

Constructs of Disability and Discrimination in Anti-Discrimination Law: A Comparative Critique of the Americans with Disabilities Act and Ireland's Employment Equality Act.

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I, the undersigned, acknowledge that this thesis is my own work and that it is being submitted for the award of degree of PhD at the University of Edinburgh.

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Abstract

This thesis critiques particular aspects of the employment discrimination protection afforded in the Americans with Disabilities Act 1990 and Ireland's Employment Equality Act 1998. It addresses specific problems with regard to the operation of the disability non-discrimination system, and it utilises the social model of disability to expose the limitations arising when non-discrimination is adopted as the primary principle of justice and inclusion.

The basic premise of the social model of disability, developed from the 1960s, is that disability is a form of oppression imposed upon people with impairments in the way they are unnecessarily isolated and excluded from participation in mainstream society. It refutes the dominance of the medical, individual-limitation construction of disability, which evolved in concert with the welfare state from the nineteenth century.

The work begins by tracing the historical development of the category disability as western society moved from feudal ties to a wage-labour capitalist economy. This prompted the establishment of a parallel universe for a large number of disabled individuals. Challenging the hegemony of their displaced existence, the disability movement developed a radical social theory, which shifted the locus of the problem away from impaired bodies and towards the institutional, exclusionary and unchallenged practices of society. In response to rising inequalities and the political agitation of minority groups, a wave of non-discrimination legislative protections pertaining to disability have been introduced. The concepts of equality and non-discrimination adopted within legal discourse are discussed in order to provide a backdrop against which subsequent analysis of the specifics of the disability non-discrimination system is assessed. The analysis also extends to the constitutional plane and considers the constitutional obstacles to the reformulated view of disability suggested by social model of disability within disability discourse. Here, the barriers raised by orthodox constitutional reasoning and tradition to the introduction of disability discrimination protection, are addressed. An examination of each jurisdiction's approach to the distinct and thorny issue of proving disability for the purposes of statutory protection illustrates how the non-discrimination paradigm continues to sustain and perpetuate the individual, functional-limitation approach to disability-based exclusion. Finally, the reasonable accommodation duty is examined, both as a form of legal equality and as a tool which "gestures" towards substantive ideals of equality. The discussion

considers that anti-discrimination law's reasonable accommodation duties are less extensive than may originally have been conceived.

Despite their inclusion of the more expansive equality norm of reasonable accommodation, the limitations that inhere in the disability non-discrimination paradigms, as represented by the ADA and the EEA, provide support for the development of a new synthesis between social model conceptions of disadvantage and equality rights.

Introduction

“ ... the particular form of poverty principally associated with physical impairment is caused by our exclusion from the ability to earn a living on a par with our able bodied peers due to the way employment is organized. This exclusion is linked with our exclusion from participation in the social activities and provisions that make general employment possible”¹

This statement draws attention to the exclusionary forces built into the organisation of employment and how they disproportionately affect people with impairments. It places disabled people as a distinct social grouping defined in terms of stigma, neglect, prejudice and stereotyping. This is contrary to the view traditionally held, in which society has seen the exclusion of disabled people as a natural consequence of the impaired body.

Despite this pervasive construction of the disability phenomenon, civil society worldwide² has begun to re-examine the social disadvantage of disabled people by using the framework of equality and discrimination law.³ Chapter one considers the significance of this development against the backdrop of historically entrenched attitudes to disability. It traces the origins of the exclusion of disabled people from mainstream structures following the emergence of capitalist economies. It further considers the subsequent social construction of disability in terms of dependency, inferiority and exclusion.

Originally, the construction of equality expressed through the equal treatment principle seemed wholly inapplicable to individuals with impairments who, because of those impairments, appeared to be naturally unequal.⁴ The official state response was based on the philosophy that pertained during the institutionalisation era. Since disabled people lacked independence and autonomy, the role of government was in the repair and rehabilitation of their damaged bodies, and in providing financial support to

¹ Union of the Physically Impaired Against Segregation, *Fundamental Principles of Disability* (London, UPIAS, 1976) p.14.

² For a useful review of disability discrimination legislation, see T. Degener “Disability Discrimination Law: A Global Comparative Perspective” in C. Gooding and A. Lawson (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford, Hart Publishing, 2005) p.87.

³ For an account of this gradual transition in the US context, see R. K. Scotch, *From Goodwill to Civil Rights Transforming Federal Disability Policy* (2nd ed.) (Philadelphia: Temple University Press, 2001). On the case for disability equality rights in the UK, see C. Barnes, *Disabled People in Britain and Discrimination* (London: Hurst and Company, 1991) and for discussion in a comparative US-UK context, C. Gooding, *Disabling Law, Enabling Acts Disability Rights in Britain and America* (London Pluto Press 1994).

⁴ See chapter two.

this otherwise deserving group. The phenomenon of discrimination was not originally conceived as contributing to the exclusion of disabled people. Rather, their exclusion - caused by their inability to work and otherwise participate in society - was simply a natural by-product of their functional impairments. Theoretical discourse around the meaning and construction of disability, as well as around notions of equality, discrimination and exclusion, laid a challenge to this one-dimensional view of the disabled.⁵ In chapter one, I aim to contextualise the dramatic sea-change that came with viewing disabled people as rights-holders and as citizens entitled to equal treatment.

On the back of prolific successes achieved by the civil liberties movement, a campaign of reform, initially spearheaded by disabled war veterans in the United States, adopted the language of equality to tackle the oppression of disabled people. The foundation of this new approach is that disabled people cannot be reduced to the sum of their clinical conditions. Instead, disabled people are a minority group denied equal rights.⁶ This minority group analysis of disability, introduced in chapter one, pursues a political strategy advocating the application of equality and non-discrimination guarantees to disabled people. It is predicated on the belief that disabled people endure disproportionate levels of stigma, prejudice and overt animus, which can be tackled through guaranteeing disabled people the basic equal rights enjoyed by others. The minority group model shares the reconstructed view of disability developed under what can loosely be termed the social model of disability.⁷

The social model of disability emerged from social science discourse in the UK in the late 1960s. Social model theorists reject the individualised, medical and personal tragedy model of disability that has dominated disability-based policy. Their reformulation is based on a distinction between impairment and disability, which is further outlined in chapter one. The distinction suggests that disability is not an attribute of the individual, but a complex collection of conditions, activities and relationships created by the social and political environment. In short, disability is a social construct imposed through a myriad of exclusionary social barriers. It is a

⁵On the reconstruction of disability, see R. K. Scotch, "Models of Disability and the Americans with Disabilities Act" (2000) 21 *Berkeley Journal of Employment and Labor Law* 213. On the values promoted by a truly substantive conception of equality, see S. Fredman, *The Future of Equality in Britain* (Manchester, EOC, 2002).

⁶ The most influential proponent of the minority group model is US political scientist, Harlan Hahn. See H. Hahn, "Civil Rights for Disabled Americans: The Foundation of a Political Agenda" in A. Gartner and T. Joe (eds.) *Images of the Disabled, Disabling Images* (New York: Praeger Publishing, 1987).

⁷ For an overview of social model theory, see C. Tregaskis, "Social Model Theory: The Story so far ..." (2002) 17 *Disability and Society* 457.

“sophisticated form of social oppression”.⁸ Consequently, social model perspectives on disability demand a comprehensive and transformative societal response to the exclusion experienced by disabled people.

From this, it can be stated that the disability movement’s strategy for inclusion can be divided into two broad camps. First, the minority group model which places faith in legal institutions to found, protect and promote the equal rights of disabled people. Second, the social model of disability, with its more ambitious aims.⁹ The latter model does not subscribe to rights-based responses to disability because the same exclusionary barriers which contribute to the exclusion of disabled people, it is argued, permeate the institutional structures of the legal system itself.¹⁰ The reliance upon legal strategies, according to social model reasoning, misconceives the nature of disability-based exclusion for two reasons. First, the legal system generally adheres to the dominant medical constructs of disability; and second, the legal system’s ability to capture the institutional forms of discrimination which create disability is, at best, ad-hoc.¹¹

Though there is discord within the disability movement over the effectiveness of a legal rights strategy, many view the promise held out by disability equality rights as beneficial to the political aims of the movement.¹² Indeed, despite this thesis’s criticisms of a number of limitations to the non-discrimination system, it would be churlish not to acknowledge the benefits that attach to this shift in emphasis on disability status. In the first instance, the application of discrimination norms to disability challenges the dominant welfarist construct of disabled people and elevates disabled people to subjects and rights-holders in their own right. The extension of the non-discrimination rule in employment to cover disabled people “deconstructs the expectation that ... disabled

⁸ See M. Oliver, *The Politics of Disablement* (London: Macmillan, 1990)

⁹ Included in this general umbrella theory is the universalist view of disability which is discussed in chapter six.

¹⁰ M. Oliver, *supra* n.8 p.105-6.

¹¹ See V. Finklestein, “The Social Model of Disability Repossessed” Paper delivered at Manchester Coalition of Disabled People December 1, 2001. Available at Centre for Disability Studies Resources Web page:< <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> > Finklestein argues that “the social model of disability has to do with the creation of a society which enables us to be “human” – not just access our “rights” within an existing competitive market society. ... Our society is built on a competitive market foundation and it is this social system that disabled us. From this point of view disabled people are forced to live in a social prison. While no one can object to campaigning for “rights” so that the prison in which we live is made more human, it is only a political buffoon who believes that exploring prisoner experiences can lead to emancipation.”. At p.4.

¹² See generally, G. Quinn, “Rethinking the Place of Difference in Civil Society – the Role of Anti-Discrimination Law in the Next Century” in R. Byrne and W. Duncan, *Developments in Discrimination Law in Ireland and Europe* (Dublin: ICEL, 1997) p.65.

[people] do not work”.¹³ One cannot deny the magnitude of this development in the historical treatment of disabled people, particularly since they have been confined to a class that was exempt from both contributing to collective structures and benefiting from them.¹⁴ The symbolic effect of extending non-discrimination law to disabled people is, therefore, immense. Legal recognition that people with physical, sensory and cognitive impairments are the subjects of invidious forms of discrimination supports the proposition that such treatment is as destructive as race or gender-based discrimination. On a positive level, it provides them with a tangible invitation to become full members of the social polity. It signals a clear message regarding their full citizenship and encourages disabled people to invest in their talent bank with fresh confidence.

Consequently, I do not argue that equality and non-discrimination law principles have no place in the disability context. Instead, my argument is based on the proposition that the response to disability-based inequality cannot be limited to current non-discrimination norms. In this sense, I utilise social model reasoning and perspectives to critique the limitations of the non-discrimination system. However, this thesis parts company with social model reasoning at a critical juncture. It will be argued that the social model’s rejection of discrimination legal norms is based on a restrictively narrow view of the range and possibility of discrimination law. This is particularly the case in light of emerging developments under the banner of so-called “fourth generation” equality initiatives.¹⁵ Further, it will be argued that the minority group model and the social model need not be viewed as inherently antagonistic. This will particularly be the case if the current strategy of non-discrimination is developed and “flanked” by more expansive equality norms than those which currently persist.

The provisions of the Americans with Disabilities Act 1990 (hereafter the ADA) and Ireland’s Employment Equality Act 1998 - 2004 (hereafter the EEA)¹⁶ provide the framework for the analysis. Also included in the discussion is the European Union’s (hereafter the EU) approach to disability discrimination under the Framework Directive.¹⁷ It concludes that these statutory protections remain an insufficient use of the equality norm in the disability context. It bases this discussion around two core and related concepts - disability and discrimination - within the specific context of anti-

¹³ A. Silvers, “Formal Justice” in A. Silvers, D. Wasserman and M. Howard, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham: Rowman and Littlefield Publishers, 1998) 13 p.132.

¹⁴ A. Silvers, “Introduction” *Ibid.* p.3.

¹⁵ This point is developed in chapter six

¹⁶ The Employment Equality Act 1998 was recently amended by the terms of the Equality Act 2004, implementing the provisions of the Framework Directive.

¹⁷ Framework Directive 2000/78 OJ [2000] L303/16.

discrimination employment law. Reference is also made to the practice of other jurisdictions, including Canada and South Africa.

The choice of the United States' disability discrimination regime as the comparative focal point has been made for a number of reasons. By adopting the duty to make reasonable accommodation in the disability context, the ADA provided the pioneering model for legislation worldwide. As noted earlier, the requirement for reasonable accommodation is key to modern disability discrimination legislation. Reasonable accommodation is a tool of public policy that recognises the myriad ways through which the built and social environment favours the needs and requirements of non-disabled individuals. It requires reasonable alterations in particular circumstances in order to lessen the exclusionary impact of 'ordinary' practices on disabled people. In the employment context, reasonable accommodation refers to the need to adapt or adjust the workplace, its policies and its structures in order to enable a disabled person "to have access to, participate in, or advance in employment".¹⁸ The ADA's reasonable accommodation provision has generated a body of case law and prompted extensive academic research across many disciplines. There is, therefore, considerable scope to draw out some points of contrast and concern in the discussion of the two statutory approaches. Further, as chapter three discusses, there were initially constitutional barriers to the introduction of the equality norm by way of reasonable accommodation in Ireland in the late 1990s.¹⁹ Chapter three discusses how established modes of constitutional reasoning can affect the introduction of expanded concepts of disability and meanings of equality. Given that both jurisdictions share the tradition of a written constitution, the United States perspective was a useful starting point in assessing the relationship between the equality principle in the context of disability and more substantive prior rights, such as property rights. Since the ADA initially enjoyed a position of constitutional security, the comparative discussion critically assesses the reasoning process of the Irish Supreme Court. However, as is also discussed in chapter three, the ADA's constitutional position has begun to erode following a recent decision of the United States Supreme Court.²⁰ Chapter three also contrasts the constitutional climate in the US with the interpretation of the Canadian Charter's equality guarantee in the context of disability. This discussion illustrates the weaknesses both in formal

¹⁸ Article 5 of the Framework Directive.

¹⁹ In Ireland, the original reasonable accommodation provision in the Employment Equality Bill of 1996 was found to amount to an unconstitutional interference with employers' property rights. *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

²⁰ See the decision in *Board of Trustees of the University of Alabama v Garrett* 531 U.S. 356 (2001) discussed in detail in chapter three of this work.

constitutional equality guarantees and in the senior judiciary's understanding of disability based-inequality. Ireland's reasonable accommodation duty was eventually strengthened as a consequence of the State's membership of the European Union. However, since the disability equality agenda in Ireland derives little or no support from the formal equality guarantee under the Irish Constitution, it remains devoid of institutional support in areas outside of the European Union's competence.²¹ Provisions within the ADA and the EEA have faced particular difficulties on the constitutional plane because of conflicts between weak equality guarantees and more "substantive" rights. Where constitutions do not specifically endorse transformative objectives - through, for example, interpretive clauses and substantive equality guarantees - the legal system can end up preserving the status quo.²² This point is underlined by the contrast between the US and Irish constitutional orders and that operating in the Canadian context.

This thesis also discusses the approaches to the pursuit of equality through orthodox, non-discrimination frameworks. It will be argued that in spite of the potential of the reasonable accommodation duty, there remain limitations in the disability context. The disability anti-discrimination project relies on the equal treatment and equal opportunities principles, though there are occasional, imperfect "gestures" towards substantive equality.²³ To this end, chapter two addresses the core non-discrimination tools, namely the prohibition on direct discrimination and indirect discrimination, and it assesses their utility and effectiveness in the disability context. It points out that the direct discrimination principle plays a useful, yet often overlooked role in the context of disability-based discrimination. The Supreme Court of Canada recently stated that indirect discrimination is the most pervasive form of discrimination endured by disabled people.²⁴ However, chapter two questions the operation of the indirect discrimination principle within Ireland's EEA, particularly in the context of its ability to unpack unnecessary job qualifications. It also points out the unclear relationship between indirect discrimination, the justification defence and the duty to make reasonable

²¹ Indeed, the Irish disability equality agenda has experienced a considerable constitutional battering in the context of education. See *Sinnott v Minister for Education* [2001] 2 IR 545 and C. O'Mahony, "The Right to Education and 'Constitutionally Appropriate' Provisions" (2006) 28 *Dublin University Law Journal* (forthcoming).

²² J. Baker et al. *Equality From Theory to Action* (Basingstoke, Palgrave Macmillan, 2004) p.137.

²³ S. Fredman, "Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm" in A. Lawson and C. Gooding (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 199, 213.

²⁴ *Eldridge v British Columbia* (1997) 3 SCR 624.

accommodation. At EU level, in particular, this relationship remains unsatisfactory.²⁵ Chapter four takes on the definition of disability and clearly indicates the EEA's superiority over the ADA in this context. It argues that despite initial misgivings within the disability movement, the EEA's approach represents the best attempt at defining the characteristic which receives the benefit of discrimination protection. The definition for the most part ensures that the focus of the statute remains on the alleged act of discrimination. This stands in marked contrast to the position under the ADA, where the characteristics of the individual, as opposed to the treatment of the individual, receive undue focus.

Thereafter, the thesis considers the duty to make reasonable accommodation. This discussion takes place at a number of levels.

Chapter five compares and contrasts the specific operation of the duty under the pioneering ADA and under the EEA as amended by the European Union's Framework Directive. Also discussed are issues such as the "reasonableness" of an accommodation, and the interaction, if any, between an accommodation's "reasonableness" and the defences available to employers. The scope of the mandate in terms of its ability to enable an individual perform a job's essential functions is set out.

Chapter six considers the conceptual boundaries of the reasonable accommodation duty by means of a comparison with positive action programs. This chapter also surveys the relevant literature and concludes that reasonable accommodation and positive action are distinct concepts and, for both practical and political reasons, should remain distinct. While the reasonable accommodation duty embraces some aspects of an equality of results formulation, it is argued that both the ADA and EEA fail to adequately embrace a truly "substantive" form of equality. At this stage, the considerable body of interrelated difficulties with the antidiscrimination legal system begin to build up. In this sense, the thesis queries the transformative impact commonly accorded to this form of anti-discrimination intervention. It also argues that the dominant mode of equality conceived by the anti-discrimination project is insufficient to address the patterns of inequality that result in the discrimination and exclusion of disabled people. Some improvements to the existing system, in line with developments in other jurisdictions, are canvassed. For example, the thesis suggests that the individualism of the reasonable accommodation duty could be offset through equality tools already built into the EEA. However, it shows that these tools - including

²⁵ See Article 2(2)(b) of the Framework Directive.

equality reviews, audits and action plans - have yet to be viewed as core to the legislation's operation.

Chapter six also details the reformulation of the equality norm suggested by Fredman, which seeks to offset the traditional liberal and individualised construct of the current anti-discrimination paradigm.²⁶ This involves a reconfiguration of the substantive equality norm through the formation of a new synthesis between non-discrimination and positive duties and non-discrimination and social rights.²⁷ Measures include the introduction of public sector duties to promote equality in the disability context recently agreed to in the UK.²⁸ Equality policy is moving in similar directions in Ireland.²⁹ In this sense, chapter six provides a response to the social model's rejection of legal strategies.

²⁶ See generally, S. Fredman, *supra* n.23 and chapter six.

²⁷ S. Fredman, *supra* n 23 pp.211-217.

²⁸ See the Disability Discrimination Act 2005.

²⁹ See S. Mullally and O. Smith, *Equality Proofing* (Dublin Government Stationery Office, 2000) and S. Mullally, "Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation for All? (2001) *Legal Studies* 99.

Chapter One

The Origins and Development of the Category, Concept(s) of and Response to Disability

Introduction

By tracing the historical treatment of disability within private and public structures, this chapter surveys the advances in thinking that prompted the introduction of disability discrimination law. During the emergence of capitalist production modes in the 18th century, the category of disability provided an administrative means of ascribing 'legitimate' reasons for non-participation in the workforce. The chapter sketches the disabled identity that resulted from the growth of capitalist industry. What emerged from this era was an economic and medically-determined construct of disability that focused on the impairments of the individual. The values and principles of the new workplace (speed, maximisation of profit, waged labour, individualism, competitiveness among workers) meant that work was defined in a way that was (and still is) presumed exclusionary to many disabled people. The exclusion of disabled people from mainstream pursuits was deemed a natural result of their impairments. As a result, social institutions - including employment and public services - were designed exclusively for the needs of the non-disabled.

The view that physical and mental impairments do not automatically impair individuals from work or from participating in society began to filter into mainstream consciousness during the 1980s. The view does not imply that disabled people are without physical or mental impairments. Rather, it recognises that aspects of our social environment can be reconfigured, and attitudinal barriers can be challenged, in order to make mainstream participation possible.¹ A recent mechanism purporting to support this new understanding of disability is the employment non-discrimination legal framework, which was first introduced in the United States. However, this development took place within a long-established social policy framework which viewed individual impairment as the main cause of disablement and exclusion. This has had significant ramifications for the interpretation and scope of the non-discrimination mandate in the disability context. The chapter shows that this individual construction of disability - which underpins rehabilitative service provision and state benefits for disabled individuals -

¹ R.K. Scotch, "Models of Disability and the Americans with Disabilities Act" (2000) 21 *Berkeley Journal of Employment and Labor Law* 213.

has become embedded in societal structures and in the mainstream psyche. Consequently, it has had particular ramifications for the interpretation and reach of the non-discrimination mandate in the disability context. These include the tensions surrounding the legislative definition of disability status for the purposes of non-discrimination rights.²

The aim of the chapter is not to provide a comprehensive account of the fixtures of the modern welfare state as applicable to disability. Its ambitions are instead directed towards an understanding of how the historical construction of disability has impacted on the emerging equality and non-discrimination law discourse. This chapter goes on to contrast the traditional medical construct with the socio-political view of disablement. It places the introduction of the disability discrimination legal framework against the backdrop of an institutional setting which views disability as an inherently individual problem. It goes on to query the emancipatory promise held out by non-discrimination rights, described in terms of the “equality of opportunity” doctrine, which is discussed generally in chapter two and in more specific terms in subsequent chapters.

Historical Background: From the Poor Laws to the Welfare State

The modern meanings of disability can be traced back to its construction as an administrative category in early social policy. Although the term “disability” was never used, modern perceptions of disability derived from categories designed for the relief of poverty, established during the reign of Elizabeth 1 in England. The Poor Relief Act of 1601 built upon a series of earlier laws designed to deal with the social problems caused by vagrancy and begging in the English countryside at a time of massive social change in the period 1500-1700.³ The feudal ties between labourer and master had faded, leaving labourers free to move about the countryside from parish to parish in search of work and higher wages. Begging was at this time a critical means of ensuring survival during periods of unemployment. It is not possible to describe the historical development of the disability category in social policy without reference to its perceived relationship with vagrancy at this time. While the relationship may appear tenuous at first, both concepts - as Stone pointed out - raised an issue which dominated the

² See L. Waddington and M. Diller, “Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law” Paper presented at An International Disability Law and Policy Symposium, *From Principles to Practice* October 22-26 2000 available at: <http://www.dredf.org/symposium/waddington.html> last accessed November 04, 2002.

³ See D. Stone, *The Disabled State* (London: Macmillan, 1985), chapter two.

thinking of poor law administrators and early welfare reformers': the ability to feign their position to procure alms or relief from the public system or private charity.⁴ This issue of delineating disability from 'able-bodiedness' persists today, both in social welfare and non-discrimination structures.⁵

Contributing to the rise in the number of beggars was the prevailing social backdrop. In Ireland, this backdrop was of a strict feudal order moving towards a system of capitalist agriculture and in England, towards capitalist industry based on wage-labour. The gaps opened by a system in transition exposed the precarious position of many individuals with impairments. However, the wholesale exclusion of disabled persons from working structures had not always been the case. In pre-industrial society, when the economy consisted of co-operatively organised agriculture and small scale crafts, many disabled people contributed to the production process.⁶ At that time, disability was considered the responsibility of the family⁷ and the local community. This responsibility was discharged to the point where the particular poverty of disability was no more pressing than the affliction of poverty in general.⁸ With the breakdown that followed feudalism's demise, families increasingly struggled to provide for their dependent members. Their difficulty was exacerbated by increased urban migration (particularly in England), migration for seasonal work, periodic bad harvests and sharp rises in food prices. Subsequently, the State was gradually forced to assume a greater role. In Ireland, state intervention came later. This was due to the absence of an

⁴ D. Stone, *supra* n. 3 p.29 and generally chapter two. While many disabled people posed as beggars, many non-disabled beggars feigned disability in order to evoke greater sympathy and increased donations.

⁵ On the delineation process in the anti-discrimination framework, see chapter four.

⁶ In the earlier rural economic base which was founded upon very different organising principles (community, interdependence, necessity) many disabled people contributed to production process. According to Topliss "[d]eafness, while working alone at agricultural tasks that all children learned by observation with little formal schooling, did not limit the capacity for employment too severely. Blindness was less of a hazard in uncongested familiar rural surroundings, and routine tasks involving repetitive tactile skills could be learned and practised by many of the blind without special training." Topliss (1979) p.11 cited in M. Oliver, *The Politics of Disablement* (London: Macmillan, 1990) p.27.

⁷ See the early Brehon laws in Ireland discussed in F. Kelly, *A Guide to Early Irish Law* (Dublin: Institution for Advanced Studies, 1988) pp. 91-95. That said, disabled people hardly had a central role in an idyllic rural community. Life within the family did not necessarily mean benign treatment for disabled people. A. Scull, *Museums of Madness* (London: Allen Lane/Penguin, 1979) pp.250-253.

⁸ There is a process of oversimplification inherent in the description of a generally benign state of play for disabled people prior to the capitalist onslaught. Disabled people certainly did not live in an idealised community, though it seems to be the case that many acceptable social roles and positions disappeared at this time which directly affected disabled people. The history of the experience of disability, whether positive or negative, is difficult to assess, largely because history is silent on this issue. M. Oliver, *supra* n.6 p.28.

industrial revolution, such as had swept through the English economy, and also the role of Irish religious organisations and charities in dealing with the poor.

It is important to appreciate the basis for the State's intervention at this time. There was increasing unease among administrators about the effects on the lower classes of indiscriminate alms giving. Of particular concern was the perceived risk of encouraging idleness and indolence, and the knock-on effect this might have on the emerging wage-labour system.⁹ In the first instance, the authorities intervened to curb the growing numbers of vagrants and beggars.¹⁰ The rationale for intervention was prioritising the new labour-wage distribution system and supplanting the threat to the proper development of that system posed by idle vagrants. The assumed capacity of vagrants and beggars for deception¹¹, meant that greater transparency within a secondary distribution system for helping people in straitened circumstances was required. This was so the "truly needy" could be properly identified and the primacy of the wage-labour system maintained. These objectives were cumulatively laid out in the Poor Relief Act 1601, which refined and codified basic principles regarding vagrancy and poor relief originally established in the 14th century.¹²

As mentioned earlier, the welfare scheme established by the Old Poor Law contained no general category of 'disability'. It pioneered relief for the "lame, impotent, old and blind, and such other being poor, and not able to work".¹³ Its programmes stipulated that provision would be made only for those legitimately exempted from participation in the work-based distribution system. The accepted basis for such exemption was the presence of a number of exclusionary characteristics: all labelled individuals were automatically deemed incapable of providing for their own needs. Need - measured as "danger from perishing" - was determined in terms of an inability to apply oneself to honest labour as a result of certain allowable misfortunes or failings in life. Those defined as needy - widows with large families, orphans, the elderly and the sick - were groups that were synonymous with dependence and inability to work. The connection between withholding of aid and the compulsion to work was firmly laid down on the premise that the secondary distributive system - the need system - would operate at so low a level as to automatically prioritise the emerging wage labour system.

⁹ D. Stone, *supra* n.3 p.15.

¹⁰ On these earlier initiatives, see D. Stone, *ibid.* pp.34-36.

¹¹ D. Stone, *ibid.* p.35.

¹² *Ibid.* p.30.

¹³ "And to set to work the able-bodied without occupation, to apprentice or find work for children who had no one to care for them, and to establish places of habitation, for the impotent poor."

There was an immediate correlation between the needy and assumed absence of possibilities for gainful employment. Such traditional categories, which were later expanded, formed the basis for culturally-acceptable reasons for non-participation in the labour market.

The New Poor Law

Major reform underpinned the Poor Law (Amendment) Act 1834, which was spurred by the Poor Law Commission report that preceded it. The Poor Law Commission Report argued that relief should only be provided on proof of destitution. Credible proof of destitution was “willingness to enter the workhouse where, as protection against ‘fraudulent rapacity and perjury’, the standard of maintenance should be less eligible than that of the independent labourer of the lowest class”.¹⁴ This became known as the principle of “less eligibility”. Accordingly, the main reform of the 1834 Act was the prohibition of outside relief: while workhouses for the poor were established before the 1834 Act, relief was now supposed to be only available within the workhouse.¹⁵ One of the effects of the workhouse system was the subdivision of a previously generalised group - the poor - into several distinct categories: the sick; the insane; defectives; children; and the aged and infirm.¹⁶ These groups subsequently became “the means of defining who was able-bodied; if a person didn’t fall into one of them, he was able-bodied by default”.¹⁷ However, a problem with the new policy was that it relied heavily on the foundations of the 1601 Act and failed to consider the ramifications of “the new industrial urban society that was coming into existence with problems markedly different from those of its rural precursor”.¹⁸ Topliss describes the developments in the following terms:

“By the 1890s, the population of Britain was increasingly urban and the employment of the majority was industrial, rather than rural. The blind and the deaf growing up in slowly scattered rural communities had more easily been absorbed into the work and life of those societies without the need for special provision. ... The environment of an industrial society was different.”¹⁹

¹⁴ *Ibid* p.7.

¹⁵ The idea obviously being that the workhouse was to be so unattractive that no one who could possibly work would choose to enter it.

¹⁶ See D. Stone, *supra* n.3 pp.41-51 for a detailed account of the process of defining each of these categories for the purposes of Poor Law relief.

¹⁷ *Ibid.* p.40.

¹⁸ M. Bruce (ed.), *The Rise and Fall of the Welfare State* (London: Weidenfeld and Nicolson, 1973) p.9.

¹⁹ Topliss (1979) p. 11 cited in M. Oliver, *supra* n.6 p.27.

As the forces and requirements of the capitalist economy took hold, more and more individuals with impairments were expelled from the workforce. The character of employment under the organising principles of the capitalist economy had moved away from the necessity and interdependence of subsistence farming and towards pure profit production. This depended on narrow margins and workers with the ability to function like machines.

In summary, the problems of the emerging industrial age appeared so overwhelming that there was an urgent need to identify, classify and control the growing numbers of the poor. Disability played a pivotal role in this classification process because of its implied social status: legitimate differentiation was made between those defined as unable to work as opposed to those who are unwilling to do so. This over-classification allowed the establishment of primary systems of production and distribution that were designed without consideration to an entire section of society. However, the disabled category became increasingly problematic in an era where the secondary need system placed increasing strain on the primary wage-labour system, due to the difficulties of classification. As Oliver points out, this process became more sophisticated “requiring access to medical and paramedical professions” and “hence the simple 18th century dichotomy [gave] way to a whole new range of definitions based upon clinical criteria or functional limitation”.²⁰

Medicalisation

The emergence of the early welfare state corresponded with a period of rapid development in the medical sciences and experimentation. As Stone pointed out above, disability was a particularly problematic category, as an individual might feign physical or mental impairments in order to access the secondary distributive system. Developments in medical knowledge meant that a ‘scientific’ medical opinion was regarded as the most effective device to tackle the problem of distinguishing those able to work from those genuinely unable to do so.²¹

The medical approach locates disability against bio-medical norms of human functioning, positioning disabled people as less able, unable, or as “abnormal objects” with functional limitations. This state of being requires either rehabilitation in order to realign the individual with society’s practices or, where that fails, it will require social

²⁰ M. Oliver, *supra* n. 6 p.3.

²¹ See D. Stone, *supra* n. 3, especially chapter 3.

assistance with daily living. The rise in power of medicine, with its putative scientific base,²² and its place at the core of the welfare state, helped to legitimise the segregation of the physically and mentally impaired. The lives of disabled people became subject to medical power. Sullivan succinctly describes the effect of this process:

... medical professionals were authorised by the State to gatekeep welfare disbursements to [disabled] people. Doctors ... became involved in the allocation of benefits, in assessing individuals for specialised equipment ... in deciding educational needs and measuring work capabilities. To receive statutory provision, disabled people were required to have their 'condition' validated ... a particular perception of disability and disabled people became entrenched in the public mind. The medicalising of disability was complete.²³

Notwithstanding the obvious benefits from the advances in medical treatment,²⁴ the rise and dominance of medical knowledge during a period of industrial and social upheaval facilitated the medical profession's ability to impose social order through medicine. The presumption has always been that medical judgements and interventions are progressive, beneficial and warranted.

However, the assumed superiority of medical knowledge, and the dominance of the medical profession within emerging bureaucracies, helped to marginalise the disabled into a specially created social role: individually disabled, institutionally segregated and economically dependent on society. The parallel track for those deemed unable to work in a conventional way included the construction of special institutions for housing disabled people. This departure was widely advocated by the medical profession and sanctioned by the welfare state.²⁵ The result was segregation. The justification for these institutions reflected the paternalistic view of government at the time: disabled people needed "protection" from society. The rise of the eugenicist movement in the early twentieth century turned the tables: hence, society needed "protection" from the disabled. The effect of this process is wider than the personal

²² L. Doyal with I. Pennill, *The Political Economy of Health* (London: Pluto Press, 1979) p.12. "The way medicine is presented and society's acceptance of its claims to authority and resources, rest to a considerable extent on its definition of itself as a natural science ... Hence it is usually believed that medicine, because it is scientific, can produce an unchallengeable and autonomous body of knowledge which is not tainted by wider social and economic considerations." *Ibid.*

²³ M. O'Sullivan, "From Personal Tragedy to Social Oppression: The Medical Model and Social Theories of Disability" (1991) 16 *New Zealand Journal of Industrial Relations* 255, 257.

²⁴ For example, the fact of increased survival rates and life expectancies for disabled people.

²⁵ The early nineteenth century moved towards the segregation of those with infectious diseases and was soon followed by the development of facilities for "lunatics and idiots". Those mostly institutionalised were labelled 'insane'. Many individuals with cognitive impairments and individuals with no impairments were labelled insane or defective and incarcerated as a result.

experiences of disabled people; it has been a powerfully destructive form of social control as

... confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.²⁶

The effects of institutional ghettoisation are enormous and ongoing. Not only does institutionalisation still persist, but the remnant perceptions of that era have had a powerful influence on how contemporary society views disabled people. Segregation has undoubtedly “contribute[d] to the fear, embarrassment and powerful stereotypes which ... characterise able-bodied people’s reactions to disabled people”.²⁷ Bowe, writing in the American context, powerfully describes the lingering consequences of the phenomenon of segregation:

For 200 years we have designed a nation for the average, normal, able bodied majority, little realising that millions cannot enter many of our buildings, ride our subways and our buses, enjoy our educational and recreational programs and facilities and use our communication systems ... We have said for 200 years and say anew that we do not want to see disabled people ... We do not wish to be reminded of their needs or their desires to live in the world. We prefer these people to be sequestered safely in secluded institutions – and they have been. Most of all we stubbornly refuse to recognise that the problems that disabled people face are not theirs alone ... Disabled people have been out of mainstream ... life for [hundreds of] years and these years have seen the construction of modern ... society. So that now when they are coming back into our society the barriers that they face are enormous.”²⁸

In short, a system of disability apartheid sprang up.

A Note on Stigma

As with the signification that resulted from the Poor Law, the label ‘disability’ carried with it particular connotations that operated on numerous levels. Social forces applied a stigmatising label to those with differences that were labelled “disabilities”. Goffman pointed out that stigmas were originally inflicted through marking or branding individuals who had transgressed the norms or values of a particular society.²⁹ Stigma occurs when prevailing social practices treat particular “undesirable” traits as

²⁶ Justice Ginsburg in *Olmstead v LC* 119 S.Ct. 2176, 2187 (1999).

²⁷ C. Gooding, *Disabling Laws: Enabling Acts Disability Rights in Britain and America* (London: Pluto Press, 1994) p.17.

²⁸ F. Bowe, *Handicapping America* (New York: Harper and Rowe, 1978) p.170.

²⁹ E. Goffman, *Stigma: Notes on the Management of a Spoiled Identity* (1963) cited in S. Bagenstos, “Subordination, Stigma, and “Disability” (2000) 86 *Virginia Law Review* 397, 437.

universally discrediting.³⁰ The social meaning of disability that has come to be accepted is based on a strict division between individuals can carry out set functions and those who cannot. The latter have been stigmatised as unworthy of equivalent levels of concern and respect.

The stigma of disability is a clear marker of a particular identity. It is associated with non-productivity, and deviance. It inspires fear among non-disabled individuals. It evokes discomfort and prompts tactics of avoidance. An individual's impairment could almost be viewed as contagious— functional impairments were [and remain] something from which the non-disabled majority were not safe. This is what Hahn describes as “existential anxiety”, the fear among the majority that they too could be stricken down with disability.³¹ In order to control such fear, disabled people were sectioned off from mainstream society and kept in institutions. Even where physical differences present little or no reduction in functioning - as in facial disfigurements - the fact of physical deviance could cause “aesthetic anxiety” and prompt avoidance of the “other”.³² This process of attributing undesirable attributes to the disabled relies on stigmatisation inspired by prejudice, stereotyping and neglect. It adds up to a process of endemic social exclusion.

Stigma is endemic: it is as much about social attitudes as about the traits themselves. Those with stigmatised traits are not considered among the “average” or “normal” for whom society and its institutions are designed. As a result, those with ‘sub-standard’ modes of functioning remain outside of the norm in the planning, design and operation of the built and structural environment. Even if such individuals are not overtly or intentionally excluded, the forces of neglect that surround those with stigmatising conditions will ensure that they are simply ignored.

The Emergence of the Modern Welfare Era

The discussion above identified the way in which “disability” came to occupy a key role in the new economic order. It was used as a validation device to ensure the priority of the wage-labour system over the needs-based system. This prompted the development of a kind of parallel universe for those who had been labelled disabled. Labour market

³⁰ S. Bagenstos, *ibid.* p.437.

³¹ H. Hahn, “The Politics of Physical Differences: Disability and Discrimination” in M. Nagler, (ed.) *Perspectives on Disability 2nd*.ed. (1993) 37, pp. 39-40. Cited in M. Crossley, “The Disability Kaleidoscope” (1999) 74 *Notre Dame Law Review* 621, 662.

³² *Ibid.*

participation achieved a role of primacy in society, with the surplus labour supply³³ relegated to subsist on state-sponsored welfare. The disability paradigm became one of the foundations of this secondary system.

The modern welfare state that emerged from the Poor Law in the early twentieth century would perpetuate the practice and ideology of its forerunner in the disability context. Protection against the onset of disability - i.e. forced retirement - was built into the welfare system, via a social insurance scheme established under the National Insurance Act of 1911.³⁴ Under this Act, employees and their employers were required to pay contributions to approved societies, who then gave cash benefits to the sick and disabled.³⁵ Disabled individuals in Ireland, who had never worked, remained reliant upon the Poor Law (renamed Home Assistance) until the introduction of specific disability payments in the second half of the century.³⁶ Most disabled people not living at home were cared for under the Poor Law, primarily in the workhouse or in the insane asylum.³⁷

Post-independence, the Irish State began to introduce social policy and legal measures aimed at improving the critical situation of the disabled.³⁸ Theories of normalization took hold and inspired some movement towards deinstitutionalisation. These theories would also influence the State's intervention in the latter half of the twentieth century.³⁹ The reasons behind this sea-change can be traced to reports of deplorable conditions in many institutions and the escalating costs of running and maintaining such institutions.⁴⁰ However, the systematic institutionalisation of disabled

³³ See M. Russell, "Disablement, Oppression, and the Political Economy" (2001) 13 *Journal of Disability Policy Studies* 87.

³⁴ Though the impact of this measure in Ireland was different from England since Ireland had not experienced large-scale industrialisation. The majority of working age men were engaged in agriculture other than in an employed capacity, as compared to only 32.5% of manual employees. M. Cousins, *Social Welfare Law* 2nd, ed. (Dublin: Thomson Roundhall, 2002) p 4.

³⁵ The Department of Social Welfare was established in 1947 and took over responsibility of operating the social insurance scheme.

³⁶ Post independence, the Poor Law in Ireland was eventually renamed "home assistance" and was not formally repealed until 1975. In England, the Poor Law was repealed by the National Assistance Act 1948.

³⁷ S. Quin and B. Redmond, "Moving from Needs to Rights for People with Disability in Ireland" in S. Quin et al (eds.) *Contemporary Irish Social Policy* (Dublin: UCD Press, 1999) 146 p.147.

³⁸ See generally, S. Quin and B. Redmond (eds.) *Disability and Social Policy in Ireland* (Dublin: UCD Press: 2003).

³⁹ S. Quin and B. Redmond, *supra* n.37 p.150.

⁴⁰ Government White Paper, *The Problem of the Mentally Handicapped* (Dublin: Government Stationery Office, 1960) and the *Report on the Commission of Enquiry on Mental Handicap* (Dublin: Government Stationery Office, 1965).

people in Ireland continued until the 1960s and has not yet been completely phased out.⁴¹

With its “gatekeeping” role firmly established, the medical profession remained critical of the welfare state’s need to delineate the truly disabled from the potentially fit worker. Entitlement to social security was based on the criterion of an individual’s inability to work. However, inability to work is measured by clinical criteria, and does not include any assessment of the employment or training opportunities that might be available to meet a disabled person’s needs.⁴² Inability to work is an over-inclusive concept: it does not measure disability in terms of an impairment that might limit an individual’s employment options, or make work more difficult, as opposed to making it impossible. In the main, service provision for disabled people was overseen by the Department of Health, and it remained static and largely unchallenged until the mid 1980s. A separate sphere for disabled people - consisting of segregated schools, segregated training programmes, segregated residential centres and a few segregated employment outlets - was established. This parallel universe occupied by disabled people was widely endorsed by public bodies, educational authorities, social service providers, professionals and, indeed, families. It appeared normal. This is crucial, since the definers of normality also define, by default, what is deviant or abnormal.⁴³ Voluntary organisations did attempt to fill gaps in the system of service provision, and pointed out that the inclusion of disabled persons in society should go beyond the remit of the Department of Health. There were piecemeal changes reflecting this shift in perception. They included the valorisation of independent living; incremental changes to the health, social services and benefit systems; closure of some long-stay institutions; and a shift towards care in the community. Thus, the manner and context of the State’s intercession was increasingly challenged from the 1990s. The shift was towards what became known as “mainstreaming” service provision.

While this incremental move away from institutionalisation and segregation was beginning to take place in Irish social policy, it should be recognised that the shift in approach was still predicated on a construction of disability as an individual problem of the person. As an individual problem, the on-set of disability required rehabilitation of the body in order to make the individual a better “fit” with the existing structures of

⁴¹ There are still almost 400 individuals with learning difficulties incarcerated in institutions for the mentally ill. See F. O’Toole, *The Irish Times*, January 3rd, 2006.

⁴² A. McManus, “Social security and disability” in S. Quin and B. Redmond (eds.) *supra* n.38 p.57, 58.

⁴³ R.F. Drake, *Understanding Disability Politics* (London: Macmillan, 1999).

society. When rehabilitative measures were exhausted, state benefits took over and the individual was placed in the usual categories. The dominance of the economic and medically-determinable view of disability was based on the notion of a “truly” disabled state being identifiable. There was the idea that there is, in fact, a category of people who, because of their inherent characteristics, can be treated apart from the mainstream. The sorting process suffers the burdens of “scientific” fact and reinforces the notion that disability is an individualised status. This division has been practically and ideologically enforced across the social stratum.

A movement which first emerged in the United Kingdom began to question this conceptualisation of disability. It sought to challenge the medical construct of disability and to reconceive the place of disabled people in modern society. This reformulation of disability is discussed below. This social construction of disability was subsequently adopted by political activists in the United States. These activists favoured the minority group model of disability, which asserts rights-based responses to the exclusion of disabled people. The policy switch motivated by this civil rights analysis of disability is subsequently discussed.

Challenging the Hegemony: The Social Model of Disability

Discontent with the construction of social life that was cast upon disabled people by medical definitions led a group of disabled theorists and activists to conceptualise alternative means of describing their position.

The movement began in the late 1960s and was led by members of the Union of the Physically Impaired Against Segregation (UPIAS) who grappled with different interpretations and perspectives of the construct. This form of theorising around disability identifies different ways that it can be understood in moral and philosophical terms. It aims to illuminate how society views disability and it aims to indicate the relevance of thinking about disability to modern social policy.⁴⁴ Disability theorists do not speak with one voice on disability, and there are many variations on the social model of disability within disability studies.⁴⁵ While it is beyond the scope of this work to delineate the various interpretations of the socio-political view of disability, I provide a general overview in order to illustrate its challenge to the medical model.

⁴⁴ See M. Crossley, “The Disability Kaleidoscope” (1999) 75 *Notre Dame Law Review* 621, 649.

⁴⁵ For a concise overview of the various strands of social model theorising, see C. Tregaskis, “Social Model Theory: the story so far ...” (2002) 17 *Disability and Society* 457.

The rethinking of disability became centred on the place and situation of disabled people in society. As Finklestein describes, the members of the UPIAS were faced with a crude, but fundamental choice: “[e]ither our tragedy is that the impairments we possess make us incapable of social functioning, or our society is constructed by people with capabilities for people with capabilities and it is that that makes people with impairments capable of functioning.”⁴⁶ The group firmly rejected the “personal tragedy” view of disability imposed upon them by the medical model, which identifies them in terms of functional limitations caused by impairment.

In our view it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.⁴⁷

The social model made a vital distinction between impairment and disability.

Impairment is lacking all or part of a limb or having a defective organ or mechanism of the body; and *Disability* is the disadvantage or restriction of activity caused by a mode of social organisation that takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities.⁴⁸

In other words, impairment is a description of the body. It is not a description of the disadvantages suffered by people with impairments in terms of society’s structures.

The development of the social model by disabled people themselves was heralded as an emancipatory event. Its appeal was widespread because the model challenges disabled people’s “own internalised oppression”.⁴⁹ For the first time, disabled people considered disability as more than an individual and personal limitation. Disability, instead, was seen as the result of society’s failure to take their needs into account, and the failure to recognise a wide spectrum in human functioning and capacities when planning the built and social environment. Hence, it became an

⁴⁶ V. Finklestein, “The Social Model of Disability Repossessed” Paper delivered at Manchester Coalition of Disabled People December 1, 2001. Available at Centre for Disability Studies Resources Web page: < <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> > p.2.

⁴⁷ UPIAS, Union of the Physically Impaired Against Segregation, *Fundamental Principles of Disability* (London, UPIAS, 1976) p.14.

⁴⁸ V. Finklestein, *Attitudes and Disabled People: Issues for Discussion* (New York: World Rehabilitation Fund, 1980) p.3. One of the critiques of the definition of disability formulated by social model theorists which was partially adopted by minority group advocates, is the fact that the definition as conceived has been argued to not covering many individuals with functional limitations, particularly, powerful, well-educated men with late onset functional impairments who do not share experiences of the widespread exclusion from participation in mainstream activities because of their prior and existing powerful positions.

⁴⁹ C. Tregaskis, “Social Model Theory: The story so far ...” (2002) 17 *Disability and Society* 457.

ideological stance to view disability as being comprised of all the facets of life that impose unnecessary restrictions on impaired people: individual prejudice and fear, institutional discrimination, systemic exclusion, inaccessible transport, segregated communities, housing and schooling, and exclusionary working arrangements.⁵⁰

There are conflicts within social model theorising in disability discourse. For instance, from the seminal work of the UPIAS, a number of strains of social model theorising have developed which reject the “grand theorizing” of social science in the 1960s. The most dominant is the materialist social model account, which locates disabled people in an oppressed underclass as a consequence of capitalism, industrialisation, urbanisation and rigid working practices. The materialist analysis has been criticised for its over-emphasis on capitalist economics as the main cause of disability. It has been accused of ignoring issues such as the cultural construction of disability, as well as the very real disabling effects of some impairments. On this last point, certain aspects of social model theorising on disability, if pushed to their logical conclusions, can create a rigid dichotomy between impairment and disability to the point that the reality of impaired bodies is ignored. Disabled feminists have argued that impairment, with its very real limitations and its pain and suffering, is part of daily life experience and as such cannot be ignored in social theory or political strategy.⁵¹ While that debate within social theory and that limitation is acknowledged, it is not developed here. Despite this limitation, its initial force is not lessened as “the social model need not deny that some limitations flow directly from impairment in order to argue that externally imposed disadvantages should be remedied”.⁵²

The Minority Group Model and A Strategy of Rights

The minority group model has been utilised by various oppressed groups as a political strategy to gain legal rights which might overcome the subjugation of their members. In the disability context, the minority group analysis is an offshoot of the scholarship and political activism that centred on the social model, as discussed above. It took root in the political movement that powered the civil rights campaigns in the United States in the

⁵⁰ M. Oliver, *Understanding Disability From Theory to Practice* (Basingstoke: Palgrave, 1996) p.33.

⁵¹ See generally, S. Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (New York: Routledge, 1996).

⁵² M. Crossley, *supra* n.44 p.658 .

1960s and 1970s. The model has laid particular emphasis on legal change, in the form of civil rights to political, economic and social participation.⁵³

The main advocates of the minority group perspective have argued that the analysis applied to the marginalization of racial minorities should be applied to the disabled.⁵⁴ Disabled people are a minority group because they are denied the advantages of full participation in civil life. This is due to the pervasive nature of institutional discrimination brought about by prevailing cultural attitudes, environmental barriers, institutionalised rules and procedures. Hahn describes the primary postulate of the minority group analysis in the following terms:

“ All facets of the environment are moulded by public policy and government policies reflect widespread social attitudes or values; as a result, existing features of architectural design, job requirements ... that have a discriminatory impact on disabled citizens cannot be merely viewed as happenstance or coincidence. On the contrary, they seem to signify conscious or unconscious sentiments supporting a hierarchy of dominance and subordination between non-disabled and disabled segments of the population that is fundamentally incompatible with legal principles of freedom and equality.⁵⁵

This perspective underlines how disabled people have historically been excluded from social institutions because those institutions have failed to design for, take account of, or adapt to the needs of disabled individuals. The extract from Hahn's passage clearly links the minority group perspective to a political strategy that seeks legal equality guarantees. It considers inclusion in society's structures and practices as a claim of right rather than as a request for special benefits, because society has historically offered an inhospitable experience to disabled individuals. As a consequence, political agitation by disability groups following the original civil rights movement in the United States provided the necessary impetus for legislation such as the Rehabilitation Act 1973 and, eventually, the ADA. The minority group analysis in the US believes that the law, more than any other political or social institution, stands the best chance of guaranteeing basic individual rights to disabled people.⁵⁶

⁵³ Though other strategies have been adopted, including: political activism, language discourse, identity politics and cultural affirmation.

⁵⁴ See H. Hahn, “Anti-Discrimination Laws and Social Research on Disability: The Minority Group Perspective” (1996) 14 *Behavioral Sciences and Law* 41; H. Hahn, “Towards a Politics of Disability: Definitions, Disciplines and Policies” (1995) 22 *Social Science Journal* 87. At the same time, a criticism of the minority group analysis has been this forced analogy with race-based oppression.

⁵⁵ See H. Hahn, *ibid.* (1996) pp.46-47.

⁵⁶ See J. Bickenbach, “Minority Rights or Universal Participation: The Politics of Disablement” in M. Jones and L.A. Basser Marks (eds.) *Disability, Divers-ability and Legal Change* (Kluwer International, 2000) 101, p.104.

However, the minority group model of disability, as chapter four will further illustrate, has been thwarted in its campaign for full legal equality. Particular difficulties lie with the federal judiciary's interpretation of the definition of disability. Under the ADA, claimants have to rely on a definition of disability that dovetails with the medical model, despite the minority model's rejection of medical understandings of disability. Moreover, when demands for inclusion are framed wholly within an equal opportunities format, divisions are created within the heterogeneous minority group. As is explored later in the thesis, this approach can practically only be of assistance to a proportion of the targeted class.⁵⁷ This is a recognition that political theory and its legal implementation can, unfortunately, "essentialise" the disabled experience. In addition, particularly for individuals with severe impairments, not all limitations can be offset by 'reasonable' adjustments to the social environment. By extension, it has been argued that the minority group model is based on a rather forced analogy between racial minorities and disabled people. Social responses to disabled people, and the vast range and impacts of impairments, means that there has been comparatively less trans-disability solidarity within the disability movement. Moreover, as Bickenbach points out, "[o]ne does not have to be an anthropologist to observe that the leaders of the disability movement have tended to be highly educated, white middle class males with late on-set physical disabilities and minimal medical needs, a group that is hardly representative of the population of people with disabilities".⁵⁸ Indeed, many of the original proponents of social model theorising rejected the minority model's enthusiasm for legal rights. The minority group model was viewed as reflective of the peculiarly American penchant for pigeon-holing social problems in terms of legally enforceable individual rights.⁵⁹ Related to this point is the question of why, given the actual operation of anti-discrimination laws such as the ADA and Ireland's EEA, "anyone would want to put their trust in them or expect them to address realistically the social ill of discrimination that ... creates the condition of inequality experienced by disabled persons."⁶⁰ However, as chapter six argues, socio-political perspectives on disability

⁵⁷ One criticism of the minority group perspective on disability has been this forced analogy with race-based oppression, particularly as disability is a far from homogenous group, with the effect that, unlike race based movements, there is little commonality with which to forge a sense of 'disability' as a minority group status in terms of shared experience, self-identification and mutual support.

⁵⁸ J. Bickenbach, *supra* n.57 p.106.

⁵⁹ M. Oliver, *supra* n.4 pp.105-6 and 121-2. Oliver that argues that disabled people, as an oppressed group, cannot expect emancipation by appealing to one of the many social institutions that oppresses them.

⁶⁰ J. Bickenbach, *supra* n.56 p.106.

retain a utility in the legal context, particularly where equality and non-discrimination structures can be supplemented by more transformative equality norms. Instead of being formulised as inherently antagonistic to rights-based claims, the social model perspective can thus be harnessed and used to argue in favour of a reformulation of equality and non-discrimination norms. This idea is introduced below and developed in chapter six.

The Non-Discrimination Right as A Form of Disability/Employment Policy

The non-discrimination agenda first took hold in the United States in the 1970s, in the context of US federal employment⁶¹, and again in the late 1980s, when the exclusion of millions of disabled Americans from mainstream employment was revisited. This was due to concerns about escalating disability benefit costs, and to the emergence of the disability rights movement in the civil rights climate. The political argument prompting civil rights intervention centred on the need to tap into the vast pool of potential labour in the disability community. This was previously discounted due to a combination of social stereotyping, prejudicial attitudes and the exclusionary nature of the built environment. The benefits of anti-discrimination intervention were sold to the political right as a means of removing vast numbers of disabled people from the welfare rolls. Disabled people were to be transformed into workers, taxpayers, consumers and independent contributors to the economic health of the nation.⁶² In short, the parallel track for disabled people was proving expensive.

Parliamentary materials provide a useful starting point in determining the rationale, purposes and expected achievements of the disability discrimination regulations. This is particularly so in respect of the ADA, as the United States' Congress went so far as to codify an extensive purpose section in its text, setting out goals and aspirations.⁶³ What is clear is that the extension of the employment non-discrimination rule to disabled individuals entailed a fundamental change in the United States' view on disability and exclusion. Historically, the disabled were considered outside equality prescriptions, because it was assumed that individual limitations militated against the

⁶¹ The Rehabilitation Act 1973.

⁶² C. Feldblum, "Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About it?" (2000) 21 *Berkeley Journal of Employment and Labor Law* 91

⁶³ 42 U.S.C. §12101.

principle of treatment as an equal. However, a sea-change was made possible by the non-discrimination right of the ADA: the economic dependence, segregation and social isolation of the disabled could be brought to an end through the extension of rights towards integration into mainstream society. The stated goals of the ADA include equality of opportunity, full participation and independent living.

The purpose section of the ADA clearly indicates a commitment to an alternative view of disability. The systematic disadvantage attached to disability is not treated as inherent in the disabled person's biological condition. Instead, the purpose section points to several social practices that are the source of disadvantage. The ADA preamble notes that "the social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability".⁶⁴ Stereotypical assumptions about the limitations of disabled people have determined their opportunities, rather than any assessment of their actual talents and capabilities. The ADA was designed to shift such stereotypical notions by demonstrating that an alteration in conditions could allow disabled people to become economic contributors and full members of society. The key aspect to the ADA is the innovative "reasonable accommodation" duty⁶⁵. This requires employers and public service providers to consider that the "normal" way of doing thing is not the only way of accomplishing business objectives. The reasonable accommodation mandate works against the process of exclusion suffered by the disabled by demonstrating that adjustments within the workplace can reduce the arbitrary discrimination they endure.

As chapter two notes, the symbolic impact of disability non-discrimination precepts is enormous. However, the thesis goes on to assess whether such purposes are belied by the structure in which they are ultimately delivered, notwithstanding the purposes laid down in the ADA⁶⁶. The existing non-discrimination legal template has found it difficult to tackle deep-rooted experiences of exclusion that endure in the race and gender context: its extension to the disability ground meets similar barriers. Despite the broad transformative purposes ascribed to the disability non-discrimination structure, as mentioned above, questions are raised as to whether the employment

⁶⁴ M. Oshige McGowan, "Reconsidering the Americans with Disabilities Act" (2000) 35 *Georgia Law Review* 27, 46.

⁶⁵ See further, chapters three, five and six.

⁶⁶ See the equivalent statements in the Oireachtas debates on the introduction of the disability provisions of the Employment Equality Bill 1996. The Oireachtas is the Irish term for the Irish law-making body which is made up of the Dáil (lower house of Parliament) and the Seanad (the upper house). See statements made by the then Minister for Justice, Equality and Law Reform *Dail Debates*, October 25, 1996.

discrimination system can, in practice, intervene sufficiently against the exclusion endured by the disabled.

As the following chapter discusses, there are many limitations to the liberal state's "equality of opportunity" model, which underpins employment discrimination legislation. Many such limitations remain, despite the advances made by the duty to make reasonable accommodation. While this duty has been described as the precursor to more substantive equality tools, chapters five and six argue that it merely "gestures" towards more positive duties to promote equality.⁶⁷ Enforcement of the disability non-discrimination norm rests entirely with the individual⁶⁸: clearly, this holds the problem of employment discrimination as an inherent problem of that particular individual in that particular employment situation. Civil suits pursued by individual victims cannot provide the whole scale resolution of the discrimination problem. It is difficult to discount the experiences cited by very qualified disabled applicants for employment:

I am convinced that it is easy for most businesses to turn a candidate down and make it look like the disability had nothing to do with it. Potential employers often disguised their prejudices about blindness by offering excuses such as another applicant had more experience or would do a better job.⁶⁹

Conclusion

Social policy pertaining to disabled people seems restrained by ongoing tension. Early welfare policy created and cemented a category of individuals who were removed from the obligation to work and compensated for their inability to work. This parallel track is so embedded into public consciousness that many people outside of the disability movement do not expect disabled people to work.⁷⁰ This results in a perpetuation of

⁶⁷ S. Fredman, "Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm" In A. Lawson and C. Gooding (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 199 p.213.

⁶⁸ To file suit under the ADA, a disability discrimination complaint must first receive a "right to sue" letter from the EEOC which police the process. By 1994 33,000 ADA employment complaints had been filed with 11 percent alleging discrimination in the hiring process. The EEOC only passed 28 discrimination cases for suit, with only three alleging discrimination in hiring. Cited in M. Russell, *Beyond Ramps: Disability at the End of the Social Contract* (Monroe, Maine: Common Courage Press, 1998) p. 120.

⁶⁹ Cited in M. Russell, *supra* n.68.p118. The interviewee continues that it is not discrimination to want the best person for the job, but proving that the non-disabled person who was hired had fewer qualifications under the ADA, is really tough to do.

⁷⁰ R.V. Burkhauser, "An Economic Perspective on ADA Backlash: Comments from the Bell Symposium on the Americans with Disabilities Act" (2000) 21 *Berkeley Journal of Employment and Labor Law* 367, 368.

difficulties, including: the invisible nature of the disabled entity; widespread fear and stigmatisation of the disabled state of being; and the entrenchment of stereotypes across society's structures. As noted above, the 1970s, 1980s, and 1990s witnessed a perceptible shift in disability policy from the protectionism of the welfare era to various forms of integration into work-based production and other aspects of social life. While the range of social support for persons with disabilities in the past served a useful and indispensable function, there is little doubt that much of it came at the cost of compounding their isolation and reducing their range of choice.⁷¹ The legacy of segregation still exists in the disability context. It will take time to dissipate, and the role of the equality/non-discrimination principle in this regard is considered here.

One avenue of increasing the work participation rate of disabled people has been the employment equality intervention. This regulation presupposes a category of disabled people capable of working but who are prevented from doing so because of unjustified discrimination. At the same time, tensions within the disability non-discrimination legal prescription abound. There is the conceived labour-dependency of humanity, and the consequent exclusion of the experiences of many disabled persons.⁷² In policy discussions around the introduction of the ADA, the legislation was sold to the political right as a means to remove vast numbers of individuals from the welfare rolls.⁷³ However, this should not be taken to the extreme expectation that all those with impairments can be expected to work to an equivalent level as 'nondisabled' contemporaries, or that disabled people can or should work in the conventional sense.⁷⁴ The expectation to be "productive" placed on individuals with multiple, severe and complex impairments is one of the most oppressive aspects of modern society.⁷⁵ The prospects for inclusion of those impaired persons in a system less concerned with structural as opposed to ad-hoc change appear to be less viable. As Finklestein recognises:

⁷¹ G. Quinn, "The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose" in G. de Burca and B De Witte (eds.) *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 279 p.282.

⁷² See V. Finklestein, *supra* n.46.

⁷³ C. Feldblum, *supra* n.62.

⁷⁴ Barnes makes the rather obvious point that work is a social creation. What is considered work at one point in time may not be so perceived at another time. C. Barnes, "A Working Social Model? Disability, work and disability politics in the 21st Century" (2000) 20 *Critical Social Policy* 441, 451.

⁷⁵ *Ibid.*

A society may be willing and in certain circumstances become eager to absorb a portion of its impaired population into the workforce, yet this can have the effect of maintaining and perhaps intensifying its exclusion of the remainder.⁷⁶

Social policy and disability discourse is caught between a rock and a hard place on this point.⁷⁷ While the anti-discrimination intervention can be viewed as a mechanism towards barrier removal, there will always be people who, because of their impairment, will never work. This theme, and the notion of a synthesis between an emerging reformulation of substantive equality and social rights, is taken up in chapter six.

The next chapter considers the traditional tools of anti-discrimination regulation: namely direct and indirect discrimination. It examines how they operate in the disability context, and what concept of equality they pursue.

⁷⁶ V. Finkelstein, cited in P. Abberley, "The Significance of Work for the Citizenship of Disabled People Paper presented at University College Dublin April, 1999 p.12. Available at Centre for Disability Studies Resources Web page: <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> last accessed November 18, 2003).

⁷⁷ P. Abberley. "Work, Utopia and Impairment" in L. Barton (ed.) *Disability and Society: Emerging Issues and Insights* (Harlow: Longman, 1996) and T. Shakespeare and N. Watson "The social model of disability: an outdated ideology?" *2 Research in Social Science and Disability* (2002) p.9-28 (also available at Centre for Disability Studies Resources Web page: <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> last accessed November 18, 2003).

Chapter Two

The Traditional Tools of Anti-Discrimination Law

Introduction

This chapter considers the equality objectives underpinning anti-discrimination law. It outlines the traditional tools of anti-discrimination law, namely direct and indirect discrimination, and their operation in the disability context. The discussion first introduces the idea of equality as a political value and as an organising principle of the early liberal state. A particular and limiting construction of the equality right was codified within liberal legalism and was not thought applicable to disability until quite recently. As chapter one pointed out, disability was considered to be the remit of needs-based social programmes designed to compensate for the exclusionary effect of functional limitations.

Legal theory has made a distinction between formal equality and its more substantive conceptions. Issues of symmetry, sameness and similarity are emphasised in formal accounts of equality guarantees. Under formal equality, the law treats similarly situated people the same, while ignoring the individual and societal differences which result in people becoming differently situated.¹ Formal equality pursues the principle of equal treatment. It is based on the idea that goods should be distributed according to the neutral criterion of merit, and that all individuals are able to compete equally if they are treated equally. At the constitutional level, it is best encapsulated by the traditional guarantees of equality before the law, as exemplified by the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article 40.1 of the Irish Constitution.² These provisions are discussed in chapter three. Formal equality is also captured by the prohibition on direct discrimination within anti-discrimination statutes, which requires that individuals be treated without regard to particular

¹ L. Waddington and A. Hendriks, "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination" (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 403, 407.

² Discussed further in chapter three. These formal equality guarantees can be contrasted with more expansive equality protections such as those set out in Section 15 of the Canadian Charter of Rights and Freedoms and section 36 of the South African Constitution. What also differs is the judicial approach in Canada and the US in the interpretation of constitutional equality guarantees. See A. Mayerson and S. Yee, "The ADA and Models of Equality" Paper presented at International Disability Law and Policy Symposium: From Principles to Practice October 22-26 2000. Available at <http://www.dredf.org/symposium/mayerson.html>.

characteristics, such as sex or race, which have been the source of disadvantage in the past.

A more substantive formulation of equality moves beyond the procedural approach that characterises equal treatment, as the strict application of formal equality can exacerbate social disadvantages for certain groups. Substantive equality is more concerned with constructing the social conditions needed to ensure that people experience less inequality. It is generally equated with the ideas of equality of opportunity and equality of results.³ It requires a sensitivity to the impact of existing differences between groups in society and to the inequalities that can result from the application of neutral rules and standards to clearly unequal situations. Substantive equality focuses on the recognition of differences, and it demands different treatment in order to minimise past imbalances in the relative positions of different groups. While the formulations of substantive equality vary – as, consequently, does the usage of the term – it is generally justifiable by reference to some distributive principle of equality,⁴ as pure equal treatment can obstruct the achievement of a particular outcome. Examples of norms of substantive equality are evident in many declarations in international law. International law instruments have moved away from the classic liberal approach to equality as seen in the US and Irish Constitutions. For example, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵

The notion of equality at international level is substantive in that it links the enjoyment of equality to substantive rights and freedoms within human rights discourse.⁶ However, most of these international provisions are not directly applicable in the domestic laws of

³ L. Waddington and A. Hendricks, *supra* n.1 p.407.

⁴ H. Collins, “Discrimination, Equality and Social Inclusion” (2003) 66 *Modern Law Review* 16, 17.

⁵ For a discussion on the discrimination provisions of the ICCPR and the ICESCR, see A. McColgan, “Principles of Equality and Protection from Discrimination in International Human Rights Law [2002] *European Human Rights Law Review* 157.

⁶ The equality ideal is most obviously emblazoned upon the branch of rights termed civil and political-
e.g. the right to vote, due process, freedom of speech and association. For a useful argument on the bridge provided by the anti-discrimination principle between civil rights generally and social rights, see G. Quinn, “The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose” in G. DeBurca and B. De Witte (eds.) *Social Rights in Europe* (Oxford: Oxford University Press, 2005) p.279.

the two jurisdictions considered here. At the statutory level, the indirect discrimination principle has been described as a more substantive equality tool. This is because it recognises the disparate impact which supposedly neutral practices can have on the opportunities of particular groups. Additionally, the reasonable accommodation duty is substantive because it recognises that a failure to accommodate individuals who face structural barriers in accessing opportunities results in a denial of those opportunities. However, these tools are not unconditional, but are subject to limitations which are discussed throughout this thesis. Indeed, the difficulties in application prompted one commentator to conclude that the equality principle underpinning non-discrimination law tends to “shrink into [a] formal component when it comes to application by the court”.⁷ Whether this comment holds true in the disability discrimination law context is a theme which permeates this work as a whole.

Equality-based justifications have traditionally supported the introduction and maintenance of the anti-discrimination legal framework.⁸ These justifications include the principles of equal treatment, equal opportunity and equality of outcome, as discussed below.⁹ The equal treatment principle provided the foundation for early anti-discrimination law. Despite its revered place within liberal legalism, there are too many deviations from this principle for it to be the sole foundation of anti-discrimination law.¹⁰ There is considerable evidence that the two jurisdictions considered here have adopted equality of opportunity - the narrower form of substantive equality - as a primary foundation. At particular points, though, it is possible to show an overlap between equality of opportunity and weaker versions of the equality of results theory.¹¹ This narrower conception of substantive equality allows movement away from the formal equal treatment approach. However, any departures tend to be framed as exceptions, due to the ongoing tension between liberalism’s adherence to the equal

⁷ O. Mjoll Arnardottir, *Equality and Non-Discrimination under the ECHR* (Martinus Nijhoff, 2002) p.5.

⁸ See S. Fredman, “The Future of Equality in Britain” (Manchester, EOC, 2002). Though see H. Collins, *supra* n.4 who argues in favour of a move away from equality-framed justifications for anti-discrimination law. He argues that anti-discrimination law should be predicated upon the principle of social inclusion.

⁹ There are a range of terms used to describe the different strands of the equality principle. For example, McCrudden has identified five (sometimes-overlapping) conceptions of equality: equality as mere rationality; equality as individualised justice; equality as group justice; equality as recognition; and equality as participation. See C. McCrudden, “Theorising European Equality Law” in C. Costello and E. Barry, *Equality in Diversity : The New Equality Directives* (Dublin: Irish Centre for European Law, 2003) 1.

¹⁰ H. Collins, *supra* n.4 p.17.

¹¹ L. Waddington, *Disability, Employment and the European Community* (Antwerp: Maklu, 1995) p.65. Discussed further in chapter six.

treatment principle and more substantive conceptions of equality.¹² Thus, the easiest approach, according to Collins, has been for anti-discrimination law to pursue this limited approach to substantive equality in order to minimise the clashes with the primacy of equal treatment.¹³ Indeed, Barnard and Hepple's review of the equality principle underpinning UK anti-discrimination law queries whether it has moved away from liberal notions of non-discrimination and towards an approach based on substantive equality.¹⁴ Their discussion concentrates on the concept of indirect discrimination and on the scope of permitted positive action in favour of disadvantaged groups. Their conclusion is ambivalent when it considers if legal formulas of non-discrimination have moved in more substantive directions.¹⁵ The ambivalence continues in this thesis in the context of disability discrimination law, despite its inclusion of measures such as reasonable accommodation, indirect discrimination and positive action. The former duty, according to Fredman, "gestures"¹⁶ towards more expansive substantive equality norms. Moreover, positive action programmes remain an under-utilised tool under Ireland's EEA. The ADA contains no affirmative action provisions. While the reasonable accommodation duty is a potentially useful tool, when this duty is individualised, it may remain unable to tackle the underlying sources of disadvantage and discrimination.¹⁷ This point shall be taken up again in chapter six.

Parallel to this discussion, we must also consider the issue of the precise use of the term "substantive equality" within current anti-discrimination discourse. In practice, substantive equality has been used widely to describe measures beyond the equal treatment principle. Its adoption gives widespread legitimacy to statutory measures designed to tackle discrimination and exclusion. For example, it is correct to state that indirect discrimination moves beyond equal treatment, in that it is concerned with the disparate effects of particular practices on members of disadvantaged groups. Despite its potential, it does not necessarily move towards substantive changes for members of disadvantaged groups in terms of a net reduction in the burden of societal inequalities.¹⁸ More often than not, this is due to the translation of equality norms into the pre-existing

¹² H. Collins, *supra* n.4 pp.17-18.

¹³ *Ibid.*

¹⁴ C. Barnard and B. Hepple, "Substantive Equality" (2000) 59 *Cambridge Law Journal* 562

¹⁵ *Ibid.* pp.583-585.

¹⁶ S. Fredman, "Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm" In A. Lawson and C. Gooding (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 199 p.213.

¹⁷ See L. Waddington and A. Hendricks, *supra* n.1 for support.

¹⁸ This point is developed below. See S. Fredman, "Affirmative Action and the European Court of Justice: A Critical Analysis" in J. Shaw (ed.) *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000) 171 p.188

structures of the legal system. For example, the indirect discrimination principle has suffered from obtuse and difficult judicial applications. This has been exacerbated by the weakness of the negative, individualised enforcement model of anti-discrimination law. Yet a truly substantial vision of equality cannot, in my view, be limited by (and to) the present anti-discrimination paradigm.¹⁹ Fredman has called for a reconfiguration of the substantive equality norm that would involve a new synthesis between non-discrimination and positive duties, and between non-discrimination and social rights.²⁰ Measures in the first band include the introduction of public sector duties to promote equality in the disability context that were recently agreed in the UK.²¹ Equality policy is moving in similar directions in Ireland.²² Other developments are on-going at the level of the European Union, specifically in the context of the European Charter.²³ Despite the pioneering approach of the ADA, it may be that the scope for further development is in the Irish context, given the link between its jurisdiction and European developments. These points are taken up in chapter six. The conclusion on the transformative potential of current disability discrimination law is reserved until chapter six. This is because it is necessary to address all aspects of the disability non-discrimination system in the two jurisdictions in greater depth before fully considering this question. Issues such as judicial attitudes to disability, the impact of constitutional equality norms and competing constitutional guarantees, the “reasonableness” of accommodations, and the question of disability status, all have an impact on the operational effectiveness of the reasonable accommodation matrix. The approach taken will be in the form of a building block exercise - the foundations of the argument will be laid here. To this end, the traditional provisions of non-discrimination law are set out in this chapter. It introduces the models of equality stated above. It also considers the non-discrimination rules operating within the disability context, specifically the prohibitions against direct discrimination, indirect discrimination and the duty to make reasonable accommodation.²⁴ This is followed in chapter three by a treatment of the reasonable accommodation duty on the constitutional plane. This is necessary as judicial attitudes

¹⁹ C. Barnard and B. Hepple, *supra* n.14 p.584.

²⁰ S. Fredman, *supra* n.16 pp.211-217.

²¹ See the Disability Discrimination Act 2005.

²² See S. Mullally and O. Smith, *Equality Proofing* (Dublin Government Stationery Office, 2000) and S. Mullally, “Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation for All?” (2001) *Legal Studies* 99.

²³ See generally G. Quinn, *supra* n.6.

²⁴ Protection against disability-based harassment in employment is included in Ireland’s Employment Equality Act 1998-2004 (section 33). Pressures of space prevent discussion of this particular phenomenon and its regulation.

in the highest courts are of critical importance to how disability equality rights fare within legal discourse.

Foundations : Formal Equality in the Liberal State

Equality's place at the core of society's organising structures is a relatively modern development.²⁵ While the classic articulation of the equality concept dates from Aristotle's writings, societies prior to the liberal state did not hold it as a defining standpoint. In medieval and feudal periods, hierarchical relations of birth and status determined the rank and duties of individuals,²⁶ regardless of their innate equal worth.²⁷

Aristotle's view that "those things that are alike should be treated alike, whereas things that are unlike should be treated unlike in proportion to their unlikeness"²⁸ would play a more defining role with the demise of the feudal state. As Fredman reports, that era of burgeoning trade saw widespread agitation for greater political freedoms, and the achievement of many of them.²⁹ Most revered of all was the principle of equality in contractual arrangements, which was premised on the notion of equality between bargaining parties. The focus at this time was on the need for equality before the law - human freedom demanded that government should not intervene beyond its minimum obligation, which was to ensure that individuals were not treated with any favour or prejudice.³⁰

Despite the increasing recognition of the inherent freedom, independence and equality of all men, the promise of inclusiveness held out by the equality guarantee was offset by other core values of the developing liberal state. These other defining

²⁵ S. Fredman, *Discrimination Law* (Oxford, Oxford University Press, Clarendon Law Series: 2002) p.4.

²⁶ In Greek and Roman civilization people were traditionally divided in accordance with inequality, not equality. See R. Singh, "Equality: The Neglected Virtue" (2004) *European Human Rights Law Review* 141.

²⁷ On the innate worth of human beings, John Locke wrote in 1690: "Men [are] by Nature all free, equal and independent." In *Two Treatises of Government*, para.95 Cited in Fredman, *supra* n.25 p.5

²⁸ Aristotle, *Ethic Nichomanea* Book V 11, 113a-113b.

²⁹ S. Fredman, *supra*. n.25 p.4.

³⁰ The idea of human freedom was historically, and still is, linked to the existence and maintenance of a hard public/private distinction. The idea of this division was to protect and segregate individuals from the overbearing reach of political power and authority, and the facilitation of space for the pursuit of private choices in the economic, social or intimate sphere. This variant of human freedom, protected by the public-private divide, particularly non-interference in the private sphere, is key to the resistance to more substantive versions of equality theory. See G. Quinn, "Rethinking the place of difference in civil society - the role of anti-discrimination law in the next century" in R. Byrne and W. Duncan (eds.) *Developments in Discrimination Law in Ireland and Europe* (Dublin: ICEL, 1997) 65, 67.

characteristics of the liberal state - rationality, individualism, autonomy, the primacy of the contract and the neutrality of the state³¹ - meant that the equality guarantee had a less influential role than was originally conceived. As Fredman notes “[e]xclusion was achieved by the apparently logical argument that the basic rights to liberty and equality only inhered in individuals by virtue of their rationality”.³² Dominant political thought thus used rationality as an exclusionary tool that denied the benefits of the liberal state to the powerless and retained the status quo in favour of the powerful.³³

The political philosophy of liberalism presumes that all goods are distributed according to the criterion of merit and that individuals, if treated equally, are free to compete fairly for society’s rewards and benefits. This ideology is based on a rather optimistic view of the principles of autonomy and rationality. The manner in which individual disparities and the distributions of wealth and power impact on the free nature of societal competition are overlooked. Thus, the early liberal social structure was organised around a set of essentialist dichotomies designed to establish and retain the power structures of those in the ascendancy. Persons were either rational and autonomous, or irrational and lacking autonomy. An assumed lack of capacity for rationality and autonomy was imputed to different groups within society and this legitimised their inferior status. Those with an impaired sense of rationality, autonomy and independence were denied the guarantees and freedoms of the liberal state, including the right to treatment as an equal without bias. It was common to attribute such reduced faculties to members of minority groups and to justify their inferior social position as a natural outcome of biological flaws.³⁴ Paradoxically, it was the equality principle itself which legitimated the outcome of this approach. The emphasis within equality theory on similarity and on the devaluation of difference explains its relational nature. Yet the assignment of the labels of similarity and difference depends on a comparative process and, of course, on the position occupied by those assigning the labels. The process of assigning labels is ordinarily one which starts with the labelling as “normal” the groups to which we belong. This is followed by a comparison with a

³¹ See S. Fredman, *Women and the Law*, (Oxford: Oxford University Press, 1997), chapter one for discussion of these characteristics, specifically in the context of the position of women in the liberal state.

³² S. Fredman, *supra* n.25 p.5.

³³ Liberal philosophy introduced a whole new view of the world as compared to the medieval world order, laying emphasis on talent and merit. However, one of the great ironies of individualism is that despite its radical beginnings, it became over time a means of justifying the status quo, of accepting a society supposedly based on individual action. M. Mullard and P. Spickler, *Social Policy in a Changing Society* (London and New York: Routledge, 1998) p.47

³⁴ As discussed in chapter one.

counter example, which the power holders label “different”.³⁵ The right to equal treatment was only extended to those who were characterised as similar and therefore equal. Thus, differences attributed to certain sectors of the population legitimated their “unlike”, “unequal” and inferior treatment. For example, women were characterised by Aristotle as mutilated males.³⁶ As chapter one outlined, disabled people were stigmatised as ‘defective’ because of their ‘innate’ bodily and mental differences. Gypsies and the poor were viewed as riotous and a threat to the existing social order.³⁷ These groups and others, including religious minorities, all bore the burden of the classification process and would long remain outside the public structures of the liberal state. The practical results of this included the sanctioning of slavery, the spread of religious persecution, the extermination and institutionalisation of disabled persons and the denial of the rights of the liberal state to women.

Eventually, the central characteristics of liberal theory –rationality and autonomy in particular - were utilised by liberal thinkers, including John Stuart Mill and Mary Wollencroft, to argue for the emancipation of many groups previously labelled outside the social and political order.³⁸ They advocated the extension of the benefits of the liberal state to women as well as men on the basis that the principles of rationality and autonomy were inherent in all individuals. This was the basis of the argument that the state’s lack of neutrality in the manner in which it disenfranchised women was contrary to the liberal ideal in the first place.³⁹ As Fredman points out, this discourse was first used as a “focus for political activism, rather than as a legal concept”⁴⁰. It would take a long, slow process before equality become a real force for attacking the bastions of power and privilege, precisely because of the political inequality of the subordinated groups involved.

³⁵ A. Hendricks, “The Significance of Equality and Non-Discrimination for the Protection of the Rights and Dignity of Disabled Persons” in T. Degener and A. Koster-Dresse (eds.) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (The Hague: Martinus Nijhoff Publishers, 1995) p.40, 44.

³⁶ Aristotle, “The Generation of Animals” in J. Barnes (ed.) *The Complete Works of Aristotle* (Oxford: Oxford University Press, 1982).

³⁷ See chapter one.

³⁸ Mary Wollstonecraft, wrote in the *Vindication of the Rights of Women* “the nature of reason must be the same in all”. p.1. See Mary Astell, “If all men are born free, why are women born slaves?” (1700). Cited in S. Fredman, *supra* n.25 p.5.

³⁹ This putative neutrality of the state – whereby the state should be neutral as between its citizens, favouring no group of citizens above another - is easily challenged. As Fredman points out, this view depicts the state as separate from society, yet the state play a central role in distributing benefits (and burdens) in society. It cannot therefore be truly neutral if it refuses to take an active role in reducing disadvantage. S. Fredman, *supra* n.18 p.174.

⁴⁰ S. Fredman, *supra* n. 25 p.5.

It seemed logical, then, for early political agitators to concentrate on the similarities of subordinated groups in order for their members to access the structures of the liberal state. The initial use of the “equality before the law” principle was towards removing the legal obstacles to the equal citizenship of women. This included the removal of overt legal barriers, such as rights in marriage, rights over children, property rights, and the right to vote. However, it became clear that equality as “sameness” simply privileged the dominant norm: a precondition for inclusion required adapting to the norms and standards of the mainstream. The interpretation and application of the equality principle in this formal manner was not attuned to the practical needs of those who remained different, or dissimilarly situated. Formal equal treatment can simply ignore the extent to which opportunities are determined by individuals’ social and historical status, including their race, their sex or their disability. Moreover, merely treating persons similarly in a situation burdened with disadvantage may do no more than perpetuate that disadvantage.⁴¹

Many parallels can be drawn between the situation of women in the nineteenth and twentieth centuries and the exclusion of disabled people. Inequalities based on gender have traditionally rested on culturally-sanctioned beliefs about impairment or disability. The inequality of women was routinely justified by attributing to them physical or mental inferiorities.⁴² Disabled people have thus experienced exclusion and discrimination in a way not wholly dissimilar from the manner in which women have experienced them, and have likewise been disadvantaged by the ideology, practice, and laws of the liberal state.⁴³ The early gender equality movement, however, always sought to distance its arguments from those raised by “the truly disabled”, and it chose not to challenge the assumptions behind the hierarchical justification for disability as a source of social and political inequality.⁴⁴ Despite many shared experiences, there remains considerable discord between the feminist movement and the disability movement.⁴⁵

⁴¹ S. Fredman, “Does disability equality challenge the existing anti-discrimination paradigm?” paper presented at Disability Rights in Europe Conference, Leeds, September 25, 2003. p.3. Paper on file.

⁴² D.C. Baynton, “Bodies and Environments: The Cultural Construction of Disability” in P.D. Blanck (ed.) *Employment, Disability and the Americans with Disabilities Act: Issues in Law, Public Policy and Research* (Evanston, Illinois, Northwestern University Press, 2000) 387, 404.

⁴³ See P. Brandwein and R. K. Scotch, “The Gender Analogy in the Disability Discrimination Literature” (2001) 62 *Ohio State Law Journal* 465. S. Wendell, *The Rejected Body: Feminist Philosophical Perspectives on Disability* (New York: Routledge, 1996).

⁴⁴ D. Baynton, *supra* n.42 p. 406.

⁴⁵ See J. Morris, *Pride Against Prejudice: Transforming Attitudes to Disability* (London: Women’s Press, 1991).

A brief history of the exclusion of disabled people has been traced in chapter one. It is worth noting here that the displacement of such persons continued in the evolving liberal state. These individuals displayed marked or assumed differences from the mainstream majority and, it was held that their reduced circumstances and truncated rights were a natural consequence of their differences in functioning. The emergence of the disability movement in the civil rights era was briefly traced in chapter one. This movement rejected the natural exclusion of disabled people. Appealing to ideals such as human dignity, human fulfilment, and the universality of social justice as a moral entitlement⁴⁶, political agitation for disability equality rights gathered momentum. The translation of these ideals into the structures of the legal system is considered below.

Equal Treatment

The principle of equal treatment derives from Aristotle's maxim that likes should be treated alike and unalikes treated unlike or differently.⁴⁷ At first glance, the principle appears particularly abstract because of the need to import measurements or substantive criteria in order to ascertain who is "equal/like" and "what is meant by equal/like treatment?"⁴⁸ The maxim itself does not broach how such questions are to be answered. It is the case, of course, that human beings are broadly similar in a wide range of attributes, while they can be said to differ when alternative characteristics are utilised.

The problem with the principle in a legal context is that it involves demarcating distinctions and similarities between individuals or groups of individuals and, in particular, making distinctions that can be said to violate the equal treatment formulation. The principle is only violated if there are no objective reasons for the difference in treatment. However, the principle does not itself identify the characteristics shared by members of groups that *ought* to be worthy of its protection. However, the statement that different groups should be treated equally (in otherwise

⁴⁶ See S. Fredman, "Equality: A New Generation?" (2001) 30 *Industrial Law Journal* 145. See generally, G. Quinn and T. Degener, "The moral authority for change: human rights values and the worldwide process of disability reform" in G. Quinn and T. Degener (eds.) *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, Geneva, 2002).

⁴⁷ *Supra* n.28

⁴⁸ The maxim's indeterminacy is proven by showing that answers on its own basis get us nowhere. Who is equal? Simply those who should be treated alike. What, then, is equal treatment? Simply treatment of those who are equal.

similar circumstances) does not describe how those groups should be composed.⁴⁹ Thus, the principle lacks a determinate view of how to constitute the groups for comparison. In practice, in its legal setting, the equal treatment principle is not granted a simple and generalised meaning, as any group could claim it is not being treated equally and is deserving of protection from the law. What is crucial, it is argued, is that the group can plausibly claim that membership of that group puts individuals at such a disadvantage that the law should intervene.⁵⁰ In this sense, the relevance of the criterion on differentiation depends on an incidence of disadvantage accruing to a group on the basis of a particular ground which has been recognised as invidious, irrational and unjustifiable. Thus, the group must be able to point to the fact that group membership gives rise to disadvantage.⁵¹ For example, there has been no adopted legislation prohibiting discrimination against individuals with blue eyes in employment. This is not to say that society would deem discrimination against people with blue eyes as acceptable, but rather that the blue-eyed are not perceived as widespread victims of unfavourable treatment that requires equal treatment protection.⁵² Thus, the typical starting point in an equal treatment enquiry is whether it can be established that a certain group is excluded from the normal practice, or whether it is treated differently and worse than would normally be the case.⁵³ Christensen points out that “what an equal treatment prescription, or a prohibition against discrimination amounts to is that the group which was the object of differential treatment in an unfavourable sense shall be treated in the same manner as the group already covered by the norm, or at least not worse”.⁵⁴ The group covered by the norm is termed the reference group and the group covered by the prohibition against discrimination is termed the protected group. However, the equal treatment principle codified within anti-discrimination law typically extends its protection in a symmetrical manner, to both the protected group and the

⁴⁹ H. Collins, *supra* n.4 p.27.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* Collins goes on to point out how one effect of the indeterminacy of protected groups under the equal treatment principle is that the provenance of anti-discrimination law always remains contested. The basis of his argument is that social inclusion provides a more determinate criterion for the composition of protected groups. For example, it could include single parents, residents in particular post codes, and the educationally disadvantaged.

⁵² Though see the statement by Warrington LJ in *Short v Poole* [1926] Ch 66 that the court could declare an act of a public body to be ultra vires where it was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body. The example he used was a teacher dismissed on the grounds of her red hair. Ironically, the case upheld the decision to dismiss the claimant, a teacher, because she was a married woman.

⁵³ A. Christensen, “Structural Aspects of Anti-Discriminatory Legislation and Processes of Normative Change” in A. Numhauser-Henning (ed.) *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law International, 2001) 31, 32.

⁵⁴ *Ibid.*

reference group. This symmetry in anti-discrimination legal rules reflects the ideology of the equal treatment principle: the idea is that discrimination against the traditionally advantaged groups is as impugned as discrimination against the protected group. In the context of this thesis, the norm or reference group is that termed the able-bodied or the non-disabled and the protected group refers to disabled people. The sole divergence from the traditional symmetry of anti-discrimination law is in the disability context. The basis for this exemption is discussed below.

Limitations to the formal conceptualisation of equal treatment easily build up. Particularly problematic is the principle's management of difference. It thrives on the identification of similarities between individuals who ought to be treated equally. This formulation of equality inheres in consistency.⁵⁵ Since the equality-as-consistency argument addresses the situations of "likes", there is no requirement that persons be treated in accordance to their differences. Moreover, consistency can come at a cost. For example, if a claim for equal treatment is made based on unequal access to particular benefits enjoyed by members of the reference group, the equal treatment prescription has, in certain circumstances, been satisfied by removing the benefit from the reference group.⁵⁶ What is known as "levelling down" meets the consistency objective of the equal treatment principle, in spite of the unfavourable outcome.⁵⁷ Race, sex and other protected characteristics are rarely considered relevant to the treatment of individuals.⁵⁸ Less favourable treatment on the grounds of such a characteristic will thus constitute a breach of the equal treatment principle, unless there is an objective reason unrelated to the characteristics for the difference in treatment. However, the equal treatment ignores that certain groups have endured widespread disadvantage by virtue of these characteristics, and this cannot be offset by deeming such characteristics irrelevant. This is problematic not just at the individual level but at the group level, where certain group characteristics are equated with inherent disadvantage and innate inferiorities. Further, since the principle of equal treatment relies on a comparison between the reference group and the protected group, it invariably refers to the norms that apply to the

⁵⁵ S. Fredman, *supra* n.25 p.7.

⁵⁶ See the decision in *Smith v Avdel Systems* [1994] ECR I-4435 where the ECJ held that where an employer had decided to achieve equality by levelling down (in the context of pensionable age), this was compatible with EC law. See S. Deakin, "Levelling Down Employee Benefits" [1995] *Cambridge Law Journal* 35.

⁵⁷ The realisation of equality might be expected not to be an equivalence in "equally bad" treatment by levelling down. In *Defrenne (No.2)* [1976] ECR 455 the European Court of Justice said that in view of the connection between Article 141 and the improvement of working conditions, it was not possible to comply with Article 141 by lowering the higher salaries.

⁵⁸ See *Short v Poole*, *supra* text to n.52.

reference group. The problem is that this formal method of equal treatment “masks adherence to a particular set of norms [namely] those of dominant groups”.⁵⁹ The supposed neutrality of the equal treatment principle is exposed even though members of the protected group are in a sense ‘abstracted’ from their group identity, and to the extent that that aspects of that identity – such as ethnicity or gender - are considered irrelevant for fair employment practices. A prevailing tactic is for marginalised individuals from minority groups to have to suppress any differences through a policy of assimilation in order to benefit from the principle of equal treatment.

In the disability context, in particular, there are powerful conformist and assimilationist pressures. Disabled people constantly play down the existence, impact or effect of their impairment, in order to avoid social stigma and prejudice and to fit into existing structures. Thus, many disabled individuals were taught to “overcome” or compensate for particular differences in functioning.⁶⁰ This reinforces the dominant attributes of majority groups and, consequently, it can have harmful effects on individuals, their personal identity and self-worth.

Formal Non-Discrimination Rules

The obligation to treat equal cases equally has been reduced in specific legal situations to an obligation not to discriminate. The equal treatment formulation aims to minimise legal and social distinctions arising from characteristics which ought not to burden an individual’s life prospects. The criteria of past and present disadvantage provides foundation for the prohibitions against discrimination on grounds such as gender, race, religion, disability and sexual orientation. The liberal principle of individualism, however, requires that the person be respected without regard to this characteristic and be considered on the grounds of his or her individual talents. This formulation, then, is equated with an obligation to treat persons equally unless there are other relevant or determining considerations. In general, employment equality law in western liberal democracies formulates its rules in terms of the prohibition against discrimination across an array of grounds and with regard to various stages and aspects of the

⁵⁹ I.M.Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) p.25.

⁶⁰ In disability parlance, such individuals are termed “supercrips”. See J.C. Drimmer, “Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities” (1993) 40 *UCLA Law Review* 1341.

employment relationship.⁶¹ In recent years, the number of grounds attracting non-discrimination protection has begun to increase in different jurisdictions.⁶²

Direct Discrimination

Direct discrimination is defined in terms of the less favourable treatment of an individual on the grounds of a protected characteristic⁶³, as compared with another individual in circumstances which are not materially different.⁶⁴ It is a comparative concept that requires, for example, in the gender context, a woman to demonstrate less favourable treatment compared to a man who is in the same circumstances. In the past, the need to locate an actual, similarly situated, comparator hampered greatly the practical application of the direct discrimination rule. This was particularly hindering in the case of pregnancy-based discrimination. Initially, claims of this nature were excluded from the ambit of sex discrimination legislation due to the absence of an appropriate comparator.⁶⁵ The reality of pregnancy-based discrimination was beyond the formal legalistic comparator approach. Eventually, pregnancy-based claims were allowed to proceed by way of a forced comparison between a pregnant woman and an ill man. This line of reasoning held pregnant women and sick men as similarly situated because both were temporarily unavailable for work.⁶⁶ The impact of this odd approach⁶⁷ was eventually tempered as a consequence of EU Law. The ECJ dismissed

⁶¹ The material scope of the EEA is set out in section 8.

⁶² See S. Kilcommins, M. McDonagh, S. Mullally and D. Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* (Dublin: Government Stationery Office, 2004).

⁶³ In Ireland's equality framework, the number of protected grounds totals nine.

⁶⁴ See generally section 6 of the EEA as amended, discussed below.

⁶⁵ In England, see the EAT decision of *Turley v Allder Stores Ltd* [1980] ICR 66 where the dismissal of a woman on grounds of her pregnancy did not constitute unlawful sex discrimination contrary to the Sex Discrimination Act as there was no appropriate male comparator. Bristow J. reasoned that "[i]n order to see if she has been treated less favourably than a man ... you must compare like with like and you cannot. When she is pregnant a woman is no longer just a woman. She is a woman ... with child and there is no masculine equivalent". At 70D.

⁶⁶ See the Irish decision of *Long v Power Supermarkets, Trading as Quinnsworth* (1990) Labour Court (No Determination Number available). Here the claim of sex discrimination failed, as the Labour Court compared the treatment of the pregnant claimant with another male employee who was unable to take up employment at the specified date due to a limb fracture. Since both the male employee and the claimant were unavailable for work, they were similarly situated and treated in the same way by the employer. The claim of discrimination was, on this reasoning, unfounded.

⁶⁷ Feminists had particular problems with the nature of the comparison between a sick man and a pregnant woman, despite the fact that in the early days, this avenue was the only practical means by which a pregnancy discrimination case could proceed. The disadvantages of this approach

the comparator concept in this context when it accepted that pregnancy discrimination is sex discrimination, as only women have the capacity for pregnancy.⁶⁸

One of the defining features of the direct discrimination rule is its adherence to the principle of consistency. To this end, most legislative provisions of this sort provide for a symmetrical approach which allows persons of either sex, any race or any religion to mount a claim. Thus, on this approach, sex discrimination legislation deems discrimination against a man as invidious as discrimination against a women. In other words, discrimination against members of the reference group is deemed as harmful as discrimination against members of the disadvantaged group.

The direct discrimination rule does not guarantee its subjects any positive rewards in its field of application - it simply forbids less favourable treatment between an applicant and her chosen comparator in terms of access to the economy, its benefits and certain goods and services.⁶⁹ It may not, therefore, be concerned with equality in an instrumental sense, i.e. one that results in outcomes of fewer disadvantages. Herein lies a major critique of the equal treatment prescription underpinning direct discrimination: equality laws are not ends in themselves, but a means to redress the results of a history of detrimental treatment based on particular characteristics.⁷⁰ Moreover, this point is supported by the conceptualisation of direct discrimination as a negative right requiring individual enforcement by way of litigation. When this avenue is successfully pursued, it generally results in compensation for breach of the individual's right, rather than the individual being granted the position the discriminatory act had barred her from. Consequently, the direct discrimination principle operates in a system that concentrates on retrospective faultfinding. This promotes an adversarial approach to the problems of inequality and it places considerable burdens on an individual complainant. While pursuing a claim is, in theory, open to everyone, the individual grievances approach is

included unwanted stigmatisation of pregnancy as aberrant and abnormal and, as Fredman points out, the sole focus of this approach assumes that the only aspect of pregnancy of concern to discrimination law is its effects on an employee's ability to work. This focus ignores the medical and social reasons behind pregnancy based leave. S. Fredman, *supra* n.25 p.100. See further, S. Fredman, "A Difference with Distinction: Pregnancy and Parenthood Reassessed" (1994) 110 *Law Quarterly Review* 106.

⁶⁸ See *Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus* Case C-17/88 [1990] ECR I-39

⁶⁹ See the scope of the non-discrimination provisions outside the employment context set out in Ireland's Equal Status Act 2000.

⁷⁰ S. Fredman, *supra* n.18 p.173.

practically limited by disparities in power, status and resources among potential claimants.⁷¹

Direct Discrimination and Disability

Section 6 of Ireland's Employment Equality Act 1998, as amended by the Equality Act 2004, states that discrimination will be taken to occur "where a person is treated less favourably than another person is, has been, or would be treated in a comparable situation on any of the [discriminatory grounds] which (i) exists, (ii) existed but no longer exists, (iii) may exist in the future, or (iv) is imputed to the person concerned."⁷²

Section 6(2) sets out the discriminatory grounds: "As between any two persons, the discriminatory grounds (and the description of those grounds for the purposes of this Act) are –

(g) that one is a person with a disability and the other either is not or is a person with a different disability (... referred to as the disability ground)."

Thus, direct discrimination in the disability context arises where a person with a disability⁷³ is treated less favourably on the grounds of disability than either a person without a disability, or than a person with a different disability is, has been, or would be treated in a comparable situation.⁷⁴ While the comparative approach is again central, two approaches are possible here. First, less favourable treatment of a claimant can be established through a comparison with the treatment of a person without a disability. Alternatively, a less favourable treatment claim can proceed by comparison with the treatment of an individual with a different disability.⁷⁵ Importantly, the traditional symmetry of the direct discrimination rule is omitted. The benefit to the disabled individual [that is, the right not to be treated less favourably than a non-disabled comparator] is designed to offset the effects of stereotyping, negative attitudes and bias which they endure because of their disability. Non-disabled people cannot experience

⁷¹ C. Kilpatrick, "Emancipation Through Law or the Emasculation of Law? The Nation State, the EU and Gender Equality at Work" in J. Conaghan, R.M. Fischl and K. Klare (eds.) *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) 489 pp.505-506. Legal aid is not available to claimants pursuing employment discrimination cases.

⁷² Section 6(1)(a) of the Employment Equality Act 1998-2004. Section 6(1)(b) goes on to outlaw discrimination on the grounds of association.

⁷³ Disability is defined in section 2(1) of the 1998 – 2004 Act and is discussed in chapter four.

⁷⁴ Section 6(1) and 6 (2)(g) Employment Equality Act 1998 -2004.

⁷⁵ This is obviously a recognition that stigma and stereotyping can impact more gravely on individuals with certain impairments. For example, compare the social consequences which attach to HIV status with those attached to arthritis.

less favourable treatment on the disability ground as they do not fall within the definition of disability.⁷⁶ The only exception to this is in the context of an association with a disabled person or where an individual is perceived to be or regarded as a disabled person. Here, the EEA, as amended by the Equality Act 2004, extends protection to those who are regarded as having a disability – that is, the discriminatory ground is imputed to them and they are treated less favourably as a consequence.⁷⁷ It also extends protection to those who are treated less favourably on one of the protected grounds by virtue of an association with another individual.⁷⁸

The Irish legislation recognises that, in certain circumstances, it is insufficient for employers to treat the fact of disability as irrelevant and to refuse to take disability into account in its treatment and consideration of its employees or applicants for employment. This strict adherence to the equal treatment precept would compound the inequality and disadvantage shouldered by the disadvantaged individual. This is where the reasonable accommodation mandate seeks to further the equality agenda in the specific context of disability. Employers are obliged, in certain circumstances, to take an individual's disability into account, and to make a reasonable accommodation for it, thus allowing an individual to compete for or take-up a particular position. However, the legislation disallows non-disabled persons to claim any reasonable accommodation afforded to disabled employees or applicants by reason of their disability.⁷⁹

The reasonable accommodation duty is discussed at length in chapters three, five and six. At this juncture, it is important to emphasise that the direct discrimination principle serves an important function in disability employment anti-discrimination statutes. The function of the disability direct discrimination principle is often overlooked because of the confusion generated in academic and judicial discourse over the reach and legal legitimacy of the reasonable accommodation duty.⁸⁰ In this regard, it has been argued that the dynamics of disability-based discrimination do not always

⁷⁶ Section 2 of the 1998-2004 Act sets out the definition of disability discussed in this work in chapter four.

⁷⁷ Section 6(1)(a)iv) EEA as amended.

⁷⁸ Section 6(1)(b)(i)-(ii) EEA as amended.

⁷⁹ Section 35(3): “Where, by virtue of subsection (1) or (2) [relating to the provision of special training regarding vocational training or training or working environment suited to the disability] D, as a person with a disability, receives a particular rate of remuneration or, as the case may be, special treatment or facilities, C, as a person without a disability, or with a different disability, shall not be entitled under this Act to that rate of remuneration, that treatment or those facilities”.

⁸⁰ See generally chapters five and six of this work.

differ significantly from other forms of discrimination.⁸¹ Therefore, it is important to point out that disabled people suffer the effects of social bias, stigma and exclusion even in situations where an impairment has no functional impact on a person's suitability for a position, or their job productivity. Any automatic assumptions to the contrary are residual impacts of stereotypical notions surrounding the meaning and impact of disability. The direct discrimination principle recognises that with regards to the determining criteria for a position, a disabled individual may be similarly situated to a non-disabled individual⁸² but may suffer less favourable treatment due to discriminatory attitudes and social bias informed by prejudice. In this sense, then, discrimination based upon disability resembles other forms of discrimination because of its central feature of negative stereotyping or hostile attitudes. An example would be an employer who is hostile to a wheelchair user as a potential employee, despite the absence of any barriers to that person's job performance, because of discriminatory beliefs it holds regarding the general social position and worth of persons who mobilise by means of wheelchairs. Other examples include employing disabled persons and paying them significantly less than other employees because of misplaced or unsubstantiated assumptions surrounding disability and its impact on productivity.⁸³ Many disabled persons are capable of adequately performing the duties attached to a position but endure detrimental treatment because of the attitudes of decision-makers towards their impairment and towards disability in general. The impact of stigma on the life opportunities of people with non-functional or attributed limitations has been well-documented.⁸⁴ The direct discrimination principle is, at least in theory, an important combative tool in this regard.

Equality of Opportunity

⁸¹ This point has been subject of research on the type of litigation claims under Canada's disability discrimination legislation. See J. Mosoff, "Is the Human Rights Paradigm "Able" to Include Disability: Who's In? Who Wins What? Why?" (2000) 26 *Queen's Law Journal* 225.

⁸² In the context of employment, for example, qualified and capable of performing the job requirements.

⁸³ Though see Employment Equality Act 1998, section 35(1) recently amended by s.24 of the Equality Act 2004 regarding remuneration and disability.

⁸⁴ See chapter one, though note the difficulties attached to altering prevalent societal assumptions about disabled people's capacities for mainstream employment. Such attitudes are systemic and may require a more systematic approach beyond the individualised right to protection from direct discrimination. See M. Weber, "Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities" (1998) 46 *Buffalo Law Review* 123 discussed further in chapter six.

Equality of opportunity purports to tread the middle ground between formal equality and equality of results. Equal opportunity is critical of the equal treatment principle because of the latter's perceived toleration of disadvantage through its insensitivity to differences between persons. At the same time, equal opportunity theory rejects the equality of results approach because of its disavowal of equal treatment in favour of an emphasis on outcomes.⁸⁵

One view of the equality of opportunity thesis relies heavily on the metaphor of a race between individuals to illustrate its role as an organising principle of a liberal society. The race metaphor assumes that basic conditions of equality can be satisfied if contestants line up evenly at the starting line (thereby removing pre-existing obstacles) and every competitor begins from the starting line. This view of equality of opportunity concentrates on removing certain obstacles from the built and social environment so that individuals are free to pursue their goals free of those obstacles. Equal opportunity recognises that equality cannot be achieved if individuals begin the race from different starting points due to the burden of prior disadvantage. Equalising the starting point recognises the need for different treatment for the disadvantaged group. For example, consider the purpose commonly ascribed to employment anti-discrimination law: that individuals should be able to pursue their employment goals free of the obstacle that is unlawful discrimination based on race, sex, age, disability and so forth. What it amounts to is that a specified person is entitled to compete for the particular goal of an employment position, free from the specific obstacle of discrimination on one or more of the grounds mentioned. All that follows is that the class of persons are said to be equal "in respect of the opportunity the act proscribes".⁸⁶ The idea is that the removal of discrimination (defined in terms of less favourable treatment on a specific ground) equalises the opportunities between members of different groups to access scarce positions. Where neutral barriers that have disadvantaged groups in the past are removed, all members of the competing group are then free to compete for the position on the basis of the rules of the competition as determined by the employer. However, as Fredman point out, equality of opportunity stops short, as it reverts to traditional notions of neutrality, symmetry and the primacy of the individual.⁸⁷ As the equal opportunity guarantee has purportedly removed these insurmountable obstacles at the start of the

⁸⁵ S. Fredman, *supra* n.25 p.14.

⁸⁶ P. Westen, "The Concept of Equality of Opportunity" in L. Polman and R. Westmoreland (eds.) *Equality Selected Readings* (N.Y., Oxford: Oxford University Press, 1997) 158 p.163. In other words, all participants begin at the same starting line without regard to any previous or lingering obstacles (not proscribed) that may affect the attainment of their goal.

⁸⁷ S. Fredman, *supra* n.18 p.175.

race (i.e. the obstacle created by sex or race based preferences or the effect of practices which disadvantage individuals of a particular race or sex), the competition proceeds on the basis of more “objective” and “neutral” criteria. These are generally criteria such as qualifications, education and experience which allows for the most “meritorious” applicant to succeed. Equality of opportunity is not concerned with the outcome of the race per se, and it does not challenge the putative neutrality and validity of the other determining criteria.

The basic conditions of equal opportunity rely on the principles of individualism, meritocracy, the notion of improvement through training, conditioning and education, and neutrality in the measurement of these attributes. The equal opportunity rule in this context does not consider how the opportunity of some competitors has been hindered by those very same factors (i.e. race or sex-based considerations) with regard to the attainment of “merit”, “education” and “experience”. As Hepple points out, one is not supplying genuine equality of opportunity if one applies an unchallenged criterion of merit to people who have been deprived of the opportunity to acquire “merit”.⁸⁸ However, the criterion of merit is a social, unscientific concept which remains largely immune from the issue of entrenched disadvantage. A truly substantive account of equality of opportunity, Williams argues, would be that “the grounds considered appropriate for the good themselves be such that people from all sections of society have an equal chance of satisfying them”.⁸⁹ This demands more than procedural changes; it requires substantive input into societal structures such as education, training, caring systems and workplace routines. The race metaphor falls down because it ignores the context or the environment in which the competition is conducted.⁹⁰ As a result, women who have raised families will have less working experience than men, and thus may be viewed as the less meritorious candidates for a position. In the disability context, some disabled individuals may not have had the opportunity to pursue a mainstream course of education because of lingering attitudes and poor facilities, and this will have impacted on their “merit” and experience.⁹¹ Thus,

⁸⁸ B. Hepple, “Discrimination and Equality of Opportunity” (1990) 10 *Oxford Journal of Legal Studies* 408.

⁸⁹ B. Williams, “The Idea of Equality” in P. Laslett and L.G. Runciman (eds.) *Philosophy, Politics and Society* (Oxford: Blackwell, 1962) 110 p.126.

⁹⁰ H. Hahn, “New Trends in Disability Studies: Implications for Education Policy in Inclusion and Social Reform” in D. Kezner Lipsky and A. Gartner (eds.) *Transforming America’s Classroom* (1997) p.325.

⁹¹ Those who challenge the criteria of merit collecting activities argue that activities such as the organisation of a family and a family budget could be considered as experience relevant to a number of positions. In the disability context, it is arguable that the independent living scheme

the narrow conception of equality of opportunity does not necessarily lead to an ability to profit from that opportunity. Prior inequalities in determinative areas can affect the ultimate outcome.

In this sense, equality of opportunity has been described as a form of ‘imperfect procedural justice’: procedures are imposed with a view to achieving a desired outcome but without an *a priori* guarantee that the procedure will promote the outcome in every case.⁹² While the equality of opportunity principle supports the removal of arbitrary barriers and factors which impact on an individual’s life chances, a general lack of coherency has lessened its impact. This lack stems in part from the operational structure of the non-discrimination legal paradigm which purports to promote the equal opportunity rule. In particular, many mistake the extent to which such a precept positively enables certain members of the an excluded class to actually achieve the goal of employment. Despite this, both the Congressional debates on the ADA and the Oireachtas debates regarding Ireland’s equality legislation describe equal opportunity as the ideal tool to end the longstanding economic isolation of disabled people and other minority groups.

Fredman argues that the equal opportunities principle is best expressed through the legal formula of indirect discrimination.⁹³ The specifics of the indirect discrimination principle are considered below.

Indirect Discrimination

Originating in the case-law under Title VII of the US Civil Rights Act 1964⁹⁴, indirect discrimination was incorporated into European Community law through judicial interpretation of Article 141 of the EC Treaty.⁹⁵ Initially developed in the jurisprudence of the European Court of Justice, the concept was codified in 1997 in the Burden of Proof Directive in cases of discrimination based on sex.⁹⁶ In the context of gender

whereby a disabled individual organises the work schedule of their assistants could also be viewed as a merit accumulating activity.

⁹² B. Hepple, *supra* n.88 p.41.

⁹³ S. Fredman, *The Future of Equality in Britain* (Manchester: EOC, 2002) p.6

⁹⁴ *Griggs v Duke Power* 401 U.S. 424.

⁹⁵ *Bilka Kaufhaus v Weber von Hartz* [1986] ECR 1607. Though the UK had adopted a tight statutory definition of indirect discrimination in the Sex Discrimination Act 1975, section 1(1)(b).

⁹⁶ Article 2(2) Burden of Proof Directive 97/90/EC. “Indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.”

equality the definition has recently been reformulated in the Amended Equal Treatment Directive.⁹⁷ A further definition of indirect discrimination is set out in the Framework Directive on equal treatment in employment and vocation in employment.⁹⁸

Indirect Discrimination and Disability under Ireland's Employment Equality Act

The concept of indirect discrimination at first appears attractive because it purports to switch the focus from individual discrimination to the effects of practices that have a disadvantageous impact on particular groups. It invites employers to think about the disparate impact of supposedly neutral practices on different groups of employees or prospective employees. The strength of the indirect discrimination principle is that it conceptualises discrimination as involving more than episodic or individualised wrongdoing.⁹⁹ It exposes the discriminatory impact of putatively neutral practices. However, the weakness of the indirect discrimination principle lies in its method of enforcement and in the very real difficulties involved in proving its constituent elements.¹⁰⁰

The complexity of the indirect discrimination case-law in the gender context has received considerable comment, particularly in the UK.¹⁰¹ It may now have been simplified somewhat given the changes to domestic legal definitions prompted by the Amended Equal Treatment Directive.¹⁰² Up until recently, the legislative formulations of the indirect discrimination principle in Ireland were similarly complex, as the EEA originally contained four quite distinct definitions of indirect discrimination. The four definitions in the EEA originally included two definitions of indirect discrimination applicable to the gender ground, one specific to pay,¹⁰³ and the other applicable to all other aspects of the employment relationship.¹⁰⁴ It also included two definitions relevant to the other seven grounds, including disability again delineated by pay¹⁰⁵ and

⁹⁷ Directive 2002/73, OJ [2002] L269/15. See Article 2(2).

⁹⁸ Article 2(b) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. OJ L 303/16.

⁹⁹ C. Gooding, *Disabling Laws. Enabling Acts Disability Rights in Britain and America* (London: Pluto Press, 1994) pp. 38–39.

¹⁰⁰ Fredman points out how indirect discrimination “has proved to be too clumsy a tool to achieve its aims”. *Supra* n.18 p.188.

¹⁰¹ See C. Barnard and B. Hepple, *supra* n.14. See also, C. Barnard and B. Hepple. “Indirect Discrimination: Interpreting Seymour-Smith” (1999) 58 *Cambridge Law Journal* 399.

¹⁰² See text to n.97 *supra*.

¹⁰³ Section 19(4) EEA 1998.

¹⁰⁴ Section 22(1) EEA 1998.

¹⁰⁵ Section 29(4) EEA 1998.

all other aspects of the employment relationship.¹⁰⁶ The original definitions of indirect discrimination in the EEA maintained some differences with regard to the definition applicable to the gender ground and the definition applicable to the other seven grounds.¹⁰⁷ However, these differences have been eradicated by the terms of the Equality 2004 Act which was enacted in order to better align the domestic non-discrimination provisions with the terms of the Race and Framework Directives and the Amended Equal Treatment Directive.

The EEA's original definition of indirect sex discrimination with regard to issues other than pay provided that the neutral provision applied by the employer was such "that the proportion of persons disadvantaged by the provision [was] substantially higher" for those in the protected group as opposed to those in the reference group.¹⁰⁸ If the applicant satisfied this formula, a claim for indirect discrimination would only succeed if the practice could not be "justified by objective factors unrelated" to the claimant's sex.¹⁰⁹ This definition was equivalent to the EU definition set out in the Burden of Proof Directive.¹¹⁰ This definition avoids the controversy that surrounded the UK's original definition of indirect discrimination which originally considered whether the "proportion of women who could comply [with the impugned practice] was considerably smaller than the proportion of men who could comply".¹¹¹ This test required a comparison between the ratios of the privileged group to the protected group in two statistical pools.¹¹² Initial difficulties arose over the choice of comparator groups or pools as the decision on the pool had considerable impact on the strength of the statistical figures.¹¹³ The definition in the Burden of Proof Directive, which was adopted by the EEA, simply requires a comparison between proportions of women and men. A determination of significance is still required as to whether the proportion of those disadvantaged is "substantially higher".

¹⁰⁶ Section 31 (1) EEA 1998.

¹⁰⁷ For further discussion, see M. Finlay, "Indirect Discrimination and the Article 13 Directives" in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law, 2003) p.135.

¹⁰⁸ Section 22(1) of the EEA 1998.

¹⁰⁹ *Ibid.*

¹¹⁰ Directive 97/80/EC.

¹¹¹ See section 1(i)(b) of the Sex Discrimination Act 1975 recently amended by the 2005 Regulations. See *R v Secretary of State, ex p. Seymour Smith and Perez* Case C- 167/97 [1999] CR I-623.

¹¹² H. Collins, *supra* n.4 p.32.

¹¹³ S. Fredman, *supra* n.25 p.109. As Fredman queries, "[s]hould the number of women who can comply be take as a proportion of the appropriately qualified workforce, or of the number of women in the particular establishment, or of the number of women in the workforce as a whole?"

Section 13 of the Equality Act 2004 amends section 22 of the EEA with regard to the definition of indirect discrimination on the gender ground. It states that indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (being As or Bs)¹¹⁴ at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer”.¹¹⁵ This is deemed discrimination unless “the provision can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” Section 13 also inserts a new section 22(1)(A) into the EEA which provides that statistics are admissible for the purposes of determining whether indirect discrimination arises.

Section 31 of the 1998 Act, which sets out the definition of indirect discrimination applicable to the non-gender grounds, including the disability ground, was amended by section 20 of the Equality Act 2004. The net effect of this technical amendment is to apply the definition of indirect discrimination that operates in respect of the gender ground to the other eight grounds, including the disability ground. The reference to persons of a particular gender (being As and Bs) is a reference to persons (being Cs and Ds) who differ in respect of the other discriminatory grounds.¹¹⁶ Thus, the definition of indirect discrimination in the disability context reads:

“Indirect discrimination occurs where an apparently neutral provision puts persons of a particular disability at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer.”¹¹⁷

Where this paragraph is satisfied, the employer shall be treated for the purposes of the Act as discriminating against the [claimants], unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹¹⁸

¹¹⁴ Part III of the EEA is titled “Specific Provisions as to Equality Between Men and Women” and utilises the letters “A” and “B” to refer to the comparators who differ by reason of their sex: section 18.

¹¹⁵ Section 12 Equality Act amends the definition of indirect discrimination applicable to pay.

¹¹⁶ Part IV of the EEA is titled “Specific Provisions as to Equality Between Other Categories of Persons” and utilises the letters “C” and “D” to refer to the comparators who differ by reason of the other eight protected grounds: section 28.

¹¹⁷ Section 31(1)(a) of the EEA as amended. Though note that the definition of indirect discrimination in the Framework Directive has taken an approach based on contingent harm, i.e. it covers the possibility of adverse impact as opposed to the actual occurrence of adverse impact. Article 2(2)(b) of the Framework Directive refers to provisions, criteria or practices which “would put” persons having a particular disability at a disadvantage. The EEA definition does not reflect this aspect of the Framework Directive definition. See E. Ellis, *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2005) pp.91-94 for discussion.

¹¹⁸ S.31(1)(b) of the EEA as amended.

The amended definition omits the previous formulation's requirement of an inquiry as to whether the putatively neutral practice was to the disadvantage of a substantially higher proportion of individual having the same characteristic as the complainant. The new approach requires a showing of a "particular disadvantage" to individuals sharing the complainant's characteristics as compared with other employees of the employer. However, there is one obvious difficulty with the application of the indirect discrimination definition in the context of disability, that is, the fact that disabled people do not form a homogenous group. Given the range and number of impairments and their varying functional and stigmatic effects, some individual claimants may have "great difficulty in identifying a particular group that is disadvantaged by the relevant provision, criterion or practice in the same manner as they are".¹¹⁹ The downside to the amending definition is its narrowing scope; the comparison must be made between the complainant and the other employees of the employer, and not other members of the particular sector or the workforce more generally.

However, even if a case of disparate impact is made out, indirect discrimination is not thereby actionable. While a prima facie case of indirect discrimination may be raised, the major downfall with the principle is its poor relation to the employer's interests in continuing with the practice. This raises the issue of the scope of the employer's justification defence. The original justification test set out in the EEA 1998 was considerably weaker in that it permitted an employer to justify a prima facie case of indirect discrimination where it was "reasonable in all the circumstances". The 2004 Act tightens the scope of the employer justification defence by adopting the European standard of proportionality. Thus, the provision must be capable of objective justification as pursuing a legitimate aim and the means of achieving that aim must be appropriate and necessary.¹²⁰ The origins of the proportionality test lie in the European Court of Justice decision in *Bilka Kaufhaus*.¹²¹ While it stressed that the assessment of whether there was any objective justification was for the national Court, the ECJ laid down the following three-tier test:

¹¹⁹ R. Whittle, "The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective" (2002) 27 *European Law Review* 303, 308. The ADA, in contrast, allows adverse impact to be proven on just one individual. See 42 USC s 12112(b)(6). However, offsetting this interpretation of the Framework Directive is the fact that the text includes disadvantage of a "persons with a particular disability" which, according to Whittle, would allow an individual to establish a claim by reference to tightly defined sub-groups within the larger ground of "disability".

¹²⁰ Section 31(1)(b) EEA as amended.

¹²¹ *Bilka-Kaufhaus GmbH v Weber Von Hartz* Case 170/84 [1986] ECR 1607.

- (1) whether the measures chosen by the employer correspond to a real need on the part of the undertaking
- (2) whether they are appropriate with a view to achieving the objectives pursued and
- (3) are necessary to this end.¹²²

However, the ECJ has imported different standards of justification depending on the context. For example, where legislation or state social policy has a discriminatory impact, it will be justified by the state if the means adopted are a necessary objective for social policy and it is appropriate and necessary for that end.¹²³ This test was subsequently weakened in *Nolte*¹²⁴ where the state only had to show that the policy was legitimate as opposed to necessary and this will be so where it is unrelated to any discrimination on the grounds of sex. Ellis points out that proportionality provides a more rational means of patrolling the boundary between the employer's discretion to act and the right of the individual not to be discriminated against.¹²⁵ It is a more structured enquiry and its emphasis on the necessity for discriminatory action makes it a more satisfactory and effective test for this purpose than reasonableness.¹²⁶ Indeed, the previous test of "reasonableness in all the circumstances of the case" could have allowed an employer to justify its practice on the basis of stereotypical conceptions of reasonableness which could include appeals to the way things are ordinarily done.¹²⁷ However, the utility of the proportionality principle depends upon its effective application, that is, that the court equitably considers the arguments forwarded by both parties.¹²⁸

The Supreme Court of Canada recently stated that adverse effects discrimination is the major form of discrimination endured by disabled people.¹²⁹ In *Eldridge v British Columbia*, a state policy providing for health care for all citizens was

¹²² *Ibid.* at 1628.

¹²³ *Rinner-Kuhn* Case 171/88 [1989] ECR 2743.

¹²⁴ *Nolte* Case C 317/93 [1995] ECR I-1531.

¹²⁵ E. Ellis, "The Concept of Proportionality in European Community Sex Discrimination Law" in E. Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) 165 p.179.

¹²⁶ *Ibid.*

¹²⁷ An example of the reasonableness standard for the justification test can be seen in the UK decision of *Ojutiku v Manpower Services Commission* [1982] ICR 661, where Kerr LJ considered that the term "justifiable" was an ordinary word which "clearly applies a lower standard than the word "necessary". At p.670. Stephenson LJ referred to the discriminator's need for the provision as "that need is what is reasonably needed by the party who applies the condition" At p. 674.

¹²⁸ Compare the Irish Supreme Court's application of the proportionality test in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, discussed in the following chapter.

¹²⁹ *Eldridge v British Columbia* (1997) 3 SCR 624.

found to be indirectly discriminatory against deaf individuals because of the absence of sign-language facilities in hospitals. The Supreme Court noted that the same facilities were available to everyone which allowed hearing patients to converse with their doctors, whereas deaf patients were denied effective communication. This was, therefore, a policy which indirectly denied deaf people the equal benefit of the law. An argument for the application of indirect discrimination to the disability ground is that

... inclusion of a concept of indirect discrimination would promote better practice among employers and service providers making them identify and remove barriers in advance rather than providing individual solutions to individual problems which the current duty to make reasonable adjustments ... ensures.¹³⁰

This comment, written from a UK perspective (as the UK's Disability Discrimination Act contains no prohibition on indirect discrimination) is, as will be shown below, a rather optimistic account of the possible range and utility of the indirect discrimination principle. This is particularly the case when the interaction between the indirect discrimination principle and the duty to make reasonable accommodation, as set out in the Framework Directive is assessed.¹³¹ Despite its emphasis on tackling putatively neutral practices affecting members of particular groups, at the level of enforcement, the prohibition against indirect discrimination becomes an individual matter. In addition, as Baker et al point out, while the concept of indirect discrimination can be utilised to remove unnecessary job performance criteria, these are only unearthed in cases concerned with what employers have done, not with what they have failed to do.¹³² For instance, a failure to provide 'family-friendly' work arrangements will clearly have particular implications for women given the gendered division of labour, yet this is immune from challenge as a form of discrimination. This is because there is no generally applied provision, criterion or practice. In the disability context, this lacuna can be reached in part by the reasonable accommodation duty. Thus, it is important to consider the relationship between indirect discrimination and reasonable accommodation. This issue is considered below.

However, there remains an aspect to the EEA's structure, discussed below, that compromises the potency of both tools in the context of disability and 'neutral' job-qualifications. The EEA's indirect discrimination provision is intended to capture the

¹³⁰Citing a submission made to the B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK AntiDiscrimination Legislation* (Oxford: Hart Publishing 2000) p.31.

¹³¹ See below for discussion.

¹³² J. Baker et al, *Equality: From Theory to Action* (Palgrave: Macmillan, 2004) p.128.

imposition of a provision which puts persons with a particular disability at a particular disadvantage in respect of any aspect of the employment relationship as compared with other employees of their employer. A practical application of the Irish definition in the disability context could be the imposition of a specific educational qualification for a position – for example, a Leaving Certificate – a neutral requirement which applies equally to all prospective employees. Prima facie, this requirement could be shown to operate to the disadvantage of individuals with certain learning disabilities who received segregated schooling which did not pursue this course of education. This practice could put them at a particular disadvantage as compared to other employees of the employer. However, where an employer could demonstrate that the requirement to possess a Leaving Certificate pursues a legitimate aim - namely, an objective measurement of required levels of competency in literacy and numerical skills - and the use of that certification is appropriate and necessary, then the certification requirement could be justified. The proportionality enquiry is fact specific and requires close consideration of the job specifications to see if the actual levels of competency required by the job could appropriately and necessarily be gauged only by this means of certification. If, in the context of the specific job, such a level of certification was not objectively necessary, or qualification could be measured by means of alternative criteria, then the employer's use of it would be indirectly discriminatory on the disability ground.

One recent case before the Equality Tribunal raised the issue of indirect discrimination on the disability ground, and arguably, the question of the interaction between the indirect discrimination provisions and the duty to make reasonable accommodation. However, the Equality Officer managed to avoid a consideration of this latter point by relying on an alternative legislative provision. In *Gorry v Office of the Civil Service and Local Appointments Commissioners*,¹³³ the complainant claimed direct and indirect discrimination on the grounds of disability where the respondent refused to allow him to proceed in the competition for appointment to the grade of Executive Officer following a successful written examination because he had failed his Leaving Certificate English examination in 1990. In 1992, the complainant had been diagnosed with a specific learning disability akin to dyslexia.¹³⁴ The complainant had participated in an open competition for admission to the Civil Service and he performed sufficiently well in order to proceed further with the competition. When he informed

¹³³ DEC -E2005-038.

¹³⁴ The complainant's disability remained undiagnosed until the two years after his examinations. Following his diagnosis with dyslexia, he asked the Department of Education to review his scripts, however, all scripts had been destroyed and reassessment was not possible.

the respondent that he did not possess the required Leaving Certificate result, he was deemed ineligible to proceed any further. The complainant argued that he was, per section 16, fully competent and capable of undertaking the core competencies identified for the job subject to the provision of a minimum reasonable accommodation in relation to the presentation of written material.¹³⁵ He argued that the insistence on a pass in Leaving Certificate English, given his dyslexia, was indirect discrimination. The policy applied to all prospective employees, but it operated to the disadvantage of the complainant compared to someone without dyslexia and in practice could be complied with by a substantially smaller proportion of employees who may have dyslexia or a related condition.¹³⁶ Since he had already been successful in the Civil Service written admission tests, he argued that the requirement to pass Leaving Certificate English was not justified as being reasonable in all the circumstances of the case.¹³⁷ He further relied on section 16(3) which stipulates that a person with a disability shall be considered fully competent and capable of undertaking the duties of a position if, with the assistance of “special treatment”, they would be so competent. An employer is obliged to do all that is reasonable to assist such a person by providing such special treatment.

However, the respondent pointed to section 36 of the 1998 Act which states:

Nothing in this Part ... shall make it unlawful to require, in relation to a particular post - (a) the holding of a specified educational, technical or professional qualification which *is a generally accepted qualification in the State* for posts of that description, ...¹³⁸

(b) Nothing in this part shall make it unlawful for a body controlling the entry to, or carrying on of any profession, vocation or occupation to require a person carrying out or wishing to enter that profession, vocation or occupation to hold a specified educational, technical or other qualification *which is appropriate to the circumstances*.¹³⁹

The Equality Officer identified the issue to be one of indirect discrimination and accepted that the respondent’s practice could be indirectly discriminatory against

¹³⁵ Section 16 of the EEA, which is discussed in chapter five, provides that an individual with a disability shall not be considered other than fully competent and capable of carrying out the duties attached to a position if, with the assistance of a “reasonable accommodation” they would be so capable.

¹³⁶ The complainant was relying on the original definition of indirect discrimination in section 31 of the EEA prior to its amendment by the Equality Act 2004.

¹³⁷ The complainant referred to the Canadian decision of *Canada (Attorney General) v Green* [2000] 4 FC 629 where the Canadian Human Rights Tribunal opined that otherwise non-discriminatory tests had adverse consequences for those with dyslexia, and that the tests administered focused on the person’s weakness and not on his or her ability to do the job. The complainant argued that this was similar to his situation in that the seemingly non-discriminatory practice of insisting on a Leaving Certificate pass in English focused on his weak points.

¹³⁸ My emphasis.

¹³⁹ My emphasis.

persons with dyslexia in circumstances where necessary supports were not available when sitting the examination, unless it could be demonstrated to be reasonably justifiable. Despite this, the Equality Officer relied on section 36 of the Act and held that the Leaving Certificate examination was not anything other than a “generally accepted qualification in the State” for posts such as Executive Officer, and could not find it other than “appropriate” in the circumstances. She concluded, therefore that the requirement that a candidate have attained this level of education was not discriminatory.

This case demonstrates that section 36 precludes some of the very enquiries demanded by the reasonable accommodation duty. Consequently, the Equality Officer did need to discuss the interplay between the reasonable accommodation duty and the indirect discrimination principle. In this scenario, the individualised, nuanced enquiry into the specifics of the disabled individual’s circumstances as required by the reasonable accommodation duty did not take place. Section 16 requires an employer to do all that is reasonable to accommodate a disabled individual by providing special treatment or facilities which would allow the individual to demonstrate capability and competence for the position. Thus, the reasonable accommodation duty can assist those ‘otherwise’ deemed incompetent for a position to become competent.¹⁴⁰ The duty on the employer is to consider whether a reasonable accommodation would enable an individual to become so competent and this is core to the enquiry. However, in *Gorry*, this enquiry was deemed unnecessary because of the dictates of section 36. This section legitimates the Equality Officer’s conclusion for it states that “Nothing in this Part shall make it unlawful to require ... qualifications generally accepted in the State.” Historically, the Leaving Certificate has been (and remains) the holy grail for entry to the civil service and both the indirect discrimination principle and the reasonable accommodation duty are subject to the right of the employer to control entry qualifications for positions in this traditional manner. Interestingly, the policy of the Civil Service in this case does not sit comfortably with the government target of a 3% employment rate of disabled people in the public sector. Discussed in chapter six, this policy attempts to tackle the barriers to the increased employment of disabled people. It specifically mentions that certain educational requirements (for example the Leaving Certificate or equivalent formal qualifications) may be less frequently held by disabled

¹⁴⁰ The candidate here had already demonstrated competency for the position by performing sufficiently well in the written examination test for entry to the Civil Service.

people. Consequently, it urges public sector employers to examine whether there are suitable alternative means of assessing job suitability and performance.

Putting aside the incongruence between the target program and the civil service's approach in *Gorry*, the decision illustrates the inability of the EEA to fully tackle practices which indirectly discriminate against disabled individuals, particularly when it comes down to the issue of 'legitimate' qualifications. Even if the qualification standard remains justifiable under the indirect discrimination principle, the question remains whether it ought to have been analysed under the reasonable accommodation duty. *Gorry* provides an example of a prima facie indirectly discriminatory job specification which did not have to be justified because of section 36. It also remained untouched by the core enquiry demanded by the individualised reasonable accommodation duty. It demonstrates once again, the inability of the legislation to tackle the systemic disadvantage endured by disabled individuals.¹⁴¹ The relationship between indirect discrimination and reasonable accommodation at EU level is discussed below.

Reasonable Accommodation and Indirect Discrimination

While the *Gorry* decision turned on the interpretation of a different statutory provision, it raises an interesting issue, which is the relationship between indirect discrimination, the justification defence and the duty to make reasonable accommodation. Specifically, the point at issue is whether a neutral practice or condition which is found to be prima facie indirectly discriminatory against a group of disabled people, can be offset by the requirement to provide "special treatment or facilities" to a disabled individual by way of reasonable accommodation.

The Framework Directive provides that a provision, criterion or practice will amount to indirect discrimination where

it would put persons having a particular disability ... at a particular disadvantage unless i) [it is] objectively justified by a legitimate aim, or (ii) as regards persons with a particular disability ... the employer ... is obliged to [make a 'reasonable accommodation'] in order to eliminate the disadvantages entailed by such provision, criterion or practice.¹⁴²

¹⁴¹ This is an example of Young's thesis that discrimination law fails to get to grip with the unchallenged institutional structures of labour. Young argues that non-discrimination frameworks ignores wider questions surrounding injustice in the definition of positions, admission to them, and what it takes to be qualified for a position. See I.M. Young, *supra* n. 59 pp.200-202.

¹⁴² Article 2(2)(b)(ii) of the Framework Directive.

One reading of Article 2(2)(b) suggests that provided the employer provides effective accommodation to a disabled employee, the employer will be entitled to maintain the provision which puts disabled people more generally at a particular disadvantage. This is problematic. Thus, an employer can continue to apply the indirectly discriminatory practice against the group, as long as the employer offsets the disadvantage accruing to the specific individual with a disability by way of a reasonable accommodation. Thus, it suggests that in the context of the example used above, (putting section 36 aside) the desirability for a minimum level of certification could be retained despite being prima facie discriminatory against a certain category of disabled persons, if when presented with a particular disabled individual, the individual could be reasonably accommodated through alternative assessment measures. This will apply even if the employer would not have otherwise been able to provide objective justification for the provision, criterion or practice. As Whittle comments, one effect of the Directive's approach "is to remove any group benefits that may have otherwise accrued from a successful action in this regard".¹⁴³ De Schutter adds that these "[a]d-hoc, individualised compensation measures risk becoming substitutes for wider scale modifications especially in the built environment or the organisation of work ...".¹⁴⁴ In this sense then, the individualised reasonable accommodation provision could allow the continuation of instances of indirect discrimination against disabled people generally.

Equality of Results

Under an equality of results understanding it is not the fairness of the procedure or the competition which is considered, but the actual distribution of resources or rights. In this sense, equality of results presents a challenge to the universal, symmetrical conception of equal treatment. Whilst the latter formulation is concerned with procedural fairness in terms of the even application of rules and distinctions, (once this is done, the results take care of themselves) equality of results has been described as moving towards a fairer distribution of burdens or benefits. Any model of equality predicated on equality of results theory recognises that the under-representation of disadvantaged groups in particular occupations and sectors is a symptom of inequality

¹⁴³ R. Whittle, *supra* n.119 p.310.

¹⁴⁴ O. De Schutter, "Reasonable Accommodations and Positive Obligations" in C. Gooding and A. Lawson, *Disability Equality in Europe From Theory to Practice* (Oxford: Hart Publishing, 2005) 35 p.63.

of opportunity prior to market entry: this fact of under-representation represents an inequality in the take up of opportunities.

Equality of results is not a unitary concept. Fredman delineates its application in three ways.¹⁴⁵ The first approach focuses on the impact of apparently equal treatment on the individual. Where the equal treatment principle is breached, the non-discrimination structure provides a remedy for the individual but does not result in any proportionate decrease in the disadvantage to the group to which the individual belongs. The second is concerned with the results on a group (e.g. women, or other minorities), but as Fredman points out, the aim here is diagnostic in that it exposes the obstacles to participation as opposed to implementing an outcome pattern. She uses the example of the low numbers of female airline pilots which on equality of results theory raises a presumption of discrimination. If the reason for this exclusion is based on the assumption that women do not make good pilots, then the inequality of results has demonstrated discrimination. If it is due to the fact that there are not enough trained women, then despite the inequality of results, there is no discrimination. Consequently, the third and strongest form of equality of results seeks to ensure an equal outcome,¹⁴⁶ that is, an outcome which is measurable at the end of the process and which demonstrates that the unequal burden of disadvantage has been tackled.

Equal outcome can be described as achieving levels of parity between marginalized and non-marginalised groups in terms of access to and the distribution of economic, educational, cultural, political and other benefits. Equal outcome is regarded as the strongest conceptualisation of equality of results. It aims to redistribute resources and opportunities to traditionally disadvantaged groups and thus to improve the position of such groups relative to the power holding groups in society. The theory behind such intervention is based on the lingering effects of past discrimination, continued subordination because of a devalued position, and a concern for distributive justice. Equality of outcome is not concerned with the existence or proof of discriminatory factors,¹⁴⁷ but rather focuses on alleviating the under-representation of minority groups across a workplace or society. Barnard and Hepple argue that indirect discrimination can be viewed as results orientated in the first and second sense, but that it falls down when it comes to the strongest point of equality of results.¹⁴⁸ This is because of the justification defence and the operation of the principle within the confines of

¹⁴⁵ S. Fredman, *supra* n.25 p.11.

¹⁴⁶ See C. Barnard and B. Hepple *supra* n.14 p.564.

¹⁴⁷ S. Fredman, *supra* n.25 p.13.

¹⁴⁸ *Ibid.*

antidiscrimination law's enforcement system, which means that the outcome is often compensation and always not an actual removal of the original unequal burden endured by the members of the complainant's group.

The strongest concept of equality of results is not attainable by way of traditional non-discrimination precepts. It requires the adoption of measures that move beyond the employment sphere. This is in recognition of the fact that inequality of outcome stems from disadvantages that occur beyond the marketplace. The most expansive view of equality of results is the preferential treatment of the minority group. However, there are less controversial means of pursuing equality outcome objectives, such as preferential training courses, targeted hiring or aggressive outreach programs.¹⁴⁹ Equality in outcome does not, however, insist on parity in numbers. Rather, a balance is sought which reflects the spread of places and opportunities among members of minority groups in proportion to their position in a particular workplace or society. As Fredman comments, "it is usually not equality but fairness or balance which is required".¹⁵⁰ Positive action programs are designed to promote a better representation of groups in a workplace, and therefore seek to address the issue of access to education and training initiatives as well as goods, facilities, services and ultimately employment. The issue whether the reasonable accommodation duty and the positive action duty within the Framework Directive and the Irish legislation are a formulation of equality of results is dealt with in chapter six. In many ways, the policy implications of the limited version of equality of results theory differ little from those of the equality of opportunity theory. Both look to correcting disadvantages arising from the work environment, such as unsuitable training modules, inaccessible workstations, and inappropriate tools.¹⁵¹

Chapter six also discusses how undue concentration on equality of outcomes may in itself be misleading. Equality of results can be reduced to a numbers game; thus the increase in members of disadvantaged groups in grades, sectors or workplaces reflects an equality of results methodology, but it may be achieved at a particular cost. For example, it may be merely indicative of an increasingly successful assimilationist policy, which operates to benefit the most advantaged members of the disadvantaged class. However, sometimes an increase in the numbers of traditionally disadvantaged groups into a particular sector may coincide with a decrease in the status or pay of that sector.¹⁵² Moreover, the focus on results may detract from the reform of institutional

¹⁴⁹ See *infra* for further discussion.

¹⁵⁰ S. Fredman, *supra* n.25 p.13.

¹⁵¹ L. Waddington, *supra* n.11 p.65.

¹⁵² S. Fredman, *supra* n.25 p.13

structures which generate unequal burdens and disadvantages. These points are picked up and developed in chapter six.

Conclusion

The notion of formulating problems of discrimination endured by disabled individuals within legal structures has powerful resonance. It gives legal expression to the idea that there is a legally enforceable response to the unnecessary exclusion of a certain proportion of disabled people from employment. Moreover, this departure brings greater visibility to disabled people and their struggle for inclusion: it brings the problem of disability out of the private sphere and into public discourse. The impact of disability non-discrimination law in this sense is enormous.

That said, what remains to be assessed in the following chapters is whether the overall operation of the disability non-discrimination system as assessed in the two jurisdictions, move beyond the traditional criticisms accorded to non-discrimination law generally. The question is whether the structure of the disability discrimination norms represents a truly transformative departure. Direct discrimination has an important role to play in deconstructing the impact of stigma and stereotyping on disabled people's chances in the workplace. Facially neutral practices are challenged through the proscription on indirect discrimination, which remain, however, justifiable. Many of the exclusionary barriers faced by disabled individuals can be justified on grounds, which may be job-related, but are not neutral to disability and its impact. Where such criteria remain legitimate, certain groups of individuals – such as disabled people - by virtue of their prior disadvantage, may find it impossible to comply. While it is arguable that the individualised accommodation duty could require employers to think of job qualifications necessary for job performance and alternative means of certification or qualification, section 36 of the EEA expressly limits the utility of the indirect discrimination provision in the disability context when it comes to job certification and qualifications. This demonstrates, as Fredman points out, the vicious circle which arises in situations where qualifications are necessary for a job, but the absence of qualifications is due to past or ongoing discrimination.¹⁵³

Commentators have highlighted indirect discrimination and reasonable accommodation of religious practices, disabilities or pregnancy as legal articulations of a substantive version of equality, yet the scope of these articulations still remain far

¹⁵³ S. Fredman, *supra* n. 25 p.112.

short of a substantive standard of equality of outcomes. This “branding” of these concepts as substantive visions of equality is something of an overstatement.¹⁵⁴ Ellis argues that the indirect discrimination principle is “essentially ... non-dynamic [and] non-redistributive. ... it seeks to take note of the hidden obstacles facing protected groups of people and to set them aside where they are irrelevant to the matter in hand, [but] it does nothing to dismantle those obstacles or to change customarily stereotyped roles.”¹⁵⁵ Thus, even if proven, the remedy is often individual compensation rather than an absolute duty to eradicate the offending requirement.¹⁵⁶ Therefore, indirect discrimination is not concerned with the idea of equality of results in its strongest sense. It may speak to notions of equality of opportunity,¹⁵⁷ in that it is concerned with eradicating barriers with disparate impact, but not all offending barriers need be removed. It merely seeks to remove particular barriers, and leaves many job-related criteria, despite their disparate impact unchallenged.

Limitations also stem from the principle’s operation within the pre-defined limits of the non-discrimination system. It is adversarial. It over-relies on negative enforcement methods and is dependent upon individuals conceiving a wrong and being willing to pursue this wrong by way of litigation. These limitations of the anti-discrimination enforcement model are continued, and appear exacerbated, in the disability context. In order for the legislation to be triggered, an objectionable practice must occur. Thus, even blatant discrimination goes unchallenged unless an aggrieved individual is in a position to pursue a case. This process unduly burdens individuals who may already be in vulnerable situations. As Walsh laments, despite all the appeals to the transformative potential and the symbolic effect of outlawing discrimination across a range of grounds, the structure of the non-discrimination cannot be described as preventative and transformative.¹⁵⁸ Discriminatory practices are endemic and repetitious. A quick perusal of the caseload of the tribunal system demonstrates this. There is a considerable degree of repetition in the types of cases pursued under the legislation.

The difference in the disability context is the duty to make reasonable accommodation, the mechanics of which are discussed further in chapter five. The

¹⁵⁴ As Barnard and Hepple eventually conclude at the end of their article. C. Barnard and B. Hepple, “Substantive Equality” (2000) 59 *Cambridge Law Journal* 562.

¹⁵⁵ E. Ellis, *EU Antidiscrimination Law* (Oxford: Oxford University Press, 2005) p.115

¹⁵⁶ S. Fredman, *supra* n.25 p.115. Though where an employer does not eradicate the practice, it risks similar claims in the future.

¹⁵⁷ *Ibid.*

¹⁵⁸ J. Walsh, *Submission on the Equality Bill*, (Equality Coalition, March 2004). Paper on file.

question remains: to what extent does the duty to make reasonable accommodation pursue substantive goals of equality beyond the narrow version of the non-discrimination system? This chapter has set out the traditional pre-existing limits of the vision of equality within liberal legalism's conception of anti-discrimination orthodoxy. The narrative now turns to the constitutional plane where judicial conceptions of equality and attitudes to disability have been instrumental in the operation of, and approach to, the reasonable accommodation duty. It reverts back to the statutory structure in chapter four by focusing on a distinct issue in the disability context, the threshold issue which confines the benefit of non-discrimination protection to a particular class of individual. Following an assessment of these issues, the thesis reverts to the issue as to whether the disability discrimination system challenges and moves beyond the existing non-discrimination paradigm in chapter six.

Chapter Three

Disabling Discourse, Judicial Attitudes and Constitutional Protection

Introduction

This thesis is concerned with the limitations associated with the civil rights model of disability discrimination pioneered by ADA, and whether these limitations have been replicated in Ireland's EEA. In this chapter, the focus switches to constitutional obstacles to the effective operation of disability equality provisions in both of these jurisdictions. The themes which emerge in this chapter include: the precarious position of the reasonable accommodation duty in constitutional orders with formal equality guarantees; the related point of the poor relationship between equality guarantees and more 'substantive' constitutional rights and norms; a general sense of judicial ambivalence to the emerging discourses on the meaning of disability and the rights of disabled people; and an unsophisticated commitment to traditional liberal means of apportioning costs based on negative liberties of contract and property.

A major theme in equality and non-discrimination law concerns costs. It is the hidden but powerful agenda behind much of equality law.¹ In the context of disability discrimination law, the cost agenda, far from being hidden, has remained firmly to the fore. This is because where the aim of disability discrimination legislation is to prevent employment discrimination against disabled persons arising from the institutional and physical barriers contributing to their unemployment, then the legislation faces head on the issue of who pays for the removal of those barriers. The legislative history of the ADA and the EEA demonstrates that a major concern of both legislatures was the elimination of barriers to the full societal participation of disabled people.² The United States Congress-commissioned report by the National Council on the Handicapped, *Toward Independence*, led to the introduction of the bill that would eventually become the ADA.³ It recommended an express provision placing a duty on employers to make

¹ S. Fredman, "Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm" In A. Lawson and C. Gooding (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 199, p.208.

² See chapter one for report on the purpose section of the ADA.

³ National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities – With Legislative Recommendations*

“reasonable accommodation”⁴ for a person’s disability. In a similar vein, though some time later in Ireland, the Commission on the Status of People with Disabilities⁵ recommended the introduction of legislation outlawing all discrimination against disabled people. It recommended imposing an obligation on public and private bodies to make reasonable accommodation in favour of disabled people.⁶ Implicit in both reports’ recommendations is that the proposed laws would transfer some of the costs of integrating disabled people from government financed sources to employers. The burdens associated with the costs of tackling discriminatory practices has tended to focus on a single actor - namely the employer - to the exclusion of the perspective of both the affected individual and the tax-payer. Thus, it has been less frequently recognised that prejudice, animus and stereotypical assumptions towards the abilities and talents of disabled people “signals a market failure that should be redressed to everyone’s material advantage – including that of the taxpayer”,⁷ the individual and the employer. Because the interaction between impairment and the social and built environment disables certain individuals, a proper understanding of non-discrimination in the disability context obliges employers to take impairments positively into account and make reasonable accommodation for it.⁸ In the context of disability, the concept of equality is bounded by the criteria attached to the accommodation duty. This includes issues such as the ‘reasonableness’ of the accommodation and whether its provision may impact on an employer’s business operation so as to give rise to an “undue hardship”,⁹ a cost other than “nominal”¹⁰ or a “disproportionate burden”.¹¹ These standards are discussed at different points in this thesis.

(Washington, 1986) cited in R. Burgdorf Jr., *Disability Discrimination in Employment Law* (Washington, Bureau of Public Affairs, 1995).

⁴ Discussed in detail in chapter five.

⁵ See Report of the Commission on the Status of People with Disabilities, *A Strategy for Equality* (Dublin: Government Stationery Office, 1996) which submitted 402 recommendations for improving the lives of disabled people in all aspects of Irish society to Government .

⁶ Commission on the Status of People with Disabilities, *supra* n.5 para. 2.14-2.16. For comment on the Disabilities Bill 2001 see S. Quinlivan, “The Disabilities Bill 2001” (2002) 7 *Bar Review* 37.

⁷ G. Quinn, “The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose” in G. DeBurca, and B. De Witte (eds.) *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 279, 300.

⁸ S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002) p.129 who argues that a substantive conception of equality suggests that responsibility for correcting disadvantage does not rest with those to whom fault can be attributed. Thus, all those who benefit from the existing structure should be expected to bear part of the cost of the remedy.

⁹ This is the ADA standard, discussed in chapter five.

¹⁰ This was the standard of Ireland’s EEA up until July 1998 also discussed in chapter five.

In Ireland, the legitimacy of imposing the ‘burden’ of disability equality upon employers was originally and successfully challenged at the constitutional level. Disability non-discrimination protections in Ireland have had, it is fair to say, a difficult birth.¹² Before the discussion goes any further, it is necessary to set out a brief chronological account of the course which the reasonable accommodation duty has chartered in Irish law.¹³ The first Employment Equality Bill was introduced in 1996. Following its passage through both Houses of the Oireachtas, the Bill was sent to the President for signature. However, the then President, Mary Robinson, exercised her discretion under Article 26 of the Constitution and referred the entire Bill to the Supreme Court to test its compatibility with the Constitution.¹⁴ This decision is the subject of this chapter’s analysis. In brief, the constitutional problem, according to the Supreme Court, was that the disability provisions of the Employment Equality Bill 1996 “... attempts (sic) to transfer the cost of solving one of society’s problems on to a particular group ... it requires [an employer] to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work”.¹⁵ The Bill was held to be incompatible with the Constitution and it failed to reach the statute book. An amended version of the anti-discrimination template, which included a significantly watered down version of the reasonable accommodation duty, was tabled as the Employment Equality Bill 1997. Briefly put, this introduced a requirement on employers to do all that was reasonable to provide special treatment to a disabled employee, unless its provision would amount to a cost, other than a nominal cost on employers.¹⁶ This provision became law in the Employment Equality Act 1998 and its operation is discussed in chapter five. The Employment Equality Act 1998

¹¹ This is the standard of the Framework Employment Directive set out in Regulation 5 (Council Directive 2000/78, OJ 2000 L306/16), subsequently transposed into Irish law by the Equality Act 2004.

¹² O. Smith, “Disability, Discrimination and Employment: A Never-ending Legal Story” (2001) 23 *Dublin University Law Journal* 148.

¹³ See generally, O. Smith, *Ibid.*

¹⁴ *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321. Pursuant to Article 26 of the Constitution, the President may, following consultation with the Council of State, refer a Bill passed by both Houses of the Oireachtas to the Supreme Court which is required to pronounce on whether the Bill or any provision of the Bill is repugnant to the Constitution. There is no equivalent to Article 26 in the US Constitution. Some state constitutions contain provisions that authorise their legislators or executives to request from their Supreme Courts “advisory opinions” regarding the constitutionality of proposed legislation. Since 1793, the US Supreme Court has consistently refused to issue advisory opinions. See P. Bator et al. *The Federal Courts and the Federal System* (Westbury, N.Y.: Foundation Press, 1988), 65-6.

¹⁵ *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321, 367.

¹⁶ This is a summary of the effect of section 16(3)(a)(c) EEA, discussed in chapter five.

subsequently required amendment in light of the standards laid down in the Framework Directive adopted at EU level. These amendments are contained within the Equality Act 2004 and are also discussed in chapter five.

The chapter picks up on the constitutional discourse which surrounds reasonable accommodation as a principle of disability non-discrimination and its battle with competing, prior and more substantive, rights. It proceeds by outlining the Irish constitutional landscape in the context of the equality and private property guarantees. It then examines the disability provisions of the Employment Equality Bill 1996 and the Supreme Court's rejection of the reasonable accommodation mandate because of its unconstitutional interference with employer's private property rights. This will then be followed by a comparative constitutional assessment utilising the ADA and the American constitutional tradition. Despite enjoying a strong footing in the United States federal order, the ADA has more recently witnessed constitutional encroachment on the reach of its provisions.

The discussion in this chapter, which pursues a comparative constitutional perspective, is an important part of the narrative surrounding the introduction and the consequent transformative ambitions of the disability non-discrimination framework. What the chapter aims to uncover is the differences in terms of constitutional tradition, provision and interpretation between the two legislative schemes which shared similar provisions, yet suffered wholly disparate fates. It points out the barriers that exist on the constitutional plane to any normative alternative construct of disability and disability rights within legal discourse. The chapter contributes to the thesis presented here by demonstrating that the reformulation of the equality norm, discussed in chapter six, "implies constitutional change and attention to interactions between the formal political and legal contexts".¹⁷ Consequently, it briefly introduces the Canadian equality provisions and jurisprudence, which provides a useful contrast from the formal models of equality operating within traditional equality before the law (Ireland) and equal protection (US) doctrines.

Fundamental Rights in the Irish Constitution

¹⁷ J. Baker *et al*, *Equality From Theory To Action* (Basingstoke, Palgrave Macmillan, 2004) p.137.

Articles 40-44 of the Irish Constitution contain a large body of provisions collectively entitled 'Fundamental Rights'. They include many classic liberal rights: equality before the law, personal liberty, freedom of expression and assembly, freedom of association, family and education rights, property rights and freedom of religion. By contemporary standards, the list of rights expressly protected is incomplete.¹⁸ However, this has been remedied by the recognition of a large body of 'unenumerated' personal rights under Article 40.3.¹⁹ Articles 40-44 have been an essential part of the mechanism of judicial review and have provided the basis for a number of significant decisions in Irish constitutional law. The judiciary has been demonstrably "active"²⁰ and displayed considerable imagination in interpreting these provisions. However, it cannot be said that the same degree of judicial imagination has been applied to the equality provision.

*The Irish Equality Guarantee*²¹

Article 40.1 provides:

All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

Despite the fact that Article 40.1 is a free-standing equality norm with a potentially broad scope, the provision has never been interpreted as a core norm.²² This weakness of Article 40.1 seems quite deliberate. The parliamentary material containing the debates on the Constitution's text indicate that its principal architect, Eamon DeValera,

¹⁸ Bunreacht na hEireann (Constitution of Ireland) dates from 1937 and was devised earlier than the wave of modern constitutions adopted in Europe after the war.

¹⁹ Article 40.3.1° states: The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. Article 40.3.2°: The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen. For an account of the extensive list of unenumerated rights discovered by the senior judiciary as being inherent in Article 40.3., see J. Casey, *Constitutional Law in Ireland* (3rd ed.) (Dublin: Roundhall Sweet and Maxwell, 2000) Chapter 12.

²⁰ On the activism of the Irish senior judiciary, see D.G. Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* Undercurrent Series (Cork: Cork University Press, 2001).

²¹ This overview draws heavily on M. Donnelly, S. Mullally and O. Smith, *Predicting the Impact of Policy: Gender Auditing as a Means of Assessing the Probable Impact of Policy Initiatives on Women: Country Report – Ireland* (Liverpool: Feminist Legal Research Unit, University of Liverpool, 1999) pp. 64-69.

²² As Whyte remarks: "... it remains one of the more underused, and arguably undeveloped, principles in Irish constitutional jurisprudence". G. Whyte, "A Comment on the Constitution Review Group's Proposals on Equality" in R. Byrne and W. Duncan (eds.) *Developments in Discrimination Law in Ireland and Europe* (Dublin: ICEL, 1997) 93, 93.

did not believe in the legitimacy of the concept of equal opportunities.²³ The Irish judiciary has demonstrated a marked reluctance to rely on the guarantee, preferring to invoke other constitutional rights instead. This reluctance has permeated throughout the constitutional jurisprudence on fundamental rights to date, with the consequence that many questions as to the precise scope of Article 40.1 remain unanswered.

There are many limitations to Article 40.1. First, the right-holders under Article 40.1 are individuals. Collective or legal persons, such as trade unions, are not covered by the guarantee. At present, the guarantee applies only to individual citizens, and only to citizens as “human persons”. The phrase “as human persons” has been used by the courts to restrict the material scope of the equality guarantee. In *Quinn’s Supermarket v Attorney General*,²⁴ it was held that the guarantee refers to human persons for what they are in themselves, rather than to any lawful activities, trades or pursuits which they may engage in or follow. In the most recent and comprehensive review of the Constitution,²⁵ the Review Group called for the deletion of the phrase “as human persons”,²⁶ but the provision persists. Further, in *Murtagh Properties Ltd v Cleary*²⁷ it was held that the constitutional protection of equality related only to the “essential attributes” of citizens as persons, those features which make them human beings, and had nothing to do with their trading activities or with the conditions on which they are employed. However, there are signs that this interpretation is beginning to lose favour with the judiciary.²⁸ Hogan and Whyte suggest that the Court “now sees Article 40.1 as having a much wider field of application than previously thought”.²⁹ While there has been no exhaustive

²³ DeValera believed that inequalities persist in nature. “Inequalities must exist in any organised society ... I say that equality of opportunity is not possible”. 67 Dáil Debates 1590ff.

²⁴ [1972] IR 1.

²⁵ *Report of the Constitution Review Group* (Dublin: Government Stationery Office, 1996). The Constitution Review in the mid-1990s was intended to provide a systematic and comprehensive examination of the Constitution in a two-part process. The first part consisted of the production and publication of a report by a government appointed expert group, which was then to be considered by an all-party Oireachtas committee. This report draws on comparative constitutional discourse and considers it in the particular context of Ireland’s political and legal tradition. It sets out a number of recommendations for constitutional change. It also includes a number of minority recommendations, which evidences the particular views of individual members of the expert group where consensus was not obtained. Ultimately, it rests with the government of the day to determine whether and to what extent the process of reform should be initiated, with the final say resting, necessarily, with the electorate. To date, none of the governments since the report’s publication have moved to implement its recommendations.

²⁶ *Report of the Constitution Review Group* (Dublin: Government Stationery Office, 1996) p.224.

²⁷ [1972] IR 330.

²⁸ See generally G. Hogan and G. Whyte, *Kelly: The Irish Constitution* (3rd ed.) (Dublin: Butterworths, 1994) p. 723 and G. Whyte, *supra* n. 22 pp. 101-105.

²⁹ G. Hogan and G. Whyte, *Kelly: The Irish Constitution* (4th ed.) (Dublin: Butterworths, 2002) p.1343.

definition of the essential attributes of the human person under this Article, the Supreme Court has indicated that classifications based on sex, race, language, religious or political opinions are presumptively proscribed by Article 40.1.³⁰

The second sentence of Article 40.1 specifies “acceptable” bases for the differential legislative treatment of persons. These “acceptable bases” for distinction are differences in “physical and moral capacity and social function”. This reference to differences of social function has been particularly problematic for the gender equality agenda as the courts have used it to uphold legislation based on questionable stereotypes.³¹ At the same time, the provision has never been used to promote positive equality rights for members of different disadvantaged groups. Nor was it considered as providing constitutional support for the introduction of the reasonable accommodation provision under the terms of Article 40.1, which permits “the State in its enactments to have due regard to differences in capacity”. The Constitution Review Group recommended that this sentence be replaced by a more general provision:

This shall not be taken to mean that the State may not have due regard to relevant differences.³²

However, there was nothing in this recommendation to suggest that the State should be bound by a positive vision of equality to safeguard the rights of individuals to enjoy the equal benefit of the law through the accommodation of individual differences.³³

The State’s obligation to respect equality applies to the exercise of state authority. It would seem that all arms of government are bound by this obligation: the administration, the executive, the legislature and the judiciary. It remains unclear whether the obligation is capable of direct enforcement against persons or bodies other than the State. While it is generally presumed that constitutions regulate relations between the individual and the State, the Irish judiciary has interpreted a number of the fundamental rights provisions within the Constitution as being capable of “horizontal application”. In a number of cases, the courts have imposed constitutional obligations on non-state actors and awarded damages for breach of constitutional rights against such

³⁰ *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 347.

³¹ See *Norris v Attorney General* [1984] IR 36 (sexual differences between men and women were invoked to justify the criminalisation of male homosexuality) and *Dennehy v Minister for Social Welfare* Unreported High Court 26th July, 1984 (differential treatment of deserted wives and deserted husbands sanctioned because of women’s different social function).

³² *Report of the Constitution Review Group supra* n.25 p. 229.

³³ Contrast the Irish equality guarantee with more expansive equality protections such as section 15 of the Canadian Charter of Rights and Freedoms. The latter approach is discussed below.

actors.³⁴ While the courts have generally taken the view that the law of tort provides adequate protection for personal rights, in the absence of a common law or statutory right of action, an individual may sue directly for a breach of a constitutional right. The majority of these cases have come under the rubric of the State's duty, under Article 40.3, to "defend and vindicate" the personal rights of its citizens. As noted above, whether or not the equality guarantee is capable of horizontal application remains unclear. The possibility has not been ruled out, but given the Irish judiciary's reluctance to invoke Article 40.1, and while there still exists a measure of uncertainty as to the precise scope and meaning of the equality guarantee, it appears that such an interpretation may not be acceptable to the present judiciary.³⁵

Much of the reluctance to invoke the equality guarantee can be explained by the underlying theory of equality on which the judiciary presumes it to be based and the poor relation it has to prior values or more substantive rights. This limited approach was explicitly endorsed by the majority of the Constitution Review Group, despite appeals to a broader conceptualisation of equality.³⁶ Whyte neatly sums up the Review Group's rejection of any constitutional obligation on the State to ensure respect for equality by parties such as individuals or private bodies: its approach implicitly endorses "the view that the obligation to respect the principle of equality cannot restrict the autonomy of the individual or fundamental rights such as freedom of association or expression".³⁷ Indeed, as is discussed below, the fundamental rights capable of trumping the equality provision were judicially expanded to include rights over private property. The majority of the Review Group rejected equality as a "core norm" on the basis of separation of powers concerns, arguing that this was "essentially [a] political argument for an optimum degree of socio-economic rather than strictly equality before the law. ... the former is a policy issue appropriate to be addressed by Government and the Oireachtas

³⁴ In *Meskeil v CIE* [1973] IR 121, pp.132-133 Walsh J. remarked that constitutional rights could be protected or enforced by action, "even though such action may not fit into any of the ordinary forms of action in either common law or equity".

³⁵ J. Casey, *Constitutional Law in Ireland* (2nd ed.) (London: Sweet and Maxwell, 1992) p. 379.

³⁶ See *Report of the Constitution Review Group supra* n.25 at p. 221 where it is stated that "[e]quality is, however, more than the absence of discrimination whether direct or indirect. [Its attainment] is not solely a matter of individual effort. It involves the development of strategies which would actively promote a civil society based on principles of social, economic and political inclusion. This embraces the taking of positive measures to enable persons to overcome disadvantage and to afford them real equality of opportunity; and it is important to recognise that such measures do not constitute discrimination but rather promote equality." However, this statement is nothing beyond simple political rhetoric given the subsequent reaffirmation of a purely formal or "process" approach to the equality guarantee by the Group's report.

³⁷ G. Whyte, *supra* n. 22 p.97.

rather than by a constitutional assertion”.³⁸ Unfortunately, the Review Group did not feel it necessary to expand upon what precisely is meant by the obviously more limited concept of “equality before the law”. As consolation for failing to include a description of equality as a “full and equal enjoyment of all rights and freedoms”³⁹ and for refusing to extend the principle of equality to private action, the Review Group alluded to the proposition that the silence of the Constitution does not prevent the Oireachtas from pursuing such objectives in ordinary legislation. However, this silence ultimately proved costly for the ‘ordinary’ statutory regime of equality in employment in favour of disabled people and it illustrates the core weakness of the Article 40.1 guarantee. It demonstrates that there is no substantive equality norm on which to base the idea of equality inherent in the accommodation of difference. Given that the substantive constitutional right of private property was invoked by the Supreme Court in its assessment of the disability provisions of the Employment Equality Bill under Article 26, the judicial approach to the property provisions of the Constitution is discussed below.

The Constitutional Protection of Property Rights in Ireland

The protection of private property lies at the heart of the fundamental rights provisions of the Irish Constitution, the text of which offers express protection in two separate provisions. First, there is Article 43, set out below.

Article 43.1.1°: The State acknowledges that man, in virtue of his rational being, has the right, antecedent to positive law, to the private ownership of external goods.

43.1.2°: The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

43.2.1°: The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

³⁸ *Report of the Constitution Review Group supra* n. 25 at p. 223. Thus, reinforcing the traditional division between traditional civil rights and the social and economic counterparts. On the separation of powers argument and positive social rights for disabled people, see G. Quinn, “Effective Remedies and Other Challenges – An International Legal Perspective” available at <http://www.nda.ie>. Last accessed December 3, 2003. See also G. Quinn, *supra* n.7 for a discussion on the role of the non-discrimination right in making a bridge between substantive equality and the enjoyment of positive social rights.

³⁹ As is the case with the equality guarantee in the Constitution of South Africa. See G. Vogt, “Non-Discrimination in South Africa under the new Constitution” (2000) *Public Law* 187.

43.2.2°: The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

Second, by virtue of Article 40.3.2°, the Constitution specifically strives to protect from unjust attack and, in case of injustice done, vindicate the life, person, good name and property rights of every citizen. However, difficulties in constitutional adjudication arise in the contrast between the evidently firm protection accorded to property under Article 40.3.2° and the yielding principles of the common good and social justice contained within Article 43.

Article 43 permits the governmental regulation of property rights in accordance with the principles of social justice and the common good. The need for this type of regulation in a democratically functioning society has been spelled out by the Constitution Review Group:

If the State is to function, property rights must yield to a wide variety of countervailing interests, among them the redistribution of wealth, the protection of the environment, the necessity for consumer protection. This in turn means that the State must have extensive taxation powers, powers of compulsory acquisitions and a general capacity to regulate (and even in some cases to extinguish) property rights.⁴⁰

The general consensus among Irish constitutional commentators is that the text of these Articles, their relationship with each other and their consequent judicial interpretation is “replete with difficulties”.⁴¹ The wording of both Articles is open to subjective judicial appraisal as phrases such as “unjust attack”, “principles of social justice” and the “exigencies of the common good” allow much room for judicial manoeuvres.⁴² While there was considerable concern expressed about the Constitution’s property provisions, Hogan points out that there were so many irreconcilable textual judicial interpretations on the exigencies of Articles 43 and 40.3.2° that a new methodology – that of proportionality⁴³ – was adopted in order to bring “an objective structure and order in an area where reliance on the text alone offered a wholly subjective appraisal”.⁴⁴

⁴⁰ *Report of the Constitution Review Group supra* n. 25 p.357.

⁴¹ G. Hogan, “The Constitution, Property Rights and Proportionality” (1997) xxxii *Irish Jurist* 373, 375. See also R. Keane, “Land Use, Compensation and the Community” (1983) 18 *Irish Jurist* 23, referring to the “unattractive language” and “tortured syntax” of Article 43 and D. Barrington “Private Property under the Irish Constitution” (1973) 8 *Irish Jurist* (n.s.) 1, 2; “The wording of Article 43 is certainly difficult. It may, however, be as simple as the complexity of its subject-matter allows”.

⁴² See generally, J. Casey, *supra* n.35, chapter 18.

⁴³ The proportionality concept is an often used tool of the European Court of Human Rights. When state action is being tested for compliance with Convention guarantees, the Court looks to

In *Re Article 26 and the Employment Equality Bill*, the Supreme Court directed considerable attention to the constitutional text, yet, as Hogan points out, the case was decided on proportionality principles.⁴⁵ I argue here that its actual (mis)use of proportionality reasoning in that case failed to counter any judicial subjectivity in the reconciliation of the terms of the Employment Equality Bill 1996 and the property provisions of the Constitution. Moreover, a more nuanced engagement with the statutory provisions and the proportionality principle could have saved the Bill from constitutional failure. This point becomes particularly clear when the approach is compared to the Supreme Court's methodology in another Article 26 referral decision in the context of planning legislation.⁴⁶ In order to provide foundation for this assertion, I will first outline the disability provisions of the Employment Equality Bill 1996.

The Disability Provisions of the Employment Equality Bill 1996

The Employment Equality Bill 1996 was the legislative product of a commitment in the social partnership agreement, the *Programme for Economic and Social Progress (PESP) 1993-1996*⁴⁷, to expand the State's anti-discrimination legislative programme. The Bill outlawed direct and indirect discrimination in employment on the basis of nine grounds,⁴⁸ including disability. In addition, and following international disability discrimination statutes, the Bill made provision for the concept of "reasonable accommodation".

Section 16(3) of the Bill stated that a person with a disability would not be regarded "otherwise than as fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, that person would be so fully competent or capable". Then, subject to certain provisos, an employer was required to do all that was reasonable to accommodate a disabled applicant or employee by making provision for such treatment or facilities. Section 35(4) went on to stipulate that discrimination would not be taken to have occurred

the legitimacy of the aim of the contested measure and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. For discussion of the concept of proportionality, see generally G. De Burca, "The Principle of Proportionality and its Application in EC Law" (1993) *Yearbook of European Law* 111 and see *infra* for its application in an Irish context.

⁴⁴G. Hogan, *supra* n. 41 p.376.

⁴⁵G. Hogan, *ibid.* p.387 text to fn.49.

⁴⁶*Re Article 26 and the Planning and Development Bill 1999* [2000] IR 321. Discussed *infra*.

⁴⁷(Dublin: Government Stationery Office, 1993)

where (a) a person needs special treatment or facilities in order satisfactorily to take part in a selection process or to undertake that employment; and (b) the employer does all that is reasonable to accommodate the needs of that person; [or where], having regard to the relevant circumstances (specified in ss.5) the cost of providing the treatment or facilities would give rise to an undue hardship.

Section 35(5) of the Bill set out a number of factors relevant to the decision as to whether a reasonable accommodation may give rise to undue hardship. It outlined the following factors which were to be considered:

- (a) the nature of the treatment or facilities that would be required;
- (b) the cost of the treatment or facilities and the number of persons who would benefit from them;
- (c) the financial circumstances of the employer;
- (d) the disruption that would be caused by the provision of the treatment or facilities; and
- (e) the nature of any benefit or detriment which would accrue to any persons likely to be affected by the provision of the treatment or facilities.

Thus, in a somewhat convoluted fashion, the Bill placed a duty on employers to provide reasonable accommodation to a newly protected class of worker – disabled people – unless the associated costs would give rise to an undue hardship on the employer. Somewhat surprisingly, it was the possible cumulative effect of these provisions that was found to be at odds with the property provisions of the Constitution.⁴⁹ Before discussing the Supreme Court's findings in that case, for the purposes of clarity, I intend to outline the reach of the Constitution's property guarantees with which the Employment Equality Bill was ultimately competing.

Judicial Interpretation of Articles 43 and 40.3.2^o ⁵⁰

⁴⁸ The nine discriminatory grounds are: gender, marital status, family status, age, disability, race, religion, sexual orientation and membership of the traveller community.

⁴⁹ I use the term surprising because most observers at the time were of the opinion that the then President, Mary Robinson, had section 37 (1) dealing with the extent to which religious run institutions could discriminate in order to maintain the religious ethos of the institution, in mind when she referred the Bill to the Supreme Court. [1997] 2 IR 321 pp.350-360 for the Court's treatment of this section. The actual outcome did not present a surprise in some quarters. See the submission made by the Commission on the Status of People with Disabilities to the Constitution Review Group, to the effect that the equality guarantee in the Irish Constitution might prove too weak to support the kind of legislation needed to underpin the equal opportunity commitment in the disability context. Cited in G. Quinn and S. Quinlivan, "Disability Discrimination: The Need to Amend the Employment Equality Act 1998 in light of the EU Framework Directive" in C. Costello and E. Barry, (eds.) *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law 2003) 213, p.225.

⁵⁰ Text to these articles is set out, *supra*.

By way of preliminaries, it is worth pointing out that the vast majority of constitutional cases concerning the property provisions deal with land use regulation, planning and development regulations, and rent restrictions. Therefore, the appearance of these guarantees in an Article 26 challenge to anti-discrimination legislation was a novel feature.

As has been noted already, the precise relationship between Article 43 and Article 40.3.2° remains disputed: as Casey comments, “in hardly any branch of constitutional law has judicial opinion shown so much fluctuation”.⁵¹ The uncertainties build up from the contrast in wording between Article 43.1 where “the State ... guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property” and 43.2 where stress is placed on the exigencies of social justice and the demands of the common good. A contributing factor to the uncertainty is what relationship, if any, there is between Article 43 and Article 40.3.2°.

Article 43 appears to have two objectives. First, it prohibits the State from abolishing private property as an institution. The second limb of the Article recognises that private property may be regulated by the legislature where such regulations can be justified by the requirements of social justice and the common good.⁵² The exigencies of the concepts of social justice and the common good⁵³ have been examined by the Courts on numerous occasions in its rather tangled consideration of the relationship between Articles 43 and 40.3.2°: though initially, the Courts were reluctant to interfere in a matter originally thought to be the proper domain of the Oireachtas. However, since *Buckley v Attorney General*,⁵⁴ it has been accepted that Article 43 was intended to enshrine the property rights of citizens and that those rights could be regulated by the Oireachtas in the interests of the common good. However, any decision by the Oireachtas as to what constitutes the common good for the purposes of this Article could be reviewed by the courts. While not considered here in any great detail, the property jurisprudence demonstrates that the courts have “found it more or less

⁵¹ J. Casey, *supra* n.19 p.662.

⁵² For a general discussion of these concepts, see D. Phelan, “The Concept of Social Rights” (1994) 16 *Dublin University Law Journal* 105.

⁵³ See the Supreme Court’s embracement of the Constitution’s “constant concern for the common good” *per* Finlay CJ in *Webb v Ireland* [1988] IR 353, at 383. Casey comments that “[i]t will rarely be difficult to establish the “common good” basis of the impugned Act; the presumption of constitutionality obviously helps here. Consonance with principles of social justice may pose a greater problem”. J. Casey, *Constitutional Law in Ireland* (Second edn.)(London: Sweet and Maxwell, 1992) p.544.

⁵⁴ [1950] IR 67.

impossible to adhere to a strict categorisation of Article 40.3.2° in contrast with Article 43 property rights”.⁵⁵

The Move to Proportionality

The definitive statement of the proportionality principle in Irish constitutional jurisprudence is Costello J’s judgment in *Heaney v Ireland*.⁵⁶ In considering whether a restriction on the exercise of rights is permitted by the Constitution, the proportionality test, which is predicated on the ideals of minimal restraint on the exercise of protected rights and the exigencies of the common good in a democratic society, has been more frequently referred to.⁵⁷ Costello J. noted how the test is a common tool of the European Court of Human Rights⁵⁸ and relied on the following formulation from the Supreme Court of Canada:

The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must

- a. be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- b. impair the right as little as possible, and
- c. be such that their effects on rights are proportional to the objective: see *Chaulk v R*.⁵⁹

This line of reasoning was subsequently confirmed by the Supreme Court.⁶⁰

Proportionality and Property Rights

One of the clearest applications of the proportionality principle to the property context is Costello P’s judgment in *Daly v Revenue Commissioners*⁶¹ where he stated that because the Oireachtas had interfered with property rights did not of itself mean that such regulation would be unconstitutional. What was required was that the applicant had to

⁵⁵ G. Hogan, *supra* n.41 p. 386, citing Report of the Constitution Review Group p. 361.

⁵⁶ [1994] 3 IR 593. The earlier decision of *Cox v Ireland* [1992] 2 IR 503 was decided on proportionality reasoning without the term being directly referred to.

⁵⁷ Per Costello J. at p.607.

⁵⁸ Costello J. referred to *The Sunday Times v United Kingdom* (1979) EHRR 245.

⁵⁹ (1990) 3 SCR 1303, 1335-1336.

⁶⁰ *Director of Public Prosecution (Stratford) v Fagan* [1994] 2 IR 265.

⁶¹ [1995] 3 IR 1; [1996] 1 ILRM 122.

show that the infringement of his property rights was disproportionate in the circumstances for

... legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. When ... an applicant claims that his constitutionally protected property rights ... have been infringed and that the State has failed in the obligation imposed on it ... to protect his property rights he has to show that those rights have been subjected to an unjust attack. He can do this by showing that the law which has restricted the exercise of his rights or otherwise infringed them has failed to pass a proportionality test ...⁶²

Of more direct relevance for my analysis here is the Supreme Court decision in *Re Article 26 and the Planning and Development Bill 1999*.⁶³ The approach of the Supreme Court in this decision provides a useful contrast with the Employment Equality Bill decision in terms of its analysis of the scope of the property guarantees, its thorough review of the Bill and its reconciliation of the competing constitutional rights. The aim of Part V of the Planning and Development Bill 1999 was to provide affordable housing for persons who would not ordinarily be in the position to buy houses and to ensure that housing developments of this kind would not be segregated from the general community. This aim was to be realised through planning legislation. Each planning authority would be required to include in its development plan a “housing strategy” which would designate a specified percentage of the lands zoned for residential use for affordable housing.⁶⁴ The Bill provided that where the owner of land zoned for residential use applied for permission for a housing development on the land, as a condition of grant, the planning authority could require the owner to either cede up to 20% of the developed land for such purposes or to provide serviced sites or houses actually built for such purposes. The price for such land to be paid by the planning authority was to be calculated by reference to its existing use value, that is, on the assumption that no development other than exempted development would be allowed on the land.

Counsel assigned by the Supreme Court⁶⁵ argued that the provisions of the Bill were in violation of Article 40.3.2° and Article 43 protecting the property rights of the citizen. The Supreme Court subjected both the provisions of the Bill and the property

⁶² [1995] 3 IR 1, 11.

⁶³ [2000] 2 IR 321; [2001] 1 ILRM 81.

⁶⁴ Provision was also made to make housing available for persons within certain defined categories; the homeless, members of the traveller community and people living in unfit or overcrowded accommodation.

⁶⁵ Counsel assigned by the Court are charged with arguing against the constitutionality of the Bill before the Supreme Court.

provisions of the Constitution to careful scrutiny. Where an individual challenges the validity of legislation which regulates property rights, then the burden rests with that individual to establish that it constitutes an unjust attack on those rights. According to the Court,

The challenge typically arises, however, ... in circumstances where the State contends that the legislation is required by the exigencies of the common good. In such cases, ... there will be an enquiry as to whether, objectively viewed, it could be regarded as so required and as to whether the restrictions or delimitations effected of the property rights of individual citizens are reasonably proportionate to the ends sought to be achieved.⁶⁶

While affirming that the provisions of Article 43 were relevant to its enquiry, the Supreme Court felt that question of whether the restriction effected of the property rights of individual citizens was permitted by the Constitution was firmly grounded on proportionality arguments.⁶⁷

The Court went on to apply the tests proposed by Costello J. in *Heaney v Ireland*⁶⁸ and was satisfied that the statutory scheme laid down in the Planning and Development Bill passed those tests. The statutory aim of providing affordable housing was

... an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. ... [T]he court is satisfied that they impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained.⁶⁹

The interesting contrast with the Employment Equality Bill decision, discussed below, is the absence there of such a carefully constructed, reasoned and applied proportionality test

Property, Disability and The Article 26⁷⁰ Referral Decision⁷¹

In April, 1997, following consultation with the Council of State⁷², the then President, Mary Robinson, referred the Employment Equality Bill 1996 to the Supreme Court under Article 26, for the Court's decision "as to whether the said Bill or any provision or

⁶⁶ *Supra* n. 63 p.348.

⁶⁷ See *Dreher v Irish Land Commission* [1984] ILRM 94.

⁶⁸ *Supra* text to n.56.

⁶⁹ *Supra* n.63 p. 354.

⁷⁰ See text to n.14, *supra*.

⁷¹ *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

provisions thereof is or are repugnant to the Constitution”.⁷³ The Supreme Court was obliged to consider the entire Bill and give its decision within sixty days of the date on which the Bill was referred.⁷⁴

The disability sections of the Bill were considered separately by the Supreme Court. At the outset, the Court noted that the “Bill has the totally laudable aim of making provision for such of our fellow citizens as are disabled”.⁷⁵ What had a significant bearing on the judgment, however, was the Court's focus on the property provisions in Articles 43 and 40.3.2° of the Constitution.

It was argued before the Court that the burdens imposed on employers were “extremely onerous and so disproportionate to the results intended to be achieved, as to amount to a failure adequately to protect the rights of employers to earn a livelihood”.⁷⁶ The fact that employers would be required to accommodate employees with a disability and bear what could amount to “significant costs”, without a provision for compensation payable by the State, constituted, it was argued, an unjust attack on their property rights within the meaning of Article 40.3.2°.

Against this, Counsel for the Attorney General, argued that disability provisions amounted to a delimitation of the exercise of the property rights of employers, which had clearly been imposed by the Oireachtas

with a view to reconciling the exercise of those rights with the exigencies of a particular aspect of the common good i.e. the promotion of equality between disabled and more fortunate citizens. As such, it was permissible by virtue of Article 43.2.2° of the Constitution, unless it could be shown that the abridgement thus affected of property rights amounted to an unjust attack of those rights within the meaning of Article 40 s.3 – subsection 2.⁷⁷

A number of cases were cited in support of the argument that the absence of a provision for compensation by the State did not, in itself, amount to an unjust attack on property rights.⁷⁸

⁷² On the functions and role of the Council of State, see J. Casey, *supra* n.19 pp. 98-99.

⁷³ Besides the disability provisions, the Supreme Court held that section 15, providing for vicarious liability for employers in criminal proceedings, and section 63(3), providing for certification as evidence of offences, to be incompatible with Article 38.1 and Article 40.1 of the Constitution.

⁷⁴ Given its length and the cumbersome fact that this Bill either amended or referred to 33 other statutes, this was quite a formidable task and noted by the Supreme Court. *Supra* n.71 p. 331.

⁷⁵ *Supra* n. 71 p.367.

⁷⁶ *Ibid* pp. 363-364 .

⁷⁷ *Ibid*.p.364

⁷⁸ *Dreher v Irish Land Commissioners* [1984] ILRM 94; *O'Callaghan v Commissioners of Public Works* [1985] ILRM 364; *Cafolla v O' Malley* [1985] IR 486.

The Supreme Court stated that the disability provisions were a delimitation of the exercise by employers of the constitutionally protected right to earn a livelihood and carry on a business. The Oireachtas had attempted to balance the exercise of these rights with the common good of promoting equality in the workplace between the disabled and “their more fortunate fellow citizens”.⁷⁹ The issue facing the Supreme Court was whether the provisions requiring an employer to make a “reasonable accommodation ... unless causing undue hardship”,⁸⁰ were a reasonable delimitation of property rights under Article 43 or whether they amounted to an “unjust attack” on an individual citizen's private property within the meaning of Article 40.3.2° of the Constitution.

The Supreme Court clearly felt that it was in accordance with the principles of social justice that society should make accommodation for disabled people in the workplace and that *prima facie*, society should bear the cost of this. The problem the Supreme Court found with the Bill in context of disability is summed up in the following passage:

... it attempts to transfer the cost of solving one of society's problems on to a particular group ... it requires [an employer] to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work unless the cost of the provision of such treatment would give rise to 'undue hardship' to the employer.⁸¹

In support of its reasoning, the Court expressed some disquiet over the wide definition of disability which would make it impossible to estimate in advance the likely cost to employers.⁸² Referring to the “significant costs” which employers might have to bear (without provision for compensation by the State), the Court concluded that the provision amounted to an unjust attack on their property rights. The Bill was, therefore, unconstitutional.

Unjust Attack on Property Rights?

The senior judiciary's invalidation of the disability provisions of the Bill is open to challenge across a number of grounds. An obvious angle of attack is the judicial view of an “unjust attack” on property rights in this context. Hogan and Whyte comment that “[t]he notion of unjust attack is clearly one which invites highly subjective

⁷⁹ *Supra* n. 71 p.366.

⁸⁰ Set out in sections 16 and 35(4)-(5).

⁸¹ *Ibid.* p. 367-368.

interpretation”.⁸³ The principle emulating from the case law is that an absence of compensation will render legislation invalid if there is an unjust attack on property rights.⁸⁴

Following this line of reasoning, the issue for consideration was whether the obligation to “reasonably accommodate ... unless causing undue hardship”, without provision for state compensation, (though with provision for state assistance)⁸⁵ amounts to an unjust attack on employers’ property rights. In order to assess the rationale of the judgment, and to expose the judicial belief that such alterations or accommodations constitute a *prima facie* unjust attack on property rights, it is necessary to explore further the concept of reasonable accommodation. This the Supreme Court clearly omitted to do.

As noted earlier, the requirement for reasonable accommodation underpins the heart of modern disability discrimination legislation. The central terms employed in the 1996 Bill, like the ADA, are reasonable accommodation and undue hardship; the determination, therefore, of whether or not a specific accommodation is required hinges on the question of whether it is reasonable and whether it imposes an undue hardship on an employer. What the Supreme Court failed to recognise was that employers were not required to make every conceivable accommodation for a disabled individual (and thus bear what was described as a disproportionate societal burden). Rather, the purported obligation referred to the notion of providing “special treatment or facilities ... by doing *all that is reasonable ... to accommodate*”.⁸⁶ The Supreme Court appeared to overlook the “reasonable” term (which is in itself significant in terms of delimiting the extent of the obligation)⁸⁷ when it stated that an employer may have to “bear the cost of *all* special treatment or facilities” which the disabled person may require to carry out the work.⁸⁸ Given that this Bill enjoyed the presumption of constitutionality, the Supreme Court should have expressly demonstrated in what way this abridgement of property rights amounted to an “unjust attack”. Instead, it took too broad an approach to the concept of reasonable accommodation. This over-inclusive approach facilitated an all too easy and unconsidered reconciliation between the concept of “unjust attack” and “reasonable accommodation”.

⁸² *Ibid.* p.368.

⁸³ Hogan and Whyte, *supra* n. 28 p.1071.

⁸⁴ *Central Dublin Development Association v Attorney General* (1975) 109 ILTR 69.

⁸⁵ See *infra* p. 25 on this point.

⁸⁶ Emphasis added.

⁸⁷ On the relationship between the “reasonableness” of an accommodation and the undue hardship defence, see chapter five of this work.

The Court did not consider the fact that the Bill imposed both financial and practical limits on the requirement to make adjustments to the workplace. It did not give due consideration to the terms “reasonable” and “undue hardship” in any accommodation enquiry; specifically, whether these could have protected employers against such “unjust” interferences. On this point, section 35(5) of the Bill sought to identify a number of factors as being relevant to the decision as to whether a reasonable accommodation may give rise to undue hardship. Thus, consideration could be given to the type or nature of the facilities or treatment required; cost; the number of persons who would benefit; the financial circumstances of the employer; any disruption that would be caused by the provision of the treatment or facilities; and the nature of any benefit or detriment which would accrue to any persons likely to be affected by the provision of the treatment or facilities. However, the Court overlooked the role of these factors in its rush to judgment on an “unjust attack” on employers’ property rights.⁸⁹ Rather selectively, the Court focused on one single limb of section 35(5) as support for its argument. Since the financial circumstances of the employer could be taken into account in determining any undue hardship, this would be inappropriate, according to the Court, for it could imply that “an employer would have to disclose his financial circumstances and the problems of his business to an outside party”.⁹⁰ The balancing of rights which takes place here means that the constitutional equality guarantee loses out to the private property guarantee, which seems to include, what Quinn and Quinlivan call, “a corporate right of privacy”. Indeed, as these commentators point out, the reasoning of the Supreme Court on this point is hard to understand given that “private companies are already highly regulated in the amount of financial information they must report to the State on”.⁹¹ Proper consideration was not given to the cumulative strength of section 35 in protecting employers against burdensome and non-effective accommodations. Moreover, in keeping with the theme of this work, the refusal on the part of the Supreme Court to involve employers in the task of barrier removal by way of the reasonable accommodation duty is a judicial endorsement of disability as an individual problem of the person.⁹²

⁸⁸ Emphasis added.

⁸⁹ Would (re)arranging the working hours of an employee with a disability to accommodate intervals of rest or periods of rehabilitation be always such an unjust financial disruption to an employer? The refusal of an accommodation cannot be solely based on the inability or otherwise of the employer to pay, as this approach would give no account of the other factors set out in section 35(4).

⁹⁰ *supra* n.71 p. 368.

⁹¹ G. Quinn and S. Quinlivan, *supra* n.49 at p.19.

⁹² See further, chapters four, five and six.

The Supreme Court went on to state how it would be “impossible to estimate in advance what the likely cost to an employer would be”.⁹³ The Court, rather loosely, referred to “what could be significant costs to employers”.⁹⁴ This is unsatisfactory, particularly when other jurisdictions have researched the projected costs of accommodations to employers. Empirical evidence in the US clearly indicates the inaccuracy of such broad sweeping statements: the Job Accommodation Network, a referral service of the US President’s Committee on Employment of People with Disabilities, regularly surveys employers to establish the costs, savings and benefits of making “reasonable accommodations” in the workplace. The findings from its September 1996 survey indicate that 19% of accommodations cost nothing and 50% cost between \$1 and \$500; only 3% were found to cost more than \$5,000.⁹⁵ No compliance cost research was carried out in Ireland prior to the Bill’s publication. Further, the Supreme Court did not consider the argument that accommodations can result in savings to employers.

The Supreme Court also laid (mistaken) emphasis on the absence of a state funded support scheme and implied that employers would have to bear all cost of the past exclusion of disabled people from working structures. What the Court ignored was the fact that the State already makes significant provisions for measures which *de facto* subsidise current initiatives to accommodate disabled people in employment.⁹⁶ Grants available include the Job Interviewer Grant, the Workplace and Equipment Adaptation Grant (maximum of €6348.70 available towards the cost of adaptations to premises or equipment), the Personal Reader Grant, the Employment Support Scheme and the Employee Retention Grant Scheme.⁹⁷ Neither did the Supreme Court see fit to address the relevance or otherwise of past precedents holding that an absence of compensation does not operate as an absolute indication of an unjust attack on property rights.⁹⁸ As a result, these unsubstantiated conclusions aided judicial protection of, and commitment

⁹³ *Supra* n.71 p.368.

⁹⁴ *Ibid.*

⁹⁵ See US President’s Committee’s Job Accommodation Network site at <http://www.pcepd.gov/pubs/ek96/benefits.html>

⁹⁶ Though this is not to suggest that the existing state funded scheme is an adequate one. As part of the mainstreaming of services for people with disabilities, the Supported Employment Program for People with Disabilities is now under the aegis of FÁS, the national training and employment body.

⁹⁷ For further details of these schemes see www.fas.ie. On the employee retention grant scheme, funding of 90% towards the implementation of a retention strategy for any one employee (up to a maximum of €12,500) is available, as well as €2,500 towards the development of a retention strategy programme.

⁹⁸ See *Daly v Revenue Commissioners* [1995] 3 IR 1.

to, traditional liberal proprietary rights under the cover of “predicted” unjust attacks on individual employers. This conclusion remained at the expense of the many disabled people who continue to legitimately burden the costs of exclusion from mainstream social institutions.

The (non)application of the Proportionality Test

While the text of the Supreme Court judgment indicates the Court’s interest in the interface between Article 43 and Article 40.3.2°, Hogan argues that the case was in effect decided on proportionality grounds.⁹⁹ The mixture of the underlying appeal to proportionality with the relationship between Articles 40.3.2° and 43 resulted in an inconsistent and fundamentally flawed application of neither principle. What this decision demonstrates is that a poorly applied proportionality principle can allow for as much subjective judicial appraisal of competing constitutional rights as was with the position under earlier judicial engagements with the text of the property provisions.¹⁰⁰ As McCrudden has written, “... rationality and proportionality do little to address adequately the intricacies of discrimination ... and leave considerable discretion to judges to address these problems without guidance and too often prey to their personal or professional biases or preferences”.¹⁰¹ Despite the Court’s implicit appeal to (dis)proportionality, nowhere in the judgment is reference made to the proportionality test adopted in *Heaney*, discussed above.¹⁰² Nor did the Court see any use in applying this test to the reconciliation between the competing social objectives of the legislation and the constitutional rights of the parties involved. Indeed, as has already been pointed out, the judgment failed to consider the potential practical application of the disability provisions beyond the floodgate unconstitutional vision presented by the Supreme Court.¹⁰³ This is in stark contrast to the Supreme Court’s treatment of Part V of the

⁹⁹ *Supra* text to n.45.

¹⁰⁰ See G. Hogan, *supra* n.41 on this point.

¹⁰¹ C. McCrudden, “Theorizing European Equality Law and the Role of Mainstreaming” in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law, 2003) 1, p.20. While a properly applied proportionality principle can be an improvement on a “reasonableness” approach, the utility of the former is compromised when the principle is poorly applied.

¹⁰² *Heaney v Ireland* [1994] 3 IR 593.

¹⁰³ On this point, appeals should have been more strongly made to the presumption of constitutionality. A Bill referred to the court under Article 26 enjoys the same presumption of

Planning and Development Bill 1999, discussed above, which was subjected to a more rigorous analysis.¹⁰⁴ The Supreme Court's language here is particularly instructive when compared with that of the judgment under consideration. In the Planning and Development decision, the Court carefully considered the interference with the constitutional right concerned. A thorough reading of the statute allowed it to be satisfied that the scheme "impaired the right as little as possible and [its] effects are proportionate to the objectives sought to be obtained". Section 35(5) of the Employment Equality Bill, which documented limits to the extent of the employer's duty to provide reasonable accommodation, received little to no consideration. The Court felt that the protection of corporate privacy rights was superior to the provision in the Bill which allowed the financial circumstances of an employer to be considered in determining the hardship or otherwise imposed by a requested accommodation in any individual instance. And in any event, as has already been mentioned, the Supreme Court's refusal to consider the other factors relevant to a decision on an accommodation's imposition of undue hardship facilitated its conclusion that the scheme was disproportionate to the objectives to be achieved. This line of reasoning was sustained further by the Court's inaccurate summary of the statute's objectives. The cursory nature of this summary, especially its omission to make clear that the provisions of the Act only apply to disabled applicants or employees who are capable, competent and qualified to do the job¹⁰⁵ and the inaccurate description of the burden imposed on employers, allowed the Court to conclude that its "effects [were] [dis]proportionate to the objectives sought to be obtained".

A final point is the emphasis placed by the Supreme Court on the statute's absence of compensation for the interference with employer's property rights. The general principle, although subject to individual judicial discretion, is that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be compensated at a level equivalent to at least the market value of the acquired property.¹⁰⁶ This principle is subject to the restrictions which the general law (of planning) may impose. It did not prevent the Planning and Development Bill from passing the constitutional hurdle even though compensation was payable at the existing land use level only. The point at which compensation becomes payable is when there is

constitutionality as an act of the Oireachtas: *In Re Offences Against the State (Amendment) Bill* [1940] IR 470.

¹⁰⁴ [2000] 2 IR 321.

¹⁰⁵ See O. Smith, *supra* n.12 pp.167-8, discussed in more detail in chapter five.

¹⁰⁶ *Dreher v Irish Land Commission* [1984] ILRM 94.

a deprivation of a property right. The question is whether an employer, if required to make a reasonable accommodation for an employee/applicant with a disability, is suffering a deprivation and therefore entitled to compensation from the State? If, as a result of making the accommodation, the employee becomes (more) productive, the employer offsets the cost by availing of state sponsored assistance and/or reduces the disabled employees pay¹⁰⁷, the disproportionate interference with the said property right becomes more difficult to detect.

The Subjugation of the Equality Guarantee Continues

As predicted by the Constitution Review Group, the equality guarantee in *Re Article 26 and the Employment Equality Bill 1996* lost out in “the inevitable boundary adjustment between it and other rights”.¹⁰⁸ The Supreme Court judgment contains no treatment of the interplay between Article 43, 40.3.2° and 40.1, thus dispatching the latter provisions to the constitutional fringes once again. Neither was there any real consideration given to the meaning of equality in the context of disability.¹⁰⁹ Drawing on Whyte’s analysis, it is clear, and almost inevitable, that the Court refused to look at the scope of the equality guarantee in “results” terms¹¹⁰. A more expansive understanding of equality in the context of disability would have allowed the Bill to stand. An example of this understanding on the constitutional plane can be seen in the jurisprudence under section 15 of the Canadian Charter of Rights, discussed below. Prior to this, the discussion moves to a consideration of the constitutional treatment of the pioneering disability discrimination model in the US.

The US Constitutional Perspective

The analysis here switches its focus to the United States constitutional tradition. It queries whether established guarantees, such as those protecting private property, or

¹⁰⁷ This reduction of disabled employee’s pay is permitted by virtue of section 35(1) of the Employment Equality Act 1998 which allows an employer to provide a particular rate of remuneration for work of a particular description if, due to the disability, the employee is restricted in her capacity to do the same amount of work (or work the same hours) as a non-disabled person engaged in work of that description. The reduction of a disabled worker’s pay is expressly prohibited by the terms of the ADA.

¹⁰⁸ Report of the Constitution Review Group, *supra* n.25 p. 222.

¹⁰⁹ Contrast this with the more sophisticated understanding of the Canadian Supreme Court, discussed below.

¹¹⁰ G. Whyte, *supra* n. 22 pp.95-96.

other aspects of constitutional doctrine and reasoning, have presented any obstacles to the equality objectives underpinning the ADA.

The fencing in of public power at the constitutional level through the recognition of the limits that private rights place on legitimate government was a primary objective of the framers of the US Constitution.¹¹¹ The aim was to protect a number of core rights from encroachment by democratic legislatures; in other words, to outline a number of areas of private conduct where the State was not permitted to intervene. These rights were delimited and defined by common law baselines securing liberty of contract and property, leading one commentator to summarise that “[t]he Constitution [is] an effort not entirely successful to balance the rights of persons, the rights of property and political rights”.¹¹²

Given the content of this chapter’s discussion it appears somewhat surprising that, as a leading market economy, the US Constitution contains no independent property clause and that the text does not describe property as a fundamental right. Protection is afforded to private property through a combination of the Fifth and Fourteenth Amendments to the federal Constitution. The Fourteenth Amendment famously provides that “no State shall deprive a person of life, liberty or property, without due process in law; nor deny to any person within its jurisdiction the equal protection of the law”. The Fifth Amendment warns “nor shall private property be taken for public use, without just compensation”.

The development of the constitutional norms protecting private property can be seen in the judicial interpretation of the due process clause of the Fourteenth Amendment in conjunction with the Fifth Amendment’s “takings” provision.¹¹³ A

¹¹¹ The framers of the federal constitution were concerned with reducing the power of state governments dominated by popular majorities who tended to enact legislation to promote their own interests over the interests of the nation. See M. Tushnet, “The Politics of Constitutional Law” in D. Kairys (ed.), *The Politics of Law* (New York: Pantheon Books, 1990) pp.220-223.

¹¹² J. Nedelsky, “American constitutionalism and the paradox of private property” in J. Elster and R. Slagstad (eds.) *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 241, 246. See generally J. Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago and London: University of Chicago Press, 1990).

¹¹³ Any regulation of property use, including most regulation of business, presents a “takings” claim that could invite judicial review. This is because the takings clause is not restricted to exercises of the power of eminent domain (i.e. where the state condemns private property and pays the owner its fair market value), but includes the doctrine of regulatory takings developed by the Supreme Court in *Penn. Central Transp. Co. v New York City* 438 U.S. 104 (1978). However, the extent to which government can regulate property without committing a compensable taking is particularly vast and the Supreme Court has so far failed to develop a coherent takings jurisprudence. See J. Nedelsky, *supra*. n.112 pp. 231-240 for a concise account of the judicial destruction of the takings clause. See also G. Alexander, ““Takings” Jurisprudence in the U.S. Supreme Court: The Past Ten Years (1996) 56 *Heidelberg Journal of International Law* 857.

literal interpretation of the Fourteenth Amendment's text¹¹⁴ suggests that the due process clause was meant to have been employed to ensure that no person is deprived of life, liberty or property "except by a suitable *process* - that is, by an appropriate procedure".¹¹⁵ However, the Supreme Court soon began to rely on a substantive interpretation of the due process clause. This clause has been used as an assessment tool for a suitable procedure for the deprivation of rights, and also as a mechanism prohibiting the taking away of these rights altogether.

The Rise of Substantive Due Process¹¹⁶

The high watermark constitutional case in terms of the substantive scope of the due process clause is *Lochner v New York*.¹¹⁷ The case concerned a regulation enacted by the state of New York prohibiting bakers from working their employees more than sixty hours a week. The majority of the Supreme Court declared the statute unconstitutional, holding that the right of contract, which includes the right to buy and sell labour, is part of the liberty protected by the due process clause. While the Court recognised the possibility of the regulation being upheld by the "police power"¹¹⁸, which allowed the government to legislate with the aim of protecting health or morals, the majority refused to assent to the need to protect the health of bakers. Unlike mining,¹¹⁹ for example, baking was not considered a dangerous occupation. The majority view was that this legislation was not an appropriate means of protecting the health of bakers as no sufficient connection between maximum hour legislation and the protection of health

¹¹⁴ See also the remarks of L. Tribe, *American Constitutional Law* (New York, Foundation Press, 1978) at p. 452 in the context of a discussion of the rise and fall of substantive due process: "[t]he notion of mechanically laying statutes beside the constitutional text to see if they fit was properly discredited long ago".

¹¹⁵ Emphasis in original. D.P. Currie, *The Constitution of the United States A Primer for the People* 2nd ed. (Chicago and London: University of Chicago Press, 2000) p.47. Recent decisions tend to equate due process with a procedure that is fundamentally fair. *Ibid.*

¹¹⁶ See generally L. Tribe, *American Constitutional Law* (New York, Foundational Press, 1978) Chapter 8.

¹¹⁷ 198 U.S. 45 (1905)

¹¹⁸ To be valid, a purported exercise of the police power required that the law advance a public purpose; i.e. further health, safety and general welfare. Excluded from this definition was "class" legislation designed to redistribute between groups or to reduce "inequalities of fortune". M. McUsic, "Redistribution and the Takings Clause" in D. Kairys (ed.), *The Politics of Law* (3rd ed.) (New York: Peruses, 1998) p. 617. Demarcation difficulties abound here and the situation is not helped by judicial statements on the reach of the constitutional property guarantee.

¹¹⁹ *Holden v Hardy*, 169 U.S. 366 (1898)

had been shown.¹²⁰ In addition, the state had no interest in protecting workers against economic exploitation or in regulating the liberty protected freedom to negotiate terms of employment contracts. This redistributive attempt to relocate power from capital to labour was not a valid exercise of the police power.¹²¹

The minority justices were prepared to hold that liberty of contract could be subjected to regulations designed to promote the general welfare or to guard the public health, the public morals or the public safety.¹²² The dissenters were satisfied that the legislature had demonstrated a “real and substantial” relationship between the statute and its objectives and looked to factual evidence (including empirical evidence on the effects of excessive working hours and the dangers of baking to the health and safety of workers).¹²³ In a powerfully short dissent, Justice Holmes challenged judicial interference with values commonly held by reasonable people and expressed by the legislature as the people’s representative:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.¹²⁴

What emerges from the *Lochner* is the Supreme Court’s refusal to sanction governmental redistribution of resources in this manner.¹²⁵ The measures “... did not fall within the ‘police power’; the employer had committed no common law wrong, and regulatory power was largely limited to redress of harms recognised at common law”.¹²⁶ Another notable feature of the majority’s reasoning was its careful scrutiny of the legislation in terms of “means-ends” analysis; while the promotion of health was a legitimate governmental goal, the maximum hour law was an inappropriate means of achieving it. The minority were willing to accept the legislature’s assessment of the

¹²⁰ The Court concluded that the statute was the result of “other motives”, which it did not specify. 198 U.S. 45 (1905) p. 64.

¹²¹ See text to n.130.

¹²² See judgment of Justice Harlan (with whom Justices White and Day concurred) citing the Supreme Court in *Jacobson v Massachusetts* 197 U.S. 11 “The liberty secured by the Constitution of the United State to every person within its jurisdiction does not import ... an absolute right in each person to be, at all time and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good”. *Ibid.* p. 40

¹²³ Justice Harlan stating “[n]or can we assume that [the] legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good”. *Ibid.* p. 73.

¹²⁴ *Ibid.* p. 76

¹²⁵ C. R. Sunstein, “Lochner’s Legacy” (1987) 87 *Columbia Law Review* 873, 877.

¹²⁶ *Ibid.*

facts, which demonstrated the necessity of protective legislation as the benchmark from which to assess a state's regulatory power.

The Decline of Lochner

Today, in light of social, economic and political developments, it appears obvious that the maximum hour law would be upheld. The *Lochner* decision was abandoned in 1917,¹²⁷ and the 1937 decision of *West Coast Hotel v Parrish*¹²⁸, where the Court upheld a minimum wage law for women, finally sounded the death knell for *Lochner* reasoning. Whereas in *Lochner* the baseline for decision making was common law neutrality, the *West Coast* decision indicated a rejection of the common law concept of neutrality and a willingness to import a new framework for baseline regulation. The new baseline became a system in which all workers had a living wage.¹²⁹ As Tribe points out, with the onset of the Depression, then World War II, and the economic realities of those times, it could no longer be argued that

... the invisible hand of economics was functioning simultaneously to protect individual rights and produce a social optimum Positive government intervention came to be more widely accepted as essential to economic survival and legal doctrines would have to thus operate from that premise.¹³⁰

Since the *West Coast* decision, the Supreme Court has shown increasing deference to legislative interference in property or other economic interests. It has abandoned the substantive due process approach on which *Lochner* was based, and it has reduced the scope of the contracts clause,¹³¹ and the use of the takings clause.¹³² As Tribe points out, in abandoning *Lochner*, the Supreme Court eventually moved well beyond Justice Harlan's criterion that legislatures need only demonstrate a real or substantial relation between the law and their objectives; "soon [the Court] gave way to

¹²⁷ *Bunting v Oregon*, 243 U.S. 426 (1917).

¹²⁸ 300 U.S. 379 (1937). Here the Court held that "The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage ... casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay ... The community is not bound to provide what is in effect a subsidy for unconscionable employers". At 399.

¹²⁹ C.R. Sunstein, *supra* n.125 pp. 880-881.

¹³⁰ L. Tribe, *supra* n.116 pp.446-447.

¹³¹ Adopted as a limitation on state authority, the contracts clause of Article I s 10 forbids the states to pass laws impairing the obligations of contracts. It was of most significance in the nineteenth century, but as Currie reports, twentieth century decisions have so narrowed its scope that it no longer plays an important role. D.P. Currie, *supra* n.115 p.12

¹³² See *infra* text to n.113.

virtually complete judicial abdication”.¹³³ The police power has been expanded to include and allow economic regulation and redistributive welfare laws. The prevailing test for whether legislation affecting economic interests complies with the due process clause is whether the legislature had a “rational basis” for upholding it.¹³⁴ Substantive due process thus lost its teeth and ushered in an era with little to no judicial interference with governmental regulation, unless a more concrete constitutional provision was involved. As Nedelsky points out, “[a]lthough the Court has not formally abandoned property ... neither property nor its sister concept of contract have in fact been effective means of challenging legislation for many years now”.¹³⁵

Equal Protection of the Laws

The Fourteenth Amendment adopted in 1868 sets out the US constitutional guarantee of equality in the following terms; “[n]o State shall deny to any person within its jurisdiction the equal protection of the laws”. While the amendment is stated to apply only to state action, the Supreme Court has, however, interpreted the federally binding guarantee of due process in the Fifth Amendment as applying the same protection against discrimination as found within the Equal Protection Clause. The legislative history of the clause indicates its specific purpose of prohibiting discrimination on the basis of race with respect to newly emancipated blacks.¹³⁶

Gradually, the Supreme Court moved towards a doctrinal basis for the application of the equal protection clause beyond the race category. With the demise of “substantive due process” in the 1930s, unsuccessful attempts were made to invoke the equal protection clause for the protection of economic and property interests from which the Supreme Court developed the “rational basis” test. The general rule is that

¹³³ L. Tribe, *supra* n.116 p.450.

¹³⁴ While the judiciary rejected substantive due process in the economic sphere it proceeded to apply the same concept in order to apply the guarantees of the first amendment to the states. In so doing, the Court decided that freedom of speech, press, religion and assembly came within the liberty protected by the due process clause, because of their “fundamental” nature. The Court then went even further when it held that First Amendment liberties enjoyed a “preferred” position the result of which meant they enjoyed superior judicial protection than economic liberties. D.P. Currie, *supra* n.115 pp. 51-52.

¹³⁵ J. Nedelsky, *American Constitutionalism and Private Property supra.* n.112 p. 255.

¹³⁶ Specifically to reverse the decision of the infamous Dred Scott decision – *Dred Scott v Sandford* 60 U.S. 393 (1856). See also the *Slaughterhouse* cases where this view was reaffirmed by the Supreme Court describing the provision as “so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.” See generally, W. E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge and London: Harvard University Press, 1988).

legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.¹³⁷ The Supreme Court then adopts various levels of scrutiny for different types of legislation. In keeping with the historical antecedents of the Fourteenth Amendment, all racial classifications are presumed suspect and are subject to a “strict” level of scrutiny.¹³⁸ Economic classifications are required to meet the rationality test and gender classifications, falling somewhere between the two, are accorded intermediate examination.¹³⁹

The ADA’s Constitutional Authority

When passing the ADA, the US Congress set out its constitutional authority in the preamble.¹⁴⁰ The first authority is the power to regulate inter-state commerce under Art.1 (8) (3) of the federal Constitution. In effect, the inter-state commerce clause allows Congress to regulate entities that are not in direct proximity to the federal government but whose activities affect (in one way or another) commerce between the states.¹⁴¹ The primary intention behind the invocation of this power is to enable Congress to ‘catch’ private sector employers of significant size. This clause is traditionally interpreted widely by the courts with the effect that most private entities of any size are simply deemed to affect inter-state commerce by their activities.

Congress next invoked section 5 of the Fourteenth Amendment in the enactment of the ADA. Section 5 gives Congress the power “to enforce, by appropriate legislation, the provisions of this article”.¹⁴² In *Fullilove v Klutznick*¹⁴³ the Supreme Court acknowledged Congress as the ultimate enforcers of the Equal Protection Clause. On the basis of numerous research reports, and following years of hearings, Congress decided that it was necessary to tackle the endemic societal discrimination suffered by

¹³⁷ *City of Cleburne v Cleburne Living Center*, 473 U.S. 432, 440 (1985).

¹³⁸ “[A]ll legal restrictions which challenge the civil rights of a single racial group are immediately suspect”: *Korematsu v United States*, 323 U.S. 214, 216 (1944).

¹³⁹ *Craig v Boren* 429 U.S. 190 (1976).

¹⁴⁰ S. Mikochik, “The Constitution and the Americans with Disabilities Act: Some First Impressions” (1991) 64 *Temple Law Review* 619.

¹⁴¹ See *Gibbons v Ogden* 22 U.S. (9 Wheat) 1 (1824) where it was stated that the power of Congress over interstate commerce is plenary, “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” At 196.

¹⁴² “It is fundamental that in no organ of government [does] there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.” *Fullilove v Klutznick* 448 U.S. 448 (1980) At 483.

¹⁴³ 448 U.S. 448 (1980)

an estimated 43 million Americans with disabilities. The Supreme Court had already ruled that “correctly viewed §5 is a positive grant of legislative power ... to secure the guarantees of the Fourteenth Amendment”.¹⁴⁴ Under that power, Congress is not constrained from enacting “legislation to enforce the Equal Protection Clause unless the judiciary [first] decides ... that [the challenged action] is forbidden by the equal protection clause itself.”¹⁴⁵ As Mikochik summarises, in passing the ADA,

... Congress invoked that remedial authority to address the major areas of discrimination faced day-to day by people with disabilities, by combating those policies and practices which, in form or in effect, served as “built in headwinds” against their full participation in public life.¹⁴⁶

In introducing the ADA, Congress was acting within its section 5 powers because it was endeavouring to ensure that disabled individuals would receive equivalent legislative civil rights protection against discrimination as other groups suffering endemic forms of discrimination and exclusion.¹⁴⁷ Coupled with the additional constitutional authority granted to Congress under the inter-state commerce clause and the strong bipartisan political support for its introduction, the ADA initially enjoyed a strong foothold within the constitutional and political order.

The ADA's Constitutional Difficulties

Recent Supreme Court jurisprudence has begun to erode the constitutional security enjoyed by the federally-driven ADA. Specifically, the US Supreme Court has utilised the Eleventh Amendment's state sovereign immunity clause to the detriment of the anti-discrimination protections of the ADA. As is discussed below, this has left the reasonable accommodation duty open to attack under the Fourteenth Amendment.

¹⁴⁴ *Katzenbach v Morgan* 384 U.S. 641, 651. See also *United States v Guest* 383 U.S. 745 (1966).

¹⁴⁵ *Ibid.* at 648. “[It] is beyond question ... that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing [effects]”; *Fullilove v Klutznick*, 448 U.S. 448, 502 (1980). Though Congress may not exercise this power to “restrict, abrogate or dilute these guarantees”; *Mississippi Univ. for Women v Hogan* 458 U.S. (1982)

¹⁴⁶ S. Mikochik, *supra* n.140 pp.627-628.

¹⁴⁷ A. Mayerson and S. Yee, “The ADA and Models of Equality” Paper presented at International Disability Law and Policy Symposium: From Principles to Practice October 22-26 2000. Available at <http://www.dredf.org/symposium/mayerson.html> .

The state sovereign immunity doctrine guarantees the states immunity from suits taken by private individuals in the federal courts.¹⁴⁸ However, the doctrine is not absolute, as Congress retains the right to abrogate state sovereign immunity in certain circumstances. The abrogation test is twofold: first, Congress must have expressed its intent to abrogate the immunity; second, Congress's actions must be pursuant to a valid exercise of power.¹⁴⁹ On the first element, the ADA is clear and unequivocal: "A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in a Federal or State Court of competent jurisdiction for a violation of this [Act]".¹⁵⁰ As mentioned earlier, the preamble to the ADA took the unusual step of asserting its constitutional authority under the terms of the Fourteenth Amendment and the commerce clause.¹⁵¹ However, a recent body of precedents has clawed back Congress's legislative powers to abrogate the sovereign immunity clause through the commerce clause.¹⁵² As a result, the only way Congress can validly abrogate state sovereign immunity is through a proper exercise of the powers found in section five of the Fourteenth Amendment. This means that Congress can only act to ensure that the goals of the Fourteenth Amendment are fulfilled.¹⁵³ The question, then, with relation to the ADA, is whether Congress's actions were pursuant to a valid exercise of its Fourteenth Amendment powers.

Whether legislation can be deemed unconstitutional because it violates the Fourteenth Amendment's equal protection clause is a question for the judiciary. However, the test for appropriate legislation under section five of the Fourteenth Amendment has moved away from the question of whether the measure simply tends to enforce the Fourteenth Amendment prohibitions. It had now moved towards a "congruence and proportionality test". As set out in *City of Boerne v Flores*¹⁵⁴, the

¹⁴⁸ The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Later the Supreme Court held that the Eleventh Amendment also granted immunity to the states against suits from their own citizens: *Hans v Louisiana*, 134 U.S. 1(1890).

¹⁴⁹ *Seminole Tribe of Florida v Florida*. 517 U.S. 44 (1996).

¹⁵⁰ 42 U.S.C. § 12101(b)(4)

¹⁵¹ The purpose of the Act is in part, "to invoke the sweep of constitutional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."

¹⁵² *Seminole Tribe of Florida v Florida* 517 U.S. 44 (1996)

¹⁵³ This means that Congress has the power to enforce the Amendment which includes the authority to remedy and deter violations of the rights guaranteed there under. However, Congress does not have the power to create new rights, due to the long-settled principle that it rests with the Supreme Court to define the substance of constitutional guarantees. Confirmed in *City of Boerne v Flores* 521 U.S. 507 (1997), 519-524.

¹⁵⁴ *Ibid.*

essence of the “congruence and proportionality” test is that legislation passed by Congress under the Fourteenth Amendment must first identify and provide evidence of a constitutional wrong that is to be remedied or prevented. Second, the appropriateness of the remedial measures must be considered in light of the wrong presented. According to the Court in *Flores*, where legislation is not “congruent and proportional” to the constitutional wrong, the legislation is no longer remedial but substantive, and it oversteps the powers afforded to Congress under section Five.¹⁵⁵ Moreover, where legislation prohibits more constitutional than unconstitutional conduct, it will fail the “congruence and proportionality” test. Broad prophylactic measures can be issued under Congress’s remedial powers. However, in order to justify legislation of this type, Congress must establish a strong evidentiary record of unconstitutional behaviour of the type to be remedied or prevented by the statute in question.

A further complication is the three-tier standard of review, as has already been referred to. Since most laws grant exemptions or benefits for some people while imposing burdens on others, no legislation applies equally to all persons. As noted earlier, the Supreme Court has developed three standards of review according to the classification of the legislation. The problem in the disability context of the “congruence and proportionality test” is the standard of review adopted by the Supreme Court in order to ascertain if state legislation denies groups of citizens the equal protection of the law. The US Supreme Court has ruled that the disabled (specifically “mentally retarded” individuals)¹⁵⁶ do not constitute a suspect or quasi-suspect class. They are denied the benefit (or indeed the hindrance¹⁵⁷) of strict or immediate scrutiny of state legislation or state action. The rational basis review only requires that “there be a legitimate state objective” and that the means adopted are “rationally related to achieving that objective”. Thus, under rational basis review, a state may discriminate¹⁵⁸

¹⁵⁵ *Ibid* pp. 519 – 520.

¹⁵⁶ Following *Cleburne*, see *infra*, lower courts have held that physically disabled people do not constitute a suspect or quasi-suspect class. Therefore, it is safe to assume that all disabled people are subject to the minimum rational basis test in judicial review of legislative regulation or action.

¹⁵⁷ *City of Cleburne, Texas v Cleburne, Inc.* 473 U.S. 432, 439 (1985). The basis of the Court’s decision was that mentally retarded people have a reduced ability to cope with and function in the everyday world, and are thus immutably different from the rest of the population. Thus states have a legitimate interest in regulating the treatment of retarded persons. The Court explained in *Cleburne* that rational scrutiny would provide greater flexibility for lawmakers; “How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps uninformed opinion of the judiciary”.

¹⁵⁸ Which would include a failure to intervene in the phenomenon of discrimination against disabled people.

on the basis of disability without compromising its equal protection duties, at least if the disability classification is rationally related to a legitimate state interest.¹⁵⁹ The implications of this approach are discussed in specific terms below. In particular, I examine how dominant conceptions of rationality can support disability-based discrimination.

The Supreme Court Decision in Garrett

In *Board of Trustees of the University of Alabama v Garrett*,¹⁶⁰ the Supreme Court, by a 5:4 majority, held that the states are not subject to private suits for monetary damages under Title I of the ADA. *Garrett* combined two cases, both involving employees of the state of Alabama. Garrett had been employed as a nurse but following chemotherapy for breast cancer, she was demoted to a lower-paid position in the hospital. Ash, a security officer who suffered from chronic asthma and sleep apnoea, was refused any accommodation for his conditions. Both respondents brought an action under the ADA against the state as their employer.

The issues for consideration before the Supreme Court were as follows:

First, whether Congress had legitimately abrogated the states' sovereign immunity against private suit by sufficiently determining the scope of the constitutional right at issue, i.e. the injury to be prevented.¹⁶¹ And second, whether the remedy adopted by Congress was congruent and proportional to the constitutional violation under Fourteenth Amendment jurisprudence.

Under the two-pronged test required to validly abrogate state sovereign immunity, as outlined above, the ADA clearly satisfied the first element, as it expressly stated that Congress intended to abrogate the terms of the Eleventh Amendment. The second element required that Congress's action be pursuant to a valid exercise of power - in other words, that its action was a proper means of guaranteeing the rights under Fourteenth Amendment. This required the Court to define the injury to be prevented. Specifically, it had to isolate the violation of the Fourteenth Amendment which Title I was designed to remedy, and it then had to ask whether the remedy set out in the ADA against the states was an appropriate use of Congress's power.

¹⁵⁹ See the age discrimination analysis applied in *Kimel v Florida Board of Regents*, 528 U.S. 62 (2000)

¹⁶⁰ 531 U.S. 356 (2001).

With regard to the nature of the constitutional right at issue, the Court cited *Cleburne* for authority that the disabled are a non-suspect class. Hence, the minimum ‘rational basis’ standard of review is used to determine if a law or action invidiously discriminates against them.¹⁶² The minimum ‘rational basis’ review only invalidates laws that *irrationally* discriminate against a certain class of people, and it allows the states to give almost any reason for their actions. Therefore, the distinction between rational and irrational discrimination is critical. Rational (and thereby constitutionally-permissible) discrimination is any discrimination that is related, however minimally, to a legitimate state goal. Past precedents have deferred to broadly-defined legitimate state goals, including administrative efficiency and economic saving.¹⁶³ Under this standard of review, very little discrimination can be termed “irrational”, except in cases of overtly invidious or intentional discrimination. The critical nature of this distinction lies in the fact that many characterise the discrimination endured by disabled people as a non-intentional by-product of institutional structures and unthinking practices, as opposed to deliberate or intentional exclusion.¹⁶⁴ Where this standard becomes pivotal is in the context of the Supreme Court’s treatment of the rights and remedies within the ADA against the states, particularly the rights of individuals to sue for failure to comply with their right to reasonable accommodation. Citing *Cleburne*, the *Garrett* Court opined that “[states] are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.”¹⁶⁵

Having outlined the “metes and bounds of the constitutional right in question”, the Court next examined whether Congress had established a history of unconstitutional employment discrimination by the states against disabled people.¹⁶⁶ This was necessary in order to ensure that Congress’s authority is properly exercised in response to state transgressions of the Fourteenth Amendment. The majority undertook a partial and selective reading of the legislative history, and quickly concluded that such evidence did

¹⁶¹ Congress has the power to eradicate discriminatory practices or to prevent them, but Congress can only act to prevent the violation of rights guaranteed under the Fourteenth Amendment, it does not have the power to create new rights.

¹⁶² *Garrett*, 531 U.S. 356 at 367 relying on *Cleburne*.

¹⁶³ *Supra* text to n.159.

¹⁶⁴ For a rejection of this, see H. Hahn “Equality and the Environment: The Interpretation of ‘Reasonable Accommodations in the Americans with Environmental Adaptations’” (1993) 17 *Journal of Rehab. Administration* 101.

¹⁶⁵ *Garrett*, 531 U.S. 356 at 367.

¹⁶⁶ Justice Breyer, writing for the dissent, compiled a list of over two hundred instances of state discrimination against people with disabilities. 531 U.S. 356 (app.C) Breyer J. The majority dismissed this evidence as merely anecdotal.

not exist. Justice Rehnquist stated that in order to authorize private individuals to recover money damages against the states, there must be a pattern of unconstitutional discrimination by the states which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation.¹⁶⁷ The Court determined that, despite the large record of discrimination against disabled people, Congress did not provide sufficient evidence of a pattern of *state* discrimination.¹⁶⁸ It referred to the wide-spread societal discrimination documented before Congress, but it found no Congressional evidence of specific patterns of state discrimination.¹⁶⁹ Since no such pattern was found to exist, according to the majority, the provision providing for a monetary remedy in Title I of the ADA was not sufficient under section five of the Fourteenth Amendment to abrogate a state's sovereign immunity from damages under the Eleventh Amendment. Since Congress did not accumulate sufficient evidence to show that it was seeking to remedy a constitutional violation, it had overstepped its authority. In essence, what Congress had done was to incorrectly create new rights within the Equal Protection Clause in favour of disabled people.¹⁷⁰

The Court went on to address the hypothesis that, were it possible to squeeze out of the examples presented to the Court a pattern of unconstitutional discrimination by the states, the rights and remedies created by the ADA against the states would "raise ... concerns as to congruence and proportionality".¹⁷¹

Going back to the standard of review granted to disabled people under equal protection jurisprudence, the Court reiterated that it would be entirely rational and, therefore, constitutional, for a state employer to preserve financial resources by hiring employees who are able to use existing facilities, yet the ADA requires employers to "make[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities".¹⁷² On this view, the Fourteenth Amendment does not require states to make special (i.e. reasonable) accommodations for the disabled, so long as their actions towards such individuals are rational. Rational action includes the legitimate state interest in preserving resources, and this is presumed antithetical to an

¹⁶⁷ *Garrett*, 531 U.S. 356 at 374.

¹⁶⁸ Emphasis added.

¹⁶⁹ Chief Justice Rehnquist stated that while Congress made a general finding that discrimination against disabled people is a serious and pervasive social problem and included supporting evidence on this point, however, "the great majority of [this evidence] do not deal with the activities of States". 531 U.S. 356, 369

¹⁷⁰ See *supra* text to n.153.

¹⁷¹ *Garrett*, 531 U.S. at 372

¹⁷² *Ibid* at 372.

employer's duty to employ disabled individuals who may require reasonable accommodations.

In summary, unlike the experience in Ireland, the ADA's constitutional authority was not threatened by property guarantees because Congress ensured its legitimacy under the operation of the commerce clause. However, recent constitutional encroachments have come from the state sovereign immunity clause. In order for Congress to legitimately abrogate the states' sovereign immunity against private suit by individuals, it was imperative that Congress's ADA action was pursuant to a valid exercise of power. In other words, whether or not its act was a proper way of ensuring that rights under the Fourteenth Amendment were guaranteed. Thus, in order to authorize private individuals to recover monetary damages from the states, there must be a pattern of unconstitutional discrimination by the states which violates the Fourteenth Amendment. Then, the remedy imposed by Congress must be congruent and proportional to the targeted violation. In *Garrett*, there was no accepted evidence of state discrimination against disabled people. The majority viewed discrimination consequent upon inaccessible environments and structures as rational and constitutional discrimination on the part of the states. Consequently, the Supreme Court held that Congress's action had overstepped its constitutional authority to enforce equal protection guarantees against the states. The effect of *Garrett* is that state employees and job applicants are left with truncated rights and reduced legal recourse when faced with discrimination by a state employer on the disability ground. However, the *Garrett* decision does not affect the standing of other remedies provided under the ADA and still available to individuals against the states.¹⁷³

Consequently, the *Garrett* decision reiterates the formal nature of equality within the United States Constitution. The guarantee that the states shall not deny persons the equal protection of the law has been deemed incapable of recognising that disabled people may need to be treated differently in order to enjoy an equivalent protection from discrimination as that enjoyed by non-disabled individuals.

¹⁷³ The other available remedies include suit on behalf of an individual in the name of the federal government against the states, and recourse to injunctive relief. Moreover, the decision does not affect the ability to seek relief under the various state disability discrimination laws.

The Constitutional Positions Compared¹⁷⁴

There is considerable scope for comparative comment on the Irish Supreme Court's assessment of the reasonable accommodation provision under the Employment Equality Bill 1996, the maximum hour law rejected by the US Supreme Court in *Lochner*, and the more recent US Supreme Court attack on the constitutional validity of the ADA's reasonable accommodation mandate. The decisions in *Garrett* and *Re Article 26 and the Employment Equality Bill* illustrate how established modes of constitutional tradition and reasoning militate against the recognition of more expansive formulations of equality. They also provide evidence of the difficulties of translating the social experience of disability and expanded norms of discrimination into the idiom of constitutional law.¹⁷⁵

There is a remarkable similarity between *Lochner*-style reasoning of 1905 and the Irish Supreme Court's decision in *Re Article 26 and the Employment Equality Bill*. In light of developments in social, economic and political strategy, it was noted earlier that *Lochner*-style reasoning fell out of favour in the late 1930s. Yet, intriguingly, aspects of that era's reasoning emerge in an Irish decision made over ninety years later. The Irish Supreme Court demonstrated a marked similarity to the *Lochner* majority in terms of its adoption and interpretation of a "means-ends analysis". As in *Lochner*, where the promotion of health was a legitimate governmental goal, the Irish Supreme Court recognised that measures promoting the participation of disabled people in employment were within the legislature's concern for social justice and the common good. However, just as with the maximum hour law, the reasonable accommodation provision was an inappropriate means of achieving it. The majority in *Lochner* reasoned that there were other means of securing or promoting employees' health, without infringing fundamentally on the freedom or liberty to contract. Consequently, the restrictive regulation violated the police power. Similarly, the Irish Supreme Court implicitly held that there were alternative means of achieving the laudable aims underpinning the provisions of the Employment Equality Bill, means that would not interfere with more substantive constitutional rights of employers. In this regard, it

¹⁷⁴ See generally, V. Jackson and M. Tushnet, *Comparative Constitutional Law* (New York: The Foundation Press, 1999). Comparative constitutional law analysis is a particularly complex undertaking, because of differences between constitutional texts, in the social contract on which the constitution of a country is based and differences in countries judiciary's training, tradition and analysis.

seemed to be alluding to the need for a public mechanism to fund accommodation costs which, as was pointed out already, does in fact exist. Essentially, the Irish Supreme Court manipulated the competing rights involved in such a way as to reinforce the status quo: the economic subjugation of disabled people. The competing rights considerations raised by the equality guarantee were never addressed. The Court also ignored the argument that the second sentence of Article 40.1 could constitutionally support reasonable accommodations for disabled people. In light of previous judicial interpretations of Article 40.1, this is not altogether surprising.¹⁷⁶

What is of interesting from a comparative constitutional perspective is that the ADA initially received widespread bi-partisan political support. It received no constitutional scrutiny, such as that faced by the Irish provision. One reason for this is, of course, the obvious differences in the respective constitutional approaches to private property. Decisions interpreting the property clause of the US Constitution's Fifth Amendment have been eroded to the extent that most of the case law is simply concerned with whether the regulation in question raises "public use" and "just compensation" issues. This position, in conjunction with the decline of substantive due process, and the fact that Congress need only demonstrate a rational basis for legislating under the equal protection clause, meant that concern for the property rights of employers was never a threat to the enactment of the ADA. The constitutional basis of the ADA was expressly founded under the commerce clause, and this provides another distinguishing factor.

Of greater constitutional concern to the position of the ADA, however, are the deeply-entrenched issues of constitutional tradition and analysis. This includes Congress's power to enforce and the remedy violations of the Fourteenth Amendment's Equal Protection Clause. The US Supreme Court is no longer solely focused on attacking aspects internal to the ADA's statutory structure.¹⁷⁷ Now, the federal statute's legitimacy has been attacked on the constitutional plane. A number of established constitutional doctrines have been used as paring tools to reduce the reach of the federal statute.¹⁷⁸ For example, Congress was found to have overstepped its regulatory authority by providing monetary remedies for private individuals against the states for disability

¹⁷⁵ P. Brandwein, "Constitutional Doctrine as Paring Tool: The Struggle for "Relevant" Evidence in *University of Alabama v Garrett*" (2001/2002) 35 *University of Michigan Journal of Law Reform* 37.

¹⁷⁶ See discussion *supra*.

¹⁷⁷ Specifically, the definition of a disabled individual and the duty to make reasonable accommodation, discussed in chapters four and five respectively.

¹⁷⁸ P. Brandwein, *supra* n.175 p. 42.

discrimination under the ADA. It was argued that Congress had not demonstrated that the measures adopted in the ADA were taken to remedy unconstitutional acts by the states. As such, it was found that there was insufficient evidence of invidious discrimination by the states against disabled people to warrant the adoption of the remedial measures of the ADA. Therefore, Congress had not sufficiently abrogated state sovereign immunity under the Eleventh Amendment. In short, the reasonable accommodation provision was not considered a proper enforcement of the Fourteenth Amendment against the states.

What is ironic in this comparison is the different arenas in which this clash was played out in the respective jurisdictions. In the US, longstanding, historical products of constitutional reasoning and interpretation have removed the right of individuals to take suit for monetary damages against the states for violations of Title One of the ADA. The states are public bodies, and it is in the public realm that the disability discrimination duties have been pared down. As regards private employers, the ADA does not need to rely for its constitutional validity on the contested nature of equality and the contestable standards of review laid down by the Supreme Court under the Fourteenth Amendment. The reason that reasonable accommodation persists unchallenged by Fourteenth Amendment conceptualisations - of rational and irrational or constitutional and unconstitutional discrimination - is that, in the private sphere, the ADA's constitutional validity is secured under the commerce clause. In this sense, it is ironic that the Irish Supreme Court's concern regarded the impact of reasonable accommodation on the property rights of private employers.

There is further common ground between the approach of the Irish Supreme Court in 1997 and the US Supreme Court in *Garrett*, notwithstanding the non-applicability of the federalist concerns of American constitutional law in an Irish context. The commonality is clear in the attitudes to reasonable accommodation, and in the constructs of disability, negative rights, and formal equality. Article 5 of the Fourteenth Amendment grants Congress power to enforce the equal protection guarantee, the scope of which is determined by the Courts. There is no duty placed on Congress to weed out clearly unequal situations by means of legal regulation. Similarly, the silence of the Irish Constitution allows the Oireachtas to tackle persisting inequalities in Irish society by means of legislation.¹⁷⁹ However, as mentioned earlier, the fact that the Irish Constitution tacitly allows the Oireachtas to take legislative steps to remedy the inequalities faced by marginalized groups does not guarantee the

constitutionality of such measures. This is particularly so given the prevailing judicial view that the principle of equality before the law cannot compete with other, more fundamental rights. Similarly, the US Supreme Court has acted in a similar vein by utilizing the provisions of the equal protection guarantee, in conjunction with established constitutional doctrines, to limit the reasonable accommodation duty. When legislatures work within the confines of formal equality, the odds are stacked against more expansive versions of equality precepts - such as reasonable accommodation - even before competing rights or traditions are factored in. Indeed, the Commission on the Status of People with Disabilities in Ireland had argued, with considerable foresight, that the equality guarantee in the Irish Constitution might prove too weak to support the kind of legislation needed to underpin the equality commitment with regards to disability.¹⁸⁰

Similarly, the Irish Supreme Court demonstrated a remarkably one-sided approach to the competing issues. It referred to the difficulties of estimating the “excessive” costs which would be thrust on employers who were forced to “carry” disabled workers at the expense of their production process. The Supreme Court took a distinctly limiting view of the concept of disability when it refused to sanction the legitimacy of employers’ duties to provide for reasonable accommodation. It recast the burden of societal exclusion and the impact of discrimination back onto the shoulders of disabled individuals. In short, it demonstrated no understanding of the social construction of disability. The Irish and US Supreme Courts held broadly similar views regarding the cost elements of making a reasonable accommodation. Both proceeded on the basis that the provision of a reasonable accommodation involves costs which, from a US perspective, a rational state employer would avoid, and which, from an Irish perspective, would interfere with an employer’s constitutional rights to private property. The costs of disability, in this view, legitimately rest with the individuals themselves.

A Substantive Contrast: A Brief Note on the Canadian Perspective

The formal language and interpretation of the US and Irish equality guarantees can be contrasted with the language of the equality provisions of the Canadian Charter of Rights and Freedoms (hereafter the Charter), which came into effect in 1985.

¹⁷⁹ Though for a discussion on the limitations of this approach, see G. Quinn, *supra* n.38

¹⁸⁰ Submission by the Commission on the Status of People with Disabilities to the Constitution Review Group, cited in G Quinn and S. Quinlivan, *supra* n.49 p.225.

Section 15 of the Canadian Charter reads:

- (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.¹⁸¹

Section 15 must be read in conjunction with section 1, which applies to all of the Charter, and which states that “the Canadian [Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Since the decision of *R v Oakes*¹⁸², the government has borne the onus of establishing whether the limits it imposes on the Charter’s rights and freedoms were reasonable. Thus, the government must establish that (i) the objective behind the impugned legislation or action is of sufficient importance to justify a Charter infringement and (ii) the means chosen to achieve this objective are reasonable and justified. This second requirement involves the application of a proportionality test which includes three parts: (i) is there a rational connection between the objective and the means? (ii) is there minimal impairment of the Charter right? and (iii) does the objective have a proportionate effect?

Section 15’s specific wording shows it to be clearly beyond formal “equality before the law” precepts. Its inclusion of equality “before and under the law” and the “equal protection and equal benefit of the law” have been referred to as the “four equalities”.¹⁸³ Moreover, the reference in section 15(2) to its “object of [ameliorating the] conditions of disadvantaged individuals or groups” endorses a more substantive formulation of equality. However, despite its more expansive wording, there was some initial concern that the scope of the equality guarantee was being defeated through judicial reductionism.¹⁸⁴ In the first Supreme Court decision interpreting section 15,

¹⁸¹ Because of its constitutional nature, this guarantee of equality rights applies to all levels of legislative authority in Canada. Its reach is broad in that it applies to all Canadian law, whether at a federal, provincial or municipal level, including taxation, immigration, education, health care and even human rights protections.

¹⁸² [1986] 1 SCR 103.

¹⁸³ A. Mayerson and S. Yee, *supra* n.147 p.7.

¹⁸⁴ G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ontario: Canadian Advisory Council on the Status of Women, 1989) cited in A. McColgan, *Women Under the Law: The False Promise of Human Rights* (London: Longman, 2000) p.41.

Andrews v Law Society of British Columbia,¹⁸⁵ the Court recognised that section 15 of the Charter protects against the impact as well as the content of discrimination, recognising this as an issue of “fundamental fairness”. In this way, it signalled a move away from the equality-as-sameness argument which has bedevilled formal equality guarantees. The Court held that

S.15 is designed to protect those groups who suffer social, political and legal disadvantage in society ... [and] the burden resting on government to justify the type of discrimination against these groups is appropriately an onerous one.¹⁸⁶

It also moved beyond the US insistence on intentional discrimination¹⁸⁷ through its recognition of indirect discrimination at the constitutional level: “discrimination may be described as a distinction, whether intentional or not ... which has the effect of imposing burdens, obligations or disadvantages on an individual or group not imposed on others or which withholds or limits access to opportunities, benefits and advantages available to others”.¹⁸⁸

The importance of the *Andrews* decision for disability equality rights lies in the Court’s adoption of a contextual, effects-based approach. This approach recognises disadvantage as central to the analysis of discrimination.¹⁸⁹ It exposes the disadvantages produced by public policies or social practices which treat disabled people the same as their non-disabled counterparts in particular contexts, usually resulting in the exclusion of the disabled person. In this sense, Canadian equality jurisprudence has shown itself more capable of absorbing key aspects of the social construction of disability. Section 15 has provided a context in which the discourse and the legal and policy considerations of disability have gradually taken on an equality rights perspective. In *Eaton v Brant County Education Board*¹⁹⁰, which concerned the rights of disabled children to a mainstream education, the Supreme Court began to carve out its understanding of equality in the disability context (despite an unsuccessful outcome on the facts of the case) and stated:

“Exclusion from the mainstream of society results from the construction of a society based solely on mainstream attributes to which the disabled will never be able to gain access. It is the failure to make reasonable accommodation to

¹⁸⁵ [1989] 1 SCR 143.

¹⁸⁶ *Ibid.* p.154.

¹⁸⁷ See *Garrett, supra* n.160.

¹⁸⁸ [1989] 1 SCR 143 p.154.

¹⁸⁹ M. H. Rioux and C.L. Frazee, “The Canadian Framework for Disability Equality Rights” in M. Jones and L.A. Basser Marks (eds.) *Disability, Divers-ability and Legal Change* (Kluwer Law International, 2000) p.171, 172.

¹⁹⁰ [1997] 1 SCR 241.

fine-tune society so that its structures do not prevent the disabled from participation, which results in discrimination against the disabled.¹⁹¹

Thus, the Canadian Supreme Court, unlike its US and Irish counterparts, has begun to recognise how central the notion of accommodation is to understanding equality in the disability context. This understanding was cemented in the decision of *Eldridge v British Columbia*¹⁹², which concerned a claim by deaf patients. They alleged a section 15 violation arising from the failure of the government of British Columbia to provide funding for sign language interpretation on hospital and doctor visits. The Supreme Court began by emphasising the dual purpose of section 15, which is to affirm the equal worth and dignity of all persons, as well as to rectify and prevent discrimination against particular groups.¹⁹³ Justice La Forest started his analysis by considering the historical exclusion of disabled people: it had resulted in exclusion from the labour market, it had reduced opportunities for social interaction and advancement, it had led to invidious stereotyping and a dependence on institutional care. This historical disadvantage had been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that section 15(1) of the Charter demands.¹⁹⁴ Yet the lower courts and Court of Appeal had found no section 15(1) violation, as the need for sign language was not attributable to legislative inaction but to the disability: there was simply no inequality for which the law was answerable. In essence, this was a reversion to the line of reasoning that views disability as an “individual problem of the person”. The inequality was simply a natural result of the impairment. The impact of this analysis, as Pothier points out, is that as long as the state did not directly cause the disability, it was free to deliver services on an exclusively able-bodied model, and could ignore the disparate impact on those not fitting the model.¹⁹⁵

The Supreme Court, in rejecting the lower courts’ approach, analysed the case as a classic example of adverse effects discrimination, or indirect discrimination. The same services were available to all individuals but while hearing individuals were able to communicate with their healthcare professionals, deaf patients were denied effective communication in the absence of sign language interpretation. Thus, La Forest J.

¹⁹¹ *Ibid.*

¹⁹² [1997] 2 SCR 624. For a useful review which urges caution on the extent of the judgment’s impact for disability equality rights, see D. Pothier, “*Eldridge v British Columbia (Attorney General)*: How the Deaf Were Heard in the Supreme Court of Canada” (1997-1998) 9 *National Journal of Constitutional Law* 263.

¹⁹³ *Eldridge*, at pp. 207-208.

¹⁹⁴ *Ibid.* p.209.

continued, “[section 15(1)] makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effects discrimination ... the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.”¹⁹⁶ The Court further held that section 1 did not allow this violation of section 15, despite the delicate balance in terms of healthcare spend within the province that was created by legislative decisions. This was because the Government could not establish that the total denial of interpretation services for the deaf constituted a minimal impairment of their rights.¹⁹⁷ “The Government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures”.¹⁹⁸ The significance of the *Eldridge* decision is that when government is delivering a universal programme, it cannot provide services to the general population in a manner that denies persons with disabilities the equal benefit of such a programme. Thus, while the Government has to this extent a positive obligation towards disabled people, the Charter has never been used as a tool to force the state to promote the equality rights of disabled individuals generally.¹⁹⁹

The discussion in this chapter has focused on the failure of the US and Irish Supreme Courts to conceptualise constitutional equality guarantees to take account of the specific difference of disability. It contrasted this state of affairs with the more developed analysis emerging under the Canadian Charter. However, the analysis should not be taken to mean that the Canadian interpretation and its application of accommodation mandates is without problems. Chapter six takes up this discussion and will more critically assess the Canadian understanding of reasonable accommodation. The issue which will be raised relates to the assumption underpinning accommodation mandates: accommodation demands, it is argued, an ad-hoc rebuilding of mainstream structures to include a greater proportion of disabled people. Thus, the approach does not suggest a fundamental rethink of the mainstream norm - rather, the mainstream norm is the “unproblematic background” as opposed to an “institutional arrangement as

¹⁹⁵ D. Pothier, *supra* n. 192 p.268.

¹⁹⁶ *Eldridge*, p.224. The Court went on to point out that sign language interpretation would not have to be provided in every medical situation. The effective communication standard is a flexible one and will have to take into account such factors as the complexity and importance of the information to be communicated, the context, the number of people involved.

¹⁹⁷ Applying the test set out in *R v Oates*, discussed above.

¹⁹⁸ *Eldridge*, *supra* n. 192 p.231

¹⁹⁹ As to whether the Government could be subject to a section 15 challenge for a failure to act, McColgan points out that the Canadian Supreme Court would be likely to follow the Ontario

[the] conceivable source of the problem”.²⁰⁰ Leaving the substance of that discussion to chapter six, it can still be acknowledged here that the Canadian approach to disability equality represents a significant advancement in constitutional equality jurisprudence, particularly when compared with the approaches in the US and Ireland. The Canadian jurisprudence has challenged notions of disability as an individual deficit and has moved towards an understanding of disability in terms of social status. In this respect, it stands in marked contrast to the US and Irish experiences. In the context of disability, these jurisdictions’ Supreme Courts failed to adequately interpret their constitutional equality guarantees in support of accommodation mandates. Because of this failure, their analysis amounted to a significant judicial endorsement of the inferior status and exclusion of disabled people.

Disability Rights and The Limits of Constitutionalism

The eminent Mr Justice Brian Walsh wrote that the Irish Constitution

“is not simply a composition of exhortations or aspirations which it is hoped will be followed. It is the basic law which distributes powers and imposes obligations and guarantees rights ...”.²⁰¹

Constitutionalism represents a particular genus of basic law, and it can incorporate a particular and limiting theory of law in western liberal democracies such as the United States and Ireland. It is generally recognised that constitutions regulate relations between the individual and the State, as envisaged by the social contract theory. Thus, the rights and obligations guaranteed and imposed by the Constitution are those between the individual and the State. Of course, it would be churlish not to acknowledge that the rights frameworks of the respective texts have provided protection to citizens against the tyranny posed by state power. Moreover, the Irish judiciary has already interpreted many of the fundamental rights provisions within the Constitution as being capable of “horizontal” application.²⁰² However, this has not been the case with the equality

Divisional Court in *Ferrell v Attorney General of Ontario* 149 DLR (4th) 335. See A. McColgan, *Women Under the Law: The False Promise of Human Rights* (London: Longman, 2000) p.56.

²⁰⁰ This is the language of Martha Minow, *Making All the Difference, Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) p.112, cited in D. Pothier, *supra* n.192 p.271.

²⁰¹ See Foreword to J. Casey, *Constitutional Law in Ireland* (Dublin: Roundhall Sweet and Maxwell, 1987) p.vii written by Mr Justice Brian Walsh.

²⁰² S. Mullally, “The Myth of Constitutionalism and the “Neutral” State” in T. Murphy and P. Twomey (eds.) *Ireland’s Evolving Constitution 1937-1997 Collected Essays* (Oxford: Hart Publishing, 1998) 147 pp. 151-152 and text to n.34.

guarantee which, in the absence of specific protective legislation, would be of no assistance to a disabled job applicant discriminated against by an employer in a “private” decision.

However, the Supreme Court’s judgment trumped employers’ private property rights and their rights to carry on a business at the expense of minimum forms of non-discrimination rights for disabled people. The negative consequences of this liberty-enhancing view of private property are rarely, as Robertson points out, brought to the fore:

[L]iberals find it hard to see that private property can be a source of oppressive power even more dangerous to individual freedom than the state. Because private property is categorised by them as belonging in the realm where freedom is safeguarded, liberals find it hard to fully absorb the way property can give owners great power to restrict the freedom of others. The second effect is that liberals find it hard to appreciate fully the public aspects of private property. Because property is categorised by them as belonging in the private zone, they find it hard to acknowledge the large range of ways in which it has a public dimension.²⁰³

This is a clear example of “Irish constitutional law and practice [having] failed adequately to address the tensions between the constitutional values of liberty and equality”.²⁰⁴ Liberal theory generally assumes that non-intervention by the State in private matters expands and protects individual autonomy. However, in this context, it has simply preserved the exclusionary status quo. It has substituted private for public power.²⁰⁵ Disabled people’s claims to equality rights, by the Irish Supreme Court’s reasoning, have been naturally excluded from the statutory anti-discrimination regime by dominant and “neutral” constitutional precepts, values and traditions. There was no room to consider the lack of neutrality implicit in their exclusion from the structural organisation of work, which the limited provisions of the Employment Equality Bill had attempted to redress.

Why the Irish Constitution failed to deliver in this instance is partly because of the judiciary’s refusal to rank the constitutional equality norm on which the legislation was predicated. The disadvantages associated with the Article 26 procedure did not aid the reasoning process.²⁰⁶ There have been numerous calls for rethinking the place of the

²⁰³ M. Robertson, “Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property” in J. MacLean, (ed.) *Property and the Constitution* (Oxford and Portland, Oregon: Hart Publishing, 1999) p. 239, 242.

²⁰⁴ S. Mullally, *supra* n.202 p. 162.

²⁰⁵ *Ibid.*

²⁰⁶ The constitutional fate of this Bill was intertwined with the flaws of the Article 26 procedure itself. The arguments were abstract in character precisely because there was no consideration of

equality guarantee within Irish constitutional jurisprudence. The nature of this rethink would require some form of resolution with dominant conceptions of liberty and more substantive rights. Yet, the Constitution Review Group argued against the extension of the equality guarantee on the ground, *inter alia*, that it would constitute an “unjustified intrusion” upon other fundamental rights.²⁰⁷

Additionally, what has emerged from the United States Supreme Court’s decision in *Board of Trustees of the University of Alabama v Garrett*²⁰⁸ is the clear constitutional obstacle²⁰⁹ to the proper recognition of the social construction of disability within current civil rights protection. This decision, like the Irish Supreme Court decision, was predicated upon a particular and limiting conceptualisation of disability. The contested nature of the “reasonable accommodation” provision as an element of the equality concept becomes more than a matter of academic interest or a mere legislative quibble. It has clashed with (and floundered before) established components of US constitutional law, much as the Irish provision faced a brick wall in the property guarantees raised by the Irish constitutional text. When the reasonable accommodation mandate struggles for recognition the shadows of the “discourse of legitimacy [enjoyed by] constitutional law”,²¹⁰ judicial control of our legal understanding of disability and disability rights will usurp any legislative attempts to capture the social-political aspects of disability.²¹¹ No matter how limited the right to reasonable accommodation may be, it remains the only acknowledgment of the socio-political factors of disability within the anti-discrimination framework which, in all other aspects, adheres to the medical, “personal limitation” construct. There are great difficulties facing the disability equality agenda where dominant modes of judicial reasoning interpret anti-discrimination measures in terms of the medical or economic model of disability. It is difficult enough to alter dominant constructs of disability where disability discrimination remains contested at statutory level, as was the case in the US prior to the *Garrett* decision. These difficulties are compounded when traditional modes of constitutional thinking thicken the mix. Constitutional tests utilized by the US Supreme Court, such as the

any actual competing claims between a disabled applicant seeking reasonable accommodation and an employer claiming undue hardship and unjust attack on property rights. This allowed for the fictional vision of floodgate type expenses being thrust on employers forced to heavily accommodate severely impaired workers.

²⁰⁷ S. Mullally, *supra* n.202 p.162.

²⁰⁸ *Supra* text to n.160.

²⁰⁹ See generally chapters four and five.

²¹⁰ P. Brandwein, *supra* n.175 p.38.

“congruent and proportionality” test, did not allow for the particular view of reasonable accommodation in considering whether the remedies in the ADA were proportional to the injury to be prevented. The dominant view was that reasonable accommodation is a special right granted to people with impairments in order for them to participate in mainstream society.²¹² When viewed as “special”, the Supreme Court interpretation maintains the locus of the problem in the individual’s medical or personal deficiencies. Special intervention is required because of a disabled person’s impairments, and not because they are individuals disadvantaged by the built and social environment. The restructuring of job requirements is only viewed as “special” if one perceives the usual way of doing tasks as the natural way. “Yet if one recognizes that such requirements are often structured to exclude people with disabilities – and, therefore, the expectation of adaptation is shifted from the individual to the structured environment, then the lack of such accommodation is not inherently rational.”²¹³ As a result, if the Supreme Court viewed the ADA’s terms through the lens of the social model, there would have been space for the view of reasonable accommodation not as “special accommodations” but as proper steps needed to remedy violations of the equality clause.²¹⁴

In Ireland, the view that the Constitution remains a barrier to the introduction of proper means of ensuring the inclusion and participation of disabled people across society is widespread, and possible amendments to the property provisions of the Constitution have been mooted. The Labour Party proposed a constitutional amendment in order to “give constitutional effect to a broader interpretation of the rights of persons with disabilities”.²¹⁵ It proposed a constitutional provision reading, *inter alia*,

“... the State may impose an obligation on some or all sections of the community to take reasonable steps to accommodate the needs of persons with a ... disability, notwithstanding that the provision for that purpose of appropriate treatment or facilities may give rise to a cost”.²¹⁶

²¹¹ See the contradiction between this approach taken by the judiciary and the more proper judicial restraint admonished by the Supreme Court in *Cleburne*. See specifically, text to n.157 *supra*.

²¹² See chapters five and six for a rejection of this view of reasonable accommodation.

²¹³ J. Lav, “Conceptualizations of Disability and the Constitutionality of Remedial Schemes under the Americans with Disabilities Act” (2002) 34 *Columbia Human Rights Law Review* 197 pp.226-227.

²¹⁴ *Ibid.* Such an interpretation is clearly possible since even the Supreme Court concluded that, under rational basis review, segregating people with disabilities could be a violation of equal protection. See *Cleburne*, *supra* n.137.

²¹⁵ The Labour Party, *Yours by Right: proposals for achieving equal citizenship for people with disabilities 2001-2004* (2001) p.7.

²¹⁶ *Ibid.*

That said, there is the alternative view that a constitutional amendment would be unnecessary to reverse the specific ruling in the Employment Equality Bill decision. Instead, “[w]hat is needed is a much more sophisticated balancing of the competing interests at stake”.²¹⁷ While unnecessary in the present context due to the State’s membership of the European Union, the sophisticated balancing required in the disability context generally might be a somewhat forlorn ambition in light of the politics pursued by the Supreme Court.²¹⁸

The judiciary’s fundamental misunderstanding of the concepts of reasonable accommodation and the social construction of disability contributed greatly to the Irish decision’s outcome. Notwithstanding these factors, a revised and watered-down version of the duty was inserted into the Employment Equality Act 1998. This was amended by the terms of the Equality Act 2004, which implemented the terms of the Framework Equal Treatment Directive and was introduced as a consequence of the State’s membership of the European Union.²¹⁹ The next chapter switches focus to an issue internal to the discrimination legislation’s structure – that of defining those who are entitled to its protection.

²¹⁷ G. Quinn, *The Irish Times* May 19, 1997.

²¹⁸ *Sinnott v Minister for Education* [2001] I.E.S.C. 39

²¹⁹ By virtue of doctrine of supremacy of EU law. See Article 29.4.3^o–8^o of the Constitution and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, discussed in chapter five.

Chapter Four

The Definitional Quandary: The Meaning of “Disability” and its Place within The Anti-Discrimination Model

Introduction

Chapter one considered how the legal system’s main experience with disability reflects the medical model which underpins social security legislation. The basis of this approach is compensatory: medical science delineates those ‘truly disabled’ individuals who are unable to work and the state compensates them, while a guard is simultaneously provided against fraudulent attempts at claiming disability. However, the focus of anti-discrimination legislation in the employment context has warranted a shift away from the presumptive attitudes engendered by this view of disability.

As has been described in chapter one, advocates of the social model of disability reject the medical model, which defines disability as deviations from bio-medical norms of human structure or function that exist in individuals because of disease, illness or accident. The social model stresses the role of external barriers, rather than organic deficiencies, in its account of the pervasive social exclusion endured by the disabled. While this thesis need not dedicate itself to a review of the diverse strands of social model theory, it utilises the general perspective of the theory as a tool to highlight difficulties with the anti-discrimination model’s approach to demarcation. However, mainstream opinion continues to consider that disability and impairment are synonymous, both in form and in outcome. This position derives from the commonly-held view that disability amounts to a functional limitation which disables the individual in personal or social activities. For most people, it is the impairment which *causes* the various limitations and barriers faced by disabled people.

The idea underpinning the disability equality norms is that a large proportion of disabled people could participate in employment but are excluded through a combination of stereotypical attitudes about their capabilities and rigid aspects of the built and structural environment which disproportionately impact upon the disabled as a group. Unlike in the more familiar anti-discrimination statutes, it may not be immediately obvious in the disability context that a particular individual possess the “discrimination-prompting attribute”.¹ Making this distinction, in light of the purpose

¹ M. Crossley, “The Disability Kaleidoscope” (1999) 74 *Notre Dame Law Review* 621, 625.

of anti-discrimination law, brings into focus the fact that the boundaries of the disability category are complex and cannot easily be reduced to clinical criteria. Thus, the question of who exactly is disabled is an active battleground in political and theoretical discourse.²

This chapter documents and analyses the two approaches to disability definition that have been taken under the United States' Americans with Disabilities Act (ADA) and Ireland's Employment Equality Act (EEA). In the main, disability discrimination statutes define disability in terms of personal and organic deficit. The models tend to come in two main formats: a functional model that focuses on the severity of the impairment as a disqualification or barrier to activities and employment; and an impairment model that focuses on the existence of some organic impairment.³ At their core, both models are predicated on a conceptualisation of disability as inherent and problematic to the person, though they retain some differences with regard to the practical extent of the respective statutes' protections. Despite the disability movement's concern over the EEA's impairment-based definition, this chapter concludes that this definition is preferable, as it presents fewer barriers to the operation of the non-discrimination system.

Defining Disability: The Issues

In discussing who the legislation was designed to cover, it is a useful starting point to ask which individuals would need to be protected to achieve the goals of anti-discrimination legislation in the employment context.⁴ While this raises broader issues regarding the nature and possible achievement of the goals of an anti-discrimination legal measure, this section addresses this question in the context of the introduction of specific disability discrimination protection in the United States' ADA. It is clear that the legislative construction of disability is of consequence from a number of perspectives. First, the most essential point is that in order to be protected by disability non-discrimination legislation, a person must satisfy the definition of disability set out in the Act. Secondly, and somewhat related, is that any definition adopted in statutory

² See generally J. E. Bickenbach, *Physical Disability and Social Policy* (Toronto, Buffalo: University of Toronto Press, 1993) for a useful discussion on the medical, economic and minority group models of disability.

³ D.C. Baynton, "Bodies and Environments: The Cultural Construction of Disability" in P.D. Blanck (ed.) *Employment, Disability and the Americans with Disabilities Act: Issues in Law, Public Policy and Research* (Evanston, Illinois, Northwestern University Press, 2000) 387, 392.

⁴ See the purpose section of the ADA, discussed in chapter one.

form becomes a statement, both to the disability movement and to society in general, of the law's construction of the disabled individual and the disability generally. It provides an indication as to whether revised understandings of disability - prompted by the social model - are now permeating equality constructions.⁵

There is little ambiguity about the overall objectives which non-discrimination precepts seek to achieve with respect to disabled people. The ADA does not articulate its goals narrowly: it articulates a broad-based rationale for the legislation's introduction. The preamble states that "[t]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals".⁶ Its primary purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities".⁷ Considering such ambitious and wide-ranging objectives, it is surprising that persons whom one would expect to be included within the protection of the ADA have been excluded through a sustained campaign of judicial reductionism.⁸ The question is raised: what kind of individuals does the statute set out to protect, and how has its ultimate interpretation responded to its initial ambitions?

The first point regarding the threshold issue is that there is an immediate distinction between the operation of the non-discrimination regime in the context of disability as compared with the sex discrimination system. In the latter, there is never a discussion around the individual's 'protected class' status, as sex discrimination affords protection from discrimination symmetrically to both sexes. This can be contrasted with the protected class approach prevalent in disability discrimination statutes, which provide asymmetrical protection against discrimination to those deemed disabled. Consequently, non-disabled individuals do not fall within the protected class and are not entitled to statutory protection.⁹ However, due to the specific definition of disability under the ADA, many plaintiffs expend considerable time, money and energy on proving that the type and impact of their impairments are sufficient to qualify as a disability within the meaning of the statute. The irony is that having placed considerable emphasis on the medical and functional impacts of impairment, applicants are then

⁵ See O. Smith, "Disability, Discrimination and Employment: A Never -ending Legal Story" (2001) 23 *Dublin University Law Journal* 148, 163.

⁶ 42 U.S.C. § 12101 (a)(8).

⁷ In its long title, Ireland's Employment Equality Act describes it as "an act to make further provision for the promotion of equality between employed persons"; thus, articulating its goals less ambitiously and with less aplomb.

⁸ Discussed below.

forced to prove that the impairment is not so serious as to prevent them doing the job.¹⁰ As Burgdorf argues, “proving that one is disabled is the direct antithesis of the goals underlying the non-discrimination mandates of the ADA ...”.¹¹ He bemoans the pattern of restrictive judicial interpretations under the ADA, where many cases are dismissed at summary judgment solely by a process of looking at the characteristics of the plaintiffs.¹² In cases of summary dismissal, the court never gets to consider whether the plaintiff could have performed the job in question with or without a reasonable accommodation or, if an accommodation was necessary, whether it was reasonable to expect its provision within the terms of the Act. It has become clear that a particular perspective on the nature of disability, and on who should be considered disabled for the purposes of the ADA, has permeated the ADA jurisprudence. It correlates closely with the traditional approach underpinning social security protection, which is concerned with assessing needs-based claims and minimising fraudulent claims. The purposes of anti-discrimination law are different,¹³ yet remain conflated with the reductionism of the social security system.¹⁴

In the employment context, the ADA addressed the goal of improving the status of people with disabilities by including the “General Rule” that “no covered entity shall discriminate against a qualified individual with a disability because of the disability”.¹⁵ This encompasses three requirements which are placed on employers. First, there is the prohibition of simple or direct discrimination, which forbids employers from discriminating against individuals with disabilities on the basis of their disability. The second requirement involves a protection against what is termed disparate-impact discrimination¹⁶ or, in European terms, indirect discrimination. The third requirement

⁹ See section 35(3) of the EEA as amended.

¹⁰ R.L. Burgdorf Jr., “‘Substantially Limited’ Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability” (1997) 42 *Villanova Law Review* 409, 571.

¹¹ *Ibid.*

¹² *Ibid.* p. 561. See also “Study Finds Employers Win most ADA Title I Judicial and Administrative Complaints” (1998) 22 *Mental & Physical Disability L. Rep.* 403.

¹³ The issue is not one of delineating complete inability to work due to the impact of functional impairment, but rather the presence of an impairment which disproportionately impacts upon an individual’s opportunity by prompting discriminatory treatment.

¹⁴ See generally, L. Waddington and M. Diller, “Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law” Paper presented at An International Disability Law and Policy Symposium, *From Principles to Practice* October 22-26 2000 available at: <<http://www.dredf.org/symposium/waddington.html>> last accessed November 04, 2002.

¹⁵ 42 USC s. 12101(b)(1).

¹⁶ 42 USC s. 42 2000e-2(a).

demands that an employer make a reasonable accommodation for a qualified individual with a disability.¹⁷ As chapter two pointed out, Ireland's EEA follows a broadly similar template. Yet, as Friedland argues, writing in the US context, these goals pull in different directions. She suggests that the definition of disability is open to constriction if the legislature is simply concerned with meeting the economic goals of the legislation.¹⁸ If the aim of the legislation was simply to eliminate dependence on government-funded welfare and to ameliorate the situation of persons previously unable to work, then a narrow definition of disability, such as "a total inability to work" as is adopted under social security regulations, would have been appropriate. A possible formulation would have been a "total inability" - in the absence of accommodation - to work.¹⁹ However, where the stated statutory goals refer to the integration and mainstream participation of disabled people in social life, then the tenet of "equality of opportunity"²⁰ implies that the legislation must have intended to remove existing barriers to the continued and productive employment of a wider range of disabled people. However, the statute intended to tackle attitudinal, physical and environmental obstructions to the use or development of disabled people's skills. The task of the statutory drafters was to formulate a definition of disability encompassing both goals. Thus, whatever definitional route is taken, complainants must still work with the statutory definition assigned to the term "disability".²¹ It is with the construction of the assigned definition that this chapter is ultimately concerned.

At this point, an even greater divergence takes place between the definitions of disability under the ADA and Ireland's EEA. The ADA's approach focuses on the severity of impairments in functional terms and their impact on certain personal and societal activities. On the other hand, the Irish definition provides something akin to a list of impairments in quasi-medical terms.

The Meaning, Effect and Impact of the Disability Definition under the ADA

¹⁷ 42 USC s 12112(b)(5)(A) discussed in chapter five.

¹⁸ See M.T. Friedland, "Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability" (1999) 52 *Stanford Law Review* 171, 189.

¹⁹ *Ibid.*

²⁰ 42 USC s 12101.

²¹ *Ibid.*

The Confusion Starts Here: Defining Disability under the Rehabilitation Act

Despite being generally termed as the predecessor to the ADA, the Rehabilitation Act 1973 is significantly different in its scope and application. It can best be described as a general vocational rehabilitation statute. Almost as an addendum, however, it included an innovative initiative into the rights sphere for disabled people.²²

The Act requires departments and agencies in the executive branch of the federal government to submit an affirmative action plan for the hiring, placement and advancement of people with disabilities.²³ In addition, its reach extends to federal contracts by providing that contracts in excess of \$2,500 must contain a provision requiring the contractor to take affirmative action to employ and advance the situation of people with disabilities.²⁴ Section 504 goes on to outline a general non-discrimination aim. It appears that section 504 was modelled on almost identical provisions in Title VI of the Civil Rights Act 1964²⁵ and Title IX of the Education Amendments of 1972.²⁶ The Congressional Committees involved borrowed this language without giving much thought to what anti-discrimination protection based on disability would mean in practice.²⁷ The original text to s. 504 provided

“no otherwise qualified *handicapped*²⁸ individual in the United States ... shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance”

Discussions on the suitability or otherwise of the definition of “handicap” (disability) for the purposes of the Rehabilitation Act took place during the drafting of regulations

²² See R. K. Scotch, *From Goodwill to Civil Rights: Transforming Federal Disability Policy* (1984) pp.51-54 and C. Feldblum, “Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About it?” (2000) 21 *Berkeley Journal of Employment and Labor Law* 91, pp. 98-102 and also L. Eichhorn, “Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990” (1999) 77 *North Carolina Law Review* 1405, 1420.

²³ s. 501.

²⁴ s. 503.

²⁵ Title VI prohibits discrimination based on race in any program or activity receiving federal financial assistance.

²⁶ Title IX prohibits discrimination based on sex in any educational program or activity receiving federal financial assistance.

²⁷ R. Scotch, *supra* n.22 pp.51-54. The regulatory framework envisioned to support the legislation was to be developed over the following four years facilitated Congressional laxity in this regard. At 60-81.

²⁸ Handicapped was the term still used at this time and was replaced with the term disability upon the ADA’s introduction.

for sections 501, 503 and 504. The pressing question was whether the definition used in a vocational rehabilitation statute was appropriate in its application to the non-discrimination provisions of section 504. Problems were swiftly identified with the definition of a handicapped individual as “any individual who

- (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and
- (B) can reasonably be expected to benefit in terms of employability from vocational services”.

This definition, which could be reasonably apposite for the purposes of determining participation in vocational rehabilitation programs, was patently unsuitable to disability discrimination protection under civil rights statutes.²⁹ Specifically, the definition failed to include the possible discrimination directed at persons with a mental or physical disability that does not result in “substantial handicap to employment” or the discrimination endured by disabled persons who would not be beneficiaries of vocational rehabilitation services.³⁰ Shortly thereafter, the Rehabilitation Act Amendments of 1974 were introduced.³¹ The amending instrument did not alter the existing definition of “handicapped individual”, preferring to add a new definition for Titles IV and V of the Act. Thus, for the purposes of these Titles, which includes sections 501, 503 and 504, the term “handicapped individual” means any person who

- (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities,
- (ii) has a record of such an impairment, or
- (iii) is regarded as having such an impairment.³²

This three-pronged definition of disability (handicap) was extended to the ADA and its restrictive judicial interpretation has prompted increasing dissatisfaction with the ADA’s operation.

Definition of Disability: The ADA

Ignoring alternative proposals, the ADA’s drafters borrowed the definition of disability from the Rehabilitation Act 1973.³³ The thinking behind this was that the federal

²⁹ C. Feldblum, “Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About it?” (2000) 21 *Berkeley Journal of Employment and Labor Law* 91, 100.

³⁰ *Ibid.*

³¹ See Report of the Senate Labor and Public Welfare Committee, S.R. No. 93-1297, 93rd Congr., 2nd Sess., for discussion and Feldblum, *ibid.* pp. 102- 106.

judiciary would have the benefit of the body of precedents applying the definition for the previous fifteen years.³⁴ Congress had no reason to be concerned about a possible reduction in the ADA's coverage through the definition of disability because the courts had, for the most part, read the definition in a broad and all-encompassing manner. Apart from a couple of isolated decisions,³⁵ whose precedential value provided foundation for the courts' subsequent turn-around under the ADA, the courts rarely analysed under the the Rehabilitation Act whether the plaintiff was indeed a disabled individual. Thus, the disability lobby remained confident that the same persons, with the wide range of impairments covered under existing disability anti-discrimination legislation, would be protected under the ADA. However, this confidence was shattered in the 1990s when the federal judiciary changed course and began to parse thoroughly both the definition of disability and the impairments of plaintiffs, excluding all those who did not accord with its particular view of a "truly disabled" claimant.

The text of the definition is considered below, followed by a discussion of the implications of its judicial interpretation and application.

The Three-Pronged Definition of Disability under the ADA

The first prong defines an individual with a disability as a person with any physical or mental impairment which "substantially limits" one or more of "the major life activities". The second prong includes any individual with "a record of such an impairment". The third prong includes within the meaning of the term an individual who is "regarded as having such an impairment".³⁶

As is the case with many regulatory definitions, one definition begets several more.³⁷ Accompanying this somewhat sparse statutory text, therefore, is a bewilderingly array of material, including a rich legislative history, regulations, interpretive guidance

³² Codified as amended at 29 U.S.C. § 706(8) (1998).

³³ Set out in s.3 ADA, 1990. For an excellent account of the history and debates surrounding the definition of disability proposed for the ADA, see generally C. Feldblum, *supra* n. 29 and R.L. Burgdorf, *Disability Discrimination in Employment Law* (Washington: Bureau of National Affairs; 1995), chapter 4.

³⁴ In addition, it was felt that it would be easier to muster political support for a definition of disability with fifteen years experience, rather than attempt to convince Congress to adopt a new, untested definition. C. Feldblum, *supra*.n. 29 p.128.

³⁵ *Forrissi v Bowen* 794 F.2d 931, A AD Cases 921 (4th Cir. 1986) and *E.E. Black Ltd. v Marshall* 497 F. Supp. 1088, 1 AD Cases 220 (D.Haw. 1980).

³⁶ Section 3(2)(a)-(c) ADA.

³⁷ S. Locke, "The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans with Disabilities Act" (1997) 68 *University of Colorado Law Review* 107, 110.

and many advisory memoranda, the most prolific author of these being the United States Equal Employment Opportunity Commission (hereafter the EEOC).³⁸ The legislative history of section 504 of the Rehabilitation Act 1973 indicates that the three-pronged definition was designed to address different types of disability discrimination. The first prong was designed to address direct discrimination based on actual disability, and to provide a definition to facilitate the statute's disability-based affirmative action requirements.³⁹ The remaining two prongs were designed to address discrimination stemming from classifications of disability and perceptions regarding disabilities. However, all three are compromised by the limiting nature of the terms "major life activities" and "substantial limitations": these terms place massive and contradictory procedural burdens on claimants.

The First Prong: Actual Disability and Major Life Activities

The first prong is the most restrictive in that it only covers persons with a physical or mental impairment that substantially limits one or more major life activities. The term "physical impairment" is defined as "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss" affecting one or more of the body's systems.⁴⁰ Mental impairment is defined as "[a]ny mental or psychological disorder".⁴¹ In general, these terms have been accorded a wide and liberal interpretation, though certain conditions tend to push at their boundaries.⁴²

³⁸ The EEOC regularly publishes a series of guides to assist compliance with all of the major federal laws that prohibit discrimination in employment. See also the Department of Justice regulations, codified at 28 C.F.R. pt.361. For sharp criticism of this "backdoor regulation" and the EEOC's attempts to "rewrite the statute", see B. J. Fisher with G. E. Farb, *The ADA: Ten Years On* (National Legal Center for the Public Interest, 2000) pp.2-10.

³⁹ L. Eichhorn, *supra* n.22 p. 1427. Burgdorf explains the apparent inconsistency between the first prong which is restrictive in scope and the more expansive second and third prongs. It stems from the broad purposes that Congress wished the definitions to serve – i.e. both affirmative action efforts, barrier removal efforts and non-discrimination mandates. A broad definition was required for the non-discrimination mandate, but "the objective of affirmative action programs would ... be undermined if ... employers could claim success based upon workers whom the employer merely regarded as being a person with a disability." It does not stretch credulity too far to imagine an employer who says "I have a perfect affirmative action program under section 503; I regard all my employees as impaired". R. L. Burgdorf, *supra* n.10 pp. 432-433.

⁴⁰ 29 C.F.R. 1630.2 (h)(1). Body systems are described as "neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, haemic and lymphatic, skin and endocrine. (July 2003 ed.)

⁴¹ Examples included are mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities". 29 C.F.R. 1630.2 (h)(2) (July 2003, ed.).

⁴² For example, obesity and certain fatigue syndromes which depend upon self-reporting. Though see *infra* for discussion of the requirement for medical validation of impairments.

The burden of proving that an impairment “substantially limits” one or more “major life activities” and that the individual is “qualified” for the job he or she has lost or seeks is the arduous task facing an ADA claimant. Regulations promulgated by the EEOC and the US Department of Justice define “major life activities” as including functions such as: caring for oneself; performing manual tasks; walking; seeing; hearing; speaking; breathing; learning; and working.⁴³ This list, however, was not intended to be exhaustive, and certain courts have been willing to add to the range of “major life activities”.⁴⁴

Nowhere in the legislative history does there appear to be any clear explanation as to why actual disabilities are defined in terms of “substantial limitations” on “major life activities”. The regulations simply define “major life activities” as the functions listed above. There appears to be no common thread linking the items listed. Some are physiological, some are sensory - they seem arbitrarily decided. Without a common thread, it becomes even more difficult to forecast functions “such as these” with regard to the inclusion of other “major” life activities. In addition, the inquiry into which life activities are “major” is a requirement loaded with bias: presumably, one who cannot perform a “major life activity” does not have much of a life.⁴⁵ Eichorn persuasively states that:

[i]f the disability label has historically depended upon arbitrary notions of the activities that people should be able to perform and the ways in which they should perform them, then the categorisation of some activities as “major” takes this arbitrariness one step further.⁴⁶

This approach contradicts the disability movement’s attempt to shift the goal posts from descriptions of impairments and towards social, cultural and environmental reactions to impairments. The ADA definition, however, locates disability primarily in the body of the individual. For example, one “major life activity” is said to be walking, yet disability advocates argue that this could preferably be defined in terms of moving about freely.⁴⁷ While there is more than one method of moving about freely, walking remains the dominant, valued and protected form. As Silvers points out, disablement can be seen as a social phenomenon when one realises how tightly it is linked to disadvantage: “From the standpoint of persons mobilizing in wheelchairs disablement is experienced not as

⁴³ 29 CFR 1630.2(i) (July 2003 ed.).

⁴⁴ Lower federal courts have ruled that standing and sitting, as well as procreation, sexual conduct and normal social relationships are major life activities. See R. Burgdorf, *supra* n.33 p.133-136.

⁴⁵ L. Eichorn, *supra* n.22 at p. 1429.

⁴⁶ *Ibid.*

the absence of walking but as the absence of [access to] bathrooms, theatres, transportation, the workplace ... all those opportunities most other citizens expect to access.”⁴⁸ Yet the statutory formulation emphasises individual impairment, whereas the social formulation directs attention to an obstacle-laden environment.⁴⁹ The definition at once reinforces the strict demarcation line inherent in the disability-ability dichotomy and ignores the spectrum-of-abilities theory advocated by the disability movement.⁵⁰

Feldblum reports that the attorneys drafting the regulations under the Rehabilitation Act believed that the now-contentious limiting phrase would simply exclude coverage of minor impairments.⁵¹ Any physical or mental impairment that affected an individual’s life in any significant or major way was understood to be covered under the new definition.⁵² However, the failure to make this implicit understanding an explicit feature of the statute has given the judiciary free rein to exclude coverage to impairments far beyond supposedly minor ones.⁵³

Actual Disability and Substantial Limitations

Moving on to the issue of “substantial limitations”, the EEOC states that a “substantial limit” on a major life activity arises if the person is either:

1. unable to perform a major life activity that the average person in the general population can perform; or
2. significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.⁵⁴

The EEOC has also stated that in determining whether an individual is substantially limited in a major life activity, a court must look at:

⁴⁷ D.C. Baynton, *supra* n.3 p. 388.

⁴⁸ A. Silvers, “Formal Justice” in A. Silvers et al. (eds.) *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham: Rowman and Littlefield, 1998) p.13

⁴⁹ D.C. Baynton, *supra* n.3 p.388.

⁵⁰ The US Civil Rights Commission have argued that while laws and the general public usually assume that people with disabilities are significantly impaired in ways that make them sharply distinguishable from non-disabled people, the underlying reality is not so easily categorised; instead of two separate and distinct classes. There are spectrums of physical and mental abilities that range from superlative to minimal or non-functional. See *Accommodating the Spectrum* (Washington) p. 87.

⁵¹ C. Feldblum, *supra* n. 29 pp. 104-105.

⁵² *Ibid.*

⁵³ Discussed in more detail, *infra*.

⁵⁴ 29 C.F.R. § 1630.2 (j) (1) (i)-(ii) (July 2003 ed.).

- (1) the nature and severity of the impairment;
- (2) the duration or expected duration of the impairment; and
- (3) the permanent or long-term impact, resulting from the impairment.⁵⁵

The language of this sub-clause implies that the ADA coverage is restrictive: it should only apply to the “truly disabled” and not to those less severely or temporarily impaired. Yet, Congressional findings and debates show that the Act was intended to protect those people with disabilities who were not necessarily limited in their activities, but who were limited by the exclusionary impact of prejudice and negative attitudes.⁵⁶ Congress was concerned to protect individuals both from negative societal reactions to the differences caused by impaired modes of functioning and from negative reactions to atypical bodies generally. Clearly, the statutory language here is at odds with the nature of the harm it seeks to remedy and prevent. EEOC regulations indicate that an impairment lasting eight weeks, for example, would not be considered to be substantially limiting. If the right contained within the statute is the right to be free from discriminatory actions, it is difficult to perceive why this guarantee does not extend to those with less than “substantial” limiting impairments or with impairments of a temporary duration.⁵⁷ Indeed, it remains questionable whether the statutory text provides sufficient foundation for the EEOC’s assertions on this point. While the statutory concept contemplates quality and quantity considerations - what life activity is limited and how seriously - it does not include “temporal considerations”.⁵⁸ The argument is that the history of the Act does not suggest that a substantial limiting condition should not be considered as such merely because it does not last long enough. This unhappy terminology, and the associated difficulties that arise, continues in the second and third prongs, as considered below.

The Second Prong – “Record” of a Disability

Many disability advocates took the view that the restrictiveness of the first prong of the disability definition would be offset by the width of coverage thought to be inherent in

⁵⁵ 29 C.F.R. § 1630.2(j) (2) (i)-(iii) (July 2003 ed.). A “substantial” limit on the major life activity of working means that the individual is significantly restricted in the ability to perform a class of job activities as compared to an average person with comparable training, skills, and ability. 29 C.F.R. § 1630.2(3)(i). (July 2003 ed.).

⁵⁶ See the purpose section attached to the ADA, introduced in chapter one.

⁵⁷ Of course, describing this impairment as a disability is a separate issue, though it could become so if discriminatory animus is directed towards such an impairment, whatever its duration.

⁵⁸ R. Burgdorf, *supra* n.33 p.135.

the second and third prongs. The legislative history of the ADA indicates that the second prong, the record prong, is intended to prevent discrimination against individuals who have been classified, correctly or incorrectly, as having an impairment that limits a major life activity.⁵⁹ Building on this, section 504 regulations, and the subsequent EEOC ADA regulations, define the record prong as including those who have a history of an impairment or those misclassified as having an impairment.⁶⁰ The EEOC's Interpretive Guidance includes, by way of example, individuals who have recovered from impairments, such as cancer patients, and individuals misclassified as learning disabled.⁶¹ However, the "substantially limited" restriction still looms over these two prongs. Any determination as to whether an individual is covered by the second prong is contingent on the "record" at issue being a record of an impairment that *substantially limited*⁶² a major life activity. A record of condition that is not an impairment, or a record of an impairment that is not substantially limiting, does not satisfy this part of the definition.⁶³

*The Third Prong – "Regarded as" Having a Disability*⁶⁴

The "regarded as" prong recognises that individuals are often identified or labelled as disabled and subjected to discrimination based on society's accumulated fears, stereotypes and prejudices regarding disability. Consequently, the "regarded as" prong is directed at the entity that harbours such prejudices or fears, rather than at the person alleging the discrimination. Thus, the emphasis here is very much placed on the employer's perception and whether the employer treats the individual as having an impairment that substantially limits major life activities. Not surprisingly, the "regarded as" test has been expanded upon in regulations, first issued under the Rehabilitation Act, 1973.⁶⁵ To be regarded as having an impairment means that the individual

⁵⁹ See Senate Report No. 106-116 at 23, House Education and Labor Report at 52-53 and House Judiciary Report at 29.

⁶⁰ 45 C.F.R. § 84.3 (j)(2)(iii); 29 C.F.R. § 1630.2(k) (July, 2003 ed.). This would include school or other institutional records or documents labelling or classifying an individual as having a substantially limiting impairment.

⁶¹ 29 C.F.R. Ch. XIV, Appendix to Part 1630 – *Interpretive Guidance on Title I of the Americans with Disabilities Act*, commentary on § 1630.2(k) (July 2003 ed.).

⁶² My emphasis.

⁶³ See *Byrne v Board of Education* 979 F. 2d 560 (7th Cir.1992).

⁶⁴ See R. Burdgorf, *supra* n.33 pp.152 – 163.

⁶⁵ For the Rehabilitation Act's definition see 45 C.F.R §84.3(j)(2)(iv) (1993).

- (A) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation;
- (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (C) has none of the impairments defined [in the impairment paragraph] but is treated by a covered entity as having a substantially limiting impairment.⁶⁶

The common thread is that a person who does not meet the definition of disability in the first prong is treated as having such a disability by the employer, based on either personal or societal perceptions. Thus, if an employer makes an adverse decision against an individual because of myths, fears and stereotypes about disability, then the employer's action would fall under the third prong of the definition, whether the employer's perception was a universal or an idiosyncratic one.

Burgdorf argues that the regulatory formulation outlined here overly complicates a reasonably straightforward statutory objective.⁶⁷ Paragraph A and B are remarkably similar: “[b]oth deal with circumstances in which a person has a physical or mental impairment but not one that substantially limits a major life activity, and in both instances the individual is treated as if the impairment did limit major life activities”.⁶⁸ The difference is that in (A), the employer treats the impairment as more limiting than it really is, whereas in (B), the person's activities are limited as a result of attitudinal barriers in society. Paragraph (C) is simply where a person has no actual physical or mental impairment but is treated as possessing such an impairment.

The rationale underpinning the “regarded as” prong was articulated by the Supreme Court in *School Board of Nassau County v Arline*⁶⁹, decided under the Rehabilitation Act 1972. Here, the Supreme Court recognised that an impairment which does not have a substantial limitation or does not diminish a person's capabilities “could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment”.⁷⁰ The inclusion of this prong by Congress was, according to the Supreme Court, an acknowledgment “that society's accumulated myths

⁶⁶ EEOC, *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 29 C.F.R. §1630.2 (l) (July 2003 ed.).

⁶⁷ R. Burgdorf, *supra* n.33 p. 154.

⁶⁸ *Ibid.* p. 153.

⁶⁹ 480 U.S. 273 (1987).

⁷⁰ *Ibid.* p. 283.

and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairments”.⁷¹

The Qualification Requirement

The complex US definition of disability is compounded by the fact that the anti-discrimination principle only applies to a “*qualified individual with a disability*”.⁷² This paradigm is prescribed in section 101(8) of the ADA to mean an individual who “with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires”. This makes it necessary to determine whether the individual is qualified for the job as a precursor to discrimination protection. This aspect to the ADA is discussed in the following chapter as part of the discussion surrounding the operation of the reasonable accommodation duty.

Conditions Expressly Excluded

The ADA goes on to expressly exclude conditions which might be open to doubt as to whether they can be included in the disability category. Section 511(b) contains a list of eleven conditions that are excluded from the definition of disability for the purposes of the act. The eleven conditions are set out in three categories: (1) transvestism, transsexualism, paedophilia, exhibitionism, voyeurism, gender identification disorders not resulting from physical impairments, or other sexual behaviour disorders; (2) compulsive gambling, kleptomania, or pyromania; (3) disorders resulting from the use of psychoactive substances and illegal drugs.⁷³

The Impact of the ADA Definition on the Statutory System

This section demonstrates how the judiciary has restricted protection under the ADA to its own definition of a truly deserving “disabled person”. This is contrary to the construct of disability presented by the disability movement and it is also contrary to the original intentions of Congress. Congressional members and Washington advocates simply did not foresee the disarray that would be created by the federal judiciary’s interpretive ploy. Yet, history should have warned that legislatures cannot always rely

⁷¹ *Ibid.* p. 284.

⁷² Section 102 (a) ADA, 1990. Emphasis added.

on the judicial body to interpret broad statutory provisions in accordance with policy aims. The statute has been drafted in an open-ended manner and many key concepts have been filled out by non-binding agency regulators: consequently, Congress has been accused of abdicating its legislative power.⁷⁴

As is outlined below, the federal courts have not interpreted the ADA in a manner faithful to its remedial purpose, which was to affirm the capabilities of the disabled and end their labour market isolation. Attempting to discourage frivolous cases taken under the often-misunderstood reasonable accommodation duty, the judiciary has shifted the focus to the issue of coverage. By this ploy, the personal characteristics of the employee or potential employee take centre stage. This redirects the debate on disability exclusion back towards the relative deficit of the individual and away from the endemic and structural nature of disability discrimination. The discussion below demonstrates how the ADA's functional limitation approach has been turned on its head and, as a consequence, how this pioneering model of disability anti-discrimination law has lost much of its original worth.

Catch 22: Not Disabled Enough, Yet Too Disabled to do the Job

Protection from discriminatory action on the basis of a characteristic should not depend upon the degree of the characteristic if the facts show that the action was in any case irrational, irrelevant and unfair. This is not to suggest that the degree of an impairment is never relevant. On the contrary, the degree and impact of an impairment may be relevant at a different stage: in terms of the practicalities of any available accommodation or in the context of service provision. However, disabled employees and applicants in the United States are still faced with a Catch 22 situation. If a person has an extensive impairment, the federal courts view this as compromising his or her qualifications for a position.⁷⁵ If they do not have what is proven to be a substantial or significant limitation, they are then excluded from the Act's protection.

An examination of the prevailing federal jurisprudence on the definition of disability unearths a number of anomalies. For example, some ADA plaintiffs have successfully persuaded courts that a specific impairment causes a substantial limitation

⁷³ See R. Burgdorf, *supra* n.33 pp.146-148 for discussion.

⁷⁴ S. Epstein, "In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes 'Undue' under the Americans with Disabilities Act" (1995) 48 *Vanderbilt Law Review* 422, 441.

on a major life activity. Remarkably, other courts disagree that the same impairment satisfies the statutory definition. As O'Brien comments, there has been no consistent line of reasoning indicating why one impairment is a disability and another is not.⁷⁶ Successful claimants (those who have not had their cases dismissed at summary judgment) have had impairments such as depression, HIV, diabetes and infertility recognised. Cases dismissed include persons with impairments such as paranoid thought disorder, asthmatic bronchitis, carpal tunnel syndrome⁷⁷, back injuries, high blood pressure, psoriasis and degenerative arthritis. This individual scrutiny as to whether a plaintiff is truly "substantially limited" by his or her particular set of symptoms enables courts to dispose of claims on motions for summary judgment. At the same time, the courts can insulate their rulings from review by restricting them to factual findings of deficiencies in the plaintiffs' particular medical conditions.⁷⁸ However, the key enquiry under the ADA should not be an extensive report on the fact and impact of impairment - rather, the key issue should concern how the employer reacted to the impairment in the employment context. Protection against discrimination and prejudice should not depend on the minutiae or intricacies of a particular condition and on the degree to which a particular condition impacts on a major life activity. Rather, it ought to react to the general phenomenon of disability discrimination, which is based on myths, stereotypes and assumptions about disability and disabled people generally. The ADA approach to the demarcation issue individualises the definition of disability to an extent that detailed medical scrutiny of an individual is required in order to determine whether he or she warrants protection. This process of individualisation spills over from the judicial experience with disability in the entirely different framework of social security protection.

As a consequence of the US federal courts' approach, there are considerable risks associated with disability discrimination suits. For example, take an employee with a non-apparent disability who makes an accommodation request - this request necessarily discloses her disability to her employer. However, the employer may refute the claimant's disabled status as a defence to the request. If the claimant cannot prove

⁷⁵ Entitlement to non-discrimination protection is only conferred upon a "qualified individual with a disability". See 29 C.F.R. §1630.2(q). Discussed further in chapter five.

⁷⁶ R. O'Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* (Chicago and London: University of Chicago Press, 2001) p.179.

⁷⁷ The US Supreme Court, in an unanimous opinion, reversed the lower court's finding that the employee's carpal tunnel syndrome was a disability covered by the ADA: *Toyota v Williams* 2002 WL 15402, Jan 8 2002.

⁷⁸ C. Lanctot, "Ad Hoc Decisions Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA" (1997) 42 *Villanova Law Review* 327, 332.

that her impairment rises to the level of a disability - i.e. by amounting to a substantial limit on a major life activity, or that the employer regarded her as having such a limitation - she is not a disabled person, and loses her civil rights protection. The bitter irony is that she has now provided her employer with grounds for her termination.⁷⁹ By disclosing her impairment, which has fallen short of the “disabled standard” of the ADA, the employer can direct any discriminatory animus toward her whatsoever, entirely free of legal sanction. *Sutton v N.M. Dept of Children Youth and Families*⁸⁰ provides a clear example. The plaintiff, who suffered from degenerative arthritis of her hip, was found not to be regarded by her employer as having a disability. The Court conceded that her ability to stand for four hours instead of eight might be an impairment, but this did not affect any of her major life activities. But since the plaintiff only had the strength to stand for four hours as opposed to eight, she was considered no longer competent for her position and had given the employer grounds for termination. The plaintiff was not entitled to protection of the ADA. With the focus squarely located on the characteristics of the plaintiff, other critical enquires were simply dispensed with. There was no need to consider whether any discriminatory animus was directed toward the claimant, or whether or not the alleged treatment was “on the grounds” of disability. There was no need to consider whether the employee was qualified for the position - i.e. whether she could perform essential functions with or without reasonable accommodation - or whether an employer was otherwise justified in the course of action taken.

The other side to the coin is that if the courts perceive an individual as being too disabled, they are likely to hold that the person is not qualified to do the job. The ADA’s qualification requirement deems a person with a disability as an “otherwise qualified person with a disability who with or without a reasonable accommodation can perform the essential functions of the job”.⁸¹ The impact of this provision is discussed in chapter five.

Mitigation Measures

⁷⁹ R. O’Brien, *supra* n.76 p.181.

⁸⁰ 922 F.Supp. 516 (D.N.M.).

⁸¹ Section 101 (8) ADA.

All regulatory guidance and Congressional reports⁸² indicate that the determination of disabled status for the purposes of the ADA was to be carried out without regard to medication or to aids such as prosthetic devices or to other equipment used to ameliorate the effects of conditions. Eight out of the nine US Court of Appeals that considered the issue accepted this and agreed with the guidance of three enforcement agencies that the effects of mitigating measures should not be considered. One Court of Appeal - the Tenth Circuit - did not. It decided to evaluate the effect of mitigation measures on an individual's impairment in order to decide whether it substantially limited a major life activity. This issue eventually came before the US Supreme Court.

In *Sutton et al v United Airlines*,⁸³ the Supreme Court, led by Justice O'Connor, rejected both legislative history⁸⁴ and interpretive material developed by the EEOC,⁸⁵ when it held that a person was not disabled for the purposes of the ADA if her condition could be mitigated with medication or equipment. As will be discussed below, the ramifications of this line of reasoning are far-reaching. This case makes plain the nature of judicial engagement with the disability definition under the ADA.

Three decisions of the Supreme Court were handed down which clearly indicated its intent on this matter.⁸⁶ In the main decision, *Sutton*, twin sisters with severe myopia which was fully corrected by their eyeglasses, challenged United Airlines' policy which required global pilots to have uncorrected visual acuity of 20/100 or better. Both sisters met the federal vision standards required and had met all other qualification criteria – age, education, experience and certification. However, they failed to meet the airline's standard of possessing uncorrected visual acuity of 20/100 or better.

⁸² See the Senate Report: "whether a person has a disability should be assessed without regard to the availability of mitigating measures such as reasonable accommodations or auxiliary aids." S. Rep No. 101-116 p.23 (1989). Referring to the "regarded as" prong, it continued: "[An] important goal of the third prong ... is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation." At p. 24. See also Report of the House Committee, H.R. Rep. No. 101-485, pt III, p.28 (1990).

⁸³ 527 US 471 (1999) 482.

⁸⁴ When it comes to statutory interpretation in the Supreme Court, once that Court relies on plain legislative text, all accounts of legislative intent are immediately discarded. "Because we decide that, by its terms, the ADA cannot be read in this manner [i.e that persons should be assessed in their unmitigated state], we have no reason to consider the ADA's legislative history." *Ibid.* p.482.

⁸⁵ Justice O'Connor questioned the authority of the EEOC to issue regulations interpreting the definition of disability, which has express authority to issue guidelines interpreting Title I of the Act. *Ibid.* p.479.

⁸⁶ The other two decisions are *Albertson v Kirkinburg* 527 U.S. 555 and *Murphy v United Parcel Service* 527 U.S. 516.

The plaintiffs argued that the company discriminated against them on the basis of their disability, or because it regarded them as having a disability. Without considering the claim on its merits - i.e. whether the action of the company was warranted in light of business necessity or safety exemptions - the Supreme Court concentrated exclusively on the definition of disability. The issue arising was whether an individual's satisfaction of the statutory definition of disability should refer to measures that mitigate the individual's impairment. By a seven to two majority, O'Connor J., writing for the Court, held that since the sisters' impairment was mitigated by their eyeglasses, they were not disabled and therefore fell outwith the statutory protection. Three reasons were forwarded in support of this holding.

First, Justice O'Connor relied on the statute's use of the phrase "substantially limits" in its "present indicative form".⁸⁷ In a proper reading of the Act, this required that "... a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability".⁸⁸ Justice O'Connor continued: "[a] 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might', 'could' or 'would' be substantially limiting if mitigating measures were not taken".⁸⁹ Despite their visual impairments, the twins, while wearing eyeglasses, were not disabled because the impairments, where corrected, did not substantially limit any major life activity.

Second, relying on *Bragdon v Abbott*⁹⁰, the Court emphasised the individualised nature of the inquiry as to whether a person has a disability under the ADA. Any relinquishment of this individualised approach "would require Courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition".⁹¹ This argument was sufficient for O'Connor J. to dismiss the EEOC regulations on the matter.⁹²

⁸⁷ 527 U.S. 471, 482.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ 524 U.S. 624 (1998) where the Court stated: "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." At pp.641-42.

⁹¹ 527 U.S. 471, 483.

⁹² Feldblum argues that the Court's emphasis on individualised assessments in this context is misplaced. She points out that: "[i]t is true that individualized assessments lie at the very core of disability anti-discrimination law. Because one of the causes of discrimination faced by people with disabilities is stereotypes regarding what people with disabilities are capable of doing, it is critical that each person with a disability be individually assessed to determine his or her

Third, and in an interestingly selective piece of judicial deference to Congressional findings,⁹³ O'Connor J. described Congress's finding that "some 43,000,000 Americans have one or more physical or mental disabilities" as "critical".⁹⁴ From this statement, O'Connor J. deduced that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities.⁹⁵

Since the twins' impairments were found to be insufficiently debilitating to satisfy the first prong of the definition, the Court went on to consider the alternative argument: whether the sisters were "regarded as" being disabled. The relevant question in this context was whether United Airlines regarded the sisters as substantially limited in a major life activity. According to Justice O'Connor, there are two ways to fall within this definition: first, where a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities or second, where a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities. Common to both approaches is the idea of a misperception. Either the employer wrongly believes that a person has a substantially limiting impairment, or believes that a person has a substantially limiting impairment which, in fact, is not so limiting. The basis of this protection has been to protect those persons who, on the basis of society's accumulated myths and fears about disability, are regarded as being disabled. Justice O'Connor felt that the company did not mistakenly regard the sisters as having an impairment, because the remedial measures – glasses – were obvious and ubiquitous.

As a last resort, the sisters argued that United Airlines regarded them as disabled because of a substantial limitation in the major life activity of working.⁹⁶ However, to succeed on this prong, a plaintiff has to demonstrate that he or she is

capacity to do a job ... and moreover ... disability law presumes the need for intensive individualized assessments whenever reasonable accommodations are at issue. ... but the idea that an individualized assessment would be used to determine whether one person with epilepsy would be covered under the law while another person with epilepsy would not, was completely foreign both to Section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates". C. Feldblum, *supra* n.29 pp. 152-153.

⁹³ The Court is so eager to rely on Congress's findings for the purposes of this argument. Yet, ironically, it refused to also rely on relevant House and Senate reports indicating congressional intent on the issue of mitigating measures as this was contrary to the view favoured by the Court.
⁹⁴ 527 U.S. 471, 484.

⁹⁵ This conclusion was reached after a brief examination of the two different means of ascertaining those with a disability – the functional and non-functional approaches. See C. Feldblum, *supra* n. 29 p.154 for a discussion of the insignificance of the numerical estimation of the number of people with disabilities during the drafting process. See also National Council on Disability, *Significance of the ADA Finding that Some 43 Million Americans Have Disabilities* (Policy Brief Series: Righting the ADA, November 2002).

⁹⁶ See *infra* for discussion on the "regarded as" prong of the definition of disability.

excluded from more than one type of job and that they are regarded as excluded from an entire class of jobs or a broad range of jobs.⁹⁷ O'Connor J. found that the plaintiffs were not regarded as excluded from a class of jobs: the employer did not regard the employee as incapable of fulfilling the requirements of an array of jobs, but those attached to the particular position.⁹⁸ The sisters were regarded by United Airlines as qualified to fly planes regionally but not globally. Citing EEOC regulations,⁹⁹ O'Connor J. argued that to be substantially limited in the life activity of working, the sisters had to show that the employer regarded their impairment as a barrier to work as a pilot anywhere, rather than as a barrier to a position as a global airline pilot. Since the position of global airline pilot is a single job, the sisters failed to meet the elements of the "regarded as" prong as it applies to the major life activity of working.

The Supreme Court's approach in *Sutton* reflects a judicial concern for managerial power in light of the perceived threat posed by the remedial nature of the disability non-discrimination model. An employer, according to Justice O'Connor, "is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment - such as one's height, build or singing voice - are preferable to others". This preference extended to the freedom to ignore or terminate those whose impairments are limiting, as long as such action excluded those with *substantially* limiting impairments. Applicants for employment could, as a consequence, be rejected if they had epilepsy or a vision problem, as long as the employer regarded their condition as limiting but not substantially limiting.¹⁰⁰ The result here is that the ADA is turned "on its head".¹⁰¹ For example, epilepsy could be one such medical condition which, on O'Connor J's reasoning, an employer may decide is not "preferable" in the workplace, notwithstanding that the individual may be qualified to do the job. It is not difficult to imagine certain employers screening out such unsuitable workers, thereby nullifying the very core of the ADA's protection.

Justice Stevens, in dissent, presented a composite retort to the majority opinion. Relying on an earlier opinion authored by a member of the majority, Chief Justice Rehnquist, Stevens J. drew the Court's attention to its oft-repeated statement that "the authoritative source for finding the legislative intent lies in the Committee Reports on

⁹⁷ The exclusion from a "class of jobs" and an "array of jobs" categories is discussed below.

⁹⁸ 527 U.S. 471, 493.

⁹⁹ The inability to perform a single particular job does not constitute a substantial limitation in major life activity of working. 29 CFR §1630.2(j)(3)(i).

¹⁰⁰ R. O'Brien, *supra* n.76 p.195.

¹⁰¹ *Ibid.*

the bill.”¹⁰² Consequently, if the Court had adhered to its own past precedents and consulted the rich legislative history of the ADA, it would have unearthed no foundation for its argument and ultimate conclusion.

The dissenting Justice also rejected O’Connor J’s view that the definition of disability excludes the assessment of impaired individuals in their unmitigated state. Justice Stevens pointed out that the three prongs “do not identify mutually exclusive, discrete categories ... [rather] they furnish three overlapping formulas aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are covered by the Act.”¹⁰³ He argued that the Court’s emphasis on the “present indicative verb form” used in the first prong was misguided, and that while the first definition was written in the present form, the second and third definitions were not. He also identified the weakness in the Court’s reasoning by pointing out that if a disability only exists where a person’s actual or present condition is substantially impaired “there would be no reason to include in the protected class those who were once disabled but who are now fully recovered.”¹⁰⁴ The second prong clearly covers a person who once had a serious impairment and has recovered. Moreover, an approach which assures protection under the Act without regard to “mitigation that has resulted from rehabilitation, self-improvement, prosthetics, or medication” avoids the counterintuitive conclusion that the ADA’s safeguards disappear when “individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations.”¹⁰⁵

The dissenting judge deftly dealt with the majority’s concern for the business community - that is, that the ADA might force them to hire persons who would endanger the lives of the public - and the related gate keeping role taken on by the majority to protect against frivolous cases and overburdening of the court system. Stevens J. clearly recognised this case for what it was. It simply raised the threshold question, and it had nothing to do with whether the claimants were genuinely qualified or whether they could perform the job without posing an undue safety risk, or whether the employer could have been said to take discriminatory action on the basis of the impairment.¹⁰⁶ According to Justice Stevens, the case simply asks whether the ADA

¹⁰² Citing Justice Rehnquist (as he then was) in *Garcia v United States*, 469 U.S. 70, 76 (1984).

¹⁰³ 527 U.S. 471, 498.

¹⁰⁴ *Ibid*

¹⁰⁵ *Ibid*, p.499. “The fact that a prosthetic device, such as an artificial leg, has restored one’s ability to perform major life activities surely cannot mean that section a of the definition is inapplicable.” At p.498.

¹⁰⁶ An employer may avoid liability if it shows that the criteria it imposes is “job-related and consistent with business necessity” or that a deficiency in such criteria would pose a health or safety hazard. § 12113(a)-(b) ADA.

lets the sisters in the door and “[i]nside that door lies nothing more than basic protection from irrational and unjustified discrimination”¹⁰⁷ The dissenting judge saw no valid reason for the majority to restrict the definition of disability so that it would only benefit the numbers of individuals estimated in the Congressional findings. He reminded the Court that it has been a traditional tenet of statutory construction that remedial legislation should be construed broadly so as to effectuate its purposes.¹⁰⁸ He also referred to the fact that, in the past, generous interpretations have been granted to other core anti-discrimination statutes so as to include classes of individuals traditionally excluded “even when the particular evil at issue was beyond Congress’ immediate concern in passing the legislation”.¹⁰⁹

The Court’s interest in constricting and narrowing the definition of disability made it a gatekeeper, according to Justice Stevens. Since persons can already file employment discrimination claims on the basis of their race, sex, religion or age, he found it “hard to believe that protecting individuals with one more antidiscrimination protection will make any more of them file baseless or vexatious lawsuits”.¹¹⁰ Moreover, he pointed out that Congress had never regarded this as a reason to restrict classes of antidiscrimination coverage. An analogy following this logic to its conclusion would be the supposition that the fact that all women or all men can pursue a Title VII sex discrimination claim is a sufficient reason for judicial restriction of the class. In short, the number of people who could pursue redress is irrelevant: what matters simply is the merits of the claim.

Ultimately, Stevens J. felt that this case should not have been decided on the basis of coverage or access. While he did not deliberate on the merits of the twins’ claim, he did allude to the fact that had United Airlines decided that the twins should not be hired because of safety concerns, he need not have dissented. However, this issue got lost in the majority’s scramble for judicial control of the ADA. This interpretative

¹⁰⁷ 527 U.S. 471, 504.

¹⁰⁸ Stevens J., citing *Tcherepnin v Knight*, 389 U.S. 332 (1967). See C. Feldblum, *supra* n.29 p.154 for a discussion of the (in)significance of Congress’s estimation of the number of disabled people in the US.

¹⁰⁹ Such forays have included construing Title VII to cover claims of same-sex harassment (*Oncale v Sundowner Offshore Services, Inc.*, 523 US 75 (1998)) and to include claims of race discrimination from Hispanic Americans and Asian Americans, as well as Caucasians. See eg. *Steelworkers v Weber*, 443 U.S. 193 (1979).

¹¹⁰ 527 U.S. 471, 511.

ploy extends far beyond myopia and short-sightedness¹¹¹ and undermines the broad-based policy aims on which the ADA is founded.

The Problem of the “Substantial Limit on the Major Life Activity of Working” Limb¹¹²

The ADA regulations include as disabled not only those individuals whose impairments present substantial limitations to their general functioning, but also those whose impairments impact substantially on their ability to work. If a plaintiff can demonstrate a substantial limitation on one of the other major life activities, then there is no need to invoke the work-based life activity.¹¹³ Following this, the EEOC’s regulations indicate that courts should first determine whether an individual is substantially limited in any other major life activity before considering limitations in work.¹¹⁴ For example, a visually impaired person may demonstrate that she is an individual with a disability by demonstrating the substantial limit on the major life activity of seeing. However, those with impairments such as cancer, HIV, carpal tunnel syndrome, scarring, back injuries and so forth may have no problems with functioning as regards the major life activities or no problem in functioning generally, yet are limited by an exclusion from work.

Contrary to the interpretations of “breathing”, “walking” or “hearing”, defining “working” as a major life activity is problematic. This is not only because of the vast range and variety of jobs but also because of the confusion deriving from the separate tests specially formulated for its application. It is not surprising to learn then that most of the litigation and analytical discussion on the concept of “substantial limitation” has arisen in the context of its meaning under the major life activity of working.¹¹⁵ Under this approach, the issue for consideration is how much of an interference with working or employability must be shown. According to the EEOC, in the context of working,

[t]he term substantially limits means significantly restricted in the ability to perform either *a class of jobs* or *a broad range of jobs in various classes*, as compared to the average person having comparable training skills, and abilities.¹¹⁶

¹¹¹ In some jurisdictions, short-sightedness is not capable of bringing an individual under the protection of disability discrimination legislation. See the UK’s Disability Discrimination Act 1995 -2005.

¹¹² See generally, S. Locke, *supra* n.37.

¹¹³ 29 C.F.R. Appendix 1630.2(j) (July 2003 ed.).

¹¹⁴ 29 C.F.R. Appendix 1630.2(j) (July 2003 ed.).

¹¹⁵ Courts have denied protected status to many persons under this limb.

¹¹⁶ 29 C.F.R. § 1630.2(j)(3)(i) (July 2003 ed.). Emphasis added. Presumably the argument goes that an exclusion from one job does not demonstrate a substantial limitation on the ability to

The EEOC regulations simply imply that ‘substantial limits’, in the context of working, means more than an inability to perform one particular job and also less than a general inability to work. Thus, “the courts have been engaged in an elusive search for the grey area in between.”¹¹⁷ Apart from these general insights, little can be stated with certainty about the range of these regulations or the outcome of their application in any given case. The courts seem to proceed on the basis of quantitatively analysing whether an impairment bars a person from a “class of jobs” similar to the case in hand or from a broad range of jobs in various classes.¹¹⁸ The EEOC provides additional factors specifically relevant to the issue of working which courts may consider. These are set out to assist courts in determining the impairment’s effect on the individual’s ability to obtain other work in the geographical area.

The factors are set forth as follows:

- (A) the geographical area to which the individual has reasonable access;
- (B) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
- (C) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).¹¹⁹

The case law indicates that the courts have struggled to apply the “class of jobs” or “broad range of jobs” categories. The two categories have been meshed together and this places massive evidentiary burdens on plaintiffs. The test has caused more confusion than resolution, and the evidentiary and procedural burdens placed on plaintiffs forced the EEOC to reissue its Interpretive Guidance, clarifying the nature of the burden demanded by the provisions.¹²⁰

work in general. It merely demonstrates an effect on one job in particular. This is why the regulations look to a class of jobs or a broad range of jobs to see if the exclusion is truly “substantially limiting” the life activity of working.

¹¹⁷ S. Locke, *supra* n.37 p. 117.

¹¹⁸ As Locke comments, “[w]hile the EEOC has defined other activities by the ability to perform a physical task, working has been defined in terms of securing employment. Instead of attempting to break working down into specific tasks, the EEOC has opted to define the term by determining how many jobs one can theoretically obtain. *Ibid.* p. 116.

¹¹⁹ 29 C.F.R. § 1630.2(j)(3)(ii) (1993).

¹²⁰ The Guidance reads that the standards regarding numbers and types of jobs are not intended to require an onerous evidentiary burden. They are meant to require only evidence of “general employment demographics and/or of recognised occupational classifications that indicate the approximate number of jobs (e.g. ‘few,’ ‘many,’ ‘most’) from which an individual would be

A controversial issue remains as to whether exclusion from one job because of an actual or perceived impairment is sufficient by itself to establish coverage under the Act. Responses differ on this point, depending on which prong of the definition is under consideration. In respect of the first prong – actual impairment – EEOC regulations state that a substantial limitation in the major life activity of working requires a plaintiff to show more than an inability to perform a single specific job for one particular employer. The EEOC gives the example of a pilot with a vision impairment who could not work as a commercial airline pilot, but who could work as a co-pilot or as a courier service pilot. In this example, the person is only unable to perform a particular job or a narrow range of jobs. However, the rationale behind this approach is again misplaced. There appears to be no pressing reason, beyond the “need” to restrict the protected class, why an employee who presents *prima facie* evidence of discrimination just once on the basis of “disability” should be excluded and made to climb evidentiary mountains to prove that he or she is disqualified from a class of job or a broad range of jobs. Feldblum argues that the “resonance of the requirement that an individual be unable to work in a whole range of jobs ... in order to meet the ADA’s definition of disability reflects the staying power of the historical image of a “disabled person” as a person who is unable to work and unable to function in society”.¹²¹

The problem with the working as a life activity limb is that the courts have turned the limb into a standard to be applied whenever it comes to determining whether an individual has a disability. What seems evident from the application of the substantial limitation in working limb is a meshing of the evidentiary functions regarding the threshold issue and the substantive claim of discrimination. Instead of ruling that the employer was not in violation of the ADA because the individual was not qualified for the job in question, or that the employer could otherwise defend his or her decision within the statute - as in the EEOC’s pilot example - the courts are dismissing cases without reaching their merits on the basis that a person is not an individual with a disability.¹²²

“Regarded as” Substantially Limited in the Major Life Activity of Working

excluded because of an impairment....” 29 C.F.R.1630 (appendix. to pt. 1630) (commentary on § 1630.2(j)) (July 2003 ed.).

¹²¹ C. Feldblum, *supra* n.29 p.143.

¹²² For evidence of the bizarre litigation twists demanded by the federal courts approach on this issues, see Feldblum, *ibid*.

The case law under the third prong demonstrates that the courts are divided on whether an employer's rejection of a person with a physical or mental impairment as incapable of doing a particular job is sufficient to establish that the employer "regarded" the person as having a disability. The leading case rejecting the "one job is enough approach" is *Forrissi v Bowen*.¹²³ In this case, a utility systems repair man rejected from his job because of his agoraphobia did not succeed in showing that he was "regarded as" having a substantial limit on the life activity of working. In contrast, a man discharged from his position in the Army Corps of Engineers due to an incorrect interpretation of his spine abnormality was found to have met the "regarded as" criteria, because the Corps perceived this to impose a disqualifying limitation on his ability to lift weight.¹²⁴ Here, there was no suggestion made of a need to show that his perceived impairment would impact on his employability beyond the immediate position from which he had been discharged.¹²⁵

As has been stated before, the essence of the "regarded as" prong is based on a misperception. Either the employer perceives the individual as having a substantially limiting impairment when the impairment is not substantially limiting, or the individual's impairment is only substantially limiting because of the attitudes of others towards it, or the individual may have no impairment but is regarded by the employer as having a substantially limiting impairment. Such misperceptions are most likely to arise in the context of the "working" life activity. It is ultimately questionable whether the *Forrissi* test has any legitimate application under the "regarded as" prong. This is because the "regarded as" prong operates on the basis of employer misperceptions regarding an individual's disabled status. If an employee or applicant is basing his claim on the basis that the employer regarded him as substantially limited in working - for example, because of facial disfigurements/infectious diseases - why is there a need for the plaintiff to establish the analytical framework present in actual disability cases? This requires proof that the employer regarded the plaintiff as incapable of working for him or her, and that his impairment generally foreclosed the type of employment involved.¹²⁶ "[R]equiring a plaintiff to prove that if the employer's erroneous perception of her condition had been correct, her employability generally would have

¹²³ 794 F.2d 931, A AD Cases 921 (4th Cir. 1986).

¹²⁴ *Thornhill v Marsh* 866 F.2d 1182 (9th Circ. 1989).

¹²⁵ R. Burgdorf, *supra* n.33 p. 159.

¹²⁶ Indeed, proof of the latter requirement would be very difficult because of the difficulty of estimating similar reactions or misperceptions among employers to the plaintiff's impairment or perceived impairment.

been seriously curtailed is unduly burdensome”.¹²⁷ This test was formulated in the context of actual disability, not in the context of misperceived or non-existing impairments.

An examination of the ADA’s legislative history uncovers Congressional intent to reject the *Forrissi* “not just one job” approach under the “regarded as” prong of the disability definition. The Senate committee report pointedly cites examples of individuals included within the “regarded as” concept as being “people who are rejected for a particular job for which they apply because of findings of a back abnormality in an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids”¹²⁸ The Report adds:

A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity’s negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, ... if an employer refuses to hire someone because of a fear of the “negative reactions” of others to the individual, or because of the employer’s perception that the applicant may have a disability which prevented that person from working, that person would be covered under the third prong”.¹²⁹

Similarly, the approach of the other committees indicates that exclusion from a single job because of a physical or mental impairment would establish coverage of the excluded individual under the “regarded as” disability prong.¹³⁰ The EEOC regulations issued under the ADA do not go so far as to embrace the intent inherent in the legislative history, though they do acknowledge that exclusion from a single position may be sufficient to satisfy the “regarded as” prong in certain circumstances. The Interpretive Guidance states:

“An individual rejected from a job because of the “myths, fears, and stereotypes associated with disabilities would be covered under this part of the definition of disability, whether or not the employer’s ... perception were shared by others in the field”.¹³¹

In many cases, the “exclusion from one job” approach has been used as a useful reductionist tool. It justifies judicial dismissal of claims under the “regarded as” prong at summary stage. As a result, the courts have compromised the objective of the

¹²⁷ S. Locke, *supra* n.37 p.143.

¹²⁸ Senate Report. No. 116, 101st Congr., 1st Sess. 24 (1989).

¹²⁹ *Ibid.*

¹³⁰ See House Committee on the Judiciary which relies on *Thornhill*.

¹³¹ 29 C.F.R. pt. 1630 app. A§ 1630.2(1).

“regarded as” prong as laid out in both the legislative history and in the EEOC regulations.

In summary, it has been demonstrated that ADA plaintiffs face a mammoth task where employers defend a charge of disability discrimination by pressing for summary judgment on the basis of non-disabled status. The complex combination of the three prongs of the disability definition, and the investigations required by “substantial limitations” upon “major life activities”, complicates and weakens a legislative framework which was defined with a purpose far removed from microscopic analysis of impairments and their effects.

The Meaning of Disability under Ireland’s Employment Equality Act

Although it was initially denounced by the disability lobby in Ireland,¹³² the EEA’s definition of disability differs significantly from the ADA definition. It does not confine its protection to individuals who can demonstrate “substantial limitations” in a range of daily life activities. In other words, the definition is not tainted by the need to confine protection against discrimination to those who truly ‘deserve’ it. Rather, it seeks to extend protection to all those who actually endure discrimination. Consequently, the EEA’s impairment model of disability has been widely welcomed, as it recognises that the phenomenon of discrimination is not confined to those with severely-limiting impairments. The position in Ireland, at least to date, reflects the general attitude of the US federal judiciary under the Rehabilitation Act 1973.¹³³ There has been little attention directed to the issue of whether the applicant is or is not a disabled individual.¹³⁴ More often than not, coverage under the Act has been accepted or conceded.

Notwithstanding its practical advantages, the EEA’s impairment model has been subjected to criticism from certain quarters. It has been asked whether the definition continues to perpetuate the individual deficit model of disability. This point is addressed below, following a consideration of the statutory definition.

The EEA’s Definition of Disability

¹³² See O. Smith, “Disability, Discrimination and Employment: A Never-Ending Legal Story” (2001) *Dublin University Law Journal* 148 p.163.

¹³³ Discussed briefly above.

Section 2(1) of the Employment Equality Act, 1998, furnishes the following definition of disability for the purposes of the Act:

- (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person's body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

It should be noted that this is the definition in its entirety. There are no amplifying regulations, or no supplementary guidance, as is the case with the ADA. Like the ADA, the EEA definition does include an individual who does not, in fact, have any disability. It extends protection to individuals where the alleged discriminator has perceived the individual to be disabled - this is the imputed limb of the definition of disability. In contrast to the ADA, however, the EEA definition does not require that the imputed disability be a "substantially limiting one". The definition also includes those who have been discriminated against because they may have a disability in the future or because they have had a disability in the past. Section 6(1) also extends the Act's protection to those who may endure discrimination because of their association with a disabled person.

Yet, when the Act was drafted, both opposition members in the Oireachtas and some in the Irish disability movement expressed reservations about the definition because of what they felt was an excessively medical focus. As formulated - the final paragraph excluded - the definition amounts to an itemisation of medical conditions that can be described as "classic" impairments and it can be perceived as placing undue attention on the health status of a person with a disability.¹³⁴ The disability movement was unhappy with this approach because of the inclusion of a list of impairments in quasi-medical terms. It was felt that the definition ignores the contributing external factors that encompass disability.¹³⁵ As is discussed below in greater detail, the danger

¹³⁴ See *infra* for further discussion.

¹³⁵ O. Smith, *supra* n. 5 p. 164.

¹³⁶ See chapter one.

with this approach, from a social model perspective, is that “disability” is reduced to a description of impairment: it holds that disabled people’s limitations and disadvantages arise from personal, medical deficiencies, and not from any wider source of societal disadvantage. The problems of constructing a definition of disability that accords with the social model, while also satisfying the existing operational requirements of non-discrimination law, are discussed below. Indeed, the social model of disability does not give any guidance as to how disability might be defined differently.¹³⁷ Notwithstanding the impairment model of disability in the EEA, it has been argued that the non-discrimination law system as a whole, as it is applied to disabled people, endorses social model thinking because it locates the problem of discrimination outside the individual person. In this sense, then, discrimination law recognises that discrimination is a major social problem for disabled people, and this view is in keeping with disability as a social construct.¹³⁸ However, as chapter six argues, the flaw to this argument is the question of whether the design of the non-discrimination system can adequately tackle the forces of exclusion that contribute to the social creation of disablement.

The Application of the EEA Definition

A brief perusal of case law taken to date under the Employment Equality Act reveals the sorts of individuals protected and, importantly, how disability is constructed and recognised. The latter is important, because law is a tool that both constructs and reflects social reality in modern society.¹³⁹ Thus, every legal definition, whether in social welfare law, education law or discrimination law “takes part in the social construction of disability”.¹⁴⁰ The issue raised here is whether the anti-discrimination law definition in the EEA perpetuates the individual deficit model of disability.

The Labour Court recently stated that section 2 defines disability in broad terms and confirmed that both epilepsy and loss of hearing are covered by the definition in s.2 (c).¹⁴¹ In the first case, the Labour Court determined that the company had terminated the complainant’s employment because she suffered from epilepsy and that “[t]his, prima facie, constituted an act of discrimination on the disability ground. The

¹³⁷ T. DeGener, “Definition of Disability” (EU Network of Experts on Disability Discrimination, August, 2004) pp.5-6.

¹³⁸ *Ibid.* p.5.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ See *A Computer Company v A Worker* ED/00/8 Determination no. 013 (epilepsy) and *A Motor Company v A Worker* ED/01/40 Determination no. 46 (hearing impairment).

[company] can only be relieved of liability if it can be shown that, by reason of her disability, the complainant was not fully competent and fully capable of performing the duties of her employment, having regard to the conditions under which those duties were to be performed and could not have had her needs reasonably accommodated". What is useful to note from the interpretation and application of the disability definition here is that the Labour Court did not consider the severity, extent, or impact of the condition on the complainant's life once medical evidence was provided as to its existence. Thus, the Irish definition does not operate to screen out individuals who do not match up to the stereotypical view of a disabled person. In *A Complainant v Civil Service Commissioners*,¹⁴² the complainant was registered with the National Rehabilitation Board as having a mental health problem and it was accepted that schizophrenia comes within the definition of disability. Other decisions on the disability ground support the assertion that, in the main, where supported by medical evidence, the disability of the complainant is accepted. Employers have generally not disputed a complainant's disability status.¹⁴³ There has been only one case to date where the respondent employer disputed the complainant's disability status. In *Mr O v A Named Company*¹⁴⁴ the complainant suffered from anxiety, work-related stress and depression that required hospitalisation. In this case, the employer argued that the alleged condition was not properly evidenced and that it did not conform to the definition of disability in section 2(1) of the 1998 Act. The Equality Officer relied on the medical professionals present at the hearing, representing both the respondent and the complainant, who accepted that the complainant's illness was covered by the definition of disability in the 1998 Act. The Equality Officer also explained that the complainant was correct in arguing that "it is irrelevant whether the stress was work-related, the fact is that he suffered stress (a disability under the 1998 Act) and the issue of discriminatory treatment, harassment and victimisation must be investigated in that context".¹⁴⁵ This decision clarifies that, for the purposes of protection under the EEA, it is not necessary to investigate the cause of disability.

The Impact of the EEA Definition

¹⁴² DEC – E-2002/015.

¹⁴³ See *Anne Harrington v East Coast Area Health Board* (wheelchair user) DEC – E/2002/001 and *An Employee v A Local Authority* (brain injury) DEC – E/2002/4 and *Mr. C v Iaranrod Eireann* DEC-E-2003/054 (depression).

¹⁴⁴ DEC – E – 2003/052.

¹⁴⁵ *Ibid* paragraph 4.3. The Equality Officer remained satisfied on the basis of the extensive medical evidence that the disability in question was not solely work-related in this context.

Concern has been expressed in some quarters that the width of the disability definition under the Irish legislation could invite spurious claims or discrimination claims based on minor impairments. In chapter three, it was pointed out how the Irish Supreme Court was concerned with the width of the disability definition in the context of its interaction with the duty to make reasonable accommodation under the 1996 Bill - this was found to be unconstitutional.¹⁴⁶ The fear was raised that employers would be required to “accommodate” large numbers of minor impairments, and this would involve unknown levels of resources. The concerns raised by this line of argument are greatly overstated and demonstrate a general misunderstanding of the nature of impairment, disability discrimination and, specifically, the reasonable accommodation duty.

A proper examination of the legislation indicates that spurious claims will not be easily entertained by the interpreting tribunals. Moreover, spurious claims are not created or indulged by the supposed width inherent in the EEA’s definition of disability. Since the Irish definition of disability covers minor impairments, and does not require that a person’s limitations be substantial, part of the Supreme Court’s concern was that this introduced an unacceptable level of uncertainty with regards to the costs to be borne by employers. But it must be recalled that direct discrimination is defined as less favourable treatment on one of the prohibited grounds accorded to one person as compared with another person. Further, an employer is obliged to do all that is reasonable to accommodate the needs of a person with a disability. Despite the absence of an express provision, the intent behind the statutory structure is that a failure to make an accommodation would amount to discrimination on the disability ground.¹⁴⁷ However, the case against a broad definition of disability, on the grounds of restricting employers’ accommodation costs, is misplaced. That a person with a minor impairment can invoke the protection of anti-discrimination legislation if she has been treated less favourably does not involve unduly burdensome costs.¹⁴⁸ If any accommodation were required, the burden would be nominal precisely because the disability is minor.¹⁴⁹ What

¹⁴⁶ *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

¹⁴⁷ See chapter five.

¹⁴⁸ In this sense, then, discrimination based upon disability resembles typical forms of discrimination because of the central feature of negative stereotyping or hostile attitudes. This thesis has been borne out by research into litigation on disability discrimination in Canada. See J. Mosoff, “Is the Human Rights Paradigm “Able” to Include Disability: Who’s In? Who Wins What? Why?” (2000) 26 *Queen’s Law Journal* 225.

¹⁴⁹ See *Definitions of Disability in Europe: A Comparative Analysis* Final Report (2002) p. 60. Available at <http://www.brunel.ac.uk/depts/govn/research/finalreport.doc> Accessed November 1, 2002.

other accommodation, beyond granting leave/time off for rehabilitation to an employee with a minor impairment, is reasonable, useful or effective? This is an accommodation generally granted to all employees.¹⁵⁰ Thus, the argument that the definition of disability should be narrowed on the grounds of potential cost misses the point. What this argument ultimately reduces to is the extent to which reasonable accommodation burdens employers. The argument is taken up again in chapters five and six.

What is also notable from a perusal of the Irish case law is the importance of clinical opinion to the Equality Tribunal's decision that the individual claimant is disabled for the purposes of the Act. The weight of clinical opinion is such that a failure on the part of an employer to employ it when assessing the ramifications of a particular condition has been found by the Equality Tribunal to establish evidence of a failure to adequately engage with the reasonable accommodation duty.

While the statute's definition of an individual with disability does not expressly refer to medical judgment, all expositions on the criteria to which the definition refers is undertaken with reference to medical judgment.¹⁵¹ Thus, legal relevance is attached to specific physical and mental attributes of the body on the basis of mainstream medical opinion. Protected status is determined through medical confirmation of the characteristics of the claimant against the background of the statutory definition of disability. Leaving aside the practical issue of the need to prove the existence of an impairment by means of medical evidence, it is the long process of medical assessment that draws objections from the disability movement. While the proof issue is by no means as protracted under the EEA as compared with the ADA, medical evidence regarding impairment falls back into the trap of connecting inability and incapacity with disability. Problems of medical certification have largely been ignored by the legislative body, but the fact remains that medical diagnosis is far from unproblematic and far from objective.¹⁵² Medical conflict surrounds many impairments, such as obesity, chronic fatigue syndrome, and other impairments which depend on self-reporting, particularly self-reporting with regards to pain. Social science research has

¹⁵⁰ Note the operation of the Unfair Dismissals Act in this context. This argument is also used to deconstruct the "specialness" of accommodations. See further chapters five and six.

¹⁵¹ As chapter one introduced, the medicalising of disability means that disability is validated on the basis of clinical authority which subjects disabled people to the power of the medical gaze. Thus, one's subjective experience of impairment or limitation is often irrelevant unless it is professionally validated. Social science researchers have argued that medical professionals have a tendency to falsely universalize the impact of particular impairments. The result is a failure to recognise that a given impairment may produce varying degrees of limitation in different people. See M. Crossley, *supra* n.1 pp.650-651.

¹⁵² M. Crossley, *supra* n.1 pp.689-694, for discussion.

shown that issues of gender, age, ethnicity and social status all impact on clinical diagnosis, recording and recognition of an impairment.¹⁵³ This demonstrates that the line-drawing involved in medical decisions is far from objective and can produce arbitrary and unfair results.

Rethinking Disability Definitions

Discrimination and Accommodation: Separate Concepts, Separate Definitions?

In light of the large numbers of persons who it was assumed would benefit from ADA protection but who were subsequently excluded by the US Supreme Court's reductionism, it has been argued that the definition of disability should be reworked. It should be recalled here that the general rule prohibiting employers from discriminating against a qualified person with a disability because of that disability places two distinct obligations on employers: the familiar non-discrimination mandate, and an extended definition of discrimination caused by the failure to make a reasonable accommodation. Friedland argues that litigation has produced many "strange results" because "the single definition of disability is not well matched to the two distinct components of the Act's approach to employment."¹⁵⁴ She advocates redrafting the ADA so as to have separate definitions of disability dealing with discrimination in employment and accommodation in employment respectively.

There is some merit to Friedland's argument, especially when we assess the utility of the accommodation mandate to the "record of" and "regarded as" prongs of the disability definition. If an individual presents herself with a record of a disability, or if the employer incorrectly regards the individual as disabled and acts negatively towards her, this is a case of traditional disparate treatment (direct discrimination). What need of accommodation or what kind of accommodation is envisaged if an employer mistakenly regards her as having a disability? Entitlement to workplace accommodation should only be accorded to those whose impairments have a work impact. In any event, no

¹⁵³ *Ibid.* See also C. Woodhams and S. Corby, "Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act 1995" (2003) 32 *Journal of Social Policy* 159 for a critique of the medical assumption underpinning the DDA definition and a report on research which demonstrates how this stifles the impact of social variables on disabled status. At pp.161-172.

¹⁵⁴ M. Friedland, *supra* n.18 p.173. The cause of this can be traced to the uneasy importation of the three-pronged definition from the Rehabilitation Act.

entitlement to accommodation arises merely because of meeting the threshold for disabled status. There is no automatic entitlement to an accommodation. The point behind the accommodation duty is that it assists in overcoming work-related barriers and not all impairments raise such barriers. In any event, the provision of an accommodation depends upon many other governing factors built into the Act.¹⁵⁵

However, the real difficulty in the US context manifests itself in a more damaging manner because “... the anti-discrimination and accommodation requirements of the ADA share the same definition of disability, judicial decisions regarding that definition set precedent for both discrimination and accommodation suits.”¹⁵⁶ This concern over the presumed extent of the accommodation mandate’s special reach gives the courts “legitimate” reasons to entangle themselves in confusion over “disabled status”. The result has been that the courts, misunderstanding the operation of the discrimination/accommodation duality, limit the definition for fear of accommodation costs being thrust on employers. And they may do so even when cases present evidence of simple discrimination. The result is a narrowing of the threshold requirement in a way that undermines not only the accommodation provisions but also the more accepted non-discrimination provisions.¹⁵⁷

This “narrowing” of the definition of disability does not arise in the Irish context. This is because the width of the Irish definition’s statutory language defies restriction by the interpreting bodies. The expansive definition could be said to be predicated on a legislative understanding of the specifics of the discrimination/accommodation spectrum, and also on a confidence in the belief that the inclusion of minor impairments places no great burden on employers because of the correlating minor nature of the accommodation (if any) that may be required. However, as has been discussed in an earlier chapter, the Irish Supreme Court missed this point and it implicated the definition of disability in its conclusion on the interface between accommodation mandates and property rights.¹⁵⁸ In this sense, then, the senior judiciary relied on the traditional conception of disability as problematic to the person. It excluded any understanding of disability as arising from the interaction between impairment and structural barriers, including those operated by employers. The impact

¹⁵⁵ See chapter five.

¹⁵⁶ M. Friedland, *supra* n.18 p. 195.

¹⁵⁷ *Ibid.*

¹⁵⁸ See chapter three for discussion.

of this approach has been the weakening of the accommodation duty from a wholly different point of attack.¹⁵⁹

Protection Based on Stigmatised Characteristics?

Crossley argues that an alternative approach would be to open up the protection of disability discrimination law to anyone adversely affected on the basis of a physical characteristic.¹⁶⁰ This would open up the protected class and could include individuals who were bald, had blue eyes, or red hair, or were short in stature.¹⁶¹ However, limitations could be put on the approach, through expressly excluding characteristics that the legislature deemed not to merit protection¹⁶² and by placing a qualifier on the protection against discrimination on the basis of physical attributes. For example, prohibited discrimination might include actions only based on a physical characteristic associated with social, cultural or economic disadvantage, or associated with stigmatic exclusion, and this would exclude the blue-eyed and red-haired examples mentioned above. This approach would be in keeping with social model theory, as it would look at the economic, social and cultural disadvantages that can stem from an individual's differences. In the final analysis, the courts would still be involved in line-drawing, with regards to how grave the disadvantage might be, or how connected the disadvantage might be to the characteristic in question. However, as Crossley points out, "if we are stuck drawing lines, we should at least attempt to identify standards for drawing lines that comport with our understanding of whom we wish to protect. ... [I]t might be perfectly rational to trade one set of line-drawing issues for another if we believe that the second set of issues is more closely related to accomplishing our policy goal".¹⁶³ It can be argued that this second approach to line-drawing, divorced from a reliance on clinical criteria, avoids the conflation of disability with impairment and recognises the social, cultural or economic disadvantages that are associated with particular characteristics. In this respect, the law would take a small step away from the

¹⁵⁹ See chapter two and chapter five for discussion.

¹⁶⁰ M. Crossley, *supra* n.1. p.713.

¹⁶¹ For criticism of the inclusion of individuals whose impairments are minor, not stigmatised and not subject to social subordination, see C. Gill, "Questioning Continuum" in D. Barrett Shaw (ed.), *The Ragged Edge: The Disability Experience from the Pages of the First Fifteen Years of the Disability Rag* (1995) p.42.

¹⁶² As is the case in the ADA which excludes, *inter alia*, left-handedness, kleptomania and paedophilia.

¹⁶³ M. Crossley, *supra* n.1 p.714.

dominance of the medical model of disability and move towards addressing the social factors which can disadvantage disabled people.

While Crossley's argument does not retain quite as much relevance in the EEA context, it is argued here that this type of definition could be usefully employed in the context of positive action programmes. One concern expressed by the disability movement is that the legislation is not reaching those with so called "unpopular disabilities" – those with more severe impairments, with certain mental impairments, or with learning disabilities. These individuals endure disproportionate levels of exclusion because of stigma, prejudice and fear. In this sense, positive action programmes could be usefully tailored to specific sub-groups of disabled people, based on levels of stigma and exclusion. Positive action is discussed in chapter six.

Does the EEA perpetuate the medical model of disability?

In terms of legal practicalities and ease of coverage, the EEA definition of disability is preferable to the ADA's because of the complexity that bedevils the interpretation of the latter. In light of Crossley's alternative approach to the protected class, as set out above, I consider here whether the impairment definition supported by medical evidence reinstates the individual medical model into the EEA. The EEA, it is argued, perpetuates medical and individual models of disability through its conflation of impairment with the broader social construction of disability. This argument concerns the ideological impact which a medicalised definition of impairment still carries within an equality statute: if disability is viewed solely as deficiencies in biological forms of structure and functioning, then the social disadvantages which accompany it appear natural and not attributable to any cause or factor external to the individual. However, disability discourse adopts a different point of view. The collapsing of the entire definition or concept of disability into the concept of impairment appears dangerous from the perspective of disability theory. As Crossley points out:

Once we begin to understand impairment as describing the ways in which a person's activities are affected by a bodily condition or deficit, it is but a short step to viewing all the disadvantages suffered by disabled people as being simply part and parcel of their impairment. ... To the extent that we conflate a description of the body with the social, political and cultural disadvantages that accompany it, the latter start to appear to be caused by, and inextricably linked to, the former. But the belief that bodily inferiority naturally causes the disadvantages of disability reflects precisely the medical model of disability that disability theorists reject. Thus, when a court speaks of a plaintiff's impairment

being a medical condition and then goes on to describe the person as being impaired in relation to her employment opportunities, the message sent by the choice of language is that the social disadvantages of decreased employment opportunities is but one side effect of a medical condition and not the result of exclusionary forces.¹⁶⁴

Crossley is writing in the context of ADA analysis, and it remains questionable whether her comments extend with equal force to the EEA definition. Thus, not all impairment or capacity-related definitions within anti-discrimination law perpetuate the medical individualised model of disability to the exclusion of the social construction.¹⁶⁵ This point recognises that the application of strong social model reasoning within non-discrimination discourse becomes impossible. This is because social model reasoning characterises disability as a disadvantage accruing from an inhospitable built and social environment which excludes individuals with impairments.¹⁶⁶ As Degener points out, it mixes characteristics and treatment.¹⁶⁷ Yet, by definition, discrimination is manifested through stigma, animus, thoughtfulness or neglect based on the presence or assumed presence of a particular characteristic – in this instance, impairment. In this sense, discrimination law needs to define discrimination (the treatment) as well as disability (the characteristic), as it is unworkable to legally define disability as the outcome of discrimination. Thus, the issue of whether discrimination law perpetuates a medical model of disability depends upon the width and character of its definition. The ADA definition dangerously conflates disability with impairment in its emphasis on functional activities compromised by bodily conditions. In this sense, then, the medical model is perpetuated: the definition of disability covers a certain “truly disabled” group of individuals delineated by complicated, excessive and costly medical enquiries into the extent of their personal deficits. The EEA’s definition, while it is impairment-based, does not have its entire statutory structure predicated upon the medical model. That determination depends upon a wider enquiry. Thus, the capacity for disability discrimination law to further the social model agenda does not solely rest on its definition of disability. Whether discrimination law pursues a social model understanding of disability not only depends upon its definition of disability but, ultimately, on its cumulative impact in terms of offsetting the creation and perpetuation of socially-constructed disablement. This last point is developed in chapter six. Thus, in spite of its medical interpretation, the practical reality remains that the impairment

¹⁶⁴ M. Crossley, *supra* n.1 p. 702.

¹⁶⁵ T. DeGener, *supra* n.137 p.11.

¹⁶⁶ See chapter one.

definition of disability in the EEA is likely to pose the least problems for individuals seeking access to protection. It is related to impairment, it does not depend on the severity of the condition, it covers past, present, future or imputed impairments, and it covers associates of individuals with impairments. DeGener argues that discrimination law needs a definition of disability not merely to define the group protected under the law but to assist in defining the acts prohibited. To this end, the definition should describe and utilise the term “disability-based” discrimination, rather than the term “disabled person”.¹⁶⁸

Conclusion

Disability discrimination is based on the forbidden ground of ‘disability’ which, in statute law at least, appears to mesh the elements of impairment and disability. As a system, law relies heavily on regulatory classifications, and in the context of disability non-discrimination protection, such strict categorisation can deny social models of disablement by requiring, and thereby legitimatising, medical assessments as ‘objective’ definitions of the term. The medicalisation of disability, from a judicial perspective, acts as a both a validation device and a limitation device. Yet, as the disability movement has argued, medicalisation can entail a complete takeover of the self: it feeds a construction of the disabled individual in terms of treatment, rehabilitation, personal shortcoming, dependence and passivity.

The federal courts in the US have shown remarkable inconsistency in their assessment of when an impairment rises to the judiciary’s nebulous standard of disability. Judicial treatment has relied on the rehabilitative school of medical thought in its refusal to accept anything other than traditional, stereotypical designations of disability. It has been particularly difficult to detach the concept of disability from its historical meaning of an inability to work or function in society due to personal misfortune. The judicial approach simply reflects broader societal views of disability as a fixed, permanent and debilitating state, requiring pity, rehabilitation and charity. Judicial engagement with these influences has manifested in the need to confine the category in order that the deserving disabled only are protected. The implication is that the “special protection” afforded by the ADA should be available to the “worthy” only. The result has been a situation in which the delineation of those worthy of protection

¹⁶⁷ T. DeGener, *supra* n.137 p.11.

¹⁶⁸ T. De Gener *supra* n.137 p.11.

has become the federal courts' occupation. Yet, they have lost sight of the foundations upon which the protection is putatively built: equality of opportunity, independent living, economic self sufficiency, and equal citizenship.

With the medicalisation of disability, the overt focus of the "problem" remains on the individual. This reinforces the rehabilitative approach to the problems faced by impaired individuals. The reason that control is accorded to medical opinion is because of the line-drawing that is required under the anti-discrimination law framework. The focus of anti-discrimination protection is comparative: discrimination is less favourable treatment accorded to an individual with a disability, as opposed to the treatment accorded a non-disabled individual. The anti-discrimination framework, in the context of disability, extends discrimination to include an additional form of protection in the guise of the reasonable accommodation mandate. This provision occupies an uneasy position within the equality framework of the liberal state. The judiciary, particularly in the United States, has assumed a gatekeeping role in order to limit the number of individuals who can claim under the accommodation mandate. This approach can be traced to the judicial attitude to disability with regards to social security regulations: the desire to protect only the "truly disabled" and to reduce the incidence of fraud is paramount.

The EEA definition operates differently to the ADA's in that it is not based on a certain minimum severity of disability. It is not concerned with the degree of functional limitation(s). It has recently been recognised as a model definition for other EU States who are implementing the Framework Directive.¹⁶⁹ At the same time, it has been criticised by the disability movement for its excessive focus on impairment, and for its putative disregard of the social construction of disablement. As was discussed above, there are considerable difficulties attached to formulating a definition of disability based on the social model perspective. As discussed in chapter one, the social model perspective mixes the treatment and the characteristic. Discrimination law cannot simply define the characteristic (disability) as the treatment (discrimination). The EEA defines the characteristic as impairment. In this way, discrimination law's multi-faceted prohibition of the social phenomenon of discrimination, it is argued, brings the system within a social model perspective. For this to hold true, it is argued here that the non-discrimination principle needs to be reformulated within a more substantive equality norm. In chapters five and six, it is considered if there are too many other limitations to

¹⁶⁹ T. Degener, *supra* n. 137 p.11.

the current non-discrimination structure to warrant its characterisation as a tool of social model reasoning.

Chapter Five

Reasonable Accommodation: The Legal Response to Workplace Disability Discrimination

Introduction

This chapter discusses the mechanics of the duty to make reasonable accommodation under the ADA, Ireland's EEA and the Article 13 Framework Directive.¹ The ADA's articulation of the reasonable accommodation mandate inspired equivalent provisions across the globe. The periodical literature in the United States discussing the authority, meaning, extent and impact of the reasonable accommodation mandate is particularly voluminous. Discussion of the concept takes a number of perspectives across a wide spectrum of positions.² This thesis argues that reasonable accommodation is a permissible conceptualisation of disability equality law but queries the extent to which its initial promise as a tool to address exclusion has been realised. The purpose of this chapter is to provide a comparative assessment of the mechanics of the concept³ in order to substantiate and extend the general argument regarding the operation of the disability discrimination framework. First, the founding United States model will be assessed, given its seminal position in the field of disability discrimination law. A lengthy and complicated structure, the application of Title I of the ADA is based upon the interaction of four factors: i) the individual's particular disability,⁴ ii) the essential functions of the job she seeks to perform, iii) the possible accommodation that would enable her to do the job and iv) the burden that those accommodations would impose on employers.⁵ The latter three factors shall be considered below.

¹ Framework Directive 2000/78 OJ [2000] L303/16.

² These range from the law and economics school's concern with an unfunded mandate (see R. Epstein and C. L. Weaver, "Incentive versus Controls in Federal Disability Policy" in C.L. Weaver (ed.) *Disability & Work: Incentives Rights and Opportunities* (1991) p.6), to traditional civil rights supporters' concerns that reasonable accommodation goes beyond permissible civil rights legislation, which, thereby, threatens the system as a whole, to disability rights theorists, who see it as a proper application of the civil rights system.

³ For a comparative perspective, see S. Herr, "Reforming Disability NonDiscrimination Laws: A Comparative Perspective" (2001/2002) 35 *University of Michigan Journal of Law Reform* 305. See also G. Quinn, M. McDonagh, and C. Kimber, *Disability Discrimination Law in the United States, Australia and Canada* (Dublin: Oak Tree Press, 1993).

⁴ As already discussed in chapter four.

⁵ P. Karlan and G. Rutherglen, "Disabilities, Discrimination and Reasonable Accommodation" (1996) 46 *Duke Law Journal* 1 p.10.

The specifics of the Irish duty are then discussed. First, the original position set out in the Employment Equality Act 1998 is considered. This is followed by a brief examination of the European Union model, as set out in the Framework Directive, and by a consideration of the consequent transposition of the Framework Directive into Irish law via the terms of the Equality Act 2004. The discussion here of the reasonable accommodation mandate under the ADA, while reasonably extensive, does not claim to be an exhaustive treatment on the entire range and extent of the duty. Rather, it is included to demonstrate points of contrast and comparison in the search for examples of good practice and to illustrate points of weakness both in statutory design and in the judicial interpretation of the duty. It relies for further insight on the extensive regulatory guidance which accompanies the ADA's reasonable accommodation duty. It should be noted that while the reasonable accommodation provisions of the ADA influenced equivalent measures in disability anti-discrimination statutes elsewhere, the duty is now experiencing something of a downturn in fortunes in its domestic setting. This is as a result of judicial reductionism, academic attack and widespread media bias.⁶ As is pointed out below, recent case law has begun to question the "perceived fairness"⁷ of requiring accommodations for disabled people.

Reasonable Accommodation under the ADA

*Background*⁸

The meaning of reasonable accommodation has been described as the ADA's "greatest unsettled question"⁹ and, by two other commentators, "by far its most important one".¹⁰

⁶ See L. Hamilton Kreiger, "Foreword – Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies" (2000) 21 *Berkeley Journal of Employment and Labor Law* 1 and M. Diller, "Judicial Backlash, the ADA, and the Civil Rights Model" (2000) 21 *Berkeley Journal of Employment and Labor Law* 19.

⁷ See S. Befort and T. Holmes Donesky, "Reassignment under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?" (2000) 57 *Washington and Lee Law Review* 1045, 1048.

⁸ The phrase "reasonable accommodation" first appeared in regulations published by the EEOC under Title VII defining employer prohibitions on discrimination against employees on the basis of religion. See 22 C.F.R. § 1605.1(1995). These regulations were essentially codified by an amendment to Title VII that required employers to "reasonably accommodate" religious observances and practices. 42 USC § 2000e(j), cited in R.L. Burgdorf Jr., *Disability Discrimination in Employment Law* (Washington, D.C.: Bureau of Public Affairs, 1995) pp. 274-275.

⁹ P. Karlan and G. Rutherglen, *supra* n.5 p. 8.

The scope of the reasonable accommodation duty is the core protection provided by the ADA for many disabled people. Its meaning, therefore, is of crucial importance for all three major players: the courts, who have been described as “confused and inconsistent”; for disabled people themselves, who need greater certainty in their protection; and for employers, who also have unpredictable obligations.¹¹ A considerable number of cases decided by the federal appeal courts have demonstrated remarkable variation in respect of core issues, such as the burden of proof, the “reasonableness” of accommodations and the defence of “undue hardship”.¹² The US Supreme Court has only recently considered the concept of reasonable accommodation for the first time. In that decision, it confined its comments to the facts of the case, which concerned the impact of a form of reasonable accommodation on an employer’s seniority system.¹³

Much of the criticism about the open-ended nature of the ADA’s accommodation mandate has been directed at the legislature.¹⁴ While Congress did attempt to articulate its intention with respect to the various threshold requirements of the Act, this has achieved at best a debatable success. Much of the guidance regarding the legislative intent on the scope of duty has derived from the Senate Committee Reports.¹⁵ Although it has been accepted that these contain insights on what Congress meant by reasonable accommodation, the guidelines have been derided as patchy and incomplete by some ADA commentators.¹⁶ Clearly, Congress felt that any fixed standards would be counter-productive and that the federal courts would be in a better position to decide standards on a case-by case basis. It was believed that the federal courts’ interpretive prowess, aided by the EEOC’s federal regulations and guidance, would cumulatively endorse the overall intent of Congress’s actions in the disability context. This approach has met sharp criticism. Congress has been accused of “complete

¹⁰ S. Schwab and S. Willborn “Reasonable Accommodation of Workplace Disabilities” (2001) Cornell Working Paper Series. Available at <http://www.law.cornell.edu/leda/search/seriesbyauthor> Last accessed December 4, 2002. p.3

¹¹ *Ibid.*

¹² See B. Poitras Tucker, “The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm” (2001) 62 *Ohio State Law Journal* 335 (detailing cases where the federal courts have narrowed the scope of the ADA) and R. Colker, “The ADA: A Windfall for Defendants” (1999) 34 *Harvard Civil Rights-Civil Liberties Review* 99 (demonstrating how employers have been successful in the overwhelming majority of ADA Title One cases).

¹³ See *US Airways v Barnett* 535 U.S. 391 (2002) discussed below.

¹⁴ For a critique of the open-endedness of the reasonable accommodation provision, see Schwab and Willborn, *supra* n.10 pp.31-33.

¹⁵ Specifically the Senate Committee on Labor and Human Resources, see Senate Report no. 116.

¹⁶ S. Schwab and S. Willborn *supra* n.10. p 21.

abdication of its legislative power” for “[t]he assumption that the courts will adequately clarify what Congress did ignores both history and reality.”¹⁷ The practical reality is that many federal courts routinely ignore both the guidance produced by the Senate Reports and the interpretive guidance set out in the EEOC’s regulations.¹⁸ Recent Supreme Court jurisprudence on the ADA indicates that the federal courts’ conservative element is only too willing to undermine Congressional intent, particularly where the latter has been imperfectly expressed.

Legislative description

The obvious place to seek guidance on the boundaries of the reasonable accommodation obligation is in the statutory text. At first glance, the statute appears limited in its description of the accommodation duty. To a certain degree, the absence of fixed rules as opposed to standards is comprehensible, given the intricate interplay between an unquantifiable number and degree of impairments, the variable needs for accommodations, a correspondingly vast number of job requirements and the variable levels of employer resources.¹⁹ However, problematic lacunae remain, which a more vigilant legislative body could have avoided without compromising the individualised core of the accommodation enquiry.

Section 102 of the ADA sets out the “General Rule” that no covered entity²⁰ shall discriminate against a qualified individual with a disability because of [their]

¹⁷ S. Epstein, “In Search of a Bright Line: Determining When an Employer’s Financial Hardship Becomes ‘Undue’ under the Americans with Disabilities Act” (1995) 48 *Vanderbilt Law Review* 422, 441 cited in R. O’Brien, *Crippled Justice* (Chicago and London: University of Chicago Press, 2001) p. 176.

¹⁸ O’Brien points out that the federal courts prefer to take their cue from the body of law established by the Supreme Court. Hence, many of the federal courts have combined the substantive issue about employment discrimination with the procedural issue of determining whether someone has a disability. *Ibid.*

¹⁹ As the EEOC points out, the “case -by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs. For this reason, neither the ADA nor the [regulations/appendices] can supply the correct answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply established parameters to guide employers in how to consider and take into account, the disabling condition involved.” EEOC, *Appendix to Part 1630 – Interpretive Guidance on Title I of the Americans with Disabilities Act*, (July, 2003 ed.) p.349

²⁰ “Covered entities” are defined to mean an employer, employment agency, labor organization or joint labor management committee. EEOC, *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 29 C.F.R. Ch. XIV (July 2003 ed.) § 1630.2(b).

disability at all stages of the employment relationship.²¹ As this thesis has discussed, the act of discriminating in employment is made novel in the disability context, as the statute stipulates that “discrimination” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee ...”.²² The provision goes on to state that a denial of employment opportunities to an “otherwise qualified individual with a disability” amounts to discrimination if such a denial is based on the employer’s need to make reasonable accommodation to the physical or mental impairments of the applicant.²³

*Qualified Individuals and Essential Functions*²⁴

The extent of the accommodation duty placed on employers by Title I is tempered by a number of statutory caveats. These obviously include the qualifying term “reasonable” and its interaction with the “undue hardship” defence.²⁵ These terms shall be considered below, following an analysis of two elements that are often omitted from the debate over accommodations – the qualified individuals and the essential functions requirements.

Instrumental to the application of the reasonable accommodation provision is the definition of a “qualified individual with a disability” to whom the duty to accommodate only extends. Title I decrees a “qualified individual with a disability” to mean an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position in question.²⁶ The insights raised here on the role played by this factor in the accommodation matrix will be of particular comparative use when discussing Ireland’s reasonable accommodation provision.

The business community’s primary concern with the ADA can be summed up as an uneasy belief that its measures would force employers to hire or retain individuals whose impairments made it impossible for them to do the job. The predominant sense

²¹ Specifically with regard to job procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

²² Section 102(b)(5)(A).

²³ Section 102(b)(5)(B).

²⁴ See generally, R.L. Burgdorf Jr., *Disability Discrimination in Employment*, (Washington, D.C.: Bureau of Public Affairs, 1996), chapter 6.

²⁵ Other statutory defences available to an employer include a refusal to employ an individual where that individual poses a direct threat to the health or safety of other individuals in the workplace, unless that risk cannot be eliminated or reduced by reasonable accommodation: section 103(b) ADA.

among the employer lobby was that equality objectives in the context of disability would result in unqualified personnel, increased health and safety expenditures, productivity slumps, and a reduction of employer prerogative in the design and operation of workplace functions. However, a proper analysis of the ADA's non-discrimination provisions clarifies that an employer's refusal to hire or retain a person who does not possess the ability to perform the essential functions of the job does not amount to discrimination. What remains important in any such determination is the procedural manner by which the employer arrived at this decision.²⁷

The qualification requirement is addressed both in the statutory text and in the EEOC's Interpretive Guidance. These seek to outline a structural framework for deciding whether or not a job function is "essential". Title I of the ADA extends statutory protection from discrimination only to qualified individuals with a disability. This is a disabled person who, with or without reasonable accommodation, can perform the essential functions of the employment position she holds or desires.²⁸ If the person concerned is not "qualified" in the particular sense required by the statute,²⁹ she loses her non-discrimination protection. At the same time, it is important to emphasise the rationale underpinning the "essential functions" prerequisite.³⁰ The purpose behind the essential functions concept is one that seeks to ensure that employers do not systematically ignore the capabilities of disabled workers by misconceiving that a disability in itself prevents job performance, when in fact a person is capable of performing the job that the employer needs carried out.³¹ Determining whether an individual is "qualified" is obviously an individualised issue, to be assessed on a case by case basis. The EEOC has stated that the first step involves determining whether the individual satisfies the prerequisites for the position in terms of appropriate education, employment experience, skills and licences. The US Supreme Court has stated that any such inquiry should determine, first, whether the particular individual can perform the essential functions of the job despite his or her disability and, second, if the individual

²⁶ Section 101(8).

²⁷ See below for discussion on this point.

²⁸ Section 101(8).

²⁹ EEOC regulations define "qualification standards" to mean "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. §1630.2(q).

³⁰ R. Burgdorf, *supra* n.24 pp. 191-192.

³¹ The Report of the Senate Labor and Human Resources Committee states that the purpose of the concept is to ensure that people with disabilities are not "disqualified simply because they have a difficulty in performing tasks that bear only a marginal relationship to a particular job". Cited in R. Burgdorf, *supra* n.24 p. 206.

cannot perform its essential functions, whether a reasonable accommodation would enable him or her to do so.³²

The essential functions concept allows, therefore, disabled employees and applicants to demonstrate an ability to carry out the fundamental aspects of the employment position, even if the job possesses some marginal tasks which they may not be able to carry out because of their disability. If a person with a disability is denied a job, or discharged because his or her disability precludes the performance of a marginal job function, then this action has negatively impacted on the individual's employment opportunities and is actionable under the statute. The crucial question is whether a particular function is in fact "essential" to the performance of the specific job.

On this point, initial guidance can be found in the statutory text, which attaches considerable weight to the employer's right to determine the functions of the job. The statutory provision states that "... consideration shall be given to the employer's judgment as to what functions of a job are essential"³³ and evidence of the employer's judgment shall be taken to include "... a written description before advertising or interviewing applicants for the job" if any such document is prepared by the employer. While the employer's job description is an important factor, it is by no means the decisive one. Several courts have ruled that employer job descriptions are not controlling, and that a fact-specific individualised inquiry of this type "... should reflect the actual functioning and circumstances of the particular enterprise involved."³⁴ Indeed, the point that employer prerogative was not conclusive in this regard was firmly endorsed by Congress: an amendment to assign the prerogative a presumptive validity was thrown out prior to the ADA's enactment.³⁵

The EEOC has produced further regulatory guidance on the "essential functions" requirement. It defines the term as the "fundamental job duties" of the job the individual with a disability holds or desires and it expressly excludes from consideration the "marginal functions" of the position.³⁶ It goes on to list a number of reasons that may make a particular function essential. These include the following:

- (i) The function may be essential because the reason the position exists is to perform that function;

³² *School Board of Nassau County v Arline* 480 U.S. 273, 1 AD Cases 1026 (1987), decided under the Rehabilitation Act 1973.

³³ Section 101(8).

³⁴ *Hall v United States Postal Service* 857 F.2d. 1073, 1 AD Cases 1368 (Sixth Circ. 1988).

³⁵ See generally R.Burgdorf, *supra* n.24, chapter six.

³⁶ 29 C.F.R. 1630.2(n)(1) (July, 2003 ed.).

- (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and /or
- (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.³⁷

In addition, the regulations list the type of evidence that may be considered in determining whether the function is essential.³⁸ These include the employer's judgment and the written job description prepared before advertising or interviewing for the vacant position.³⁹ In addition, the time spent on functions may be indicative of its status within the overall job position.⁴⁰ The terms of a collective bargaining agreement may be presented as evidence of whether a function is essential or not to a particular job description, as can evidence of the work experience of past and current incumbents⁴¹ in the position.

Thus, there is a clear relationship that cannot be overlooked between "qualification" for the "essential functions" of the job in this statutory sense and the obligation to make reasonable accommodation. However, this is one of the more obvious sites where a disabling discourse clouds the operation of disability equality rights. What proves difficult from a disability rights perspective is the conjunction of a restricted functional limitation definition and a qualification clause which produces, at least in many employers' eyes, an untenable dichotomy: the fact of disability and a correlating assumption of a lack of qualifications or capacity for the position. As Hahn points out, "the conjunction of these terms obviously produces difficulty in proving that the actions of an employer were prompted by discriminatory attitudes rather than by evaluation of a lack of ability".⁴² Evaluation of a lack of ability or qualification for a position is often prompted by an inherently disabling perspective which relies on far

³⁷ 29 C.F.R. 1630.2(n)(2)(i)-(iii) (July, 2003 ed.).

³⁸ 29 C.F.R. 1630.2 (n)(3).

³⁹ 29 C.F.R. 1630.2(n)(3)(i)-(ii). While deference is given to the employer's judgement, it is open to challenge by the plaintiff based on the practical experience of the workplace. Though this is certainly an example of how the operation of the ADA weighs more heavily on applicants for positions seeking discrimination protection as compared with job- incumbents. Statistical studies on litigation under the ADA bears out this point. See M. Russell, *Beyond Ramps: Disability at the End of the Social Contract* (Monroe, Maine: Common Courage Press, 1998) p. 120.

⁴⁰ 29 C.F.R. 1630.2 (n)(3)(iii). Some obvious examples indicate when such a test should or should not be relied on. For example, consider the amount of time a pilot spends in taking off and landing a plane, but it could hardly be conceived that such functions are not essential to the position.

⁴¹ 29 C.F.R. 1630.2(n)(3)(iv). (July 2003 ed.).

⁴² H. Hahn, "Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?" (2000) 21 *Berkeley Journal of Employment and Labor Law* 166, 187.

from neutral criteria such as merit or past experience. This may include, for example, a demand for experience of performing the tasks of a position in a particular manner, which may prove exclusionary for many disabled individuals.

Practical Requirements of Accommodations

Reasonable accommodation can be viewed as a tool of public policy that recognises the myriad ways through which the built and social environment favours the needs and requirements of non-disabled individuals and, as a consequence, requires alterations of that environment to mitigate its disproportionate and exclusionary impact on disabled people. The term “accommodation” in the context of disability is used in an umbrella sense: it can refer to a multitude of changes to be made in the ordinary functioning of the workplace in order to ensure the adequate participation of a qualified individual with a disability.⁴³ The EEOC has described reasonable accommodation in the following way:

It is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken or inflexible job procedures that unduly limit the models of communication that are used on the job or in the way particular tasks are accomplished.⁴⁴

Conscious of not imposing immutable standards, the ADA makes some attempt to identify for employers the forms that possible accommodations may take. However, it falls short of providing a tangible framework of examples. These have been collated in non-binding EEOC guidance and can also be extracted from the often-conflicting decisions of the federal courts.⁴⁵

The EEOC regulations state that reasonable accommodation requires modifications in three main circumstances. First, they stipulate that modifications or adjustments ought to be made to a job application process so that qualified applicants with disabilities can be considered. Second, the most commonly considered

⁴³ Chief Judge Posner: “It is plain enough what “accommodation” means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.” *Vande Zande v State of Wisconsin Dept. of Administration* 44 F.3d 538, 542.

⁴⁴ 29 C.F.R. Appendix to Part 1630 at p. 419.

accommodation requires modifications or adjustments to the work environment or the manner or circumstances under which a position is customarily performed, so that a qualified individual with a disability can perform its essential functions. Third, accommodations must be made so as to allow an employee with a disability to equally enjoy all the benefits and privileges of employment that are enjoyed by non-disabled employees in similar positions.⁴⁶

Various regulatory sources describe the types of adjustments required by the concept of reasonable accommodation.⁴⁷ In all, some seven express categories and a catch-all category are included in the statutory text. These categories include (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities.⁴⁸ The concept “may”⁴⁹ also include (2) job restructuring, (3) part-time or modified work schedules, (4) reassignment to a vacant position, (5) acquisition or modification of equipment or devices, (6) adjustment or modification of examinations, training materials or policies and (7) the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities.⁵⁰ EEOC Regulations further expand on the range of accommodations that employers may be required to furnish through illustrative examples in the commentary appended to federal regulations.⁵¹

Unlike the Irish and EU measures discussed below, the ADA provides a number of sign posts indicating the possible directions reasonable accommodation may take. However, the generality of the statutory language has not lent itself to consistent application. As a consequence, there is considerable divergence on the range and extent of the duty in the federal jurisprudence.

Examples of Reasonable Accommodation

Making facilities accessible and usable by an employee or applicant with a disability appears an obvious component of any reasonable accommodation duty. However, there

⁴⁵ See B. Poitras Tucker, *supra* n.12 for a discussion of the inconsistencies in the reasonable accommodation case-law.

⁴⁶ 29 C.F.R §1630.2 (o)(1)(i)-(iii) (July 03 ed.).

⁴⁷ See EEOC, Appendix to Part 1630.

⁴⁸ S. 101 (9)(A).

⁴⁹ Schwab and Willborn point out that the ambivalent tone of the statute’s wording here is unhelpful: an accommodation “may” require any of the listed actions; then again, it “may not”. *Supra* n. 10 at p.31.

⁵⁰ S. 101(9)(B).

⁵¹ 29 C.F.R. Appendix to Part 1630, commentary on § 1630.2(o).

is no general duty to make as many aspects of the workplace environment as accessible as possible to the widest range of disabilities. This approach is reflective of the individualisation of the accommodation process and is a recognition that, while the blanket removal of structural barriers may be a natural progression, not all accommodation requirements are amenable to that approach. The modification duty here is reactive rather than anticipatory in nature. It focuses on the particular needs of a particular job-seeker or employee.⁵² Examples include, *inter alia*, installing a ramp, reserving car park spaces near building entrances, making restroom facilities accessible, rearranging, altering or purchasing new office furniture or equipment, and so forth.

Job restructuring is another form of reasonable accommodation, though toying with the essential functions of a position is unnecessary.⁵³ What does require modification is a position's marginal functions which an employee with a disability may be unable to perform: these marginal duties may be reallocated or redistributed.⁵⁴ Additionally, restructuring may require altering when or how a function either essential or marginal is performed. This requires an employer to assess traditional workplace practices and to consider whether any alternative manner of performing the job will allow the previously excluded disabled employee reach the required end.

As disabled individuals often have greater medical requirements, the use of leave from work is described as a reasonable accommodation. An employer must permit the use of accrued paid leave or provide unpaid leave when necessitated by an employee's disability. An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees.⁵⁵ Closely related to the leave requirement is the duty to modify work schedules. While in certain positions, the time during which an essential function is performed may be critical, in other positions this

⁵² R. Burgdorf, *supra* n.24 p. 282.

⁵³ Though see the discussion over the difficulties of subtracting marginal from essential functions in the reasonable accommodation enquiry raised by Burgdorf, *ibid.* p.209.

⁵⁴ The reorganisation of tasks within a team or workplace can often take place without undue disruption where an individual's disability makes it difficult to carry out a particular task. Gooding points out how such shifts take place all the time amongst able bodied people: tasks and duties are shuffled to suit the skills and talents of individuals. Thus, rearranging rules to take into account a person's disability should be an extension of this process, as opposed to an exceptional requirement. C. Gooding, *Disabling Laws. Enabling Acts Disability Rights in Britain and America* (London: Pluto Press, 1994) p.8.

⁵⁵ An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his or her same position unless the employer demonstrates that holding open the position would impose an undue hardship. With regard to leave entitlements, see the Family and Medical Leave Act 1993 (FMLA). There are salient differences between the operation of the ADA and FMLA.

may not be the case. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, or allowing an employee to use accrued leave. These must be provided if such alterations would allow a worker with a disability to perform the duties attached to her position and if it would not result in an undue hardship on employers. Such modifications can prove especially useful to persons with certain conditions that may necessitate treatment during the working day, or to persons with mobility impairments who may require schedules to be adjusted to align with transportation requirements.

A common form of reasonable accommodation is the provision of devices or equipment which would allow the disabled individual to perform the essential functions of the position in question. The EEOC's Technical Assistance Manual lists an extensive array of equipment and devices which may be required as a reasonable accommodation. These include items such Telecommunication Devices for Deaf People (TDDs), specialised computer software which converts documents to braille, speaker phones, and so forth. The EEOC also includes a cost assessment of the specific provisions.⁵⁶ In addition, the statute requires - where appropriate - adjustments to take place in examinations, training materials and policies. The ADA importantly adds that the definition of discrimination includes the selection and administration of tests that do not accurately reflect the skills and aptitude of an employee with a disability.⁵⁷ Regulations issued by the EEOC expand upon the purposes behind this form of adjustment:

It is unlawful for [an employer] to fail to select and administer tests concerning employment in the most effective manner to ensure that, when its test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).⁵⁸

The provision of readers and interpreters is also a common form of reasonable accommodation: however, a reader would not be required if the reader would in effect be performing the job's essential functions instead of the employee doing so. The purpose of a reader or interpreter is to assist in the performance of the essential duties of the post.

⁵⁶ See the Technical Assistance manuals published and regularly updated by the United States Department of Justice Civil Rights Division. Available at www.ada.gov.

⁵⁷ § 102(b)(5)(7).

The ADA specifically lists reassignment to a “vacant position” as a form of reasonable accommodation. The ADA’s committee reports, as Burgdorf has noted, “indicate that including a reassignment obligation furthers important interests in preventing the employee’s loss of a job and the employer’s loss of a valuable worker in circumstances where the employee can be transferred to another position.”⁵⁹ Reassignment allows for the retention of a person with a disability who can no longer perform the essential functions of his or her original position but who can be accommodated in a vacant position. EEOC guidance points out that reassignment is required only for current employees and not for job applicants.⁶⁰ The employee must be “qualified” for the new position in terms of satisfying the requisite skill and experience and must be able to perform its essential functions with or without reasonable accommodation.⁶¹ The EEOC regulations indicate that reassignment is the reasonable accommodation “of last resort” and is only required following a determination that there is no effective accommodation that will allow the employee to perform the essential functions of her current position, or where all other reasonable accommodations would impose an undue hardship on the employer.⁶² This provides a timely reminder that all modifications requested by way of reasonable accommodation are subject to the undue hardship defence, in addition to the health and safety exemptions under Title I.⁶³

*Reassignment and Seniority Systems*⁶⁴

The US Supreme Court has recently considered for the first time the reasonable accommodation duty in the particular context of job reassignment and its impact on seniority systems. In *US Airways v Barnett*,⁶⁵ by a 5:4 majority, the Supreme Court

⁵⁸ 29 C.F.R. §1630.11 (July, 2003 ed.).

⁵⁹ R. Burgdorf, *supra* n. 24 pp. 297-298 relying on Senate Report at 31-32 and Education and Labor Committee Report at 63.

⁶⁰ 29 C.F.R. app s 1630.2 (o) (July, 2003 ed.).

⁶¹ The EEOC regulations indicate that the employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

⁶² EEOC, Appendix to Part 1630 at p.357.

⁶³ An employer can include in any consideration of the qualification standards of an employee with a disability whether that individual might pose a “direct threat” to his or her fellow employees. Section 103(b) ADA. The EEOC regulations define “direct threat” to mean “a significant risk of harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”. 29 C.F.R 1630(q).

⁶⁴ See generally Leading Cases, “Americans with Disabilities Act – Accommodation and Seniority Systems”, (2002) 116 *Harvard Law Review* 342.

⁶⁵ 535 U.S. 391 (2002), 122 S. Ct. 1516. Barnett injured his back whilst working as a cargo handler and transferred to a physically less demanding mailroom position. His new position later became open to seniority-based employee bidding under US Airways’ seniority system. US

handed down the principle that, in general, it will be unreasonable to reassign an employee with a disability where such a transfer would violate the rules of a seniority system. Thus, the Court held that seniority systems, whether collectively bargained or unilaterally imposed by management, trump the duty to make reasonable accommodation for disabled employees, because of the importance of the seniority system to employee expectations. Such systems governing job placement “give important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment.”⁶⁶ According to the Supreme Court, the case-by case, individualised assessments required by the reasonable accommodation process would serve only to destabilise the seniority systems. The Supreme Court did go on to create an exception to this general rule. It ruled that a plaintiff “... remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”⁶⁷ The Court was content not to delineate such exceptional circumstances, but it did allude to a number of examples. In one of these, an acceptable exceptional circumstance might be where a plaintiff shows that the employer retains the right to unilaterally alter its seniority system, and does so frequently, thereby reducing employee expectations that the system will be followed. As a result, one further departure needed to accommodate an individual is unlikely to affect any difference.⁶⁸ Additionally, the plaintiff may be able to discharge the burden of showing that the system already contains derogations which mean that, in the circumstances, one further exception is unlikely to matter.⁶⁹

The effect of this decision is to create a presumption about the inviolability of seniority rules, except in rare circumstances. A logical extension of this decision is that it provides an incentive for employers to organise strict seniority systems in order to avoid reasonable accommodation obligations. Yet, the outcome in *Barnett* is not clearly derivative of the ADA’s statutory text. By requiring reassignment to a *vacant* position, the ADA makes it clear that employers are not required to “bump” other employees to

Airways refused his request to accommodate his disability by allowing him to remain in the mailroom and he subsequently lost his job. He claimed disability discrimination due to US Airways’ failure to allow him to remain in the mailroom by way of reasonable accommodation.

⁶⁶ 535 US 391 (2002), 404.

⁶⁷ *Ibid* at 405.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*. Thus the plaintiff bears the burden of showing the presence of “special circumstances” that make a departure from the seniority system reasonable in any particular case. If such special circumstances are shown, the burden then shifts to the employer to show why the reassignment would pose an undue hardship.

make space for a disabled employee. The ADA expressly states that “reassignment to a vacant position” and “modification of existing policies” are required by way of reasonable accommodation.⁷⁰ Therefore, it seems logical to presume that a modification of an existing seniority policy by assigning a person to a vacant position could be a reasonable accommodation, unless the position was not in fact vacant or the employer could demonstrate undue hardship on its business operations. In addition, the statute nowhere exempts the rules of seniority systems from the requirements of the reasonable accommodation duty, as is the position under equivalent provisions in the United States’ Age Discrimination in Employment Act. Indeed, the legislative history of the ADA makes it clear that the existence of collectively-bargained protections for seniority “would not be determinative” on the issue of whether an accommodation was reasonable.⁷¹

This decision is an example of a judicial failure, from the lower to the superior courts,⁷² to interpret the statute in accordance with its plain language and in a manner consistent with its stated goal of integrating and retaining disabled people within workplace structures. The creation of a rebuttable presumption that reassignment to a vacant position may violate seniority rules moves away from the individual case-by-case approach to the ADA’s reasonable accommodation duty. As part of the accommodation required through “modifying policies”, it should have remained an issue within the general scope of accommodation enquiries. Thus, it should be fact-specific and individually assessed. On this view, a standard presumption that an employer-negotiated seniority system is inviolable gives way to a balancing enquiry between the seniority system and the proposed reasonableness of the accommodation and any undue hardship defence.

Two Supreme Court Justices dissented from the majority line of reasoning. In dissent, Justice Souter, who was joined by Justice Ginsburg, pointed out that there was nothing in the ADA which insulates seniority rules from the reasonable accommodation duty, as is specifically the case with Title VII of the Civil Rights Act 1964 and the Age Discrimination in Employment Act 1967.⁷³ Justice Souter looked to the statute’s legislative history. This gives evidence of Congress’s intention that a collective

⁷⁰ My emphasis.

⁷¹ House Representative Report No. 101 – 485, pt.2, p.63 (1990). See also the Senate Report No. 101-116, p.32 (1989).

⁷² For discussion on the litigation history of this case and lower courts divergent approach to the issue, see M. B. Robinson, “Reasonable Accommodation vs. Seniority in the Application of the Americans with Disabilities Act” (2003) 47 *St. Louis University Law Journal* 179.

bargaining agreement providing for seniority could be considered as one factor in determining the reasonableness of an accommodation.⁷⁴ He went on to state that, in his opinion, Mr Barnett had discharged the burden of showing that his proposed accommodation was a “reasonable one”, despite the policy in place at US Airways, because of the absence of any “unmanageable ripple effects” from his request.⁷⁵ In fact, Justice Souter went on to declare that “... it is hard to see the seniority scheme here as any match for Barnett’s ADA requests, since US Airways apparently took pains to ensure that its seniority rules raised no great expectations”⁷⁶, no other employee was “bumped”, and nobody had lost a job on his account. He declared that since the request was reasonable, the burden should shift to US Airways to demonstrate that the seniority violation would have created an undue hardship.

The US Supreme Court’s interpretation of the ADA with regard to seniority systems is further evidence of the disabling discourse surrounding judicial interpretation of disability civil rights. A sharp division is drawn by the Supreme Court between “normal” or “ordinary” workers’ expectations of fair, uniform treatment and the atypical, special statutory rights granted disabled workers. The latter, according to the Supreme Court, serves to “destabilise” the predictable standards of the workplace environment. Claims that disabled workers enforcing accommodation duties are “destabilising” once again provides evidence of a judicial attitude which assumes the innate displacement of disabled individuals.

What is clear from this review of the majority and dissenting judgments is that legal discourse often views disabled individuals’ claims to reasonable accommodation as a form of “special” rights. Such claims go beyond the legitimate boundaries of the traditional civil rights paradigm.⁷⁷ However, the goal of equality of opportunity is undermined when judicial statements attack the legitimacy of the reasonable accommodation provision by questioning the level of protection accorded to disabled people, despite the strong purpose statements of Congress. In this sense, judicial

⁷³ Both of these statutes contain explicit protection for seniority systems - See 42 USC § 2000e-2(h) (1994 ed.) and 29 USC § 623(f) (1994 ed.) respectively.

⁷⁴ 535 U.S. 391 (2002), at 421, citing Senate Report no. 101- 116 p.32 (1989).

⁷⁵ *Ibid.* p.421.

⁷⁶ *Ibid.* p.423.

⁷⁷ For a persuasive counter to this point including how employers routinely provide accommodations for all employees as a matter of course and how reasonable accommodation in favour of disabled people is an extension of this process, see R. Burgdorf, “ ‘Substantially Limited’ Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability” (1997) 42 *Villanova Law Review* 409, 529-32 and H. Hahn, “Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?” (2000) 21 *Berkeley Journal of Employment and Labor Law* 166.

discourse in the US has yet to fully accept or grasp that the existing rules of the workplace operate to the advantage of many non-disabled workers in the first place.⁷⁸ This calls for, as Tucker argues, greater education for the courts and the public at large on the true meaning of civil rights for disabled people.⁷⁹ In turn, this depends on a great change in the prevailing understanding of the concept of disability.

Procedural Reasonable Accommodation: An Interactive Process

The ADA regulates the procedural aspects along with the substantive scope of the accommodation mandate. In the first instance, it must be pointed out that an employer need only make a reasonable accommodation for the known disability of an employee or applicant.⁸⁰ Thus, the disabled employee or applicant must make his or her impairment known to the employer, except where a disability is immediately obvious.

The ADA's accommodation duty envisions an interactive process of ongoing dialogue between the employer and the disabled employee with regard to the type of accommodation required.⁸¹ In *US Airways v Barnett*, discussed previously, Justice Stevens made reference to the Appeal Court's correctly-held view that there was a triable issue of fact with respect to whether the employer had violated the statute by failing to engage in an interactive process concerning the respondent's proposed accommodations. According to Justice Stevens, this holding remained untouched by the Supreme Court's judgment in that decision.⁸² However, it must be pointed out that the courts are divided over the extent and existence of the procedural aspect of the accommodation duty.⁸³ The most common reason given for a refusal to recognise this procedural component is the possibility of an odd situation where "employers who had provided an adequate substantive accommodation could nevertheless be held liable for a

⁷⁸ See further, A. Myerson and S. Yee, *Reasonable Accommodation after Barnett* (2003) available at <<http://www.ncd.gov>>

⁷⁹ B. Poitras Tucker, *supra* n.12 p.335.

⁸⁰ See EEOC, Appendix to Pt. 1630, §1630.9 p.363.

⁸¹ To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. EEOC, 29 C.F.R. §1630.2 (o)(3) (July, 2003 ed.). See also Appendix to Part 1630 §1630.2(o) .

⁸² 228 F.3d 1105 117 (CA9 2000).

⁸³ That is, the lower federal courts. The Supreme Court has not considered the procedural aspect of reasonable accommodations.

procedural shortcoming.”⁸⁴ However, this outcome has arisen in other areas of procedural obligations without any great practical or theoretical difficulty ensuing.⁸⁵

The procedure element of the reasonable accommodation duty has an interesting role to play in the context of addressing employer reactions to disabled people and their status as employees. For example, it is recognised that discrimination by employers against disabled applicants can take many forms, and not least of these is an inherent discriminatory bias against such persons, in much the same way as with gender- or race-based preferences.⁸⁶ In particular, employer aversion may arise in the context of the accumulated myths regarding the limitations and deficits of the stereotypical person with a particular type or severity of disability. More often than not, employment decisions in this sort of situation are taken on the basis of generalised, inaccurate information which feeds and helps to perpetuate these myths and stereotypes.⁸⁷ The procedural aspect of the accommodation duty can reduce decisions caused by employer aversion in a number of ways. For a start, the “forced interaction” is more likely to increase the chance of decisions being made on the basis of substantive information rather than on the basis of inherent aversion.⁸⁸ In addition, as Schwab and Willborn argue, procedural discussions may eventually contribute to the ADA’s goal of changing employer preferences, as the discussion may inform and educate employers of the positive potential and strengths of individuals with disabilities.⁸⁹

Additionally, the interactive process has a role to play in offsetting the disadvantages of statistical discrimination. The fact of statistical discrimination weighs heavily on the labour market capital of disabled people. Statistical discrimination is often utilised by employers to screen out certain characteristics among its potential workforce, and it is achieved by acting on the basis of average, statistical stereotypes. Schwab and Willborn explain this employer practice as it occurs in the disability context in the following manner:

If the average productivity of a certain class of individual with a disability is lower than that of other workers and if it is expensive for employers to make individual determinations of productivity within that class, the profit

⁸⁴ See S. Schwab and S. Willborn, *supra* n.10 p.36.

⁸⁵ For example constitutional due process and estoppel, *ibid.* See also statutory unfair dismissals in the Irish context, discussed in M. Redmond, *Dismissal Law in Ireland* (Dublin: Butterworths, 1999), chapter 13, and see *infra* for discussion of the Labour Court’s imputation of a procedural obligation in the Irish Employment Equality Act.

⁸⁶ Often this bias is an unconscious one and is the result of the accumulated impact of exclusionary attitudes and unthinking factors which disproportionately affect disabled people.

⁸⁷ EEOC, Appendix to Part 1630, § 1630.5.

⁸⁸ S. Schwab and S. Willborn, *supra* n.10 p.34.

⁸⁹ *Ibid.*

maximizing employer will rely on the lower average productivity and refuse to hire individuals with disability even if many are excellent workers. ... Because it is expensive to distinguish a particular productive individual with a disability from the class of persons with disabilities who have lower average productivity, an employer is better off relying on the statistical stereotype.⁹⁰

When employers rely on statistical information or misinformation⁹¹ regarding the productivity of the average disabled person, it contributes to a low employment rate and disproportionately high levels of poverty among disabled people as a group. As a consequence, many disabled people have a reduced incentive to invest in their own productivity bank.⁹² Through requiring individual evaluation of disabled people under the reasonable accommodation duty, the ADA deems statistical discrimination illegal.⁹³ The procedural requirement, it is argued, has the potential to break this cycle of deprivation and “creates a proper set of incentives for people with disabilities to invest in their own productivity.”⁹⁴ Viewing the provisions positively, disabled people have been empowered by the knowledge that the law grants them the right to be individually considered and engaged with under the procedural limb of the reasonable accommodation mandate.⁹⁵

The interactive nature of this process should not be taken, however, to imply that the disabled employee or applicant retains an ongoing duty with regard to this aspect. The regulations clearly state that the onus lies with the covered entity to initiate the interactive process in order to unearth the precise nature of the individual’s disability and the potential features of any accommodation required to allow competent performance of the essential functions of the position. The obvious advantage to the employer of this system is that, very often, the person best equipped to advise on the nature and type of accommodation required is the disabled person herself.⁹⁶ On the other hand, there is the risk of such a mechanism unduly burdening individuals with

⁹⁰ *Ibid.* p.17

⁹¹ Schwab and Willborn discuss how employers act on the basis of proxies designed to fill information deficits about the productivity and labour values of certain groups of possible employees. *Ibid* p.5-8.

⁹² The fact of statistical screening and discrimination means that members of the depressed groups lack the incentive to invest in their own productivity, since they believe that they are going to be treated as an average member of the group with a similar disability, in a negative, discriminatory and exclusionary manner.

⁹³ EEOC, Appendix to Part 1630 points out that it would be a violation of the ADA for an employer to limit the duties of a disabled employee based on a presumption of what is best for the person or a presumption about the abilities of an individual with such a disability.

⁹⁴ Schwab and Willborn, *supra* n.10 p.35.

⁹⁵ Though this right remains enforceable in a negative manner.

⁹⁶ See advice on the extent of this interactive process, *supra*, text to n.81

disabilities in circumstances where employers try to abrogate responsibility, on both the administrative and financial front, to the protected employee.

The “Reasonableness” of Reasonable Accommodation?

A reading of the duty to make reasonable accommodation indicates two limitations. First, the accommodation which is granted need only be a “reasonable” one, and second, any failure by an employer to provide a reasonable accommodation can be excused if it would impose an “undue hardship” on its business operation. The statute fails to expand on the relationship between the reasonableness of the employer’s accommodation and any encroachment towards undue hardship. However, it was generally thought that the approach on this issue would be consistent with that adopted under the Rehabilitation Act and in the EEOC regulations.⁹⁷ Originally, it was believed that a “reasonable accommodation” entailed a modification that was effective in enabling an individual with a disability to perform the “essential functions” of the particular job she holds or desires, as per the EEOC regulations. Thus, the term “reasonable” was linked with the suitability or effectiveness of the accommodation in terms of it facilitating the disabled person’s performance of essential job functions. The reasonableness of the accommodation did not refer to any limitations in terms of cost or inconvenience to an employer but rather to “its potential to provide equal opportunity [and] reliability”.⁹⁸ A second approach imports an independent standard of “reasonableness” into the reasonable accommodation inquiry and is divorced from the traditional EEOC approach. The US Supreme Court has recently confirmed that the terms “reasonable” and “undue hardship” impose analytically separate, though related, limitations on the scope of required accommodations.⁹⁹ The approaches are addressed below.

The first approach is that the “reasonableness” of the accommodation duty placed on employers requires a level of provision that enables the disabled person to satisfactorily perform the essential functions of the job in question. This argument was made by lawyers in the *US Airways v Barnett* decision, discussed above, and it has also

⁹⁷ C. Feldblum, “Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About it?” (2000) 21 *Berkeley Journal of Employment and Labor Law* 91. Professor Feldblum one was of the drafters of the ADA.

⁹⁸ L. Waddington, “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice” (EU Network of Experts on Disability Discrimination, August 2004) p.63.

⁹⁹ *US Airways v Barnett* 535 U.S. at 399-402.

been put forward by disability rights advocates and commentators.¹⁰⁰ Thus, the accommodation's reasonableness should be considered in the light of its ability to meet an individual's disability-related needs in the workplace. Support for this approach can be found in the EEOC regulations, which state that "reasonable accommodation means ... [m]odifications or adjustments ... that enable a qualified individual with a disability to perform the essential functions of [a] position."¹⁰¹ If this is correct, then an accommodation is "reasonable" where it allows a disabled person to carry out the essential job functions of the position she holds or desires. On this analysis, an accommodation would be unreasonable if it would not adequately assist a person with a disability meet the position's essential job functions. In other words, it implies that the accommodation offered is insufficient and therefore unreasonable in its approach. But does it follow from this reasoning that the "best" accommodation which allows the performance of essential job functions is demanded by the term "reasonable"? It seems difficult to defend an interpretation of "reasonable" that requires the maximum provision of accommodating measures to a particular disabled individual. Such an approach would be antithetical to the term "reasonable", at least to its meaning within legal discourse. It also appears to be contrary to EEOC guidance in the area, which states that an employer may choose between a number of "reasonable" accommodations - it is not necessarily required to choose the best (often interpreted as the most expensive) accommodation.¹⁰² For argument's sake, however, consider the statement that a "reasonable" accommodation is one that best allows the employee or applicant to meet the essential functions of a job. If this is correct, does it add to the burden placed upon an employer, apart from the undue hardship enquiry? This question raises the boundary issue implicit in any interpretation of reasonableness and in any impact it may have, for example, on very large employers who might not be able to rely on the financial distress element of the "undue hardship" defence. However, the basis of this question is predicated on an incomplete assessment of the meaning and extent of the undue hardship defence, as employers could still rely on non-pecuniary factors in

¹⁰⁰ Justice Breyer, writing in *US Airways v Barnett*, reported on the respondent's argument which was that: "the statutory words "reasonable accommodation" mean only "effective accommodation," authorizing a court to consider the requested accommodation's ability to meet an individual's disability-related needs and nothing more. On this view, a seniority rule violation, having nothing to do with the accommodation's effectiveness, has nothing to do with its reasonableness. It might at most, help to prove an "undue hardship" on the operation of the business". 535 U.S. 391 at 399. But this, as it was acknowledged, is for the employer to demonstrate.

¹⁰¹ 29 C.F.R. § 1630(o)(ii) (July 2003 ed.).

deciding whether or not a particular accommodation presents a hardship which is “undue”.¹⁰³ Thus, it would appear that the better approach would be to keep up the traditional and purposeful separation between reasonable accommodation and undue hardship.

However, there is evidence that this traditional approach has been eroded by certain federal circuits that have interpreted the reasonableness limb of the reasonable accommodation duty as one that provides an additional means for allowing employers to avoid their obligations.¹⁰⁴ The statute clearly states that an employer must reasonably accommodate a qualified employee with a disability, unless it can prove that doing so would cause an undue hardship on its business operations. The issue for the courts, however, is whether the term “reasonable” modifies the accommodation duty in a manner distinct from the undue hardship defence, or whether proving the “unreasonableness” of the proposed accommodation is, in essence, the same as proving an undue hardship. In *Vande Zande v State of Wisconsin Department of Administration*,¹⁰⁵ a federal appeals court decision, Chief Judge Posner argued by analogy with the duty of reasonable care imposed by the law of negligence. The Chief Judge cited Judge Learned Hand’s dictum that, in deciding what care is reasonable, the court considers the cost of increased care¹⁰⁶ and he used this approach to flesh out the meaning of “reasonable” in the context of Title I. He denied that this approach would mean that the cost and benefits of alterations to a workplace to enable a disabled person to work would always have to be quantified, or that an accommodation would be deemed unreasonable if the cost exceeded the benefit, however slightly. “At the very least”, Judge Posner argued “the cost could not be disproportionate to the benefit”.¹⁰⁷ It is argued here that the cost-benefit analysis suggested by Judge Posner is misplaced and actually falls under the umbrella of the “undue hardship” defence. Contrary to the general assumption, undue hardship entails more than just difficulties with expenditure and looks to non-pecuniary impacts on employers, as is discussed below. Other federal appeal courts have similarly stated that in determining whether an accommodation is “reasonable,” one must look at the costs of the accommodation in relation to its

¹⁰² EEOC, Appendix to Part 1630, “Process of Determining the Appropriate Reasonable Accommodation” p.364.

¹⁰³ Section 101(1) (b) – I- IV.

¹⁰⁴ See G. Scolieri and M. Woodward, “A Call for Clarification: Achieving a Uniform Proof Structure in Reasonable Accommodation Cases under the Americans with Disabilities Act” (2002) 20 *Hofstra Labour and Employment Law Journal* 117.

¹⁰⁵ 44 F.3d 538, 542.

¹⁰⁶ Citing Judge Hand in *United States v Carroll Towing Co.* 159 F.2d 169, 173 (2d Cir. 1947).

¹⁰⁷ *Supra* n.65 p. 542.

benefits.¹⁰⁸ It is important to point out that this analysis has no foundation either in the statute, in its legislative history, or in the regulations issued under the ADA.¹⁰⁹

However, in *US Airways v Barnett*¹¹⁰, the Supreme Court recently discussed these aspects of “reasonable accommodation”. It specifically addressed the respondent’s argument that the reasonableness of an accommodation is concerned with “enabling” the individual with a disability to perform the job’s essential functions. This is in keeping with the EEOC’s Regulations. The respondent’s argument was that any other view would make the words “reasonable accommodation” and “undue hardship” virtual mirror images, thus creating a redundancy in the statute.¹¹¹ Ignoring the approach taken under the Rehabilitation Act, the Supreme Court refuted the “reasonable” as “effective” accommodation argument: first, because “... in ordinary English the word “reasonable” does not mean “effective”¹¹² and second, because nowhere in the statute did “... Congress indicate that the word ‘reasonable’ means no more than ‘effective’.”¹¹³ It dismissed the EEOC regulations equating reasonable accommodation with “enabling” a person with a disability to do the essential functions of a job - this was simply a phrase that “emphasizes the statutory provision’s basic objective.”¹¹⁴ The regulations, the Court continued, do not say that “enable” and “reasonable” mean the same thing. Rather, the Supreme Court simply stated that “[i]t is the word “accommodation” and not the word “reasonable” that conveys the need for effectiveness”.¹¹⁵ Accordingly, “[a]n *ineffective* “modification” or “adjustment” will not *accommodate* a disabled individual’s limitations.”¹¹⁶ The Court further declared that “an accommodation could be unreasonable in its impact even though it might be effective in facilitating performance of essential job functions”. But surely its impact beyond the individual in whose favour it is raised should come within the undue hardship analysis? Yet, the Supreme Court was at pains to point out that this interpretation of “reasonable accommodation” and “undue hardship” does not result in the former becoming a redundant term. The undue hardship enquiry, it argued, relates

¹⁰⁸ See *Monette v Electronic Data Sys. Corp.* 90 F. 3 d 1173, 1184 n. 10 5 AD Cas. (BNA) 1326, 1335 (6th Cir. 1996) and *Vande Zande supra* n.105.

¹⁰⁹ See House Education and Labor Report at 69.

¹¹⁰ 535 U.S. 391, 122 S. Ct. 1516.

¹¹¹ *Ibid.* p. 400.

¹¹² *Ibid.* But surely, an interpretation based on ordinary English should not come into play, given the significance of reasonable accommodation in the disability context and its historical development as a ‘term of art’ in that context.

¹¹³ *Ibid.* p. 401.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* p. 400.

to the impact of the provision of reasonable accommodation on the operation of the business. This is because

“... a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees – say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.”¹¹⁷

This analysis appears misconceived, particularly in light of the factors to be considered in any determination as to the existence of an undue hardship. One of the factors to be taken into account is any impact which the accommodation would have upon the operation of the facility, and this is surely capable of including issues such as employee relations.

The decision in *Barnett* charges the lower courts to interpret the term reasonable accommodation so that a plaintiff must show that an accommodation “seems reasonable on its face, i.e. ordinarily or in the run of cases”. This approach, while it may be designed to prevent frivolous claims, gives the judiciary broad discretion based on circular reasoning.¹¹⁸ Moreover, this approach opens a can of worms, for it allows “employers to interject their own ... possibly prejudiced view about what is reasonable and allows courts to second-guess otherwise workable and not unduly burdensome accommodations”.¹¹⁹ It may also restrict employees to requesting traditional accommodations, and not necessarily ones which enable them to carry out the job’s essential functions. Also, this approach denies the interactive nature of the reasonable accommodation process, because it gives an employer scope to argue that, despite an accommodation being effective and not unduly costly or difficult, it does not view it as being “reasonable”. Both the original interpretation of reasonable accommodation under the Rehabilitation Act and its explanation in the EEOC regulations have always approached “reasonable accommodation” as a term of art: that is, modifications or changes to the work environment that allow a qualified individual with a disability to carry out a job’s essential functions. It is based on the premise that it allows “a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities”.¹²⁰ The emphasis is on allowing the disabled individual to participate on an equal footing. The

¹¹⁶ *Ibid.* Emphasis in original. But could an effective modification be unreasonable because it affects other issues, such as other employees?

¹¹⁷ 535 U.S. 391, pp.400-401.

¹¹⁸ G. Scolieri and M. Woodward, *supra* n.104 p.122.

¹¹⁹ L. Waddington, *supra* n.98 p.69.

other side of the equation - the permissible extent of the impact of any proposed reasonable accommodation on employers - had always been determined by means of the undue hardship enquiry. As Waddington points out, the Court's opinion in *Barnett* "makes a dramatic and unfortunate break with the ADA's legislative history and implementing regulations by stating that the statute imposes an independent standard of reasonableness of accommodations".¹²¹

Undue Hardship

Once an employer determines that a "reasonable accommodation" will allow a qualified employee or applicant with a disability to perform the position's essential functions, it must make space for that accommodation, unless an "undue hardship" will ensue for the employer's business operations. It was with the precise parameters of this concept that the ADA's principal detractor, the business community, was most vociferously concerned. Given the inclusion of the untested concept of reasonable accommodation, the business lobby was even more concerned with Congress's minimal articulation on the substance of any undue hardship. Congress had clearly stated its intention of requiring more than "de minimis" expenditure. Early consultation on the ADA indicated that an accommodation could not be refused unless its provision threatened the continued existence of the employer's business concern.¹²² Congress pulled back from the perceived asperity of this approach but the business lobby pushed for a more exacting standard. Its argument was premised on the fact that it would be profoundly unfair to leave employers open to liability on the basis of a statutory silence that resulted in a standard so vague as to hardly amount to a standard at all. In spite of extensive campaigning, two amendments addressing this concern were defeated.¹²³ The first sought to establish as an undue hardship any accommodation that exceeded ten per cent of a disabled employee's annual salary.¹²⁴ The second amendment would have limited

¹²⁰ 29 C.F.R. s 1630.2(o) (July 2003 ed.).

¹²¹ L. Waddington, *supra* n.98 p.70.

¹²² B. Tucker, "The Americans with Disabilities Act: An Overview" (1989) *University of Illinois Law Review* 923, 927.

¹²³ For more extensive discussion on the debates surrounding the Olin Amendments, as these were termed, see S. Epstein, *supra* n.17

¹²⁴ Opponents to this amendment argued that it would unfairly switch the focus away from the resources of the employer and onto the annual salary of the employee. 136 Congress Record H2474. It would also severely disadvantage lower-wage workers in need of accommodations, and large numbers of disabled people in employment hold mainly lower wage and unskilled positions.

expenditures on reasonable accommodation to five per cent of annual profit for businesses with gross annual receipts of \$500,000 or less.

However, all Congress placed in the statutory text was a statement to the effect that an undue hardship “means an action requiring significant difficulty or expense”, which is to be judged in light of the following statutory factors:

- (i) the nature and cost of the accommodation needed under this Act;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

What these factors make clear is that the primary consideration is not the “cost” of the accommodation but rather the employer’s ability to absorb the cost and the impact of its provision.¹²⁵ As a result, an “undue hardship” determination is by its nature an individualistic one, and one to be made on a case-by-case basis. The only boundaries immediately ascertainable to the accommodation duty are those accommodations that are less than the risk of the employer being driven out of business and more than a *de minimis* expense. However, within these boundaries, there is considerable room for manoeuvre.

Epstein lists three reasons for Congress’s loyalty to such a vague standard. First, Congress anticipated that the concept of reasonable accommodation would, for the most part, place no more than trivial expenses on employers.¹²⁶ Second, Congress was of the opinion that the undue hardship concept had operated adequately under the Rehabilitation Act: any ambiguities had been satisfactorily clarified by the courts who were better placed to define the standard’s parameters on a case-by case basis. Third, and quite persuasively from a disability rights perspective, Congress concluded that because of the infinite permutations of disability, accommodation requirements and

¹²⁵ J. Cooper, “Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act” (1991) 139 *University of Pennsylvania Law Review* 1423, 1449.

¹²⁶ See the Jobs Accommodation Network, a service of the Office of Disability Employment Policy of the US. Department of Labor which regularly collates and updates information on the mean cost and type of various accommodations. <http://www.jan.wvu.edu>

levels of employer resources, a fixed standard worked against the principle of fair and equitable application across all situations.¹²⁷

Reasonable Accommodation: Ireland

Origins

The reasonable accommodation provision in Ireland's employment equality legislation had a difficult birth.¹²⁸ As already discussed in chapter three, the legislature's first formulation of the reasonable accommodation duty was held by the Supreme Court to infringe the property provisions of the Irish Constitution.¹²⁹ From October 1999 until July 2004, a reformulated reasonable accommodation provision operated under the Employment Equality Act 1998. However, as of July 2004, the Equality Act 2004 took effect, the purpose of which is to amend the 1998 Act in light of the State's obligations under the Framework Directive. Consequently, a further formulation of the reasonable accommodation duty is up for discussion. The approach taken here is chronological: first, the focus is on the terms of the Employment Equality Act 1998 Act; then, attention is directed to the provisions of the Framework Directive; and finally, the discussion turns to the Equality Act 2004, which transposes the terms of the Directive.

Reasonable Accommodation under the 1998 Act

The reasonable accommodation duty under the 1998 Act operated at the intersection of a number of statutory provisions.

Under the 1998 Act, the reasonable accommodation duty was provided for in a rather unwieldy fashion in section 16(3)(a)-(b). This stated that "[f]or the purposes of [the] Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities they would be fully competent to undertake, and be fully capable of undertaking, those duties."¹³⁰ If a disabled individual was decreed as fully capable and competent of job performance with special treatment or

¹²⁷ S. Epstein, *supra* n.17 p. 427.

¹²⁸ See generally, O. Smith "Disability, Discrimination and Employment: A Never-ending Legal Story" (2001) 23 *Dublin University Law Journal* 148 pp. 156-160 for discussion and also chapter three of this work.

¹²⁹ *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

facilities, then the subsection went on to require that “[a]n employer ... do all that is reasonable to accommodate the needs of a person who has a disability by providing [such] special treatment or facilities...”¹³¹ Finally, and importantly in terms of delineating the extent of the obligation placed on employers, paragraph (c) decreed that “[a] refusal or failure to provide for [such] special treatment or facilities ... shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer”. An employer’s obligation, then, extended to providing special treatment by doing all that is reasonable to accommodate a person with a disability, up to a nominal cost standard. Unlike the original position in the US, there is within this construction an immediate link between the reasonableness of the accommodation and its costs. Where the cost exceeded nominal expenditure, an employer was relieved of its accommodation duty. As chapter three discussed, this approach was due to the constitutional history surrounding the provision of the legislation. This provision shall be returned to in due course.

An “Essential” Function Omission?

The employer’s reasonable accommodation obligations are clearly circumscribed by the terms of section 16(1)(a)-(b) which, it is presumed, must have been intended to mirror the “qualified individual with a disability” approach of the ADA. However, the provision is lacking in one crucial regard. Section 16(1) states that the Act shall not be interpreted to require any person to recruit or promote, or to provide training or experience to an individual for a position if the individual –

- (a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which *those duties*¹³² are, or may be required to be, performed, or
- (b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which *those duties*¹³³ are, or may be required to be, performed.

This provision thus insulates employers from a requirement to hire or retain incompetent or incapable personnel, though the employer has to bear in mind the effect

¹³⁰ Section 16(3)(a) EEA 1998.

¹³¹ Section 16(3)(b) EEA 1998.

¹³² Emphasis added.

¹³³ Emphasis added.

of the later subsections, relating to the provision of an accommodation, on any evaluation of competency based on disability.

The divergence in approach between the two statutory schemes under consideration stems from the extent to which employers are entitled to delineate and define the functions (in the US) and the duties (in Ireland) of the particular position. To recap, in the US, the employer must make a reasonable accommodation for a “qualified individual with a disability”: a person who, with or without reasonable accommodation, can perform the “essential functions” of the job required or desired. As has been discussed above, the “essential functions” component of the non-discrimination scheme plays a material role in determining the equal opportunities available to disabled employees in the US. What the US formulation recognises is that there may be non-essential components to a job that present barriers to that job’s performance by certain disabled individuals. Alternatively, a job may be restructured to be carried out in a way that will allow a disabled person to complete the task which the employer requires. The “essential functions” requirement specifies that non-essential job functions should not place any material barrier to the employment prospects of disabled employees or applicants. It demands assessment procedures which are capable of measuring the employment capabilities of disabled people and it requires adaptable job descriptions loyal to actual job practices. In this way, it seeks to ensure that job descriptions are not rigidly drafted in such a way as to have a disparate impact on disabled individuals’ employment opportunities. It is, therefore, a pivotal component of the reasonable accommodation mandate.

The Irish legislation, on the other hand, does not adequately safeguard against the possible abuse by employers of their prerogative to set and determine job duties.¹³⁴ These could be designed in such a way as to insulate employers from the specific requirements of disabled applicants or employees. The legislation clearly states that an employer need not employ or retain any person who is not competent and fully capable of undertaking the duties attached to a position. Note that the “duties” which are required to be performed are not linked to the requirement of a capacity to perform the “essential” duties of the position, the duties integral to the job itself. Further, the statute states that such duties are to be assessed with regard to the “conditions under which

¹³⁴See G. Quinn and S. Quinlivan, “Disability Discrimination: The need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment” in C. Costello and E. Barry, *Equality in Diversity: The New Equality Directives* (Dublin: ICEL, 2003) p.213, 220. Note also the effect of section 36, discussed in chapter two, which allows an employer to insist on educational qualifications deemed generally acceptable in the State.

those duties are, or may be, required to be performed". Presumably, the prerogative power with regard to the conditions attached to the duties of a position remains, as is traditionally the case, with the employer, the statute being of no further assistance. The effect of this provision is that it leaves room for employers to reduce their reasonable accommodation obligations. Employers could demand nothing short of full and competent performance of *all* the duties of a position, as they determine them, with the result that some disabled applicants or employees may be "not competent" or "not capable" for a position because of their inability to carry out what are merely ancillary job functions. There is a pertinent difference between providing a reasonable accommodation to allow an applicant carry out the "essential" duties of a position and providing a reasonable accommodation which would still not enable an employee to perform "all" the duties of a post. This could turn out to be a problematic omission.

Despite this criticism, the Irish legislature did not take the opportunity to amend the "essential functions" duty omission in the recent Equality Act, 2004. Section 16(1)(a)-(b) remains intact in its original form.

Practical Requirements of Reasonable Accommodation

When it comes to practical indicators of what reasonable accommodation entails, the Irish legislative scheme was at first remarkably lax in two respects. The first point is that the 1998 Act contained no guidelines equivalent to the ADA's eight categories of reasonable accommodation. This made it unclear, for example, whether reassignment to a vacant position is required by way of a reasonable accommodation under the Irish legislation. As is pointed out below, the Equality Act 2004 tackles this position of uncertainty to a certain extent, but the new approach is far from comprehensive

The second point is that, unlike the US system, which is supplemented (perhaps to excess) with technical assistance, House Committee Reports and Federal Regulations, there remains a dearth of any kind of equivalent information or assistance with regard to the Employment Equality Act, and this is the case seven years on from its enactment.¹³⁵ The fact that the statute fails to expand upon or clarify the scope of the duty leads to even greater uncertainty for all parties. Employers are given no assistance with

¹³⁵The Equality Authority has committed itself to develop such guidelines in its Strategic Plan 2003-2005, available at <www.equality.ie> There is of course a happy medium to be struck on this point. It could be argued that the amount and level of regulatory jargon in the US is such that it allows for consistent flouting of statutory rules based on arguments over binding or non-binding, (as the case may be) and often conflicting, regulations.

estimating the scope and form their obligation should take. Employees and applicants are also in a weak bargaining position in that they have no benchmark against which to measure any accommodation requests. The net effect of this is that precedents will be deduced on a case-by-case basis. This places a massive burden on disabled employees and applicants to pursue complaints through the formal enforcement channels regarding refusals, or inadequate accommodation provision. Despite the fact that the Equality Authority committed itself to develop guidelines in its 2003-2005 Strategic Plan, there has been no movement towards the development of regulatory guidance on reasonable accommodation.

This information deficit has had a considerable impact: early examples from the Irish case-law indicate a complete unawareness among employers regarding the procedural implications of the reasonable accommodation duty, let alone its substantive ramifications. As has already been pointed out, the procedural aspect of the reasonable accommodation mandate is an obvious means for employers to ensure that they have sufficient information to evaluate their compliance with the substantive obligations of the statute. With regard to the accommodation's procedural enquiry, the Labour Court determination in *A Health and Fitness Club and A Worker*¹³⁶ clearly laid down the extent of this aspect of the employer's duty. The Labour Court referred to the terms of section 16(1), which release the employer from employing any person who is not competent or capable of performing the duties for which they are employed, but made it clear that this is subject to the terms of section 16(3), the duty to do all that is reasonable to accommodate. This, in turn, is dependent on the employer being normally required "to make adequate enquiries so as to establish fully the factual position in relation to the employee's capacity".¹³⁷ The Labour Court went on to describe the enquiry as being in all cases fact-specific but at a minimum

"... an employer, should ensure that he or she [is] in full possession of all the material facts concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision. In practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee's doctor or obtained independently. Secondly, if it is apparent that the employee is not fully capable, s. 16(3) of the

¹³⁶ Labour Court ED/02/59 Determination No.037.

¹³⁷ *Ibid.*

Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become capable.¹³⁸

Emphasising the interactive nature of the accommodation enquiry, the Labour Court stated that its adequacy is contingent upon the employee concerned having “full opportunity to participate at each level and [being allowed] to present relevant medical evidence and submissions”.¹³⁹ Thus, the interpretation of the legislation to date indicates two approaches underpinning the reasonable accommodation enquiry: first, there must be a discussion with the individual as to what form an accommodation should take and second, expert evidence (almost always medical) is used to identify the most appropriate accommodation.¹⁴⁰ Thus, the Irish approach differs from that recommended by the EEOC under the ADA. There, the disabled individual is recognised as being in the best position to advise on the practical form of the reasonable accommodation and this accords with the general (if contested) approach to the burden of proof. Under the EEA, while the disabled individual is expected to be consulted on the nature of the accommodation, it appears from the approach of the Equality Tribunal that considerable deference is shown to expert, most often medical, opinion on the form any reasonable accommodation should take.¹⁴¹

However, retaining the theme of information deficit on the accommodation duty, case law to date indicates that employers are either making insufficient efforts on the accommodation front or simply making no efforts whatsoever. Employers are dismissing disabled employees or refusing applicants employment on assumed incapacity grounds without carrying out any accommodation inquiry.¹⁴² On this point,

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ In *A Computer Company v A Worker* ED/008/08 the Equality Officer referred to the importance of obtaining a medical report to determine the capabilities of the complainant. Similarly in *A Company v A Worker* ED/01/11 a failure to carry out an assessment of the complainant regarding capabilities was held to be a failure to provide reasonable accommodation.

¹⁴¹ See *An Employee v A Local Authority* DEC – E/2002/4 where it was held that a vocational assessment was required and *A Company v A Worker* ED/01/11 where the Labour Court emphasised the need to have an expert assessment carried out in order to ascertain the capabilities of the complainant.

¹⁴² See the determination before the Labour Court of *A Garden Centre and A Worker* ED/02/17 Determination no.0210 where the employer stated that if he had known that the complainant had a disability he would never have hired him and, as soon as he found out about the complainant’s medical history, he dismissed him. In a foray showing blatant disregard and/or ignorance of the Act, the employer even went as far as arguing that the responsibility for the matter rested with FAS (the national employment agency) as they had been “extremely negligent in recommending someone with the claimant’s illness to him.” See also the decision of *Mark Kehoe v Convertec Limited* DEC-E-2001/034 where, upon discovering the existence of the complainant’s disability, the employer’s defence was “I gave you a job when no-one else would take you on”. As a result,

the decision of the Equality Tribunal in *Mr O v A Named Company* is illustrative.¹⁴³ Here, the Equality Officer found that the respondent company had discriminated against the complainant under the terms of the 1998 Act when it treated him less favourably than a colleague with a different disability in relation to a return to work on a phased basis,¹⁴⁴ and also because it failed to comply with the duty to make a reasonable accommodation. The importance of dialogue between an employer and the employee was emphasised in the decision: “I am satisfied that the respondent should have afforded the complainant an opportunity to express his own wishes in terms of workload on his return to work in an effort to find common ground which would have been acceptable to both parties”. While the employer had attempted to treat the complainant “in a sensitive manner ... in reality, [it] failed to some extent in terms of providing him with reasonable accommodation.”¹⁴⁵ Similarly, in the recent decision of *Bowes v Southern Regional Fisheries Board*,¹⁴⁶ the Equality Officer, addressing a refusal by the employer to fit a company vehicle with hand controls, commented that “it is ... noteworthy that the respondent failed to engage in any real dialogue with the complainant in relation to this requirement.” The Equality Officer referred to the earlier Labour Court recommendation which set out “the basic process which employers must, at a minimum, observe in order to provide reasonable accommodation and it specifically includes constructive dialogue with the workers concerned”.¹⁴⁷

“Reasonable” Accommodation under the 1998 Act

It is necessary to briefly mention the “reasonable” limb of the reasonable accommodation enquiry in the context of this comparative analysis. The wording of the 1998 Act was different to its US counterpart when it came to the “reasonable” aspect of the accommodation duty. To recall, the issue discussed under the ADA was the relationship between the determination of a “reasonable” accommodation and the employer’s undue hardship defence. More specifically, the competing approaches to the “reasonableness” of the accommodation determination were assessed. The US Supreme

the Equality Officer found that the “company made no effort to establish the impact of the complainant’s disability on his performance” and did not have regard to section 16(3) of the Act – i.e the duty to make reasonable accommodation.

¹⁴³ DEC – E- 2003/052.

¹⁴⁴ This was a claim for direct discrimination because a phased return to work had been granted to an employee with a different disability.

¹⁴⁵ The Equality Officer ordered a remedy of €8,000 compensation.

¹⁴⁶ DEC –E-2004/008.

¹⁴⁷ At p.10 of the decision.

Court has rejected a link between the reasonableness of the accommodation and its role in allowing a disabled employee perform a position's essential job functions, despite strong evidence that this was the approach which Congress intended. The Supreme Court noted that lower courts past reconciliation of the terms, and the burden placed on the plaintiff to show that the accommodation was reasonable on its face - i.e. ordinarily or in the run of cases - amounted to a sufficient approach to the issue.¹⁴⁸

The divergent interpretations that are possible for the "reasonable" prefix to the accommodation duty under the ADA do not appear to occur in the Irish legislation. The wording in the EEA is set out in section 16(3)(b): "[a]n employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities ...". The phrase "doing all that is reasonable to accommodate the needs of a person with a disability" could be argued to be equivalent to the original US approach which delineates the reasonableness of the accommodation in terms of meeting the needs of a disabled person in terms of allowing her perform the job's essential functions. However, the notion of "doing all that is reasonable" under the 1998 Act was ultimately judged in light of the burden it presented to the employer. This is because the 1998 Act stated that a refusal of special treatment would not be unreasonable if it gave rise to costs, other than a nominal cost. The reasonableness of the proposed accommodation was not assessed by balancing its utility to the employer and the employee concerned in terms of enabling competent job performance, but through a measurement of the costs imposed upon employers.

Nominal Costs under the 1998 Act

Following the Supreme Court judgment on the 1996 Bill, the original draft of the Employment Equality Bill 1997 placed before the Oireachtas contained no reference to the newly-controversial concept of reasonable accommodation.¹⁴⁹ However, at committee stage, the reasonable accommodation duty was reintroduced and an amount of parliamentary time was spent discussing the standard against which employers' reasonable accommodation duties would be judged. Recall here that the statute eventually decided to place an obligation on an employer "do all that is reasonable to accommodate" a disabled person's needs by providing "special treatment or facilities",

¹⁴⁸ *US Airways v Barnett* 535 US 39 (2002).

¹⁴⁹ O. Smith, *supra* n.128 p. 168. See sections 16(3) of the Employment Equality Bill 1997 as initiated and s.35(4).

unless the provision would give rise to a cost, other than a “nominal cost”.¹⁵⁰ The nominal cost standard was greeted with massive disappointment by the Irish disability lobby and was the constant subject of debate and amendments from opposition members throughout the Bill’s passage. How did such a standard - described at the time as “a rhetorical flourish signifying nothing”¹⁵¹ - come to be enshrined as the means to overcome the barriers faced by disabled people in accessing the Irish workplace?

The Oireachtas debates are an important resource as to the origins, meaning and extent of the “nominal cost” standard. The debates have since been supplemented by decisions and recommendations of the Equality Tribunal and the Labour Court. Parliamentary discussions identified the possible effects of a “nominal cost” standard.¹⁵² There were a number of reasons behind the insistence on the “nominal costs” standard. Every amendment with alternative formulations of the reasonable accommodation obligation was rejected. Plainly, there was the obvious fear of infringing the boundaries laid down by the Supreme Court judgment.¹⁵³ Since the previous formulation of “reasonable accommodation unless undue hardship” was found to infringe employers rights to private property, the sponsoring Ministers¹⁵⁴ kept referring to these fixed constitutional parameters. In essence, their hands were tied, or so they believed. Opposition members, however, refused to desist. They continued to formulate alternatives to “nominal costs” and attempted to construct an approach within the parameters of the Supreme Court judgment.¹⁵⁵ The Government was accused of abandoning its legislative power in this context. It should have been more engaged with establishing a constructive consensus that would address and tackle the concerns of the Supreme Court. Its “real job”, according to one Senator, should have been to find a way through these criticisms which met the constitutional requirement, but which also went as far as possible towards protecting the rights of disabled people.¹⁵⁶ However, the

¹⁵⁰ Section 16(3) of the 1998 Act.

¹⁵¹ Senator B Ryan, *Seanad Eireann* vol. 154 col. 823 (5 March 1998).

¹⁵² For example: “There is the extraordinary situation ... that if an employer must incur a cost of any description, the rights of disabled people are not taken into account.” Senator O’Meara, *Seanad Eireann* vol 154 col 820 –21 (5 March 1998).

¹⁵³ See exchanges between Senator Norris and Minister of State, Ms Wallace, TD. Senator Norris: “Let us take a risk. Are we really that frightened of the Supreme Court judgment?” Ms Wallace: “We cannot continue to keep chancing it in the Supreme Court”. *Seanad Eireann* vol 154 col 826- 828 (5 March 1998).

¹⁵⁴ The Ministers responsible for guiding the legislation through the Oireachtas were Mr J. O’Donoghue, TD, Minister for Justice, Equality and Law Reform and Ms M. Wallace, TD, Minister of State with responsibility for Disability Issues.

¹⁵⁵ See for example, the amendment tabled by Senator Norris at *Seanad Eireann* vol 154 col 661 (6 February 1998).

¹⁵⁶ Senator B Ryan, *Seanad Eireann* vol 154 col 822 –823 (05 March 1998).

Ministers reiterated the necessity for constitutional compromise and the nominal cost standard. In addition, the Oireachtas debates show that the Ministers had grown somewhat weary of the protracted discussions surrounding the disability ground: the Minister of State referred to disability as being one of nine protected grounds under the legislation, the implication being that excessive focus was being directed at the disability ground.¹⁵⁷ Related to this excuse is the somewhat feeble promise from the then Minister for Justice, Equality and Law Reform of “an opportunity to revisit the question of statutory provision for reasonable accommodation in the context of specific disabilities legislation”.¹⁵⁸ Obviously, the lack of space dedicated to the formulation of a more specific and sophisticated standard against which reasonable accommodation requests were to be balanced indicates the policy dilemma faced by the sponsoring Ministers at the time. The choice was between getting the Bill onto the statute book, despite an apparent dilution in standards, or removing the disability provisions in their entirety and concentrating on the disability ground in the context of more comprehensive disabilities legislation. The delay associated with the latter option was considered unpalatable. Unlike the unitary scope of the ADA, the Irish disability equality framework is at present spread across at least four separate enactments.¹⁵⁹

Ultimately, the Government’s response to the Supreme Court judgment was to formulate a proposal that moved away from the impermissibility of laying down the excessive costs envisaged by the Supreme Court and towards one that allowed no costs whatsoever (arguably a plausible, if literal interpretation of the nominal standard) to accrue to the employer. It is difficult to see how the “nominal” standard was the only outcome available to the Government following the Supreme Court’s decision. In itself, the Supreme Court’s judgment is a contestable decision and possibly one that would not necessarily be followed by a differently-constituted Court or outside of the Article 26 referral setting.¹⁶⁰ That said, it is clear that the problems the Supreme Court had with the reasonable accommodation mandate of the first Bill were cumulative. The Oireachtas could have sought to address these problems one by one, with clear and specific legislative protections to ease the concerns of the Supreme Court Justices. It could, in the words of one commentator, have formulated a “more sophisticated balance”

¹⁵⁷ Minister of State, Ms M. Wallace, TD, “There are nine categories in the Bill.” “... we must cover all nine”. Seanad Eireann vol 154 col 828 (05 March 1998).

¹⁵⁸ Mr John O’Donoghue, TD, Seanad Eireann vol 154 col 665 (6 February 1998).

¹⁵⁹ The four enactments include the Employment Equality Act 1998, the Equal Status Act 2000, the Equality Act 2004 and the recently introduced Disability Act 2005.

between the competing interests.¹⁶¹ Instead, the legislature deferred to the property concerns of the Court in order to keep within constitutional parameters.¹⁶²

Nominal Costs Before the Tribunals

Despite this rather gloomy view of the “nominal costs” standard, the Tribunals have actually assessed the ‘nominal’ component in a relative sense, as distinct from a literal sense. Support for this approach can be found in the words of the then Minister for Justice, Equality and Law Reform:

“ ... the definition of “nominal” would not be the same for every employer or enterprise. The term ... may be interpreted in a relative sense. [W]hat may be regarded as nominal by a large enterprise employing thousands of people will not be the same as that regarded as nominal by a small business with only two or three employees.”¹⁶³

The adjudicative bodies under the Act - the Equality Tribunal (consisting of Equality Officers) and the Labour Court - have followed this approach to the nominal cost standard in the cases to date. In *A Motor Company v A Worker*,¹⁶⁴ the complainant, who had a hearing impairment, was dismissed because of his difficulties with telephone communication caused by excessive noise coming from nearby building works. While the respondent company had provided a headset, the matter did not improve. It was subsequently discovered that the headset in question was not of a type which would have actually dealt with the problem. A more specialised headset was available, recommended by the National Association for Deaf People, at a cost of €450. The respondent’s argument was that any action beyond the provision of the original, but ineffective, accommodation would have resulted in the respondent incurring additional costs, which would have been other than nominal. However, the Equality Officer held that as a “substantial company and, in the context of its turnover, a cost of €450 could

¹⁶⁰ For example, if the constitutionality of the Bill had not been tested within the Article 26 procedure, but as an Act under Article 34.3.2°, it is arguable that the outcome could have been radically different given a concrete factual situation.

¹⁶¹ G. Quinn, *The Irish Times*, May 19, 1997.

¹⁶² Issues such as the width of the definition of disability and the resulting impact of this factor on employers who bear the cost of reasonable accommodation (the anomalous basis of this point has already been addressed in chapter four), the impact of reasonable accommodation on small employers, and the availability of state aid or tax relief to offset the costs of accommodations could have been addressed.

¹⁶³ Seanad Eireann, Volume 154, Col 666 (6 February 1998).

¹⁶⁴ ED/01/40 Labour Court Determination No. 026.

not be considered as anything other than ‘nominal’” to the respondent.¹⁶⁵ In *An Employee v A Local Authority*,¹⁶⁶ the Equality Officer followed the Minister of State’s line of reasoning when she determined that had a professional job coach been engaged by the respondent to assist the complainant, the complainant would have been able to carry out the functions attached to the position in a competent manner.¹⁶⁷ The respondent’s refusal to consider and assess this option, and its decision to dismiss the complainant, was influenced by subjective factors and could not be considered reasonable. The Equality Officer then considered whether the respondent could be relieved from financing this special treatment by the nominal costs provision of the Act. Citing the Minister of State, the Equality Officer argued that the legislative intention in this context “was that all employers would not be treated in an identical fashion”¹⁶⁸ and that the particular circumstances of each case would be determinative. As a result, she did not believe that the costs associated with the provision of a job coach “could be considered as anything other than nominal to a large public sector organisation”.¹⁶⁹

Thus, a number of factors can be said to have informed the Tribunals’ approach to the nominal cost standard. These have included: an individual consideration of each employer, i.e., employers are not treated in an identical fashion in determining whether an accommodation gives rise to a cost other than nominal; the size of the enterprise; and the status of the enterprise, i.e., whether it is public or private body.

European Intervention: Reasonable Accommodation and the Framework Directive

The Framework Directive designates the principle of equal treatment to mean that there shall be no direct or indirect discrimination whatsoever on any of the named grounds.¹⁷⁰ Like the Irish legislation, but unlike the ADA, the Framework Directive does not explicitly identify a failure to make a reasonable accommodation as a compensatable discriminatory act. However, the text to the Directive makes a link between the accommodation mandate and the need to comply with the principle of equal treatment, which should be sufficient to ensure adequate protection. Article 5 of the Framework

¹⁶⁵ *Ibid.* The determination does not include any information on the ratio of turnover to accommodation cost.

¹⁶⁶ DEC – E /2002/4.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Article 2(1).

Directive states that the principle of reasonable accommodation is to be adopted by Member States “in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities”. Reasonable accommodation means

that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

As a broad-based general Directive, this European instrument does not expound further on the many components of the accommodation mandate that have been more comprehensively articulated under the ADA. It is in keeping with the European principle of subsidiarity to allow for detailed transposition of EU legal obligations to take place at national level. However, the adoption of broad based minimum standards can result in fluctuating standards of protection across the Union.

Essential Functions?

The discussions above indicate the importance of a synthesis between the competence of disabled people for the performance of the *essential*¹⁷¹ functions of a position and the duty to reasonably accommodate. Where the “essential” qualifier to the functions which are required for a position is omitted, the reasonable accommodation mandate could be compromised in its bid to end discriminatory exclusion of many disabled people. This is because an unscrupulous employer could seek to require performance of all functions, including marginal or non-essential duties, and this could raise real barriers to the employment of disabled persons. Article 5 of the Framework Directive pertains exclusively to reasonable accommodation, yet it does not contain any formula linking the employability of disabled persons in terms of the performance of a job’s “essential functions” with the duty to accommodate. However, reference should be made to Recital 17, which states:

“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.”¹⁷²

In light of this chapter’s earlier discussion on the “essential functions” doctrine, it is difficult to understand why such an integral aspect of the non-discrimination system has

¹⁷¹ My emphasis.

been placed outside of the binding Articles of the Framework Directive. It would have been preferable if the Recital's intent had been expressed in a stronger format because of the possible avoidance mechanism that exists in Irish legislation.¹⁷³ However, as was discussed above, the amended Irish legislation fails to make the critical distinction between the 'essential' functions of a job and the 'non-essential' functions of a job.

Reasonable Accommodation unless Disproportionate Burden

In keeping with traditional accommodation requirements in the context of disability, there are, of course, limits to the European accommodation duty. As ever, an employer need only make a *reasonable* accommodation and again, this is a term for which Member States may furnish further guidance. There are no indications of what is envisioned by the "appropriate measures" to be taken by employers in order to comply with the accommodation mandate. It is presumably up to Member States to formulate regulations and guidance on this point. And, as has been demonstrated in the Irish context, some Member States are remarkably lax when it comes to advising both employers and employees on the scope of their respective obligations and entitlements under this aspect of the legislation.¹⁷⁴ However, it could be that any decision on the reasonableness or otherwise of a proposed accommodation will be taken by the enforcement authorities of Member States on a case-by-case basis. Recall that under the original approach to "reasonable" accommodation under the ADA, the question of reasonableness was equated with the form of alterations that would assist the disabled individual carry out the essential functions of the job and it was unrelated to whether or not this would impose an undue hardship on the employer. This approach also accorded with what was originally assumed to be the shifting burden of proof between the parties: namely, that the applicant undertook the burden to demonstrate that a reasonable accommodation was possible and the respondent held the burden of demonstrating any undue hardship on its business operations. Waddington argues that the ADA approach was influential on the drafting of Article 5 of the Framework Directive and that the use of the term was "intended to convey the same meaning as it has in the ADA, or at least the meaning the term, had when the Act was originally adopted".¹⁷⁵ Thus, an

¹⁷² Emphasis added.

¹⁷³ See G. Quinn and S. Quinlivan *supra* n.134 for discussion.

¹⁷⁴ Contrast the dearth of supporting measures with the Codes of Practice issued by the Disability Rights Commission under the UK's Disability Discrimination Act 1995-2005.

¹⁷⁵ See L. Waddington, *supra* n.98 pp.62-64.

accommodation which achieves the goal of allowing a disabled individual perform a job's essential functions should be regarded as reasonable. Of course, since this interpretative approach has not been made explicit in the Directive, there may be some differences in approach at the level of national law. As has been discussed above, this problem persists in the Irish context.

Where an accommodation is reasonable, in the sense of the discussion above, the way an employer may defend the burden is to prove that the accommodation would give rise to a "disproportionate burden". Thus, an employer's accommodation duty extends to implementing "special measures" designed to ensure equal employment opportunity for disabled persons at all stages of the employment relationship, unless this would give rise to a disproportionate burden on the employer. Recital 21 of the Directive lists the factors to be considered in determining whether the measures adopted give rise to a disproportionate burden. These include:

- i) in particular, the financial and other costs entailed;
- ii) the scale and financial resources of the organisation or undertaking and;
- iii) the possibility of obtaining public funding or any other assistance.

The term "disproportionate burden" implies a different standard of review from those utilised under the ADA and under Ireland's original legislation. If one looks closely at the factors to be considered in determining the existence of a disproportionate burden, there is "particular" emphasis laid on its financial cost to the employer. The language of the Directive speaks to the possibility of the provision of an accommodation imposing a burden on an employer and moreover, the possibility that this burden may be disproportionate. The question for consideration here is whether the "disproportionate burden" defence is to be influenced by the proportionality enquiry adopted by the ECJ in the context of the justification of indirect discrimination, or whether it will be more strictly confined to the pecuniary measures listed in Recital 21. On the basis of paragraph 21 of the Recital, Wells has argued that under the Directive, the financial cost of the accommodation is the primary factor in determining whether a "disproportionate burden" exists.¹⁷⁶ And the language of the Recital seems to keep with the view that what is to be assessed is the question of whether the employer's economic enterprise has been disproportionately burdened. What appears to have been intended is a calculus that

¹⁷⁶ "This polar opposition of individual gain versus employer cost is not conducive to tackling attitudinal and systemic forms of disability discrimination, and it may reinforce the perception that the principal result of accommodation of disabled people is expense and not benefit." K. Wells. "The Impact of the Framework Employment Directive on UK Disability Discrimination Law" (2003) 32 *Industrial Law Journal* 253, 264.

ensures that the burden (presumably the employer's burden, and not the burden of unemployment and/or discrimination suffered by a disabled person as per the text to Article 5) should not be disproportionate to the benefits of the accommodation in question, taking into account the factors listed in the Recital.

It appears unfortunate that the recital does not expressly refer to the possible benefits which may accrue to an employer as a result of making a reasonable accommodation. These may include benefits such as the adaptation of a premises which will facilitate a wider customer base by including those with disabilities, or the accommodation of an existing employee with a disability, thereby avoiding any severance payments, or a resulting increase in productivity of the accommodated worker. But contrary to Wells' assertion, it is arguable that in a proper proportionality enquiry, one must look to the benefits of the action and compare them with the burden or costs. What is crucial to determine is whose perspective this proportionality enquiry takes, and it is at this stage that one could argue for a more nuanced approach which assesses the burdens and benefits from the perspective of both the employee and the employer. While the Directive does not expressly point to the benefits to employers in making reasonable accommodations, and it does not expressly concern itself with the burden or cost to the employee of a failure to accommodate,¹⁷⁷ it is arguable that it does not expressly exclude such a perspective in the proportionality enquiry. And, if the ECJ approach to proportionality operative in the indirect discrimination context has any influence, it is argued that this perspective ought to be fashioned into the equation. Moreover, what ought to be remembered in any analysis of the extent of the duty of reasonable accommodation is its original purpose, which is that of equality of opportunity, and not that of economic efficiency.¹⁷⁸ This purpose provides support for a more balanced proportionality enquiry.

Article 5 expressly underlines the important role which public support and funding will play in any determination of disproportionate burdens: "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". So where the State makes "sufficient provision" for accommodations available, the burden on employers

¹⁷⁷ This raises the question whether the consequences of not providing the accommodation for the disabled individual – such as continued marginalisation or exclusion of an individual – should be factored into the equation where an individual would not be able to find a comparable job, or less severely, if alternative employment would require either no accommodation or a more modest one.

will not be disproportionate.¹⁷⁹ It is interesting to assess what is meant by “sufficient” in this context. Of itself, a literal interpretation of “sufficient” does not seem to imply that the State must offset *all* of the cost of the accommodation in order for a burden on an employer to be proportionate. Indeed, it would be difficult for an employer to argue that where it has availed itself of any state grants to support an accommodation that the insufficiency of the grant itself results in a disproportionate burden on the employer. In other words, all of the factors must still be assessed in any determination of disproportionate burden in this context.

Reasonable Accommodation under The Equality Act 2004

The Framework Directive was transposed into Irish Law by the Equality Act 2004, which came into effect in July 2004.

In the disability context, the main amending provisions reformulate the standard against which a reasonable accommodation may be judged. They also go somewhat further in defining what “appropriate measures” by way of reasonable accommodation should be taken. Section 16(3)(a) starts by emphasising the competence and capability of disabled persons for employment with the provision by the employer of “appropriate measures” by way of reasonable accommodation. The amending duty to make reasonable accommodation by taking appropriate measures is delimited as follows:

the employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability –

- (i) to have access to employment,
- (ii) to participate or advance in employment, or
- (iii) to undergo training

unless the measures would impose a disproportionate burden on the employer.¹⁸⁰

This formulation marks an improvement on the approach taken in the 1998 Act. It clarifies that the reasonable accommodation duty applies at different levels of the employment relationship. Critically, as derived from the Framework Directive, the standard against which appropriate measures are to be measured is the imposition of a “disproportionate burden” on the employer. Thus, there is no room for considering in the proportionality enquiry the burden of not providing the accommodation on the

¹⁷⁸ As Schwab and Willborn point out in the US context, Congress rejected efficiency as the guiding principle for the ADA and that the Act sometimes requires inefficient actions”. *Supra* n. 10 p.4.

¹⁷⁹ An example of State funded provisions of this nature is the Supported Employment Program for People with Disabilities co-ordinated by FAS, an initiative that seeks to facilities the integration of people with disabilities into paid employment in the open labour market.

employee. Lifting the wording of the Directive almost verbatim, section 16(3)(c) lists the factors to be taken into account in determining whether the measures impose such a burden. These include:

- (i) the financial and other costs entailed,
- (ii) the scale and financial resources of the employer's business, and
- (iii) the possibility of obtaining public funding or other assistance.

The 2004 Act builds on the terms of the 1998 Act in that it makes an attempt at providing statutory guidance on the substantive content of reasonable accommodation. It does so by describing what form "appropriate" measures in relation to a person with a disability could take. "Appropriate" measures

- (a) means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,
- (b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but
- (c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.¹⁸¹

Interestingly, there is still no indication as to whether reassignment to a vacant position - the reasonable accommodation of last resort under the ADA - would be required by an employer as a reasonable accommodation under Irish law.

A provision that needs to be factored into the discussion, particularly in terms of its impact upon disabled applicants for employment positions, is contained in section 36. Section 36(1)(a) states that "Nothing in this Part ... shall make it unlawful to require, in relation to a particular post - (a) the holding of a specified educational, technical or professional qualification which is a generally accepted qualification in the State for posts of that description." Section 36(1)(b) continues "Nothing in this part shall make it unlawful for a body controlling the entry to, or carrying on of any profession, vocation or occupation to require a person carrying out or wishing to enter that profession, vocation or occupation to hold a specified educational, technical or other qualification which is appropriate to the circumstances." What is interesting, particularly as regards applicants for employment, is that section 36 is expressly stated to be unaffected by the reasonable accommodation duty. Thus, the reasonable accommodation duty is incapable of countering the assumed legitimacy of educational

¹⁸⁰ Section 16(3)(b) Employment Equality Acts 1998-2004.

¹⁸¹ Section 16(4)(c) Employment Equality Acts 1998-2004.

qualifications deemed to be “generally accepted” qualifications for posts in the State.¹⁸² It is submitted here that this provision is too broad. It does not make room for the fact that job specifications can be tailored not only to require specific minimum qualifications for a job, but also in ways which exclude those who have capabilities which have been or are capable of being measured in alternative, less common ways, hence making these alternative standards not “generally accepted”. Thus the means of unpacking job specifications not strictly required for particular positions, so long a feature of the indirect discrimination provisions, is undermined by the overriding nature of section 36. It is submitted that this is another example of how the disability discrimination provisions differ in the protection afforded to job incumbents and to those seeking work. A job incumbent who becomes disabled on the job may already possess a generally accepted educational requirement (such as a Leaving Certificate) and will be entitled to request a reasonable accommodation to allow him to remain in employment. However, a disabled applicant who was denied access to training and educational opportunities in the past, but who has since obtained other qualifications, may be unable to seek to rely on the reasonable accommodation duty because section 36 insulates “generally accepted qualifications” from the reasonable accommodation enquiry.

Conclusion

The discussion of different statutory constructs of reasonable accommodation reveals disappointing shortcomings in the Irish context. The concept has chartered an uneasy course in Irish law. The most obvious failing of the Irish legislation was thought to have been the “nominal cost” standard under the 1998 Act. This allowed an employer to avoid providing any special treatment or facilities for an employee or disabled applicant where such provision would give rise to any costs other than a nominal cost. It appears, however, that the various adjudicating bodies adopted a relative, rather than a literal interpretation of this standard. Despite this welcome development, the provision still manages to blunt the wide-ranging objectives underlying the concept of reasonable accommodation. The nominal cost provision lasted only five years on the Irish statute book. The standard against which an employer’s obligation is now measured has been raised to that of “disproportionate burden” under the Equality Act 2004.

¹⁸² See the decision of *Gorry v Office of the Civil Service and Local Appointments* DEC – E2005-038, discussed *infra*.

Due to a distinct dearth of statutory direction on the contours of the reasonable accommodation provision under the 1998 Act, applicants and employers were forced to rely on guidance emanating from case-law under the Act. However, the decisions emerging from the Irish case - law did not flesh out the bare bones of the 1998 Act. This is not only because of the deficiency in the Irish legislative text, but also due to the dearth of regulatory assistance regarding the disability ground directed at employers and employees in Ireland. Judge Posner described the meaning of “reasonable accommodation” in the US as simply “plain enough”. The plainness he speaks of is hard to gauge from the Irish statutory text. It derives to some extent - in the US context - from the abundance of explanatory guidance available to all parties involved. However, the Irish statute has only recently attempted to make itself clear on this point. In addition, the perceived (and often misunderstood) width and nature of these forms of platitudes by employers can lead, in the absence of regulatory guidance, to a policy of ignorance or confusion. This point certainly emerged from the Irish case-law under the 1998 Act. Faced with an applicant or employee with medical or capacity issues, employers seem willing to take their “discriminatory” chances. Either they refuse to hire such persons on capacity grounds and/or they ignore any possible reasonable accommodation enquiry. Few employers in the case-law have faced the reasonable accommodation enquiry head on.¹⁸³ And by this process, what they are in the first instance breaching is the procedural aspect of the reasonable accommodation requirement. They are failing to enquire - prior to discharge or refusal to hire - what effect a reasonable accommodation would have on the person’s ability to perform the functions of the job. Of course, it could be argued that the employer’s failure in this regard could well stem from a continuation of discriminatory animus, rather than from any ignorance of the process of reasonable accommodation.¹⁸⁴ As a result of the traditional tendencies of the adjudicative bodies, all of the successful claims so far have involved alleged discriminatory dismissals, with complainants awarded derisory levels of compensation. The result is a body of case-law which does not indicate the forms a reasonable accommodation may take, but rather the need to make, as a matter of procedure, a reasonable accommodation enquiry.

¹⁸³ For example, see blatant discriminatory attitudes of the employer in *A Garden Centre and A Worker* ED/02/17 Determination no. 0210. The employer ... stated that if he had known that the complainant had a disability he would never have hired him and as soon as he found out the complainant’s medical history he dismissed him”. At p. 2.

¹⁸⁴ A plausible hypothesis since many of the cases under the Irish Act has involved claims of direct discrimination plus a failure to reasonably accommodate.

This is where, comparatively speaking, the ADA statutory text clearly outclasses its Irish counterpart. Under the 1998 Act, the Irish legislation omitted to include anything equivalent to the seven discrete categories and the eighth miscellaneous category of reasonable accommodations referred to under the ADA. While section 16(4)(c) provides some indication, many issues regarding the practical sweep of the accommodation mandate still persist. For example, what is the status of job restructuring under the EEA? Does the duty to make reasonable accommodation include “reassignment to a vacant position”? Of course, through the process of evolution that accompanies statutory interpretation, such examples could plausibly come within the term “appropriate measures”. The point is that the possibility here raises massive uncertainties for employers and employees alike.

The Government defended its refusal to plug these statutory gaps by referring to the avenues of redress open to employees or applicants with a disability who perceive themselves as having been subject to discrimination.¹⁸⁵ It is unacceptable to defend legislative laxity by pointing to the avenues of redress available to some of the most vulnerable members of Irish society. This is especially the case when, as has already been pointed out, most of the cases to date have involved discriminatory dismissals. In general, the issue of whether a reasonable accommodation need not have been made by an employer is being addressed in the case-law in the context of discriminatory dismissal decisions. Since the Labour Court and Equality Officers are reluctant to order any remedies other than compensation, not only have the individual claimants taken great personal risk for minimal return, but they are also left without the job. Ultimately, the Irish legislature has much to answer for with regard to this uncertain state of affairs. In the United States, the implementation of the ADA was delayed for two years while the Equal Employment Opportunities Commission devised the necessary regulatory guidance. This guidance is regularly updated and is supplemented by technical assistance manuals with a wide array of examples of forms of accommodations both required and not required by the terms of the Act.¹⁸⁶ While the Irish Equality Authority

¹⁸⁵ See the opinion of Minister of State, Ms Wallace, speaking in the context of the Government’s refusal to accept an amendment to the effect that employer’s cannot take into account state aid and grants in any assessment of costs beyond the “nominal” standard. “The message must go out clearly to employers that an employee with a disability can bring them before the Director of Equality Investigations if they have not taken into consideration the various supports available. Dail Debates, vol 492, col. 48 (09 June, 1998)

¹⁸⁶ See < <http://www.ada.gov> > for the latest Technical Assistance manuals.

committed itself to developing guidelines on the scope of the reasonable accommodation duty in employment by 2005, these have yet to appear.¹⁸⁷

This chapter has outlined the practical application of the reasonable accommodation in a comparative context. The following chapter goes on to critically assess its impact within the overall framework of anti-discrimination law.

¹⁸⁷ See Equality Authority, Strategic Plan, 2003-2005 available at < <http://www.equality.ie> >

Chapter Six

Assessing the ADA and EEA: Equality of Opportunity or Substantive Positive Equality ?

Introduction

Following the previous chapter's discussion of the operational details of the ADA and EEA's reasonable accommodation mandate, and chapter four's discussion of the protected class approach to statutory equality protection, this thesis is now moving towards a position from which to assess the overall operation of the disability discrimination frameworks. Central to the discussion is the place of the reasonable accommodation duty. The discussion in this chapter takes place at a number of levels. The chapter concentrates on the conceptualisation of the reasonable accommodation mandate within the ADA and EEA. Specifically, it considers whether these two examples fall within the traditional equal opportunities model or whether they are better formulated within a substantive model of equality which positively promotes equality objectives. Consequently, the chapter questions the transformative role ascribed to the disability non-discrimination system and considers the charged liberal rhetoric which surrounds it in the two legal systems under discussion.¹ It argues that while the individual right to accommodation is a useful tool, its operation and interpretation, at least within the ADA and the EEA, can leave unchallenged the policies and practices which create the experience of inequality for disabled people.² This analysis considers the possibility that the difficulties endured by disabled people may be beyond the reach of the civil rights analysis of the minority group model, as discussed in chapter one. In other words, the broader condition of inequality endured by disabled people will not always fit into the present moulds of non-discrimination.³ In essence, by outlining what

¹ An example of this rhetoric is the expansive preamble attached to the ADA. 42 U.S.C. section 12101.

² L. Waddington and A. Hendriks, "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination" (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 403, pp.414-415.

³ Elements of the disability movement remain rightly sceptical regarding the ability of the non-discrimination system to tackle the depressed situations of all types of disabled people. The discrimination system, it is argued, favours employees over applicants (in terms of proof),

the current structure of disability non-discrimination law cannot do, the chapter draws together some of the cumulative defects inherent to the ADA and the EEA. However, this is not taken to mean that an equality perspective is limited to the current non-discrimination norms.

While at certain points the reasonable accommodation duty gestures towards substantive formulations of equality, these remain imperfect, particularly in light of the emerging reformulation of the substantive equality norm.⁴ Because of its attention to the difference of disability and its movement beyond indirect discrimination principles, reasonable accommodation has been the subject to a type of fanfare which has deemed it a form of affirmative action in favour of disabled people. This assumption is subject to critical enquiry here. While it is certainly true to say that the duty envisages alterations to workplace structures to allow for the participation of some disabled people, the basis of the duty is to accommodate individuals into existing structures without systematically challenging the institutional norms and structures themselves.⁵ Many of the traditional problems with the anti-discrimination regime persist and appear exacerbated in the disability context.⁶ Past experience with the anti-discrimination framework offers evidence of the limitations of such a reliance and there is little to suggest that this is eased in the disability context. In particular, the reasonable accommodation duty is severely constrained by the continuing adherence to individualism. Given the vulnerable situation occupied by disabled people, who are often at the margins of society, the burden of individually-based enforcement seems particularly marked. The group dimension of reasonable accommodation has not been recognised either in the ADA or the EEA.⁷ There are many points at which the

favours those with late onset mobility or sensory impairments as opposed to those with less popular or accepted impairments, such as mental impairments. In the interaction between the various controlling terms, [as discussed in chapter five] it is argued that the legislation has little to offer individuals with multiple or serious impairments. See J. E. Bickenbach, "Minority Rights of Universal Participation: The Politics of Disablement" in M. Jones and L.E. Basser Marks, (eds.) *Disability, Diversity and Legal Change* (Kluwer International, 1999) p.101, 107-108.

⁴ S. Fredman, "Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm" In A. Lawson and C. Gooding (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 199, 213.

⁵ See D. Pothier, "*Eldridge v British Columbia (Attorney General)*: How the Deaf Were Heard in the Supreme Court of Canada" (1997-1998) 9 *National Journal of Constitutional Law* 263.

⁶ These include the priority granted to market outcomes, the focus on individual rights as opposed to group relations, the excessive reliance on comparators, the negative and individual enforcement regime and the limited impact of positive action. See J. Baker et al. *Equality From Theory to Action* (Basingstoke: Palgrave Macmillan, 2004), chapter seven.

⁷ This contrasts with the reasonable accommodation mandate in South Africa where it operates as a generalised duty which embraces all grounds of discrimination and is expressly linked to the

reasonable accommodation duty may fail to access the real experience of inequality endured by many disabled people. Where an individual needs an “extra- reasonable” accommodation, or where its provision would effect an undue hardship or disproportionate burden, the inequality remains. Compounding matters is the fact that its overall utility cannot be divorced from the persistent problems of delineating those entitled to benefit from the duty.⁸ Admittedly, this point has greater pertinence with respect to the operation of the ADA.⁹

The first part of the chapter’s discussion considers the purpose of, and the policy behind, different forms of positive action. Positive action programs are not mandated under the ADA and positive action initiatives are entirely voluntary (and consequently underused) under Ireland’s EEA. Judicial attitudes to the legitimacy of positive action at EU level are then considered. The European Court of Justice’s treatment of positive action programs in the gender context reveals the tension between the equal treatment principle and the notion of “full equality in practice”¹⁰, which greatly affects developments in this area. Thereafter, the scope of Ireland’s positive action provisions in the EEA and Equality Act 2004 are discussed. The discussion considers how positive action tools fit into the models of equality underpinning anti-discrimination regulations, raised in chapter two. Despite the more expansive ambitions of positive action programs, it points out how the focus on equality outcomes through altering the composition of a workplace can be misleading. To this extent, positive action programs do not provide uncritical answers to the condition of inequality that disabled people face in accessing the labour market. In short, they may alter the under-representation of disadvantaged groups in particular sectors, yet they can leave unchallenged the existing structures which generate systemic inequalities.

To substantiate the overall assessment of the disability non-discrimination framework, the second part of the chapter is a comparison between stronger forms of positive action (traditionally hard preferences¹¹) and the reasonable accommodation duty. The chapter proceeds to distinguish the reasonable accommodation duty from preference-providing forms of positive action. It recognises one particular point under the ADA where the synthesis between reasonable accommodation and positive action is at its strongest – that is, where reassignment to a vacant position is at issue. However,

duty on certain employers to engage in affirmative action. See Employment Equity Act 1998, section 15(2)(c).

⁸ See generally chapter four.

⁹ *Ibid.*

¹⁰ See Article 141(4) of the TEC.

¹¹ Discussed below.

this form of reasonable accommodation is unreferenced under the EEA. Despite the criticism of the ADA and the EEA's non-discrimination framework, I do not reject the utility of rights-based approaches to disability exclusion. Rather, it is argued that existing principles need to be supplemented with more expansive equality tools. Consequently, part three of the chapter moves on to consider supplementary approaches to the traditional disability non-discrimination regime.

The traditional divergence between the social model and the minority group model of disability has been with regard to the former's reliance on the existing rights strategy underpinning anti-discrimination law. The condition of disability-based inequality and exclusion is not, on a social model analysis, capable of resolution within legal frameworks. However, as the chapter goes on to consider, this perspective fails to recognise that the narrow and negative discrimination model is moving slowly towards positive formulations. These formulations include developments such as mainstreaming, positive equality duties and links between non-discrimination and positive freedom-enhancing social rights. Rather than characterising the minority group model and the social model as inherently antagonistic, these formulations suggest an alliance between universalist approaches to disability (an offshoot of the social model)¹² and the concept of equality. In turn, those approaches are linked to a more substantive, social rights-based conception of freedom and participation.¹³ Ultimately, it appears that the prospects for future developments of this nature are greater in the context of Ireland's equality framework.¹⁴ This leads to the conclusion that the once-pioneering model of disability discrimination law - the ADA - is being left behind. This can be attributed both to a judicial assault on its existing provisions and also to the failure to move beyond liberal, negative and individual formulations of equality rights.

The discussion begins by turning to the equality ambitions of positive action programs.

¹² Universalism in the context of disability was developed by US sociologist, Irving Zola, and shares considerable common ground with the original social model analysis. See I. Zola, "Toward the Necessary Universalizing of a Disability Policy (1989) 67 *The Milbank Quarterly* 401.

¹³ See S. Fredman, *supra* n.4 pp. 213-217.

¹⁴ This is because of Ireland's membership of the European Union, which opens the state up to developments taking place on a pan-European stage, for example, the provisions of the European Social Charter. The momentum is also developing domestically with poverty and equality proofing initiatives and the introduction of the Disabilities Act 2005. These are discussed below.

Positive Action

Background

Concerns about whether negative prescriptions against non-discrimination¹⁵ sufficiently address the unemployment rate of disabled people inevitably lead towards the debate which surrounds the concept of positive action, or affirmative action, as it is known in the United States.¹⁶ A number of tools fall under this umbrella term, with each enjoying variable degrees of public and political support.¹⁷ The extent of the concept has been consistently challenged and considerable confusion surrounds what types of practices are, or should be, properly termed affirmative or positive action.¹⁸

Broadly stated, positive or affirmative action can be described as the deliberate use of race, gender or disability criteria for the specific purpose of tackling the endemic exclusion and disadvantage of a group on such grounds.¹⁹ Positive action measures go beyond the prohibition of discrimination and strive to alter the composition of a particular workplace or sector.²⁰ Given its required use of race, sex or disability criteria, the concept challenges the traditional formulas of equality discussed in chapter two, particularly the equal treatment and equal opportunity models. The equal opportunity principle shares features of a substantive formulation of equality by requiring the

¹⁵ Despite the fact that the duty to provide a reasonable accommodation for a disabled applicant or employee is ostensibly framed in positive terms, as a matter of practice, the duty becomes a negative right. A failure to provide a reasonable accommodation amounts to disability discrimination which, practically speaking, particularly in the context of discriminatory dismissals, is compensatable in monetary terms only.

¹⁶ In the United States, the term used is affirmative action. In general, this thesis adopts the European terminology, though affirmative action is adopted when quoting or citing from US sources.

¹⁷ The contentiousness of these interventions stems from the presumed interference with the demands of neutrality, meritocracy and free market principles, and has generated widespread, and often hyperbolic, reaction. In particular, claims of “reverse discrimination” suffered by more advantaged groups, particularly white men, have dominated recent political and mainstream debate. See F. Pincus, *Reverse Discrimination Dismantling the Myth* (Boulder, London: Lynne Rienner Publishers, 2003), Chapter two for statistical rejoinders to the claimants of reverse discrimination.

¹⁸ See C. McCrudden, “Rethinking Positive Action” (1986) 15 *Industrial Law Journal* 219 who distinguishes five categories of positive action: i) identification and removal of discriminatory practices; ii) facially neutral but purposefully inclusionary policies; iii) outreach programmes designed to attract members of underrepresented groups; iv) forms of preferential treatment, including targets or set-asides; and v) provisions which redefine merit.

¹⁹ S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, Clarendon Law Series, 2002) p.126.

²⁰ C. Bell, A. Hegarty and S. Livingstone, “The Enduring Controversy: Developments on Affirmative Action Law in North America” (1996) *International Journal of Discrimination and the Law* 233, 234.

removal of structural barriers to participation. However, once overt barriers to participation have been removed, then the model reverts to the primacy of the individual and places the stress on merit.²¹ It does not necessarily allow individuals to move through the door of opportunity. The equal opportunity model specifically rejects positive action programmes which would allow individuals to be treated preferentially on the basis of certain characteristics, such as their sex or race. Positive action programmes also contradict the equal treatment's tenet of non-discrimination and treatment as an individual²², as well as the liberal state's commitment to neutrality in its treatment of its citizens. Of course, as has been discussed, a more considered assessment of these concepts reveals the in-built patterns of injustice in state commitment to neutrality, rationality and the status quo.²³ Statistical evidence on the education, employment, and mean income of traditionally more advantaged groups, as compared with members of disadvantaged groups, demonstrates persistent disparities and this is despite more than a generation of non-discrimination legislation.²⁴ Yet, the "benign" use of race- or gender-specific criteria by the state or employers for classification purposes is viewed as being as invidious as discrimination based on malign prejudice. However, formal approaches to discrimination law do not seem to alleviate disadvantage *per se*.

The most common rationale for positive intervention is to alleviate and redress the impact of past discriminatory practices which persist despite years of statutory prohibition against discrimination. The adoption of an historical rationale for affirmative action policies attracts a number of objections. In particular, it is argued that those who benefit from positive action policies today are rarely those who originally endured the virulent forms of exclusion of the time, such as those who suffered under the Jim Crow

²¹ Chapter two discussed the limitations of this model. It remains unconcerned with the impact of past discrimination and the consequent fact that members of disadvantaged groups might not be in a position to take advantage of such opportunities.

²² In terms of interference with individual accumulation of merit and placing burdens on individuals not personally responsible for historical or institutional discrimination. However, as McColgan argues, the merit against which affirmative action programs operate is far from neutral: merit is defined by a yardstick represented by the dominant and valued attributes of the comparative norm. Thus, bland statements about rights to equal treatment are of substance only for those who can compete with the majority on the terms of the majority. A. McColgan, *Women Under the Law: The False Promise of Human Rights* (London: Longman, 2000) p.165.

²³ In particular, the concept of equalising starting points is not concerned with whether more members of disadvantaged groups will in fact be in a position to take advantage of such opportunities. For example, past discrimination in the education system, or child-care burdens, may mean that individuals will not find it easier to take up positions.

²⁴ See F.Pincus, *supra* n.17 pp.9-18 for a statistical analysis of the relative position of white men, females and blacks in the United States that demonstrates the many economic advantages still enjoyed by white men despite their claims as victims of "reverse discrimination".

laws in the United States.²⁵ By extension, it is argued that those who assume the burden of affirmative action are rarely those who took part in the discriminatory practices in question.²⁶ In response, proponents of positive action have articulated a two-pronged forward looking rationale: the first prong sees positive action as a means of overcoming prejudice by changing widely-held attitudes towards members of disadvantaged groups; the second is an integrative argument which sees affirmative action as a necessary tool for integrating disadvantaged groups into a properly-functioning democratic society.²⁷

One of the contributory factors to the often inflammatory and hyperbolic debate surrounding positive action is the absence of a clear picture of what positive action programmes actually entail. There is a tendency to equate positive action with strict hiring preferences and quotas, despite the existence of tight legal controls on these types of practices in both Europe and the US. A charge frequently levied against the conception of positive action is that of “reverse discrimination”.²⁸ The argument proceeds on the basis that any preference based on race, sex or disability is invidious, no matter how benign the purpose. Thus, past discrimination against disabled people is wrong, so any form of present discrimination in their favour is equally wrong. However, the charge of reverse discrimination has been rejected by the defenders of affirmative action who argue that affirmative action policies are lacking one crucial component of past discrimination: that is, the fact that past discrimination towards blacks, women and disabled people has been predicated on the basis of inferiority and a reduced sense of moral standing because of their race, colour, sex or disability. Nagel, a well-known defender of affirmative action in the United States, writes:

²⁵ The Jim Crow era in the US dates from the late 1890s when southern states began systematically to codify in law and state constitutional provisions the subordinate societal position of African Americans. See <http://www.jimcrowshistory.org/home.mtm>

²⁶ O. Dupper “Remedying the Past or Reshaping the Future? Justifying Race-based Affirmative Action in South Africa and the United States” (2005) *International Journal of Comparative Labour Law and Industrial Relations* 89, pp.101-102. Problems with the rationale of past discrimination against disadvantaged groups have been raised by the courts. Some Justices in the United States have attempted to limit affirmative action to assisting actual victims of proven discrimination. See the judgment of Scalia, J. in *Adarand Constructors v Peña*, 515 U.S. 20 (1995): “Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as a creditor race or a debtor race.”

²⁷ O.Dupper, *ibid.* pp. 113- 120, for discussion. Iris Marion Young has also argued that affirmative action policies should not be predicated on the compensatory theory of past discrimination. Rather, the primacy purpose is “to mitigate the influence of current biases and blindness of institution and decision makers.” In this way affirmative action programs can be judged: not on the grounds they perpetuate discrimination against innocent privileged members of society (which on discriminatory theory they do) but on the basis of assisting members of certain groups over others in discrete and carefully tailored circumstances for particular purposes. See I. M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) p.198.

²⁸ See below for discussion of the anomalous nature of “reverse discrimination”.

“Race and sexual discrimination are based on contempt or even loathing for the excluded group, a feeling that certain contacts with them are degrading to members of the dominant group, that they are fit only for subordinate positions or menial work [...] Affirmative action involves none of this: it is simply a means of increasing the social and economic strength of formerly victimized groups and does not stigmatise others”.²⁹

Thus, the crucial elements of disdain and prejudice are lacking in affirmative action policies, which puts affirmative action “morally in a different category”.³⁰ This distinction, it is argued, makes it misleading to refer to properly-controlled affirmative action policies as “reverse” discrimination.³¹

In any event, many forms of positive action fall far short of hard quotas or preferences in opening up access to employment opportunities. In an attempt to provide accurate background information for the debate on the legitimacy or otherwise of these actions, Pincus describes seven different types of affirmative action policies across a number of aspects of social life in the USA.³² These can be grouped into three general categories: needs-based programmes funded and provided by the state; outreach programmes designed to attract qualified candidates and encourage applications from members of under-represented groups; and the use of preferential treatment as a hiring tool, which itself can be divided into soft and hard categories.³³ A soft preference is where two candidates are equally qualified and, in the tie-break scenario, the member of the under-represented group is appointed. A hard preference is that which occurs where the preferred candidate is less well-qualified - but not so unqualified as to be deemed incapable of performing the position, which would compromise the principle of objectivity - and the policy dictates that their membership of an under-represented group is determining. The question as to whether the formulation of reasonable

²⁹ T. Nagel, ‘A Defense of Affirmative Action’ in T. L. Beauchamp and N. E. Bowie (eds.) *Ethical Theory and Business* (1988) p.346.

³⁰ O. Dupper, *supra* n.26 p. 93.

³¹ *Ibid.*

³² The seven different forms of affirmative action include: Office of Federal Contract Compliance Programs Affirmative Action Guidelines, Government Agencies under the Equal Employment opportunities Act 1972; Hiring and Promotion Quotas (applied generally only by court order or with court approval); Race/Gender –Plus Policies (only used to rectify severe employment segregation – used more extensively in higher education - see the seminal US Supreme Court decision of *University of California v Bakke* 438 U.S. 265 (1978) and the more recent decision of *Gratz v Bollinger* and *Grutter v Bollinger* 539 U.S. 306 (2003)); Race Based Scholarships; Government Contract Set Asides and Voluntary Affirmative Action. F. Pincus, *supra* n.17, chapter 2.

³³ See C. McCrudden, “The Constitutionality of Affirmative Action in the United States: A Note on *Adarand Constructors Inc v Peña*” (1996) 1 *International Journal of Discrimination and the Law* 369.

accommodation can be conceptualised as providing hard preferences in favour of disabled people is taken up below.

In Europe, the picture is less easily summarised. Given the leeway enjoyed by individual member states in areas outside of the Union's competence, a report on the exact picture of the range of positive action measures is beyond the scope of this work. What does seem to be the case is that, in the employment context, the majority of positive action initiatives are undertaken by the states acting as public sector employers. The European approach to the legal legitimacy of positive action programmes on the gender ground in the employment context is discussed below. This is followed by a treatment of the positive action provisions applicable to the disability ground.

The European Approach to Positive Action in the Gender Context

The European Commission has long recognised the persisting inequities stemming from women's horizontal and vertical occupational segregation as a barrier to the Union's economic competitiveness.³⁴ Following findings from Commission-driven research,³⁵ issues such as the organisation of working hours, the devaluation of "women's work", the balancing of family and professional responsibilities and the reintegration of older women into the workforce have been acknowledged as both pressing and beyond the remit of the formal equal treatment principle. At first, merely soft law proposals were introduced: initiatives were developed to identify and remedy situations which lead to or perpetuated inequalities in the workplace.³⁶ These were subsequently complemented by the terms of the Equal Treatment Directive.³⁷

Positive action in the gender context originally derived its legitimacy from Article 2(4) of the Equal Treatment Directive, which provides that the Directive shall be

³⁴ Though in more recent times, following efforts to ascribe a more "human" and "social" face to Community action, the rationale for intervention supports the removal of such barriers for the sake of the alleviation of the inequalities themselves. See Employment Action plans and Articles 2 and 3 of the Treaty of Amsterdam .

³⁵ See European Commission, *Positive Action. Equal Opportunities for Women in Employment. A Guide* (1988).

³⁶ C. Barnard, *EC Employment Law* 2nd ed. (Oxford: Oxford University Press, 2000) p.244. The work of the Commission in this context has been considerable and includes Council Recommendations, guides and programmes designed to educate employers on the means of putting such a program into place. It also includes Community programmes committing and funding programs directed at increasing opportunities for women, see for example, the NOW Programme (New Opportunities for Women).

³⁷ Equal Treatment Directive 76/207/EEC. See also Council Recommendation on the Promotion of Positive Action for Women 84/635/EEC [1984] OJ L331/34. Though non-binding the Recommendation is not completely devoid of legal effect as it should be taken into account in the interpretation of the Directive.

“without prejudice to measures which promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities” in access to employment, promotion, vocational training and working conditions.

Following the Treaty of Amsterdam, which created an emboldened new framework for EC equality law,³⁸ Article 141(4) of the TEC contains the new text for positive action.

This new provision will be discussed following a consideration of the original positive action regulations in EC jurisprudence. The case-law discussed below demonstrates an obvious reluctance on the part of the Court to depart from dominant conceptions of equal opportunities loyal to individual qualifications and merit.

EC law permits, rather than requires, positive action, which takes place at member state level. This approach to positive action, according to one commentator, makes it conceptually equivalent to formal notions of equality.³⁹

The Court of Justice and Positive Action

The cases of *Kalanke*,⁴⁰ *Marschall*,⁴¹ *Badeck*⁴² and *Abrahamsson*⁴³ illustrate the evolution of the ECJ’s position on the permissible reach of positive action measures in the context of gender equality. *Abrahamsson* was the first decision of the ECJ post-Article 141 of the TEC and it will be considered last. One preliminary point should be made prior to this discussion. The consideration of the gender positive action jurisprudence is merely indicative of the ECJ approach in that particular context and it may not necessarily control the approach to be taken by the ECJ in the disability context. Article 7(1) of the Framework Directive and Article 5(1) of the Race Equality Directive⁴⁴ are materially equivalent to Article 141(4). According to McColgan, the ECJ interpretation of Article 141(4) is a likely indication of its approach to positive action on the newly protected grounds.⁴⁵ However, in the disability context, Article 7(2) needs to be factored into the equation: it states that “With regard to disabled persons, the

³⁸ Articles 2 and 3 EC Treaty deem the promotion of equality between men and women a task and aim of the Community.

³⁹ H. Fenwick, “From Formal to Substantive Equality: The Place of Affirmative Action in European Union Sex Equality Law” (1998) 4 *European Public Law* 507, 508.

⁴⁰ *Kalanke v Freie-Hansestadt Bremen* Case C – 450/93 [1995] ECR I-3051

⁴¹ *Marschall v Land Nordrhein-Westfalen* Case C – 409/95, [1997] ECR I- 6363

⁴² *Badeck v Hessen* Case C-158/97 [2000] ECR I-1875

⁴³ *Abrahamsson & Anderson v Fogelqvist* Case C-407/98 [2000] ECR 05539.

⁴⁴ Article 5 states: “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin..”

⁴⁵ A. McColgan, *Discrimination, Text, Cases and Materials* 2nd ed. (Oxford: Hart Publishing, 2005) p.168.

principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provision on the protection of health and safety at work⁴⁶ or to measures aimed at creating or maintaining provision or facilities for safeguarding or promoting their integration into the working environment". Also material to the matter, of course, will be the relationship, if any, between the positive action provisions and the duty to make reasonable accommodation. Because of these specific points, it is difficult to foresee the extent to which the gender positive action cases will impact on the Court's approach to the disability ground. However, some tentative points may still be attempted.

The *Kalanke* case concerned a challenge to a Bremen law on positive action applicable in the public sector which, in the case of a tie-break situation, gave priority to an equally-qualified woman over a man if women were under-represented in the workforce. The Court ruled this particular approach an impermissible departure from the principle of the individual right to equal treatment and in contravention of Article 2(4) of the Equal Treatment Directive. Despite accepting that "existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities", the Court held that "[n]ational rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the directive."⁴⁷ The Court's judgment attracted much criticism.⁴⁸ It omitted any attempt at balancing the competing policy arguments. It focused excessively on formal equality and it displayed a considerable lack of sensitivity to the reality of the workplace disparities between women and men across the Union. Since both applicants were equally qualified and had, by definition, equal merit, "it is hard to see why the male applicant had any greater right on the assumed facts to be selected than the woman".⁴⁹ It is difficult to see how the Bremen law departed from the much-revered principle of

⁴⁶ For discussion of the health and safety provisions, see R. Whittle, *infra* n.78 pp. 317-318.

⁴⁷ para.22

⁴⁸ The Commission issued a communication in the aftermath of the *Kalanke* decision (see COM (96) 88) and considered proposing an amendment to the Equal Treatment Directive to offset the restrictiveness of the ECJ's approach. The proposed amendment would have been to the effect that "[p]ossible measures [permissible] shall include the giving of preference, as regards access to employment or promotion, to a member of the under represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case." The decision also generated a considerable body of academic literature. See U. O'Hare, "Positive Action Before the European Court of Justice: Case C-450/93 *Kalanke v Fie Hansesstadt Bremen*" [1996] 2 *Web Journal of Current Legal Issues*; Peters, "The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis" (1996) 2 *ELJ* 177.

⁴⁹ S. Fredman, *supra* n.19 p.137.

individual merit, as the regulation constituted a tie-break positive action scheme and was hardly, in the words of the Court, “an absolute and unconditional priority”. As Lonen and Veldman comment, an “insistence on equal treatment in this case implies that flipping a coin is the desired decisional mechanism”.⁵⁰ Moreover, the Court gave no indication as to what a permissible equal opportunities strategy might entail.

The Court of Justice retreated from this strict stance in a later decision in *Marschall*. This retreat was in part facilitated by the specifics of the positive action program under challenge. It provided that where there were fewer women than men within a particular career bracket, women were to be accorded priority for promotion in the event of equal suitability, competence and professional performance “unless reasons specific to an individual [male] candidate tilt the balance in his favour”.⁵¹ It was this “individual consideration” component to the positive action policy that prompted the Court to rethink its position. It referred to the need for positive action to exist in harmony with the principle of non-discrimination so as to “counteract the prejudicial effect on female candidates of ... attitudes and behaviour and thus reduce actual instances of inequality which may exist in the real world.”⁵² A cursory analysis of the real world recognises that “even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life”.⁵³ The mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same opportunities.⁵⁴ The rule handed down in *Marschall* is that:

“[A] national rule which, in a case where there are fewer women than men at [the level of post in a sector] and both female and male candidates for the post ... and both ... candidates ... are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour, is not precluded by [the terms of the Directive] ... provided that in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the

⁵⁰ T. Lonen and A. Veldman, “Preferential Treatment in the Labour Market after *Kalanke*: Some Comparative Perspectives”, (1996) 12 *International Journal of Comparative Labour Law and Industrial Relations* 48.

⁵¹ Para.33.

⁵² Para. 31.

⁵³ Para.29.

⁵⁴ Para. 30.

priority accorded to female candidates where one or more of those criteria are not such as to discriminate against the female candidates.⁵⁵

What saved the system in *Marschall* was the in-built individual assessment of all candidates. This allowed the employer to disregard the system which favoured equally-qualified women following an objective assessment, non-discriminatory to female candidates, which could tilt the balance in the male's favour.⁵⁶ The effect of the *Marschall* decision is to narrow the reach of *Kalanke*, which only outlaws hard automatic preferences (which are few in any case, and was arguably not the case at all in *Kalanke*). *Marschall* was generally welcomed, if only because it was seen to alleviate the harshness of the court's stance in *Kalanke*. At this stage, EU law only approved of soft positive-action provisions - that is, those that eschew fixed-quota schemes through an insistence on equal qualifications and individualised assessment of male candidates. However, the Court completely side-stepped the site of the future challenges in positive action jurisprudence - that is, programmes which are not predicated upon equal qualifications, but instead operate quotas for jobs or membership of decision-making bodies.⁵⁷

The position was instead incrementally extended in *Badeck*, which concerned the legality of the Hessen law on equal rights for men and women and the removal of discrimination against women in public administration. This law contained what was called a "flexible results quota", which applied in areas of the public sector where women were underrepresented. It gave priority to female candidates where male and female candidates had equal qualifications, and where the priority was necessary for complying with the binding targets in the "women's advancement plan"⁵⁸, but only if no

⁵⁵ Para. 33.

⁵⁶ This so-called soft quota in favour of women, however, has been queried with regard to the type of criteria that may be applied to "tilt the balance back in the favour of men". While the factors may not be discriminatory against women, they also cannot be made on the basis of generalisations about the position of men. However, in practice, the savings clause could allow consideration of the controlling factors which existed to disadvantage women in the first place, namely traditional promotion criteria, such as age, seniority, length of experience.

⁵⁷ See S. Fredman, *supra* n.19 p.140. Statistical objectives or quotas forms a central part of the Commission's aim of achieving balanced participation for men and women in decision making. See Council Recommendation EC 96/694 on the balanced participation of men and women in the decision-making process. OJ L 319/11.

⁵⁸ The provincial legislation under consideration required public administrative departments to adopt women's advancement plans, which aimed, in part, to avoid possible instances of indirect discrimination against women by adopting wider indicators of expertise and qualifications (including for example capabilities and experience gained by looking after children or persons requiring care) where relevant. The plans also went further by setting binding targets for increasing the proportion of women in sectors in which they were under-represented, and this

reasons of “greater legal weight” were put forward. The reasons of “greater legal weight” amounted to five rules, described as “social aspects”, which make no reference to sex. These rules gave preferential treatment: firstly, to former employees in the public service who had left the service because of family commitments; secondly, to individuals who worked on a part-time basis for family reasons and who wished to resume full time employment; thirdly, to former temporary soldiers; fourthly, to seriously disabled people; and fifthly, to the long-term unemployed. The ECJ concluded that the priority rule was not “absolute and unconditional” in the *Kalanke* sense. Additionally, the Court looked favourably upon the criteria by which the initial selection of candidates occurred before the flexible quota was carried out. Although ostensibly gender-neutral, these criteria did in essence allow for some indirect discrimination against men. Thus, the shift with *Badeck* is more marked than one might first assume. As Costello points out “... once the priority does not amount to the actual award of a position of employment, quite strong preferences may be employed.”⁵⁹ This ranges from vocational training right up to the selection of candidates for interview. However, the Court still did not offer any guidance on the second limb of the formula, where candidates are the subject of an objective assessment which takes account of their specific personal situations. Moreover, the cornerstone of all the positive action plans approved so far by the ECJ has ultimately been equal qualifications between men and women.

Following the decisions of *Kalanke*, *Marschall* and *Badeck*, the legal basis for positive action in the gender context has been strengthened with the insertion of Article 141(4) into the EC Treaty. The text to Article 141(4) is reproduced below.

“With a view to ensuring full equality in practice between men and women in working life, 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 under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional life”.

Here, the EC Treaty recognises that a formal commitment to equal treatment may be insufficient to pursue the notion of “full equality in practice”. While certain commentators expected that Article 141(4) would alter the interpretation of Article 2(4)

included positions set-aside for women, save where there were good reasons demonstrating that not enough qualified women were available.

⁵⁹ C. Costello, “Positive Action” in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law, 2003) p.177, 191.

of the Directive, given its apparently wider scope, the Court has in fact interwoven its interpretation of the new Treaty provision with the existing case-law.⁶⁰

Abrahamsson was the first decision on the compatibility of Swedish positive action regulations in academia with the terms of the Equal Treatment Directive post Article 141(4). The Swedish regulations amounted to a departure from the type of provisions previously considered by the ECJ in that it required universities, when recruiting to academic positions where women were under-represented, to grant preference to a candidate from the under-represented sex. Instead of a strict commitment to the revered principle of equal qualifications, the regulations allowed for the less qualified candidate to be appointed, but only where the difference between the candidates' qualifications was not so great as to compromise the requirement of objectivity in decision-making over appointments. The ECJ ruled the scheme to be incompatible with Article 2(1) and 2(4) of the Equal Treatment Directive. It relied on its decision in *Marschall* to the effect that the Directive was not contravened where preference was granted to the candidate from the under-represented sex, given that qualifications were equal and the in-built safeguard of individual, personalised and objective assessments was present. The stronger wording present in Article 141(4) which refers to "special advantages to prevent or compensate for disadvantages in careers" introduced with the purpose of "ensuring full equality in practice" between men and women could not support the Swedish regulations. The ECJ held that it could not be "inferred that Article 141(4) allows a selection method [such as the Swedish regulations] which appears, on any view, to be disproportionate to the aim pursued".⁶¹ However, this simple reference to proportionality was not elaborated.⁶² In *Badeck*, Advocate General Saggio stated that the reconciliation between the primacy of individual consideration and the need for substantive equality when interpreting Article 2(4) could be carried out under proportionality principles. On this view, equal treatment conflicts with positive action only if the remedial measure is disproportionate - in other words, it demands excessive sacrifices from those who do not belong to the target group, or when the social reality does not justify it. Positive action could therefore be lawful if it were proportionate in this sense. However, equivalence in merit still retained its primacy in this formulation. This type of analysis did not appear in the *Badeck* judgment, nor was proportionality engaged with in any meaningful sense in *Abrahamsson*.

⁶⁰ *Ibid.* p. 185.

⁶¹ Para.55.

⁶² See S. Fredman, *supra* n.19 p.142.

It is submitted here that the ECJ adopted an over-inclusive approach to the Swedish regulations and, at the same time, failed to give sufficient weight to the more expansive wording of Article 141(4). The Swedish regulations did not allow for completely unqualified women to take up academic posts. The principle of objectivity in decision-making would simply not have allowed this to happen. All the regulations permitted was the slight relaxation of equal qualifications. The need for parity in qualifications remains a major contributing factor to the vertical occupational segregation of women in many workplace sectors, particularly given the unequal burden of gender roles. This would not result in the selection of unsuitable candidates for the position. However, the ECJ's disavowal of the Swedish regulations means that, at least in the hiring context, the legitimacy of strong positive action preferences has been corroded. Candidates have to be equally qualified, and only in cases of under-representation can sex be used as a factor in the decision.

Positive Action on the Disability Ground

Chapter one detailed some of the stereotypical assumptions and negative attitudes which persist with regard to the proper place and role of disabled people in mainstream society.⁶³ These are extremely difficult to alter and are compounded by the pervasiveness of environmental and structural barriers.⁶⁴ Negative attitudes and stereotypical assumptions may be better challenged with the inclusion of all types of disabled people in revised societal structures.⁶⁵ This suggests that more aggressive efforts beyond legal formulations of individual non-discrimination protections are

⁶³ It is because disabled people are a devalued and marginalized minority that society sees nothing untoward and unacceptable about the exclusionary barriers it has erected. Silvers utilises the exercise of historical counterfactualising to demonstrate how the assumptions as to the utility of disabled people would be different if disabled people constituted a dominant social group. See A. Silvers, "Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities" *Hypatia* (Winter 1995) p.48.

⁶⁴ Hahn's work utilising the minority group analysis is that negative attitudes have translated into unequal burdens of the built environment being placed on disabled people. Policy decisions are tainted with unfavourable attitudes towards disabled people, thus structures are built and institutions are created in an exclusionary manner, because law, ordinances and regulations permit their construction in such a manner. See H. Hahn, "Accommodations and the ADA: Unreasonable Bias or Biased Reasoning" (2000) 21 *Berkeley Journal of Employment and Labor Law* 166.

⁶⁵ C. Barnes, "A Working Social Model? Disability and Work in the 21st Century" Available at Centre for Disability Studies Resources Web page: <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> last accessed November 18, 2003).

required to rectify the exclusion of disabled people from the working structure.⁶⁶ Such efforts need to be directed against both of the problems that lead to economic exclusion: discrimination, especially unconscious and structural forms of discrimination, and the limits on inclusion posed by the interaction between disability and the institutionalised practices of society.⁶⁷

Positive action programmes aim to side-step some of the limitations of the negative, individualised non-discrimination construct. However, because positive measures tend to be grafted on to the negative non-discrimination framework, they can be viewed suspiciously by courts as exceptional, suspect and open to challenge.⁶⁸ The justifications for positive action in favour of disabled people are not difficult to make out. Although not having endured the legacy of slavery, like black people in the United States, the legacy of institutionalisation and (ongoing) segregation has a major impact on the life chances of disabled people.⁶⁹ Disabled individuals have lived through a lengthy period of institutionalisation and *de facto* (if not totally *de jure*) segregation. While political and social theory continues to challenge this construct of the disabled identity, institutional discrimination against disabled people persists. This is compounded by open or more covert forms of negative attitudes regarding the capacity and moral worth of the impaired body and mind. Yet, non-discrimination prescriptions, which rely mainly on individual enforcement, can rarely guard against the more covert forms of discrimination that can lie behind the subjective decision-making that employers wield with regard to employment opportunities. It is very easy to hide a *prima facie* prejudice against disabled people and their abilities behind concerns for health and safety or other business matters.⁷⁰ Disabled people often do not get beyond the door of opportunity because an assumed dichotomy between inherent limitations (impairment) and workplace capacity retains its validity in the eyes of decision-makers: the assumption that disabled people do not work and cannot work becomes a natural fact beyond challenge. It has been argued that only with the positive inclusion of disabled people within employment structures can attitudes of employers, managers and

⁶⁶ M. Weber, "Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities" (1998) 46 *Buffalo Law Review* 123 (Obtained from Westlaw, no page numbers available).

⁶⁷ *Ibid.*

⁶⁸ J. Baker et al. *supra* n.6 p.127.

⁶⁹ In 2002, the Irish Government admitted that there were still a considerable number of individuals with learning difficulties residing full-time in mental institutions despite their apparent good-health. By the end of 2005, their number totalled almost 400. See F. O'Toole, *The Irish Times*, January 3rd, 2006.

⁷⁰ M. Russell, *Beyond Ramps: Disability at the End of the Social Contract* (Monroe, Maine: Common Courage Press, 1998) p.118.

co-workers be challenged and the patterns of exclusion that prevent disabled people from making it inside the front door be broken down.⁷¹ As is discussed below, it is by no means clear that the duty to provide reasonable accommodation to disabled people can positively impact on the visibility and inclusion rates of disabled people in mainstream employment structures in proportion to their current rates of exclusion.⁷² To this extent, it is important to consider the role and purpose of positive action principles in the disability context.

Disability and Positive Action: The Framework Directive

As of yet, the European Court of Justice has not had to determine the reach of the positive action provisions in their application to the disability ground in the context of employment and occupation. Article 7 of the Framework Directive adopts a similar approach to the EC Treaty in that it bases the adoption of positive action by Member States on “ensuring full equality in practice”. Again, it is stated that the principle of equal treatment shall not prevent Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the protected grounds. The approach is equivalent to that operating on the gender ground: the principle of equal treatment shall not prevent Member States from introducing positive action measures. Thus, the commitment to substantive equality that was initially apparent in the Framework Directive’s positive action provisions is diluted by the permissive formulation of the construct. Fenwick describes this approach to positive action as conceptually consistent with the formal notion of equality.⁷³ A truly substantive vision of equality sees positive action not as an exception or aberration to the principle of equal treatment, but as an integral component of a wider, reformulated equality norm. This would demand more than merely permitting positive action strategies by those with the inclination to act. A better approach would seek to impose mandatory positive action plans on those with extremely segregated workplaces. An example of this approach can be found in Canada’s employment equity legislation,

⁷¹ M. Weber, *supra* n.66.

⁷² See D.C. Stapelton and R. V Burkhauser, *The Decline in Employment of People with Disabilities: A Policy Puzzle* (Kalmazoo, Michigan, W.E. Upjohn Institute for Employment Research, 2003) p.7. The argument from within more critical factions of the disability movement is that antidiscrimination regulation favours certain types of disabled people, thereby intensifying the exclusion felt by those with less accepted or serious disabilities. The statistics on the tribunal complaints generally bear this point out.

⁷³ H. Fenwick, *supra* n.39 p. 508.

where obligations are imposed on employers to survey their workplace for evidence of segregation, low pay or exclusion of members of protected groups, and to introduce action plans in response to any findings.⁷⁴

However, a more optimistic view of the European positive action precepts puts to one side the permissive nature of Article 7 and emphasises the ultimate goal, which is “full equality in practice”. The language in Article 7 is results-oriented and speaks of a commitment to altering disadvantage that is associated with specific grounds. It refers to “creating or maintaining provisions or facilities for safeguarding or promoting [disabled workers’] integration into the workplace”. The pressing question, of course, surrounds the interpretive ploy of the ECJ - that is, whether it will adopt the same tight control which it wields over positive action in the gender context. The demand for equal qualification as determined in the traditional, merit-accumulating manner continues to permeate the positive action framework on the gender ground as overseen by the European Court of Justice. It remains to be seen whether such a strict approach to hard preferences is continued by the ECJ in the context of disability. It is questionable, given the political salience of the disability ground, and given the existence of the individualised accommodation duty, whether an equivalent approach on the gender and disability grounds will be adopted. This is because the traditional argument against gender-based positive action, namely its contravention of the equal treatment principle, does not have the same resonance in the disability context. It is impossible to deny that for the disability ground, at least, perfectly equal treatment can constitute discrimination.⁷⁵ It may well be the case that the interaction between the accommodation duty and the positive action provisions will be instrumental in shaping the direction of disability positive action jurisprudence. It may also be likely that proportionality principles will come into play, despite the fact that the ECJ’s positive action jurisprudence on gender has skirted over this concept. This will be returned to below in a discussion of the interaction between these two concepts in Irish law.

If the ECJ accepts the entrenched nature of the disadvantage that disabled people suffer in the European labour market, then it could legitimate positive action

⁷⁴ Under the Employment Equity Act, the federal public service, Crown corporations and federally regulated private sector employers with 100 or more employees must examine their workforces to determine whether any of the designated groups is under-represented. Each employer must identify and remove barriers to the employment of disabled people and, where necessary, establish goals for improving their representation. See *infra* for a discussion of equality action plans and audits in the context of Ireland’s EEA.

⁷⁵ On the tension between the equal treatment principle and the wider conceptualisations of equality, see H. Collins, “Discrimination, Equality and Social Inclusion” (2003) 66 *Modern Law Review* 16.

programmes which include quotas adopted at Member State level.⁷⁶ While this methodology has been strictly curtailed in the gender context, it is arguable that the entrenched disadvantage that disabled people occupy in society could prompt a change in judicial attitudes. On this point, the Commission has generally assumed that the ECJ would be sensitive to the extreme nature of the exclusion of disabled people and would tailor its scrutiny of employment quotas and schemes accordingly. In other words, the social reality of unemployment rates of up to eighty per cent among disabled people ought to be recognised.⁷⁷ However, Article 7(2) makes this point explicit because its wording is specifically tailored to the disability ground alone. The wording states that “[w]ith regard to disabled persons, the principle of equal treatment is without prejudice ... [to provisions] aimed at ... safeguarding or promoting their integration into the working environment”. Whittle argues that this “sends a clear signal to the Court of Justice that positive action measures for this group must be treated differently to those in respect of gender”.⁷⁸ Accordingly, it is submitted here that the Directive should not prevent any obstacle to the proportionate use of employment quotas and other schemes in the disability context.

Positive Action: Ireland

The architecture of Ireland’s equality legislation includes provisions which allow for voluntary positive action programmes applicable across all nine protected grounds. Yet positive action is an under-utilised tool within Ireland’s anti-discrimination law framework. The regulations pertaining to positive action were initially set out in the Employment Equality Act 1998 and these have recently been amended by the Equality Act 2004.

⁷⁶For a discussion of disability quotas, see L. Waddington, “Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws” (1996) 18 *Comparative Labour Law Review* 62.

⁷⁷ See National Disability Authority, *Disability Agenda 4 – Disability and Work* (2004).

⁷⁸ R. Whittle, “The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective” (2002) 27 *European Law Review* 303, 319-320.

Section 33: Employment Equality Act 1998

Originally, sections 35 and 33 of the Employment Equality Act 1998 permitted employers to adopt positive action initiatives on a number of the non-gender grounds, including disability.

Section 35(2) of the 1998 Act remains intact, following the introduction of the Equality Act 2004, and it provides that special treatment or facilities for persons with disabilities in relation to vocational training courses shall not be unlawful under the terms of the Act. Where special pay, treatment or facilities are provided for disabled people, these do not have to be extended to non-disabled people.⁷⁹ The point of this latter provision, in section 35(3), would seem to be to protect positive action initiatives from attack of claims of “reverse” discrimination by non-disabled individuals.

Originally, section 33(3) of the EEA 1998 envisaged a role for the State in the positive action context. It granted power to the Minister for Justice, Equality and Law Reform to provide training or work experience for disadvantaged groups of individuals where the Minister believed that such a group would be otherwise unlikely to have such an opportunity. The resource implications of this course of action appear to have been the primary reason why such a direction was never ordered by the Minister in question.⁸⁰ In any event, section 22 of the Equality Act 2004 repealed section 33 of the 1998 Act in its entirety, substituting an amended definition of positive action which completely removed the provisions relating to the certification of training opportunities for particular groups.

Most importantly, section 33 stated that the Act did not preclude measures intended to “reduce or eliminate the effects of discrimination” on “persons with a disability or any class or description of such persons” where such measures are designed to “facilitate [their] integration into employment generally or in particular areas or a particular workplace ...”.⁸¹

In keeping with the asymmetrical nature of disability discrimination protections, the positive action provisions pertaining to disability were not framed as derogations from

⁷⁹ Unfortunately, unlike the ADA, the EEA allows a special rate of remuneration payable to disabled individuals in certain circumstances. See section 35(1).

⁸⁰ In addition, it is arguable that the inclusion of these general policy provisions which allow the Minister to act in such circumstances can be seen as political strategies adopted at the time of the Bill’s passage designed to assuage the concerns of the equality lobby over the continued single-axis approach to tackling discrimination in Irish society.

⁸¹ Section 33(1)-(2)(b). This provision also extends to persons over the age of 50 and members of the traveller community.

the symmetrical right to equal treatment granted to all. The language of this original Irish positive action provision appeared to be broad-based. As long as the measures were intended to “reduce or eliminate” the effects of discrimination and designed to “facilitate the integration” of disabled people into employment in general or in a particular workplace, they were *prima facie* lawful. The controls over the positive action programme indicate the legislature’s adoption of two differing rationales for such action: first, the remedying of past discrimination following the emphasis on the need to reduce or eliminate discriminatory effects, and second, the more forward-looking integrative argument, based on including more disabled people within employment structures and creating a more inclusive civil society. The amended positive action provisions in Irish employment equality law are discussed below.

Positive Action: The Equality Act 2004

The amended section 33, inserted by section 22 of the Equality Act, alters the definition of positive action in certain respects. It states that the Act does not “render unlawful measures maintained or adopted with a view to ensuring full equality in practice between employees”. Such measures being

- (a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than the gender ground),
- (b) to protect the health or safety at work of persons with a disability, or⁸²
- (c) to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment.

Thus, any measures adopted must advance the principle of “full equality in practice” and can be designed to prevent disadvantages accruing to the discriminatory grounds or to create facilities which promote the integration of protected individuals into the workplace. A comparison of the 1998 and 2004 definitions reveals that the latter’s inclusion of the provision “full equality in practice”, which is linked to the prevention or compensation of “disadvantage”, appears to be a wider mandate than the 1998 Act’s determination of “the effects of discrimination” against the target group. Thus, disadvantage could be viewed as a wider term than discrimination, which, as we have already seen, can be interpreted in a formal and narrow sense.⁸³ Thus, disadvantage in

⁸² Article 7(2) of the Framework Employment Directive refers specifically to health and safety concerns. It states : “ ... with regard to disabled persons, the principle of equal treatment is without prejudice to the right of Member States to maintain or adopt provision on the protection of health or safety”. See R. Whittle, *supra* n.78 pp. 317-318 for discussion.

⁸³ See chapter two.

the context of the disability ground recognises the forms of discrimination which are manifested in the form of negative attitudes, and the disadvantages that accrue because of the barriers to participation that persist in the interaction between an individual's impairment and the demands of the workplace structure. Further, this approach is strengthened by the provision which allows the creation or maintenance of facilities to ensure the integration of such persons into the work structure. Thus, the onus of initiation is shifted away from reacting to the accommodation requirements of a particular disabled individual and towards the *ex-ante* actions of the employer.

The extent to which employers may legitimately implement positive action policies is of particular interest. What types of measures in favour of disabled people could offset the effects of disadvantage and help integrate them into employment? Does the Act legitimise the adoption of quotas in the form of specific recruitment for certain positions in order to meet disability targets? For example, could an employer, however unlikely it may seem, reserve one hundred per cent of available positions for take-up by disabled persons?⁸⁴ To answer this question, it must be recognised that positive action targets and quotas are generally not regarded as being without limits. If the rationale underpinning their application is to remedy past and lingering forms of discrimination, to promote integration and to change attitudes through challenging established prejudicial belief structures, then the extent or measure of this purpose should determine the scope of the remedy. Statistical surveys carried out in the United States constantly indicate that there are a large body of disabled individuals who want to work but who cannot find work due to a combination of institutional and attitudinal barriers.⁸⁵ Thus, within a particular employment sector, a hiring target for a particular group, such as those with disabilities, would be approximate to (i.e. a proxy for) what the employment rate of disabled people could or should be in ideal conditions.⁸⁶ One could start with statistics regarding qualified individuals with disabilities registered as looking for work in a local economy. However, a real difficulty in this regard is the status dichotomy that persists between being registered disabled for the purposes of disability benefit and

⁸⁴ This would be likely to fall outside of the forms of action permissible within positive action programs. Particularly, on the proportionality enquiry favoured by Advocate General in the ECJ decision in *Badeck* discussed above, because a balance ought to be struck between the ambitions of the targeting policy and also the possible burden to be borne by individuals who are not members of the target group.

⁸⁵ See D.C. Stapelton and R. V Burkhauser, *The Decline in Employment of People with Disabilities: A Policy Puzzle* (Kalmazoo, Michigan, W.E. Upjohn Institute for Employment Research, 2003) p.7

⁸⁶ M. Weber, *supra* n.66. See also NDA, *Disability Agenda – Disability and Work* (2004).

being an individual with a disability seeking employment free from discrimination.⁸⁷ In Ireland, in particular, given the statistical gaps regarding the prevalence, impact and extent of disability, it could be difficult to determine what the hiring rates for disabled people would be in the absence of discrimination in its broader sense. However, such an approach is not wholly foreclosed. In light of the recent census results of 2002, and the proposed work of the National Disability Authority on a methodology for disability statistical work, it should become possible to perform a demographic breakdown by region in order to come up with an estimate figure regarding the employment rate of disabled people.⁸⁸ However, the overarching comment to make on the positive action provisions is that the information deficit is costly and the provisions are highly unlikely to be taken up by an employer acting in a voluntary and economically rational manner.⁸⁹ It has only been filled in practice by the (rarely used) remedy of court-ordered affirmative action in the United States in the case of extremely sex- or race-segregated workplaces,⁹⁰ an option which is unavailable to courts and tribunals under the ADA or the EEA.

Other examples of positive action initiatives would be the utilisation of disability as a “plus one factor” in favour of a disabled individual, or the use of disability as the determining factor where all other factors are equal, that is, in a tie-break situation. Other positive action initiatives falling short of quota-based hard preferences could involve the alteration of entry qualifications in instances where

⁸⁷ The difficulty here is with the problematic interface between welfare policy and anti-discrimination policy in the context of disability. Those receiving disability benefit are recorded as having an inability to work, and this conflicts with the notion of disabled individuals being qualified and available for work. See L. Waddington and M. Diller, “Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law” Conference Paper delivered at From Principles to Practice: An international Disability Law and Policy Symposium, October 22-26 2000 available at: <http://www.dredf.org/symposium/waddington.html> Last accessed April 11, 2002.

⁸⁸ See the Central Statistics Office, *2002 Census of Population, Volume 10 – Disability and Carers* (Dublin: Government Stationery Office, 2004) and also the work planned by the National Disability Authority, Disability Agenda “Designing and Piloting a Research Instrument for a Proposed National Disability Study” (Dublin: National Disability Authority, May, 2004). Issue 2.

⁸⁹ S. Schwab and S. Willborn “Reasonable Accommodation of Workplace Disabilities” (2001) Cornell Working Paper Series. Available at <http://www.law.cornell.edu/leda/search/seriesbyauthor> Accessed December 4, 2002 who discuss the information deficits that employers labour under in this regard.

⁹⁰ The ADA contains no affirmative action provisions. In the United States, the federal Rehabilitation Act 1973 requires departments and agencies in the executive branch of the federal government to submit an affirmative action plan for the hiring, placement and advancement of people with disabilities. In addition, its reach extends to federal contracts by providing that such contracts in excess of \$2,500 must contain a provision requiring the contractor to take affirmative action to employ and advance the situation of people with disabilities.

existing practices might adversely impact on applicants with certain disabilities: that is, employers could rethink what other measurements beyond, for example, formal certification, could be used to indicate competence for a position.⁹¹ What this form of probing raises, of course, is the issue of whether the duty to make reasonable accommodation and positive action provisions share certain similarities in their features. This point is discussed more fully below.

However, the determining feature in any discussion of this provision is that the commitment to offset group-based disadvantage is immediately undermined by the passive nature of the statutory provisions on positive action. Framed in voluntary terms - i.e. it shall not be unlawful to ... - it would be an embellishment to describe the positive action provisions as posing even a moral obligation on employers to act positively with regard to disability and the other grounds in ways such as those described above.⁹² Further, when it came to the negotiations around the amending Equality Act, the equality lobby again expressed its disappointment at the omission of a statutory obligation on employers to engage in positive action in the workplace.⁹³ There is nothing in the Act to suggest that it will be anything other than a piece of dead letter law.⁹⁴ At a bare minimum, the statute precludes anti-discrimination claims from members of traditionally advantaged groups and, in this way, it eliminates the anti-differentiation rebuttal of positive action provisions.⁹⁵

Positive Action Outside Anti-Discrimination Law: The Government's 3% Target

The experience of the public sector target bears out many of the issues discussed above.

⁹¹ Note the operation of section 20 of the Employment Equity Act in South Africa, discussed below, which directs employers to consider alternative ways of measuring competence and qualifications for a position. While the acceptance of lower qualification standards or entry requirements in respect of minority candidates appears on its face to be anti-meritocratic, there is utility in proper assessment of qualification standards actually necessary for the performance of a particular job. As McColgan points out, the demand for higher qualifications – which can serve to exclude less advantaged candidates – could be a form of indirect discrimination. A. McColgan, *supra* n.22 p.166. Moreover, while it is arguable that the alteration of entry conditions could amount to an adjustment that might be undertaken by way of a reasonable accommodation, it is important to reiterate that section 36(4) of the EEA exempts qualifications “generally accepted in the State” from the scope of the reasonable accommodation duty.

⁹² See H. Fenwick, *supra* n.39 p.508.

⁹³ The Equality Coalition, *Submission on the Equality Bill* (March 2004) p.10.

⁹⁴ This assumption is based on the experience of the similar and under-utilised positive action provisions of the Employment Equality Act 1977.

⁹⁵ Section of the Act 35(3) EEA 1998-2004.

Beginning in 1977, the Government introduced a positive action measure aimed at achieving a 3% target for the employment of disabled people in the public sector in order to jump-start their integration into mainstream employment. While this measure has been described as being “quota”-based, quotas are more properly described as legal obligations which are backed up with specific sanctions. This initiative, though Government-led, is not legally enforceable. It places only a moral obligation on the civil and public service to comply with its directions. As a result, its effectiveness has been compromised. That said, some progress has been made. In 1981, disabled people comprised 0.9% of the workforce in the Civil Service and 1.11% of the public service workforce. By 1990, compliance had only improved marginally. However, by 1993, the 3% target was achieved in all but three of the nineteen Government Departments. By the late 1990s, the figure had dropped below the 3% target once again. Of course, it is possible - and this possibility has been alluded to - that this target was achieved through manipulation of the definition of disability.⁹⁶ Compliance across the wider public sector has been less successful, and it appears that throughout the last decade, compliance in the civil service has diminished again.⁹⁷ Monitoring of the target has also been erratic. It was hoped that the promised establishment of an inter-departmental monitoring committee would track progress more carefully. Further promises for achievement of the target have been made in various partnership agreements, with the second most recent agreement advocating achievement “at an early date”.⁹⁸

Under the regulations, public service employers are expected to take specific initiatives, suited to their circumstances, to recruit and retain employees with disabilities in order to meet the target. Public sector employers are expected to identify and seek to remove or reduce barriers to recruiting and retaining employees with disabilities where it is within their competence to do so. Among the main barriers that may be identified at recruitment level in the public service are:

- The specification of a minimum educational requirement (for example the Leaving Certificate or equivalent formal qualifications may be less frequently held by people

⁹⁶ P. Conroy and S. Flanagan, “Research Project on the Effective Recruitment of People with Disabilities into the Public Service 2000” (2001) Report Commissioned in Partnership by the Equality Authority and the Department of Justice, Equality and Law Reform. Available at www.equality.ie (last accessed, October 30, 2003).

⁹⁷ By the late 1990s it had fallen below the target again. See C. Murphy, *Employment and Career Progression of People with a Disability in the Irish Civil Service* (Dublin: Goodbody Economic Consultants, 2003).

⁹⁸ Government of Ireland, *Programme for Prosperity and Fairness 2000-2002* (Dublin: Government Stationery Office, 1999).

with disabilities).⁹⁹ Employers may need to examine whether there are suitable alternative means of assessing future job suitability and performance;

- The requirement for full time working /attendance during normal office hours. (Job redesign or part-time working may be necessary elements in an initiative to attract people with disabilities into employment and to retain them.)

Research demonstrates that public sector managers have problems with the relationship between the disability target and the operation of the employment equality legislation. Conroy and Flanagan report an apprehension among employers regarding the 3% target and the Employment Equality Act. In particular, the question raised was “where does the apparent preferential treatment of the 3% target end and discrimination begin?”¹⁰⁰ Although there may be concern over the form and extent of positive action measures allowable under the Employment Equality Act, the comment quoted above indicates something of a misunderstanding among public sector employers over the statute’s provisions. The Act provides that it does not render unlawful (in other words, it is not discriminatory) the taking of measures with a view to ensuring full equality in practice, to prevent or compensate for disadvantages linked to “disability”, or “to create or maintain facilities for the integration of such persons into the working environment”.¹⁰¹ It would be difficult to envisage how a 3% public sector target for disabled workers could be seen as anything other than a measure facilitating their integration into employment, thereby offsetting the effects of discrimination, particularly given that 10-12% of the population has a disability and this sector suffers an unemployment rate of between 70 and 80%. Moreover, the asymmetrical nature of the statute’s disability non-discrimination provisions means that employers are secure from claims by non-disabled individuals of breaches of the equal treatment principle. Despite this, Conroy and Flanagan report that as a safeguard from discrimination claims, many public sector employers apply the principle of non-discrimination at the recruitment process and the principle of positive action once the person is employed in the public sector.¹⁰² Given that many disabled people find that the greatest barrier to participation is overcoming the prejudices which employers hold regarding their capabilities, this approach seems to be missing the point. Usually, public sector employers are comparatively well-informed on the potentials of workers with

⁹⁹ Though see the effect of section 36(4) and(5) regarding qualification standards discussed in chapter two.

¹⁰⁰ P.Conroy and S. Flanagan, *supra* n. 96 para.4.1.

¹⁰¹ Section 33 of the Employment Equality Act 1998-2004.

¹⁰² *Ibid.* One employer is quoted as stating that merit as a principle of admission is strictly applied by the Civil Service.

disabilities. When one considers the information deficit which many private sector employers suffer, hopes regarding their impetus for positive action programmes are not high.

Disaggregating Reasonable Accommodation from Preferential Positive Action Programs

In this second part of the chapter, I address the tendency, particularly common within the ADA jurisprudence¹⁰³ and within academic literature,¹⁰⁴ to equate the ADA's reasonable accommodation duty with the policy of affirmative or positive action, as it is understood in the traditional sense of providing preferences to members of protected groups. The discussion is based upon a comparison between the concept of reasonable accommodation and the positive action initiatives which fall under McCrudden's third category.¹⁰⁵ This heading refers to forms of positive action which involve preferential treatment (often termed hard preferences) for the purposes of increasing particular groups' participation and representation in sectors where they have been historically underrepresented and excluded.¹⁰⁶ It remains questionable whether reasonable accommodation can be equated with positive action in this sense, as the general formulation of the reasonable accommodation duty does not expressly set out to increase the representation of disadvantaged groups within workplace structures or sectors.¹⁰⁷ As is discussed below, the one possible exception to this is reasonable accommodation by way of "reassignment to a vacant position".¹⁰⁸ While it can certainly be stated that reasonable accommodation and positive action programmes share certain

¹⁰³ See Justice Breyer writing in *US Airways, Inc. v Barnett* 12 S. Ct. at 1521: "...[T]he Act specifies ... that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodation" that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, i.e. preferentially." See below for a rebuttal of this analysis based on the social construction of disability.

¹⁰⁴ See below for references.

¹⁰⁵ The discussion is confined to a consideration of the reasonable accommodation duty in the context of employment discrimination law in the two jurisdictions under consideration. It is therefore mindful of the fact that in other jurisdictions, notably Canada and South Africa, reasonable accommodation operates more expansively. There, express links are made between reasonable accommodation and affirmative action, which emphasise the group, as opposed to the traditional individual orientation, of accommodation mandates. See *infra* for further discussion of these measures.

¹⁰⁶ See generally C. McCrudden, *supra* n.33.

¹⁰⁷ This is developed below.

¹⁰⁸ Section 101 (9)(B) ADA.

features, it is less acceptable, in my view, to conceptualise measures undertaken by way of reasonable accommodation as positive action. This is because of key distinctions between the two forms of intervention, which are drawn below.¹⁰⁹ The discussion goes on to highlight the limitations to positive action programmes. It considers how more substantive equality formulations represented by positive duties to promote equality could offset and supplement both the individualism of the accommodation duty in the disability context and the permissive nature of positive action programmes.

Preferential Treatment? Parallels between Reasonable Accommodation and Positive Action

The resemblance between the implementation of positive action programmes and the provision of reasonable accommodations in favour of disabled people is straightforward. Each involves an employer taking active or positive steps to provide something of benefit to the members of the group protected by anti-discrimination law.¹¹⁰ Thus, reasonable accommodation has been characterised as a form of positive action where it places an obligation on employers to take account of a protected characteristic by taking certain reasonable steps, short of imposing a disproportionate burden or an undue hardship, to allow disabled employees and job applicants equal opportunities. Support for this conceptualisation of reasonable accommodation can be located in the literature.¹¹¹ For example, Karlan and Rutherglen note an equivalence in reasonable accommodation and positive action: “[r]easonable accommodation is affirmative action in the sense it requires an employer to take account of an individual’s disabilities and to provide special treatment to him for that reason”.¹¹² However, the same commentators see reasonable accommodation operating along the lines of hard preferences when they state that it confers a right upon a disabled individual to “insist upon discrimination in their favour” and this is described as a distinct form of affirmative action.¹¹³ Similarly,

¹⁰⁹ On this analysis, it remains arguable that some measures adopted by way of reasonable accommodation could fall within traditionally softer forms of positive action, such as, for example, McCrudden’s first category of “identification and removal of discriminatory practices”.

¹¹⁰ See J. Cooper, Comment, “Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act” (1991) 139 *University of Pennsylvania Law Review* 1423, 1431.

¹¹¹ See P.S. Miller, “Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender and Age” (1989) 1 *University of Pennsylvania Journal of Labour and Employment Law* 511.

¹¹² P. Karlan and G. Rutherglen, “Disabilities, Discrimination and Reasonable Accommodation” (1996) 46 *Duke Law Journal* 1 p.9.

¹¹³ *Ibid.*

Schwab and Willborn argue that the ADA's reasonable accommodation duty contains hard preferences which require employers to engage in affirmative action.¹¹⁴ The substance of their argument is dealt with more extensively below. At this stage, it suffices to state that the articulation of the accommodation duty moves beyond the negative duty of discrimination law orthodoxy, which prohibits decision-makers from taking into account specific characteristics such as race or gender. It is also beyond the remit of traditional indirect discrimination precepts, as it is concerned with the exclusionary effect of omissions on the part of an employer¹¹⁵ as opposed to the disparate impact of particular practices or provisions. In this sense, both reasonable accommodation and positive action share a vision of equality that calls for the differential treatment of subordinated individuals and groups. However, that vision is implemented rather differently and, in practice, it responds differently to the experiences of exclusion suffered by disabled people.¹¹⁶ However, viewing reasonable accommodation as positive action on Karlan and Rutherglen's theory involves characterising reasonable accommodation as "special" treatment. This is an assessment which is closely linked with traditional medical models of disability and impairment.¹¹⁷ This view is rejected because of an understanding of the functions of the reasonable accommodation duty as informed by the minority group model of disability, and is discussed below.

Notwithstanding the differences that will be drawn below between the two concepts, there is one point at which the synthesis between reasonable accommodation and the traditional meaning of positive action becomes less easy to challenge. This is where reassignment to a vacant position is the form of reasonable accommodation at issue.¹¹⁸ This form of reasonable accommodation is expressly set out in the EEOC regulations accompanying the ADA, but it remains unreferenced under Irish and

¹¹⁴ S Schwab and S. Willborn, *supra* n.89 p.9.

¹¹⁵ See J. Baker et al. *supra* n.6 p.128. The failure of an employer to provide child-care facilities on site could not, therefore, be actionable on current indirect discrimination principles.

¹¹⁶ See *infra* for development.

¹¹⁷ The reason we view accommodation requests from disabled people as a request for "special" or "extra" benefits is based on dominant understandings that existing workplace structures provide the appropriate baseline for what employers should provide. M. Crossley, "Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project" Working Paper available at <http://www.law.ufl.edu/faculty> p.34 Recently published at (2004) 35 *Rutgers Law Journal* 861.

¹¹⁸ See Stephen F. Befort and T. Holmes Donesky, "Reassignment under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action or Both?" (2000) 57 *Washington and Lee Law Review* 1045, 1092. ("The similarities between reasonable accommodation and affirmative action are most acute when the accommodation in question is reassignment.")

European legislation. Reassignment to a vacant position is argued to form a preference in respect of which class status, such as disability, serves as a preferential basis for selecting an individual to fill a position.¹¹⁹ However, as was discussed in chapter five, reassignment as a form of reasonable accommodation under the ADA is closely controlled.¹²⁰ It is expressly stipulated to be the reasonable accommodation of last resort. Moreover, the EEOC regulations state that reassignment to a vacant position is only available to a disabled employee and not to an applicant seeking a job.¹²¹ The federal courts remain divided on whether the ADA's inclusion of reassignment in its list of possible accommodations requires an employer to reassign a disabled employee even where a better qualified employee or applicant seeks the position.¹²² If the ADA were interpreted to mandate the preference of a disabled employee over a better-qualified applicant for the vacant position, then the reassignment function would appear to operate preferentially along the lines of traditional preference-based positive action programmes. This form of reasonable accommodation is predicated upon the integrative argument for positive action programmes. Its purpose is to allow for the retention of a disabled individual within the workplace, which is better served by allowing a newly disabled employee to be accommodated by way of reassignment as opposed to forcing that individual to re-enter the labour market as a job-seeker.¹²³ This form of reasonable accommodation as positive action would appear to be within the boundaries of a proportionality enquiry, such as that formulated by the Advocate General in the ECJ decision in *Badeck*¹²⁴. The act, if reasonable, in favour of the disabled individual would not place excessive burdens on individuals outside of the target group - it is only available to employees and not job applicants - and the social reality of the widespread nature of discrimination and exclusion endured by disabled

¹¹⁹ *Ibid.*

¹²⁰ Compare *Aka v Washington Hospital Center* 156 F.3d 1284 (D.C. Cir. 1998) with *Smith v Midland Brake, Inc* 180 F.3d 1154 (10th Circuit. 1999). Though in the UK context, see the House of Lords decision in *Archibald v Fife* [2004] ICR 954, where it was held that the duty to make reasonable adjustments under the Disability Discrimination Act 1995 could require a disabled person to be treated more favourably than a non-disabled person in the context of the specific adjustment at issue, that of "transferring to fill an existing vacancy".

¹²¹ 29 C.F.R. app s.1630.2 (o) (July, 2003 ed.)

¹²² This point was not addressed in the context of the Supreme Court decision in *Barnett* which discussed the interaction between the reasonable accommodation of reassignment and seniority systems. See *US Airways v Barnett* 535 U.S. 391 (2002), 122 S. Ct. 1516 discussed in chapter five.

¹²³ Crossley argues that the integrative argument supports a redistributive policy to maximize the employment of people with disabilities and as such keeps the purposes of reassignment within the anti-discrimination structure of the ADA, if uncomfortably so. M. Crossley, *supra* n.117 p.88

¹²⁴ *Badeck v Hessen* Case C- 158/97 [2000] ECR I- 1875.

people provides support for its use. It is submitted that this is the only aspect to the reasonable accommodation duty of the ADA that falls within target-based measures aimed at expressly increasing the relative representation of disabled people in workplace structures. As chapter five pointed out, Ireland's EEA is comparatively silent on the forms of accommodations which would be reasonable for an employer to make. There are no supporting regulations which specify whether reassignment to a vacant position is thought to be within the statutory concept.

The interesting point, in the US context, is that this positive aspect to the ADA was never articulated by Congress when the Bill was progressing. In the justifications advanced by Congress for enacting the ADA, nowhere, either in the preamble or in the accompanying Congressional history, does the ADA speak of granting preferences to disabled individuals. Indeed, Befort and Holmes state that it would have been ironic if the language of the ADA appealed to affirmative action policy, as the ADA's introduction came at a point where judicial, legislative and public opinion was retreating from the legitimacy of affirmative action policies in the race and gender contexts.¹²⁵

Differences between Reasonable Accommodation and Positive Action: Barrier Removal versus Preferential Treatment

Despite the parallels discussed above, it is argued here that there are sufficient distinctions between the reasonable accommodation mandate and positive action programmes which consolidate the need for both practical and political reasons to uphold the boundary between the two. It is argued that the text, practicalities and policy underpinning the ADA and the EEA support the view that reasonable accommodation should not be equated with, or reduced to, preference-based positive action, specifically positive action programmes which are quota-based and which alter entry standards for members of targeted groups.¹²⁶

The first difference between reasonable accommodation and positive action lies in their respective regulatory characters. Simply put, reasonable accommodation is a mandatory duty under the ADA and the EEA. Failure to provide a reasonable accommodation is stipulated (or interpreted, in the Irish context) as amounting to

¹²⁵ S. Befort and T. Holmes Donesky, *supra* n.118 p. 1081.

¹²⁶ The basis for maintaining this distinction is multi-faceted. First, it distinguishes reasonable accommodation from positive action in order to protect the former from the discourse of illegitimacy that surrounds positive action. Secondly, the distinction isolates the limits of the reasonable accommodation duty as compared to preferential based positive action programs.

discrimination and is a legally-enforceable individual right.¹²⁷ Conversely, the language and text of positive action at EU and domestic level (the ADA contains no affirmative action provisions) is permissive and facilitative: employers and Member States are given the freedom to allow for or to adopt positive action measures in favour of disabled people under Article 7. Where initiatives are pursued, then any purported action must be designed to alleviate the effects of disadvantage or to create facilities to promote the integration of disabled people into employment.¹²⁸ Positive action purports to go further towards dismantling barriers faced by disabled individuals by allowing set-asides, targets and quotas in favour of the disabled.

This difference is further crystallised by the operational context of the two concepts. Positive action programmes are generally employer- or state-driven plans adopted in reaction to an assessment of the position of disadvantaged groups within a particular sector or workplace. Employers typically establish targets and goals through a statistical comparison of their workforce with the relevant labour market.¹²⁹ Consequently, hiring and recruitment policies are altered until the target is met.¹³⁰ The reasonable accommodation duty is, on the other hand, a reactive duty which arises on an individual case-by-case basis - either because an existing employee becomes disabled or because an employer is faced with the prospect of a disabled person applying for a position. It retains an individual focus and does not involve setting targets in response to an assessment of a workplace which shows evidence of disadvantage, segregation and exclusion. To be successful, it relies upon an interactive process between an employer and a single individual. What is determinative is that the individual is able to perform the “essential functions” (ADA) or the “duties”(EEA) attached to a position - this means that he or she must be qualified for the position.¹³¹ One must then assess whether a

¹²⁷ Section 102(b), 5(A) and (B) ADA.

¹²⁸ See the text to section 33 of the EEA as amended set out above. Of course, this latter aspect to the Irish positive action provisions demonstrates that measures falling short of the hard preferences can fall under one of the first two characterisations of positive action drawn by McCrudden. And in this sense, then certain measures undertaken by way of a reasonable accommodation in favour of one individual could operate more broadly in favour of the integration of other, similarly situated disabled individuals, for example, the insertion of ramps in favour of those who mobilise by way of wheels. However, this discussion here is on the basis of an understanding of positive action in its strongest sense.

¹²⁹ See Befort and Holmes Donesky *supra* n.118 p.1082.

¹³⁰ Examples include the plans laid out in the public sector in Ireland, discussed above, and also the public sector hiring plans which were the subject of ECJ discussion in *Marschall* and *Abrahamsson* discussed above.

¹³¹ Title I of the ADA extends statutory protection from discrimination only to qualified individuals with a disability. If the person concerned is not “qualified” in the particular sense required by the statute, she loses her non-discrimination protection. EEOC regulations define “qualification standards” to mean “the personal and professional attributes including the skill,

'reasonable' accommodation would enable the individual to become qualified¹³² and if so whether its provision would be a proportionate burden (EEA) or an allowable hardship for the employer to bear (ADA).

As has been pointed out above, the traditional justification for positive programmes in the race context was the need to counter the lingering effects of past discrimination. The accommodation duty under the ADA, according to Crossley, does not require evidence of past discrimination by the employer.¹³³ The purpose of the accommodation mandate is to remove barriers and to alter policies that currently impede the proper inclusion of disabled people within the labour market. In the context of reasonable accommodation under the ADA, the duty does not operate to alter or adjust an employer's job standards. Rather, the reasonable accommodation mandate requires employers to permit qualified disabled individuals to utilise non-conventional means of performing job functions. Thus, the duty does not operate to alter or adjust an employer's job standards, apart from discounting the effect of an individual's inability to perform non-essential job functions.¹³⁴ This dialogue which the ADA's reasonable accommodation duty prompts is intended to identify both the essential functions of the position and the particular needs of the disabled person in question.¹³⁵ This dialogue "does not guarantee an accommodation in favour of a disabled worker"¹³⁶ and neither does the accommodation itself, if provided, guarantee an applicant a particular position. Where there is a more qualified individual without a disability, there is nothing in either the ADA or the EEA that says that the hiring decision must go to the disabled

experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. §1630.2(q). –As noted above, while the demand for higher qualifications (unrelated to job performance) could be a form of indirect discrimination, (see A. McColgan, *supra* n.22) section 36 of the EEA exempts qualification standards "generally accepted in the State" from the scope of the reasonable accommodation duty and the indirect discrimination principle.

¹³² See chapter five for discussion on the diverging interpretations to the "reasonableness" of the accommodation matrix.

¹³³ M. Crossley, *supra* n.117 p. 32. This is, of course, a specifically American take on the operation of affirmative action. In the employment context, the criteria utilised to support voluntary affirmative action plans no longer include proof of the existence of past intentional discrimination. See *United Steelworkers v Weber* 443 U.S. 193 (1979) and *Johnson v Transportation Agency* 480 U.S. 616 (1987) for judicial opinion on the extent of affirmative action plans in private employment in the United States.

¹³⁴ See discussion of this important limb of the reasonable accommodation duty in chapter five.

¹³⁵ Whether this dialogue actually takes place in the real world in an entirely different question.

¹³⁶ S. Befort and T. Holmes Donesky, *supra* n.118 p.1083. Of course, the applicant may not be qualified in the sense required by the statute, or the particular accommodation may fall foul of the standard of undue hardship (US) or disproportionate burden (Ireland). Alternatively, its provision may not be viewed as within the band of 'reasonableness'.

individual.¹³⁷ On this point, reassignment to a vacant position, the one construction of reasonable accommodation that falls within a traditional hard preference category, is not available to job applicants. Crucially, if an employer fails to provide an accommodation or engage with the request, the only recourse left open to the individual is the pursuit of compensation through the adjudication system.¹³⁸ So while there may be a positive duty to engage in reasonable accommodation, in a large number of cases it is conceptualised and remedied as a negative right.¹³⁹ In this sense, the reasonable accommodation duty may not positively increase the representation of disabled people across a workplace or sector. While it is true that a positive action programme does not guarantee any particular individual any automatic preference or result,¹⁴⁰ what it does aspire towards is a form of preferential treatment for the group to which the individual belong. In this way, the pervasiveness of attitudes and stereotypical assumptions about the working capacity of disabled people can be challenged through the positive inclusion of disabled people within working structures. In this sense, then, positive action programmes are said to provide a “systemic” as opposed to an individual remedy for the exclusion endured by members of the historically-disadvantaged group.¹⁴¹

The inapplicability of reassignment at the application stage underscores another significant distinction between reasonable accommodation and traditional affirmative action programmes. In the United States, reassignment to a vacant position operates only as a post-hire mechanism through which an employer may retain the services of a current employee with a disability. It will only be required if, in the circumstances, it

¹³⁷ See below for discussion of the narrow form of hard preferences available in hiring to disabled applicants seeking accommodations.

¹³⁸ Other forms of redress available under the EEA include reinstatement and reengagement orders (s. 82(2)(a)) and a more open ended order that a “a person or persons specified ... take a [specific] course of action”: s. 82(1)(3) See s. 82 and s. 83 of the EEA. The former actions have been rarely ordered and an example of a course of action ordered under the latter include a requirement for an employer to undertake equality training.

¹³⁹ Waddington argues that Article 5 of the Framework Directive clearly establishes a positive duty on employers to make a reasonable accommodation and that consequently, individuals should be able to enforce a right to benefit from an accommodation. While in certain cases, individuals employees have been able to extract an adjustment from an employer, such as a piece of equipment or an alteration in work practices, the vast majority of the cases under the EEA have been remedied in the traditional negative manner. L. Waddington, *Implementing and Interpreting the Reasonable Accommodation Provisions of the Framework Employment Directive: Learning from Experience and Achieving Best Practice* (EU Network of Experts on Disability Discrimination, 2004) p. 44.

¹⁴⁰ Positive action programs themselves are not without limitations. In particular, they are prone to an attack of being over-inclusive and under-inclusive in their impact and effect on both the target group and the non-protected group.

¹⁴¹ S. Leiter and W. Leiter, *Affirmative Action in Antidiscrimination Law and Policy: An Overview and Synthesis* (2002). Their thesis is that systemic bias against protected groups justifies a remedy that goes beyond compensating individuals for their injuries. At p.53.

would be a reasonable accommodation and if it would not impose any undue hardship or disproportionate burden. No other employee loses employment as a result of this job transfer.¹⁴² By way of contrast, court-ordered positive action programmes in the United States generally operate as a pre-hire formula that reserves employment opportunities for one group of applicants, and this is perceived to be at the expense of another group of applicants. The inapplicability of reassignment at the hiring stage - the point at which conventional positive action programs are most pervasive - further diminishes the similarities between reasonable accommodation and positive action.

Beyond Equality of Opportunity: Reasonable Accommodation and Hard Preferences

The conceptualisation of the ADA's reasonable accommodation mandate in preferential terms has been advocated in the academic literature which pursues an economic analysis of US civil rights law. Adopting an economic framework for analysing the ADA, Schwab and Willborn have argued that the reasonable accommodation mandate provides disabled people with both hard and soft preferences in the workplace.¹⁴³

As the statute was conceived in order to reverse the status quo and to bring disabled people into the economic and social mainstream of American life, they see the ADA's clear purpose as "requir[ing] employers to treat individuals with disabilities more favourably than they had been treated prior to the Act".¹⁴⁴ However, the adoption of the language of preferential treatment in this sense seems to be erroneous, particularly in light of the purposes of the ADA. Where, prior to the ADA, disabled individuals have suffered less favourable treatment as compared with workers of equal merit, it seems a stretch to equate the removal of that discriminatory disadvantage with the preferential treatment of disabled people. Schwab and Willborn state that "[b]ecause individuals with disabilities were treated less favourably than others before the ADA treating them the same as others now is a preference, albeit a soft preference because disabled individuals are not treated more favourably than others; instead they are merely

¹⁴² Though see the discussion of the *Barnett* decision in chapter five. Of course, difficulties may arise if a number of disabled employees were to seek reassignment to the vacant position and it remains the case that an applicant for employment may lose out in this situation.

¹⁴³ S. Schwab and S. Willborn "Reasonable Accommodation of Workplace Disabilities" (2001) Cornell Working Paper Series. Available at <http://www.law.cornell.edu/leda/search/seriesbyauthor> Accessed December 4, 2002.

¹⁴⁴ *Ibid.* p.8.

treated the same”.¹⁴⁵ This last statement, I believe, exposes the dangers of loose assignment of the label “preferential treatment”. Treating disabled people with non-functional limitations the same as other applicants, by excluding any decisions taken on the grounds of their disability motivated by animus, myths or stereotypes, is one of the functions of the direct discrimination (disparate treatment) provision. Yet, labelling this statutory stipulation as providing preferences to disabled people is both misleading and ultimately harmful to the disability agenda because of the liberal assumptions which persist around issues of preferential treatment in antidiscrimination law.

Schwab and Willborn’s second interpretation of the ADA presents more of a challenge to advocates who view reasonable accommodation as no more than a tool for levelling the playing field so as to allow disabled workers enjoy equal employment opportunities. They argue that, at certain points, the ADA mandates hard preferences in favour of disabled people. The point at which the preference in favour of disabled individuals operates, according to this view, is where the costs involved in hiring a disabled person are greater than the costs of hiring a non-disabled person because of the costs of an accommodation, or where the disabled applicant is less productive because he cannot perform non-essential job functions. In these two situations, the employer would violate the ADA by refusing to hire. The accommodation matrix requires the employer to ignore the costs of the accommodation and any productivity measured through the performance of non-essential job functions unless the accommodation is unreasonable or would impose an undue hardship.¹⁴⁶ However, the operation of the ADA in such preferential terms is not wholly equivalent to the forms of hard preferences which operate in quota-based positive action programmes. As Schwab and Willborn show, the ADA mandates hard preferences for disabled persons who are more costly but just as productive as non-disabled workers. The ADA does not mandate a hard preference for disabled persons who are no more costly but less productive than other workers. They illustrate this point with the following example:

¹⁴⁵ *Ibid.*

¹⁴⁶ Schwab and Willborn, *supra* n.89 p.20.

D1 has the same productivity as C (a non-disabled comparator) but requires an accommodation of \$2 per hour. The ADA creates a hard preference for D1 because it requires the employer to treat C and D1 as equal even though C has a wage-cost advantage.

Compare then D2 to D1. D2 costs no more than the comparator, but C produces 20% more (this could arise with a disability that reduces productivity and has no satisfactory accommodation) Employer is indifferent to both D1 and D2 and would prefer C.

The ADA treats D1 and D2 very differently and gives a hard preference to D1 by requiring the employer to ignore the accommodation cost and to treat D1 and C the same. (i.e. denying D1 employment would ostensibly be based on the need to pay for the accommodation and would be contrary to s .12112(b)(5)(b) ADA)

The ADA gives no hard preference to D2 and would let the employer choose C instead. (D2 cannot avail of an appropriate accommodation that would increase his productivity, and thus, the employer is entitled to choose the most qualified individual for the job).¹⁴⁷

Under the ADA, the employer can consider the productivity and qualifications of a disabled applicant and other applicants only with reference to their essential functions. An individual with a disability must be treated as equal to another worker if both can perform the essential functions of the job equally, even if the other worker can make an additional contribution to productivity by performing non-essential functions. In Ireland, this preference may not exist because, as was pointed out in chapter five, the employer could be entitled to insist on the performance of *all* the duties and not merely the essential functions attached to the position.¹⁴⁸ Therefore, where an individual under the Irish legislation remains less productive across all the functions of the job following the provision of a reasonable accommodation, then the employer is legitimately entitled to prefer the more productive applicant. Thus, the point in the US context is that where a disabled individual remains “10 per cent less productive in the essential functions of a job”, the employer need not accommodate, even though the employer must accommodate an equally productive worker with 10 per cent greater costs.¹⁴⁹

When all this is translated into the practicalities of real-world hiring decisions, the actual strength of the hard preference granted to disabled applicants becomes

¹⁴⁷ As P.D. Blanck states, the ADA “does not require the employer to hire or retain a qualified individual with a covered disability regardless of the need for accommodation, over an equally or more qualified individual without the disability.” P.D. Blanck, text to n. 165 *infra*. Similarly, Ireland’s EEA states that an employer need not employ or retain any person who is not competent and fully capable of undertaking the duties attached to a position.

¹⁴⁸ My emphasis.

¹⁴⁹ Schwab and Willborn, *supra* n. 89 p. 22.

difficult to assess because of the uncertainties surrounding the substantive reasonable accommodation duty.¹⁵⁰ The preferential-basis analysis of reasonable accommodation, outlined above, is not as persuasive as one might think, particularly if one subscribes to the minority group model's rationale for the accommodation duty, which concentrates on the removal of socially-imposed barriers to the proper employment of disabled people. Schwab and Willborn's analysis is predicated on the common understanding of disability as an individual problem of the person which imposes costs on external agents who bear no responsibility for the exclusion endured by disabled people.¹⁵¹ However, if one views the costs involved as ones that remove the socially-constructed barriers to the employment of disabled people, then the cost allowance preference in favour of disabled people need not necessarily be viewed in preferential terms. If the reasonable accommodation duty is to have any true bite, then the additional cost of removing socially-constructed barriers to the employment of disabled people can be more properly rationalised as a formulation of an equality of opportunity policy in the specific context of disability. This is because it requires employers to discount the costs of an accommodation when assessing the capacities and capabilities of a disabled person for the position. In this sense, employers properly bear some of the costs of the removal of disadvantageous structures, provided that the cost is not disproportionate. The proper point, it is submitted, at which a hard-preference analysis of reasonable accommodation should arise would be if it were interpreted to require that an employer must prefer a disabled applicant who is accommodated, but who still has a reduced productivity over a more qualified non-disabled applicant. On the analysis above, this is something which the ADA does not require.

Adopting an equality-of-results analysis, there remain many points at which the reasonable accommodation duty will fail to assist disabled people to more proportionately achieve positions within the existing labour market. One such point is where a disabled person needs an extra-reasonable accommodation to perform a

¹⁵⁰ Outstanding questions such as when must the extra cost of an accommodation be ignored, when does a job function contribute so little to productivity that it is non-essential and must be ignored are difficult to assess. All of these questions are fact specific and can turn on the interpretation given to the central term of reasonableness. However, as chapter five discussed in detail, there is no settled mechanism for ascertaining the reasonableness of an accommodation. An employer must provide a reasonable accommodation, but not an unreasonable one. An employer need not provide even a reasonable accommodation if it would impose an undue hardship or disproportionate burden.

¹⁵¹ The substantive reformulation of equality, discussed below, rejects as misleading the aspirations of individualism. Fredman argues that all those who benefit from an existing structure of disadvantage should be prepared to bear part of the remedial costs. S. Fredman, *supra* n.19 p.129.

position's essential functions: these individuals are outside of the statute's protection. Other problems of the reasonable accommodation mandate include its failure to deal with those with reduced capacities and capabilities, i.e. the disadvantages that accrue from functional impairments which are not accommodated. Schwab and Willborn point out that given the uncertainty surrounding the reasonableness limb of the accommodation duty, the reality is that many disabled people will try and settle for less desirable jobs which require lesser accommodations.¹⁵² If this hypothesis is correct, it explains many of the statistical surveys which demonstrate the generally low costs of accommodations: as individuals seek accommodations which are inexpensive, or individuals seek less generous accommodations than the law requires. The problem with this situation, in reality, is that requests for low-cost accommodations, combined with the economically-rational employer's desire for low accommodation costs, threatens the ADA's goal of providing fair employment opportunities. In this sense, full accommodation would assist disabled individuals into better-suited jobs, but as chapter three discussed, there are still constitutional barriers to placing the costs of full accommodations on employers.¹⁵³

Reasonable Accommodation as Equality of Opportunity?

Chapter two pointed out the very general distinction made by legal commentators between formal equality and substantive equality. Since formal equality emphasises sameness, symmetry and similarity, it is at once clear that the concept of reasonable accommodation falls into a substantive formulation of equality because of its concern for and attention to difference. However, as chapter two argued, the adoption and use of the substantive equality term within existing anti-discrimination legislation is overstated. Consequently, the question remains as to whether reasonable accommodation represents a truly substantive equality norm aimed at tackling the underlying creation and legitimisation of exclusionary structures, or whether it merely pursues a weaker distributive goal more like equality of opportunity.

In the US context, conceptualisations of reasonable accommodation are caught between a rock and a hard place. The narrow underpinning of the constitutional equality guarantee in the US has meant that there has been a practical need to argue that the ADA's reasonable accommodation duty falls squarely within an equality of opportunity

¹⁵² S. Schwab and S. Willborn, *supra* n. 89 p. 47.

¹⁵³ This could be somewhat achieved through the introduction of a rule which allowed disabled people themselves to pay for some of their accommodation costs.

formula.¹⁵⁴ While this argument seeks to cement the foundations of the reasonable accommodation duty, it also exposes the reality that equality of opportunity formulations in the disability context significantly reduce the chance of achieving the political ambitions of the minority group model. Indeed, it reinforces the social model's critique of the minority group model's reliance on legal formulations of liberal ideals.¹⁵⁵ These ideas are developed below.

Despite the real significance of the extension of the non-discrimination structure to disabled people, when the reasonable accommodation duty is broken down into its constituent parts and analysed within the confines of non-discrimination law and its enforcement system, its initial expansiveness appears compromised. Yet there remains considerable division among commentators with regard to its place within non-discrimination and equality theory. One approach, central to the minority group model of disability, has been to view the failure to accommodate the disadvantage endured by disabled people as a plain denial of equal employment opportunities. In other words, reasonable accommodation is simply part and parcel of meaningful non-discrimination.¹⁵⁶ The statutory structure of the ADA, which specifies that discrimination is a failure to provide a reasonable accommodation for an otherwise qualified individual with a disability, makes this clear.¹⁵⁷ Moreover, the preamble to the ADA states, with considerable clarity, that the purpose of the ADA is to provide clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities, and it states that its provisions are designed to provide equality of opportunity for disabled people.¹⁵⁸

¹⁵⁴ See generally chapter three and A. Mayerson and S. Yee, "The ADA and Models of Equality" Paper presented at International Disability Law and Policy Symposium: From Principles to Practice October 22-26 2000. Available at <http://www.dredf.org/symposium/mayerson.html>. Doctrinally, this argument has been made by many commentators, particularly Jolls, who places reasonable accommodation in the same category as indirect discrimination. See C. Jolls, "Antidiscrimination and Accommodation (2001) 115 *Harvard Law Review* 642.

¹⁵⁵ See generally, P. Handley, "'Caught Between a Rock and a Hard Place': Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act" (2001) 36 *Australian Journal of Political Science* 515.

¹⁵⁶ A. Mayerson and S. Yee, *supra* n.154 p.2.

¹⁵⁷ To recap, the ADA defines "discrimination" as

- (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless [the employer] can demonstrate that the accommodation would impose an undue hardship
- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant. 42 U.S.C. Section 12112(b)(5)(A)-(B).

¹⁵⁸ 42 U.S.C. s. 12101.

One of the ADA's drafters, Arlene Mayerson, recently commented that "[w]e were insistent that reasonable accommodation was not affirmative action ... [W]e conceptualised equal protection as equal opportunity, which by necessity required affirmative steps to eliminate barriers to participation."¹⁵⁹ Thus, reasonable accommodation merely formulises and activates the principle of equality of opportunity in the specific context of disability and it does so by paying attention to the difference of disability consequent upon the effects of socially-constructed barriers. It does so by taking cognisance of the construction of disability as understood in terms of the minority group model, which was discussed in chapter one. On this view, accommodation duties are not conceptualised as providing special treatment for disabled people, but rather they remove discriminatory barriers that prevent disabled people from participating in social structures which have been constructed in an exclusionary manner. Advocates of this view of reasonable accommodation have pointed out that the insistence on characterising accommodations for disabled people as special treatment fails to appreciate how existing workplace structures already accommodate the needs of, and indeed give an advantage to, non-disabled individuals.¹⁶⁰ Support for this view of reasonable accommodation is widespread in the US literature, particularly among advocates heavily involved in drafting the ADA. For example, Burgdorf rejects any characterisation of reasonable accommodation as "special treatment" for disabled people.¹⁶¹ Diller similarly views reasonable accommodation not in terms of providing any advantage for disabled people, but rather as a means of equalising the playing field so that disabled people are not disadvantaged by the fact that the workplace ignores their needs.¹⁶² Similarly, Whittle describes the Framework Directive as a measure to improve the employment opportunities for disabled people, but it does not "provide people with disabilities ... with any special advantages ... [nor] does [it] intend to help an individual with a disability get a job simply because they have an impairment."¹⁶³ According to Whittle, the Directive operates within a system of meritocracy, a system that will still demand that the most

¹⁵⁹ A. Mayerson and S. Yee, *supra* n.154 p.2. The constitutional reasons for conceptualising reasonable accommodation in this manner were discussed in chapter three.

¹⁶⁰ See M. Crossley, *supra* n.117.

¹⁶¹ See R.L. Burgdorf, " 'Substantially Limited' Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability" (1997) 42 *Villanova Law Review* 509, 529-32 for discussions of how accommodations in favour of disabled people are simply an extension of the accommodations routinely granted by employers to all employees as a matter of course.

¹⁶² M. Diller, "Judicial Backlash, the ADA, and the Civil Rights Model" (2000) 21 *Berkeley Journal of Employment and Labor Law* 19.

¹⁶³ R. Whittle, *supra* n.78 p.305.

qualified and suitable person gets the job. What it does seek to do, however, is to inject into this system the principle of equal treatment, albeit with the principle specifically tailored to the disability context.¹⁶⁴

On this analysis, when a disabled individual requests an accommodation, he or she is requesting what non-disabled employees receive as a matter of course: the tools that will enable them to perform the requirements of the job. Thus, it is based on the interpretation of equality of opportunity which requires that disabled individuals are considered in a manner which does not unduly disadvantage them because of an interaction between their impairment and the working environment that can be remedied. The request for a modification of the physical environment or a physical feature or policy of the workplace in order to allow an individual with a disability to perform a job does not, of itself, provide the disabled person with any advantage over a non-disabled individual who is capable of performing the job without an accommodation.¹⁶⁵ Crossley argues that where an accommodation removes a barrier to a disabled employee's ability to competent job performance, this accommodation would not generally benefit a non-disabled worker precisely for the reason that the barrier does not exist for the non-disabled worker.¹⁶⁶ Of course, this generalisation does not hold true in every case, particularly where a disabled employee obtains modifications in a work schedule, or workplace practices, that a non-disabled employee might covet or find beneficial.¹⁶⁷ Crossley's response is that although a non-disabled employee might find an accommodation beneficial, the accommodation would not be necessary in order to allow the non-disabled worker to successfully perform the job's functions.¹⁶⁸ In any event, it is worth recalling that the accommodation need only be a reasonable one¹⁶⁹ and, as Tucker has pointed out, optimal accommodations may not serve to put the

¹⁶⁴ *Ibid.* pp. 304-305. Though admittedly Whittle does not engage with the meaning of these labels he ascribes to the disability provisions of the Directive.

¹⁶⁵ As Blanck states, the ADA "does not require the employer to hire or retain a qualified individual with a covered disability regardless of the need for accommodation, over an equally or more qualified individual without the disability." P. D. Blanck, "The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I – Workplace Accommodations" (1997) 46 *DePaul Law Review* 877, 894. This position has been confirmed by the Court of Appeals jurisprudence

¹⁶⁶ M. Crossley, *supra* n.117 p.87. For example common accommodations such as making alterations to existing facilities or providing assistive devices or personnel would not be of any benefit to non-disabled people. Rather, they may be of some convenience to non-disabled workers. For example, the introduction of certain facilities on particular lower floors.

¹⁶⁷ For example, through the removal of non-essential job functions. This does not generally require existing employees to be overburdened.

¹⁶⁸ M. Crossley, *supra* n. 117. pp.30-31.

¹⁶⁹ See chapter five for discussion of the competing approaches to the criterion of "reasonableness" and its relationship to undue hardship or disproportionate burdens.

disabled worker in an equivalent position to non-disabled colleagues.¹⁷⁰ This interpretation equates with the theory of disability underpinning the minority group model of disability. This model conceptualises the accommodation mandates as a means of levelling the playing field or clearing it of barriers between employees in a particular setting.

Reasonable Accommodation: Beyond Equality of Opportunity?

The question now arises as to whether the duty to provide reasonable accommodation moves beyond the weaker, distributive goal of equality of opportunity that was discussed in chapter two. Linked to this is the question of whether reasonable accommodation requires equality of results, or whether it moves towards a reformulation of structures in a manner not unlike more substantive duties which actively promote equality. Chapter two detailed how the equality of results requirement can be met in different ways. Fredman points out that an equality of results theory can be used in at least three different ways.¹⁷¹ The first approach is individual: it considers whether the apparently equal treatment has had a detrimental impact on an individual because of some protected ground. The aim, on this example, is not equality of results but merely a remedy for the individual. Reasonable accommodation would clearly fall within this conceptualisation of results, but it is the manner in which the wrong is remedied that detracts from a more substantive characterisation. The second approach sees equality of results used to focus on the results to the group. However, the approach is for diagnostic purposes only in that it “demonstrates the existence of obstacles to entry rather than prescribing an outcome pattern.”¹⁷² On this view, reasonable accommodation, in conjunction with the indirect discrimination principle, could be utilised to demonstrate the obstacles to entry for groups of disabled people in the mainstream labour market. However, as chapter two noted, the interaction between reasonable accommodation and indirect discrimination is compromised under the Framework Directive. In addition, omissions on the part of an employer may not fall within the indirect discrimination formula and, in any event, establishing indirect

¹⁷⁰ B. Poitras Tucker, “The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm” 62 *Ohio State Law Journal* 335, 347. Tucker goes on to point out that an accommodation granted in the form of TDD technology does not granted her any preference or advantage over her colleagues, in fact, her ability to communicate retains limitations even with the use of TDD technology.

¹⁷¹ S. Fredman, *supra* n.19 p.11.

¹⁷² S. Fredman, *supra* n. 19 p.12.

discrimination does not necessarily result in a removal of entry obstacles. In particular, section 36 of the EEA expressly deems qualification standards to be immune from the scope of the indirect discrimination principle and the reasonable accommodation duty.¹⁷³ Thus, it cannot always uncover the obstacles to entry. The third and strongest meaning of equality of results, and the sense in which it is relied on in this thesis, is that of equal outcome. This would demand that the proportion of traditionally disadvantaged groups - such as women or minorities - in a category should reflect their proportions in the workforce or the population as a whole. It is difficult to isolate how the individualised duty to make reasonable accommodation operating within employment discrimination law can be characterised within this understanding of equality of results. Factors which must be considered in any analysis of the conceptualisation of equality pursued by disability discrimination law include the extent to which the system as a whole perpetuates the individualist orthodoxy of anti-discrimination law. This individualist slant is continued with the reasonable accommodation duty, because at its core it is specifically formulated as an individual duty. The ADA and EEA duties do not encapsulate a group dimension to reasonable accommodation. Thus, the duty does not actively target the increased participation of disabled people in employment structures, which reflects their proportions in a population or community more generally. In order for reasonable accommodation to fall within this understanding of equality of results, there would need to be a greater link between the positive duty to engage in reasonable accommodation and positive action programs.¹⁷⁴ The link between reasonable accommodation and positive action is not specifically established in the Irish or European legislation - on the contrary, they are conceptually and practically kept apart.¹⁷⁵ On this analysis, while employers are required to act positively towards disability when making a reasonable accommodation, it pursues the equality of opportunity rationale by removing certain socially-constructed barriers in the specific context of disability. Once these barriers are removed, individuals are considered on their merits. This can be contrasted with the aims of strong positive action programmes which recognise how the enduring nature of disadvantage affects the accumulation of "merit".

¹⁷³ See discussion in chapter two.

¹⁷⁴ See section 15 of the South African Employment Equity Act which expressly links reasonable accommodation to positive action programs.

¹⁷⁵ Both the Framework Directive and the EEA as amended do not enunciate on the relationship between reasonable accommodation and positive action, but it seems implicit in the wording that the two kinds of instruments are regarded as distinct. L. Waddington, *supra* n. 139 p.31.

The minority group model, which locates reasonable accommodation within the existing matrix of antidiscrimination regulation and within the narrow distributive goal of equality of opportunity, immediately raises obvious questions about the limitations of such an approach in the context of tackling the pervasive disadvantage endured by disabled people. Because the ADA and EEA keep within the traditional prohibitions on discrimination, and because they remain premised on a liberal individualistic model of enforcement, this system is embedded with limitations which militate against more substantive equality ideals. Thus, any analysis of reasonable accommodation within the existing antidiscrimination matrix needs to be tempered with an understanding that, as a tool, reasonable accommodation can only tackle some of the disadvantages endured by disabled people. In other words, it is necessary to understand what it is that antidiscrimination measures cannot do. To this end, antidiscrimination law needs to be supplemented with measures which go beyond the narrow conceptualisation of reasonable accommodation under both the ADA and the EEA.

Rethinking Substantive Equality in the Disability Context

The discussion here explains how the simple pursuit of equality of results theory in itself may be misleading and ultimately unhelpful.¹⁷⁶ The problem with an equality of results view of antidiscrimination regulation is the precedence accorded to the existing institutional structure. Monitoring results and outcomes does not necessitate any fundamental re-examination of the structures that perpetuate the inequalities that produce discrimination. It does little to alter the underlying causes of unequal patterns. While positive action programmes explicitly aim to restructure the make-up of a particular grade or sector, they can be subject to legal challenges, as has been the case in the gender context. Certainly, such programmes have their uses, such as seeking to alleviate blatant racial and sex imbalances across employment sectors, certain workplaces or educational institutions. Yet, a change in the colour or gender composition of a grade, workplace or sector, consequent upon a positive action programme, while useful, may reflect only an increasingly successful assimilationist policy.¹⁷⁷ Thus, traditional constructs of legal positive action programmes focus on

¹⁷⁶ S. Fredman, *supra* n.19 p.13.

¹⁷⁷ *Ibid.* It also leads to what is known as the creamy top effect. This is where positive action programs assists the most advantaged members of disadvantaged groups who find it easier to make the fit with the dominant practices of society. This point is particularly salient in the context of disability.

distributing positions among members of different groups. These programmes are ultimately limited by the assumptions made about institutional organisations that underline all discussions of equal opportunity: that the hierarchical division of labour is a given and that distribution is rightly made according to the neutral criterion of merit.¹⁷⁸ Yet, the pervasive exclusion of disabled people from mainstream structures is symptomatic of the operation of the existing market and liberal system. Non-discrimination precepts and positive action programmes simply adopt different ways of assuaging the symptoms. Even where the programmes survive judicial scrutiny, positive action programs require continuous remedial efforts since the structure remains untouched.¹⁷⁹ In addition, positive action programmes tend to benefit the most privileged members of the disadvantaged group.¹⁸⁰

Many of these points can be raised with regard to the reasonable accommodation duty. Reasonable accommodation practices in the disability context require adjustments in workplace practices and environments in order to allow disabled people proper opportunities to access the existing labour market. As discussed above, it does not radically alter the standards of the workplace. So, where disabled people fail to meet those standards - because accommodations are unreasonable, too costly, or disproportionate - they then legitimately bear the cost of non-participation. This conception of reasonable accommodation works on the basis of adjustments to dominant social norms that are deemed manageable and reasonable concessions from the way things are normally done. Thus, the predominant legal interpretation of reasonable accommodation in the ADA and EEA places it within a weak distributive setting that makes concessions to the disadvantaged group on the terms of the advantaged. The limitations inherent in this interpretation of the reasonable accommodation duty were raised by disabled feminists before the Canadian Supreme Court in the course of their argument in favour of a revised understanding of the equality guarantee in section 15 of the Canadian Charter:

“Equality under section 15 entails much more than simply “accommodating” persons with disabilities into existing societal norms and structures leaving unscrutinized those norms and structures themselves. Substantive equality challenges the very existence of mainstream structural and institutional barriers, including the socially constructed notions of disability which inform them. For

¹⁷⁸ I. M. Young, *supra* n.27 pp.200-206.

¹⁷⁹ As Fraser comments, they can “mark the most disadvantaged class as inherently deficient and insatiable, as always needing more and more”. N. Fraser, *Justice Interruptus: Critical Reflections on the Post-Socialist Condition* (Princeton: Princeton University Press, 1997) p.25. Cited in J. Baker et al. *supra* n.115 p.132.

¹⁸⁰ S. Fredman *supra* n. 19 p.152.

persons with disabilities, equality means the right to participate in an inclusive society. It does not mean merely the right to participate in a mainstream society through the adoption of non-disabled norms.¹⁸¹

As this extract highlights, the policy of the minority group analysis of disability, which has formulated remedies against disability disadvantage within the existing conceptualisations of individual non-discrimination rights, has problematic implications. The non-discrimination approach, including the reasonable accommodation duty, depends upon the identification and categorisation of a discrete group of individuals labelled as “disabled”. This has meant that, despite their best efforts, the minority group analysis has returned to the medical model of disability as a fixed and individual problem. This paradox, coupled with the associated problems of the model’s over-reliance on legal norms, forms the basis of the critique of the minority group analysis within disability studies. This universalist view, developed by US sociologist Irving Zola, shares many characteristics of the social model analysis of disability that was introduced in chapter one. The universalist view moves away from the protected class approach, and seeks to classify disability as fluid and continuous:

“Disability is not a human attribute that demarks one portion of humanity from another; it is an infinitely various but universal feature of the human condition. No human has a complete repertoire of abilities.”¹⁸²

The idea, therefore, is that disability should not be viewed as a human attribute that separates one portion of the community from another, but rather as an infinitely various but universal feature of the human condition. Universalist policy seeks to demystify the “specialness” of disability, seeks to respect difference and calls for a widened range of what is perceived as normal.¹⁸³ The policy response demanded by a universalist analysis is for justice in the distribution of resources and opportunities. This is contingent upon universal access and universal design in the built environment, in housing, in the

¹⁸¹ Factum of the Intervenors, Disabled Women’s Network Canada and Women’s Legal Education and Action Fund in the Supreme Court of Canada, *Eldridge v British Columbia* (1997) 218 N.R. 161. Cited in M. H. Rioux and C. L. Frazee, “The Canadian Framework for Disability Rights” in M. Jones and L.A. Basser Marks (eds.) *Disability, Divers-ability and Legal Change* (Kluwer International, 1999) 171, pp.178-179.

¹⁸² J. Bickenbach et al. “Models of disablement, universalism and the international classification of disabilities and handicaps” (1999) 48 *Social Science and Medicine* 1173, 1175.

¹⁸³ This is contrary to the process of normalisation which seeks to rehabilitate disabled people in order to ensure a better fit between the individual and the existing services and institutions, which are designed around an average or normal individual.

workplace and in transportation policies.¹⁸⁴ In this sense, the provision for “special” needs and “special attention” that special categories require, means that disability policy becomes not merely a minority issue but a policy for all.

Traditional proponents of the universalist analysis have tended to eschew anti-discrimination, rights-based resolutions. They argue that disability is not genuinely a discrimination issue.¹⁸⁵ This argument is based on the reality that the condition of inequality that disabled people face does not always fit into the mould of antidiscrimination law and regulation. The many barriers faced by disabled people - exclusionary physical environments, reduced training programmes, inadequate and confusing income supports, policy neglect, minimal political clout - do not appear, it is argued, resolvable within the orthodox antidiscrimination setting. Bickenbach queries how socially-created disadvantage associated with disability can be tackled within an equality and non-discrimination framework, given their impact both on and beyond the employment context.¹⁸⁶ However, the minority model’s criticism of universalism’s rejection of disability as a genuine discrimination issue is, as Fredman points out, reflective of “the tendency ... to portray different models as conflicting and mutually exclusive”.¹⁸⁷ It is also predicated on a narrow and negative-freedom based model of discrimination law and it fails to realise that the equality law agenda is moving, albeit slowly and imperfectly, in substantive directions, and it may yet achieve a symmetry between equality prescriptions based on positive visions of freedom and universalist principles. On this point, Fredman has recently argued that more expansive legal disability equality norms can be fruitfully informed by the universal view of disability because “[t]he policy prescriptions of the universalist model in fact converge strikingly with [emerging] notions of substantive equality ...”.¹⁸⁸

Examples of an amelioration of the individualist dimension of the reasonable accommodation duty can be seen by the attempts of some jurisdictions, such as Canada and South Africa, to emphasise the group dimension to the accommodation duty and to extend the accommodation duty to embrace all groups of discrimination. The interpretation pressed upon the Canadian Supreme Court by a group of disabled

¹⁸⁴ This equates with Fredman’s description of substantive equality which rejects abstract views of justice and instead, insists that justice is only meaningful in its interaction with society. S. Fredman, *supra* n.19 p.128.

¹⁸⁵ J. Bickenbach, “Minority Rights or Universal Participation: The Politics of Disablement” in M. Jones and L.A. Basser Marks (eds.) *Disability, Diversity and Legal Change* (Kluwer, 1999) 101, pp. 106-108.

¹⁸⁶ *Ibid.*

¹⁸⁷ S. Fredman, *supra* n.4 p.218.

¹⁸⁸ *Ibid.* p.208.

feminists in the *Eldridge*¹⁸⁹ decision, noted above, did not succeed. However, there are signs of more expansive formulations of accommodation mandates which move further towards addressing the unequal burden of existing structures. For example, the Canadian Supreme Court decision of *Meiorin*¹⁹⁰ evidences a more integrated approach to systemic discrimination. It does so through a revised interpretation of the positive right to be accommodated. Whereas the conventional approach to accommodation mandates requires adjustment to existing workplace norms in order to allow an individual to reach the standard set by others, the Court held in this decision that the validity of the standard itself must be scrutinized in detail.¹⁹¹ This decision therefore requires employers to identify and implement alternative approaches that do not have discriminatory effects. This ultimately impacts on all individuals as opposed to a protected, “special” class, and it reflects universalist principles. Since this analysis looks akin to the remit of the indirect discrimination principle, it might be asked why indirect discrimination is not proving more useful in these situations? Indirect discrimination purports to remove apparently neutral barriers which, in fact, function to exclude greater proportions of disadvantaged groups. However, as chapter two indicated, the indirect discrimination principle loses much of its bite when it comes to application by the court. It remains heavily reliant on an individual litigant arguing that the practice in question meets the contested elements of the definition. In addition, even if the applicant successfully overcomes these barriers, the exclusionary practice remains capable of employer-based justifications. Moreover, as chapter two pointed out, the interaction between indirect discrimination and reasonable accommodation in the Framework Directive is problematic.

More developed applications of the reasonable accommodation duty can also be seen in South African employment equity legislation. Under section 15, certain employers are required to take affirmative action, which is expressly related to the duty to make reasonable accommodation for the needs of women, blacks and disabled people.¹⁹² Where accommodation mandates become available to all employees, this assists in deconstructing the “specialness” of disability policy. The synthesis between positive action and accommodation mandates in this way avoids the problem of

¹⁸⁹ *Eldridge v British Columbia* (1997) 3 SR 624.

¹⁹⁰ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union* [1999] 3 S.C.R. 3.

¹⁹¹ This decision clearly makes the link between reasonable accommodation duties and indirect discrimination. The Canadian decision of *Eldridge v British Columbia* (1997) 3 SCR 624 characterised disparate impact discrimination as the major form of disability discrimination.

¹⁹² Employment Equity Act 1998 s 15(2)(c).

individualisation, which always besets the operation of indirect discrimination and reasonable accommodation in isolation. Equality objectives here are not dependent on litigation by individual victims, nor is it necessary to prove the existence of exclusionary rules with disadvantageous impacts.¹⁹³ Section 15 is prompted by the patterns of under representation of the disadvantaged groups across particular sectors.

Towards a New Synthesis

The developing analysis surrounding accommodation mandates in other jurisdictions has some equivocation with Fredman's reformulation of substantive equality.¹⁹⁴ This exercise requires a refashioning of the equality norm so that it appeals to the concept of social diversity in a way that is more broadly conceived. In this sense, the expanded equality norm does not view disability in difference terms - as a special class requiring special treatment within the existing system - but rather views the experience of disability as a normal aspect of life that can affect any person. This reformulation of substantive equality in the disability context can be aligned, according to Fredman, with the universalist analysis of disability.¹⁹⁵ This could mean that equality law would still refer to social groups, but the groups would be conceived of in structural rather than in purely cultural or identity terms.¹⁹⁶ This links with DeGener's argument, discussed in chapter four, that the definition of disability in disability discrimination law should not describe the group protected under the law, but rather define the act declared prohibited - thus, the term of preference would be disability-based rather than based on the disabled person.¹⁹⁷ This would allow the focus to shift away from the minutiae which dominate certain legislative definitions of disability and move towards a focus on the relative disadvantage consequent upon being treated as a member of a particular group. Substantive equality, understood in this way, moves significantly beyond the minority group model of disability underpinning antidiscrimination precepts, and it requires that

¹⁹³ S. Fredman, *supra* n.19 p.152.

¹⁹⁴ This reformulation of substantive equality takes place in the specific context of disability. More generally, I perceive that the general aspects of Fredman's reformulation amount to a reclamation of the substantive equality term from imprecise application to traditional tools of antidiscrimination regulation, which, I have argued, are better conceptualised with an equal opportunities formula.

¹⁹⁵ See I. K. Zola, "Toward the Necessary Universalizing of a Disability Policy (1989) 67 *The Milbank Quarterly* 401. "Substantive equality encapsulates the universalist analysis, according to which the aim is not different or special treatment, but universal access to all activities".

¹⁹⁶ I. M. Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) p.82.

¹⁹⁷ T. DeGener, *Definition of Disability* (EU Networks on Disability Discrimination, August 2004) p.11.

social institutions and practices be restructured to reflect the widened norm.¹⁹⁸ While it could be argued that reasonable accommodation is predicated upon this view of equality in both the ADA and EEA, reasonable accommodation is more limited than either the positive duty to promote equality, introduced below, or the more expansive interpretations of generalised accommodation duties in Canada and South Africa.¹⁹⁹

To this end, the reformulated substantive equality norm put forward by Fredman draws on universalist policy and requires a positive duty to promote equality.²⁰⁰ This could be supplemented by a positive right to be accommodated which would be exercisable by all employees. Public sector equality duties have been implemented in Northern Ireland and have recently been formulated in the disability context in the rest of the United Kingdom.²⁰¹ Baker *et al* detail aspects of an “equality of condition” as one that operates, in the employment context, in a way that is predicated upon a positive duty to promote equality. They advocate the tailoring of these duties in order to fit the specific context of workplace equality. Laws based on this formulation of equality start from the premise that the disproportionate representation of traditionally more advantaged groups in grades, sectors and workplaces provides evidence of institutional bias.²⁰² This approach implies a radical departure from the established structure of discrimination law, which does not change institutions, but gives compensation retrospectively to an individual who has been “wronged” on proof of the “fault” of another.²⁰³ Rules or practices that have originally been orientated to benefit members of particular groups would be reassessed, and this would then prompt a rethink about traditional, non-neutral merit standards, such as educational qualifications or length of service. Chapter five already discussed how the reasonable accommodation duty failed to assist the complainant in the Irish decision of *Gorry v Office of the Civil Service and Local Appointments*²⁰⁴. Despite passing the competency tests for appointment to the Civil Service, this disabled claimant was deemed ineligible for appointment because of the absence of the required formal qualification (a pass mark in Leaving Certificate English) which was generally accepted as necessary for certain

¹⁹⁸ S Fredman, *supra* n.13 p.214

¹⁹⁹ *Ibid.* pp.213-214.

²⁰⁰ See C. O’Cinneide, “A New Generation of Equality Legislation? Positive Duties and Disability Rights” in A. Lawson and C. Gooding (eds.) *Disability Rights in Europe: From Theory to Practice* (Oxford, Hart Publishing, 2005) p.219.

²⁰¹ See section 75 of the Northern Ireland Act 1998 and the recently introduced Disability Discrimination Act 2005.

²⁰² J. Baker et al. *supra* n.6 p.135.

²⁰³ S. Fredman, *supra* n.4 p.214.

²⁰⁴ DEC – E2005- 038.

types of employment in the State.²⁰⁵ The non-neutral application of generally accepted merit criteria was sharply exposed in this context, yet the existing antidiscrimination structure was powerless to intervene. An example of a statutory provision which seeks to reformulate existing norms in the light of untapped evidence of bias is set out in section 20 of the South African Employment Equity Act 1998. This provides that a person may be suitably qualified for a job as a result of a combination of factors. These factors can include “learning by doing and life learning” and the “capacity to acquire, within a reasonable time, the ability to do the job”.

At the level of individual employers, legislation supporting the reformulation of the equality norm to include obligations to promote equality could be developed out of existing models. Equality audits, action plans and pay equity schemes already form part of the anti-discrimination package in some jurisdictions.²⁰⁶ The advantage of these tools is that they apply prospectively and not just against individual employers who are found to be in default.²⁰⁷ Their weakness lies in the required commitment to their execution and implementation, at least in some jurisdictions. The major deficit to these programmes, however, is not only the lack of political will to ensure their implementation but also - as is the case with many mainstreaming initiatives - the democratic deficit which persists in the formulation of the plans.²⁰⁸ Truly transformative plans require the effective participation of traditional outgroups, as opposed to the simple transposition of norms and solutions formulated by bureaucrats.

The implementation of these plans promoting a revised understanding of equality needs to be based on an understanding of equality that is concerned not with measuring outcomes for groups but rather with “enabling individuals to make real choices between real options”.²⁰⁹ Real choices between real options can only derive from a change in the practices that perpetuate the unequal relations with groups. For

²⁰⁵ Section 36 of the EEA as amended is not subject to the operation of the duty to make reasonable accommodation.

²⁰⁶ Equality action plans and reviews are specifically provided for in Ireland’s EEA. To date, these tools have been under-utilised, though in 2003, the Equality Authority invited 5 employers to undertake an equality review.

²⁰⁷ J. Baker et al. *supra* n.6 p.136.

²⁰⁸ The key to mainstreaming equality into public policy has been the early and advanced involvement of representatives of target groups and the challenge to adequately resource and enable this form of participation. Research carried out on the operation of mainstreaming initiatives demonstrates that the needs and experiences of affected groups have generally been mediated by professionals in statutory agencies. S. Nott, “Accentuating the Positive: Alternative Strategies for Promoting Gender Equality” in F. Beveridge, S. Nott and K. Stephen, *Making Women Count: Integrating Gender into Law and Policy Making* (Aldershot: Ashgate, 2000) p.247.

²⁰⁹ J. Baker et al, *supra* n.6 p.136

example, the prevention of exploitative work contracts and oppressive work environments could be an integral component of substantive equality. It would require that all those who benefit from structures of disadvantage should bear some responsibility in the cost of altering such structures. This could also further Fredman's reformulation of substantive equality by protecting one of its key values, namely the individual's dignity.²¹⁰ The focus on choice recognises that key components to the structural system bear more heavily on members of certain groups. This can deconstruct the existing assumptions that the depressed situations of disadvantaged groups can be attributed to moral weakness, individual choices or faults. As Baker points out, this revision of equality "emphasizes the influence of social factors on people's choices and actions and so implies that practices should be examined for how they systematically shape the choices of members of different groups."²¹¹ For example, decisions made by some disabled people not to enter the labour market have been reduced to personal, natural or inevitable reasons, including individual impairments, which, it has been argued, have no equality implications.²¹² However, several inter-related factors can prompt this decision. Existing job structures may present barriers to entry which the individual may not be willing to force by way of reasonable accommodation requests. Because the social situation of many disabled people is frequently depressed in terms of income and education, many are likely to be risk-averse and the prospect of taking action against employers may not seem a realistic option. The forces of past discrimination against disabled people, in the form of negative barriers and attitude, may have impacted on disabled people's accumulation of labour market capital and contributed to their exclusion from the networks that produce the capital that contributes to success. The existence of more covert barriers, which nonetheless place considerable personal costs on disabled people, can neither be discounted. The facilitation of real choice through promoting participation is central to the substantive values of the reformulation of equality.

In particular, participation cannot be confined to workplace participation, but should refer to an active contribution to the life of the community. The emphasis on participation draws attention to the narrow construction of labour and to the exclusion and devaluation of the non-monetary aspect of labour. This point will be revisited in the context of the concluding chapter. Genuine fears exist within the disability community as to whether the concentration on increasing the inclusion of disabled people into the

²¹⁰ S. Fredman, *The Future of Equality in Great Britain* (Manchester: EOC, 2002).

²¹¹ J. Baker et al, *supra* n. 6 p.136.

²¹² *Ibid.*

labour market is both a pretext for cutting social security benefits and a means of continuing the subordination of alternative forms of labour and participation. In this sense, the promotion of the positive equality duty across all policies and across all levels of institutions is key. In turn, this depends upon the proper participation of members of disadvantaged groups in the process of altering discriminatory institutional and organisational structures. However, the participative group-approach requires a recognition that disadvantaged groups have different perspectives and values, and that the groups themselves are not homogenous.²¹³ This is particularly pertinent in the disability context: there is a sense that the disability equality agenda has excessively focused both on employment issues and on certain impairment groups who have found it easiest to assimilate into existing standards and take advantage of accommodation mandates. While the participatory model is not yet fully developed, and is not without its problems, it is said to “increase the likelihood that strategies will succeed as well as democratising the very process of equality”.²¹⁴ However, participation cannot become an end in itself. The danger is that participation is seen as a procedural right and that institutions which satisfy this process are in compliance. The point is that the requirement of participation is ongoing, and a part of the process: it demands continual diagnosis, responses, monitoring and modifications. Hence, it is the outcome of participatory processes that matters.

The second limb of the reformulated substantive equality norm is the link between the equality agenda and social rights.²¹⁵ This approach again has links with the universalist analysis of disability, as social rights are accorded to all those who can make use of them. In particular, it links the notion of choices with the core value of participation in society. Participation also suggests inclusion in, and access to, major social institutions, particularly decision-making bodies. Social rights, then, operates hand in hand with the positive duty to promote equality because, as Fredman points out, it would require social and economic programs to be reoriented to facilitate participation and choice.²¹⁶

The best current example of how a substantive conception of equality based on social rights has operated in the context of disability is the Canadian decision in

²¹³ C. O’Cinneide, “Making Use of Positive Equality Duties: The UK Experience” in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law, 2003) 75 p.87

²¹⁴ S. Fredman, *supra* n.4 p.215.

²¹⁵ S.Fredman, *supra* n.13 p.215.

²¹⁶ *Ibid.*

Eldridge v British Columbia.²¹⁷ The case concerned a claim that the failure to provide sign-language interpreters in hospitals infringed the rights of deaf people. It was held that the equality guarantee of the Canadian Charter included a duty to ensure that disadvantaged groups benefit equally from services offered generally:

“To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of section 15(1).”

In this sense, reorientating substantive equality with social rights reduces the traditional tension between social welfare and non-discrimination.²¹⁸ Neither can be viewed as providing privileges for disabled people. Rather, they are conceptualisations of rights which place duties on states to ensure that all citizens, and not just a protected class, derive benefits from those rights. Thus, the values of participation and choice, which are inherent to a substantive notion of equality, would go beyond negative, non-discrimination duties and move towards placing positive duties on states to facilitate choice and participation. Indeed, one of the key components to substantive equality is the rejection of the putative neutral state which sits apart from society. The state plays a key role in the distribution of societal benefits and cannot, therefore, be truly neutral.²¹⁹ A substantive view of equality views the state as having a duty to positively correct the results of such discrimination.²²⁰ This could, under a positive duty analysis, mandate the greater subsidisation of mainstream workplaces for disabled people.

In the two jurisdictions considered in this thesis, there are markedly different rates of advancement towards the extension of the equality law agenda. In the United States, the ADA remains the zenith of the disability movement’s political achievements. Despite the inclusion of political rhetoric which emphasises the political and social aspects of disability, the statute retains the traditional civil rights model to disability discrimination and includes a limiting, medical model of disability. Further limitations endure in the form of a narrow constitutional equality guarantee, which does not specifically endorse transformative or substantive equality objectives. In Ireland, the discrimination legislative structure is peppered with tools such as equality action plans

²¹⁷ [1997] 3 S.C.R. 624.

²¹⁸ See L. Waddington and M. Diller, “Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law”. Paper presented at International Disability Law and Policy Symposium, October 22-26, 2000.

²¹⁹ See S. Fredman, *supra* n.19 p.129.

²²⁰ Constitutional difficulties to any formulation of substantive equality in the US and Ireland can be seen from the narrative in chapter three.

and equality audits which could usefully advance the negative non-discrimination agenda. However, these remain acutely under-utilised. While the positive equality duty agenda attracted considerable momentum in the late 1990s and early 2000s, following the developments in the equality agenda in Northern Ireland, the subsequent political and policy commitments are devoid of a statutory footing.²²¹ In Ireland, the traditional cluster of social rights - rights to adequate income, health-care and housing - are relegated to Article 45 (the Directive Principles of Social Policy) and do not fall within the remit of the courts. However, Ireland's place within the European Union may allow it to benefit from the "contribution ... at the level of ideas and values" of the European Social Charter to the interpretation and development of the disability equality norm.²²² While the European Social Charter is beyond the scope of this work, it is a useful peg on which to hang the reformulated equality norm. It provides that every individual has the right to independence, social integration and participation.²²³ A review of the case-law of the European Committee of Social Rights indicates that it has taken a useful approach to the role of the equality norm in the socio-economic sphere with respect to disability.²²⁴ In this sense, it brings social rights back to their "well-spring" in equality - they do not exist for their own sake, but rather they demonstrate the material basis for positive freedom, which includes participation and the idea of belonging for all individuals. While Quinn cautions that "it would be a mistake to telescope the value of the Charter into an analysis of the outcomes it could drive ...", he pointed out that its value resides in "how effectively it can become an expositor of social values".²²⁵ The impact may be slowly taking effect. While not containing any express positive duties to promote equality, there has been a recent formulation of disability-based social rights

²²¹ See S. Mullally, "Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation?" (2001) *Legal Studies* 99 and S. Mullally and O. Smith, *Equality Proofing* (Dublin: Government Stationery Office, 2000).

²²² G. Quinn, "The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose" in G. de Burca and B De Witte (eds.) *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 279, 303.

²²³ European Social Charter, para 15 Q 36.

²²⁴ In particular in its understanding of the meaning of disability and its commitment to the reasonable accommodation duty. See the collective complaint taken before the Committee of *Autisme –Europe v France* (decision available on the social charter website) which was a complaint that France had not satisfactorily implemented the education provisions of the Charter (as Revised) due to the low rates of integration or targeted provision for the educational rights of children and adults with autism. This collective complaint mechanism usefully offsets the individualism of anti-discrimination law. There are at least eight collective European-level disability non-governmental organisations listed as entitled to bring collective complaints before the Committee. See G. Quinn, *supra* n.222 p. 223- 229 for discussion.

²²⁵ G. Quinn, *supra* n.222 p.303.

under the Disabilities Act 2005.²²⁶ This statute remains, however, beyond the scope of this work.

Conclusion

While the reasonable accommodation mandate in both the ADA and EEA places a positive duty on employers, this chapter has placed it within an equality of opportunity framework. It has done so because of the continued operation of a number of interrelated limitations which beset workplace antidiscrimination laws. The substantive content of this positive development is undermined by the fact that it is simply “grafted onto” the negative model of non-discrimination. At the same time, placing reasonable accommodation within the equal opportunities framework is a means of safeguarding its legitimacy, particularly in the US context. Further, the positive action programme at EU and Irish level is voluntary and, in this sense, it does not pursue substantive equality objectives.

There have been considerable attempts in the US academic literature to dispel the presumed links between reasonable accommodation and affirmative action. These attempts have been made in order to keep the reasonable accommodation mandate firmly within the architecture of traditional anti-discrimination law. The distinction has been similarly drawn at EU level. This is in order to embed the reasonable accommodation duty within the existing antidiscrimination paradigm so as to safeguard its political and moral legitimacy and to protect it from public and judicial backlash.²²⁷ Conceptualising reasonable accommodation within an equality of opportunity format could, it has been argued, help improve judicial attitudes towards the ADA generally. It could assist dispel the reductionist approach to ADA adjudication, as is reflected in the constricted interpretation of the definition of disability and in the interpretation of the ‘reasonableness’ of accommodations. Where courts see the accommodation duty as granting extra or “special” benefits, as opposed to a means of protecting individuals against discrimination, these reductionist interpretations appear unsurprising. The claim of special rights and special treatment is rhetorically powerful because its tars anti-discrimination law with the brush of preferences. This leads easily to the conclusion that

²²⁶ This Act provides a statutory entitlement to a health and needs based assessment for disabled people. It formalises the preparation of public sector plans to meet the needs as measured. It has, however, been subject to considerable criticism, in particular, with regard to its truncated enforcement provisions.

²²⁷ See M. Diller, “Judicial Backlash, the ADA, and the Civil Rights Model” (2000) 21 *Berkeley Journal of Employment and Labor Law* 19.

such treatment discriminates against those who do not receive it, and that they are antithetical to the primacy of equal treatment. Different commentators have taken different approaches to safeguarding the traditional view of the accommodation mandate. Some commentators doctrinally draw comparisons between reasonable accommodation and existing antidiscrimination regulation in terms of operation, effect and costs. For example, Jolls doctrinally links the duty to make reasonable accommodation with the disparate impact (indirect discrimination) principle by arguing that the former is just an extension of the latter in terms of costs and effects. Consequently, on this analysis, the reasonable accommodation mandate fits firmly within existing orthodoxy.²²⁸ More recently, Crossley has argued for a similar view of reasonable accommodation. However, her discussion is based on a conceptual analysis of reasonable accommodation utilising the social construction of disability proposed by the minority group model.²²⁹

In this thesis, I conclude and agree with the placement of the reasonable accommodation mandate within the traditional antidiscrimination analysis - but this is not done in an attempt to extol the virtues of this resolution. Rather, this approach has allowed me to challenge the assumption that reasonable accommodation operating within the ADA and the EEA's anti-discrimination structure represents a truly substantive form of equality regulation that goes beyond existing non-discrimination precepts. I do this by concentrating on a combination of forces, some of which already affect orthodox antidiscrimination regulation, while others remain the sole preserve of the disability regime. These include the pre-existing limitations that affect tackling systemic inequalities through an individualised, negative-enforcement regime. While it is a reality that many disabled people will need more than the ADA's protections against discrimination in order to truly share in the rewards of social life, there are many individuals who could benefit from the forms of protection envisaged by the ADA and the EEA, but who depend on the law being enforced as it is written in order to do so.²³⁰ Unfortunately, experience demonstrates that this has not happened. The social situation of many disabled people is often depressed, in terms of access to resources, education and employment. In this light, the burden of individual enforcement appears particularly

²²⁸ See C. Jolls, *supra* n.154.

²²⁹ M. Crossley, *supra* n.117 p.90.

²³⁰ Case law statistics provide an (imperfect) indication on the operation of the disability discrimination statute is working. The majority of claims under the ADA are discharge cases - something like 51.6% ; this supports the point that people are more likely to be concerned over the loss of something they have than the failure to get something they want. See H. Friendly, "Some Kind of Hearing" 123 *Pennsylvania Law Review* 1267, 1296.

heavy. In the United States, in particular, the ADA has been described as a “windfall for defendant employers” because the burden of proof placed on individuals with disabilities is so onerous.²³¹ Moreover, empirical research demonstrates that the reasonable accommodation duty is not achieving some of the forward-looking goals set out in the grand purpose sections of the ADA which, *inter alia*, refer to the goals of economic independence and integration into workplace environments. The vast proportion of claimants in disability cases are from discharge cases – not failure-to-hire cases – which indicates that disabled people are not getting through the door of opportunity putatively built into the antidiscrimination regulation. Indeed, large numbers of cases have been taken by employees with back impairments and mental impairments. Since the manifestations of these impairments can often be hidden, the indications are that these individuals are “outed” after they have been hired. Consequently, the non-discrimination structure appears not to be tackling the stereotypes and prejudices that prevents the hiring of disabled people in the first place. In Ireland, a statistical assessment of the employment equality cases demonstrates that the majority of claims are from employees and not from individuals seeking employment.²³²

Any assessment of reasonable accommodation’s potential also requires accepting the reality of what reasonable accommodation cannot or will not achieve. Reasonable accommodation cannot compensate for many functional impairments which disabled people have. Reasonable accommodation has done little to tackle the endemic poor participation rates of those with mental impairments, whether those are individuals with mental illnesses or those labelled with learning difficulties. There are individuals who will remain less competitive than non-disabled employees even with a reasonable accommodation. Many individuals may simply find themselves with the “choice” to sue for monetary damages for breach of a duty to provide a reasonable accommodation for failure to allow them demonstrate their productivity - thus, they get trapped in a cycle of exclusion created by the persistence of negative attitudes and exclusionary forces.

While the minority group model of disability rejects this formulation of reasonable accommodation as special treatment - arguing that it is simply a tool which applies the equal opportunity principle in the context of disability - this argument is, by

²³¹ See R. Colker, “The Americans with Disabilities Act: A Windfall for Defendants” (1999) 34 *Harvard Civil Rights – Civil Liberties Law Review* 99.

²³² In 2003, twenty five cases concerned access to employment as opposed to sixty seven cases concerning disability discrimination in employment. Equality Authority, *Annual Report 2003* (Dublin: Government Stationery Office, 2004).

its very nature, self-limiting. It places undue faith on the ability of the existing structure, including the legal system, to remedy the pervasive nature of disability-based disadvantage. Day and Brodsky have eloquently decried the accommodation duty as being overly assimilationist: it can legitimise and perpetuate structural discrimination, because it does not

challenge the imbalances of power, or the discourse of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are 'accommodated'.²³³

This individualised, assimilationist approach to accommodation was highlighted in the Canadian Supreme Court by McLachlin J. The learned judge noted that it does not address the need for the transformation of society, nor does it "challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness".²³⁴ In particular, where the minority group interpretation of disability and the reasonable accommodation duty remain unsupported by the equality guarantees of constitutional texts, then its useful features - including its asymmetry and its positive approach - remain in fundamental dispute with the dominant visions of equality as being the right to formal equal treatment.²³⁵

In light of the limitations to reasonable accommodation uncovered above, and in light of the low-take up of positive action measures, this chapter recommended that the equality agenda cannot remain limited to the nadir of reasonable accommodation within a negative, non-discrimination model. It referenced some *ad hoc* amendments to the ADA and EEA which could usefully remedy their existing, protective structures. However, the minority group analysis of disability civil rights needs to be supplemented and expanded by emerging understandings: both by the synthesis between anti-discrimination and social rights, and by the developing promotion of positive equality duties. Ultimately, the programme for development in these directions seems more likely in the Irish context, given Ireland's membership of the European Union and given the fact that public policy has already advanced considerably towards fourth-generational positive duties.²³⁶

²³³ S. Day and G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 *Canadian Bar Review* 433, 462.

²³⁴ McLachlin J. in *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (usually referred to as the *Meiorin* case) at para.41.

²³⁵ J. Baker et al, *supra* n.6 p.131.

²³⁶ See S. Mullally and O. Smith, *Equality Proofing* (Dublin: Government Stationery Office, 2000).

Conclusion

This thesis has concentrated on how two jurisdictions have implemented legal protections against disability discrimination in employment. It drew first on the Americans with Disabilities Act 1990, which was the pioneering model for disability discrimination legislation worldwide, and then considered how Ireland's Employment Equality legislation, as supported by the European Union's Framework Directive, compares and contrasts with the American model. The thesis has questioned the transformative potential of these examples of disability discrimination law and has paid particular regard to the duty of reasonable accommodation. The discussion centred on concepts of disability and concepts of discrimination and took place on a number of levels and across a number of disciplines, including constitutional discourse, theories of equality, disability discourse and issues of enforcement. Central to the discussion has been a consideration of anti-discrimination law's most expansive equality norm: the duty to make reasonable accommodation. It has been argued that the traditional limits of the non-discrimination system will persist, unless the non-discrimination norm, including the accommodation duty, is "flanked" by more expansive equality measures.¹ Taking this perspective, the discussion moves towards a conclusion that questions the continued effectiveness of the American model at a time when other jurisdictions are seeking to advance on their approaches to disability-based inequality. While sharing some, though not all, of the ADA's limitations, Ireland's equality landscape is perhaps entering a more positive era, partly because of developments at the level of the European Union.

Contesting Disability and Disabled Status

It is critical to address different approaches to the meaning and understanding of disability in any discussion on the improved operation of disability discrimination law.

The opening chapter of this thesis provided an historical account of modern society's initial understanding of the disability category: disability was understood in terms of making a legitimate distinction between those unable to work and those who

¹ G. Quinn, "The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose" in G. DeBurca and B. DeWitte, *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 279 p.280.

were simply refusing to do so. It also traced the consequent stigmatisation of impaired bodies and modes of atypical functioning. With the demise of roles once usefully filled by disabled people, and with the establishment of a parallel track of segregated service provision, social structures were designed, developed and expanded with scant regard for a large section of society. This prompted widespread institutional discrimination - that is, discrimination that is designed into the structures of an institution, as opposed to discrimination stemming purely from the actions of individuals in isolation. Institutional discrimination has played a key role in perpetuating structural disadvantage. While the range of social supports for disabled people serves a useful and indispensable function, there is little doubt that such supports can also compound the isolation of disabled people and reduce their range of choice.² The legacy of segregation still exists in the disability context. The individual deficit construct of disability is deeply embedded within the institutional fabric of mainstream society. In particular, the equation of disability with non-participation in work has been hugely difficult to break.

As chapter one reported, the exhaustive nature of this view of disability has been challenged by both the minority group model of disability and by social model theorising around disability. Both of these perspectives shift attention away from impaired bodies and towards the contributing impact of the external environment. A principal aim of the social movement of disability has been to displace the dominance of the medical or individual model of disability. It also envisages a substantive reconstruction of the structures of society so that these do not in themselves disable people.³ The critical difference between the two models is that the minority group model places faith in the legal process, through the guarantee of equal rights, to eradicate the discrimination endured by disabled people. However, while civil rights agitation by the disability movement helped to prompt the ADA, advocates never predicated the state of disarray over the meaning of disability that has been created by the federal judiciary. Social model theorists, on the other hand, argue that the experience of disablement imposed upon individuals with impairments cannot be tackled within a framework of equal rights in an inherently unequal society. The social model contends that the minority group model, despite its successes, misconceives the nature of disability, and

² G. Quinn, *ibid.* p.282.

³ See V. Finklestein, "The Social Model of Disability Repossessed" Paper delivered at Manchester Coalition of Disabled People December 1, 2001. Available at Centre for Disability Studies Resources Web page:< <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> > p.5.

that this is reflected in the key aspects to the statutory protection.⁴ Indeed, the proponents of the minority group model underestimated the structural barriers that militate against the acceptance of disability as an exclusionary state imposed by society on people with impairments.⁵ Many judicial interpretations continue to adhere to the ideology of the medical and 'tragic' model of disability. For example, when canons of statutory interpretation adhere to plain, ordinary meanings of terms and words in a statute's application, then the common ideology of disability and its meaning in society will dominate. As Parmet points out, in the US, federal judges have exhibited a preference for textualism as the dominant method of statutory interpretation for ADA cases. Textualism relies heavily on plain meanings and understandings of terms in a way that bring the interpreter back to the colloquial - and often stereotypical - meaning of the words. This approach makes it difficult to implement truly transformative legislation without first transforming wider perceptions of disability.⁶ These traditional understandings of disability in social policy are predicated upon the existence of a narrow class in need of social assistance because of a personal inability to provide for their needs through the primary distributive system. This view of a closed and special class does not sit easily with the reality of discrimination, which does not respect such tightly-drawn boundaries. Therefore, the US definition, originally thought unproblematic, has had its statutory language hijacked by the federal judiciary expressing welfarist and administrative concerns.⁷ These concerns - described as the "fear of falsification" - are that only those "truly disabled" ought to fall within the legislation's protection. As a result, the process has been reduced to a medical, fact-specific enquiry that focuses on the substantial limits of the individual's impairment on specific "major life activities".⁸ The effect is that the individual's "abnormality" takes on the central focus, rather than the focus switching to structure of the institution or to

⁴ See J. Bickenbach, "Minority Rights or Universal Participation: The Politics of Disablement" in M. Jones and L.A. Baser-Marks (eds.) *Disability, Diversity and Legal Change* (Kluwer Law International, 2000) p.101.

⁵ See C. Donoghue, "Challenging the Authority of the Medical Definition of Disability: an analysis of the resistance to the social constructionist paradigm" (2003) 18 *Disability & Society* 199.

⁶ See W.E. Parmet, "Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability" (2000) 21 *Berkeley Journal of Employment and Labor Law* 53, 55.

⁷ As chapter four reported, the ADA definition of disability was borrowed from the earlier Rehabilitation Act 1973. Congress had no reason to be concerned about the definition because the courts had read the definition in a broad and inclusive manner.

⁸ See section 3(2)(a-c) ADA. Protection is also extended to those who are regarded as having such an impairment or those with a record of such an impairment. In both of these cases, the impairment must have been one which substantially limits one or more of the listed major life activities.

the social response to the impairment. If the individual is insufficiently limited in respect of a major life activity, she is disentitled to the statute's non-discrimination protection. The inherent contradiction between the legislation's triggering criteria and its overall objectives is stark. People with hidden impairments and non-functional impairments can endure the consequences of stigma, prejudice and discriminatory exclusion from workplace opportunities to much the same extent as those with more visible impairments.⁹

Ireland's EEA diverges from the ADA with regard to this aspect of the statutory scheme. Although initially denounced by the disability lobby, the impairment-based definition has, in practice, not presented barriers to the everyday operation of the statute.¹⁰ The advantage to the EEA definition is that it is impairment-related and it is not predicated upon the severity of a condition. Like the ADA, it also covers past and imputed impairments, though it is easier to fall within these provisions under the EEA because of the absence of a functional limitation test. The EEA also extends discrimination protection to individuals who associate with disabled individuals. The disability movement still has reservations over the impairment-based definition because of its perceived sole focus on the characteristics of the individual, as opposed to the social construction of disablement. However, chapter four pointed out that discrimination law needs to define both discrimination (the treatment) and disability (the characteristic). In this sense, it was recognised that whether discrimination law pursues a medical or social approach to disability-based exclusion does not entirely rest upon its definition of disability, but on its overall capacity to offset the creation and perpetuation of socially-constructed disablement. However, where the strategy for inclusion rests solely on a negative, individualised non-discrimination regime, the social model critique on equal rights retains its relevance. Chapter six demonstrated that the equality agenda in Europe is moving towards more robust forms of legally-inspired measures that expand the role and utility of the non-discrimination norm. Meanwhile, in the context of the internal operation of the non-discrimination system, the disability movement's concerns over the disability definition might be assuaged somewhat by the approach formulated by Degener. She has argued that the definition of disability should not be

⁹ S. Bagenstos, "Subordination, Stigma, and Disability" (2000) 86 *Virginia Law Review* 397 p.463 describes the process of "churning" of people with hidden disabilities. Churning occurs when employees with hidden conditions experience repeated cycles of being hired by unknowing employers, discharged when their conditions are discovered, and then hired again by different, unknowing employers.

¹⁰ The definition of disability is set out in section 2(1) of the EEA as amended and was discussed in chapter four.

concerned with defining the protected group but should help define the act prohibited. On this point, she advocates utilising the term “disability-based” instead of “disabled person”, as this resets the focus to the treatment as opposed to the characteristics of the individual.¹¹

Ironically, the putative breadth of the Irish definition of disability was implicated in the Irish Supreme Court’s constitutional denouncement of the reasonable accommodation duty, as discussed in chapter three. The Court reasoned that the wide definition of disability would make it impossible to estimate the likely cost to employers of the reasonable accommodation duty.¹² It was argued that the Court’s reasoning rested on a misunderstanding of the purpose and function of the reasonable accommodation duty. While the traditional symmetry of gender and race discrimination protection does not extend to the disability ground, there remains a distinction between the operation of the prohibition on direct discrimination and the duty to make reasonable accommodation. Every individual with an impairment-based condition is capable of experiencing less favourable treatment in the form of direct discrimination, just as every man or woman can suffer from the impact of gender-based stigmas or stereotyping. However, unlike the direct discrimination prohibition, not every impairment or condition will trigger the duty to make reasonable accommodation. Moreover, the duty to make reasonable accommodation is itself subject to numerous statutory limits, which guard against the imposition of excessive costs. Consequently, emphasising the width of the definition of disability to prove an excessive reach of the accommodation duty is misconceived.

However, there is one point at which the definition of disability might be revisited in the Irish context - that is in relation to the types of disability-related conditions which could usefully be the subject of positive action programmes. On this point, one of the concerns of the disability movement with regard to the disability non-discrimination provisions is an assumed lack of inclusiveness in their protections. There is a sense in the disability community that the legislation is of greater benefit to certain impairment groups - for example, those with mild impairments that attract comparatively less stigma, or those with late-onset physical or sensory impairments.¹³

¹¹ T. DeGener, *Definition of Disability* (EU Network of Experts on Disability Discrimination, 2004) p.11

¹² *Re Article 26 of the Constitution and the Employment Equality Bill* [1997] 2 IR 321, 368.

¹³ “A strategy founded on anti-discrimination law favours intelligent people with late onset mobility or sensory impairments. ... The ADA does not secure the promise of protecting people with unpopular mental disabilities to the same degree as it does those with physical disabilities.

The burden of exclusion can appear to be heightened for individuals with more severely-limiting impairments or certain mental impairments or those with learning disabilities.¹⁴ While positive action initiatives are voluntary under Ireland's EEA and the Framework Directive, it is argued here that they could be tailored towards categories of conditions that endure disproportionate levels of exclusion from workplace structures due to stigma. Applying these initiatives to those impairments which are disproportionately associated with states of disadvantage, subordination and stigma would provide one method of line-drawing that might ensure better protection for the targeted class.

Equal Treatment and Direct Discrimination

Chapter two drew attention to some of the limitations which attach to formal conceptions of equality. In particular, it considered the equal treatment principle, which is pursued at the anti-discrimination level through the prohibition against direct discrimination. Direct discrimination is often overlooked in the disability context due to the focus directed at the reasonable accommodation duty. However, the direct discrimination principle retains an important role - it recognises that disabled people can be subject to bias, stereotyping and prejudice and treated less favourably than non-disabled individuals in otherwise similar circumstances because of the assumed effects of their disability.¹⁵ In other words, such individuals become no more than the sum of their impairment, and they endure less favourable treatment because of that impairment, even where that impairment has little or no functional impact on an individual's life experiences or his or her capacity for the position in question. In addition, individuals with asymptomatic conditions routinely endure less favourable treatment on the grounds of their condition. Consequently, an important aspect of the non-discrimination architecture remains the prohibition on direct discrimination. Notwithstanding this, some of the traditional limitations to the individualised, negative-enforcement regime of non-discrimination law were raised. It was argued that these difficulties are exacerbated

The largest class of complainants under the ADA employment provisions have been people with lower back pain." J. Bickenbach, *supra* n.4 pp.107-108.

¹⁴ See D. Fleischer Zames and F. Zames, *The Disability Rights Movement: From Charity to Confrontation* (Philadelphia: Temple University Press, 2001).

¹⁵ See J. Mosoff, "Is the Human Rights Paradigm "Able" to Include Disability: Who's In? Who Wins What? Why?" (2000) 26 *Queen's Law Journal* 225. This author's research demonstrates that many disability cases are direct discrimination cases. Thus, the dynamics of disability discrimination do not always differ significantly from other forms of discrimination.

in the disability context for a number of reasons. Many individuals with hidden impairments have been taught to compensate for their impairments to avoid or minimise the experience of discrimination. The pursuit of a disability discrimination claim in part involves focus and attention being directed to a condition or experience that many individuals have learned to deny or reject. Many who experience disability discrimination may fail to pursue formal redress for fear of drawing undue attention and stigma to something which society still perceives negatively. Indeed, ADA commentators have noted the endemic nature of discriminatory practices against individuals with so-called hidden disabilities. In such cases, individuals have been employed, their impairment has subsequently been discovered, and they have been discharged. This phenomenon of “churning” occurs when employees with hidden conditions experience repeated cycles of being hired by unknowing employers and discharged when their conditions are discovered, and then hired again by different, unknowing employers.¹⁶ The other reason why the individualised enforcement route bears so heavily on disabled people is because of the vulnerable position they occupy. Non-discrimination precepts are not equitably enforced. Differences in access to resources greatly affect the ability of individuals to pursue a breach of their individual rights. For many, this aspect, coupled with the pervasive need to downplay the impact of an impairment, can militate against adequate enforcement of equality rights. Under the EEA, there is scope for the statutory promotion body, the Equality Authority, to enforce discrimination cases on behalf of complainants.¹⁷ Resource implications, however, tend to compromise the effectiveness of this option. The Equality Authority is responsible for representing the nine protected grounds under the equality legislation, not just the disability ground. Priority tends to be accorded to individuals with cases that present novel facts or important points of law. With regard to individual enforcement, the recurring point is that this system does not adequately tackle the source of the discrimination.¹⁸ Time and again, similar cases make their way through the equality tribunals and the courts, which indicates the weakness of the legislation’s prophylactic effect. For every individual who pursues a discrimination case, there are many who simply lack the resources to do so. The social situation of many disabled people is

¹⁶ S. Bagnestos, *supra* n.9 p.463.

¹⁷ Section 85 of the EEA as amended.

¹⁸ However, the success of the law cannot be determined by the number of legal cases brought under it, but by the rate of compliance. As Sayce points out, we judge the effectiveness of laws against burglary not by the numbers convicted, but by the rise or fall of burglaries. L. Sayce, “Beyond Good Intentions: Making Antidiscrimination Strategies Work” (2003) 18 *Disability and Society* 625, 631.

frequently unenviable in terms of income and employment opportunities. It is reasonable to suggest, therefore, that many disabled people are likely to be extremely risk-averse in situations of high uncertainty, and that the choice to take discriminators to court will, for many, represent no choice at all.

Indirect Discrimination

Indirect discrimination has always been held up as a more transformative equality tool. It has been described as pursuing the wider goal of equality of opportunity as opposed to taking a narrow focus on equal treatment. It moves beyond the formality of equal treatment through its recognition of the unequal impact of supposedly neutral practices on different groups. It is concerned with the exclusionary outcomes of neutral practices that remain unchallenged. However, chapter two pointed out some of the weaknesses of the EEA's indirect disability discrimination provision. While the constituent parts needed to raise a successful indirect discrimination claim have been simplified following the Equality Act's transposition of the terms of the Framework Directive,¹⁹ the transformative capacity of indirect discrimination remains open to challenge. It has been suggested that indirect discrimination principles can promote better practice among employers and that it can make them identify and remove exclusionary barriers in advance.²⁰ In turn, this proactive act has a beneficial impact on members of the disadvantaged group. In this sense, the group-based dimension of indirect discrimination is thought to be an advance on the reactive, individualised approach central to the reasonable accommodation duty. However, this concern for the structural impact of practices on groups is compromised by the anti-discrimination enforcement system. The potency of indirect discrimination is overstated: as Ellis comments, it does not proactively dismantle obstacles or change stereotyped roles.²¹ The indirect discrimination principle's effective operation depends upon the actions of an individual complainant. It also depends upon the isolation of a practice, provision or criteria - in this sense, it is not concerned with omissions, or with a failure to act.²² While the latter may be captured by the reasonable accommodation duty, the relationship between these two provisions in the Framework Directive further undermines the group dimension to

¹⁹ See chapter two for discussion.

²⁰ Submission cited in B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework – Report of the Independent Review of the Enforcement of UK AntiDiscrimination Legislation* (Oxford: Hart Publishing, 2000) p.31.

²¹ E. Ellis, *EU Antidiscrimination Law* (Oxford: Oxford University Press, 2005) p.115.

²² J. Baker et al. *Equality From Theory to Action* (Palgrave: Macmillan, 2004) p.128.

indirect discrimination. Under Article 2(2)(b) of the Framework Directive, an employer is entitled to maintain the *prima facie* exclusionary provision - and is not required to justify it - if, with respect to a single disabled individual, a reasonable accommodation could eliminate the disadvantage that that particular individual faces. While this aspect of the Directive does not appear to have been transposed into Ireland's EEA, some uncertainty remains as to the relationship between indirect discrimination, the justification defence and the duty to make reasonable accommodation. Moreover, the ability of the EEA's indirect discrimination and reasonable accommodation principles to challenge the effects of traditional job qualification standards are compromised by section 36. As was seen in the *Gorry*²³ decision, discussed in chapter two, Section 36 insulates job qualifications "generally recognised in the State" from the scope of the reasonable accommodation duty and the indirect discrimination principle. The purpose of section 36 is to allow employers and professions to insist on relevant qualification standards in line with their respective professions and occupations. Presumably, the point of the section is to avoid the "blind bus driver" scenario - however, it was argued that the provision is over-inclusive. There are sufficient statutory safeguards in place to avoid arguments of this type.²⁴ Section 36 reduces the potency of the indirect discrimination principle and the accommodation mandate in terms of their ability to unpack and challenge the impact of excessive and unnecessary job qualifications for particular positions. This was clearly demonstrated on the facts of *Gorry* itself.

Disabling Discourse: Judicial Approaches in the Supreme Courts

The reasonable accommodation duty is core to the operation of the disability equality framework and it was discussed in this thesis on a number of levels. The purpose of the duty is to provide for adjustments to workplace practices and structures to allow an individual with a disability to compete for, take up, or advance in employment.

The discussion of the reception accorded to reasonable accommodation on the constitutional plane in both the US and Ireland demonstrates how pervasive the individual, personal-problem conception of disability remains within legal structures. In addition, the formal nature of both the US and Irish constitutional equality guarantees

²³ DEC – E2005 -038.

²⁴ Specifically, the cumulative impact of section 16 of the EEA.

was exposed following a comparison with the more expansive, substantive-equality norm under the Canadian Charter of Rights and Freedoms.

When the initial Employment Equality Bill 1996 was referred to the Supreme Court under Article 26, the Court ruled that the cost of disability accommodations would amount to an unconstitutional interference with an employer's right to earn a livelihood.²⁵ The constitutional attack on the reasonable accommodation duty came from the more substantive right to private property. There was no little or no discussion as to what a workable concept of equality might involve in the context of disability. The equality guarantee in Article 40.1 was simply not factored into the reasoning process of the Supreme Court. The Court failed to uncover in a balanced manner the point and reach of the accommodation mandate. It continued to perpetuate the dominant view of disability as a medical and personal tragedy. The Court's preoccupation with the costs of including disabled people was influenced by the exclusionary, one-dimensional view of disability that is a legacy of the welfare state. Consequently, any movement towards their (re)integration inevitably raises issues of the costs of inclusion and whether those costs could legitimately be placed on employers.²⁶ However, pregnancy discrimination protection,²⁷ along with more traditional forms of discrimination protection such as indirect discrimination, not to mention minimum wage directions, all carry considerable and equivalent resource burdens for employers.²⁸ Private property implications have not arisen in these instances, indicating that attitudinal barriers regarding the "proper place" of disabled individuals might well extend to the highest judiciary. What the Supreme Court refused to face up to is the cost of exclusion from mainstream activity that is

²⁵ *Re Article 26 Of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

²⁶ But as Fredman has argued, responsibility for correcting disadvantage under substantive formulation of equality, should not rest solely with those to whom "fault" can be attributed. To do so would overlook the structural nature of discrimination. Thus, all those who benefit from the existing structure of disadvantage should be expected to bear part of the costs of the remedy. Consequently, a community or workplace structure based on disability discrimination has conferred benefits on the dominant group as a whole. Thus, employers should be required to bear part of the costs of correction, subject to a proportionality enquiry. See S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002) p. 129.

²⁷ It has been argued that maternity leave can be described as a form of 'reasonable accommodation' on the gender ground as it responds appropriately to the fact of gender difference. See G. Quinn, "The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose" in G. De Burca and B. DeWitte, *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 279, p.304.

²⁸ See C. Jolls, "Antidiscrimination and Accommodation" (2001) 115 *Harvard Law Review* 642. Jolls thesis is that aspects of indirect discrimination law are in fact aspects of accommodation law. She describes several types of cases where the indirect discrimination principle requires employers to bear special costs to respond to the needs of an identifiable group of employees. At pp.62-64. See also S. Rabin-Margalioth, "Antidiscrimination, Accommodation and Universal Mandates – Aren't They all the Same?" (2003) 24 *Berkeley Journal of Employment and Labor Law* 111.

wholly shouldered by disabled people: in short, the refusal to place any associated costs on employers does not mean the costs disappear. The cost of alleviating discrimination visited upon disabled individuals could not properly be borne by employers, and thus legitimately rested with disabled individuals, precisely because of their disability. Thus, where disability is viewed as an issue of individual “misfortune” rather than the product of social forces, the disabled individual has no claim of right to social remediation: any benefits society bestows can be viewed as charitable, or as a “special” response to their individual situation.²⁹

Similar attitudes can be found among members of the US federal judiciary. Here, the constitutional assault on the enforcement of the reasonable accommodation duty came from the interaction between the Equal Protection Clause of the Fourteenth Amendment and the State Sovereign Immunity Clause of the Eleventh Amendment.³⁰ In *Board of Trustees of the University of Alabama v Garrett*³¹, the Supreme Court held that the states as public employers could not be subject to private suits for monetary damages for failure to provide a reasonable accommodation under Title I of the ADA. Under the constitutional test required to abrogate the states’ sovereign immunity, Congress’s action in enacting the ADA can only extend to a proper enforcement of the rights under the Fourteenth Amendment - it cannot create new rights under the guarantee.³² The *Garrett* Court remarkably decided that since there was no history of unconstitutional discrimination against disabled people, Congress did not, therefore, act to remedy any constitutional violation. It had overstepped its authority by creating new rights within the Equal Protection Clause in favour of disabled people. However, the ADA requires employers to “make existing facilities used by employees readily accessible to and usable by individuals with disabilities”.³³ The preservation of financial resources that comes with hiring employees who do not require accommodations meant that the remedy of public employees to sue for damages under the reasonable accommodation provision of the ADA had to be removed. In particular, the decision illustrates the formal nature of the US constitutional equal protection guarantee: it is a guarantee which is, in the disability context, concerned only with intentional, animus-based discrimination, and not with the by-products of institutional, systemic and

²⁹ M. Crossley, “The Disability Kaleidoscope” (1999) 74 *Notre Dame Law Review* 621, pp.651-52.

³⁰ See chapter three.

³¹ 531 U.S. 356 (2001).

³² Congress can only act to prevent the violation of rights guaranteed under the Fourteenth Amendment. It does not have the power to create new rights.

³³ *Ibid* at 372.

structural inequality. Disabled state employees were denied their right to sue for failure to make a workplace accommodation because their impairment deems them dissimilarly-situated and disentitled to equal treatment in accordance with their differences.

An example of a shift at the level of constitutional discourse in the approach to disability was considered in chapter three. Canadian equality jurisprudence is contextual and effects-based, and it has begun to recognise the link between disadvantage and discrimination. While its analysis of the accommodation duty in decisions such as *Eldridge*³⁴ and *Eaton*³⁵ have moved beyond the personal-limitation model of disability endorsed by the US federal judiciary, chapter three raised an emerging concern with the accommodation mandate. This concern has been central to social model thinking around disability - that the accommodation mandate is predicated on uncomplicated and manageable concessions to the workplace to allow for the increased participation of a number of disabled individuals. This point gradually developed in the context of the assessment of the core components of the accommodation duty in chapter five.

The Practicalities of Reasonable Accommodation

In chapter five, the practical operation of the reasonable accommodation duty at the statutory level was considered in order to fully understand its reach. A procedural yet practically significant point is the contrast between the detail of the ADA's statutory text and regulatory guidance on reasonable accommodation and the incredibly sparse approach under the EEA. While this was remedied somewhat following the introduction of the Equality Act 2004, which implemented the Framework Directive, there still exists some uncertainty with regard to the scope of the Irish duty. For example, it is unclear whether the EEA duty extends to reassigning a disabled individual to a vacant position. Also discussed at this point were the different approaches to important operational terms such as the "reasonableness" of an accommodation. In the US, judicial interpretation of the "reasonableness" term varies widely at the level of the federal appeals courts.³⁶ Some disability commentators, who were originally involved in its drafting, have argued

³⁴ *Eldridge v British Columbia* (1997) 3 SCR 624.

³⁵ *Eaton v Brant County Education Board* (1997) 1 SCR 241.

³⁶ See chapter five.

that the federal judiciary has ignored the original intent behind the “reasonable” appendage to the accommodation duty.³⁷ The reasonable accommodation provision was intended to be a term of art. The idea was that a reasonable accommodation was one which would enable the individual to perform the “essential functions” of the position. In other words, it was to allow a disabled individual to demonstrate competence and capability for the job’s essential functions. However, despite the existence of the undue hardship duty, an independent standard of reasonableness has begun to creep into the reasonable accommodation mandate.³⁸ The Supreme Court’s view is that ADA plaintiffs must show that a requested accommodation “seems reasonable on its face, i.e., ordinarily or in the run of cases.”³⁹ This is, as Waddington points out, a worrying development in that it allows employers to interject their own view of what is reasonable and gives them further scope to challenge accommodations that may not be unworkable or unduly burdensome.⁴⁰

Chapter five also considered the practical application of the accommodation duty. Under the ADA, it only extends to qualified individuals who can perform the “essential functions” of the job, while any non-essential duties must be discounted in assessing the employee’s capability. However, under Ireland’s EEA, an important loophole remains because of the omission of the “essential functions” aspect. Despite much prompting, the Equality Act 2004 did not fill this gap by making the critical distinction between the “essential functions” and the “non-essential functions” of a job.⁴¹ Under section 16, employers are entitled to demand competence and capability for *all* the duties attached to the position. As chapter five pointed out, there may be a critical difference between the provision of a reasonable accommodation which allows an applicant to carry out the “essential” duties of a position and an accommodation which would still not enable the applicant to perform “all” the duties of the position. The statute should be amended in order to prevent any undermining of the

³⁷ See A. Mayerson and S. Yee, “The ADA and Models of Equality” Paper presented at International Disability Law and Policy Symposium: From Principles to Practice October 22-26 2000. Available at <http://www.dredf.org/symposium/mayerson.html> .

³⁸ *US Airways v Barnett* 535 U.S. 391, discussed in chapter five.

³⁹ *Ibid.* 400-401.

⁴⁰ L. Waddington, *Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice* (EU Network of Experts on Disability Discrimination, 2004)

⁴¹ See Recital 17 of the Framework Directive and G. Quinn and S. Quinlivan, “Disability Discrimination: The Need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment” in C. Costello and E. Barry, *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law 2003) 213, pp.219-220.

accommodation duty's reach. Arguably, this may be required in order to be in proper compliance with the Directive.

Conceptualising Reasonable Accommodation

This led to a discussion of the accommodation duty in the context of prevailing equality theories. This was developed, first, through comparing reasonable accommodation with traditional, more robust interventions into inequality, such as positive action programs. It was argued that while reasonable accommodation moves beyond formal equality because of its attention to difference, it represents an incomplete move towards the reformulated substantive equality norm discussed in the latter part of chapter six. This in part stems from its place within the current non-discrimination framework and its inability to capture the structural creation of disablement. To safeguard its legitimacy in US jurisprudence, it has been imperative for the minority group model to place the reasonable accommodation duty within a narrower equality of opportunity framework. This is because US constitutional jurisprudence is hostile to measures which compromise the sanctity and neutrality of the equal treatment principle. Consequently, the narrower conceptions of equality have played a prominent role in the legal system which can remain untouched by the understandings and developments of other discourses. As Collins usefully points out, a legal system which has achieved autonomy from the political and economic systems still has its independent demands, which include the general preservation of its system.⁴² Collins continues that formal equality maxims represent fundamental operational principles of these legal systems.⁴³ Consequently, when political goals have to be incorporated into law, the legal system must accommodate them within its own operational principles.⁴⁴ The compromise between the legal system's commitment to equal treatment and equality discourse's wider formulations has been the equality of opportunity principle. Chapter two placed indirect discrimination within an equality of opportunity framework. While the discussion in chapter six did attempt to formulise reasonable accommodation in terms of the wider equality-of-results formula, reasonable accommodation was demonstrated to have fallen short. Indeed, on this point, some commentators have suggested that in our conceptualisation of the ADA within the anti-discrimination project, it is necessary to give considerable thought to what the reasonable accommodation duty is not. In this

⁴² H. Collins, "Discrimination, Equality and Social Inclusion" (2003) 66 *Modern Law Review* 16.

⁴³ *Ibid.*

⁴⁴ See A. Mayerson and S. Yee, *supra* n.37.

sense, a long and sobering look at its metes and bounds can reveal the hyperbole attached to the concept. Where the reasonable accommodation duty is formulised in terms of eliminating discrimination against disabled people, and even where discrimination is conceived of more widely in terms of socially-created barriers, it will not necessarily provide total assistance to disabled people. The duty does not compensate for functional limitations, the accommodations need only be reasonable, and the employer defence of undue hardship extends beyond pecuniary considerations. Moreover, where the accommodation duty is reduced to a negative right enforced by way of compensation for a failure to make it, the non-discrimination matrix fails to tackle the stereotyping which surrounds disabled people and perpetuates their exclusion. However, this point may be overstated, particularly if one takes account of the procedural aspect to the accommodation duty, as discussed in chapter five. The forced interaction between the employee and employer in terms of considering a reasonable accommodation could be a way of challenging employer ignorance and the exclusion of disabled people. As Schwab and Willborn argue, procedural discussions may eventually contribute to the ADA's goal of changing employer preferences, as the discussion may educate employers of the positive potential of individuals with disabilities.⁴⁵ The effectiveness of this, however, may be a long-term goal and it should be subject to empirical enquiry.

The ADA and EEA's reasonable accommodation duty, while progressive, fails to embrace a truly substantive vision of equality. In light of social model thinking on disability, the discussion of the transformative potential of reasonable accommodation was questioned because of judicial statements made in a jurisdiction that boasts one of the most advanced equality guarantees of western democracies. The statement by Sopinka J. in the Canadian Supreme Court decision of *Eaton*⁴⁶ was affirmed with approval by the La Forest J in *Eldridge*⁴⁷ and it illustrates this critique of the duty succinctly. While the statement places reasonable accommodation at the core of the equality ideal in the disability context, it paradoxically represents the social model's discontent with the equality principle in a legal context:

Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a

⁴⁵ S. Schwab and S. Willborn "Reasonable Accommodation of Workplace Disabilities" (2001) Cornell Working Paper Series. Available at <http://www.law.cornell.edu/leda/search/seriesbyauthor> Accessed December 4, 2002.

⁴⁶ [1997] 1 SCR 241.

⁴⁷ *Eldridge v British Columbia* (1997) 218 N.R. 161.

written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled people from participation, which results in discrimination against them.⁴⁸

From a social model perspective, these passages contain problematic assumptions.⁴⁹ Whereas Justice Sopinka identified the context for disability discrimination as “the construction of a society based on mainstream attributes”, he did not suggest the need for a fundamental rethinking of that norm. Instead, “fine-tuning” and accommodation after the fact were identified as appropriate responses.⁵⁰ In the words of Martha Minow, Justice Sopinka treats the mainstream attributes as the “unproblematic background” rather than conceiving of “current institutional arrangements as a conceivable source of the problem”.⁵¹ Pothier’s analysis of this approach is starkly revealing, as the accommodation of disabled people becomes an end in itself, rather than as a means to the end of inequality.⁵² It is premised on the continued dominance of able-bodied design and able-bodied norms, with tinkering and concessions available through the accommodation duty where they are reasonable. Provision for the difference of disability should not be dependent upon the construction and perpetuation of a hierarchy between normal and abnormal difference. In this sense, the hierarchy suggests that certain deviations from the norm are acceptable through the modest tool of accommodation. This leaves vulnerable those whose differences are more than a little different. Disability discrimination case-law confirms this analysis.⁵³

Consequently, it has been argued that more robust measures beyond the individualised accommodation duty are required in order to tackle the exclusion of disabled people from working structures. Weber argues that increasing the presence of people with disabilities within mainstream structures benefits society as a whole, as society’s exposure to individuals who do not conform to the norm is crucial in

⁴⁸ *Ibid.* pp.226-228.

⁴⁹ D. Pothier, “*Eldridge v British Columbia (Attorney General): How the Deaf Were Heard in the Supreme Court of Canada*” (1997-1998) 9 *National Journal of Constitutional Law* 263, p.271.

⁵⁰ *Ibid.*

⁵¹ M. Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca, Cornell University Press, 1990) p.112. Cited in D. Pothier, *ibid.* p. 217.

⁵² D. Pothier, *supra* n.49 p. 272.

⁵³ R. Colker, “The Americans with Disabilities Act: A Windfall for Defendants” (1999) 34 *Harvard Civil Rights – Civil Liberties Review* 99.

displacing myths about disabled people.⁵⁴ Where the invisibility of disabled people is challenged, more realistic attitudes about disabled people can be fostered. Chapter six discussed how movements in this direction, encapsulated by the positive action provisions within the Irish non-discrimination framework, have been extremely limited. However, the ADA contains no positive action provisions at all.⁵⁵ The utility of positive action at national level is generally compromised by the voluntary nature of the statutory provisions. Even the State, as a public sector employer, has demonstrated a wavering ability to commit to its target of an employment rate of 3 per cent across the public sector, and research on the policy's implementation demonstrated public sector confusion on the relationship between positive action and the principle of equal treatment.⁵⁶ Further, the discussion began to question the focus which an equality-of-results theory attracts, particularly in terms of its transformative potential. Positive action within an equality-of-results theory can sometimes be crudely reduced to a numbers game.⁵⁷ While the increased representation of individuals from traditionally disadvantaged groups represents a move forward, it can again divert attention away from the exclusionary structure that perpetuates the disadvantage in the first place.

Deconstructing the hierarchy of difference involves a systemic as opposed to an individualised, ad-hoc response. Embracing difference and expanding participation requires efforts beyond the current non-discrimination protection, as "an anti-discrimination strategy does not provide adequate guidance in developing cost-effective, politically defensible policies that meet the employment and other needs of people with disabilities".⁵⁸ However, it was suggested in chapter six that the role of equality and non-discrimination legal precepts should not be quickly dismissed by the various strands of the disability movement. While the social model decries the minority group model's focus on equality rights, chapter six argued that it would be unwise to simply dismiss the current discrimination system to its own self-limiting paradigm. This is because emerging developments in the legal use of the equality principle, particularly in European countries, view equality not simply in terms of difference. Tentative steps in

⁵⁴ M. Weber, "Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities (1998) 46 *Buffalo Law Review* 123 (Obtained through Westlaw, no page numbers available).

⁵⁵ There are some affirmative action provisions – contract compliance and action plans in the context of federal contracts under the Rehabilitation Act 1973.

⁵⁶ Discussed in chapter six.

⁵⁷ *Ibid.*

⁵⁸ K. Schriener and R. K. Scotch, "Disability and institutional change: A human variation perspective on overcoming oppression" (2001) 12 *Journal of Disability Policy Studies* 100. (Article obtained through ProQuest, no page numbers available).

this direction have been taken under the banner of the so-called “fourth generational” equality initiatives, such as the public sector duty to promote equality and the proofing of policies for equality impacts.⁵⁹ Others see the non-discrimination norm as a bridge between civil rights and freedom-enhancing social rights.

Final Remarks

This work borrowed from social model theorising around disability to challenge orthodox legal discourse on disability and disability discrimination under the ADA and Ireland’s EEA.

It welcomes the extension of the non-discrimination norm to disabled people but argues that some internal aspects of the system need addressing. It further argues that equality ambitions in the context of disability cannot be limited to this particular paradigm. Thus, current structures of anti-discrimination law cannot be the sum of the equality agenda in the legal context. The individualised enforcement of non-discrimination precepts - which sees the citizen as an equal actor in the judicial process, with the legal power to redress instances of discrimination - overlooks aspects internal to the legal system’s structure that impact on the redress of discriminatory practices. Traditional concerns regarding access to justice, resources and power in the enforcement process impact on the operation of the structure and remain wholly outside of the control of the individual. Moreover, traditional discrimination theory and law has done little to challenge the internal workings of this system. When expressed in ordinary language, the aims of reasonable accommodation make it clear that it requires employers to think about ways in which their practices and procedures are exclusionary of an entire category of people and the means by which such practices could be rethought to take account of the different ways disabled people have of performing tasks. However, the doctrinal make-up of the accommodation duty prioritises the existing structures as generally unproblematic except in isolated cases where manageable accommodations are required. Yet, labour is still divided hierarchically: many positions are overvalued, others are comparatively and continually devalued, leaving some people barely rewarded and, where competition is stiff, others not rewarded at all. Equal opportunity and equality of results are limited because of the piecemeal (re)distribution of these scarce positions and wider questions, surrounding the

⁵⁹ For example, see s.75 Northern Ireland Act 1998. On the proofing procedure, see S. Mullally and O. Smith, *Equality Proofing* (Dublin: Government Stationery Office, 2000).

injustice in the definition of the positions, admission to them and what it takes to be qualified for a position⁶⁰ are routinely ignored. The individualism of non-discrimination can be offset with fully-resourced and commission-based enforcement, but also through a better emphasis on the preventative aspect of discrimination law. On the latter point, there is recent evidence of an increased consciousness-raising and education on the suitability and viability of disabled people for employment under the EEA. To this end, Equality Officers and Equality Mediation Officers have made use of their powers to order respondent employers appearing before the Equality Tribunal to undertake disability equality training, and a number of disability consultancy firms have been established to fill this niche.⁶¹

Beyond Work: Equality as Belonging

In the disability context, the policy behind the discrimination norm recognises that there are members of the disability community who could be working but who are excluded by prejudice or because the structure of the market is antithetical to their operational capacity. To a certain extent, the forces of the system can be altered to accommodate them. The rules then operate clearly in favour of disabled people who possess no or few functional impairments, but suffer the effects of discriminatory animus and exclusionary bias. While not regaling against those who can make the “fit” within the existing system, there is a view that the centrality of contributions in the workplace can have a particular polarising effect within the disability community. This stems from the pivotal place occupied by “work” within modern society. As long as this centrality persists, there will always be a division between those disabled people whom society or employers are willing to accommodate and the residuum of people who, because of the nature of their impairment, will remain excluded.

While one can talk about how much effort is needed in terms of wholehearted commitment to barrier removal, and indeed what kind of barrier removal is required, when the removal of some barriers creates barriers for others, a utopian scenario where all disabled people have realistic chances of employment is unrealistic. The obvious approach would argue for, as many feminist writers have done, the displacement of

⁶⁰ I. M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) pp.200-202.

⁶¹ See the work carried out by www.disabilityconsultancy.ie and also the grants available from FAS, the national training authority, to carry out disability awareness training and towards a strategy of retention of disabled workers. See www.fas.ie for further details.

certain forms of work (i.e. paid) as the central social role. Barnes has written about the radical reconceptualisation of work beyond the rigid waged-labour confines, an approach that is more than simply a reaction to or a tinkering with existing inequalities. Such a sea-change moves towards challenging and overturning the ideologies and cultural values upon which these inequalities are based.⁶² Barnes gives examples such as the introduction in Britain of The Community Care (Direct) Payments Act. Many people perceived as being severely impaired now employ personal assistants to do tasks that they cannot do themselves, and while they remain unemployed in a traditional sense, they are engaged in the employment of others. There is room for argument that the management of the budget and timetabling of the assistants could be reconceptualised as a form of work and a contribution on the part of the disabled individual. In the disability context, it has been accepted, then, that not every person will be able to achieve inclusion into the economy as presently structured. However "... a mature society [includes] everyone on the basis, not of the work they have done, but on the needs they have".⁶³

These arguments within disability discourse have particular resonance in the context of the reformulated equality norm in chapter six, particularly with regard to the role of positive duties in promoting the broader values of participation and choice. This has emerged in the literature through a necessary link between non-discrimination and equality and the enjoyment of social, freedom-enhancing rights, which promote participation and choice.⁶⁴ In the disability context, the utility of this developing synergy lies in bridging the traditional gap between non-discrimination rights and social programs, and the characterisation of the former as benefits of the political milieu. It would be better, perhaps, as Quinn argues, that the birth of social and economic rights in "the wellspring of equality" should be understood in terms of the equal intrinsic worth and dignity of human beings. This would allow rights to become "means to the higher end of human freedom and choice".⁶⁵ In this sense, the equality concept opens out to a wider meaning, and is not just the measurement process that inheres in an equality-of-

⁶² C. Barnes, "A Working Social Model? Disability and Work in the 21st Century" Available at Centre for Disability Studies Resources Web page: <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> last accessed November 18, 2003).

⁶³ T. Shakespeare and N. Watson "The social model of disability: an outdate ideology?" 2 *Research in Social Science and Disability* (2002) p.9-28 (also available at Centre for Disability Studies Resources Web page: <http://www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm> last accessed November 18, 2003).

⁶⁴ G. Quinn, *supra* n.1 p.281.

⁶⁵ G. Quinn, *supra* n.1 p.281.

outcome approach in existing institutional practices. Rather than simply measuring the numbers of traditional out-groups within an existing structure, as has become a staple tool of employment anti-discrimination research,⁶⁶ the reformulated equality norm seeks to create space in the mainstream through its reformulation, based on notions of choice, dignity, self-worth and respect. This reformulated mainstream would necessarily recognise that dignity deriving from participation does not inhere solely within standardised employment contracts, but comes from the right to belong to an inclusive community. In this sense, then, equality law need not be inherently antagonistic to the social model of disability which involves “searching for openings in the structures of society where [disabled people] might effectively contribute with others in the restructuring of society so that it is not disabling for all people”.⁶⁷ Here, equality law and theory has tentatively begun to consider a number of possible methods of moving beyond the traditional limits of the non-discrimination system. It must be remembered, though, that these will persist unless the law “can attach itself to – and help to animate – the material basis for human freedom” in its widest sense.⁶⁸

⁶⁶ See See D.C. Stapelton and R. V Burkhauser, *The Decline in Employment of People with Disabilities: A Policy Puzzle* (Kalamazoo, Michigan, W.E. Upjohn Institute for Employment Research, 2003).

⁶⁷ V. Finklestein, *supra* n.3 p.5.

⁶⁸ G. Quinn, *supra* n.1 p.280.

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