

"This book demonstrates the symbiotic theoretical and practical treatment of the protection against disability discrimination in the international human rights law." - prof.Jovan Ananiev, Dean of the Faculty of Law - University Goce Delcev, Macedonia. "The book authored by Dr. Zaneta Poposka titled Disability Discrimination in the International Human Rights Law is very important for several reasons. Firstly, the book in general, and especially in the Republic of Macedonia is such a rare book that treats the issue in a comprehensive and complementary way. Secondly, the book covers all aspects of legal regulation of the issue that is the subject of the book, and in theoretical, international, comparative and national context. Thus, the book gives a complete picture of the legal regulation of discrimination on grounds of disability. Thirdly, the book is a source of a lot of information pertaining to discrimination on grounds of disability. Especially the judgments of the Court of Justice of the European Union, which authoritative decisions are source of law." - Dr.Bekim Kadriu, Assistant Professor at the Faculty of Law - Tetovo State University, Macedonia.

Discrimination

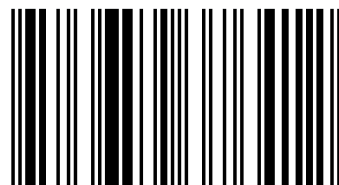
The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individuality, excluding or restricting members of the group on the grounds of race, sex, or age.

Zaneta Poposka

Disability Discrimination in International Human Rights Law



Zaneta Poposka, PhD, Assistant Professor in International Public Law at the Faculty of Law-University Goce Delcev, Shtip, Macedonia. She is Rule of Law Officer in the OSCE Mission to Skopje.



978-3-659-37641-2

Zaneta Poposka

Disability Discrimination in International Human Rights Law

Zaneta Poposka

**Disability Discrimination in
International Human Rights Law**

LAP LAMBERT Academic Publishing

Impressum / Imprint

Bibliografische Information der Deutschen Nationalbibliothek: Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Alle in diesem Buch genannten Marken und Produktnamen unterliegen warenzeichen-, marken- oder patentrechtlichem Schutz bzw. sind Warenzeichen oder eingetragene Warenzeichen der jeweiligen Inhaber. Die Wiedergabe von Marken, Produktnamen, Gebrauchsnamen, Handelsnamen, Warenbezeichnungen u.s.w. in diesem Werk berechtigt auch ohne besondere Kennzeichnung nicht zu der Annahme, dass solche Namen im Sinne der Warenzeichen- und Markenschutzgesetzgebung als frei zu betrachten wären und daher von jedermann benutzt werden dürften.

Bibliographic information published by the Deutsche Nationalbibliothek: The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at <http://dnb.d-nb.de>.

Any brand names and product names mentioned in this book are subject to trademark, brand or patent protection and are trademarks or registered trademarks of their respective holders. The use of brand names, product names, common names, trade names, product descriptions etc. even without a particular marking in this work is in no way to be construed to mean that such names may be regarded as unrestricted in respect of trademark and brand protection legislation and could thus be used by anyone.

Coverbild / Cover image: www.ingimage.com

Verlag / Publisher:

LAP LAMBERT Academic Publishing

ist ein Imprint der / is a trademark of

OmniScriptum GmbH & Co. KG

Heinrich-Böcking-Str. 6-8, 66121 Saarbrücken, Deutschland / Germany

Email: info@lap-publishing.com

Herstellung: siehe letzte Seite /

Printed at: see last page

ISBN: 978-3-659-37641-2

Zugl. / Approved by: Macedonia, Faculty of Law 'Justinianus I', University Ss Cyril and Methodius, Skopje, Diss., 2012

Copyright © 2015 OmniScriptum GmbH & Co. KG

Alle Rechte vorbehalten. / All rights reserved. Saarbrücken 2015

**Disability Discrimination in
International Human Rights Law**

Author: Zaneta Poposka, Ph.D

2015

Book: Disability Discrimination in International Human Rights Law

Author: Zaneta Poposka, Ph.D

**Peer-review: prof. Jovan Ananiev, Ph.D,
Ass.prof. Bekim Kadriu, PhD**

CIP

ISBN

CONTENT

Peer-review	8
Introduction	13
1. Subject of the research	13
2. Aim of the research	16
3. Methodology	18
Part I: Concept and Specific Features of Disability Discrimination	20
1. Disability throughout History - Different Theories on Disability	21
2. The Concept of Disability Discrimination	26
2.1. Definition of Disability	27
2.2. Disability Discrimination	33
2.2.1. Direct Disability Discrimination	35
2.2.2. Indirect Disability Discrimination	41
2.2.3. Harassment on Grounds of Disability and Instruction to Discriminate	44
2.3. Burden of Proof	47
2.4. Justification of Disability Discrimination	51
2.4.1. Justification of Direct Disability Discrimination	52
1) Protection of Public Health and Security	53
2) Genuine and Determining Occupational Requirement	54
3) Affirmative Measures	56
2.4.2. Justification of Indirect Disability Discrimination	60
3. Specific Features of Disability Discrimination	62
4. Areas in which Disability Discrimination Occurs	66
4.1. Disability Discrimination in Employment	66
4.1.1. The Issue of Reasonable Accommodation and Disproportionate Burden	66
4.1.2. Open Labour Market v. Sheltered Employment	73
4.2. Disability Discrimination in Education – Inclusive versus Special Education	75
4.3. Disability Discrimination in Access to Goods and Services	82
4.3.1. The Issue of Accessibility (Physical Environment/Infrastructure, Transport, Information and Communications)	82
4.3.2. Housing	90

4.4. Disability Discrimination in Areas of Social Protection and Health Care	91
4.4.1. Social Protection and Assistance	91
4.4.2. Health Care	92
4.4.3. Deinstitutionalization of Persons with Disabilities	94
5. Multiple Discrimination	95
Part II: Protection against Disability Discrimination in the International Level	100
1. Protection against Disability Discrimination in the UN System	101
1.1. Universal Human Rights Treaties	101
1.2. International Soft Law	103
1.3. Convention on the Rights of Persons with Disabilities	105
2. Protection against Disability Discrimination in the Council of Europe System	117
2.1. European Convention on Human Rights - Case Law	117
2.2. European Social Charter	127
3. Protection against Disability Discrimination in the EU System	130
3.1. EU Directive on Equal Treatment in Employment and Occupation	135
3.1.1. The coverage of the Council Directive on equal treatment in employment and occupation / <i>ratione materiae</i> and <i>ratione personae</i>	135
3.1.2. Basic elements of direct and indirect discrimination according to the EU Directive for equal treatment in employment and occupation	142
3.1.3. Reasonable accommodation according to EU Directive for equal treatment in employment and occupation	146
3.2. Future challenges of the EU anti-discrimination legislation, with a focus on protection against disability discrimination	150
3.2.1. Horizontal Directive on equal treatment	150
3.2.2. Accession of the EU to the Convention on the Rights of Persons with Disabilities	156
4. Comparative review of legislation on protection against disability discrimination ...	169
4.1. Disability discrimination in the USA	169
4.1.1. Definition of disability	170
4.1.2. Disability discrimination and its justification	172
4.1.3. Reasonable accommodation	172
4.1.4. Development of legislation against discrimination of persons with disabilities in specific areas	177
4.1.4.1. Employment and labour relations	177

4.1.4.2. Education	179
4.1.4.3. Access to public institutions, goods and services	180
4.1.4.4. Deinstitutionalization	184
4.2. Disability discrimination in Australia	185
4.2.1. Definition of disability	185
4.2.2. Disability discrimination and its justification	186
4.2.3. Reasonable accommodation	189
4.2.4. Development of legislation against discrimination of persons with disabilities in specific areas	192
4.2.4.1. Employment and labour relations	192
4.2.4.2. Education	193
4.2.4.3. Access to goods and services	193
4.3. Disability discrimination in the United Kingdom	195
4.3.1. Definition of disability	196
4.3.2. Disability discrimination and its justification	198
4.3.3. Reasonable accommodation	201
4.3.4. Development of legislation against discrimination of persons with disabilities in specific areas	206
4.3.4.1. Employment and labour relations	206
4.3.4.2. Education	208
4.3.4.3. Access to goods and services	210
4.3.4.4. Social protection and health care	212
4.3.4.5. Positive obligation to promote equality and inclusion of persons with disabilities	212
4.4. Disability discrimination in Republic of Ireland	214
4.4.1. Definition of disability	215
4.4.2. Disability discrimination and its justification	217
4.4.3. Reasonable accommodation	219
4.4.4. Development of legislation against discrimination of persons with disabilities in specific areas	223
4.4.4.1. Employment and labour relations	223
4.4.4.2. Education	225
4.4.4.3. Access to goods and services	227
4.4.4.4. Social protection and health care	229

Part III: Disability Discrimination in the Legal System of the Republic of Macedonia	232
1. Definition of Disability	236
2. Disability discrimination and its justification	238
3. Reasonable Accommodation	241
4. Procedural Aspect	243
5. Development of Legislation against Discrimination of Persons with Disabilities in Specific Areas	244
5.1. Employment and labour relations	244
5.2. Education	250
5.3. Access to goods and services	256
5.4. Social protection and health care	259
6. Ratification of the Convention on the Rights of Persons with Disabilities	264
6.1. Steps to be Undertaken	264
6.2. Appointment of a National Monitoring Mechanism	265
BIBLIOGRAFY	272
I. Books	272
II. Scientific papers	273
III. Reports	278
IV. Case law	282
1. Court of Justice of the European Union	282
2. European Court of Human Rights	284
3. European Committee of Social Rights	286
4. Human Rights Committee	286
5. National courts/equality bodies	286
V. List of laws and legal texts	292
1. United Nations	292
2. Council of Europe	293
3. European Union	294
4. General Comments of Human Rights Treaty Bodies	297
5. List of national laws	298
VI. Online sources	302

PEER-REVIEW

Book *Disability Discrimination in the International Human Rights Law*

by the author Assistant Professor Zaneta Poposka, PhD

Macedonia and the wider scientific community in the area of social sciences and especially in the area of international public law, human rights, the legal theory, civil law, labor law, political theory, disability and other disciplines have the opportunity to meet with this scientific book titled 'Disability Discrimination in the International Human Rights Law' by Zaneta Poposka, doctor of Law. The author in this book gives the possibility of the academic and professional community, including here the scientific staff, students, public administration and the judiciary as well as employees and activists in the civil society to enrich their knowledge of the theoretical and practical aspect about the concrete subject matter. The author in a science-based and systematic way, decided to elaborate on the subject matter of this book, which in Macedonian and regional context is insufficiently scientifically developed. Disability in itself is rather difficult category to elaborate due to the fact that various countries and international organizations and through different periods in history had a different approach to this phenomenon. Accordingly, disability discrimination is a complex and subtle in its differentiation, identification and surpassing. Throughout the text is obvious the systematic knowledge of the author in the field of legal theory and the international legal framework, European case law and practice of equality bodies. This monography demonstrates the symbiotic theoretical and practical treatment of this subject matter.

The book using methodological precision and in theoretically substantiated way elaborate the disability discrimination in terms of the concept and its treatment on international and national level. In the first part the author explains the phenomenon of disability in terms of defining the concept and its development throughout history and different approaches. It states that '*Models are divided into three groups: a traditional model, medical and the social model. The traditional model sees disability as a burden that is imposed on the community through some of its members and should be resolved by rejection or isolation of that concrete member*'.

According to the medical model the disability is impairment and like any disease it should be treated. Persons with disabilities are viewed as objects. It is based on an adaptation to the existing standards in society, rather than the failure of the social environment to adapt to the needs of persons with disabilities. This model only provides justification of the practices of institutionalization and segregation of persons with disabilities.

The last model that mostly dominates today is the social model which approaches disability as a societal issue stating that the disability does not lie in the impairment of the individual but in the society itself. The social model focuses on barriers in society and the environment, which may prevent the full participation of persons with disabilities in society on an equal basis with others, and not the individual impairment. The impairment is one of the integral parts of disability, and therefore itself can not be a reason or ground of discrimination.

Biopsychosocial model is based on the view, which encompasses the medical and the social model, supplemented by individual perspective (because it claims that some aspects of disability are entirely personal). In it, the disability and functions are seen as a result of the interaction between health conditions (diseases, impairment and injuries) and contextual factors.

In the sequel to the first part of the book the author presents definitions of discrimination and explains the forms, types and exceptions to it. Furthermore, the book presents elaboration on the specific features of disability as a discriminatory ground. *Firstly, for disability defining the protected group is challenging. Namely, this group is quite diversified in its nature and not just because of the different types of disabilities that it embodies such as physical, mental, sensory and intellectual, but because that in itself can include past, present or future disability. Very often the diseases (chronic, but sometimes other diseases) are covered under this ground. The protection under this ground can be given to persons who actually do not have disabilities, but are closely related to persons who have (discrimination by association).*

Secondly, on the discrimination on grounds of disability symmetrical and asymmetrical model can be applied. The asymmetrical model provides exclusively to consider the existence of personal characteristic, i.e. disability, and the person with disabilities to be treated differently than others.

The author of the book, starting from the assumption that discrimination on grounds of disability can occur in different areas of social life, starts the elaboration of the subject of research thus analyzing the different areas using statistics on worldwide level, emphasizing the main challenges faced by persons with disabilities in certain areas, analyzing the legislation and case law of the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union. The following areas are elaborated: employment and labor, education, social protection, access to goods and services, health care, deinstitutionalization. The second part of the book emphasizes the importance of the European Convention on Human Rights and Protocol No.12 as well as the jurisprudence of the ECtHR. Then the monography elaborates the practice of the European Union and it is emphasized that within the Union human rights are seen as an integral part of the *general principles of law* that the Court must take into

consideration when interpreting and applying the EU Treaties. Directive 2000/78/EC or EU Directive on Equal Treatment in Employment and Occupation, is the most important instrument for the persons with disabilities, which clearly supports the social model, but does not provide a definition of disability.

The third part deals with the Macedonian legislation and practice. Firstly, the author analyzes the Constitution and the anti-discrimination legal framework, and then gives the definition of disability and disability discrimination as well as its treatment in legislation and practice. Complying with the approach to the analysis of discrimination on grounds of disability at international and regional levels in terms of subject matter, the same applies for the Macedonian context, using the above-stated areas as a basis for analysis and outlines key legal and practical deficiencies, indicating the appropriate conclusions.

The book in the form of a monography is a solid foundation for future research on this matter and an excellent textbook as supplementary literature on several academic courses and a source for expanding the knowledge of everyone involved in improving the status of persons with disabilities as well as those who advocate for protection from discrimination.

9 January 2015

Jovan Ananiev, PhD, Associate Professor, member of the Commission for Protection from Discrimination and member of the European Commission against Racism and Intolerance of the Council of Europe