

Wansing | Welti | Schäfers [Eds.]

The Right to Work for Persons with Disabilities

International Perspectives



Nomos

edition
sigma



Gudrun Wansing | Felix Welti
Markus Schäfers [Eds.]

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Preface

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

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

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

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

to a global goal: Achieving respect for, protection of and a guarantee of human rights for persons with disabilities.

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

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

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

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

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

The national and international courts, particularly those responsible for labour law and social law, must take up their position in each of the decisive legal disputes for the rights of persons with disabilities. They must

be open, inclusive and accessible so that these rights can be enforced effectively as well.

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

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

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

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

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

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

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

Preface

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

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

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Gudrun Wansing, Felix Welti and
Markus Schäfers

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Beauftragte der
Bundesregierung für die
Belange von Menschen mit Behinderungen



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

by Verena Bentele

Ladies and Gentlemen, dear friends and dear readers,

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

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

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

The ability and extent of participating in working life essentially depends on establishing accessibility in all its facets. Therefore, one of the key political aspects I am calling for is a commitment to the accessibility of private providers of services and products, incidentally an obligation that is also enshrined in the UN CRPD. This is why suitable support measures can include work assistance, work aids and structural changes, both in educational contexts and at the workplace, as well as accommodation of trainees during examinations – to name just a few examples. The aim is

for every person with disabilities to achieve the greatest possible participation in the sphere of labour according to their individual capability through services and facilitation tailored to the individual. It is this support specifically that results in persons with disabilities making their potential available to a diverse labour market. Politically, this requires striving to link funding of all kinds, particularly including corporate subsidies, to establishing accessibility. This would represent a great stride towards a labour market geared toward inclusivity.

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

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

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

regular labour market. At this point, one of the challenges of our time is reaching greater fluidity between the various labour market systems in Germany.

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

Best regards

A handwritten signature in black ink, appearing to be 'V. P. ...', written in a cursive style.

1. Fundamental academic contributions in law

The UN CRPD as an International Social Law

by Eberhard Eichenhofer

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

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

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

Poor relief emerged in similar forms throughout the contemporary European world of the 15th century. The creation of social insurance in Germany in the 19th century garnered attention in the outside world as well and led to corresponding reforms in Europe and, eventually, throughout the world. The British concept of unemployment insurance and the French and Belgian ideas of social security through family benefits were emulated in other countries both before and after the First World War. The ILO was founded in 1919 and encouraged the spread of labour and social rights around the world through conventions and recommendations. In this context it is evident that social policies have never and were never intended to be limited to just one country. Rather, the establishment and develop-

ment of social rights have been international events and enterprises and that has not changed to this very day.

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

II. International human rights

1. Human rights – Achievements of the nation-state

The history of human rights has not followed a straight path. The people to which these rights apply and the content of these rights have changed since they were proclaimed in the United States and France at the tail end of the 18th century. This came in the form of the Declaration of the Rights of Man and of the Citizen (*déclarations des droits de l'homme et du citoyen*) rooted first and foremost in natural rights and the ensuing justifications stemming from the general nature of man, although they initially applied *de jure* only to a small, distinctively elite cadre of property-owning men who were citizens of the state that was guaranteeing those rights. The state was strapped for funds at the time and needed each of them as taxpayers, providing compensation with human rights in turn¹.

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

1 John Locke, *Über die Regierung*, The Second Treatise of Government, 1689, p. 140; the maxims of revolution were derived from this – a revolution which, when examined in detail, constituted a taxpayers' revolt: No taxation without representation. *Qu'est – ce que, le tiers- état?* These statements associated with the revolutions underscore the calls for political participation asserted by holders of wealth subjected to taxation.

therefore, these groups were initially outside the scope of human rights. From the outset, these rights promised individual liberty among equals². Thus, they were created and designed to allow every human being to do as they wished³. That is why this liberty could not remain a privilege over the long term. The development of human rights since that time must initially and primarily be considered an expansion of personal scope and applicability over several centuries, but the actual content has changed as well.

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

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

International human rights are closely linked with the formation and goals of the United Nations. The Universal Declaration of Human Rights proclaimed in the Palais de Chaillot in Paris on December 10, 1948⁴ emerged from the experience of war, destruction and genocide due to and during the Second World War. It was written in response to gross, overt violations of human rights and the impotence of international organizations towards dictatorial regimes with disregard and contempt for human rights that characterized the interwar period. These dictatorial regimes never once considered the struggle for human rights to be nothing but what in German

2 Ernst Bloch, *Naturrecht und menschliche Würde* (161), Frankfurt/Main 1972, p. 76.

3 *Ibid.* p. 176; also see Niklas Luhmann, *Grundrechte als Institution*, Berlin 1974 (2. Aufl.), p. 32.

4 Antoine Prost/Jay Winter, *René Cassin et les droits de l'homme: le projet d'une génération*, Paris 2011, p. 269.

is called “*Humanitätsduselei*” – a sort of humanitarian rhetoric, which is conceived as an idealized observation of the reality, primarily conceived as being nasty and brutish⁵; they derided complaints made by states belonging to international organizations because of human rights violations as unsolicited interference in their internal affairs.

Franz Bernheim was a German citizen of Jewish descent who fled from Gliwice (part of Germany at the time) to Prague. In 1933, he petitioned the League of Nations regarding the persecution of Jews occurring in Germany ever since the Nazis had taken power. He criticized the poor treatment of Jewish Germans as a violation of the Convention of May 15, 1922 regarding Upper Silesia that had been initiated by the League of Nations as a protective measure intended to safeguard equal treatment in German civil society for the Jewish and other minorities⁶.

The National Socialist leadership protested against this sort of interference in allegedly “internal” affairs, which it deemed illegitimate. At the same time, the German foreign policy utilized delaying tactics in an effort to prevent a legal investigation into the persecution of Jews in Germany and by Germany at the international level. The League of Nations insisted on its request to review and safeguard the protection of human rights even within states⁷. The issue became irrelevant once Germany announced its withdrawal from the League of Nations on October 16, 1933. This sort of defensive attitude equated human rights with civil rights and considered both to be an expression of the sovereign nation-state. This attitude fed the misconception that each nation-state may define, shape and allot human rights under its own authority.

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

6 Kurt Ball-Kaderni, *Das Leben der Juden in Deutschland im Jahre 1933. Ein Zeitbericht*, Frankfurt/Main 1963, p. 185 – 199; Philipp Graf, *Die Bernheim-Petition. Jüdische Politik in der Zwischenkriegszeit*, Göttingen 2008, p. 129ff.

7 Graf, Note 6, p. 220f.

3. International human rights define the post-war order

In light of this, the United Nations must be viewed as an attempt to base the post-war world order on basic human freedoms and to allow everyone to experience them. As a follow-up to the four fundamental freedoms identified by US president Franklin D. Roosevelt⁸, freedom of speech, freedom of worship, freedom from want and freedom from fear, social rights also form a focal point for all of the guarantees of human rights⁹. In this vein, Article 53 of the Charter of the United Nations puts forth raising the standard of living, full employment as well as social and economic progress in and through international cooperation (free-trade, in other words) as goals of the post-war period. Article 68 of the Charter of the United Nations provided for a separate Economic and Social Council. It was given the responsibility of deepening international trade and monetary policy and, finally, protecting human rights.

This is the context of the Universal Declaration of Human Rights. According to Eleanor Roosevelt, widow of the US President and one of the three authors¹⁰, it should be treated as an international bill of rights¹¹. The internationally proclaimed human rights are thereby intended to form the principles to serve as a means of orientation for future global policies and so that all peoples and nations may set a common standard for achievements in human rights. First and foremost, the human right means the right to have rights and to be considered an independent being and not as a means towards other purposes¹². The core of such a guarantee is that the dignity of every human being must be recognized, every human being must receive all human rights¹³ and every state must ultimately ensure they are upheld.

8 Franklin D. Roosevelt, *The Annual Message to the Congress*, in: Samuel Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt*, vol. VI (War and Aid to Democracy), p. 663ff.

9 Article 6 of the Atlantic Charter from 1941 set forth the war objectives of the Western Allies. Among them was the post-war aim “that all the men in all lands may live out their lives in freedom from fear and want.”.

10 The others are Charles Malik (Lebanon) and René Cassin (France).

11 Mary Ann Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York 2000, p. XV.

12 Charles R. Beitz, *The Idea of Human Rights*, Oxford 2009, p. 1.

13 Hannah Arendt, *The Origins of Totalitarianism*, 1960.

As evidenced in its preamble, the Universal Declaration of Human Rights was created with due consideration because “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and “a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.” It sees the foundation of all human rights in the dignity of every human being. Extensive precepts towards equal treatment and bans on discrimination are intended to safeguard this freedom in totality for all beneficiaries.

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

Human rights no longer derive from state sovereignty but instead they set limits on the state and set the trend for sovereignty: A state is only a state of law if it heeds and respects human rights guaranteed and recognized internationally. The contemporary human rights formulated by the international community provide protection against more than just attacks during war as did the first guarantees as part of international humanitarian law. They also protect against state overstep during times of peace¹⁴. The effects this has on the state are serious: “*The rise of principle human rights causes both collusion and confluence between international and domestic law*”¹⁵.

The German legal system seeks to *treat Germans and foreigners equally*. The universal rule of equality, established in Art. 3 I of the Basic Law [GG] of the Federal Republic of Germany, is not a fundamental right for Germans but for everyone¹⁶. However, this does not result in strict equal treatment for nationals and foreigners in all matters relating to human rights. This is because the Basic Law [GG] of the Federal Republic of Germany makes distinctions between nationals and foreigners in terms of the freedom of assembly, freedom of association, freedom of employment,

14 Ibid., p. 29.

15 Ibid., p. 27.

16 Heintzen, in: Merten/Papier (ed.), *Handbuch der Grundrechte*, 2006, § 50 note 60; implications for social benefits: Eberhard Eichenhofer/Constanze Abig, *Zugang zu steuerfinanzierten Sozialleistungen nach dem Staatsangehörigkeitsprinzip?*, Münster 2004.

free movement and the right to resist¹⁷. Quite a few of these distinctions, notably the economic and social ones¹⁸, are being overcome by EU law among EU citizens. The single market is not feasible without equal treatment of market citizens; the legal expression of this idea is enshrined in the establishment of EU citizenship (Article 20 of the TFEU and subsequent parts). Foreigners are subject to the territorial jurisdiction of the host state; they are required to recognize, however, personal jurisdiction of the state of origin (allegiance) and to treat everyone in accordance with international human rights¹⁹.

III. International social human rights

1. Social human rights and the capability approach

International human rights are the global community's response to one of the three fundamental problems in social justice that Martha C. Nussbaum²⁰ still considers to be unsolved problems. She is seeking to answer the question: How can we extend justice to all the world's citizens? She reminds us that even the first international law theorist, Hugo Grotius, found that mutual dependence of states served as a basic premise for universal international law and that this was designed and aligned to create an international community²¹.

For Nussbaum, internationally recognized human rights have a contemporary explanation in the capability approach she developed together with Amartya Sen. It holds to Kant's theme that every person in an international community must be considered an end and not a means to the enrichment of others. Actions must then be taken on this basis²².

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

17 Art. 8, 9, 12, 11, 16 and 20 IV of the Basic Law [GG] of the Federal Republic of Germany.

18 Eberhard Eichenhofer, *Sozialrecht der EU*, Berlin 2015 (6. Aufl.), Note 307ff.

19 Verdross/Simma, *Universelles Völkerrecht*, Berlin 1976, p. 586ff., 599ff.

20 Martha C. Nussbaum, *Frontiers of Justice, Disability, Nationality, Species Membership*, Cambridge/Massachusetts 2006, p. 3.

21 *Ibid.*, p. 18ff.

22 *Ibid.*, p. 70.

and political participation rights emerge²³. In terms of ideas and social ethics, the capability approach has seen more refinement than the social contract theory used to explain human rights ever since they emerged. This theory states that this social contract is concluded by the readily capable, which is why people with disabilities, foreigners and animals do not appear in this sort of conceptualization.

The capability approach, however, makes it clear that the individual requires care and that this represents an asymmetrical social relationship. The culture of a society can be determined primarily based on the extent to which it assures such needs²⁴. In the capability approach, human rights are to be viewed as declarations of international guarantees of positive freedom²⁵ that, for their part, form the foundation of every state as well as the international community. This was prescribed to the states as well as the international community and given up to make them a reality. After all, liberty can be understood as an “opportunity freedom”²⁶ determined by income and quality of life²⁷. Liberty requires institutions that create social opportunities and social security²⁸.

The liberty of the individual also forms the foundation for a social commitment. It is specifically directed towards using that liberty for the general good and for the next generation²⁹. Economic and social freedoms do not oppose each other, but rather require each other. One is merely the other expressed in different terms³⁰. All of these considerations are central to the situation for persons with disabilities; in this capacity, they provided an intellectual basis for the UN CRPD and, conversely, make it readily accessible to novel socio – philosophical debates and discussions.

23 Ibid., p. 76ff.

24 Ibid., p. 168.

25 Ibid., p. 284. The capability approach makes the significance of human rights clear.

26 Amartya Sen, *Ökonomie für den Menschen. Wege zu Gerechtigkeit und Solidarität in der Marktwirtschaft*, Munich 2003 (2. Aufl.), p. 29; also see Jerome Bickenbach in this book.

27 Ibid., p. 30ff.

28 Ibid., p. 55f.

29 Ibid., p. 335ff.

30 Ibid., p. 349f.; in that same vein, at the European level, these are accompanied by the ECHR geared towards civil and political rights and the ESC targeted towards ensuring social rights. Achim Seifert, *The Social Dimension of the European Convention on Human Rights*, in: Mulder/Hofredt/Nesvik/Sundet (Eds.), *Sui generis – Liber Amicorum in Honour of Stein Evja*, Oslo 2016, p. 591.

2. *International human rights – UN CRPD: From banning discrimination to the human rights of those potentially subject to discrimination*

Another peculiarity and occurrence must be noted in the development of social human rights: This leads to a relationship between equality and freedom. The dispute over fundamental social human rights to work, social security, welfare, accommodation, education and health³¹ alone makes it clear that inequality inexorably leads to a loss of freedom – meaning that freedom and equality regularly go hand-in-hand together. The repudiation of workers' rights and women's rights in the early developmental phase of human rights meant a loss of rights in two senses – refused equality effects a loss of freedom. Securing both – freedom and equality – is the goal of fundamental social human rights for this very reason.

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

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

31 Angelika Nussberger, *Sozialstandards im Völkerrecht*, Berlin 2005; Matti Mikkola, *Social human rights*, Porvoo 2010; Ulrich Becker/Frans Pennings/Tinneke Dijkhoff (ed.), *International Standard-Setting and Innovations in Social Security*, London 2013; Klaus Lörcher, *50 Jahre UN-Sozialpakt – endlich auf dem Weg zu mehr Beachtung?* AuR 2016, p. 488.

32 Felix Welti, *Barrierefreiheit und Sozialrecht*, in: Wolfhard Kohte/Nadine Absenger (ed.), *Menschenrechte und Solidarität im internationalen Diskurs*, Festschrift für Armin Höland, Baden-Baden 2015, p. 245ff.; Theresia Degener, *Die UN-Behindertenrechtskonvention- ein neues Verständnis der Behinderung*, in: dies./Elke Diehl (ed.), *Handbuch Behindertenrechtskonvention-Teilhabe als Menschenrecht – Inklusion als gesellschaftliche Aufgabe*, Bonn 2015, p. 55; Ulrike Davy, *Das Verbot der Diskriminierung wegen einer Behinderung im deutschen Verfassungsrecht und im Gemeinschaftsrecht*, in: *Schriftenreihe des Deutschen Sozialrechtsverbandes* Bd. 49 (2002), *Die Behinderten in der sozialen Sicherung*, 2002, p. 7, 17.

discrimination against people due to their ethnic background, their sex³³ or their age³⁴ or a disability. The conventions on the rights of children or the rights of disabled persons or eliminating racism³⁵ are all an expression of the same goal of providing subjective rights for the equality and equal treatment of all victims of potential discrimination³⁶.

3. What does the approach towards human rights offer?

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

IV. International human rights and the UN CRPD

1. Setting the standard

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

33 Convention on superseding discriminations against women December 18 th, 1979 Bundesgesetzblatt (BGBl.) 1985 II, p. 648.

34 Convention on the Rights of Children November 20th, 1989, BGBl. 1992 II, p. 122.

35 Convention on the Rights of Persons with Disabilities, December, 13th, 2006, BGBl. 2008 II, p. 1420.

36 Welti, Note 32, p. 246f.

international implementation that are concerned with victims of potential discrimination.

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

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

2. Institutionalization of protective regulations

The regulations are much more than “merely symbolic gestures”³⁷; they strive for inclusion and participation and these claims are aimed at specific living environments, which must be implemented in and by the law in individual states. Therefore, applicability of international human rights for protecting disadvantaged groups calls for the legal systems of all states to create specific guarantees to protect those groups and to enforce the guarantees in their own legal system³⁸.

These sorts of guarantees establish a mandate for respect, protection and support³⁹ for the states that can normally be realized only through specific, targeted legislative actions. At the same time, they contain commitments because inclusion evokes solidarity. This, in accordance with Article 29 of the UDHR, is able to afford rights to individual persons in need of protection only to the extent to which it imposes social commitments on

37 Davy, Note 32, p. 7, 58.

38 Lörcher, Note 31, p. 489.

39 Ibid., p. 490; Davy, Note. 32 p. 7, 35ff.

all others at the same time⁴⁰. This promotes practical action in job security⁴¹ or realizing accessibility⁴². In these contexts, international law both determines the extent of the law and defines the actions to be taken by the states.

3. State commitment

International regulations formulated as human rights for potentially disadvantaged groups are thus necessary programs for juridification and also normally must be in the form of law⁴³. They require that states place their legislative power in service towards objectives and actions substantiated and formulated for the international stage and they use their own state sovereignty to embrace the realization of international human rights as a concern for humanity and to enforce them as part of their own legal system instead of pursuing “national interests” without regard for the interests of others.

V. Right to work

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

40 Alain Supiot, *Der Rechtsgrundsatz der Solidarität*, in: Wolfhard Kohte/Nadine Absenger (ed.), *Menschenrechte und Solidarität im internationalen Diskurs*, Festschrift für Armin Höland, Baden-Baden 2015, p. 167ff.

41 Peter Trenk-Hinterberger, *Arbeit, Beschäftigung und Ausbildung*, in: Degener/Diehl, Note 32, p. 105, 105f.; Ulrich Becker, *Rechtliche Grundlagen der beruflichen Teilhabe von Menschen mit Behinderungen*, in: Ulrich Becker/Elisabeth Wacker/Minou Banafsche (ed.), *Homo faber disabilis?*, Teilhabe am Erwerbsleben, Baden-Baden, 2015, p. 13ff.

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

43 Nußberger, Note 31, p. 463ff.; Robert Uerpmann-Witzack, *Völker- und verfassungsrechtliche Vorgaben für die Gleichstellung und Teilhabe von Menschen mit Behinderungen*, in: *Deutscher Sozialrechtsverband* (ed.), *50 Jahre deutscher Sozialrechtsverband Inklusion behinderter Menschen als Querschnittsaufgabe*, Schriftenreihe des Deutschen Sozialrechtsverbandes Bd. 62, Berlin 2015, p. 29ff.

Economic, Social and Cultural Rights⁴⁴, 1 ESC and 15 CFREU); therefore, every person has the right to work and is linked to a safe and secure workplace. The German Basic Law [GG] does not generally express social rights, but it does guarantee the right of free choice of workplace in Art. 12 I Basic Law [GG]. This encompasses more than the prohibition on forced labour in Art. 12 II Basic Law [GG]. The constitutions of some German states, such as Bavaria⁴⁵, Berlin and Thuringia, ascribe human labour an additional dimension as a fundamental and human right.

44 International Covenant on Economic, Social and Cultural Rights from December 16th, 1966 BGBl. 1973 II p. 1569.

45 Art. 166 of the Bavarian Constitution [BayVerf]: (1) Work is the source of our prosperity as people and is under the special protection of the state. (2) Everyone has the right to achieve a comfortable existence through labour. (3) Everyone has the right and duty to choose work commensurate with his or her own abilities and education in service of the general public in accordance with the detailed provisions of law. [(1) Arbeit ist die Quelle des Volkwohlstandes und steht unter dem besonderen Schutz des Staates.

(2) Jedermann hat das Recht, sich durch Arbeit eine auskömmliche Existenz zu schaffen.

(3) Er hat das Recht und die Pflicht, eine seinen Anlagen und seiner Ausbildung entsprechende Arbeit im Dienste der Allgemeinheit nach näherer Bestimmung der Gesetze zu wählen.] Art. 167 of the Bavarian Constitution [BayVerf]: (1) The human worker is, as a people's most valuable good, protected against exploitation, operating hazards and other health hazards (2) Exploitation that results in health-related injury may be penalized as physical harm. (3) Every resident of Bavaria who is unable to work or unable to find work, shall be entitled to welfare. [(1) Die menschliche Arbeitskraft ist als wertvollstes wirtschaftliches Gut eines Volkes gegen Ausbeutung, Betriebsgefahren und sonstige gesundheitliche Schädigungen geschützt

(2) Ausbeutung, die gesundheitliche Schäden nach sich zieht, ist als Körperverletzung strafbar.

(3) Jeder Bewohner Bayerns, der arbeitsunfähig ist oder dem keine Arbeit vermittelt werden kann, hat ein Recht auf Fürsorge.] Art. 168 of the Bavarian Constitution [BayVerf]: (1) Any honest work shall have the same moral value and claim to appropriate compensation. Men and women shall receive the same salary for the same work. [(1) Jede ehrliche Arbeit hat den gleichen sittlichen Wert und Anspruch auf angemessenes Entgelt. Männer und Frauen erhalten für gleiche Arbeit den gleichen Lohn.] Art. 169 of the Bavarian Constitution [BayVerf]: (1) Minimum wages can be defined for every profession to allow an employee a minimum standard of living for oneself and one's family according to the respective cultural conditions. [(1) Für jeden Berufszweig können Mindestlöhne festgesetzt werden, die dem Arbeitnehmer eine den jeweiligen kulturellen Verhältnissen entsprechende Mindestlebenshaltung für sich und seine Familie ermöglichen.]