed.). “Sociology and Rehabilitation.” Washington, DC: American Sociological Association, 1965, pp. 100–113, p. 101

<sup>1338</sup> Verbrugge, Lois M. and Alan M. Jette. “The Disablement process.” *Social Science & Medicine*, Vol. 38, No. 1, 1994, pp. 1-14, p. 9

<sup>1339</sup> Ibid., p. 9-10

<sup>1340</sup> Masala, Carmelo and Donatella R. Petretto. “From disablement to enablement Conceptual models of disability in the 20th century.” *Disability and Rehabilitation*, Vol. 30, No. 17, pp. 1233-1244, p. 1234

personal condition comprises the individual traits and capabilities of the individual, whereas social demands refer to the demands imposed by social activity in which the person is involved (e.g. educational, such as sitting an exam or attending a lecture) and finally the environmental demands refer to physical and psychological factors.

Following the social model of disability, it can be argued that disability results from the interaction between personal conditions and social environmental factors.

The definition embraced adds something extra to the further development of the discussion on the application of non-discrimination law, in particular in relation to the provision of reasonable accommodation and the adoption of the capability approach.

In this sense, in order to reduce or eliminate the gap in achieving equality of opportunities, a reasonable accommodation could intervene either on social environmental factors or on the personal condition. It must be highlighted that the personal condition includes not only the impairments (physical or mental) but also the capabilities of the person concerned. Along these lines, the capability approach can be applied in conjunction with the provision of reasonable accommodation.

In other words, a reasonable accommodation can be arranged in such a manner as foster a capability, intervening directly either on the person or on the surroundings.

At this stage, it is useful to provide an example based on experiences and factors. For instance, if during a written exam a person displays some degree of dysorthographia, the student may be allocated some extra time in order to cope with the difficulties encountered. In this case the reasonable accommodation intervenes on the social environmental level, allowing some extra time to students in order to finish the test. Furthermore, the main issue in applying the capability approach is how to identify capabilities in order to decide what adjustment to make in order to foster the capability and enable the person to access and participate in education, as considered in the light of the aims of this research.

However, the application of the capability approach to education will be considered in the following pages.

Along these lines, disability and impairment have been defined in various ways, and have been commonly confused with each other<sup>1341</sup>. However, despite the fact that disability and impairment feature similar characteristics, e.g. both terms can be construed as operating along a ‘spectrum’ under which it is possible to identify different disabilities or impairments and different degrees of severity for the same disability or impairment, the two terms are not equivalents.

For the purposes of this research, and especially within these concluding pages, it can be asserted that disability and impairment are not synonyms. On the one hand, impairment refers to an individual’s medical condition whereas, on the other hand, disability refers to the result of the interaction between the individual’s impairment and the social environment. Since the impairment influences and jointly causes the disability, it can be argued that, as the severity of the impairment and its manifestation changes, so too the disability will be correspondingly affected.

Pursuing this line of reasoning further, in the light of the aims of this research, it can be argued that not all disabilities will have a negative or indeed a considerable impact on access to and participation in educational life, in other words the right to education. It is thus necessary to identify a further element with reference to which it might be possible to assess whether or not disability must be addressed through the provision of reasonable accommodation. This aspect can be classified under ‘disadvantage’ or, with some further amendments, ‘vulnerability’.

### iii. The human rights model of disability and human dignity

At this stage it is appropriate to focus a little more on the issue of models of disability, paying particular attention to one of them. Indeed, a third model of disability has been introduced in the research (alongside the medical and the

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<sup>1341</sup> See Chapter II

social models), namely the human rights model of disability, which can be claimed to be slightly different from the social model<sup>1342</sup>.

In this sense, Degener mentions six differences between the social model and the human rights model<sup>1343</sup>, focusing mainly on the content of the Convention on the Rights of Persons with Disabilities<sup>1344</sup>. Here, it is sufficient to mention only a few of these elements without conducting a deep discussion of all of the arguments set out by Degener<sup>1345</sup>. Essentially, the author argues that, whereas the social model aims merely to explain disability as a social construction, it fails to assert values and to set out a full approach to be followed<sup>1346</sup>. Furthermore, the author argues that this model neglects the personal experience of the body and pain. For its part, the human rights model offers values and recognises everyone (e.g. persons with disabilities) as holders of rights, encompassing all rights from civil and political to economic, social and cultural rights, based on human dignity. Moreover, it acknowledges personal experience, taking it into account within the development of a social theory<sup>1347</sup>. In this regard Morris affirms that “However, there is a tendency within the social model of disability to deny the experience of our own bodies, insisting that our physical differences and restrictions are entirely socially created”<sup>1348</sup>. Furthermore, analysing the social model, Watson asserts that “It runs the risk of portraying disabled people as victims, not of their impairment but of a society that fails to include them. There is little room for agency or resistance”<sup>1349</sup>. In addition, it must be stressed that the human rights model is rooted in human dignity, and has some parallels with the capability approach which, as stated above, considers human dignity as a fundamental basis for its theory.

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<sup>1342</sup> Chapter II

<sup>1343</sup> Degener, Theresia. “Disability in a Human Rights Context.” *Laws*, Vol. 5, No. 35, 2016

<sup>1344</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>1345</sup> Degener, Theresia. “Disability in a Human Rights Context.” *Laws*, Vol. 5, No. 35, 2016

<sup>1346</sup> *Ibid.*

<sup>1347</sup> *Ibid.*

<sup>1348</sup> Morris, Jenny. “Pride against Prejudice.” Philadelphia: New Society Publishers, 1991, p. 10

<sup>1349</sup> Watson, Nicholas. “Enabling Identity: Disability, Self and Citizenship.” in Shakespeare, Tom. “The Disability Reader. Social Science Perspectives.” Continuum, 1998, p. 150

Therefore, it is worth briefly discussing human dignity. As highlighted by Andorno, international law does not provide a definition of human dignity, but does provide guidance<sup>1350</sup>. The Universal Declaration of Human Rights is fundamental in this respect in recognising the “inherent dignity” of all human beings, and in particular Article 1 which states that “All human beings are born free and equal in dignity and rights”<sup>1351</sup>. Following on from these assertions several authors<sup>1352</sup>, such as Andorno, observe first that dignity is intrinsic to the human condition, secondly that since human rights are derived from human dignity and human dignity is recognised as being vested in everyone, hence all human beings have equal basic rights, and thirdly that governments cannot deprive citizens of their rights<sup>1353</sup>.

Based on the discussions on the concept of dignity in this research, it is possible to assert that the concept of dignity is vague, but also that its meaning and content are continuously evolving.

Ultimately, it can be suggested that, in order to define ‘human dignity’, international human rights principles and guidelines must be followed due to the close and intrinsic connection between international law human rights and human dignity. On this basis, human dignity can be developed further and fulfilled in relation to the specific context, e.g. education.

As mentioned above, human dignity constitutes a point of contact between the human rights model of disability and the capability approach.

Along these lines, in the next step it is necessary to analyse together both the chosen theoretical framework, which consists mainly in the capability approach, and the context in which the individual is placed, namely higher education.

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<sup>1350</sup> Andorno, Roberto. Chapter 4 “Human Dignity and Human Rights.” in ten Have, Henk A.M.J. and Bert Gordijn (eds). “Handbook of Global Bioethics.” Springer, 2014, p. 50

<sup>1351</sup> United Nations General Assembly. “Universal Declaration of Human Rights.” Paris, 10 December 1948, Preamble and Article 1

<sup>1352</sup> E.g. McCrudden, Christopher. “Human Dignity and Judicial Interpretation of Human Rights.” *The European Journal of International Law*, Vol. 19, No. 4, 2008

<sup>1353</sup> Andorno, Roberto. Chapter 4 “Human Dignity and Human Rights.” in ten Have, Henk A.M.J. and Bert Gordijn (eds). “Handbook of Global Bioethics.” Springer, 2014, p. 50

Pursuing this analysis further, it is necessary to enquire what interventions should be made in relation to the social environment's demands and the individual's capabilities in order to bridge with the gap between these two factors. In this sense, the capability approach has some useful features, which should be used in order to evaluate what individual needs are and how the social environment can be adjusted.

## **2. Education and the capability approach**

The following pages will consider the capability approach discussed above, with specific reference to education.

As will be argued, the application of the capability approach to education has been considered by several authors. However, it is still a rather new and under-explored area.

### **i. The capability approach and disability in education**

Recently, the capability approach has been applied and developed in the context of education in relation to disability<sup>1354</sup>.

These three elements, namely disability, education and the capability approach, collectively establish a pattern into which the provision of reasonable accommodation can be inserted and developed. Specifically, the three elements represent (1) the main actor, i.e. disability and specifically a person with a disability, (2) a context, i.e. education, and (3) a theoretical framework, i.e. the capability approach<sup>1355</sup>.

The correlation between these three elements must be analysed and assessed in an attempt to provide an overview of the issue. In other words, it is necessary to evaluate the role of disability in hampering the enhancement of capabilities in the context of education.

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<sup>1354</sup> E.g. Walker Melanie and Elaine Unterhalter (eds). "Amartya Sen's Capability Approach and Social Justice in Education." Palgrave Macmillan, 2007, New York and Terzi, Lorella. "Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs." *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005

<sup>1355</sup> See Chapter III

When evaluating education in terms of capabilities, Terzi argues that: “Education expands the capability sets available to individuals by expanding both ability and opportunity”<sup>1356</sup>.

The main unresolved question is how to enhance these capabilities and how to prevent any hampering of the enhancement of capabilities.

In this regard, de Beco argues that “The capability theory does not require changes to this environment for that objective to be reached. It simply remains silent on how to enhance the capabilities, although this may be done by acting on the environment”, stressing that, under the capability theory, the environment is merely one of those factors that must be considered and eventually dealt with in order to bring about changes and transformations<sup>1357</sup>.

Considering disability within the context of (higher) education, the main question that may be raised is how disability affects access to and participation by students in (higher) education, hindering their opportunities and the development of their capabilities. It is thus essential to evaluate how the disability originates and operates and subsequently to evaluate how to deal with it and to establish which capabilities must be guaranteed.

In this sense, Terzi claims that “The fundamental element of a capability perspective on disability relates the criterion of social justice to the design of social arrangements” since the “dominant social framework” plays an essential role in creating a disability or including/excluding a particular person<sup>1358</sup>. Therefore, when assessing disability under the capability approach it is crucial to consider the interaction between personal impairment and environmental factors

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<sup>1356</sup> Terzi, Lorella. “A capability perspective on impairment, disability and special needs Towards social justice in education.” *Theory and Research in Education*, Vol. 3, No. 2, 2005, pp. 197-223, p. 219 referring to Saito, Madoka. “Amartya Sen’s Capability Approach to Education: A Critical Exploration.” *Journal of Philosophy of Education*, Vol. 37, No. 1, 2003, pp. 17-34, p. 27

<sup>1357</sup> de Beco, Gauthier. (2017). “The right to inclusive education: why is there so much opposition to its implementation?.” *International Journal of Law in Context*, Vol. 14, No. 3, Cambridge University Press, 2018, pp. 396–415, p. 409

<sup>1358</sup> Terzi, Lorella. “A capability perspective on impairment, disability and special needs Towards social justice in education.” *Theory and Research in Education*, Vol. 3, No. 2, 2005, pp. 197-223, p. 216

in order to evaluate “what circumstantial elements may lead impairment to become disability and how it impacts on capabilities”<sup>1359</sup>. In other words, impairments coupled with social environmental factors influence what a person can do or can be, raising an issue in terms of social justice and social policy<sup>1360</sup>. Specifically, as is explained by Solveig Magnus, when the threshold of capabilities is not met there is an issue of justice<sup>1361</sup>.

An important question concerns the drafting of a list of capabilities and in this sense Unterhalter stresses the difference between Sen and Nussbaum; the former asserts the need for public dialogue in order to decide on a possible and likely list, while the latter provides a universal list of core capabilities to be guaranteed<sup>1362</sup>.

With particular attention to education, Walker has drafted a list of education capabilities which are: practical reason; educational resilience; knowledge and imagination; learning disposition; social relations and social networks; respect, dignity and recognition; emotional integrity, emotions; and bodily integrity<sup>1363</sup>.

The author stresses that the capability approach does not offer a full and complete theory of justice. Nevertheless, she affirms that the capability approach “does provide a framework or instrument for conceptualizing inequality (the absence or deprivation of capability) and well-being (the presence of valued capabilities)”<sup>1364</sup>.

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<sup>1359</sup> Terzi, Lorella. “Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs.” *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005, p. 454

<sup>1360</sup> *Ibid.*, p. 454

<sup>1361</sup> Reindal, Solveig Magnus. “Disability, capability, and special education: towards a capability-based theory.” *European Journal of Special Needs Education*, Vol. 24, No. 2, 2009, pp. 155-168, p. 160

<sup>1362</sup> Unterhalter, Elaine. “Education, capabilities and social justice.” Background paper prepared for the Education for All Global Monitoring Report 2003/4 Gender and Education for All: The Leap to Equality, 2004/ED/EFA/MRT/PI/76, p. 2

<sup>1363</sup> Walker, Melanie. “Critical Capability Pedagogies and University Education.” *Educational Philosophy and Theory*, Vol. 42, No. 8, 2010, p. 910

<sup>1364</sup> *Ibid.*, p. 905

At this stage of the discussion, based on the assumption that capabilities are identified with potential opportunities<sup>1365</sup>, it can be argued that there is a parallel between the capability approach and equality of opportunities, since a capability does indeed represent an ‘opportunity’ to achieve a practical functioning.

Hence, in line with the aims of the research, following the capability approach within higher education, it is necessary to pursue equality of opportunities. The most suitable and effective instrument for doing so seems to be the provision of reasonable accommodation, as it will be discussed in detail below. Specifically, equality of opportunities rather than equality of results appears to be the more suitable expression of the principle of equality that should be followed and pursued, despite the fact that both constitute an expression of substantive equality. Indeed, (higher) education seeks to enhance the skills and abilities of students, preparing them for social life, professional life and even personal life. In particular, higher education entails a challenging path comprised of exams, lectures, seminars, etc. in which some degree of competitiveness can be identified, not only for the student himself/herself but also among students.

In this sense, higher education would lose its intrinsic learning objective if the outcomes of students were to be guaranteed, distorting the educational and formative purpose as well as exposing other students to unfair treatment and negative side-effects. Moreover, it can be argued that failures are physiological and an intrinsic part of the educational path and method.

Therefore, education must guarantee equal opportunities for all students in accessing and following path on equal terms and having been fairly equipped.

Nevertheless, it can be claimed in relation to students with disabilities that it is necessary and fair to provide certain adjustments in order to ensure that they can enjoy their right to education on an equal basis as their peers who do not have a disability.

In addition, it may be proposed that reasonableness be incorporated into the evaluation of the side-effects for students without disabilities of the accommodation at stake under the specific circumstances, based on the impact

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<sup>1365</sup> Terzi, Lorella. “Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs.” *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005, p. 449

that the reasonable accommodation would have not only on the student with disabilities but also on students without, maintaining fair and equal competition amongst and treatment of students.

ii. Inclusive education and the capability approach

Within the ambit of the capability approach, it has been recognised that inclusivity plays a central role within universities, since an inclusive education fosters the enlargement and improvement of student capabilities, in particular the capabilities of students facing discrimination as well as students with disabilities, further enabling their participation as citizens<sup>1366</sup>. In this sense, Biggeri, Di Masi and Bellacicco affirm that “In the Capability Approach, the inclusion of people with disabilities in universities is crucial, because it enables the development of capabilities to fulfil [Students with Disabilities’] SWDs aspirations and promote agency and tools that are fundamental for active citizenship”<sup>1367</sup>.

As regards disability and inclusive education, Terzi addresses the issue of difference and diversity, arguing that diversity should be ‘celebrated’ instead of constituting a ‘dilemma’<sup>1368</sup>. In this regard, Mutanga and Walker stress that Terzi refers “to a relational approach that considers both individual impairment and educational arrangements. It considers the specificity of a situation as well as each individual’s agency”<sup>1369</sup>. Indeed, Terzi argues that an impairment can entail a disability “under certain conditions but not under others”<sup>1370</sup>.

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<sup>1366</sup> Biggeri, Mario et al. “Disability and higher education: assessing students’ capabilities in two Italian universities using structured focus group discussions.” *Studies in Higher Education*, Vol. 45, No. 4, 2020, pp. 909-924, p. 911 referring to Halvorsen, Rune et al. (eds). “Understanding the Lived Experiences of Persons with Disabilities in Nine Countries: Active Citizenship and Disability in Europe.” London: Routledge, 2018

<sup>1367</sup> Ibid.

<sup>1368</sup> Terzi, Lorella. “Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs.” *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005, p. 448

<sup>1369</sup> Mutanga, Oliver and Melanie Walker M. “Towards a Disability-inclusive Higher Education Policy through the Capabilities Approach.” *Journal of Human Development and Capabilities*, Vol. 16, No. 4, 2015, pp. 501-517, p. 503

<sup>1370</sup> Terzi, Lorella. “Beyond the Dilemma of Difference: The Capability Approach to Disability and Special Educational Needs.” *Journal of Philosophy of Education*, Vol. 39, No. 3, 2005, p. 454

It is worth recalling, citing de Beco, that “The goal of inclusive education denotes a transformation of education systems to make all such systems inclusive for all children”, which shows some parallels with the social model of disability and its aim of removing social environmental barriers<sup>1371</sup>. In addition, de Beco concludes that the adoption of the Convention on the Rights of Persons with Disabilities “has led to a rights-based approach to the issue” on how inclusive education can be achieved<sup>1372</sup>.

In this sense, Broderick stresses that her work “demonstrates that many of the underlying premises of the capability approach correlate to those contained in Article 24 CRPD”<sup>1373</sup>. Specifically, the author argues that the parallels between the capability approach and inclusive education under Article 24 CRPD turn on the fact that both aim to enable everyone to participate equally in education and society, respecting human diversity whilst recognising and protecting human dignity<sup>1374</sup>. Particularly, Broderick affirms that the goals of inclusive education and the goals of the capability approach to some extent overlap, referring to the first paragraph of Article 24 CRPD<sup>1375</sup>.

Indeed, Article 24(1) states that:

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

*a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*

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<sup>1371</sup> de Beco, Gauthier. (2017). “The right to inclusive education: why is there so much opposition to its implementation?.” *International Journal of Law in Context*, Vol. 14, No. 3, Cambridge University Press, 2018, pp. 396–415, p. 403

<sup>1372</sup> *Ibid.*, p. 401

<sup>1373</sup> Broderick, Andrea. “Equality of What? The Capability Approach and the Right to Education for Persons with Disabilities.” *Social Inclusion*, Volume 6, No. 1, 2018, pp. 29–39, p. 30

<sup>1374</sup> *Ibid.*, p. 32-35

<sup>1375</sup> *Ibid.*

*b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*

*c. Enabling persons with disabilities to participate effectively in a free society”<sup>1376</sup>.*

Reading through this provision, it is possible to draw some parallels between the aims of inclusive education and the aims of the capability approach. In fact, Article 24 refers to the ‘sense of dignity’ and ‘respect for human rights, fundamental freedom and human diversity’, ‘development [of] their mental and physical abilities, to their fullest potential’ and the need to ‘participate effectively in a free society’<sup>1377</sup>. These tenets are fully consistent with those of the capability approach. In other words, it is possible to assert that both inclusive education and the capability approach seek inclusion (especially of persons with disabilities), aiming to achieve equality of capabilities and of opportunities through the enhancement and development of abilities and rights.

It is also clearly apparent that inclusive education shows its limits just like the capability approach. On the one hand, inclusive education does not seem to be more than a vague principle, without any practical and immediate effect or any specific framework for implementation. On the other hand, a capability approach does not ensure a solid and common universal list of capabilities to be guaranteed, nor does it provide a precise and effective method to be followed in order to identify and enhance them.

Pursuing the aims of this research, it can be claimed that the capability approach should be supported and supplemented by further theories and models, specifically concerning higher education and disability, in order to bring about the necessary changes within the social environment and to foster inclusive education, enabling students with disabilities to access and participate in higher education. One potential response can be found in the human rights model of disability and the provision of reasonable accommodations.

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<sup>1376</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 24(1)

<sup>1377</sup> Ibid.

In addition, following the legal approach within this research, it must be stressed that the enhancement and development of rights have been mentioned above alongside abilities and capacities as objectives of inclusive education and of the capability approach, following the principle of equality. Under these circumstances, in seeking to enable students to access and participate in higher education, the provision of reasonable accommodations could operate on social environmental factors as well as on individual conditions.

In other words, the parallels between reasonable accommodation and the capability approach consist in the overlapping purposes, which means enhancing on the one hand rights and on the other hand capabilities.

Thus far this research has considered the capability approach together with the model of disability and inclusive education.

In order to complete the assessment on the position regarding disability in higher education within the framework outlined above (comprised of capability approach, the human rights model of disability and inclusive education), it is necessary to discuss disability in terms of the quality assurance scheme.

### iii. Disability and Quality Assurance in Higher Education

Despite the marginal position held by disability within quality assurance, it can be claimed that disability may and must be seen as an essential element of the quality assurance scheme in higher education within the European Union.

In this sense, it can be argued that education on the one hand mirrors society and on the other hand influences society itself. Hence, fairer and more inclusive education will lead to a fairer and more inclusive society as well. Along these lines, disability represents just one goal, but also represents an effective parameter for assessing the degree of inclusion within higher education.

In the light of the *status* of disability as an element of quality assurance and as a basis for non-discrimination law, disability could constitute an ideal parameter for assessing the inclusivity of the education system and of society. Moreover, the position of disability as a ground for non-discrimination delineates further

developments since non-discrimination law entails a range of principles and approaches that are useful in order to assess, but also to enhance, inclusivity.

In addition, following the evolution of non-discrimination law, which originally focused on nationality and gender, and only later on disability, within the context of employment it is logical and appropriate to extend that action also into the field of education, beyond the original field of employment<sup>1378</sup>.

Again, the introduction of disability as a matter of quality assurance appears to offer the best way of accomplishing such an aim. As has been analysed, due to a lack of competence over direct legal action, it seems appropriate to enhance this action through the current scheme of quality assurance at European level.

At this stage, it is appropriate to briefly finalise the discussion on reasonable accommodation. The next section will consider the duty to accommodate in the context of education, bearing in mind the framework outlined by the capability approach. This brief discussion will acknowledge the lack of legislation and coordination, arguing that EU action is needed in this area. Specifically, the section will endorse a two-stage test in order to assess the reasonableness of and any undue burden arising in relation to a potential reasonable accommodation.

### **3. Reasonable accommodation**

#### **i. The duty to accommodate and the European Union**

Pursuing further the discussion started above, outlining the framework comprised of the capability approach and completed by inclusive education under the principle of non-discrimination and the principle of equality, the reasonable accommodation seems to be the most appropriate instrument for enabling persons with disabilities to enjoy and exercise their rights whilst enjoying equal opportunities. However, it must be recalled that, within the European Union, the provision on reasonable accommodation was introduced in 2000 by Directive 2000/78/EC in relation to employment only<sup>1379</sup>. For its part, the United Nations

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<sup>1378</sup> See Chapter II

<sup>1379</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

introduced the notion in 2006 in the Convention on the Rights of Persons with Disabilities (CRPD), which extended the duty to accommodate into the field of education<sup>1380</sup>. For the time being, the EU law does not explicitly regulate the duty to accommodate in education. However, as mentioned above the European Union itself has signed the CRPD, incorporating the provisions of the Convention into EU law<sup>1381</sup>. Nevertheless, the adoption of the CRPD by the EU does not entail the effective and uniform application of the provision concerning reasonable accommodation, and further action needs to be taken by the Union in order to achieve this goal.

It is clear from the analysis carried out in the research that the duty to accommodate features two main elements that are open to debate: ‘reasonableness’ and ‘undue burden’, since it is self-evident that an ‘accommodation’ only entails an adjustment of environmental and social factors. In this sense, it is not possible to define what exact ‘form’ an adjustment can take. In particular within the context of higher education, an adjustment can take the form of a physical change, but also a non-material arrangement, e.g. extra time to complete a written exam for a student with dysorthographia.

#### ii. Two-stage test

Reasonableness is perhaps the comprising vaguer and more arguable in relation to the provision of reasonable accommodation.

This research does not purport to resolve this issue, although it does nevertheless attempt to offer its own little yet worthwhile contribution.

In line with the outcomes to the research, it can be argued that a two-stage test is the most suitable approach for assessing an accommodation<sup>1382</sup>. Here, it is perhaps appropriate to remind briefly how the two-stage test operates. The two-stage test

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<sup>1380</sup> UN General Assembly. Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>1381</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_07\\_446](https://ec.europa.eu/commission/presscorner/detail/en/IP_07_446) - last visited 18.03.2021 - (IP/07/446)

<sup>1382</sup> Waddington, Lisa. “When it is reasonable for Europeans to be confused: understanding when a disability accommodation is reasonable from a comparative perspective.” *Comparative Labor Law & Policy Journal*, Vol. 29, 2008

entails two separate steps: the first in which reasonableness is assessed and the second in which it is considered whether the burden is disproportionate<sup>1383</sup>.

Indeed, in the context of (higher) education the core objective is to enable students with disabilities to enjoy their rights, i.e. to start and then to pursue their studies (e.g. attend lectures, take exams, etc.), on an equal footing with their peers without disabilities. In this sense, in most cases this objective can be achieved without considerable costs or expense for universities.

Pursuing this reasoning further, the first stage based on reasonableness requires that the accommodation must constitute the most effective adjustment under the specific circumstances of the case at issue in accordance with the principle of equality of opportunities. In this sense, it should be stressed that the ultimate aim should be to pursue equality of opportunities, which on the one hand should guarantee access to and participation in educational pathways for students with disabilities on an equal footing with their peers who do not have any disability, and on the other hand should guarantee the fairness of the adjustment between students with and without disabilities. Specifically, this last statement entails that students without disabilities should not experience any losses or negative side-effects from the accommodation provided. When doing so, it is necessary to guarantee a certain level of education and learning in addition to fair competition among students.

It is only then, in a second step, that it is possible to evaluate whether the ultimate objective (i.e. enabling students to enjoy their rights, which involves specifically starting and then continuing their studies) can be achieved in an alternative manner at lower cost. During this last stage, the costs and the expenses incurred by universities should be considered.

To conclude, having established the parallel between a capability approach and reasonable accommodation, it can be argued that the capability approach offers an effective framework within which the provision of reasonable accommodation can be placed and subsequently developed. In particular, if the reasonable accommodation is to be read in the light of a capability approach, the reasonable

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<sup>1383</sup> Chapter IV.3.i

accommodation could be interpreted as an instrument capable of promoting the capabilities and opportunities of the individual, pulling together rights and capabilities under the principle of equal opportunities.

#### **4. Final comments**

This research has attempted to establish that harmonisation within the European Union is desirable, enhancing the provisions on reasonable accommodations for students with disabilities in order to guarantee a common and homogeneous approach and legislation in this area.

In this sense, it is clear from the research that a provision or an entire body of legislation, especially within non-discrimination law, requires not only written rules but also new attitudes and theories in order to complete and enhance the provision (or legislation) at stake.

Whereas the theoretical framework is provided by the capability approach, the provision at issue concerns reasonable accommodations.

As regards the duty to accommodate at European level, it would appear to be rather difficult, and even counterproductive, to provide for identical rules, specifying the actual content of the legislation on reasonable accommodation. In fact, adjustments must be tailored to the individual's condition and to the specific circumstances of the case. Moreover, it would be impossible to draft a list of reasonable accommodations suitable for all potential situations.

It can hence be claimed regarding the issue of reasonable accommodation that it is essential to learn from precedents and experiences in order to assess what adjustments are most suitable under any given circumstances. In this sense, the Open Method of Coordination may offer a suitable framework. Moreover, within the framework of EU quality assurance, it would be possible for the universities in the European Union to evaluate and adopt appropriate adjustments, although in order to do so it is essential that information and best practices are shared. This approach would also support and boost the harmonisation of education and its quality, in addition to combatting discrimination and seeking to achieve the inclusion of persons with disabilities at universities within the European Union.

Within the context of the Bologna Process and the EHEA, although ministers responsible for higher education have acknowledged the improvements made on the basis of the ESG, they have identified ‘inclusivity’ as one of the goals to be achieved by 2030<sup>1384</sup>. Specifically, they refer to ‘inclusive’ in the sense that “every learner will have equitable access to higher education and will be fully supported in completing their studies and training”<sup>1385</sup>. It is worth stressing that the definition explicitly mentions not only access to higher education but also the completion of studies, which sits neatly within the framework outlined in this research, in particular as regards to the provision of reasonable accommodations. At this stage it is worth mentioning some of principles listed in the Rome Communiqué. Specifically, *inter alia* the first two should be noted:

1. *“The social dimension should be central to higher education strategies at system and institutional level, as well as at the EHEA and the EU level. Strengthening the social dimension of higher education and fostering equity and inclusion to reflect the diversity of society is the responsibility of a higher education system as a whole and should be regarded as a continuous commitment.*
2. *Legal regulations or policy documents should allow and enable higher education institutions to develop their own strategies to fulfil their public responsibility towards widening access to, participation in and completion of higher education studies”<sup>1386</sup>.*

It is interesting to note, and rather important, first of all that the Communiqué situates the enhancement of equity and inclusion within the social dimension, reflecting diversity within society, and secondly that the independence and freedom of higher education institutions has been recognised and maintained. Furthermore, it must be noted that, in order to pursue ‘student-centred learning’, the Communiqué endorses research into “ways to stimulate the cross-border

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<sup>1384</sup> Rome Ministerial Communiqué, 19 November 2020

<sup>1385</sup> *Ibid.*, p. 4

<sup>1386</sup> Rome Ministerial Communiqué, 19 November 2020, Annex II, p. 4

exchange of good practices for supporting the enhancement of quality learning and teaching, emphasizing active methods”<sup>1387</sup>.

In addition, the ministers combine the concept of freedom with the context of higher education, offering an interesting understanding of ‘academic freedom’. Specifically, the ministers define it “as freedom of academic staff and students to engage in research, teaching, learning and communication in and with society without interference nor fear of reprisal”<sup>1388</sup>.

This statement reflects a stimulating understanding of the provision of reasonable accommodation as an instrument capable of guaranteeing such ‘academic freedom’.

By way of conclusion to this research, it must be stressed that, for the reasons mentioned in this chapter, disability studies add something extra to what is offered by other areas of study. In particular, disability studies propose a holistic and comprehensive approach, leading to the conclusion that disability is not an element of marginalisation and discrimination but rather a particular trait, just like any other, which needs to be accommodated in order to achieve and guarantee equality. Pursuing this reasoning further, disability studies also demonstrate that not all impairments cause disabilities, and also that not all disabilities need to be accommodated.

In this sense, the concept of vulnerability could enrich this approach and theory by identifying those persons, with or without disabilities, who need reasonable accommodation.

Once the relevant person has been identified, the provision of reasonable accommodation is dependent upon a two-stage test, which assesses first the situation and then the adjustment, in accordance with the principle of equal opportunities.

However, it is essential to pursue some degree of harmonisation on the provision of reasonable accommodation, within the framework of a capability approach, in order to sustain the fight against discrimination and the inclusion of persons with

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<sup>1387</sup> Rome Ministerial Communique, 19 November 2020, Annex III, p. 3

<sup>1388</sup> *Ibid.*, p. 5

disabilities in the context of higher education within the European Union. In doing so, the fight against discrimination will be more effective and 'academic freedom' will be guaranteed. Furthermore, the European Union as a whole will grow socially and culturally, and perhaps also economically and politically.

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