United Nations Convention on the Rights of Persons with Disabilities
- Swedish compliance with the requirements of the convention

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Foreword
I would like to thank my mentor, professor Said Mahmoudi, for his most valuable inputs, directions and swift replies to my questions.
Abstract
The subject of this study is the United Nations Convention on the Rights of Persons with Disabilities, its requirements from states parties and the Swedish compliance with these requirements. In order to fully assess these matters and discuss the implementation measures that Sweden has adopted, the relationship between international and national law in general will be explored, and special attention will be paid to the Swedish circumstances. The study is carried out by employing both international law method and the legal dogmatic method. The study is based on international agreements, Swedish legislation, official publications – both international and Swedish, communications of the Committee on the Rights of Persons with Disabilities and Swedish court practice as well as legal doctrine.

Sweden applies dualism, requiring the enactment of national laws for the internal application of international law. The Disability convention is comprehensive and all-encompassing in its protection of the rights of persons with disabilities. Swedish legislation is generally of high standards; however application is often deficient. It is argued that transformation through translation, that is the adoption of a translation of the convention as a national law, would better ensure the rights of persons with disabilities in Sweden.
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1. Introduction

1.1. Background


The convention has been adopted to rectify the long-standing almost universal malpractice in providing disabled persons with human rights on an equal basis with other, non-disabled persons. All general human rights treaties as well as international customary law apply to persons with disabilities. Neither these nor the Standard rules however gave any real protection.2 Persons with disabilities are by some scholars considered to be the world’s largest minority, comprising one fifth of humanity. This surely makes the realization of human rights for persons with disabilities an important issue; the opposite creating full or partial exclusion and segregation. Furthermore the majority of disabled persons live in poverty, a factor which adds to a vulnerable situation of many in large parts of the world.3 Another aspect, further emphasizing the importance of human rights for persons with disabilities is the historical, ongoing objectification of persons with disabilities. They are not citizens with human rights as everyone else, rather they are the object of public measures and/or charity.4

Sweden signed the convention and acknowledged that measures were needed to conform in full

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3 Preamble letter (t) the Disability convention.
with the convention, for example the making of a national mechanism for the monitoring of the

convention. However, it was stated by the Swedish government that neither national legislation

nor political ambitions was insufficient enough to preclude ratification without further

legislative measures. Hence, Sweden ratified the Disability convention and its Optional

protocol in 2008.

Swedish national disability legislation covers a wide range of areas, including health, social and

personal support, accommodation, education, work, transport, accessibility and so forth.

Nevertheless, persons with disabilities have a lower employment rate and a lower degree of

higher education and are to a greater degree are supported by the social security system. Last

year in-accessibility was included as a ground of discrimination. Private employers with fewer

than ten employees were however excluded; an exception criticized by the Committee on the

Rights for Persons with Disabilities. The Committee has also criticized Sweden for, inter alia lack of sufficient provision of special support to disabled pupils, cutbacks in the provision of state-funded assistance benefit, and compulsory psychiatric care. The Swedish disability movement submitted a shadow report to the Committee containing criticism as well, concerning inter alia education, work and employment and accessibility.

1.2. Purpose

The general state of living conditions and opportunities for participation of persons with
disabilities in Sweden render an inquiry into how well Sweden live up to the requirements of
the Disability convention relevant.

The purpose of this essay is to examine the relationship between international and national law
and to apply this on Swedish implementation of the Disability convention. The purpose is

5 Government Bill 2008/09:28 Mänskliga rättigheter för personer med funktionsnedsättning (Human rights of


7 Lagercrantz, Magnus, Mehlich, Anna-Klara, Adolfsson, Jeanette, Gustafsson, Josefine & Lindqvist, Erik, Hur

är läget 2014? Uppföljning av funktionshinderspolitiken, Myndigheten för delaktighet 2014:6, Myndigheten
för delaktighet, 2014 (What’s up 2014? Disability policy follow-up), pp. 24-26 & 38 [cit. Lagercrantz, 

Mehlich, Adolfsson, Gustafsson, & Lindqvist].

8 Government Bill 2013/14:198 Bristande tillgänglighet som en form av diskriminering (Insufficient accessibility


9 Hereinafter “the Committee”.

10 Concluding observations on the initial report of Sweden, Committee on the Rights of Persons with

Disabilities, May 12th 2014, UN Doc CRPD/C/SWE/CO/1, p. 2 [cit. Concluding observations].

11 See Concluding observations on the initial report of Sweden.

12 See Åkerberg, Annika, Swedish disability movement’s alternative report to the UN Committee on the Rights of

further to investigate what can be required by Sweden and whether and to what extent Sweden fulfils these requirements. It will be analysed whether potential deficiencies in implementation can be rectified by legislation. The discussion concerning the relationship between international and national law will be used to discuss whether it is appropriate to incorporate, transform or in another manner legislate further about the Disability convention.

1.3. Research questions
The main research question of the essay is:
How is the relationship between international and national law organized, how and to what extent does Sweden fulfil its obligations under the Disability convention, and if not in complete conformity with the requirements of the Disability convention, what implementation measures can be taken and how would these affect the conformity?

This research question will be divided into the following sub questions:
How is the relationship between international and national law regulated, specific consideration being given to Swedish circumstances?
What obligations do the Disability convention impose on States parties?
How does Sweden fulfil these obligations?
And if Sweden does not fulfil its obligations:
Which method of regulation and implementation is preferable to apply to Swedish national implementation of the Disability convention and what potential result would such implementation give?

1.4. Methodology and material
There is no such thing as neutrality, either when choosing which method to use or in the choice of topic, research questions or delimitations. Everything is a choice and, depending on research questions, there are always valid alternatives.13

To interpret and apply international law the international law method will be used. To interpret and apply Swedish national legislation the Swedish juridical method will be applied.

1.4.1. The international law method

The international law method applies the sources of law provided for, and in a manner consistent with, article 38 of the Statute of the International Court of Justice. That is to say treaties and custom first, then general principles of law, then decisions of international courts and tribunals and legal doctrine. A necessary precondition for the application of these sources of law is that they are in fact binding on states. The leading theory of international law’s binding power upon states today origins in the doctrine of consent. States consent to be bound, either by customary international law or by treaties. That is to say a positivist approach to international law where states are sovereign.\textsuperscript{14} Hence, treaties bind their parties by consent and the principle of \textit{pacta sunt servanda}.\textsuperscript{15}

Sweden has signed and ratified the Disability convention. Applying the chosen method for international law, Sweden is bound to abide by the convention. The chosen method to interpret and apply the convention is the method provided for in the Vienna Convention on the Law of Treaties, articles 31 and 32, stating \textit{inter alia} that treaties are to be interpreted faithfully in accordance with the purpose of the treaty and the intentions of the parties as well as the normal meaning to be given to the text of the treaty. Articles 1-4 of the Disability convention, providing purpose, definitions, general principles and general obligations will also be used to properly interpret the Disability convention.

Apart from the Disability convention itself and the Vienna convention, quasi-judicial decisions of the Committee will be used to interpret the convention, as well as the Committee’s general comments and legal doctrine. The recommendations on individual communications passed by the Committee are not equal to decisions of international courts and tribunals and are not binding on state parties. They are however supposed to comment on individual state compliance and guide states to proper implementation of the Disability convention. They will therefore be considered nonetheless. The general comments passed by the Committee are not primary sources of law according to article 38 of the Statute of the International Court of Justice. They are instead adopted by the Committee in accordance with its rules of procedure and working methods. The Committee, being its high interpreter, is as stated above however supposed to guide state parties to correct and proper implementation of the convention, under the


Conference of States Parties. These general comments will therefore also be considered when interpreting the Disability convention. The legal doctrine used reflects various perspectives and is in unanimous agreement concerning the need for a specific Disability convention. This is in itself proof of the insufficient fulfilment of human rights for persons with disabilities.

Of special importance to the interpretation of the Disability convention is the interpretation of the terms “reasonable accommodation” and “progressive realization”. These terms are of fundamental importance in deciding what can be required under the convention in every individual situation. They will therefore be considered in depth in chapter 3.

To investigate the relationship between international and national law legal doctrine and textbooks will be used. Common law and civil law regulations and methods will be discussed. To assess Swedish regulation of the relationship between international and national law precedents will be used as well.

1.4.2. Swedish juridical method

To interpret and apply Swedish national legislation the legal dogmatic method will be used. This means that sources of law, i.e.: laws, preparatory works, non-binding precedents and doctrine will be used in the said order. Doctrine differs from the others in that it derives its authority from the strength of the argumentation; not from extraneous authority. Legislation, when applied in a specific case, may be interpreted using the following methods: logical grammatical, systemic, subjective and teleological interpretation, as well as restrictive and extensive interpretation. Law interpretation by analogy and ét contrario may also be used. Conflicts between simultaneously applicable law can be resolved using, inter alia, the following settlement mechanisms: lex superior, lex posterior, lex specialis and the principle of legality. As there is no unity considering exactly how these principles should be applied there are some theories concerning legal argumentation and application, one being the judiciary perspective where the logical grammatical or systemic interpretive methods are primarily to be used. Analysis of the law may aim at either establishing what the law says, that is an analysis de lege lata. It may also aim at establishing how the law should be applied, that is an analysis de lege ferenda.16

16 Spaak, Torben, Rättspositivism och juridisk metod, Korling, Fredric & Zamboni, Mauro (editors), Juridisk metodlära, Studentlitteratur AB, Lund, 2013, p. 47-78 (Legal positivism and juridical methodology, Juridical methodology), pp. 65-67; Sandgren, Claes, Rättvetenskap för uppsatsförfattare: Åmne, material, metod och argumentation, Norstedts Juridik AB, Stockholm, 2007 (Jurisprudence for essay writers: Subject, material, method and argumentation), pp. 36-39; Agell, Anders, Malmström, Åke, Ramberg, Christina
As concerns the relationship between international and national law preparatory works, precedents and legal doctrine will be used. The preparatory works are quite old but no changes have been communicated from the legislator. Some of the precedents are quite old as well. They are however of relevance since they describe a development in the relationship, the most significant feature of which is the membership in the European Union. The legal doctrine and textbooks that will be used varies in age, the older being used for a presentation of philosophical and juridical theories of the relationship, whereas the newer will be used for the discussion concerning the current regulation of the relationship between national and international law.

Discussions concerning current Swedish legislation make use of the legislation itself, preparatory works, precedents and legal commentaries. Preparatory works and precedents are traditional sources of law. It is however recognized that the sections of the essay containing these discussions are of secondary importance to the general discussion on Swedish compliance, based solely on state reports and investigations, the disability movement’s shadow report, the concluding observations of the Committee and the preparatory works passed prior to ratification. A comprehensive analysis of Swedish legislation would have required more material, including more precedents to compare developments and regulations adopted by national authorities.

1.4.3. Combination

In the part containing the discussion concerning general Swedish compliance with the Disability convention Swedish preparatory works, the initial report of Sweden to the Committee, the disability movement’s alternative report to the Committee, the Committee’s concluding observations on the initial report of Sweden and the official report published by the government authority the Agency for Participation, Hur är läget 2014? (What’s up 2014?) will be used.

The preparatory works are intended to represent a comprehensive review of Swedish legislation, policies etc. It is recognized that they are not all-encompassing and that a wholesome review of Swedish disability politics and legislation would in fact require an in depth review of every specific area relating to persons with disabilities. As the Disability convention concerns every aspect of life such a review would be required to include almost all legislation.

Apart from the preparatory works and in some respects the concluding observations the

materials used in this discussion are not sources of law and not legal. These materials are however of significant importance in assessing Swedish compliance as they describe Swedish policies, programmes, attitudes and factual living conditions of persons with disabilities. The report published by the Agency for Participation contains statistics such as facts concerning education, employment, economy etc. and subjective experiences of persons with disabilities; mainly collected in the inquiry “Rivkraft”, which the agency report make references to.

The initial report of Sweden and the reply to the list of issues appear to be quite impartial, describing both positive and negative aspects of Swedish compliance, although it is recognized that political considerations may have been taken into account when producing the report, i.e. a wish to attain and maintain an international reputation. The Shadow report is most concerned with deficiencies, as is to be expected. The Concluding observations, as the initial report, appears to be quite impartial, acknowledging both positive and negative aspects. It is however to be acknowledged that the Committee is most likely to be aiming at an extensive interpretation of the Disability convention, thus facilitating a comprehensive application and implementation.

The report What’s up 2014? published by the Agency for Participation is a compilation of statistics coming from other reports. It is therefore to be considered as a secondary source. The report is published by the authority responsible for monitoring and coordinating Swedish disability policy, and should be given necessary weights.

Crucial for the evaluation of Swedish compliance is the reading and interpretation of the disability convention. The essay will therefore contain a textual comparison of the authentic English text with the Swedish authoritative translation. The comparison will focus on substantial differences, not on solely linguistic difference entailing no objective differences.

1.4.4. Justification of the chosen methods

The above presented methods have been chosen because the purpose of the essay is to investigate the relationship between international and national law, to analyse what can be required under the Disability convention as well as to evaluate Swedish compliance with the convention, and if necessary, to propose legislative strategies for improved implementation. Given this purpose the chosen methods are most appropriate as they are used by authorities and courts, national as well as international. What will be carried out is thus a legal investigation and analysis, other materials will be considered as well in the discussion concerning Swedish compliance. Throughout the essay it will always be considered that the Disability convention
is a human rights convention, thus the rights perspective will be used. A disability perspective will be applied in accordance with the social model of disabilities contained in the Disability convention.

1.4.5. Alternative methods
The parts of the essay that discuss the Disability convention and Swedish compliance with it could alternatively have been analysed using several other theories of law. The ones that appear to be most appropriate in this regard, at least as concerns possible effects of effective implementation of the Disability convention as a whole, are law and economics and sociology of law. Law and economics analyses the law using an economic perspective, founded in utilitarianism. According to this theory the law is supposed to ensure as much economic efficiency or welfare as possible. Economic efficiency is classified either as Pareto efficiency or Kaldor Hicks efficiency, where Pareto efficiency is the increase in welfare for some without a simultaneous decrease in welfare for someone else. Kaldor Hicks efficiency on the other hand is an increase in total welfare, thus allowing a decrease in welfare for some, given that the total increase is bigger.17 An application of this theory would enable an analysis of the economic implications of the Disability convention; answering questions concerning efficiency of implementation.

Sociology of law is the analysis of the relationship between law and society. Either aiming at analysing the function of law in society or how society affects the law. The purpose of legislation is discussed, as are possible outcomes of specific legislation or applications of legislation in specific cases. De lege ferenda argumentation is allowed in the meaning that the most favourable outcome, given the purpose of the legislation, is to be applied.18 This method could be used to analyse societal effects of implementation, and what ways of implementation that would produce the best results.

1.5. Disposition and delimitations
This essay will first examine the relationship between international and national law, specific consideration being given to Swedish circumstances. The essay will then move on to a general

17 See further Venegas, Vladimir Bastidas, Rättsekonomi, Korling, Fredric & Zamboni, Mauro (editors), Juridisk metodlära, Studentlitteratur AB, Lund, 2013, p. 175-206 (Law and economics, Juridical methodology).
18 See further Hydén, Håkan, Rättssociologi: om att undersöka relationen mellan rätt och samhälle, Korling, Fredric & Zamboni, Mauro (editors), Juridisk metodlära, Studentlitteratur AB, Lund, 2013, p. 207-238 (Sociology of law: concerning the investigation of the relationship between law and society, Juridical methodology).
analysis of the Disability convention. Thereafter there will be a discussion concerning Sweden´s
general fulfilment of its obligations under the Disability convention. Lastly the essay will
discuss possible forms of implementation of the convention, that is to say incorporation and
different forms of transformation.

It is only Swedish implementation of the Disability convention that will be reviewed,
considering only purely Swedish circumstances. It should however be mentioned that the
European Union has approved the Disability convention entailing that its content is part of
the legal system of the EU. EU has also signed the Marrakesh treaty. The delimitations of the
essay result in that EU-regulations will not be addressed or considered, nor other international
treaties except as needed in order to interpret the Disability convention and analyse the
relationship between international and national law. The relationship between international and
national law will primarily be discussed in regard to Swedish relations.

Furthermore, solely the articles of the Disability convention providing substantial rights,
including the articles with general provisions will be analysed. The articles regulating the
structure and tasks of the Committee will only be discussed to facilitate understanding of the
individual communications, general comments and concluding observations.

Furthermore, as stated above, Swedish compliance will only be analysed using preparatory
works, the initial report of Sweden and the list of issues, the Shadow report, the Concluding
observations and the report What´s up 2014? due to shortness of time.

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19 Hereinafter the “EU”.
20 See the Council’s decision 2010/48/EC of November 26th 2009 concerning the conclusion, by the European
Community, of the United Nations Convention on the Rights of Persons with Disabilities. The Council’s
decision 2014/221/EU of April 14th 2014 on the signing, on behalf of the European Union, of the Marrakesh
Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise
Print Disabled
2. The relationship between international and national law

2.1. How international law bind states
The leading theory of international law’s binding power upon states today originates in the
doctrine of consent; states’ consent to be bound, either by customary international law or by
treaties. That is to say a positivist approach to international law where states are sovereign.21

Customary international law bind states due to *usus* and *opinio juris*, i.e. due to actual patterns
of behaviour and a true belief that the state is in fact legally obliged to act in a certain way. By
acting in conformity with the custom the state has consented to be bound by the custom. When
*usus* as well as *opinio juris* is widely implemented both geographically and during a long period
of time, international customary law has been created.22

The doctrine of consent is the leading theory explaining the binding power of treaties as well.
Hence, bilateral as well as multilateral treaties bind their parties due to consent and the principle
of *pacta sunt servanda*.23 A state may refuse to sign a treaty due to its national legislation but
can never invoke its national legislation in order to avoid international responsibility for
violations of a ratified treaty.24 National law can only act as evidence on fulfilment or not of
international obligations.25 However, as a general principle, national law still have supremacy
internally.26

First, the states party signs a treaty and so acknowledges its will to be bound by the treaty in
the future. The signature need not imply that the state is henceforth bound by the treaty, but it
can be, depending on the legal and constitutional system of the state party. After signature
parliament, government or head of state may need to approve that the state will be bound by
the treaty. Following this, the state ratifies the treaty and hence becomes a states party to the
treaty. If approval is not needed the state may become a party to the treaty immediately after
signature.27 Following this, the states party is legally bound by the treaty and breaches of its

21 Shaw pp. 121-122.
22 Sevastik, Per, Nyman-Metcalf, Katrin, Åkermark, Sia Spiliopoulou & Mársäter, Olle, En bok i folkrätt,
Sevastik, Nyman-Metcalf, Åkermark, & Mårsäter].
23 Bring, Ove, Mahmoudi, Said & Wrange, Pål, p. 16; Article 26 Vienna Convention on the Law of Treaties of
24 Sevastik, Nyman-Metcalf, Åkermark, & Mårsäter, pp. 72-73; Article 27 Vienna Convention.
25 Shaw, pp. 124-127.
26 Shaw, pp. 161-162.
27 Articles 11, 12, 14 the Vienna Convention.
obligations can result in international state responsibility. The binding power of ratified treaties is underlined in the preamble to the Charter of the United Nations as well as its article 2 section 2 and precedents from the International Court of Justice. A treaty cannot be applied retroactively. It is binding in the whole territory of a states party. If the parties to a dispute are bound by two treaties that identically regulate the dispute, the principle of _lex posterior_ as well as article 103 of the UN Charter will decide which treaty should apply. Article 103 gives priority to the UN Charter. If one of the states is not party to both treaties, the one which both are parties to will be applicable. An outsider to the conflict may always invoke the treaty to which it is a party.28

The state is obliged to make sure that its national legislation permits national authorities to abide by the international obligations of the state.29 The states party should fulfil its obligations under the treaty _bona fide_, i.e. in good faith. Treaties that are codifications of international customary law can be argued to bind all states directly, as such a treaty is an interpretation of already binding international law.30

The charter of an international organization may also provide the organization with rulemaking-power, for example concerning its own internal organisation, which will be binding upon the states parties. The United Nations General Assembly for example makes financial decisions for the United Nations. The organization in question may also possess the power to change its own charter, given that enough member states approve.31

2.2. General discussion about how international law is made binding on national authorities, courts and individuals

2.2.1. Monism and dualism
The effect and application of an international treaty on the national level is generally analysed by the doctrine of monism and the doctrine of dualism.

From a pure monist implementation of international law during the first half of the 19th century, implementation passed to monism with national law taking supremacy and then, during the latter part of the 19th century, to a dualist approach where international law was no longer

30 Eek, Bring & Hjerner, pp. 251-252.
31 Eek, Bring & Hjerner, pp. 265-267.
considered to be directly part of the law. The period between the First and the Second World War witnessed a recurrence of a modified version of monism which required consent and gave supremacy to national legislation. Some argued the international criminal responsibility of individuals for international crimes. Following the Second World War neo-natural law and legal policies facilitated the establishment of international criminal responsibility in the Nurnberg tribunals. It would however take until 1998 with the Rome Statute of the International Criminal Court that international criminal responsibility was firmly established. The period between the First and the Second World War also saw a decreased dependence on the doctrine of the will of states and greater uniformity in the legal orders which improved the opportunity for monism. There were increased possibilities of adjudication of international legislation in national courts although national legislation in general still took supremacy. Following the Second World War human rights treaties were adopted by the international community, the Bill of Rights without a doubt being the most important one. Treaties were given more influence and national legislation were, to a larger degree, interpreted in accordance with international law.

Before moving on to a discussion about the different theories of how international law can be made binding on a state’s national authorities, courts and individuals, human rights must be mentioned. The relation between individual human rights and national legislation is according to Eek, Bring and Hjerner to be considered as special areas of national legislation. Control over compliance is possible only if authority is given to a e.g. judicial organ to monitor the states. The United Nations General Assembly has the possibility to assess compliance in their discussions and the United Nations Security Council may consider grave breaches of human rights to be a threat against future peace and security.

2.2.2. Monism

Many scholars have presented different variations of monism; monism has its origin in the commentaries of William Blackstone. From what I have found Kelsen is considered to be the most influential representative of monism, his thoughts on the matter being given much

33 For information concerning international criminal responsibility and the International Criminal Court, see e.g. Cryer, Robert, Friman, Håkan, Robinson, Darryl & Wilmshurst, Elizabeth, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 3d revised ed., Cambridge University Press, Cambridge, 2014 (first published 2007).
34 Jägerskiöld, pp. 106-113.
36 Eek, Bring & Hjerner, pp. 432,437-438.
Hans Kelsen, an Austrian jurist and legal philosopher, argued that only positive law could be true law. Law are laws due to formal requirements. States are legal orders, not the origin of law. All law originates from one Grundnorm of the legal order. There can be only one legal system, with either national law or international law taking supremacy. Should supremacy be given to international law it will give states their competence; if the other way around states provide international law with binding force due to consent. The Grundnorm should be found in the law taking supremacy, being the Grundnorm for all law. Kelsen finally chose to give supremacy to international law, as international obligations survive revolutions. At first Kelsen considered the Grundnorm of international law to be the principle of *pacta sunt servanda* but finally he chose the Grundnorm of “States should behave in accordance with established custom”. Law shall direct behaviour and acts violating the right behaviour shall be punished. This applied to national as well as international law why there were no division between national and international law. States are obliged to abide by international law, international relations demands it. Therefore international law should be granted supremacy over national law. Kelsen based monism on Kant’s theories and formalistic logical grounds, and was also influenced by natural law.

Verdross shared some of Kelsen’s ideas in that that there is a Grundnorm and finally chose the Grundnorm of international law to be common conscience of justice. In this conclusion he was influenced by neo natural law. International law is a prerequisite for the positive law and takes precedence. National law in contradiction of international law is not void, however, if a strictly legal solution is provided then international law will take supremacy.

A German scholar, Friedrich Hegel considered the state to be sovereign and independent. International law possesses no powers of coercion, therefore it cannot take supremacy over national law. The will of the state is decisive, national and international law being part of a unified system with national legislation having precedence. John Austin agreed with Friedrich Hegel. National law was “law properly so called” whilst international law was conceived of as

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37 Kelsen is for example the only scholar of monism being mentioned in Sevastik, see Sevastik, Nyman-Metcalf, Åkermark, & Mårsäter, pp. 72-74.
38 Jägerskiöld, pp. 113-115; Shaw, pp. 122-123; Sevastik, Nyman-Metcalf, Åkermark & Mårsäter, p. 73.
“non-law”, a positive non-binding morality. International law could be made binding internally through legislation or precedent.40

Lauterpacht opposed state sovereignty and wanted an international law that had ethics and human rights as its starting point. All law should be guided by the wellbeing of people, and in this regard supremacy ought to be given to international law. A recurrence of a modern natural law was sought, enhancing the importance of justice. Law does not depend on positive law. International law does not only concern states but individuals as well.41

Krabbe considered that international law is the supreme legal order and all law is essentially the law of the international community. The will of the majority create both national and international law. Individuals are the subjects of international law. Krabbe’s theory gave less importance to differences between national and international law, although he according to Jägerskiöld had difficulties explaining the creation of positive international law.42 Duguit found the law independent of the state. The state is only the executive organ realizing the law, which results in there being no conflicts between national and international law. There can only be deficit implementation of the law by the executive organ. International law is abided by due to practical and moral reasons.43 Scelle considered that international and national law are equal, international law taking supremacy by necessity. If supremacy is not given to international law the international community cannot develop; making relations between peoples most difficult. Power may prevent application but the authority of the international law stands unaffected by possible opportunities for sanctions when violations occur. Individuals are the subjects of international law. To strengthen international law it is important to uphold the constitutionality of the law.44

Brierly disagreed with Krabbe and Duguit, finding law independent of the will of states and international law independent of supra state-will as well as of any agreement. International law can be applicable on individuals as well. Law derives its authority from the norm that laws must be abided by. Brierly argued the supremacy of international law, finding that states in practice already had accepted this. States are obliged to fulfil their international obligations and should national law truly be given supremacy this would be the end of international law. Brierly was

40 Bring, monism, pp. 18-19.
41 Shaw, p. 122; Jägerskiöld, p. 122.
42 Jägerskiöld, pp. 105-106.
43 Jägerskiöld, pp. 117-118.
44 Jägerskiöld, pp. 118-119, 124-125, 134.
influenced by neo-natural thoughts, but supremacy must not be given to international law. However, if supremacy is not given to international law it is for the state to fulfil the requirements of international law in another manner.  

Niboyet presented his views on a slightly different monism. He rejected the idea of a common area of application for international and national law. He found them simultaneously applicable, in their own spheres. He furthermore rejected the idea of later adopted national legislation making treaties inapplicable; only inter-state approaches could change such law.

There are thus several theories of monism, the common feature being the cohesive legal system of national and international law, although Niboyet appears to argue the opposite thus approaching dualism. Whether international law takes supremacy varies. All theories however agree to the necessity of the state to permit international law to take supremacy. Applied classic monism results in treaties being nationally binding upon authorities immediately after ratification and official publication. That is to say, that individuals can claim their rights provided for in ratified and published treaties in courts and authorities without the state having to legislate any further. Monism as a principle requires the solution of international legal disputes being finally made by inter-state’s organizations with the application of a common legal order. This does not however give precedence to international law but enables such an order. A state who applies modified monism gives direct legal effect to so called self-executing treaties, for example the United States of America. That is to say treaties which articles are clear and precise enough to enable courts and authorities to apply them without any further measures.

2.2.3. Dualism
Dualism originates from positivism and state sovereignty and was developed first in Germany, by scholars such as Gneist, Meier and Laband, where Meier was the leading of the three. The dualism achieving most influence however, from what I have found was the dualism presented by Triepel, and developed by Anzilotti. This section will therefore begin by presenting their theory of dualism and then move on to some other scholar’s theories.

45 Jägerskiöld, pp. 121-122, 124.
46 Jägerskiöld, pp. 133-134.
47 Bring, monism, p. 22.
48 Bring, Mahmoudi & Wrange, p. 44.
50 Bring, Mahmoudi, & Wrange, pp. 29, 43.
51 Shaw, pp. 121-122.
Heinrich Triepel, a German scholar, considered international law and national law to be separate systems which are applied on different levels. International law origins from the will of states and should only concern states; thus treaties should not contain individual rights. The common, binding, will of states is called the “Vereinbarung” and creates international law. Participation in the “Vereinbarung” creates its binding force. A once created international law is not revoked for a state should that state no longer participate in the common will. According to Jägerskiöld, Triepel’s theory does not adequately describe how the “Vereinbarung” can bind states not participating in the common will; tacit actions are deemed insufficient. International law cannot bind national authorities, although it is considered to be a higher legal order. Only the will of the state is binding on the given state’s authorities. International law should not be applied without adoption of national legislation. There can never be a conflict between national law and international law and the latter cannot revoke application of the first. International law may affect national legislation but this does not result in international law being applied. National law might also affect international law. There is a presumption for national law to be in conformity with international law if there is no national rule; such national legislation can be assumed and applied. National legislation shall be interpreted in conformity with international law, however, in a situation of conflict of laws, national law takes supremacy. Triepel’s theory has had great influence on German, French, Italian and Anglo-Saxon law.52

The Italian scholar, Dionisio Anzilotti, agreed and developed Triepel’s theory. In addition to Triepel he considered that states can be obliged to adopt nation legislation to enable internal application of international law. He considered that authorities or courts can not apply international law should there be no national legislation, although the courts should try to harmonize national and international legislation. The state is obliged to honour its international obligations and not to legislate contrary to international law. If a state does violate its international obligations, the state will be internationally responsible. Treaties cannot be called upon to protect citizens of a state from actions of that state. In addition to Triepel, Anzilotti considered international customary law to be proof of the will of states. The dualism of Triepel and Anzilotti has had great significance and supported the doctrine of state sovereignty.53 Cavaglieri agreed with the dualism presented by Triepel and Anzilotti, but the starting point being the principle of pacta sunt servanda, which was also later accepted by Anzilotti, though

52 Jägerskiöld, pp. 80-84; Bring, monism, p. 20.
53 Jägerskiöld, pp. 84-87; Bring, monism, p. 21. See also Shaw, pp. 121-122.
Anzilotti considered it to fall outside of the law.\textsuperscript{54}

A Swedish scholar, Carl Bergbohm, considered the existence of international law to be dependent on the will of states and international law was binding only between states. Given the lack of an executive organ to implement international law, national legislation is needed to care for implementation.\textsuperscript{55} According to Oppenheim, general consent created law. National and international law have different sources of law and different legal systems. National legislation or custom is needed to make international law applicable internally. International law is not part of common law. Practical application is however what really matters, not theory.\textsuperscript{56}

Fitzmaurice and Rousseau suggested a modified version of dualism which states that each system has primacy in its own area of application. If a state breaches an obligation of international law within its national system, international law will have no effect internally, whereas the state will assume international state responsibility.\textsuperscript{57}

The dualism presented by Walz was somewhat different, in that it recognizes that there can be conflicts between national and international law. National legislation can prevent the implementation of international law but it cannot change international law. National application requires implementation by internal legislation. International law can be of importance internally without binding force. Consent, either real or presumed is required to make international customary law binding.\textsuperscript{58}

Contrary to most dualist approaches, Keith considered direct application of international law to be possible. He also argued that international law applied to individuals as well as states.\textsuperscript{59}

The Swedish scholar Eek argues that there is two different legal systems concerning international law: customary international law and the international law of states. The first category requires national legislation to be implemented internally. According to Jägerskiöld Eek’s theory has problems explaining the application of international law internally where national legislation implementing the international law has not been adopted.\textsuperscript{60}

\textsuperscript{54} Jägerskiöld, p. 89.
\textsuperscript{55} Bring, monism, pp. 19-20; Jägerskiöld, pp. 78-79.
\textsuperscript{56} Jägerskiöld, pp. 96-98; Sevastik, Nyman-Metcalf, Åkermark & Mårsäter, pp. 74.
\textsuperscript{57} Shaw, pp. 123-124.
\textsuperscript{58} Jägerskiöld, pp. 90-93.
\textsuperscript{59} Jägerskiöld, p. 100.
\textsuperscript{60} Jägerskiöld, p. 101.
There are several variations of dualism, the common feature being the separation of the international and national legal systems. National law is in general considered supreme, although there are exceptions. Direct application of international law internally is as a principle impossible, although Keith argues the opposite, thus approaching monism. Applied classic dualism results in additional national legislation being needed to be implemented following signature and ratification to enable application in courts and authorities. Radical dualism results in an absolute need of transformation as international law and national law are considered two totally different legal systems with different sources and subjects. Another type of dualism rules that direct application of treaties may still be dualism. The divide between international and national law has become less important with time, although radical dualism give supremacy to national law.

2.3. Discussion concerning Swedish implementation of international law

2.3.1. History
The Swedish regulation of the relationship between international and national law has passed from constitutional monism to dualism. Following a change in the Act of Government in 1974, rules on the applicability of international law internally were abandoned.

Sweden ratified the European Convention on Human Rights in 1953. The point of departure was for long that the Swedish legislation met the requirements of the European Convention. Any potential problems could be solved by interpretation of national legislation in conformity with the European Convention. During the 1980’s, however, Sweden lost several cases in the European Court of Human Rights, of which many concerned the right to appeal administrative decisions. This eventually resulted in the adoption of the so-called law on legal assessment, enabling processes in courts concerning some administrative decisions. However, this was not sufficient since not every administrative case could be tried in court. Later on changes in the Administrative Act led to further opportunities for trial of administrative cases. Lack of oral proceedings could still be considered as a problem.

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61 Bring, Mahmoudi & Wrange, p. 46.
63 Bring, monism, pp. 24-25, 28-29.
In 1994 Sweden incorporated the European Convention and in 1995 Sweden became a member of the European Union. The European Union is seen as a legal order *sui generis*, i.e. a new legal order, not falling within the framework of any of the other existing organizations. As such, the developments in Sweden due to the membership in the European Union cannot be seen as a shift towards monism, although the EU primary law as well as secondary law are binding on Sweden; directives needing to be transformed or otherwise enforced.66

2.3.2. Fulfilment of international obligations today

2.3.2.1. Sweden as a dualist state

Although there are no explicit rules on the matter, it is generally established that Sweden applies dualism. Application of treaties require implementation by national legislation, be it transformation or incorporation. A third alternative is to interpret national legislation in a manner consistent with the treaty.67 Courts and authorities have no general obligation to apply international law. The courts can therefore not, without the approval by national legislation, try whether national legislation is in breach of international law.68 That Sweden applies dualism is firmly settled by the government official report concerning international agreements and national legislation. It states the following:

> Other states, among others Sweden and the other Nordic countries, apply another system, which assume that special internal legislative measures are needed to enable internal application of the rules in an international agreement. This means that if the undertakings in an agreement are not in conformity with the internal legal order, the internal legal order must be changed or complemented. (my translation)69

Mahmoudi agrees about Sweden being a dualist state concerning national application of treaties. Treaties therefore must be implemented by national legislation. Courts are not constitutionally obliged to consider international law. Unimplemented treaties will be presumed by authorities and courts to be fulfilled by national legislation. This presumption of congruence between

66 Bring, monism, pp. 31-32.
68 Bring, monism, pp. 28-29.
national and international law results in national law taking supremacy in a conflict with international law due to the presumption that there is no conflict. It also results in courts not applying international law directly. A court may never declare a case *non liquet*, hence there is a possibility for courts to use unimplemented international treaties to decide a case where there is no national legislation. According to Mahmoudi it is quite uncommon for the courts to use this possibility. He furthermore states that international customary law is usually applied in the same manner as unimplemented treaties, i.e. by applying a presumption of congruence between national and international law. Another possibility is to assume that national law possesses the same rules as generally established norms of international law. This possibility has been applied by courts in several cases concerning state immunity. All cases concern situations where there is no national legislation covering the situation. There are no precedents applying generally established norms of international law where there is national legislation. According to Mahmoudi this is a clearly established praxis, be it a question of obligations emanating from international customary law or a treaty. Courts may, when applying national legislation, take treaties into account as a basis for interpretation. This does not mean that they apply international law instead of national law. Lastly, there are several national laws making references to international customary law, thereby enabling its application.\(^70\)

### 2.3.2.2. Act of Government

The rules of signature and ratification of treaties are found in the Act of Government, chapter 10 paragraphs 1, 3, 6 and 7.\(^71\) The government signs treaties, whereas if the treaty is of less importance, the task may be delegated to a national authority. Approval by parliament, before ratification, is needed if a treaty concerns legislation or is otherwise of greater importance. Legislative power, based on the Act of Government, can be transferred to international organizations only to a limited extent after approval by parliament. The same procedure applies if administration or judicial powers are to be transferred. Administration or judicial powers not

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\(^70\) Mahmoudi, Said, *Rättsutlåtande: Angående förenligheten av bergmästarens beslut att meddela undersökningstillstånd enligt minerallagen med Sveriges folkrättsliga förpliktelse beträffande samernas rätt till eget kulturliv*, Stockholm, 2006-02-12, find at Mahmoudi, Said, professor in international law at Stockholm University (Legal opinion: Concerning the compatibility of the decision by the Inspector of Mining to grant an investigation permit according to the Mineral Act with Swedish international obligations regarding the right of the Sami people to a culture of their own), pp. 8-9, 11; Mahmoudi, Said, *Kompletterande rättsutlåtande: Angående förenligheten av bergmästarens beslut att meddela undersökningstillstånd enligt minerallagen med Sveriges folkrättsliga förpliktelse beträffande samernas rätt till eget kulturliv*, Stockholm, 2007-09-17, find at Mahmoudi, Said, professor in international law at Stockholm University (Additional legal opinion: Concerning the compatibility of the decision by the Inspector of Mining to grant an investigation permit according to the Mineral Act with Swedish international obligations regarding the right of the Sami people to a culture of their own), pp. 4-5. See also Bring, Ove & Mahmoudi, Said, *Sverige och folkrätten*, 2d ed. Norstedt Juridik AB, Stockholm, 2001, to which Mahmoudi makes references, at 38-44, corresponding to Bring, Mahmoudi & Wrange, pp. 42-55.

based in the Act of Government may be transferred without limitations, based on a decision by parliament or an authorization by parliament to the government to make such decisions. Paragraph 6 concerns the EU and the authority transferred to it. As regards transferring of power to the EU the only limitations lie in that matters concerning the constitution cannot be transferred and that no regulation adopted by the EU may infringe on the protection of human rights as provided for in Swedish legislation.\textsuperscript{72} Chapter 2 of the Act of Government provides basic human rights. The rights provided for in this chapter are intended to be binding on national authorities and courts while chapter 1 section 2 only provides national goals, lacking all binding authority.\textsuperscript{73}

If such powers as above stated have been transferred to an international organization, or is already bestowed upon it by international customary law, Sweden is bound by its binding decisions but not by general recommendations. This results in Sweden being obliged to pass legislation to implement such decisions if necessary. The most prominent example of course being the decisions made by the United Nations Security Council.\textsuperscript{74}

Chapter 11 paragraph 14 and chapter 12 paragraph 10 of the Act of Government provide for a possibility of setting aside regulations passed by national authorities, ordinances and legislation if such rules are in contradiction with higher rules. Chapter 11 paragraph 14 applies to courts and chapter 12 paragraph 10 to all administrative authorities. These paragraphs make it possible for courts and authorities to deny application of rules in contradiction with higher rules, be they purely national or based on treaties. This procedure is however only possible in concrete cases, it is not possible to bring a case to the court, asking whether a rule is in violation of a higher rule \textit{in abstracto}. The procedure applies to material as well as formal violations of higher rules. The procedure has furthermore been strengthened by the influence of EU law as well as the European Convention. In conclusion, a treaty implemented by national legislation may in a concrete cases invoke the application of either of these paragraphs, should a rule of lower dignity be in violation of the national legislation implementing the treaty. This procedure has however not gained any significant influence in courts or authorities.\textsuperscript{75}

\textsuperscript{72} See also Nergelius, Joakim, Svensk statsrätt, 3d revised ed., Studentlitteratur AB, Lund, 2014 (Swedish constitutional law), pp. 335-338 [cit. Nergelius].
\textsuperscript{73} Nergelius, pp. 130-131.
\textsuperscript{74} The Swedish Government Official Reports 1974:100, pp. 59, 62.
\textsuperscript{75} Nergelius, pp. 249-253, 277.
2.3.2.3. The European Convention on Human Rights

Chapter 2 paragraph 19 of the Act of Government stipulates that no legislation contrary to the requirements of the European Convention on Human Rights\(^76\) may be adopted. This rule does not apply to national legislation, adopted prior to the incorporation. In a case of conflict in such a situation, the principles of *lex posterior* or *lex specialis* will decide which law is applicable. The European Convention takes supremacy over national legislation but not over constitutional law.\(^77\) However, Nergelius does not take this for granted. In his opinion this is not clear. He considers the European Convention to have the same legal authority as ordinary national legislation but with some presumption for the supremacy of the European Convention. However, should the European Convention be applied as EU law it is clear that it will be given supremacy.\(^78\) The European Convention and EU have had a significant influence on Swedish implementation of human rights. The Supreme Court as well as the Supreme Administrative Court have applied the European Convention, the incorporated national law, to deny application of other national legislation, for example in several cases concerning double taxation and damages. It is however clear that the courts prefer to interpret national legislation in accordance with the requirements of the European Convention if possible.\(^79\) According to Nergelius judgements from the Supreme Court, prior to the incorporation of the European Convention, show an increased inclination towards interpretation of national legislation in conformity with the European Convention. The courts could however not refer to the European Convention directly until it was incorporated. The importance of it is today shown through the example of several cases, both from the Supreme Court and the Supreme Administrative Court.\(^80\) The Supreme Court and the Supreme Administrative Court have, in the opinion of Lind, however been careful in their implementation of international legal obligations, remaining loyal to the foundations of the Act of Government.\(^81\)

2.3.2.4. The European Union

The EU is a *sui generis* legal order. EU law takes supremacy over national legislation, though arguably not over constitutional law. An important Swedish precedent applying this principle is the Lassgårds Case, which gave supremacy to a general principle of EU law over clear national

\(^{76}\) Council of Europe, the European Convention on Human Rights, 1950 [cit. the European Convention].
\(^{78}\) See further Nergelius, pp. 174-180.
\(^{79}\) Lind, pp. 155-159.
\(^{80}\) Nergelius, p. 173.
\(^{81}\) Lind, pp. 162-164.
The European Court of Justice possesses supreme authority of interpreting all legal issues concerning EU law which applies to questions concerning the relationship between EU law and other international law as well. EU has the authority to enter international agreements, effectively making them binding on its institutions as well as its member states. The treaties are considered integral parts of the EU law. These treaties will be assessed, interpreted and applied in accordance with EU law. The European Court of Justice abides by international customary law if not in contradiction with EU law. The court tries to solve all conflicts between EU law and other international law by interpretation which is most often possible. If interpretation is not sufficient to solve the conflict a member state will have binding obligations in accordance with both norms simultaneously. In such a situation, according to EU law, EU law takes supremacy if not otherwise explicitly stipulated. A member state may not excuse its violations of international law by reference to EU law as EU law is considered as national law. This has however never proved a problem as EU often share international obligations with its member states.83

2.3.2.5. The relationship between national administrative law and international law

Given the close connections between the Disability Convention and Swedish administrative legislation, I will now discuss the implementation of international law into national administrative legislation. “Public authority, nationally as well as internationally, is exercised in tension between law, politics and economy.” (my translation)84

Sweden has not been quick to implement international law into its national legal order. According to Westerhäll this is mainly due to four reasons. Administrative law has been seen, and to some extent is still seen as a strictly domestic matter, within the domain of politicians. These reasons coupled with a prior lack of rule of law tradition and the Scandinavian juridical realism have led to Swedish defiance of its international obligations according to Westerhäll. According to Mahmoudi however, Sweden does not lack a rule of law tradition. Westerhäll’s statement can thus rightly be considered controversial85. Westerhäll furthermore holds that political power in administrative matters have been most significant. The Administrative Procedural Act was passed as late as 1971, before which the Code of Judicial Procedure had been applied by analogy on administrative matters. The district courts had no possibility to try administrative cases. The law on legal assessment was adopted in 1988, which provided

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82 Nergelius, pp. 326-329.
83 Sevastik, Nyman-Metcalf, Åkermark & Mårsäter, pp. 78-79.
84 Westerhäll, p. 251.
extended, but not all-encompassing, possibilities of trying administrative cases at court. A
change in the Administrative act, concerning paragraph 3 and 22a has entailed almost all-
encompassing possibilities to appeal.\textsuperscript{86} A strong influence of realism in the post-world war
period led to the opinion of law being the will of politicians. Up until today the conflict between
politicians and jurists continue, resulting in Sweden being in a need to make significant changes
in administrative law to fulfil its international obligations, even though the greater influence of
democracy has improved the situation.\textsuperscript{87}

2.3.2.6. Swedish precedents
In this section there will be a short presentation and discussion on some of the precedents
concerning internal applicability of international law. Emphasis will be on cases concerning
international law not implemented into national legislation.

In its verdict AD 72 nr 5 the Labour Court held, without any in depth analysis, that treaties, to
be applicable internally, need to be implemented through the adoption of national legislation. It
was however also held that unimplemented treaties may help with the interpretation of national
legislation. Lastly a presumption of congruence between national and international law was
stated by the court. This view was upheld by the Supreme Court in its verdict NJA 1973 s. 423
with the amendment that generally established norms of law are applicable directly internally,
as understood by the author of this essay.\textsuperscript{88} In NJA 1981 s. 1205, it was again held by the
Supreme Court that a presumption of congruence between national and international law should
be applied, given that national legislation had been adopted after the ratification of the treaty.

In NJA 1988 s. 572 the Supreme Court held that oral proceedings should be held, especially
considering the precedents from the European Court of Human Rights concerning the right to
a fair trial.\textsuperscript{89} NJA 1992 s. 363 also concerned the right to a fair trial. A passage of the reasoning
bears quoting:

\begin{quote}
What now have been said about the requirements of the European Convention should be
considered when applying earlier mentioned rules of the Code of Judicial Procedure,
provided that the claim for oral proceedings cannot be satisfied in another manner. (my
\end{quote}

\textsuperscript{86} Westerhäll, pp. 258-263. Förvaltningslag, SFS 1986:223, as amended by SFS 2006:306 (the Administrative
Act).
\textsuperscript{87} Westerhäll, pp. 263-275.
\textsuperscript{88} See also RÅ 1974:121.
\textsuperscript{89} See also NJA 1991 s. 512 concerning the right to a fair trial & NJA 1992 s. 513, see especially the added
section by justice Danelius.
In NJA 1994 s. 657 the Supreme Court held that the European Convention could be used as a ground for providing a possibility of appeal, even though national legislation did not. No appeal was however granted, due to the fact that the court found that the most suitable court would be an administrative one and not the general court.

In NJA 2007 s. 168 the Supreme Court did not try the questions of the case in accordance with the standards of the Convention on the Rights of the Child due to the fact that it had not been implemented into national legislation. The court did not apply the rules of the Human Rights Charter of the European Union, as it had yet to be binding within EU and Sweden.

In NJA 2005 s. 805 the Supreme Court denied to convict a pastor for agitation against ethnic groups applying the European Convention’s articles concerning freedom of expression and religion, stating that the convention would probably not allow a verdict finding the pastor guilty. In NJA 2005 s. 462 the Supreme Court awarded non-pecuniary damages without any other legal support than the European Convention. In NJA 2009 s. 463 it was established that this principle applies to municipalities as well as the state. In NJA 2013 s. 503 it was at last settled that it is a violation of the principle of *ne bis in idem* to convict someone to a sanction in one proceeding and to additional taxation in another proceeding. The Supreme Court as well as the Supreme Administrative Court have furthermore applied the rules of the European Convention, either directly or through interpretation of national legislation. In several other cases, where the requirements of the European Convention have been considered to be met by national legislation, the requirements of the convention have still been discussed and taken into account. However, in RÅ 2006 ref. 87, a right to secrecy could not be derived directly out of the European Convention, because the constitutional law the Ordinance of the Freedom of the Press did not provide a reference to the convention, enabling such secrecy.

As concerns the Swedish relationship between international and national law it can be concluded that Sweden applies dualism. International law has however had significant influence on internal legislation, as is shown by the gradual extension of the possibility to appeal administrative decisions. The obligations following membership in the EU has furthermore

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90 NJA 1992 s. 363.
entailed what could be described as constitutional monism concerning EU regulations and treaties and an absolute obligation to implement directives. Although the Supreme Court and the Supreme Administrative Court have been careful to apply international law, even after incorporation of the European Convention, the review shows that international obligations in unimplemented treaties have been.

2.3.3. Implementation of treaties into national law

2.3.3.1. Incorporation, transformation or interpretation in conformity with the requirements of the treaty

International customary law may be applied directly. 92 A treaty that only concerns the relationship between states does not require implementation by legislation to be applicable, while the opposite is true of treaties concerning the rights or duties of authorities or individuals.93 Implementation of treaties take the form of incorporation or transformation. Both methods may also be used simultaneously.94 A third alternative, if no legislation is deemed necessary, is to interpret national legislation in conformity with the requirements of the treaty. If legislation is deemed necessary to fulfil the requirements of the convention it should be adopted prior to ratification.95

2.3.3.2. Incorporation

A treaty may be incorporated in full or only partially, depending on how well national legislation already fulfils the requirements of the treaty. Incorporation is usually made by the adoption of a law, stating that the treaty shall be internally binding, or by a reference to the treaty. The treaty is usually presented in an annex to the law. The use of incorporation requires articles which are possible to apply without any further measures needing to be taken. That is to say that the articles are written in the “if X, then Y”-formula.96 The articles should thus be able to apply according to their wording, clearly stating on whom it imposes rights or duties and how these should be carried out.97

Given that the above mentioned prerequisites are met, the following benefits of incorporation

92 The Swedish Government Official Reports 1974:100, pp. 43-45; NJA 1942 s. 65; NJA 1946 s. 65; & Eck, Bring & Hjerner, p. 260.
95 The Swedish Government Official Reports 1974:100, pp. 85-86. See also Bring, Mahmoudi & Wrange, pp. 48-49.
should be mentioned. It is efficient, since the legislator need only produce a bill discussing the contents of the convention and a translation into Swedish. It is however given that some sort of investigation into the need of incorporation, transformation or interpretation in conformity with the requirements of the treaty must be made, if not a general norm of incorporation is implemented. In addition to efficiency, incorporation is more likely to create uniformity in interpretation and implementation of the treaty. It will also emphasize the international character of the legislation and furthermore the importance of application of international precedents in national adjudication. It can also prove to be in the interest of individuals to be able to refer to the treaty directly.

Incorporation, as well as it has benefits also has disadvantages. Authentic texts in foreign languages may be used in legislation, potentially making it difficult for authorities, courts and individuals to understand and apply the law. Furthermore, treaties are the product of negotiations and compromise, hence articles may be unclear, both in scope and linguistic meaning. In addition, a direct implementation of a legal concept by a national court, in accordance with its national understanding of the concept, may create an outcome in violation of the proper meaning of the treaty.

Incorporation results in the authentic text of the treaty, be it in Swedish or any other language, being the authoritative, and thus the one which should be applied. No changes or amendments are made in the treaty when incorporating it, thus making incorporation the purest form of implementation. If a treaty has more than one authentic text, all texts are equally authoritative if not otherwise provided in the treaty. Swedish constitutional law has no direct objections against foreign language in legislation, but it may very well prove unsuitable. If a treaty is written in a foreign language, for its incorporation an official translation should be provided together with the authentic text. It is likely that the translation will be used instead of the authentic text, but if they are in conflict with each other the authentic text takes supremacy. It is therefore vital that the translation be correct and in accordance with the purpose of the treaty to assure compliance with the treaty. If incorporation is to be used headings should be short and informative. It should furthermore be clear which articles that have been incorporated, what they encompass and that they are binding national law. If a multilateral treaty, it should be

101 The Swedish Government Official Reports 1974:100, pp. 72-77; Bring, Mahmoudi & Wrange, p. 48
presented in its English and French authentic texts in an annex to the law.\textsuperscript{102}

An example of incorporation of treaties is the law 1976:661 concerning immunity and privileges in certain cases, incorporating the Convention concerning diplomatic relations. The most significant example is however of course the law 1994:1219 concerning the European Convention on Human Rights.

\textbf{2.3.3.3. Transformation}

Transformation is the rewriting of a treaty, in a manner consistent with the national method of writing law. It can be done either by changes of relevant current national legislation, the adoption of a new law, or by strict translation of the treaty.\textsuperscript{103} Transformation makes national application easier. Legislation can and will be adjusted to suit the national framework, while the treaty and relevant international precedents should still be considered in application and adjudication, however only the transformed national legislation being binding internally.\textsuperscript{104} In principle national methods of interpretation should be used when applying the legislation, that is to say fundamental, restrictive, extensive, analogy, \textit{é contrario} and objective and subjective teleological. However, as already mentioned, it should be remembered and duly considered that the purpose of the law is to fulfil the requirements of a treaty. When in doubt about how to best interpret the national law, the treaty should be used as well as national and international precedents.\textsuperscript{105} In a conflict between the national legislation and the treaty the national legislation will be applied, although the treaty may still serve as a basis for interpretation.\textsuperscript{106}

The use of transformation requires no prerequisites and save for this, its most significant benefit is the simplicity of national application. Regular national legal methods are used for the rewriting and the text can be written in the same style as other national legislation. The transformation process does often involve the Swedish participants from the negotiations, should Sweden has taken part in them. Interpretation is easier and the legislator has the possibility of clarifying statements or definitions in either the legislation itself or in preparatory works. However, transformation can be very time consuming for the legislator, which must thoroughly review its legislation and find the contradictions and gaps that need to be rectified. As articles can be unclear in their wording it may be difficult to transform them without

\begin{itemize}
\item\textsuperscript{102} The Swedish Government Official Reports 1974:100, pp. 104-107.
\item\textsuperscript{103} The Swedish Government Official Reports 1974:100, pp. 45-46, 48-49.
\item\textsuperscript{104} The Swedish Government Official Reports 1974:100, pp. 63-69; Bring, Mahmoudi & Wrange, p. 48.
\item\textsuperscript{105} The Swedish Government Official Reports 1974:100, pp. 79-80.
\item\textsuperscript{106} The Swedish Government Official Reports 1974:100, pp. 75-77.
\end{itemize}
violating their true purpose. The content of the law may be in contravention of the treaty. There is also a risk of a lack of uniformity in application of the treaty in the state parties. Lastly, it may prove difficult for the legislator to anticipate all possible situations of application of the treaty which can negatively affect the implementation of the treaty.\textsuperscript{107}

If transformation is to be used, just as concerning incorporation, headings should be short and informative. It should furthermore be clear which articles that have been transformed and what they encompass. When using transformation it is also essential that the legislator acknowledges the origin of the legislation and makes a reference to the relevant treaty in the legislation.\textsuperscript{108}

Examples of national legislation passed through transformation is the law 1964:169 concerning punishment for the crime of genocide, transforming the obligations under the United Nations Convention on Prevention and Punishment of the Crime of Genocide. The law 1996:95 concerning certain international sanctions should also be mentioned, transforming the obligations under the United Nations Security Council resolution in the same subject. A last example is the law 2002:329 concerning cooperation with the International Criminal Court, transforming the obligations under the Rome Statute of the International Criminal Court.

2.3.3.4. Interpretation of national legislation in conformity with the requirements of the treaty

Before the ratification of a treaty, the government should present a bill with an investigation of whether current national legislation fulfils the requirements of the treaty. If this is found to be the case, then ratification may occur as soon as the parliament has approved, should there be a need for such approval.\textsuperscript{109} Authorities may also on their own motion interpret national legislation in accordance with international obligations. Interpretation of national legislation in conformity with the requirements of the treaty means that a conflict is only seemingly at hand and that national legislation conforms to international law. An example of this being differences in terminology. Such differences should therefore be ignored and due consideration be given to the treaty when applying national legislation.\textsuperscript{110} Interpretation in a manner consistent with the requirements of the treaty is normally considered impossible if national legislation clearly is in contradiction with the treaty. However, according to Eek, Bring and Hjerner, it should be possible to give supremacy to a treaty in such a case, if the treaty concerns human rights. Human

\textsuperscript{110} Zetterström, Stefan, \textit{Konstitutionell rätt}, Liber AB, Malmö, 2012 (Constitutional law), p. 112; Bring, Mahmoudi & Wrange, p. 48.
rights treaties should be considered, even though not implemented by national legislation, when authorities make decisions binding on individuals.\textsuperscript{111}

The Disability Convention itself is an example of this method of implementation.

\textbf{2.3.4. Which method of implementation is preferable?}

If the treaty contains articles which are possible to apply directly, the government bill considers the advantages of incorporation outweighing the disadvantages. It states, however, that many treaties do not meet the prerequisites of incorporation, and therefore dualism should still be the general rule. Constitutional monism is not appropriate. The method for implementation should be chosen based on the following criteria given that the prerequisites are met:

1. Sweden should fulfil its international obligations
2. Uniformity in interpretation and application in all state parties to the treaty
3. Interpretation and application should be correct and in accordance with the purpose of the treaty
4. The method should be as efficient as possible
5. Uniformity, clarity and a systematic context should be achieved within the current area of legislation

The bill considers these goals to be impossible to achieve using only one of the methods. This is however not seen as a significant problem as both methods often provide the same result. If using incorporation, the official translation will still be used as long as no contradiction with the authentic text arises. If using transformation, likewise, the authentic text will be considered if contradictions arises. The bill assumes that it is unlikely that any translation will be of such poor standard that an application of it will result in clear violations of the treaty. The bill does furthermore reckons that the production of preparatory works, containing guidance on interpretation and application, may overcome the disadvantages of incorporation.\textsuperscript{112} As a general rule it is held that national legislation should be in Swedish and therefore the method of transformation through direct translation should be used. In application consideration should be given to the authentic text and international precedents. Such a method will provide good preconditions for correct and uniform implementation of the treaty, making it clear that the legislation is based on a treaty. Should current national legislation already meet most of the requirements of the treaty, classic transformation may be better, transforming only what do not

\textsuperscript{111} Eek, Bring & Hjerner, p. 261.
have counterparts in national legislation. This also applies if only some of the articles meet the prerequisites of incorporation. If the treaty as it stands is difficult to apply and has great internal importance or is deemed to be difficult to translate it could also be better to use classic transformation.113

2.4. Appraisal

A monist approach facilitates internal application of international law through the theory of a cohesive legal system, especially if international law is given supremacy. Dualism on the other hand in principle requires the passing of national legislation in order to enable internal application of international law, whether international law is considered supreme or not.

Sweden applies a version of dualism, although using the possibility to interpret national law in accordance with international obligations. Such interpretation has been applied concerning the European Convention both prior to and after its incorporation. Sweden has however adopted several new national laws in order to fulfil its obligations instead of applying the European Convention directly, although the European Convention still has a strong standing internally, obliging authorities and courts to consider it as well as it is being invoked by individuals in court. Swedish respect for the rule of law has furthermore been forced to improve as a consequence of the European Convention. The EU-membership has obliged Sweden to approach monism as concerns EU law.

Sweden also applies the method of transformation, which facilitates internal application but risks diluting the origin of the legislation in international law as well as its purpose through the use of national methods of interpretation. Incorporation on the other hand facilitates international uniformity and proper application but may be more difficult for authorities and courts.

3. The Disability convention and its Optional protocol

On December 13th 2006 the United Nations General Assembly unanimously adopted the Disability convention as well as the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities. Both the Disability convention and the Optional protocol came into force on May 3rd 2008. The Disability convention contains civil and political as well as economic, social and cultural rights, thus fully covering the human rights of persons with disabilities. The Optional protocol contains procedures for review of individual complaints and gross or systematic violations of human rights. This chapter will explore the convention and the rights enshrined in it, how these should be interpreted and applied and what can reasonably be required of states parties.

3.1. General framework of the Disability convention: purpose, interpretation and general obligations

The convention applies the social model of disability. A person who has a functional impairment may or may not be disabled, depending on how society and social life are organized. A disability is not considered inherent in the human body. If society is organized in a way that enables full participation and independence then there is no disability. Persons with disabilities include but are not restricted to those who suffers from “long-term physical, mental, intellectual or sensory impairments”. National legislation containing a broader definition fall under the definition contained in the convention.

The convention shall promote, protect and ensure the human rights of persons with disabilities. Human dignity and equality are pillar stones in this effort as well as full citizenship. That is to say the acknowledgement of disabled persons as full and equal members of society, with equal rights and obligations. The Disability convention is supposed to achieve this.

All human rights are universal, indivisible, interdependent and interrelated, this being

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115 Article 1 the Disability convention.
116 Preamble (e), article 1 the Disability convention; United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, pp. 2-3.
117 Preamble letter (k), (y), article 1 the Disability convention.
emphasized in the preamble. The convention should thus be read, interpreted and applied in the context of all the articles, especially taking into account the general principles as found in article 3:

The principles of the present Convention shall be:

- Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of persons with disabilities apart of human diversity and humanity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women;
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

These general principles shall thus be used to properly interpret and implement the convention. States parties must internalise these principles and the values of the Disability convention and make them part of the legal framework in order to render them efficient. The rights perspective must permeate every measure taken and every legislation passed. The Disability convention is not about social policy or charity, it is about human rights. This results in that every article containing substantive rights should be interpreted so as to ensure autonomy, independence, equality, participation and accessibility of persons with disabilities.

According to Megrét article 3(c), concerning the general principle of participation, almost creates an independent right to participation in society. Participation permeates the entire Disability convention and concerns all aspects of life and is included in many of the rights. Furthermore, the general principle of autonomy is an innovation. This means the creation or extension of rights, or reformulation of them in a new context. Autonomy is the power to choose independently and state parties are obliged to provide it to the fullest extent possible, and to

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119 Preamble (c) the Disability convention.
that end construe society appropriately. It is however not explicitly an independent human right provided for in the convention but one of the most prioritized goals that motivated the adoption of the convention. According to Mégret it is unclear whether autonomy is a right, a reformulation of an already existing right or something new. It could perhaps be considered a “hybrid right”, applicable only to persons with disabilities. This is however doubtful as everyone would like to have autonomy.122

Article 2 provides definitions of certain key terms to the Disability convention, including “Discrimination on the basis of disability” and “Reasonable accommodation”. Discrimination on the basis of disability shall be understood as:

(...) any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation

This definition of discrimination is extensive, encompassing all possible situations of discrimination in the public sphere as well as the civil sphere. According to Mégret equality and non-discrimination are the twin-pillars of the Disability convention, although the convention in itself is not solely an anti-discrimination treaty. 123 The definition of discrimination in the convention is furthermore an example of material equality as opposed to formal equality. What is required is equality of result. Persons in equal circumstances are to be treated equally whereas persons in different circumstances are to be treated differently. This may require employing special measures which shall be taken as long as they are reasonable. These measures are in article 2 described as reasonable accommodation:

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms

123 Mégret, p. 501.
Reasonable accommodation is a far reaching concept. Necessary and appropriate measures are to be taken to ensure human rights as long as they are not disproportionate or imposes an undue burden. The key requisites here are being necessary, appropriate, disproportionate and an undue burden. How are these to be interpreted and applied? Reasonable accommodation may require for example changes to working conditions, adaptation of schools, hospitals or public transport. To decide whether such measures are reasonable or not, consideration can be given to cost, practicability, financial resources, subsidies and other kinds of financial support, and possible negative consequences. These requisites are quite similar to those used in a proportionality assessment and it begs the question whether reasonable accommodation should be applied in a similar way to that of an assessment of proportionality. Although the meaning of the two seem to be quite near each other, in my opinion, the requirement that a necessary and appropriate measure needs to be disproportionate or inflict an undue burden seems to be a higher threshold for denial than that applied in an proportionality assessment; in which the alternatives are simply weighed. However, according to Kallehauge, a proportionality assessment is what is required. He emphasizes however, that when it comes to accommodation required to be taken by public authorities or large private companies, the margin for denial is very small if at all existent. For others it will be much easier to prove that accommodation will incur a disproportionate or undue burden. According to Kallehauge, reasonable accommodation is probably the most important tool contained in the Disability convention.

Furthermore, when interpreting the articles the methods of interpretation as established by the Vienna Convention on the Laws of Treaties should be duly considered and applied. The general rule of interpretation, found in article 31 of the Vienna Convention states the following:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise,

124 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, pp. 60-63.
in addition to the text, including its preamble and annexes: (…)

3. (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Taking paragraph 1 in consideration this means that the articles shall firstly be interpreted in their ordinary meaning, that is to say a textual or grammatical method of interpretation. However, the textual analysis shall be made within the context of the convention and the articles, taking into account the object and purpose of the treaty as well. A method of interpretation that takes object and purpose into account is called subjective, or subjective teleological. In the case of the Disability convention this results in all interpretations giving due consideration to the promotion, protection and fulfilment of all human rights on an equal basis. Paragraph 2 establishes that the preamble of the convention shall be the starting point for an analysis of the context in which the convention was adopted. Article 3 of the Disability convention, as stated above, contains general principles for the interpretation of the convention. These can be considered part of the object and purpose of the Disability convention as well as providing a context for its interpretation. Paragraph 4 of the Vienna Convention establishes that special meanings to specific terms are to be respected; resulting in the definitions provided for in article 2 and 4 of the Disability convention being applied. According to article 32 of the Vienna convention the preparatory works and circumstances of the conclusion of the treaty may be used as a supplementary means of interpretation, given that article 31 does not suffice. According to article 33, a treaty that has several authentic texts, all texts shall as a general rule be equally applicable, if not provided otherwise.

Article 4 of the Disability convention contains general obligations that are bestowed upon state parties. State parties are obliged to ensure all human rights in the convention to all persons with disabilities by respecting, protecting and fulfilling them. The obligation to respect is a negative obligation, requiring states not to violate the rights of persons with disabilities. State parties are furthermore obliged to protect, which constitutes a positive obligation to ensure that no one else on their territory, as individuals or private companies, violates the convention. Lastly state parties have the obligation to fulfil. This is the most far-reaching obligation, creating extensive positive obligations. They shall take legislative and other measures to fulfil the rights of persons with disabilities including abolish discrimination in all levels and spheres of society.127 State

127 United Nations Department of Economic and Social Affairs, Office of the United Nations High
parties are obliged to consult with disability organizations when implementing the convention. The convention is a minimum treaty and therefore subsidiary to national legislation or other treaties providing disabled persons with better rights and opportunities.\textsuperscript{128} State parties also have the obligation to implement special measures where necessary to facilitate equal enjoyment of all human rights. Such measures may be temporary, as employment quotas, or permanent, as special transportation services. There is no explicit right to such measures in the Disability convention, but they are implicit in that they can be necessary to fulfil state responsibilities.\textsuperscript{129}

The Disability convention itself quite thoroughly describes how rights are to be ensured and implemented. According to Megrét this almost creates a secondary right to the implementation as described by the convention and not only to the specific rights, a \textit{sui generis} entitlement. Kallehauge agrees with this, but appears to take it one step further. He argues that articles that contain specific measures to be taken in order to comply, require state parties to implement these specific measures. Megrét further argues that if state parties choose a different path for implementation and an individual would like to have the implementation as described in the convention, a heavy burden of proof rests with the state party to prove non-violation.\textsuperscript{130} As stated by Megrét:

At times, the Convention goes out of its way to describe what exactly is required of state parties. Generically one can classify the measures to be adopted by states in the following manner.

1. To repeal or adopt certain laws
2. To mainstream concern for persons with disabilities
3. To launch public awareness campaigns
4. To build or adapt certain infrastructures
5. To train specialized personnel
6. To employ certain individuals
7. To provide certain forms of services or assistance
8. To consult with the representative organizations of persons with disabilities\textsuperscript{131}

\textsuperscript{128} Article 4(3), 4(4) the Disability convention.
\textsuperscript{129} United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, pp. 66-67.
\textsuperscript{130} Megrét, pp. 506-507; Kallehauge, p. 205.
\textsuperscript{131} Megrét, p. 506.
However, according to Quinn the obligations under the Disability convention are “open-textured”, creating a certain margin of appreciation. This enables local solutions best fitted to local circumstances.\textsuperscript{132}

Article 4(2) concerns the concept of progressive realization.

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.\textsuperscript{133}

The term is unspecific, which according to Kallehauge, it has to be in order to enable ratification. The realization can be considered progressive as long as it continues. As it is a requirement of progressive realization this implies higher demands being made on developed countries with substantial financial resources than on less developed countries lacking such resources. What can be required by each country will depend on national debt, national economy and general price index.\textsuperscript{134} Arguably, the “process of change is almost as important as the change themselves”.\textsuperscript{135} According to the United Nations in From Exclusion to Equality the requirements are higher. Progressive realization is considered the use of the greatest amount of available resources. It is furthermore held that the concept of progressive realization first and foremost gives developing countries some flexibility in implementation.\textsuperscript{136} What both authors are in agreement of is at least that higher demands are placed on developed countries, which in fact lies in the very concept of progressive realization.

3.2. Substantial rights

Human rights are only of true practical use if their application and fulfilment can be legally demanded by those the human rights are to protect. After ratification the Disability convention is internationally legally binding on states and violations results in state responsibility and might

\textsuperscript{132} Quinn, pp. 220-221.
\textsuperscript{133} Article 4(2) the Disability convention.
\textsuperscript{135} Quinn, pp. 225-226.
\textsuperscript{136} United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, p. 19.
also incur international sanctions. Whether they are also binding internally without prior national legislation, as discussed in chapter 2, depends on whether the state in question applies monism or dualism. Whatever may be the case, it is arguably of crucial importance that individuals may legally demand their rights.\textsuperscript{137} As stated in chapter 2, for Swedish circumstances this requires implementation through national legislation. According to Kallehauge no state can honestly claim that they fulfil the requirements under the convention with no legislative measures needing to be taken. Legislative measures should furthermore contain transitional regulations, providing the legislation implementing the Disability convention with supremacy.\textsuperscript{138} Nieminen furthermore finds it troublesome that almost all articles containing substantial rights uses terms such as “recognize” or “ensure” instead of “right to”. These terms rather imply state obligations than rights bestowed on individual persons.\textsuperscript{139}

Economic, social and cultural rights have in the past been valued as less important than civil and political rights.\textsuperscript{140} Many of the human rights most important to ensure autonomy and equality to disabled persons are social rights. To mention a few, the right to the highest attainable standard of health, habilitation and rehabilitation and inclusion in the community. As such, and as disability issues for long have been considered a matter of social policy or charity one of the most important features of the Disability convention is making what has been social policy into human rights law. However, one could argue that as the convention requires the implementation of social rights only through progressive realization, social rights are still treated as less important than civil rights.

The classification of human rights into civil and political and economic, social and cultural rights has thus concerning the Disability convention been questioned. According to article 4(2) economic, social and cultural rights are those which are subject to progressive realization. However, it has been argued that traditional civil and political rights, when it comes to enabling disabled persons to fully enjoy them, may require positive measures to be taken. The point of departure where civil and political rights are free of charge is no longer accurate. Flovénz argues that the articles providing substantial rights in the Disability convention do not present themselves clearly categorized in civil and political rights and economic, social and cultural

\textsuperscript{137} Kallehauge, p. 201.
\textsuperscript{138} Kallehauge, pp. 202, 204-205.
\textsuperscript{139} Nieminen, pp. 386-387.
\textsuperscript{140} Nieminen, p. 378.
rights. According to Flovénz it is quite remarkable that progressive realization has been adopted, given the universality, indivisibility and interdependence of all human rights. Progressive realization results in the continuous elevation of civil and political rights above economic, social and cultural rights and compromises the effective implementation of the latter. Non-discrimination is not subject to progressive realization and Flovénz questions whether true implementation of non-discrimination requires full and immediate implementation of social rights as well, thus enabling immediate implementation of all rights and thereby erasing progressive realization.141

Traditionally social rights present no connection between legal facts and legal consequence but simply a connection between a goal and the measures that are supposed to fulfil the goal. Social rights impose positive obligations, are vague in their formulations, and require financial resources, while civil rights are considered to only impose negative responsibilities, to be precise and clear in formulations and to be free of charge. Koch however questions this traditional division, arguing that all rights require positive measures. It is instead only a question of how extensive such measures need to be. State parties have the overreaching responsibility to implement the Disability convention. Implementation of all civil and political rights for persons with disabilities is hardly free of charge. Koch further argues that all rights in the Disability convention are partly social rights, although the rights deemed to be civil and political are not subject to progressive realization. This in turn shows the deficiencies in classification of rights into civil and social for the purpose of the Disability convention.142 Kallehauge agrees with Koch concerning difficulties in distinguishing civil and social rights, stating that some articles contain both social and civil rights, for example reasonable accommodation.143

Traditional civil and social rights are mixed in the Disability convention, further complicating the classification. However, as discussed above such classification might not prove to be neither necessary nor helpful. Given these considerations this essay will not make use of the traditional classification. Instead the rights will be divided into themes, enabling a discussion about substantial content without falling back on historical preconditions, whose relevance can be

143 Kallehauge, pp. 204-205.
seriously questioned when analysing the Disability convention.

Before embarking on a discussion concerning the material content of the substantial rights something should be said about the character of rights contained in the Disability convention. It was meant by State parties, written in the treaty itself and held by some scholars that the Disability convention creates no new rights. The articles merely clarify, enhance and adapt human rights already in existence, enabling full protection, and should thus be seen as a complement to other human rights treaties. The preamble reaffirms all present international human rights treaties and thus further emphasizes this. However, according to several other scholars, the convention arguably creates new rights. Megrét argues that the Disability convention reformulates, enhances and expands existing human rights as presented in the convention. He further considers that this results in the creation of new human rights, adapted to the needs of disabled persons.

In the following section the different categories of rights as well as the individual rights will be presented and whether new rights have been created or not will be discussed.

3.2.1. Equality and non-discrimination

The right of equality is of crucial importance to enable disabled persons to fully enjoy all of their human rights. Arguably, as stated above, every substantial right in the Disability convention contains elements triggering the right to equality. Why? Because the convention was adopted in order to rectify the lesser enjoyment of human rights on the part of disabled persons than of the majority of the world’s population. In that respect, the convention is an anti-discrimination treaty. The Disability convention was however not adopted to elevate the living conditions of disabled persons above those of non-disabled persons. The question is thus this: What is required to enable persons with disabilities to enjoy their human rights on an equal basis with others? When answering this question the Disability convention does not formally provide for a comparison between disabled and non-disabled persons, although such comparisons may be of significant use when deciding on inequality.

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145 Megrét, p. 498.

146 Arnardóttir, pp. 64-66.
As described previously, the definition of discrimination is extensive. The traditional model of implementing human rights is itself discriminatory when it comes to categories of persons who depart from the majority. The traditional model requires all human rights to be implemented in the same way to all, i.e. formal equality which ignores the different needs of different categories and needs for special measures. Historically this has been most problematic for persons with disabilities.147 The Disability convention on the other hand requires implementation resulting in material equality, i.e. equality of result, which enables the provision of human rights in different ways depending on individual needs.

The general right to equality and non-discrimination is found in article 5. Paragraph 1 provides the right to equality before and under the law. Paragraph 2 prohibits all discrimination and entitles everybody to full protection from discrimination. Paragraph 3 obliges states parties to take positive measures to ensure reasonable accommodation. Lastly paragraph 4 enables states parties to implement positive special measures to combat discrimination. The right to non-discrimination covers direct as well as indirect discrimination and furthermore denial of reasonable accommodation. The right to non-discrimination is justiciable, including the right to reasonable accommodation. Although paragraph 4 allows affirmative action programmes it does probably not provide for a justiciable right to these programmes.148 Nieminen argues that the concept of reasonable accommodation is new, and especially the fact that it covers all aspects of social life.149 Non-discrimination is a civil right and thus subject to immediate implementation, including the right to reasonable accommodation. However, one may wonder whether what can be considered reasonable accommodation is subject to progressive realization. The assessment whether the required measure imposes a disproportionate or undue burden is made with respect to among other factors, the financial resources of the state. This means first that what is reasonable accommodation will vary most considerably from state to state. It also means that as a country develops, general living conditions improve and financial resources groove the understanding of what is reasonable will expand.

According to Arnardóttir the model of equality found in the Disability convention is one of multidimensional disadvantage equality. Non-discrimination and equality are the negative and positive obligations of the same human right. Non-discrimination imposes negative obligation

147 Megrét, p. 505.
148 Arnardóttir, pp. 60-61.
149 Nieminen, p. 386.
on state parties, that is to say the obligation not to discriminate and protect disabled persons from discrimination by others. Equality, on the other hand imposes on state parties the obligation to fulfil, to create material conditions enabling full and equal enjoyment of all human rights. According to Arnardóttir, the principle of equality is the single most important principle and right provided for in the convention. As stated above, the principle shall permeate every interpretation of the convention. Furthermore, the principle of equality requires the adaptation of already existing human rights to the needs of disabled persons.\(^{150}\) It is acknowledged by Koch that non-discrimination, although considered a civil right, imposes costs on state parties.\(^{151}\) The right to non-discrimination applies equally, be it a question of fulfilment of civil or social rights.\(^{152}\)

The model of multidimensional disadvantage equality focuses on structural inequality and uses the social model of disability.\(^ {153}\) The Disability convention’s application of the social model of disability in turn provides for the model of multidimensional disadvantage equality, whereas a pure application of reasonable accommodation could be seen as entailing substantive difference equality as the focus can be seen as being on differences. The application of reasonable accommodation is not decisive, rather it is the context that is. In this case, the social context of disability which entails multidimensional disadvantage equality. It should no longer be a question of compensating for individual impairments. Instead it is a question of compensating for deficiencies in the manner which society is constructed; physically, communicative as well as attitudinal. Equality needs to be adjusted to these changes to work for persons with disabilities. This concept of equality should furthermore be main streamed into all levels of society.\(^ {154}\)

The Disability convention further emphasizes the rights of women and children with disabilities. In article 6(1) the convention acknowledges the multiple discrimination faced by women and girls with disabilities. States parties are obliged to take measures to annihilate this multiple discrimination. They are furthermore obliged to take all appropriate measures needed to ensure to all women with disabilities the full enjoyment of the rights contained in the convention. In this respect state parties shall empower women and facilitate their full development and advancement. Women with disabilities are to a higher degree subject to sterilization, denial of

\(^{150}\) Arnardóttir, pp. 41-46.

\(^{151}\) Koch, p. 72.

\(^{152}\) Flóvenz, pp. 270-271.

\(^{153}\) Arnardóttir, pp. 54, 57-59.

\(^{154}\) Arnardóttir, pp. 63-66.
control of reproduction as well as the capability of consenting to sex. In order to fulfil the rights contained in article 6 it is therefore of special importance that the right to legal capacity found in article 12 is ensured.\textsuperscript{155}

Article 7 highlights the needs of children, reaffirming the obligation to consider the best interests of the child. Disabled children are to be ensured all human rights on an equal basis with other children. States parties are furthermore required to ensure that children with disabilities have the opportunity to make their voices heard in all matters affecting them, recognizing their opinions. To be able to access this right children with disabilities are entitled to disability and age-appropriate assistance. Disabled children are to be ensured respect for their will and preferences on equal terms with non-disabled children.\textsuperscript{156}

The promotion of equality and non-discrimination arguably requires more than legislation prohibiting discrimination. Given there is legislation covering discrimination in all areas true material equality require the combating of prejudices among the majority. To this end article 8 imposes on state parties the obligation to raise awareness in all levels of society, including in families, about persons with disabilities. Such awareness-raising shall foster respect for the human rights of disabled persons as well as their inherent dignity as human beings. Prejudices shall be combated and awareness raised of the capabilities and contributions of disabled persons. In short, state parties have obligations to educate the population, to enlighten traditional notions of disability and what disabilities entail. Such education shall start early, facilitating equality among all children and normalisation of disabled children among their peers.

Equality and non-discrimination is thus both a right and a general principle of the Disability convention. It is classified as a civil right resulting in immediate application. It applies to all imaginable situations in which discrimination may occur and obliges state parties to provide reasonable accommodation to avoid discrimination. The needs of women and children are furthermore emphasized. Non-discrimination is thus to be considered in every situation relating to provision of the human rights provided for in the convention. When applying the right to equality and non-discrimination the other general principles shall also be considered. That is to say, that non-discrimination and equality shall be achieved and applied in a manner that respects the autonomy, independence and dignity of persons with disabilities and which ensures full and

\textsuperscript{155} General comment No. 1 (2014), Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, May 19\textsuperscript{th} 2014, CRPD/C/GC/1, § 35 [cit. General comment No. 1].

\textsuperscript{156} General comment No. 1, § 36.
effective participation and inclusion in society as well as accessibility. The same applies for the provision of reasonable accommodation, which again, is classified as a civil right. As stated above, what will amount to reasonable accommodation in any given moment will change as a country develops. Enhancing the work for equality and non-discrimination it is important that state parties promotes understanding, acceptance and inclusion of persons with disabilities.

3.2.2. Accessibility
In this section the right to accessibility, to freedom of expression and opinion, and access to information as well as participation in cultural and recreational life will be discussed.

The right to accessibility is of fundamental importance when it comes to enable disabled persons to fully enjoy their human rights. The Disability convention provides for the right of accessibility to the physical environment as well as to communication. Accessibility to the physical environment is not limited to adaptations to accommodate those with mobility impairments, but applies to those with visual impairments, those who are hard of hearing and those who due to other reasons need adaptations to be able to access information. The right to accessibility furthermore encompasses accessibility to transportation, public facilities and other services or facilities open to the public, such as banking, judicial authorities and recreational places. Far-reaching responsibilities are imposed on states parties. They shall inter alia make sure that private entrepreneurs take into account disability related needs and if necessary provide personal support to enable access to public buildings etc.157 Violations of the right to accessibility will result in violations of other rights as well.158

In accordance with article 47 of the Committees Rules of Procedure it has adopted a general comment on accessibility.159 According to this comment accessibility is a precondition for the enjoyment of all other human rights. Accessibility should be considered in its context, that is to say physical access, access to transportation, access to information and communication. Every place open to the public and every service or goods provided to the public shall be accessible, be it a private or public entity. Accessibility shall be considered from a disability perspective. Existing obstacles shall be removed continuously, following adopted plans for accessibility.

157 See article 9 the Disability convention; General comment No. 2 (2014), Article 9: Accessibility, Committee on the Rights of Persons with Disabilities, May 22d 2014, UN doc CRPD/C/GC/2, § 17 [cit. General comment No. 2].
158 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, p. 17.
Failure to comply should be sanctioned. Universal design and accessible construction strategies from the outset shall create an environment free from obstacles. Natural as well as historical places should be made accessible. States parties shall, in cooperation with other state parties, adopt minimum national standards for accessibility, in order to facilitate liberty of movement and nationality. State parties furthermore have an obligation to educate stakeholders in all accessibility areas, including architects, designers and those who actually build houses and produce products. New buildings, products and services must be accessible from the start. State parties have far-reaching responsibilities when it comes to enable access to public places including by providing live assistance, live intermediaries, information in Braille and easy to read-formats. The same kind of accommodation is to be provided in order to facilitate access to information and freedom of expression, including mandatory accessibility standards applicable to the Internet. Accessibility is essential in order to facilitate independence and inclusion in society. Denial of the right to accessibility should therefore be considered discrimination. The obligation to ensure accessibility exists without individual demands, that is to say, accessibility should be achieved with or without individual requests for accessibility. Accessibility is not subject to reasonable accommodation but is unconditional. Any argument made that it is too costly or imposes a disproportionate or undue burden is therefore irrelevant. The argument of cost is only applicable on already existing building etc. since they are to be made accessible gradually. As stated above, accessibility standards should be adopted. However, rare disabilities may need further adjustments to enable access, which if so can be required as reasonable accommodation.\footnote{General comment No. 2, §§ 13-26.}

According to the general comment on accessibility state parties are obliged to make sure that denial of access is considered discrimination. For example, restriction on dogs inside a building is discrimination if a disabled person is in need of his or her guide dog to be able to access the building. States parties should adopt minimum standards of accessibility, both concerning physical accessibility as well as communicative accessibility. Lack of laws regulating accessibility and denial of accessibility as discrimination should be rectified. At the very least denial of access should be considered discrimination provided that the building was constructed after the adoption of such legislation or the service provided thereafter. Denial of access through reasonable accommodation should furthermore be considered discrimination. States parties should also adopt action plans with clear deadlines for achieving accessibility and establish working monitoring mechanisms. State parties are also under an obligation to make sure that
public procurement requires goods and services to be accessible.\textsuperscript{161}

In communication no. 1/2010 the Committee considered an individual complaint concerning the right to accessibility, legal capacity and non-discrimination. The authors were Hungarian nationals with visual impairments. They argued that their rights had been violated due to inaccessible ATMs, which they could not use without assistance. The states party acknowledged the problem but considered the promise of the banking organization that the ATMs were to be made accessible were sufficient. The Committee found a violation of the right to accessibility. In coming to this conclusion the Committee acknowledged that the banks themselves had not adapted the ATMs and that the states party had not forced them to do so. The lack of enforcement of adaptation was a violation of article 9.\textsuperscript{162}

Freedom of expression and opinion is a traditional civil right contained in article 21 of the Disability convention. To enable all disabled persons to enjoy this right however there is need for positive action. Public documents will for example need to be translated into Braille. Article 21 refers to article 2, containing definitions of the term language and communication. Communication includes all imaginable methods of communication, including Braille, alternative communication, live interpretation and information technology. Language means both spoken and non-spoken languages, including sign language. States parties have obligations to facilitate communication as required under article 21 in combination with article 2 and they are to do this without imposing additional costs on the users of their services. This is the second part of the right contained in article 21, namely the right to access to information. As all rights are to be interpreted using the general principles, encompassing non-discrimination, full and effective participation and inclusion in society as well as accessibility, taking into consideration the material model of equality provided for, the obligations are most extensive. The possibility of taking part of information as well as imparting it is of crucial importance in order to fully take part in society and to achieve de facto equality. As such, much can be required of states parties to facilitate these rights. The right to freedom of expression and opinion, and access to information is not free of charge as provided for in the Disability convention. Information is to be provided in accessible formats to disabled persons in need of such adaptations. According to Koch the considerable costs imposed by these rights is an example of the difficulties that lay in

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{161} General comment No. 2, §§ 27-33.
\item\textsuperscript{162} Communication No. 1/2010, Views adopted by the Committee at its 9th session, 15 to 19 April 2013, Szilvia Nyusti, Peter Takács and Tamás Fazekas v Hungary, Committee on the Rights of Persons with Disabilities, April 23d 2013, UN Doc. CRPD/C/9/D/1/2010 (advance unedited version).
\end{itemize}
\end{footnotesize}
The connections between the general right to accessibility in article 9 and the right to freedom of expression and opinion, and access to information in article 21 are considerable and overlapping. To enable freedom of expression and opinion and access to information, the right to accessibility must be ensured.

According to Megrét the right to freedom of expression and opinion, and access to information is a reformulation. The content of rights which are reformulations of already existing human rights have been clarified and developed in accordance with the special needs of disabled persons so as to allow them to fully enjoy their rights. Common for all reformulations in the Disability convention is that they thoroughly describe how state obligations are to be fulfilled. The scopes of the articles are thus made quite exact. Detailed instructions concerning application and achievement are also provided for.

The Disability convention also contains the right to participation in cultural life, recreation, leisure and sport. This right includes the right to accessibility to cultural materials, e.g. literature, film, television and music. Disabled persons also have the right to access to theatres, museums, cinemas, libraries and as far as possible, to historical places. Disabled persons shall furthermore have access to sports, integrated as well as disability specific, and also be able to take part as spectators at sporting activities. This probably applies to other recreational activities such as concerts as well. Persons with disabilities shall furthermore be given the opportunity to develop their cultural identity, this arguably applies most to deaf culture. Disabled children are entitled to take part in sports and play and all disabled persons shall have the opportunity to develop their intellectual potential.

The right to accessibility is extensive, encompassing most parts of the Disability convention. Considered as a civil right it shall be implemented immediately, however it is recognized by the Committee that it may take some time to achieve full accessibility. The infrastructure; physical, communicative as well as cognitive is to become accessible, as well as information and recreational activities; taking into account respect for inherent dignity, autonomy, non-discrimination, participation and accessibility. As is the case concerning non-discrimination, accessibility is also a general principle of the convention. It is thus to be considered when

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163 Koch, pp. 71-72.
164 General comment No. 2, §§ 38.
165 Megrét, pp. 503-504.
166 See article 30 the Disability convention.
applying all other rights.

3.2.3. Right to life, integrity and liberty
In this section traditional civil rights such as the right to life, liberty, integrity, privacy and freedom from interference with the family will be discussed. It will however become clear that social parts of these rights come to light when looked upon in the disability perspective of human rights.

The Disability convention reaffirms the right to life of every disabled person. Every disabled person shall furthermore receive protection and assistance in situations of risk and humanitarian emergencies. States parties already existing responsibilities under international human rights and humanitarian law are emphasized.167

States parties have the obligation to ensure the right to liberty, including freedom from arbitrary detention and incarceration. In the case of disabled persons arbitrary detention is not limited to unlawful detention due to false accusations of criminal behaviour. Rather it is the placement of disabled persons in care facilities and institutions that comes to mind. This situation is specifically provided for in article 14(1)(b), containing an absolute prohibition of deprivation of liberty solely based on the occurrence of a disability. It is clear from the convention that all involuntary placements in care facilities are prohibited. The right to liberty counterbalances institutionalization168.

What can be asked is the following: will placements in care facilities due to lack of individual capability to take care of oneself amount to a violation of article 14? That is to say, do states parties have a positive obligation under article 14 to facilitate independent living? Another question that should be asked is: will the placement in care facilities after consent be a violation, given that the consent was uninformed? It is to be presumed that in most states, an uninformed consent will not be considered a consent at all, thereby outlawing such behaviour. Placement in care facilities without informed consent or with consent obtained through substituted decision-making will also amount to a violation of article 12, that is to say the right to legal capacity. A further problem with forced placement in care facilities is that the facility itself many times

167 See articles 10, 11 the Disability convention.
168 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, p. 70; article 14 the Disability convention.
gains legal capacity over the disabled person\textsuperscript{169}. The Committee has in a statement, in accordance with section three paragraphs C 64-65 of its Working methods, commented on article 14\textsuperscript{170}. The Committee states that involuntary placement in care facilities due to psychiatric disabilities is a violation of the right to liberty. This applies even if the person concerned is deemed a danger to him- or herself or others. Persons detained without trial due to that they are considered unfit to stand trial because of a psychiatric disability are also unlawfully detained according to the convention.\textsuperscript{171} States parties are furthermore under an obligation to treat those lawfully deprived of their liberty in accordance with the Disability convention including by reasonable accommodation.\textsuperscript{172}

The Committee has in communication no. 8/2012 considered an individual complaint concerning an Argentinian national, who was lawfully detained in a prison hospital. He had a disability which required extensive specialized health care as well as rehabilitation and habilitation. Due to his disability he required adaptive measures to enable him to access the whole of the prison as well as his own bathroom. He had multiple times applied to be transferred to house arrest to facilitate his rehabilitation. Before the Committee he \textit{inter alia} argued that the state party had violated his right to health, rehabilitation and habilitation and accessibility as well as liberty and integrity. The states party held that they had adapted the facilities to enable access, that they had a nurse available around the clock to see to his needs and that he was given health care as well as rehabilitation and habilitation. The health care and rehabilitation and habilitation was provided in the prison as well as at a hospital providing specialized care. In this case the Committee unanimously held that the state party had violated the author’s right to accessibility, liberty and integrity. The author had insufficient access to bathroom and recreation facilities and the state party had not shown that they could not have accommodated the author any further. Because his right to accessibility was violated his right to liberty was violated as well because he was unable to move around freely inside the prison hospital, on equal terms with non-disabled inmates. As the lack of accessibility to the bathroom facilities left him dependent on the help of a nurse his right to integrity was violated as well. As concerns the author’s accusations of violations of his right to health and rehabilitation and habilitation,

\textsuperscript{169} General comment No. 1, §§ 40, 46.
\textsuperscript{170} Working methods of the Committee on the Rights of Persons with Disabilities adopted at its fifth session (11-15 April 2011), September 2d 2011, UN doc CRPD/5/4.
\textsuperscript{172} See article 14 the Disability convention.
the Committee found no violations. Hereby the Committee acknowledged that the author had access to extensive health care, rehabilitation and habilitation and that he furthermore had failed to show that these measures were insufficient. It was however also stated by the Committee that state parties have extensive responsibilities concerning health care, rehabilitation and habilitation when it comes to persons who are detained by the state.\textsuperscript{173} The reasoning of the Committee shows that the Disability convention hold state parties to high standards. The state party was under an obligation to adapt the bathroom facilities of the prison cell, although they provided assistance by a nurse. It is not clear from the communication whether the relevant detention concerned detention prior to or following trial. Should it concern detention prior to trial the requirements on the state party was most significant, given that the author’s stay at the prison hospital in that case would be temporary. As concerns the requirement to install an elevator to enable the author to access the recreational facilities this too is an extensive obligation, should it be a temporary stay.

The right to freedom from torture or cruel, inhuman or degrading treatment or punishment is a classic civil right. Article 15 in the Disability convention however contains a special provision on a prohibition of involuntary medical or scientific experiments. These rights are subject to immediate and absolute implementation, requiring states to take all effective legislative or other measures to prevent and abolish any practices inconsistent with article 15. As article 15 provides protection from abuse by national authorities and civil servants etc. article 16 provides protection from and rehabilitation after, abuse by family members, citizens as well as professional care givers. The obligations include \textit{inter alia} education, social support and independent monitoring of care givers and care facilities. Rehabilitation shall promote dignity and self-respect. Abuse shall be prosecuted if appropriate.

Disabled persons have the right to integrity of the person, including both physical and mental integrity. Disabled persons furthermore have the right to respect of privacy, including protection from unlawful interference with correspondence, home and family. They are furthermore protected from defamation. Medical records as well as other records kept by national authorities shall be subject to secrecy on an equal basis with non-disabled persons.\textsuperscript{174} Substituted decision-making may very well be a violation of the right to privacy, as the person bestowed with

\textsuperscript{173} Communication No. 8/2012, Views adopted by the Committee at its eleventh session (31 March-11 April 2014), Mr. X. v. Argentina, Committee on the Rights of Persons with Disabilities, June 18\textsuperscript{th} 2014, UN Doc. CRPD/C/11/D/8/2012.

\textsuperscript{174} See article 17, 22 the Disability convention.
decision-making power most probably will be given access to private information. It is of great importance that the mechanisms of supported decision-making respect the right to privacy of disabled persons.\textsuperscript{175}

The preamble recognizes the family as the fundamental societal unit. Article 23 elaborates on this, providing families including disabled persons with substantive rights. All discrimination against disabled persons concerning close relationships and parenthood shall be prohibited. Disabled persons are entitled to marry on the same terms as non-disabled persons as well as to found and raise a family. Persons with disabilities shall be provided with necessary support to facilitate their parenthood, notwithstanding the best interests of the child. Disabled children and their families are entitled to support to enable such children to grow up in their families under good conditions. Separation of child and parents on the basis of disability; be it either parents or the child who are disabled, shall be absolutely forbidden.\textsuperscript{176} Respect for home and family is a traditional civil right which in the case of disabled persons might demand financial resources. However, what is required is the implementation of appropriate measures, thus relieving state parties of an absolute obligation.\textsuperscript{177}

Megrét argues that the right to liberty and security of the person, respect for privacy and respect for home and the family are reformulations of already existing human rights. The Disability convention emphasizes rights that have not been emphasized before, for example freedom from abuse. Although this right very well falls under already existing human rights it has been given an independent status in the convention, thereby creating something new.\textsuperscript{178}

The right to life, liberty, integrity of the person and of the family are all classical civil rights. In order to facilitate full citizenship and inclusion of persons with disabilities these rights are of vital importance. Every person shall have the right to be free from undue interference with their person and with their families. The state shall abstain from such activities and make sure that everyone else abstains as well. The social part of these rights comes into play when a person with a disability is in need of support from the state in order to have liberty, integrity and a normal family life. In all measures taken the dignity, autonomy and participation of persons with disabilities shall be respected. Equality of opportunity in all these situations is to be

\textsuperscript{175} General comment No. 1, § 47.
\textsuperscript{176} See article 23 the Disability convention.
\textsuperscript{177} Koch, pp. 72.
\textsuperscript{178} Megrét, pp. 503-504, 508.
ensured.

3.2.4. Citizenship and access to justice
Persons with disabilities have the right to a nationality, to choose their place of residence, to acquire all official documentation concerning identity, to leave and come back to one’s country and make use of immigration proceedings. Children has the right to a name, registration, and as far as possible to be cared for by their parents.\(^{179}\) Disabled children are less likely to be registered at birth than other children, leading to a higher risk for denial of education and health care and a higher risk of death.\(^ {180}\)

Every disabled person has the right to equal recognition before the law and legal capacity on an equal basis with non-disabled persons.\(^ {181}\) Article 12 is according to Megrét a reformulation. It can furthermore be considered to be the right *parem in pares*, when it comes to making disabled persons full and equal citizens.\(^ {182}\) True legal capacity rectifies many historical habits concerning disabled persons, for example institutionalization without informed consent or without no consent at all. The Committee has adopted a general comment on the right to legal capacity stating that it is fundamental for the enjoyment of other human rights. It does not create new rights, rather it clarifies those parts of the right that have been traditionally violated when it comes to persons with disabilities. Supported decision-making is to be applied instead of substituted decision-making. The content of the comment is based on an interpretation of article 12 founded on the general principles provided in article 3. The right to be recognized as a person before the law is absolute and all-encompassing. There may be no derogations. The Committee acknowledges that this is not explicit in the convention, but is clear from already existing human rights law, e.g. ICCPR etc. and that article 4(4) of the Disability convention establishes that the convention does not deviate from already existing human rights law. The existence of an impairment, be it of any kind either physical, intellectual, sensory or psychosocial, is always an illegitimate ground for denial of legal capacity.\(^ {183}\)

Mental capacity assessments are not allowed, be they concerned with prevention of negative decisions, functional impairments concerning decision-making or simply based on a diagnosis. Neither shall they be used to assess needs for support. Need for support and accommodation

\(^{179}\) See article 18 the Disability convention.
\(^{180}\) General comment No. 1, § 43.
\(^{181}\) See article 12 the Disability convention.
\(^{182}\) Megrét, pp. 503-504, 511.
\(^{183}\) General comment No. 1, §§ 1-9.
shall not be considered a reason for questioning legal capacity. According to the Committee the right to legal capacity has the following normative content. Article 12(1) ensures that everyone has legal personality, which is a prerequisite for possession of legal capacity. Paragraph 2 provides that the right to legal capacity consists of legal standing and legal agency, where legal standing is the power to be bearer of legal rights and obligations whereas legal agency is the power to act on these rights and obligations. That is to enter into agreements, fulfilling and ending them etc. Denial of legal agency has been frequent traditionally when it comes to persons with disabilities. Such denial is often based on the concept of mental capacity as separated from legal capacity. This means that persons may be ensured the right to legal standing, whereas legal agency is denied due to an actual or perceived lack of mental capacity. Such separation is henceforth prohibited by the Disability convention, fulfilment of the right to legal capacity means provision of both legal standing and legal agency.

Paragraph 3 obliges states parties to provide the support needed to enable autonomous decision-making by persons with disabilities. Such support may be peer support, advocacy, interpreters (sign language, alternative communication etc.) and advance planning directives to enable disabled persons to make their choices at a time when they are able to do so etc. Support can also include universal design by making private entities provide accessible information and services to enable independent decision-making. Support shall be provided at low cost or free of charge; financial limitations shall in no circumstance be a legitimate reason for denial of support. Supported decision-making shall be based on the will and preference of the person concerned. Supported decision-making is to be applied and respected even in times of public emergency. Support shall be ended whenever the disabled person so wishes and shall never be a reason for limitation or denial of other rights contained in the Disability convention, as the right to vote etc. Limited means of communication is no excuse for denial of support.

Paragraph 4 acknowledges that there will be situations where it is not possible to decide what a person wants. In such situations it is henceforth not permitted to make a decision based on the best interests of the person concerned. Instead a decision shall be made which as far as possible reflect the will and preference of the person concerned, notwithstanding potential negative consequences of such a decision. In the words of the committee: “(...) however, the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes.\(^{184}\)”

\(^{184}\) General comment No. 1, § 22.
Independent decision-making requires legal validity being granted to those decisions. Third parties must have the possibility of testing the rightfulness of decisions made with support, should they be concerned that the support person does not act on the will and preferences of the disabled person. Independent monitoring is also needed to prevent undue influence, meaning aggression, fear, manipulation or deception by the support person.

Paragraph 5 lastly obliges state parties to take measures, legislative or others, to ensure that persons with disabilities may manage their financial affairs. If they cannot do so on their own, support is to be provided.\textsuperscript{185}

Reasonable accommodation is to be provided in order to ensure non-discrimination, for example by making buildings accessible etc. Reasonable accommodation shall be provided unless it imposes a disproportionate or undue burden, whereas support under article 12 is an absolute obligation on states parties, subject to no exceptions.\textsuperscript{186} To enable full realization of article 12, information, communication and authorities dealing with matters affecting article 12 must be fully accessible. Therefore, provision of the rights contained in article 9 is needed to fully ensure the right to legal capacity.\textsuperscript{187} States parties furthermore have to recognize the importance of the community when it comes to supported decision-making. An important aspect of legal capacity is the power to decide on everyday matters.\textsuperscript{188} States parties shall make sure, under the provisions of article 12, that persons with disabilities are able to make choices for themselves, including education, place of residence and work etc.\textsuperscript{189}

Access to justice is essential to enable full enjoyment of all the rights contained in the Disability convention. Article 13 provides a right to effective access to justice, including through procedural and age-appropriate accommodation. Persons with disabilities shall be able to participate in all proceedings and appropriate training of personnel shall be promoted. Courts and other judicial authorities shall be accessible, physically as well as communicative.\textsuperscript{190} Fulfilment of the right to legal capacity is crucial for realization of the right to access to justice. Persons with disabilities shall have equal access to legal standing in courts and equal access to

\textsuperscript{185} Reference for the five preceding sections, see General comment No. 1, §§ 11-30.
\textsuperscript{186} General comment No. 1, §§ 32-34.
\textsuperscript{187} General comment No 1, § 37.
\textsuperscript{188} General comment No 1, §§ 44-45.
\textsuperscript{189} General comment No 1, § 52.
\textsuperscript{190} General comment No 2, § 37.
legal representation. They shall furthermore be eligible for posts such as judge, jury or lawyer on an equal basis with other non-disabled persons. Professional personnel in the judicial system and other concerned authorities must be educated to treat persons with disabilities in a manner consistent with their equal legal capacity. Furthermore, the support provided for in article 12 entitles persons with disabilities to support concerning testimony in courts etc.\textsuperscript{191}

To establish a climate and a society where disabled persons possesses equal rights with non-disabled persons political rights are most important. That is the right to vote, to be elected, to hold public office and be able to do so on equal terms with others. States parties are obliged to accommodate disabled persons in all these respects. Political rights also include the right to form non-governmental organizations.\textsuperscript{192} However, facilitation of participation in society and politics furthermore requires accessibility, physical as well as cognitive and communicative, and sometimes live assistance. Such measures inflict cost on state parties, erasing the clear difference between political and social rights, at least when it comes to costs.\textsuperscript{193} Denial of legal capacity has and continues to be used as an excuse for denial of the right to vote and to be elected, as well as to hold public office. This is to be absolutely forbidden.\textsuperscript{194} In communication no. 4/2011 this absolute prohibition was also established, including the prohibition on individual assessments concerning legal capacity. It was stated that states parties shall facilitate voting through adaptations and provide support instead. The right to vote is absolute.\textsuperscript{195}

Legal capacity has and continues to be denied many persons with disabilities, most of whom have some sort of psychiatric disability. The purpose of the Disability convention is to ensure all persons with disabilities all human rights on an equal basis with others. This undoubtedly requires the right to be recognized as an active agent before the law. It furthermore requires the right to an identity, the right to vote and be elected and in that way take part in the achievement of human rights for persons with disabilities. It also requires the right to access to justice, one must have the ability to claim ones rights in order to render them efficient. In order to facilitate all of this, the dignity and autonomy of persons with disabilities are key. They are to be active participants and as such receive equal opportunities in society and be recognized as equals.

\textsuperscript{191} General comment No. 1, §§ 38-39.
\textsuperscript{192} See article 29 the Disability convention.
\textsuperscript{193} United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, p. 16; Koch, p. 72.
\textsuperscript{194} General comment No. 1, §§ 48-49.
3.2.5. Independence

To gain equality and full citizenship, independence is key. Many disabilities require some sort of medical care and habilitation or rehabilitation. Congenital conditions may require plenty. Depending on the disability and individual circumstances these measures may not be sufficient. Chronic disabilities may put disabled persons in need of personal support and personal assistance. To facilitate personal mobility special transport services may be required or the adaptation of community transportation. To facilitate independence something else is required as well, namely the ability to support oneself financially. Here the right to education on equal terms with others are many times of fundamental importance. Proper education provide for opportunities for employment. It is however recognized that not every disabled persons will have the ability to financially support one self, due to the implications of the disability. Therefore there is a right to an adequate standard of living and social protection.

Disabled persons have the right to the highest attainable standard of health. Health care is to be provided on the same terms as to non-disabled persons and special care provided due to needs inflicted by the disability. Early identification and intervention should be achieved. Health care is furthermore to be provided as close to home as possible. State parties are also obliged to provide comprehensive habilitation and rehabilitation programmes to enable disabled persons to attain and maintain maximum independence, physical as well as mental. Such programmes shall begin as early as possible and be based on a multidisciplinary assessment of the needs of the person concerned. Habilitation and rehabilitation concerned with health, employment, education and social services are prioritized. All health care provided shall be with the free and voluntary consent of the disabled person. Consent by substitute decision-making is not sufficient. Forced treatment on the basis of occurrence of a disability is unlawful, amounting to a violation of articles 15, 16 and 17, the right to freedom from torture, abuse and the right to integrity. The Committee is most concerned with the large occurrence of forced treatment to be found in all parts of the world.\(^\text{196}\) States parties are furthermore obliged to promote availability of assistive devices and technologies.\(^\text{197}\) Habilitation and rehabilitation are furthermore needed to ensure the rights to accessibility, education and work.\(^\text{198}\) Vice versa, the right to accessibility is needed to ensure the right to the highest attainable standard of health, as without accessible

\(^{196}\) General comment No. 1, §§ 41-42.

\(^{197}\) See articles 25, 26 the Disability convention.

\(^{198}\) United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, p. 78.
health care and accessible transport to care facilities the right to health cannot be ensured.\textsuperscript{199}

Persons with disabilities have equal rights with other non-disabled persons to choose their place of residence, to live in the community and to participate fully in it. States parties are thus obliged to make sure that disabled persons are not forced to live in special living arrangements. Here it is quite clear, and perhaps contrary to article 14, that a failure to provide the support needed to facilitate independent living will amount to a violation of article 19. The right to live in society is thus counterbalancing tendencies to institutionalization, complementing article 14\textsuperscript{200}. Article 19(b) provides a right to such support, including in-home, residential and other community support services. Such support services includes the right to personal assistance where necessary to facilitate living and inclusion in the community and to prevent isolation or segregation. General community services shall be available for disabled persons as well. To enable independent living disabled persons must have access to transport. This may require the adaptation of public transport or the procurement of special transport services at affordable cost. Such special transport shall be provided when the disabled person choose to travel. State parties are furthermore obliged to provide mobility aids and live assistance, at an affordable cost. Persons with disabilities shall also receive training in mobility skills. Producers of assistive devices shall be encouraged to consider all aspects of mobility.\textsuperscript{201}

In communication no. 3/2011 the Committee considered an individual complaint concerning the right to \textit{inter alia} independent living, health and rehabilitation and habilitation. The author was a Swedish national with a severe physical progressive disability. The author had applied for a building permit to be able to build an indoor pool on her lawn, which however was denied. Before the Committee she argued that hydrotherapy at home was the only viable habilitation and treatment available for her, given the fact that her condition was so severe that she could no longer be moved to another pool. The states party however argued that a building permit could not be allowed as it was in contradiction with the detailed development plan regulating all construction works in the community. The states party further argued that the author’s needs were to be met by the county and its health care responsibilities. It was also stated that there were a lot of community based services available to the author, such as personal assistance etc. The Committee found violations of the right to non-discrimination, independent living, health

\textsuperscript{199} General comment No. 2, § 40.
\textsuperscript{200} United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, p. 70.
\textsuperscript{201} See article 19, 20 the Disability convention. See also General comment No. 2. § 37, concerning demands on accessibility to enable independent living.
and rehabilitation and habilitation. The Committee recognized that the states party could have allowed the building permit due to the availability of an exception in the law regulating building permits. As such an exception existed the granting of the permit would not be disproportionate or impose an undue burden on the state party. The Committee furthermore acknowledged that the author could not benefit from any other treatment than hydrotherapy at home. The denial of the permit would worsen her health and in the long run make her dependent on institutionalized health care. Using a proportionality assessment the Committee decided that the state party should have granted her the permit.\(^\text{202}\)

Disabled children have the right to quality, inclusive education on an equal basis with other non-disabled children. Children with disabilities are to reach their full academic, intellectual, mental and social potential. Reasonable accommodation is to be provided within the general educational system. Article 24(2)(a) requires states parties to ensure that persons with disabilities are not excluded from the general education system on the basis of disability. Paragraphs 3 and 4 especially target those who are deaf or hard of hearing, blind, blind/deaf or from other reasons have communicative difficulties. They are to be instructed in sign language, Braille, alternative communication etc. in an environment which facilitates the best possible circumstances for academic knowledge. Concerning secondary and academic education this is to be inclusive and within the general system as well. States parties are furthermore obliged to promote lifelong learning and vocational training.\(^\text{203}\) The Committee has commented on the right to education in its General Comment No. 2 on the right to accessibility, stating the following:

Without accessible transport to schools, accessible school buildings, and accessible information and communication, persons with disabilities would not have the opportunity to exercise their right to education (…). Thus schools have to be accessible (…). However, it is the entire process of inclusive education that must be accessible, not just buildings, but all information and communication, including ambient or FM assistive systems, support services and reasonable accommodation in schools. In order to foster accessibility, education as well as the content of school curricula should promote and be conducted in sign language, Braille, alternative script, and augmentative and


\(^{203}\) See article 24 the Disability convention.
alternative modes, means and formats of communication and orientation (…), with special attention to the appropriate languages and modes and means of communication used by blind, deaf and deaf-blind students. Modes and means of teaching should be accessible and should be conducted in accessible environments. The whole environment of students with disabilities must be designed in a way that fosters inclusion and guarantees their equality in the entire process of their education.204

It is thus clear that inclusive education is the rule, special schools and special classes for pupils with disabilities being the exception. As far as possible education is to be provided in one unified and inclusive system, integrating disabled pupils with non-disabled pupils. The provision of education of lesser quality to disabled pupils compared to non-disabled pupils constitutes direct discrimination. All reasonable accommodation is to be provided in order to facilitate quality education to all disabled pupils. The right to education is a classic social right and as such subject to progressive realization, which means that the realization of inclusive education is to be achieved progressively, using all available resources. The conclusion is this: all disabled pupils immediately have the right to education of equal quality with other non-disabled pupils, subject only to the restraints of measures that would be disproportionate or inflict an undue burden, whereas the right to inclusive education will be achieved progressively.

Disabled persons have the right to work on an equal basis with others. In this respect states parties shall prohibit all discrimination concerning all aspects of work and employment. They shall furthermore provide assistance in finding and retaining a job as well as rehabilitation and habilitation necessary to carry out a job. States parties shall also promote employment of persons with disabilities, including by employing such persons in the public sector. They also have an obligation to make sure that reasonable accommodation is provided and that disabled persons have access to safe working conditions as well as membership in trade unions. Persons with disabilities are furthermore protected from compulsory labour.205 Persons with disabilities are through the Disability convention ensured an adequate standard of living. This includes access to adequate food, clothing, housing and the continuous improvement of living conditions. They have the right to social protection, including financial aid. They furthermore have the right to subsidies for additional costs inflicted by the disability and disability related services.206 Denial of the right to work will amount to a violation of the right to an adequate standard of

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204 General comment No. 2, § 39.
205 See article 27 the Disability convention.
206 See article 28 the Disability convention.
living as well as the right to live independently in the community.\textsuperscript{207} To facilitate the right to work it is necessary to ensure the right to accessibility, including accessible information concerning work, accessible work places etc.\textsuperscript{208} If the right to work cannot be ensured disabled persons are entitled to financial aid.

In communication no. 2/2010 the Committee tried an individual complaint concerning the right to work, non-discrimination and awareness-raising. The author of the complaint was a German national. He was denied access to an integration subsidy due to that his working capacity could not be fully restored within three years. He further submitted that he had not sufficient access to training services, other services provided by the employment agency or, during some times, employment benefits. The states party argued that the author did not do what was required of him and that he did not come to meetings with the employment agency. The Committee found violations of article 27 read together with \textit{inter alia} article 5. The Committee held that the difficulties in obtaining the integration subsidy and the fact that the disabled person could not take part in the process amounted to a violation of article 27. When coming to this conclusion the Committee recognized that the states party seemed to use the medical model of disability, in only granting integration subsidies if the reduced working capacity could be restored. The difficulties in obtaining the subsidy could amount to indirect discrimination. The Committee further emphasized that states parties are obliged to promote employment of disabled persons and in so doing adopting all appropriate and necessary measures. The Committee also highlighted the fact the employment agency seemingly discouraged the author from taking initiatives to procure employment. In conclusion, the states party had failed to take sufficient measures to facilitate the right to work. The measures taken were furthermore inadequate. Measures shall thus be effective and appropriate.\textsuperscript{209} Extensive obligations are imposed on states parties, in accordance with reasonable accommodation, to facilitate the right to work.

In communication no. 5/2011 the Committee tried an individual complaint concerning the right to work and non-discrimination. The author of the complaint was a Swedish national with a severe visual impairment. She had a degree in law and applied for a position at the Swedish Insurance Agency. She met all the qualifications and was seriously considered for the job.

\textsuperscript{207} United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights & the Inter-Parliamentary Union, p. 85.
\textsuperscript{208} General comment No. 2, § 41.
\textsuperscript{209} Communication No. 2/2010, Views adopted by the Committee at its eleventh session (31 March-11 April 2014), Liliane Gröninger et al. vs. Germany, Committee on the Rights of Persons with Disabilities, July 7\textsuperscript{th} 2014, CRPD/C/D/2/2010.
However, when she informed the employer of her special needs for accommodation they employed someone else instead. Before the committee the states party argued that the accommodation required of the Swedish Insurance Agency by the author was not reasonable and furthermore that such accommodation would not have put her in an equal situation with other applicants. The majority of the Committee found that there had been no violation of either the author’s right to work or non-discrimination. The committee acknowledged that states parties have a certain margin of appreciation when assessing whether accommodative measures are reasonable or not. The Committee further stated that it is in principle for the courts of states parties to decide on evidence and facts of a case, unless there is evidence that the proceedings before the national courts have been deficient. In the present case, the Committee found that the author had not presented evidence to show that the evaluation of whether the measures required to accommodate her were reasonable or not, were deficient. The conclusions to be drawn is thus that the Committee found that the measures required imposed a disproportionate or undue burden on the states party. Here it is important to stress that the employment of the author would have required adaptations of computer systems to a cost of between 10-15 million Swedish crowns. Furthermore the adaptations would not have enabled the author to perform all tasks assigned to the current vacancy. It should also be emphasized that the potential employer was a Swedish state authority, with relatively extensive financial resources. However, 6 out of 16 members of the Committee dissented and found breaches of both article 5 and 27. 5 members considered that the states party should have considered the positive effects of the adaptations to the future employment of other persons with disabilities and that due consideration should have been paid to possible alternative solutions. They also argued that in the decision by the majority the states party was given too large of a margin of appreciation. The sixth member who dissented agreed with the other five, but for their opinion that consideration should have been paid to potential positive future effects of adaptations. The outcome of the complaint cannot be seen as evidence proving that low demands are put on states parties. On the contrary, adaptive measures amounting to 10-15 million Swedish crowns, to facilitate the needs of one disabled person to perform most of the tasks of a specific job can quite rightly be considered unreasonable.

In communication no. 9/2012 the Committee tried an individual complaint concerning the right to work and employment. The author is an Italian national with a disability who had applied for

a position as a scientific technician at a public university. Italian legislation provides a quota system for public employment of persons with disabilities. The author’s merits and qualifications ranked him third in the recruitment process. In a second recruitment concerning an equal position only former military personnel were invited to apply. The author argued that, due to the quota system, he should have been hired in the first process and that the second process was discriminatory. The state on the other hand argued that the quota system do not provide an individual with a right to a specific position but is a national public employment quota. The Committee found no violation of article 27. In coming to this conclusion the Committee stated that it is generally for national courts to assess evidence and facts of a case, unless it is shown that such an assessment is clearly arbitrary or amounts to a denial of justice. The Committee considered that the author had not provided evidence to prove any of these alternative requirements, nor that the national legislation in content and application violated his rights under article 27.\textsuperscript{211} The reasoning of the Committee in this communication is somewhat unsatisfactory as it does not elaborate on the content of the national legislation. The Committee’s conclusion appears to be based almost solely on evidentiary considerations, apart from the assessment of the verdict of the national court. Hereby, it is hard to draw on any general conclusions.

Megrét argues that the right to education, health, work and employment as well as an adequate standard of living are reformulations, and thus specially adapted to the needs of disabled persons. Article 19 containing the right to live in the community is considered a totally new right. It is not included in prior human rights treaties, according to Megrét, due to the fact that it has not been considered an issue for non-disabled persons.\textsuperscript{212}

The rights described in this section are classical economic and social rights and they are of utmost importance to enable persons with disabilities to live an independent life. According to Kallehauge states parties should begin their implementation of the Disability convention with these rights together with the right to accessibility.\textsuperscript{213} To achieve independence the dignity, autonomy and participation of persons with disabled most be ensured. They are to be ensured these rights in a non-discriminatory and accessible manner, providing equal opportunities for a

\textsuperscript{211} Communication No. 9/2012, Views adopted by the Committee at its thirteenth session (25 March -17 April 2015), A.F. vs. Italy, Committee on the Rights of Persons with Disabilities, April 24\textsuperscript{th} 2015, UN Doc. CRPD/C/13/D/9/2012 (advance unedited version).

\textsuperscript{212} Megrét, pp. 503-504, 510.

In my opinion Megrét forgets many other categories and problems such as apartheid when stating that inclusion has not been an issue before. See e.g. General comment No. 2, § 3.

\textsuperscript{213} Kallehauge, p. 209.
full and independent life with other non-disabled persons.

3.3. The Committee on the Rights of Persons with Disabilities

Article 34 of the Disability convention facilitates the establishment of the Committee, providing for how the members are to be chosen, and what tasks shall be assigned to the Committee. According to Quinn, the purpose of monitoring bodies is to induce state parties into self-reformation and implementation as well as to internalise the values contained in the treaty. 214

States parties shall submit reports concerning the implementation of the Disability convention to the Committee. Following ratification such a report is to be produced within two years. The report shall account for what measures have been taken in order to implement the convention and what further measures are needed in order to achieve full implementation, including by progressive realization. The states party should when preparing the initial report include local reports and reports produced by disability organizations and national surveys etc.215. The Committee may prepare a list of questions to be answered by states parties during their work with the state report. Following the initial report states parties are obliged to report to the Committee every four years or whenever the Committee so requests. In all work regarding reports it is desirable that states parties include disability organizations. The Committee considers the reports and makes recommendations of appropriate measures for implementation. It may also request more information by states parties before adopting its recommendations. 216

The Committee shall furthermore assist states parties in their efforts to implement the Disability convention.217 Disabled persons’ organizations are furthermore encouraged to cooperate with the Committee by submitting reports, shadow reports and other information as well as participating in sessions and interactive dialogues concerning state party reports. According to the Committee disabled persons’ organizations are those with a majority of disabled persons and which leadership is held by disabled persons.218

214 Quinn, pp. 225-227.
215 Articles 4 § 3, 35 the Disability convention; Kallehauge, pp. 206-208.
216 Article 36 the Disability convention; Rules 42, 44, 46, 48bis of the Rules of Procedure.
218 For further information on participation by disabled person’s organizations and civil society in the work of the Committee see Report of the Committee of the rights of persons with disabilities on its eleventh session (31 March- 11 April 2014), CRPD/C/11/2, Annex II, Guidelines on the participation by disabled persons’ organizations and civil society organizations in the work of the Committee. For definition of disabled persons’ organization see guideline 3.
The Optional protocol *inter alia* provides for an individual complaint mechanism.\(^{219}\) An individual complaint may be submitted by an individual or group of individuals concerning events that have taken place following ratification of the optional protocol for the concerned states party. The complaint may be submitted in alternative modes of communication, such as Braille, audio etc. To be admissible before the Committee the complaint must not be anonymous. An author’s lack of legal capacity in his or her own state is not a barrier to having legal capacity before the Committee. The complaint must furthermore not constitute an abuse of the right to file complaints or be incompatible with the convention nor be manifestly ill-founded or insufficiently substantiated. The situation concerned by the complaint cannot either be under investigation by another international body or earlier by the Committee. That is to say, the principles of *res judicata* and *litispendens*. Lastly the author of the complaint must have exhausted all domestic remedies before filing the complaint, unless provision of domestic remedies are unreasonably prolonged or unlikely to bring effective relief.\(^{220}\)

Third party interventions are allowed, provided that one of the parties to the case has authorized such an intervention in writing. The Committee may decide on interim measures, which might be of significant importance especially in situations of institutionalization where grave human rights violations are being committed.\(^{221}\) The Committee will then analyse the material at its disposal in closed session and then, upon founding the communication admissible, deliver its views on the matter with potential recommendations for the state party. The author of a communication which has been found to be inadmissible may appeal this decision, given that the circumstances resulting in inadmissibility have changed. A member of the Committee may have his or her dissenting opinion attached to the decision. A state party to which recommendations have been directed shall within six months following the decision submit a report on measures taken.\(^{222}\) The decision and recommendations of the Committee is not binding on states parties but are supposed to achieve reform in the concerned states party.\(^{223}\)

\(^{219}\) The Optional Protocol furthermore provides for investigations by the Committee of grave or systematic violations of human rights by a state party. See articles 6-8.

\(^{220}\) Articles 1-5 the Optional Protocol; Rules 24, 55 § 3, 68.

\(^{221}\) Quinn, p. 253.

\(^{222}\) See Optional protocol to the Disability convention, articles 4-5, Rules, 64, 68, 71, 72:3, 73, 75. For further information concerning the Individual complaints procedure and the Special Rapporteur on individual complaints see rules 55-75 of the Rules of Procedure; §§ 67-76 Working methods of the Committee on the Rights of Persons with Disabilities adopted at its fifth session (11-15 April 2011), September 2d 2011, UN doc CRPD/5/4.

For further information concerning the work of the Committee, see articles 37-39 the Disability convention; the Rules of Procedure and the Working Methods in their entirety.

\(^{223}\) Quinn, pp. 226-227.
3.4. Appraisal

The Disability convention arguably contains human rights concerning all areas of life and all situations in which persons with disabilities may found themselves in need of a disability adapted approach to human rights. The classic classification between civil and political and economic, social and cultural rights is no longer accurate. This because almost all rights have economic and social elements in them, when it comes to making them work for persons with disabilities. Furthermore, although the Disability convention itself states that it creates no new rights, this is probably untrue. The adaptations of already existing human rights are in some of the articles so extensive and substantial that they must be considered to create something new. Clear examples of such adaptations are the concept of reasonable accommodation and the right to live independently and being included in the community.

The substantial rights are far-reaching and all-encompassing. Applied in a holistic manner the convention can achieve substantive progress and improve the living conditions of persons with disabilities. As the Disability convention proscribes the application of progressive realization for economic, social and cultural rights, there are improvements to be made by all state parties. Some states parties have already come far in achieving full enjoyment of all human rights for persons with disabilities while others have much work to do. The Committee has in its general comments, statements and jurisprudence interpreted the Disability convention extensively, imposing significant positive obligations on states parties. The interpretations given to legal capacity, independent living, health, rehabilitation and habilitation, the right to work, integrity, accessibility and liberty mean that there is something for every state party to do. In line with the concept of progressive realization it can be expected that the requirements will only increase.

When states parties strive to implement the Disability convention it is of utmost importance that they do so considering the principle and right to non-discrimination and equality. Persons with disabilities are to be accepted as active agents and participants in society having legal capacity. Their inclusion shall be the goal as well as their possibility of leading independent lives; if be, with support, which is to be provided as a right and not as social policy.
4. Swedish compliance with the Disability convention

Sweden ratified the Disability convention and the Optional protocol and deposited the instruments of ratification with the Secretary General of the United Nations on 15th December 2008. They entered into force on January 14th 2009, through SÖ 2008:26, that is Swedish international agreements.224

Prior to ratification, Sweden reviewed its legislation and the possibilities for ratification and compliance, through official inquiries and government bills. Sweden has furthermore completed its first state review. This section of the essay will review Swedish compliance with the requirements of the Disability convention as well as provide a textual comparison between the English authentic text and the Swedish authoritative translation of the Disability convention.

4.1. Textual comparison
The Swedish version of the Disability convention and the Optional Protocol is a non-authentic translation, the authentic texts being in Arabic, Chinese, English, French, Russian and Spanish.225 If there should be a conflict between the Swedish version and any of the other authentic versions they will have precedence. Any comprehensive method of implementation will only increase the importance of this translation being correct. The comparison will focus on terms and phrases important to the interpretation of the substantial rights contained in the convention and only discuss matters entailing objective differences.

As concerns progressive realization in article 4(2), the Swedish version seemingly imposes less strict obligations on the state. The phrase “take measures and use the maximum of its available resources” instead of “to”. The word “gradvis” (gradually) is chosen in the Swedish version whereas the English version applies “progressive”. The latter is stronger, demanding more of the state.

Another important word used in several articles is “assistance” which is translated in different ways in the Swedish version; “stöd” (support), “assistans” (assistance), “hjälp” (help). In article 9(2)(e) “live assistance” is thus translated to “assistance”. In article 9(2)(f) “assistance” is translated to “help”. In article 20(b) “live assistance” is translated to “assistance”. In article

225 See article 50 the Disability convention.
19(b) “personal assistance” is translated into “personligt stöd” (personal support). One cannot help but wonder if this translation was applied to relieve the Swedish state of its international obligation to provide personal assistance, as is provided according to the Act concerning Support and Service to Persons with Certain Functional Impairments and the Assistance Benefit Act. 226 In the Committees concluding observations on Sweden § 52 the Committee recommends the state to provide personal assistants in order to enable holding of public office. It is thus likely that article 19(b) in fact provides a right to personal assistance, as the term is understood using a direct translation. Ratzka agrees with this and furthermore states that living independently is not to be interpreted as the ability of doing everything single handed, but rather the right to independent decision-making concerning when, where and by whom an act is to be performed. Those who lack the ability to single handed perform everyday activities, with consideration given to stamina, physical possibility and the time required, are to be assisted. Ratzka finds the Swedish translation of living independently of meaning the possibility to do everything single handed.227

However, in my opinion the Swedish translation of the term “to live independently” does not entail the possibility of doing everything single handed as the meaning of the Disability convention. Rather, it is independent living that is considered. However, it is acknowledged that this is quite contrary to the use of the phrase “personal support”. It is hereby recognized that the Swedish version contains inferior provision of the human right to live independently and to personal assistance. It is of fundamental importance that should Sweden implement the Disability convention through transformation and thereby an authoritative translation, this translation should be revoked and “personal assistance” should be applied instead. Such a change will probably not be granted willingly by the state as it would impose more extensive obligations on the state.

Article 24 concerning the right to education provides for “an inclusive education system”,

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which is translated into “ett sammanhållet utbildningssystem” (a cohesive education system). This do arguably not provide the same right to inclusive education as do the English version. Paragraph (2)(d) and (e) use the word “effective” in the English version, translated to “lämpligt” (appropriate) in the Swedish version, seemingly leaving a greater margin of appreciation to the Swedish state. However the opposite applies to paragraph 3(c) which imposes greater obligations on the state. All pupils with visual impairments, not just those who are blind, are to be educated in the most appropriate languages.

Article 25(b) uses the phrase “minimize and prevent further disabilities” whereas the Swedish version applies the phrase “begränsa och förebygga vidare funktionsnedsättning” (limit and prevent further disabilities), which is a less comprehensive obligation.

Article 2(e) of the Optional protocol provides as an inadmissibility criteria that a communication is not sufficiently substantiated. The Swedish version applies a rule of evidence “styrka” (proven), which probably imposes a burden of proof on the claimant not aimed at in the English version. In my opinion it is incorrect to use a domestic rule of evidence as a translation of a word in an international convention. It should further be stated that this burden of proof is used in trial, not in the proceedings concerning admissibility and that Sweden does not apply material admissibility criteria concerning evidence before trial. The translation is thus at the very least inappropriate.

Notwithstanding these deficiencies an overall assessment shows that the translation is accurate and proper. There are some minor linguistic differences, most of which do not result in objective differences between the texts. In conclusion, the Swedish translation is mostly accurate, the most significant exception being the translation of personal assistance.

4.2. Review of Swedish national legislation prior to ratification
The government proposed, also accepted by the Swedish parliamentarian committee for social affairs, ratification of both the Disability convention and the Optional protocol without prior adoption of any national legislation, hereby stating that Sweden fulfils all the requirements which are subject to immediate application. The government further held that the ratifications would not impose any additional costs on the state. The government recognized awareness-raising, accessibility and employment and work as areas of special concern.228

4.3. Swedish compliance with the Disability convention, review of legislation and practices prior to, and after ratification

4.3.1. General framework of the Disability convention: purpose, interpretation and general obligations

Sweden applies an environmental concept of disability, including physical impairments inherent in the human body and context related limitations, although disability is defined differently in Swedish legislative acts.\(^{229}\) There is also a lack of a rights perspective concerning Braille. However, Sweden does comply fully when it comes to the general principles, although they are not always considered by authorities and courts. Concerning the general obligations, Sweden is in compliance; however denial of accessibility as discrimination raises some problems.\(^{230}\)

In its concluding observations on the initial report of Sweden, the Committee states the following concerning general compliance with the Disability convention.

> The Committee is concerned that the Convention has not been integrated into Swedish law and is therefore left to the interpretation of authorities and courts. The Convention articles cannot serve as guidelines in court rulings, as they are not explicitly in the texts of the national law. There is a serious gap between the policies followed by the State party and those followed by the municipalities with respect to the implementation of the Convention. (…) The Committee urges the States party to ensure that the Convention is properly incorporated into Swedish legislation in order for it to be applicable as

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Swedish law.231

The Agency for Participation, having evaluated Swedish implementation and disability policy, states the following considering general Swedish disability policy:

National goals of the disability policy
- A social community founded on pluralism.
- A society construed so as to ensure full participation for persons with disabilities in all ages.
- Equality of living conditions for girls and boys, women and men with disabilities.

The work towards achievement of these goals shall especially be targeting identification and elimination of obstacles, prevention and combat of discrimination and provide preconditions for independence and autonomy. (…)

The strategy for implementation of the disability policy and all monitoring are based on the national goals, which in turn are based on the core of the UN convention on the rights of persons with disabilities – equality of worth and rights. No one is to be discriminated.

In reality we are yet to reach this point – something which this report is proof of.232 (my translation)

Swedish legislation concerning the general obligations and principles of the Disability convention overall complies well with the convention. Equality of worth is ensured. As will be shown individual autonomy is however not sufficiently ensured, as is not either inclusion or participation in society. Sweden furthermore arguably uses all its available resources for progressive realization of the human rights of persons with disabilities.

4.3.2. Equality and non-discrimination

The Discrimination Act defines disability as “lasting physical, psychological or intellectual limitations of a person’s capacities that due to an injury or decease were inherent, thereafter occurred or can be expected to occur” (my translation).233 The prohibition against discrimination applies to work and employment and related activities, including enterprises and membership in worker’s unions etc., education, supply of goods, services and housing, public

231 Concluding observations, §§ 7-8.
232 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, p. 112.
233 See 1:5 point 4 the Discrimination Act.
meetings, health- and medical care, social services, social security and other income benefit programmes, compulsory military service, civil service and some aspects of public employment.234

Sweden has, after ratification, adopted an amendment to the Discrimination Act, taking effect on January 15th 2015, that classifies denial of reasonable accommodation to ensure accessibility as discrimination:

*insufficient accessibility*: a person with a disability is disfavoured by lack of accommodative measures to put the person in a comparable situation with a person without the disability, provided that the measures are reasonable considering accessibility demands in law and other statutes, and with consideration to

- economic and practical preconditions
- duration and extent of the relationship or contact between the entity and the individual, and
- other circumstances of significance (my translation)235

Insufficient accessibility will amount to discrimination without there being either direct or indirect discrimination, provided that the above stated requisites are met.236 Disadvantageous treatment will amount to discrimination if the treatment results in a negative consequence for the individual, i.e. for example inability to take a test or to access the facilities of an authority. Both failure and omission to take accommodative actions meet the criteria, including total omission as well as insufficient measures. The assessment of whether there is discrimination shall take as a starting point a comparable situation with a non-disabled person. No discrimination will have occurred should accommodative measures not put the disabled person in a comparable situation. As the requisite is one of a comparable situation it follows that some objective deviations in the way an activity or facility is rendered accessible are allowed, e.g. another entrance for wheelchair users. Deviations may however not be greater than an objective assessment allows.237 Lack of accessibility as discrimination does not apply to private enterprises with fewer than 10 employees.238

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234 See chapter 2 the Discrimination Act.
235 See 1:4 point 3 the Discrimination Act.
238 See 2:12c point 3 the Discrimination Act.
Accommodation mainly includes support and personal service, communication, information and physical accessibility. What measures will be deemed reasonable will depend on other legislation containing accessibility requirements. A measure is reasonable only if its cost can be met without additional budgetary contributions. Should a measure result in considerable consequences on public or private activities it is not reasonable. The measure shall also be possible to implement, both as concerns practicability and legal possibility. Lasting relationships demand more extensive accommodative measures. A holistic assessment shall be applied in order to assess whether a measure is reasonable. Should there be several viable alternatives it is up to the operator to choose which to implement.239

The Committee is pleased with the new Swedish legislation classifying denial of reasonable accommodation as discrimination.240 It is however concerned by the exemption for enterprises with fewer than 10 employees. Denial of reasonable accommodation should be all-encompassing at all levels of government, national and local authorities, public or private entities. Sweden is urged to rectify these deficiencies and is also encouraged to adopt a legal definition of reasonable accommodation.241

22% of persons with disabilities have experienced repeated discrimination and there are discriminating structures within the Swedish society towards persons with disabilities.242 Discrimination against women with disabilities has been quite invisible and is in need of attention. Men and women are assessed differently in situations with equal needs and foreign born disabled women with disabilities have inferior living conditions compared to others, both non-disabled and other disabled persons.243 The Committee considers that procedures to better handle cases of intersectional discrimination need to be developed and the perspective of discrimination on the basis of disability must be complemented with that of gender discrimination.244 Opportunities for children with disabilities of making their voices must be improved, although not in school where disabled children have good chances of making their

240 Concluding observations, § 4.
241 Concluding observations, §§ 9-10.
242 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 116-117.
244 Concluding observations, §§ 11-12, 14.
voices heard.\textsuperscript{245} The Committee highlights the importance of providing children with the possibility of making their voices heard.\textsuperscript{246}

Awareness-raising needs to be improved. The Agency for Participation has the responsibility to coordinate, educate and promote disability policy and has conducted conferences, together with disability organizations, to raise awareness about the Disability convention and its implementation at community and county level.\textsuperscript{247} The Committee is concerned with the low public knowledge about disabilities and what they entail in needs of reasonable accommodation. The Committee urges Sweden to launch extensive awareness-raising programmes in order to rectify this and ensure an image of persons with disabilities as independent and equal citizens. Such an image should also help to reduce sociocultural discrimination and eliminate barriers to full participation. There is also a need to better promote the Disability convention, among public and private entities alike.\textsuperscript{248}

The amendment to the Discrimination Act concerning denial of reasonable accommodation to enable accessibility is a significant progress. Persons with disabilities are given the possibility of demanding accessibility in a range of occasions. However, the measures that are considered reasonable are of a simple and cheap nature, imposing no demands on measures that fall outside of ordinary budgets. The law furthermore only applies in specific areas; it is not all-encompassing. This and the exception concerning enterprises with fewer than 10 employees dilute the legislation and is not in compliance with article 2 or article 5.\textsuperscript{249}

Women with disabilities face multiple discrimination. There is however no legislation resulting in direct discrimination; rather it is the actions of authorities that sometimes result in

\textsuperscript{245} See Initial report, Sweden, § 326.
\textsuperscript{246} Concluding observations, § 20.
\textsuperscript{247} See further Initial report, Sweden, §§ 28, 50-51; List of issues in relation to the initial report of Sweden – Addendum – Replies of Sweden to the list of issues, Committee on the Rights of Persons with Disabilities, January 20\textsuperscript{th} 2014, UN Doc. CRPD/C/SWE/Q/1/Add. 1, §§ 8, 64 [cit. Replies of Sweden to the list of issues]; Åkerberg, §§ 100-101.
\textsuperscript{248} Concluding observations, §§ 21-24.
\textsuperscript{249} Article 2(3) the Disability convention reads as follows: “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation. Article 5 §§ 1-3 read as follows: 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
discriminatory effects. Sweden also needs to initiate and maintain more awareness-raising campaigns concerning disabilities, equality, capabilities and the Disability convention itself, especially to disabled persons.

4.3.3. Accessibility

The Swedish Planning and Building Act contain accessibility standards, including the elimination of easily eliminated obstacles. Significant areas of public outdoor environments are however excluded from the regulations concerning easily eliminated obstacles and easily eliminated obstacles still remain. Physical accessibility to health care facilities and social welfare offices are good, although communicative accessibility and accessibility for those with visual and cognitive impairments are inadequate. The disability movement considers that accessibility standards are insufficient concerning already built buildings. It is important to make buildings accessible from the outset. 85% of municipalities have accessibility standards concerning building permits. Municipalities need to make more efforts to increase accessibility in public facilities, although accessibility to libraries and sporting facilities are generally adequate. National authorities have improved their accessibility. Efforts are taken to render public transport stations accessible and counties strive at an accessible public transport system; 90% of public transportation has wheelchair places aboard. Legislation concerning accessibility is in general adequate, but not its application. The Committee is concerned that national legislation concerning accessibility is not adhered to by local authorities and municipalities and public procurement could be used more efficiently.

There are deficiencies concerning freedom of expression and opinion, and access to information with a lack of information in accessible formats provided by authorities, which are not under a general obligation to provide information in a way chosen by the individual, i.e. in accessible formats. The Committee is pleased with Swedish legislation as concerns the equality of sign language to the other national minority languages, but is concerned that most public material, such as new legislation, is not distributed in accessible formats and therefore urges Sweden to

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250 Plan-och Bygglag, SFS 2010:900 (the Planning and Building Act).
253 Initial report, Sweden, §§ 75-77.
254 Åkerberg, §§ 117-119.
255 See further Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 61-63.
256 See further Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, p. 65, 69-70; Initial report, Sweden, §§ 82-93.
257 Åkerberg, § 126.
259 Åkerberg, §§ 13, 145, 149, 348-351.
Persons with intellectual disabilities more often participate in cultural activities than others but have no access to higher education in the fine arts. Fewer persons with disabilities attend cultural events than non-disabled persons. 47% of county museums have eliminated easily eliminated obstacles and 80% of national museums are almost or totally accessible. Concerning communal cultural facilities variations are significant across the country. Efforts are made in order to improve hearing and visual accessibility to theatre and theatre- and dance companies are to a greater extent including persons with disabilities. There is an increase in provision of accessible movies at cinemas and television, although more is needed. More are furthermore taking part of talking- and easy-to-read books.

As regards access to sport pupils should not be excused from participation randomly, alternative solutions must be found if integrated participation is not appropriate. Assistive devices for leisure time or sports are hard to get prescribed and interpretation as well. Persons with disabilities, apart from children, practice sports less than non-disabled persons. There are significant deficiencies concerning accessibility to sporting facilities, especially outdoor arenas, a lack of information about accessible activities, and lack personal escort and special transport.

The right to accessibility is not sufficiently ensured. Authorities need to improve their communicative accessibility and for example schools and sporting facilities need to improve physical accessibility. There is a need to amend the Act concerning Public documents and Secrecy in order to provide disabled persons with a right to take note of public documents in accessible formats. In conclusion, there is a lot left to remedy before Sweden fully fulfils its obligations under articles 9 (accessibility), 21(freedom of expression and opinion, and access

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262 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 79, 82.
263 Initial report, Sweden, §§ 287-293.
264 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 82-83, 85-89.
265 Åkerberg, pp. 571-573.
266 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 90-95.
267 Offentligths- och sekretesslag, SFS 2009:400 (the Act concerning Public Documents and Secrecy). The Freedom of the Press Act, chapter 2 § 12 apparently already provides for provision of public documents in accessible formats, it is however likely that what is meant is only that all different sorts of public documents are to be provided upon request.
to information) and 30 (participation in cultural life, recreation, leisure and sport). The amendment to the Discrimination Act may facilitate improvements in this regard. If however the interpretation of reasonable accommodation provided in the accompanying government bill should be applied, substantial additional efforts will be necessary as well.

4.3.4. Right to life, integrity and liberty
The legislation concerning the right to life is adequate. Disabled persons are however especially prone to die from health care malpractice or violence and persons suffering from mental illness have higher mortality rates than others. The Committee is most concerned about the high rates of suicides among young persons with disabilities and urges Sweden to adopt all necessary measures in order to improve this situation. Accessibility to emergency evacuation must be made accessible, as should the preventive work.

Provision of compulsory psychiatric care is flawed as concerns children and youths with disabilities. Persons deprived of their liberty due to compulsory mental care must have their cases evaluated by an impartial court, which do not take the statements of doctors for granted. Compulsory care should enable inclusion in society. The Committee is most concerned about the compulsory detention in psychiatric care facilities and the provision of involuntary medical treatment in these facilities. Sweden is urged to make sure that all medical treatment is voluntary and provided only after informed consent. Financial resources should be allocated to provide sufficient support to persons with mental disabilities, without resorting to compulsory care. Electro convulsive therapy (ECT) should only be provided after an informed consent. The Committee is concerned by this use of ECT and holds that all such treatment must come to an immediate stop. The Committee is also concerned about the seclusion and use of belts or straps on children and youths with disabilities in mental health care facilities.

Many municipalities cannot provide accessible sheltered housing for women and only a few provide activities for these women. Women with mental disabilities are at greater risk of being victims of sexual and other forms of violence. Disabled children are more likely to be bullied.

268 See Åkerberg, pp. §§ 179-182.
269 Concluding observations, §§ 29-32.
270 See further Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 100-101.
271 See further Åkerberg, §§ 233-253, regarding compulsory care and treatment of disabled persons detained due to criminal behaviour.
272 Concluding observations, §§ 35-36.
273 Replies of Sweden to the list of issues, § 107.
274 Concluding observations, §§ 37-40.
275 See further Åkerberg, §§ 63, 271-273, 277-278.
It is twice as common for disabled children to be victims of domestic violence and it is more common with domestic violence between parents of disabled children. The Committee finds the level of violence against children and women with disabilities distressing, as is the lack of accessible shelters.

Attitudes in connection to adoption by disabled persons and their child rearing responsibilities need to be improved, as well as conditions to enable such responsibilities. Existing legislation provide sufficient support, but application is inadequate. Support to children and youths with disabilities and parents of disabled children are important. The Committee is concerned as well by the discrimination in adoption procedures, including additional assessments of parenting capabilities.

To achieve full compliance with the Disability convention Sweden must eliminate all compulsory treatment provided due to a disability. There is however a significant difference between provision of compulsory treatment due to the consequences of a disability and treatment solely on the basis of a disability. The Compulsory Psychiatric Care Act does only allow compulsion concerning the first alternative. It is explicitly stated that compulsory care is not to be provided solely on the basis of a developmental disorder. The Act concerning Support and Services to Persons with Certain Functional Impairments and the Social Services Act do not allow for any compulsion at all. To remove the possibility of compulsory treatment for persons who are severely ill; whose life or health is at stake or the health or life of others, would in my opinion be most inappropriate. The Compulsory Psychiatric Care Act states that the aim of the care is to enable the individual to consent to voluntary care and as soon as there is no immediate risk the individual is to be released. However, I agree with the disability movement that the judiciary put too much trust to the evaluations made by doctors. There is no point in a court proceeding if it is clear beforehand what the outcome will be. Furthermore, involuntary use of ECT should stop as should isolation and excessive use of belts.

276 See further Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, p. 97.
277 See further Concluding observations, §§ 15-16, 41-42.
279 See further Initial report, Sweden, §§ 180-183.
280 Concluding observations, §§ 45-46.
281 Article 14(1) the Disability convention reads as follows: States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of the persons; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
282 For the provisions of The Compulsory Psychiatric Care Act see §§ 2, 3 Lag om psykiatrisk tvångsvård, SFS 1991:1128, (the Compulsory Psychiatric Care Act).
The higher rates of violence and abuse towards women, men and children with disabilities are disturbing and should be addressed immediately. Article 16 is a civil right and thus subject to immediate implementation. Abuse of disabled children, be it coming from their peers or parents is most distressing as early exposure may risk affecting self-esteem and trust.

As concerns the right to respect for home and family, the additional questioning and tests disabled persons are put to as potential adoptive parents should stop, as they are discriminatory, should there not be an objective reason for the tests. It is however recognized that international adoptions may require such tests if requested by the other state. The Swedish state should however try to be relieved of this burden in situations where no objective reasons justify such additional test.

4.3.5. Citizenship and access to justice
Concerning the right to legal capacity current legislation is sufficient, administrator- and deputyship and other forms of substituted decision-making are to be ended or substituted to a less intrusive form of support whenever possible and may also be restricted to certain categories of decisions or property. It is however too difficult to have a decision of administratorship revoked for persons with learning disabilities. The Committee on is however concerned with the presence of substituted decision-making in the case of appointments of administrators. All substituted decision-making should be replaced by supported decision-making, which should always respect the will and preferences of the disabled person.

Application of legislation concerning access to justice is deficient, especially as concerns accessibility and treatment. Since 2010 all courts have been obliged to be fully accessible. There is access to interpretation and legal aid. Everyone is entitled to legal standing in courts. A lack of knowledge about disability and human rights in the judiciary can result in lack of access to justice. Over the past three years 13 % of persons with disabilities which have come into contact with the police have felt discriminated. 34 % which have participated in court proceedings experienced insufficient accessibility.

Liberty of movement is not fully ensured due to lack of accessibility to the physical

283 Replies of Sweden to the list of issues, §§ 75-79; Åkerberg, §§ 206-207.
284 Concluding observations, §§ 33-34.
286 Åkerberg, § 10. See further in Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 101-103.
287 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, p. 97.
environment, transport and lack of personal support, including interpretation. There is support available provided by the Social Services Act and the Act concerning Support and Services to Persons with Certain Functional Impairments.\(^{288}\) Persons in need of such support often have problems traveling abroad as support is seldom offered. Support for educational- or work related journeys are somewhat easier to come by.\(^{289}\)

The right to participation in political and public affairs is not fully ensured due to lack of personal support, accessibility and access to special transportation. As of 2014 no inaccessible polling stations may be used; however only 52 % of the municipalities had taken measures to ensure accessibility. Ballot papers are provided in Braille to the visually impaired. It is however not possible for the visually impaired and those with reading difficulties to independently choose a specific candidate. Information about the election in 2014 was available in Braille, easy to-read and sound recordings. 80 % of persons with intellectual disabilities do not vote. To increase the share that is voting there is a need for accessible information concerning voting procedures as well as political parties and communicative accessibility during elections. Participation in local decision-making shall be ensured as far as possible, through e.g. grants for transportation, including the coming improved possibilities of video conferences etc. There is a proposal for a trial of e-voting at the general elections in 2018.\(^{290}\) There is a need for adequate access to special transportation, escort services and interpretation to facilitate holding of public office.\(^{291}\) The Committee is pleased with Swedish legislation concerning the right to vote and to hold public office.\(^{292}\) It is however concerned about the lack of accessible information concerning voting procedures and electoral campaigns and that few disabled persons run for or are being chosen for public office. Support must be made available at polling stations in cooperation with disability organizations, including by education of voting officials. Sweden is also urged to provide all necessary support to elected representatives with disabilities, including personal assistants.\(^{293}\)

To achieve full compliance with article 12 (equal recognition before the law) Sweden must


\(^{289}\) Åkerberg, p. 302, 341. For information concerning the disability movements opinions on residence permits see Åkerberg, §§ 298-301.


\(^{291}\) Åkerberg, §§ 550-552.

\(^{292}\) Concluding observations, § 4.

\(^{293}\) Concluding observations, §§ 51-52.
eliminate all substituted decision-making.\textsuperscript{294} Administrator ship is to be abolished and trustees should not be able to make decisions without specific consent prior to every decision. According to current legislation a trustee is to be appointed if the disabled person need help in managing personal or legal affairs or property. The consent of the disabled person is needed unless rendered impossible by his or her condition. An administrator is to be appointed should the disabled person be unable to manage the above stated. The administrator ship is to be adapted to the needs of the individual and may be restricted to certain matters or property. According to the main rule the person put under an administrator loses his or her ability to make decisions whereas the opposite is true for trustees.\textsuperscript{295} With appropriate and effective support it should be possible to abolish all substituted decision-making. It is acknowledged that this will be more time consuming and impose costs on the State or municipalities, and that decisions taken will not always reflect what is best for the individual. As stated by the Committee in its general comment no. 1 however, the individual has the right to make bad decisions as well.

An accessible judicial system is of fundamental importance to enable full citizenship and maturity, to enable disabled persons to be bearers of rights as well as of obligations. All courts must be accessible, both physically and communicative. Interpretation is to be provided whenever there is a need. Verdicts are to be provided in accessible formats, both to the parties as well as the public in accordance with the right to take note of public documents. The Legal Aid Act applies to administrative proceedings, but it is difficult to receive legal aid in these proceedings. Factors which are to be included in an assessment of the need of legal aid are the importance of the matter, whether there are conflicting versions, complicated regulations and the personal circumstances of the claimant. According to the government bill 1996/97:9 such personal circumstances may be difficulties in litigating due to a disability. Parties in proceedings concerning compulsory care and the like and immigration proceedings are entitled to legal counsel. Arguably most of the legislation concerning the everyday life of persons with disabilities and their independence is of an administrative nature. Obvious examples being the

\textsuperscript{294} Article 12(1)-(4) the Disability convention read as follows: 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

\textsuperscript{295} See chapter 11, especially §§ 4, 7 föräldrabalken, SFS 1949:381 (the Parents Code).
Act concerning Support and Services to Persons with Certain Functional Impairments, the Assistance Benefit Act and the Social Services Act. These matters are of utmost importance and a fair and correct assessment is the difference between isolation, dependence and a passive life and on the other hand integration, independence and active participation. The Administrative Procedure Act seemingly contains a provision of material process guidance. Paragraph 8 states that every case shall be as investigated as its nature requires. This provision together with the limited possibility of being granted legal aid is in my opinion insufficient to ensure effective access to justice.\(^\text{296}\)

The liberty of movement and especially the liberty to travel abroad, i.e. to leave one’s country\(^\text{297}\) is not sufficiently ensured for many persons with disabilities; i.e. those in need of support according to the Act concerning Support and Service to Persons with Certain Functional Impairments. This act provides for *inter alia* personal assistance and escort service. As is shown by the Alternative report municipalities are not generally keen to grant such support for travels abroad, especially not for longer journeys.\(^\text{298}\) The Social Services Act provides for escort service as well. However this legislation cannot be used to receive support during travels abroad as it only provides support to ensure persons reasonable living conditions, i.e. quite low living conditions.\(^\text{299}\) As regards the Act concerning Support and Service to Persons with Certain Functional Impairments the question is whether a disabled person is in need of a travel abroad in order to attain and maintain good living conditions. This applies in situations where there is a need for additional support. Those who have enough support to travel without imposing additional costs on the municipality are entitled to travel without an additional assessment. Those who receive support in accordance with the Assistance Benefit Act may also travel abroad and e.g. study abroad up to one year.\(^\text{300}\) These regulations show that the problems are prominent for those in need of additional assistance or those who are not entitled to personal

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\(^{296}\) Renfors, Cecilia, Arvill, Ebba Sverne & Sverne, Erica, *Rättshjälpsslagen, kommentar till 7 §* (version 2014-03-01) “www.nj.se/zeteo” (the Legal Aid Act, commentary to § 7); *Rättshjälplag, SFS 1996:1619,* (the Legal Aid Act), especially §§ 6-8, 10-11.

\(^{297}\) Article 18(1)(c) the Disability convention reads as follows: 1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities: (c) Are free to leave any country, including their own.

\(^{298}\) See § 9 the Act concerning Support and Service to Persons with Certain Functional Impairments); HFD case number 78-11.

\(^{299}\) See 4:1 and 5:7 socialtjänstlagen, SFS 2001:453 (the Social Services Act).

\(^{300}\) See 7 § the Act concerning Support and Service to Persons with Certain Functional Impairments; RÅ 2010 ref. 69. Assistance in accordance with chapter 51 the Social Insurance Code, previously the Assistance Benefit Act has been classified as a domicile benefit in accordance with Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, entailing its provision in up to one year abroad.
assistance, but only escort service.

As regards the right to participation in political and public life extensive measures are needed to facilitate and encourage persons with mental or intellectual disabilities to vote. The measures suggested by the Agency for Participation should be implemented. As concerns physical access to polling stations the legislation, after current amendments, is sufficient. Municipalities must apply the legislation and take measures to ensure full accessibility in the next election. Communicative accessibility for those with visual impairments should be improved, the trial of e-voting being an important step in order to achieve this. To facilitate the holding of public office, special transport services should be improved, especially as concerns the share of journeys provided, as well as the personal assistance and other support necessary. Another measure is the use of video conferences.

4.3.6. Independence
The right to the highest attainable standard of health is not ensured to persons with disabilities which have an inferior standard of health compared to non-disabled persons. 20 % of disabled persons consider that they have bad health compared to 2 % of non-disabled persons. 29 % of disabled persons have no savings, compared to 17 % of others. 21 % of disabled persons lacks a close friend, compared to 12 % of others. Sedentary leisure time is much more common among disabled persons. 301 Their general health could be improved by a third without necessarily taking extensive measures, should factors affecting the standard of health be remedied, i.e. lack of influence, financial insecurity, discrimination and lack of accessibility, including communicative accessibility. The provision of health care is flawed; there is a need of coordination and centralization concerning rare deceases. Sweden applies a high cost protection for open medical care, drugs and assistive devices. 302 The Committee is concerned about mental illness among children and youths with disabilities and considers that it must be improved and resources for this purpose provided. The right of the individual to give and withdraw an informed consent to medical care is emphasized. 303

A holistic approach to rehabilitation and habilitation is applied, concerned with providing the necessary support in the right time. 304 Provision of rehabilitation and habilitation varies across

301 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, p. 51.
302 See further Department Letter Ds 2008:23, p. 84; Government Bill 2008/09:28, pp 70-72; Initial report, Sweden, §§ 217, 223; Replies of Sweden to the list of issues, §§ 141-146.
303 Concluding observations, §§ 17-18, 34.
304 See further Initial report, Sweden, §§ 226-235.
the country, the situation being worst for adults. There are also differences concerning what type of devices that are classified as assistive and how many assistive devices per person that are prescribed.\textsuperscript{305} Costs inflicted by provision of assistive devices and special transport are different depending on in which county the disabled person resides.\textsuperscript{306}

To enable independent living support may be provided according to the Act concerning Support and Service to Persons with Certain Functional Impairments, the Assistance Benefit Act and the Social Services act. Such support shall ensure disabled persons the possibility of living like other non-disabled do.\textsuperscript{307} More restrictive interpretations of the legislation, especially concerning the Act concerning Support and Service to Persons with Certain Functional impairments are distressing. Interpreters and escorts are furthermore not sufficiently provided. The Act concerning House Adaptation Grants\textsuperscript{308} should be amended so as to more generously provide grants to a person who wishes to move from an adapted home.\textsuperscript{309}

The Committee has the following to say about the right to independent living.

The Committee is concerned that State-funded personal assistance has been withdrawn for a number of people since 2010 due to a revised interpretation of “basic needs” and “other personal needs”, and that persons who still receive assistance have experienced sharp cutbacks, the reasons for which are unknown or only seemingly justified. It is further concerned at the reported number of positive decisions under the Swedish Act concerning Support and Service for Persons with Certain Functional Impairments that are not executed. The Committee recommends that the State party ensure that personal assistance programmes provide sufficient and fair financial assistance to ensure that a person can live independently in the community.\textsuperscript{310}

Provision of support according to the Social Services Act and the Act concerning Support and Service to Persons with Certain Functional Impairments have increased, especially accommodation support and special housing. Many state that their possibilities of leisure, study and work are negatively affected by provision of insufficient support. Provision of support

\textsuperscript{305} Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 45-46.
\textsuperscript{306} Initial report, Sweden, § 231; Åkerberg, § 335.
\textsuperscript{307} See the Act concerning Support and Service to Persons with Certain Functional Impairments; the Social Services Act; Replies of Sweden to the list of issues, §§ 115-118.
\textsuperscript{308} Lag om bostadsanpassningsbidrag m.m., SFS 1992:574 (the Act concerning House Adaptations Grants).
\textsuperscript{309} Åkerberg, §§ 309, 313-317.
\textsuperscript{310} Concluding observations, §§ 43-44.
according to the Assistance Benefit Act have decreased since 2009, one of the reasons for this being the more restrictive interpretation of basic needs passed by the Supreme Administrative Court. Those who lose their state-funded personal assistance or communal support according to the Act concerning Support and Service to Persons with Certain Functional Impairments sometimes receive other support according to the latter act, such as special housing. Others receive support in accordance with the Social Services Act whereas many receive no support at all.\textsuperscript{311} Provision of permits according to the Special Transport Services Act decreases every year, and those having permits make fewer trips. Partly this is due to a more accessible public transportation. However, many disabled persons feel that they are in need of an increased allocation of special transport journeys, especially for leisure time activities. There are also problems with delays and default journeys. Variations in quality are significant between the counties.\textsuperscript{312}

Swedish legislation is deemed to meet the requirements of the right to education, although the application is insufficient. Pupils with disabilities, e.g. pupils with learning disabilities or other severe disabilities, hearing impairments and visual impairments may attend special schools- or classes. The curricula in the specialized solutions are adapted to the needs of the pupils. Some of the specialized modes of education are required to see to that pupils, in so far as possible, have the possibility to attend regular classes. Education is provided in sign language, Braille, spoken language and alternative modes of communication, depending on the needs of the pupils. Most pupils hard of hearing however attends regular schools. All pupils are entitled to special support to enable the pupil to reach the minimum level of knowledge required.\textsuperscript{313} The state holds that the Swedish school system is inclusive, only 1,7 % of children and youths attending special classes or schools although special tutorial classes are used more than necessary. Teachers have low expectations on the achievements of pupils with disabilities. Schools have the possibility to deny acceptance of students with disabilities should their enrolment entail significant organizational or financial difficulties. Universities and university colleges offer different kinds of special support to disabled students.\textsuperscript{314}

However, the new Education Act contains inferior opportunities for pupils with disabilities as it gives schools the possibility of denying enrolment should enrolment impose substantial

\textsuperscript{311} Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 42-44.
\textsuperscript{312} Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 70-71.
\textsuperscript{313} See further Department Letter Ds 2008:23, pp. 73-81; Government Bill 2008/09:28, pp. 62-69; Replies of Sweden to the list of issues, § 131.
\textsuperscript{314} See further Initial report, Sweden, §§ 184-214.
financial or organizational difficulties. Furthermore the law provides fewer opportunities for provision of special support. It is only compulsory to provide such support up to the pass level. There has been an increase of pupils placed in special schools, while special school teachers find that many pupils should rightly attend regular schools instead. Education and knowledge is in less focus at these schools compared to provision of care. Children who are hard of hearing must be able to learn Swedish sign language and Braille and attend quality schools that focus on these languages, be they special schools or other schools.  

The Committee is pleased that only 1.5% of pupils are enrolled in school outside of regular teaching, as well as that such placements are made following decisions by parents. It is also pleased with the possibility to appeal decisions concerning special support. It is however concerned that schools may deny enrolment due to considerable financial or organizational difficulties and that pupils in need of extensive support do not always receive such support. Sweden is urged to ensure inclusion of all disabled pupils in mainstream education and availability of necessary support.  

30% of persons with disabilities between the ages of 25-64 have tertiary education. 44% of non-disabled persons have tertiary education. 47% of audited primary schools provide insufficient special support. 70% of audited primary schools and 82% of secondary schools violate the Education Act in some respect. 16% of disabled pupils are bullied, the rate for non-disabled pupils being 6%. 72% of primary schools are deemed accessible.  

Unemployment rates among disabled persons with reduced work capacity are high. There are extensive measures available to increase employment rates for those disabled persons with a reduced work capacity, including wage subsidies, grants provided to the employer as well as the disabled employee to adapt the work place or obtain assistive devices. Assistive devices are furthermore provided by either the Public Employment Agency or the Social insurance office, depending on whether the disabled person is already employed or not. Personal assistance is another support available. Apart from such adaptive measures there are several forms of sheltered employment, including sheltered employment within the public sector, development employment, security employment, sheltered employment within the state owned company

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315 See further Åkerberg, §§ 77-80, 89-91, 402-437.  
316 Concluding observations, § 4.  
317 Concluding observations, §§ 47-48.  
318 See further Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 33-39.  
319 Replies of Sweden to the list of issues, § 151.
Samhall, supported employment and arrangement subsidies. A further highlighted measure is the reform of the sickness benefit, focusing more on rehabilitation and opportunities for returning to work as well as putting stricter obligations on the individual when it comes to possible occupations. Persons with intellectual disabilities, participating in communal daily activities, provided according to the Act concerning Support and Service to Persons with Certain Functional Impairments, are to a greater extent to be given opportunities to remunerated work. Early retirements (today activity compensation) have increased amongst young persons with disabilities as have placements in daily activities for the same age group. Few persons proceed from daily activities to employment. Many disabled persons feel discriminated and schools and work centres should cooperate in order to help establish young persons with disabilities on the labour market.

Regulations and application procedures for receiving assistive devices or interpretation for work are troublesome. There is need for expanded opportunities for interpretation to facilitate employment of persons who are hard of hearing. Responsibilities in connection with provision of interpretation should be placed with one agency; the same applies to prescription of assistive devices. It is furthermore important that agencies’ assessments of work capacity are not based on diagnoses but on individual assessments. Legislation concerning support is adequate, it is the application that is sometimes flawed due to, for example shared responsibilities. Employers are not sufficiently informed about available support in connection with employment of persons with disabilities. Vocational guidance is furthermore many times deficient as it focuses on the disability instead of capabilities. The right to accessibility must be better ensured in order to raise employment rates for persons with disabilities. Vocational rehabilitation needs to be improved, coordinated and provided earlier to increase chances of returning to work.

The Committee is pleased with the efforts made by Sweden in order to reduce unemployment. It is however concerned by the most significant increase in unemployed disabled persons after changes in the sickness benefit system, as well as by the wage inequality between men and women with disabilities. The Committee further holds that the state should increase provision of already implemented measures as well as implement the suggestions in the FunkA Inquiry. The state is further recommended to abstain from referring to disabled persons as

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320 See further Initial report, Sweden, §§ 236-266.
321 Åkerberg, §§ 479-481.
322 See further Åkerberg, §§ 488-503, 512-517.
323 Concluding observations, § 49.
“people with reduced capacities or limitations”. 324

Persons with disabilities have a lower rate of employment than non-disabled persons: 55 % compared to 79 % in 2013. 70 % of persons with disabilities state that they have a reduced work capacity. Disabled persons without reduced work capacity have an employment or other work to the same extent as non-disabled persons. The differences in employment rates are decreasing although the share of unemployed who are persons with disabilities increase. 325 The transition from school to employment is of fundamental importance. A good education is essential to procure an employment. Only 16 % of the disabled persons registered with the Public Employment Service have a tertiary education. Early interventions and support in primary and secondary school have proved efficient. There is an ongoing increase in provision of activity compensation for youths with disabilities, especially concerning psychiatric disabilities. The rate of persons with activity compensation transitioning to employment has decreased since 2006. Among disabled persons with reduced work capacity and which have a job, 79 % are in need of support measures. 80 % of those state that they receive the support they need. 326

Concerning the right to an adequate standard of living decreased social insurance benefits without increased opportunities for work are somewhat troublesome. There are a number of different supports available for persons with disabilities, including disability benefit, care benefit, assistance benefit and car benefit. 327 The disability compensation is to compensate for additional costs inflicted due to a disability whereas the care grant shall compensate for additional costs inflicted to a family due to the disability of a child. 328 Parents may be granted parental benefit to stay with a disabled child up to, in some cases the child turns 18. Childcare allowance may be granted up till the year disabled child turns 19. 329 High fees for special housing according to the Act concerning Support and Service to Persons with Certain Functional Impairments are considered illegal. Municipalities charge fees for costs inflicted due to disabilities, which should be met by the municipality. For those who have reduced work capacity sickness benefit should be able to be provided more flexibly, enabling persons to work as much as possible. Legislation concerning disability compensation is adequate, but for the

324 Åkerberg, § 50.
325 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 23-25.
326 Lagercrantz, Mehlich, Adolfsson, Gustafsson & Lindqvist, pp. 27, 29, 31, 48.
328 Initial report, Sweden, §§ 274-275.
329 See further in Replies of Sweden to the list of issues, §§ 168-169.
levels of compensation which should be raised so as to meet the actual costs.330

The initiatives suggested by the Agency for Participation need to be taken in order to improve the general health of persons with disabilities. Education, work, economy, an active leisure time and influence are all interrelated in these efforts. They are all separately human rights provided for in the Disability convention which is an example of the interrelatedness of all human rights. The provision of rehabilitation and habilitation must be distributed more equally across the country as should the provision of assistive devices and special transport services. Not only provision but also cost varies. The Disability convention permits fees but it must always be remembered and respected that these fees shall be affordable.

To enable and facilitate independent living331, full inclusion and participation in society as well as equality of opportunity the Act concerning Support and Service to Persons with Certain Functional Impairments and the Assistance Benefit Act are of vital importance. These laws provide persons with substantial mental, intellectual, neuropsychiatric or physical disabilities with the right to personal assistance, escort service, special accommodation, daily activities etc. Personal assistance and other support is to be provided in order to achieve good living conditions for a disabled person and his or her ability to live independently and as other non-disabled persons do. A disabled person is entitled to personal assistance if he or she are in need of help to carry out basic needs. Help with personal hygiene, dressing and undressing, toilet, eating, communication or other help which requires thorough knowledge about the disabled person. A person in need of help with all of these, or some of these basic needs may also receive personal assistance for other personal needs, enabling the provision of personal assistance up to around the clock. A person who is in need of personal assistance exceeding 20 hours per week is entitled to assistance benefit, that is to say the responsibilities pass over from the municipalities to the state.332

330 Åkerberg, §§ 529, 533, 535-536.
331 Article 19(a)-(b) the Disability convention read as follows: States Parties to the present Convention recognize the right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that: (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis others and are not obliged to live in a particular living arrangement; (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation and segregation from the community.
332 See §§ 1, 5, 7, 9a the Act concerning Support and Service to Persons with Certain Functional Impairments; chapter 51 § 3 the Social Insurance Code.
Recent years cutbacks are commented on by the Committee, the disability movement and the Agency for Participation are troublesome. A verdict from the Supreme Administrative Court establishes that help with cooking, preparing or cutting food is not to be considered a basic need, it is only the act of feeding that does count. The same verdict contains a phrase that can only be described as discriminatory, it bears quoting: “The circumstance that he is able of working as a scientist during about 30 hours a week, too speaks against that his need of qualified help in the stated situations are more than marginal.” This reasoning is in clear violation of Swedish obligations under the Disability convention. Full or close to full work capacity is deemed a reason for not being in need of personal assistance, thus taking as a starting point that disabled persons in need of personal assistance are unable of working on equal terms with other non-disabled persons. The aim of personal assistance is to enable persons with substantial disabilities to live as others do. The reasoning of the court shows an alarming lack of knowledge, insight and understanding of the diversity of persons with disabilities, thus again being in violation of the convention. It is most distressing that such a reasoning comes from the Supreme Administrative Court, showing that the state needs to initiate more awareness-raising campaigns about the capabilities of persons with disabilities, in order to foster a more nuanced and dignified image of disabled person with the Supreme Court.

The government bill 1992/93:159 states that an individual assessment shall be made, taking into account medical, social and psychological factors. The assessment of whether a disabled person is in need of personal assistance or other support is thus to be assessed holistically, as is also required by the social model of disability contained in the Disability convention. To live up to the requirements of article 19 and to consider the general principles in decision-making it is necessary that the holistic approach be applied once again.

The Supreme Administrative Court has made several other decisions concerning personal assistance, both communal and state-funded. In its verdict HFD 2012 ref. 41 the Supreme Administrative Court states that the Act concerning Support and Service to Persons with Certain Functional Impairments is a complement to the Social Services Act, and that with one exception, what can be granted according to the first must also be possible to grant in accordance with the latter. The Supreme Court thereby holds that the purpose of the Act concerning Support and Service to Persons with Certain Functional Impairments is to enhance the protection under the

333 RÅ 2009 ref. 57.
Social Services Act. In principle this could be well enough, but the reasoning is flawed. Help and support in accordance with the Social Services Act is only to be provided if the needs cannot be satisfied in another way, and only to ensure the person reasonable living conditions. This is not a legislation that entails equal living conditions. The Act concerning Support and Services to Persons with Certain Functional Impairments provides personal assistance and other support if the needs of the individual are not satisfied in another manner and to achieve and maintain good living conditions; the purpose of the law being independence and equality. In my opinion, it is therefore most unfortunate to consider the Act concerning Support and Services to Persons with Certain Functional Impairments to be a complement to the Social Services Act; whereas the purpose of the first is in line with the Disability convention while the purpose of the latter is not.

The Committee complements Sweden on its low share of pupils attending special classes or special schools. Compulsory primary education is provided to all, including pupils with so severe disabilities as to rule out academic teaching almost completely. These pupils attend training school. However, the Committee is also concerned by the deficient application of the Education Act, resulting in that pupils in need of special support do not receive the support they need and are entitled to.\footnote{Chapter 3(5a)-(12) skollagen, SFS 2010:800 (the School Act).} Other areas of concern are inaccessible school buildings, inaccessible sports lessons and inaccessible social activities in school. Social inclusion is crucial for the well-being of pupils. Therefore, it is most distressing, but hardly surprising, that disabled pupils are exposed to bullying more often than other pupils. In conclusion, these deficiencies put the Swedish school system in need of change, although the entire school system is in need of change; which is already in transformation. It is important not to forget those in specialized solutions in this transformation, remembering the requirement in the Disability convention of an inclusive education system.

The Committee is pleased with Swedish efforts to ensure the right to work for persons with disabilities although it considers that more should be done. The measures suggested are in line with those already provided and furthermore the suggestions contained in the FunkA inquiry. Sweden provides extensive measures to facilitate employment of persons with disabilities; personal and financial support as well as assistive devices. Additionally better coordination and cooperation between the Public Employment Service and the Social Insurance Agency are needed. Applications and procedures prior to provision of support should be simplified, if
possible administered by one authority. These suggestions are shared by the FunkA inquiry.\textsuperscript{336} What is furthermore needed is the initiating and maintaining of effective awareness-raising campaigns to help combat prejudices against persons with disabilities on the part of potential employers. A sufficient education is many times of utmost importance, especially for persons with mobility disabilities unable of performing physical labour. The inferior school results and lower rate of tertiary education is therefore distressing.

The changes in the sickness benefit have resulted in that many disabled persons lost their benefit and have to look for employment. With low chances of being employed it is crucial that special support be provided to facilitate the transition. Those who are unable to work should be granted the sickness compensation directly (activity compensation for those under 30), i.e. to say early retirement. Social security is high in Sweden, and basic needs will be covered by the state or communal social welfare allowance.\textsuperscript{337} Furthermore, Sweden provides many forms of financial compensation to persons with disabilities or to their parents to compensate for the disabilities. In my opinion the benefits are sometimes in need of an increase in the money distributed to cover the actual costs.

4.4. Appraisal

Swedish legislation is overall adequate, one clear exception being chapter 11 of the Parents Code, concerning administrator-ship. Application of current legislation by authorities and courts is however often deficient, as compared to the requirements of the Disability convention, e.g. provision of special support in school and personal assistance. In other areas, where legislation as well as its application is mostly accurate, the requirements of the convention are many times yet to be met. This applies for example to the right to work and employment where attitudes towards persons with disabilities need to be improved and prejudices combated.

To achieve the needed changes persons with disabilities need to be empowered, for example by the facilitation of the right to vote for persons with mental disabilities, so as to enable them to make their voices better heard.

\textsuperscript{336} Find the FunkA inquiry in the Swedish government official reports SoU 2012:31 Sänkta trösklar, högt i tak. Arbete, utveckling, trygghet (Lowering thresholds, high ceilings. Work, development, security) & SoU 2012:92 Arbetshjälpmedel och försäkringsskydd för arbete på lika villkor (Assisitive devices and insurance for equal conditions in work).

\textsuperscript{337} See 4:1 the Social Services Act.
5. General conclusions

5.1. The Disability convention and Swedish compliance
The Disability convention is comprehensive, providing persons with disabilities with rights and protection in all aspects of life and all spheres of society. The classic classification between civil and political and economic, social and cultural rights is not possible to uphold in the case of the Disability convention. Most civil and political rights demand special adaptions and positive measures to ensure their enjoyment by persons with disabilities. Although the Disability convention itself states that it creates no new rights, this is probably untrue. The adaptations of already existing human rights are in some of the articles so extensive and substantial that they must be considered to create something new, e.g. the concept of reasonable accommodation and the right to live independently and being included in the community.

The substantial rights are far-reaching and all-encompassing. Applied in a holistic manner the convention can achieve substantive progress and improve the living conditions of persons with disabilities. The Committee has interpreted the Disability convention extensively, imposing significant positive obligations on states parties. In line with the concept of progressive realization it can be expected that the requirements will only increase.

When states parties strive to implement the Disability convention it is of utmost importance that they do so considering the principle and right to non-discrimination and equality. Persons with disabilities are to be accepted as active agents and participants in society having legal capacity. Their inclusion shall be the goal as well as their possibility of living independent lives; if needed with support, which is to be provided as a right and not as social policy.

Swedish legislation concerning disability matters are in general adequate and sufficient, one clear exception being legislation concerning all types of accessibility. The amendment to the Discrimination act could reasonably enhance the compliance of the authorities as well as private entities and lead to an adaptation to higher standards. Concerning access to information it is a democratic concern that authorities be obliged to provide public documents in accessible formats to all those who are in need of it. These documents should be provided in a timely manner without additional costs. Furthermore, the legislation concerning substituted decision-making is in need of change in order for Sweden to fulfil its obligation under article 12 of the Disability convention.
The situation is quite different when it comes to application and interpretation of current legislation, which apply to municipalities, national authorities and courts as well as general measures, policies and action plans not adopted by legislation. Non-discrimination and equality are not sufficiently ensured, neither is accessibility under current legislation. The situation of women and children with disabilities need to be highlighted, including as stated by the Committee the high rates of suicides amongst youths with disabilities. It is furthermore important that the judiciary do not take doctors’ opinions for granted in cases of compulsory psychiatric care; ECT is not to be used involuntary. The higher rates of violence and abuse against persons with disabilities, including bullying in school must be addressed. Attitudes towards disabled parents must improve, including concerning adoption procedures, and sufficient support must be provided.

Effective access to justice must be improved. Judges and other staff working within the judiciary must receive education concerning the diversity of persons with disabilities, including capabilities and abilities, needs for support etc. in order to make sure that the prejudiced image of persons with disabilities, evident in the verdict RÅ 2009 ref. 57, is removed. Enhanced access to legal aid and communication support should also be provided.

Concerning the right to liberty of movement it is most uncertain whether article 18 of the Disability convention contains a right to personal support in order to enable travel. Article 18(c) only states that all person shall be free to leave any country.

As regards the right to participation in political and public life it is of utmost importance that Sweden implements measures to increase the share of persons with mental disabilities which votes. Holding of public office should be facilitated, as suggested by the Committee, by a more generous provision of special transport and personal assistance.

The health of persons with disabilities should be improved. However, it is mostly factors others than pure health care such as education, employment, economy and influence, that result in the inferior state of health. Subsided health care is provided to all without discrimination. There is a high cost protection ensuring that everybody shall have access to health care, outermost the cost of health care up to the high cost protection will be borne by the municipalities, that is to say by provision of social welfare benefit. The disability movement highlights the need for more health care concerning persons with allergies and those with rare deceases. As regards rehabilitation and habilitation provision should improve in an equal manner across the country,
including the distribution of assistive devices and special transport so as to facilitate personal mobility.

The Act concerning Support and Service to Persons with Certain Functional Impairments and the Assistance Benefit Act are of crucial importance to achieve fulfilment of the rights under article 19 of the Disability convention. The legislation is generally adequate, apart from the medical approach in the enumeration of what constitutes basic needs. However, to enable Sweden to abide by its obligations under article 19, application of the laws must be improved, including returning to the purpose of independence and the ability to live like others do. As commented on by the Committee, cutbacks in recent years are distressing. These cutbacks, _inter alia_, emanates from the practice of the Supreme Administrative Court. It is possible that amendments to the acts are necessary in order to change this practice. When considering the fulfilment of article 19 it is also important to reflect upon the deficient translation of “personal assistance” contained in the Swedish authoritative translation of the Disability convention.

To achieve fulfilment of the right to education all the support that pupils with disabilities are entitled to must be provided in a timely manner. Parents and pupils alike are to be informed of the right to special support. No one is to be placed arbitrarily in a special school or class. Integration of all pupils with disabilities able of attending regular education should be a matter of priority. This requires the combat of bullying as well. Equally important is the encouragement of the strengths and capabilities of pupils with disabilities, in order to facilitate the attainment of academic knowledge.

With regard to the right to work and employment more coordination is needed as well as a simpler procedure for the provision of special support. Apart from this, Swedish legislation and policies should be considered as generally appropriate and adequate. This is true concerning the right to an adequate standard of living as well. However, those who cannot work should not be forced to seek employment. It is important though, that financial aid not be distributed lightly; employment should as far as possible be encouraged and facilitated.

In conclusion, Swedish legislation is overall sufficient in order to live up to the requirements of the Disability convention, but with a few notable exceptions. Application and interpretation is however deficient in many important areas. The next section will discuss what implementation measures can be taken in order to rectify this.
5.2. Further integration of the Disability convention into Swedish law

The ultimate goal should be that internal application of the Disability convention would enable persons with disabilities to invoke the convention directly before authorities and courts, and require these authorities to abide by the standards of the convention. Such an application would also facilitate the fulfilment of the rights of persons with disabilities, as they would only be required to invoke one law. It would then be for the authorities and courts to assess whether Swedish material legislation meets what is required under the convention or if a direct application of the convention is needed. As is shown in chapter 2, such direct application has mostly been applied hesitantly by the courts, and the legislator has instead enacted national legislation in order to meet the requirements of the European Convention on Human Rights.

What must be investigated and answered is however if these results cannot be achieved by interpretation in conformity with the Disability convention or ad hoc legislation. Interpretation in conformity with the Disability convention results in that authorities and courts will presume that national legislation fulfils the requirements of the convention. Conflicts are supposed to be considered to only seemingly be present, thus the convention is assumed to be complied with. Unimplemented human rights treaties are to be taken into consideration, notwithstanding that they cannot be applied directly. Clear contradictions between national legislation and the convention are troublesome and it must be remembered that this method gives precedence to national legislation in case of a clear conflict. Courts have been most hesitant in applying unimplemented treaties. It is thus not a viable alternative in order to change interpretation and application of national law.

Ad hoc legislation, which is a form of transformation, could very well be used. The amendment to the Discrimination act is an example of this. The articles that Sweden does not fully abide by could also be transformed and placed in relevant current legislation. For example, the right to education in the Education Act and the right to independent living in the Act concerning Support and Service to Persons with Certain Functional Impairments and in the Social Services Act. Such a method should also state the origin of the provisions in the Disability convention. It would quite easily remedy the deficiencies in these and other relevant legislations, care being given to ensure that there are no contradictions in the amended acts. This would probably imply additional legislative measures in already existing national legislation.

However, such legislative measures would not yield the same effective results as would a wholesome transformation or incorporation, as every individual will need to know, or be able
to find, the specific legislation applicable in a certain case. Furthermore, the above presented method is undoubtedly more cumbersome and time-taking for the legislator since every piece of national legislation which is to be amended must be reviewed in its entirety. In addition, the general principles contained in article 3 of the Disability convention would be needed to be transformed into several different legislative acts in order to provide sufficient and adequate application of the other transformed rights. Furthermore, a wholesome transformation or incorporation would clearly indicate the significance of the rights and their origin in the Disability convention. It would put a viable tool in the hands of the disability movement as well as individuals, facilitating equality and inclusion, not the least by the acknowledgement by the state of its importance.

Incorporation, as described in chapter 2, requires articles that are possible to apply directly. It must be clear which articles that have been incorporated; not the whole convention always needs to be incorporated. The authoritative Swedish translation should be provided together with the English and French authentic texts of the convention. As it is likely that the Swedish translation will most often be used, it is of utmost importance that the translation be correct. However, in a conflict, the authentic texts will have precedence. Transformation on the other hand is the rewriting of the convention in a manner consistent with the Swedish method of writing law. An example of this is the ad hoc legislative method presented above; others are the adoption of a new rewritten law or transformation by translation. As is the case with incorporation, it must be clarified that the legislation is a transformation of the convention and what the legislation encompasses. In a conflict, the national legislation will take precedence.

As considered in chapter 3, the articles in the Disability convention are quite specific, many times providing detailed instructions as to how rights are to be respected, protected and fulfilled. This is true for most of the articles, exceptions being for example article 10 and 17, which is the right to life and the right to integrity. The articles can be argued to be written in the “if x, then y”-formula. The articles first reaffirm or recognize a certain right and then proceed to establish what is required of states and how this is to be achieved. Some articles, like articles 8 and 16 are mostly directed to the state, making it hard for individuals to invoke them in court. In conclusion, however a majority of the articles fulfil the preconditions for incorporation.

Incorporation and transformation may be used simultaneously. As stated in chapter 2, the chosen method of implementation shall as far as possible lead to the fact that Sweden fulfils its international obligations. This method shall contain appropriate, proper and internationally
uniform interpretation of the convention as well as being systematic in national legislation and efficient. Given that incorporation as a main rule is considered preferable if the preconditions are met, it may be appropriate to incorporate the Disability convention. A proper interpretation and application as well as international uniformity is best achieved using this method. It is more efficient than classic transformation, as stated previously. It can also be assumed that it would be the best way to ensure that Sweden fulfils its international obligations in relation to other states, as well as being the method recommended by the Committee. It should however be noted that the disability movement does not suggest either incorporation or a wholesome transformation.

As stated in chapter 2, it is a general rule that Swedish legislation should be in Swedish, thus making transformation through translation most appropriate. This would also facilitate general awareness and knowledge about the convention for, authorities, courts, the general public and disabled persons. To ensure that the benefits of proper incorporation are not lost it is of crucial importance that the translation be correct. This entails that the current Swedish authoritative translation should be amended, at least as regards articles 19, 24 and 25 of the Disability convention, as provided for in section 4.1. Even though the authentic texts and international precedents can be used in interpretation, every effort must be taken in order to ensure that the Swedish version is as close to the originals as possible, as it is likely that the authentic texts will not often be consulted.

In conclusion, transformation through translation or *ad hoc* transformation should be used. Both are viable options, although transformation through translation will most probably provide the most enhanced protection and fulfilment of the human rights of persons with disabilities, as it is an all-encompassing method. Alternatively, parts of the convention can be transformed through translation while others are classically transformed or totally left out, should they already be fully abided by in current national legislation.
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