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**Legal Concepts to Increase Participation of People with Disabilities  
in the Workplace:  
An Analysis of Laws in Hungary and the United States  
through Lens of Inclusive Equality**

*Bedő Renáta*

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**BEDŐ, RENÁTA<sup>1</sup>**

**Legal Concepts to Increase Participation of People with Disabilities  
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*Abstract: The core argument of the paper is that the concept of horizontal application of fundamental rights has significance in the assessment of reasonable accommodation. To substantiate the argument, the paper proceeds first to the introduction of the concept of inclusive equality, then it continues with the analysis of different legal frameworks and concepts used to address barriers to the labor market for people with disabilities in the United States of America and Hungary. By examining the horizontal application of fundamental rights, the obligations of equal treatment, reasonable accommodation, and positive actions, the paper argues for clear distinctions between the concepts in employment discrimination law. This paper proves that the concept of reasonable accommodation should be seen as a bridge between the human dignity of people with disabilities and their right to work in an inclusive workplace, which draws attention to the concept of horizontal application of fundamental rights.*

## **Introduction**

People with disabilities face obstacles related to negative attitudes or opinions, deeply rooted stigma, and stereotypes while seeking employment. Moreover, people with disabilities are often seen as unfit for working life, incapable of carrying out tasks as required in the open labor market, or better off in protected environments such as sheltered workshops. These factors have led them to be excluded from society. The human rights model in disability studies recognizes this social problem and provides a normative framework to solve it.

As part of the paradigm shift in disability studies, the UN Convention on the Rights of Persons with Disabilities (hereinafter: CRPD) acknowledges the principle of human dignity of people with disabilities, which is central in the human rights model of disability. Moreover, the CRPD reaches beyond traditional equality and non-discrimination with the substance of the full range of economic, social, cultural, civil, and political rights.<sup>2</sup> It constitutes obligations in both the public and the private sectors through the concept of inclusive equality.<sup>3</sup> In the framework of the human rights model of disability, the paper raises the question of how the concept of inclusive equality influences the legal concepts related to equality.

The focus of the paper is on labor law, because unlike classical civil law relations, labor law relations are characterized by position imbalances, and serious economic interests influence the decisions of employers. This means that on the one hand the interests of the employer are determined by the quality of the entrepreneur and the activity, and the employer has its fundamental economic rights. On the other hand the employee is interested in earning a living.<sup>4</sup>

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<sup>1</sup> PhD Candidate at Eötvös Loránd University Faculty of Law. Comments on this study are welcome at [bedorenata@gmail.com](mailto:bedorenata@gmail.com). Thanks are due to my supervisors: Fruzsina Gárdos-Orosz and Zoltán Pozsár-Szentmiklósy for their comments.

<sup>2</sup> Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn*, 34 SYRACUSE J. INT'L L. & COM. 563, 590 (2007).

<sup>3</sup> MARINE ULDRY & THERESIA DEGENER, TOWARDS INCLUSIVE EQUALITY: 10 YEARS COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES 37 (2018), [https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/1\\_Global/INT\\_CRPD\\_INF\\_21\\_28325\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/1_Global/INT_CRPD_INF_21_28325_E.pdf).

<sup>4</sup> GYÖRGY KISS, ALAPJOGOK KOLLÍZIÓJA A MUNKAJOGBAN 7 (2010) (Hung.).

The paper examines different legal frameworks and concepts used to address barriers to the labor market for people with disabilities in the United States of America and Hungary through the lens of inclusive equality. The paper introduces, first, the concept of inclusive equality, then it continues with the analysis of legal concepts. The paper takes different approaches in constitutional law into account, considering fundamental rights and their enforcement in private relations: the so-called horizontal application of fundamental rights. Moreover, it examines the obligations of equal treatment, reasonable accommodation, and positive actions, and clarifies their role in employment discrimination law.

## **I. The era of inclusive equality**

In the framework of the human rights model of disability, the CRPD Committee advanced the concept of inclusive equality in General Comment No. 6 on equality and nondiscrimination, in March 2018. According to General Comment No. 6, the concept of inclusive equality “embraces a substantive model of equality and extends and elaborates on the content of equality in four dimensions:

- (a) a fair redistributive dimension to address socioeconomic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice, and violence and to recognize the dignity of human beings and their intersectionality;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society;
- (d) an accommodating dimension to make space for difference as a matter of human dignity.”<sup>5</sup>

Regarding the determination given by the CRPD Committee, the concept of inclusive equality advances the concept of equality by embracing the substantive equality model<sup>6</sup> and declaring the multidimensional content of equality. It is interesting to see that the CRPD Committee takes over the determination of the substantive equality model given by Sandra Fredman. Fredman highlights the same dimensions, as the CRPD Committee does in connection with inclusive equality.<sup>7</sup>

In light of the CRPD Committee’s determination, the concept of inclusive equality regards substantive equality as the base of the concept, which seeks to ensure equal opportunities for people with disabilities as well as equal results.<sup>8</sup> It advances its context by pursuing four overlapping aims, which signify the multidimensional disadvantage people with disabilities face. The concept of inclusive equality underpins the CRPD. It is also important to note that these dimensions interact with each other and human dignity takes part in all dimensions. Although, to understand the concept of inclusive equality, the paper briefly introduces the dimensions separately.

The fair redistributive dimension mainly targets the socioeconomic disadvantage that people with disabilities face every day. The CRPD also recognizes this disadvantage and aims to eliminate it by declaring socioeconomic rights. In addition, the recognition dimension addresses stigma, stereotyping, humiliation, and violence by promoting the equal dignity of all. This dimension appears in Article 8 on awareness-raising and Article 12 on equal recognition before the law of the CRPD. Concerning the accommodating dimension, Fredman suggests that it must coexist with the recognition dimension to “respect and accommodate

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<sup>5</sup> Comm. on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination*, U.N. Doc. CRPD/C/GC/6, paragraph 11 (Apr. 26, 2018).

<sup>6</sup>Theresa Degener, *Disability in a Human Rights Context*, 5 *Laws* 1, 18 (2016).

<sup>7</sup> SANDRA FREDMAN, *DISCRIMINATION LAW* 25-33 (2011).

<sup>8</sup>ANDREA BRODERICK & DELIA FERRI, *INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY: TEXT, CASES AND MATERIALS* 97 (2019).

difference by removing the detriment but not the difference itself.”<sup>9</sup> It is reflected in accessibility obligations in Article 9 and in universal design in Article 2. The participative dimension, which refers to the importance of the community of all, is also central to the CRPD, as it is included in the concept of disability and appears among the general principles of the CRPD.

It is interesting that the term inclusive only appears in Articles 24 and 27 of the CRPD. In the light of Article 27,<sup>10</sup> the right to work in relation to people with disabilities includes the right for the opportunity to gain a living by working in a labor market and work environment that is open, inclusive, and accessible in both the public and private sectors. Sarah Arduin highlights the different approaches between integration and inclusion in the context of CRPD Article 24 on education, and it clarifies that integration, unlike inclusion, relates to an assimilationist model that emphasizes a formal approach to participation and places the burden on persons with disabilities to adapt to society.<sup>11</sup> In parallel with this guideline, in the workplace integration refers to the employment of people with disabilities in mainstream settings, while inclusion entails more. Inclusive workplaces aim to include people with disabilities in mainstream settings without sacrificing the support they require.

The CRPD acknowledges the obligation of the State Parties to eliminate discrimination by private parties and requires positive actions to be taken by private actors on employment. Article 5 of the CRPD prohibits discrimination, and Article 5 (3) places an obligation on State Parties to take all appropriate measures to ensure that reasonable accommodation is provided. The CRPD provides a novel, comprehensive definition of disability-based discrimination.<sup>12</sup> It covers the main forms of discrimination, such as direct discrimination, indirect discrimination, and harassment, and it introduces a new principle stating that denial of reasonable accommodation is a form of discrimination on the grounds of disability.<sup>13</sup>

To achieve substantive equality and pursue the aims of inclusive equality, Article 5 (4) of the CRPD creates an exceptional basis for preferences in a form of specific measures, which does not constitute a violation of the nondiscrimination obligation. In connection with employment in the private sector, Article 27 (1) h) of the CRPD states that State Parties must promote the employment of persons with disabilities in the private sector with appropriate measures including affirmative action, while according to Article 27 (1) g), in the public sector the State is under a direct obligation to ensure the employment of persons with disabilities.<sup>14</sup>

The significance of the CRPD is that it aims to evolve the perception of disability in society. To fulfill the obligation of protecting the rights of people with disabilities, it is

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<sup>9</sup> SANDRA FREDMAN, DISCRIMINATION LAW 30 (2011).

<sup>10</sup> Article 27 of the CRPD develops the provision of Article 23 of the Universal Declaration of Human Rights and employs similar language to that of Article 6 of the International Covenant on Economic, Social and Cultural Rights.

<sup>11</sup> Sarah Arduin, *Article 3: General Principles* in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 99 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou ed., 2018).

<sup>12</sup> According to Article 2 of the CRPD: “Discrimination on grounds of disability means any distinction, exclusion or restriction based on 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.”

<sup>13</sup> Rachele Cera, *Article 5* in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 158 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano ed., 2017).

<sup>14</sup> The CRPD Committee considers the following specific measures: “temporary measures in nature, although in some instances permanent specific measures, outreach and support programs, allocation and/or reallocation of resources, targeted recruitment, hiring and promotion, quota systems, advancement and empowerment measures, as well as respite care and technological aids.” Comm. on the Rights of Persons with Disabilities, General Comment No. 6 on equality and nondiscrimination, U.N. Doc. CRPD/C/GC/6, paragraph 28 (Apr. 26, 2018).

necessary to expand the concept of equality in a way that is influenced by human dignity and follows the multidimensional concept. In the light of the concept of inclusive equality, it is necessary to have different kinds of legal concepts and measures which can influence the way of thinking of disability, remedy individual's infringement and promote the inclusion of people in the workforce.

## II. Legal Concepts related to equality

In light of inclusive equality, the paper seeks to look at the broad picture of the legal concepts related to equality. In this regard, the paper considers, next to the obligation of equal treatment, the concept of the horizontal application of fundamental rights, positive actions, and reasonable accommodation and seeks to clarify their role in employment discrimination law.

### 1. The horizontal application of fundamental rights

The State of the 21<sup>st</sup> century seeks to ensure the equal enjoyment of rights for the majority and the minorities in several ways. Generally, the conventional function of fundamental rights is based on the idea of guaranteeing rights to citizens against the branches of government. Although, the exemption of the private sphere from fundamental rights scrutiny is no longer justified in a societal context in which the non-state actors have more and more power. Their power allows these actors to infringe upon the fundamental rights of weaker individuals.<sup>15</sup>

For the enforcement of fundamental rights between private parties, courts use the concept of horizontal application of fundamental rights. It deals with the question of how constitutional requirements can bind private parties. The concept is not directly related to the rights of people with disabilities, rather it serves as a concept which advances the application of fundamental rights in private relations.

In the context of protection of people with disabilities in employment, it is important to see that Hungary and the United States of America implement such constitutional systems which have different emphases on constitutional law. One of the differences is the role of human dignity in the system of fundamental rights.

In Hungary, equal human dignity constitutes the essence of being human, therefore it is inviolable and may be considered the true origin of protection.<sup>16</sup> The Hungarian Constitutional Court ruled that "human dignity is a quality linked to life; therefore, it is indivisible and absolute, equal for all human beings. Right to human dignity and life is inviolable for all people, regardless of physical or mental development, status or how much they have achieved in their life." The equality of human lives is guaranteed by human dignity.<sup>17</sup>

Unlike the Hungarian Constitution, in the United States, the Founding Fathers thought that the best way to protect fundamental rights is to establish a structure of government with divided and separated powers because the government with limited power could not violate civil liberties and civil rights. For this reason, before having added the Bill of Rights the text

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<sup>15</sup> Georg Sommeregger, *The horizontalization of equality: The German Attempt to promote non-discrimination in the private sphere via legislation* in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 41 (Andras Sajó & Renata Uitzed., 2005).

<sup>16</sup> The right to human dignity is expressly recognized by the Fundamental Law of Hungary. Article II of the Fundamental Law of Hungary states that "*Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.*"

<sup>17</sup> 64/1991. (XII.17.) Decision of the Constitutional Court (Hung.), 23/1990. (X.31.) Decision of the Constitutional Court (Hung.).

of the Constitution contains only a few provisions concerning individual liberties. Later, since several states were concerned about the absence of an enumeration of rights, the Bill of Rights, the first ten amendments, was added to the Constitution.<sup>18</sup> The US Constitution does not even include the phrase “human dignity”. In addition, the US Constitution excludes positive rights.<sup>19</sup> Briefly, while in Hungary, the right to human dignity is expressly recognized in the constitution as a constitutional right, in the United States of America, human dignity is included in the constitution as a constitutional value.

Furthermore, the concept of the horizontal application of fundamental rights is controversial internationally, as the diverse historical development of the states and the different legal systems resulted in all kinds of institutions for protecting fundamental rights or their absence. The different approaches of horizontal application of fundamental rights give the basis for this analysis. The vertical application of fundamental rights appears in the United States of America. It means that the fundamental rights only protect individuals against the State’s actions. This model is called the state action doctrine<sup>20</sup> which formulates a seemingly simple principle: the individual rights apply only to state action, not to private action.

As the German legal system and legal thinking have a huge influence on the Hungarian legal system, the German doctrine, called *Drittwirkung*,<sup>21</sup> “third-party effect”<sup>22</sup> also affected the debate over the horizontal application of fundamental rights in Hungary. As the Fundamental Law does not explicitly contain a provision on the horizontal effect of fundamental rights, the Hungarian Constitutional Court currently interprets the horizontal application of certain fundamental rights in private disputes through the role of the constitutional complaint<sup>23</sup> and the concept of constitutional conform interpretation,<sup>24</sup> the outline of the horizontal effect of fundamental rights is made case by case.

In the decision of 8/2014 (III. 20.), the Hungarian Constitutional Court ruled that fundamental rights apply among private entities and individuals through interpretation of the general clauses, which signifies the German model, the indirect effect of fundamental rights.<sup>25</sup> In its later decision, the Hungarian Constitutional Court stated that the prohibition of discrimination applies more strongly and more directly in private relations than other constitutional freedoms referring to human dignity, which is the foremost fundamental right. It proves that Act V of 2013 on the Civil Code (hereinafter: Civil Code) lists the right to nondiscrimination as a personal right that is inalienably attached to the human personality.<sup>26</sup>

Regarding labor relations and the horizontal applications of fundamental rights, the Hungarian Constitutional Court pointed out that the ordinary courts should interpret the general clauses regulating employment in the light of the Fundamental Law, respecting the

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<sup>18</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES*, 718, (2015).

<sup>19</sup> See Emily Zackin, *Positive Rights* in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* (Mark Tushnet, Mark A. Graber, and Sanford Levinson ed., 2015).

<sup>20</sup> Hershkoff Helen, *Horizontality and the Spooky Doctrines of American Law*, 59 *BUFF. L. REV.* 455, 455 (2011), CHERMERINSKY ERWIN, *CONSTITUTIONAL LAW* 91-93 (2001).

<sup>21</sup> BVerfG 15 January 1958, BVerfGE 7, 198.

<sup>22</sup> It means that the constitutional provisions also establish an objective order of values, which have a radiation effect on law below the constitution that influences every legal relation in the legal system. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 355 (2002), DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 182 (1994).

<sup>23</sup> Article 24 (2) d) of the Fundamental Law of Hungary.

<sup>24</sup> Article 28 of the Fundamental Law of Hungary states that “the courts shall in principle interpret the laws in light of their purpose and in accordance with the Fundamental Law”, which is seen as the so called “constitutional conform interpretation”, which signifies a method to find compatibility between legal norms belonging to different, but coordinated systems. András Jakab, *A bírójogértelmezés az Alaptörvény tükrében*, 4 *JOGESZETEK MAGYARÁZATA* 86, 86 (2011) (Hung.).

<sup>25</sup> Fruzsina Gárdos-Orosz & Renáta Bedő, *Az alapvető jogok érvényesítése a magánjogi jogviták során – az újabb alkotmánybírói gyakorlat (2014-2018)*, 1 *ALKOTMÁNYBÍRÓSÁGI SZEMLE (CONSTITUTIONAL COURT REVIEW)* 3, 5 (2018) (Hung.).

<sup>26</sup> 3001/2016 (I.15.) Decision of the Constitutional Court, Opinion [57] (Hung.).

contractual freedoms and free commitments of the parties. Moreover, in the case of certain fundamental rights, the Hungarian Constitutional Court drew attention to the application of the necessity-proportionality test, and emphasized that the stronger the arguments for the protection of a fundamental right are, the more firmly it is necessary to act in case of its limitation.<sup>27</sup>

In the context of the constitutional aspects of the inclusion of people with disabilities, it is obvious that Hungary and the United States of America implement such constitutional systems which have different emphases in constitutional law. One of the differences is the role of human dignity in the system of fundamental rights. In Hungary, the right to human dignity is expressly recognized in the constitution as a constitutional right, whereas in the United States of America, human dignity is included in the constitution as a constitutional value. Furthermore, although the concept of the horizontal application of fundamental rights is also different in the case of the two countries examined above, altogether, these differences do have an influence on the interpretation of fundamental rights and their enforcement among private entities. The Hungarian Constitutional Court's case law for example shows how human dignity assists the interpretation of fundamental rights, such as the anti-discrimination principle, extending the reach of their horizontal application.

## 2. The obligation of equal treatment

The anti-discrimination law is an instrument for the promotion of the value of non-discrimination in the private sphere. Through the legislature, it is possible to set limits on private freedom in particular fields for which the legislator decides to do so.<sup>28</sup> The principle of non-discrimination, which is originated from the public sphere, appears in the private sphere, where equality refers rather to equal standing or equal autonomy. This way, it means there is a transfer of the logic of equality, and the principle of non-discrimination limits liberty and the principle of free choice.<sup>29</sup> The obligation of equal treatment is based on ensuring equal conditions and prohibiting distinction in the treatment of employees on the ground of disability.

On the constitutional level, both the Hungarian and the American Constitution contain a general equality clause, which imposes formal equality.<sup>30</sup> In Hungary, Article XV (2) of the Fundamental Law includes a formal equality clause with an open-ended list of protected grounds. In the United States of America, in line with the constitutional background, the principle of equality is enforceable by the Fifth Amendment's Due Process Clause against the federal government's acts and the Fourteenth Amendment's Equal Protection Clause against states' acts.<sup>31</sup>

Furthermore, in both countries, the general equality clause is detailed by laws related to equality. In Hungary, the Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (hereinafter: Hungarian Equality Act) is the base to which the civil law and labor law refer in discrimination-related instances. The protection provided by the Hungarian Equality Act is amplified by the Civil Code. Although the American constitutional

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<sup>27</sup> 14/2017. (VI. 30.) Decision of the Constitutional Court, Opinion [17]-[18], [34] (Hung.).

<sup>28</sup> Georg Sommeregger, *The horizontalization of equality: The German Attempt to promote non-discrimination in the private sphere via legislation* in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 42 (Andras Sajó & Renata Uitzed., 2005).

<sup>29</sup> *Id.* at 46.

<sup>30</sup> According to Article XV(2) of the Fundamental Law of Hungary "Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, color, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever."

<sup>31</sup> The Supreme Court has expressly declared that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

rights are vertical, due to the Enforcement Clause, anti-discrimination norms have been extended against private actors in the American system principally by statute, like Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act (hereinafter: ADA)

The Hungarian Equality Act prohibits any discrimination in the public sector, but in the private sector, it only covers four groups of actors, one of which is the group of employers with respect to the act of employment.<sup>32</sup> The Hungarian Equality Act specifies definitions for both direct and indirect discrimination, harassment, unlawful segregation, and retaliation as the breach of the principle of equal treatment. The Hungarian Equality Act does not include the provision of reasonable accommodation, and it does not regard the denial of reasonable accommodation as a form of discrimination either. Only the Hungarian Labor Code recognizes this obligation.<sup>33</sup> In this regard, it seems that in the Hungarian framework the obligation of equal treatment reflects more on formal equality strengthening the basic conception that likes should be treated alike.

In the United States of America, while the Title VII of the Civil Rights Act of 1964 is premised on a color-blind model of anti-discrimination, the ADA represents an inequality perspective. It means that other civil rights laws do not require a person to prove eligibility by meeting certain criteria, for example in Title VII cases plaintiffs never have to prove their race or gender, while under the ADA a person with disabilities has to meet the statutory definition to be able to bring a suit.<sup>34</sup> Furthermore, the ADA also represents the civil rights perspective, which mainly concentrates on civil rights providing equal opportunities, focusing on individual experience and remedies.<sup>35</sup> It is important to point out that the civil rights perspective has limitations in the case of a historically excluded group, people with disabilities, as it cannot move all the barriers away, people need not only civil and political rights but also social, economic, and cultural rights.<sup>36</sup>

The ADA is intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The goals include economic independence and ending employment discrimination by requiring employers to provide “reasonable accommodation” to employees with disabilities.<sup>37</sup> The ADA prohibits discrimination by disparate treatment, disparate impact, and failing to make a reasonable accommodation as well. The fact that the equality clause is expanded by the concept of reasonable accommodation shows there is a shift in the anti-discrimination concept, which requires employers to take positive measures.

To sum up, even if the concept of the horizontal application of fundamental rights is different in Hungary and the United States, on a subconstitutional level both countries extend anti-discrimination norms to private entities. As the obligation of equal treatment is enforceable, its role in the inclusion of people with disabilities is inevitable. However, it is based on the basic concept that likes should be treated alike, which, in light of inclusive

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<sup>32</sup> Section 4 and 5 of the Hungarian Equality Act.

<sup>33</sup> In Subsection (5) of Section 51 of the Labor Code, there is a brief provision on reasonable accommodation: “in the employment of persons with disabilities, appropriate steps shall be taken to ensure that reasonable accommodation is provided.”

<sup>34</sup> RUTH COLKER, *THE LAW OF DISABILITY DISCRIMINATION* 33-34 (2009).

<sup>35</sup> Gerard Quinn & Eilionoir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AM. J. COMP. L. 23, 24 (2012).

<sup>36</sup> Theresia Degener, *A New Human Rights Model of Disability*, in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY* 45 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano ed., 2017).

<sup>37</sup> Although the ADA sought to address discrimination and persistent unemployment among people with disabilities, like many policies, it did not specify how to deal with particular individual and labor market complexities, nor did it propose a method by which to change attitudes and behavior in the workplace. Michelle Maroto & David Pettinicchio, *The Limitations of Disability Antidiscrimination Legislation: Policymaking and the Economic Well-Being of People with Disabilities*, 36 LAW & POL'Y 370, 373 (2014).

equality, is not sufficient to enable people with disabilities to participate as fully as possible in professional life. Legal concepts, that consider the special need of the group of people with disabilities or an employee with disabilities and include appropriate steps are necessary as well.

### 3. The duty of reasonable accommodation

The concept of reasonable accommodation originates in the United States following the approval of the Equal Employment Opportunity Act of 1972. The term was originally used in reference to religious discrimination, requiring employers to demonstrate that they would be unable to reasonably accommodate the religious practices of their employees without undue hardship.<sup>38</sup> As the table shows, both domestic and international law regulates the concept of reasonable accommodation. Although the degree of the regulation on it is different. Hungarian laws are not sufficiently clear on this topic, and the case law does not indicate what exactly is meant by the requirement of reasonable accommodation either. Unlike in Hungary, the framework of the ADA is detailed: it defines both the term of reasonable accommodation and the term of undue hardship as well.

Country/Governing Body	Law	The concept of reasonable accommodation
United Nations	Convention on the Rights of Persons with Disabilities (hereinafter: CRPD)	<i>“necessary and appropriate modifications 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.”</i> Article 2 of the CRPD
Hungary	Act I of 2012 on the Labor Code  Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities	<i>“in the employment of persons with disabilities, appropriate steps shall be taken to ensure that reasonable accommodation is provided.”</i> Subsection (5) of Section 51 of the Hungarian Labor Code  <i>“the employer employing a person with a disability is obliged to provide accommodation at the workplace to the extent necessary for the performance of the work, in particular, to ensure the appropriate refurbishment of tools and machines. Support from the central budget can be requisitioned to cover the expenses incurred by such refurbishment.”</i> Section 15 (2) of the Hungarian Disability Act
United States of America	Americans with Disabilities Act, 1990 (hereinafter: ADA)	<i>“The term “reasonable accommodation” may include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”</i> 42 U.S.C.A. § 12111. <i>Entities must make ‘reasonable accommodation’ “unless such covered entity can demonstrate that the accommodation would impose <u>an undue hardship</u> ... “or “would result in <u>an undue burden</u>, i.e., significant difficulty or expense.”</i> 42 U.S.C.A. § 12111.

<sup>38</sup> Gerard Quinn & Eilionoir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AM. J. COMP. L. 23, 31 (2012).

As the paper points out in the section above, the place of the denial of reasonable accommodation in the concept of anti-discrimination is divisive. While the CRPD categorizes the denial of reasonable accommodation as a particular form of discrimination,<sup>39</sup> the authors of the Employment Equality Directive chose to make the denial of reasonable accommodation a part of indirect discrimination.<sup>40</sup> The ADA considers it a part of anti-discrimination, not as a civil right. Contrary to international law and CJEU (Court of Justice of the European Union) practice, no Hungarian legal provision connects the requirement of a reasonable accommodation to the right of non-discrimination. The requirement of reasonable accommodation is regulated at a legislative level, neither its legal content nor its legal nature is clear.

Regarding its legal nature, Article 5, para. (3) of the CRPD classifies the denial of reasonable accommodation into the form of discrimination on the grounds of disability.<sup>41</sup> For this reason, Theresia Degener regards it as the most obvious proof of an extended nature of equality concept in the CRPD.<sup>42</sup> Moreover, Rachele Cera highlights that the legal obligation to provide reasonable accommodation has received full expression as a separate and enforceable human right under international human rights law.<sup>43</sup> Consequently, in the framework of inclusive equality, the reasonable accommodation, as a non-discrimination obligation facilitates the equal and universal enjoyment of human rights, such as the right to work.

The CRPD Committee highlights that reasonable accommodation aims to ensure to persons with disabilities the enjoyment or exercise of all human rights on an equal basis with others and without any discrimination,<sup>44</sup> and concerning Article 24 of the CRPD, it states that reasonable accommodation is to ensure non-exclusion from education for persons with disabilities and to support inclusion.<sup>45</sup> Delia Ferri<sup>46</sup> and Paul Harpur<sup>47</sup> regard it as an “incidental right” and a gateway to the equal enjoyment of human rights, which ensures other human rights to be recognized. Delia Ferri underlines the incidental-right nature of reasonable accommodation with the case law of the CRPD Committee, which has also discovered the linkage between reasonable accommodation and the fundamental principle of human dignity.<sup>48</sup> In this regard, the paper regards the denial of providing reasonable accommodation as an atypical form of discrimination. The concept of reasonable accommodation basically should be seen as a bridge between the human dignity of people with disabilities and their right to work in an inclusive workplace. Shifting the emphasis on the concept in this manner requires more direct measures from the State in promoting reasonable accommodation and from the courts in interpreting it and creating appropriate assessments.

Moreover, Rachele Cera uses the term “trigger” for the reasonable accommodation, which this paper considers more expressive for the universal enjoyment of rights aspect of the

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<sup>39</sup> Article 5 of the CRPD.

<sup>40</sup> Article 2 Subsection 2 b) (ii) of the Employment Equality Directive.

<sup>41</sup> Rachele Cera, *Article 5* in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 158 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano ed., 2017).

<sup>42</sup> Theresia Degener, *Disability in a Human Rights Context*, 5 *Laws* 1, 15-17 (2016).

<sup>43</sup> *Supra* note 41 at 167.

<sup>44</sup> Comm. on the Rights of Persons with Disabilities, *Views adopted by the Committee at its 7th session, 16 to 27 April 2012, concerning communication No. 3/2011*, U.N. Doc. CRPD/C/7/D/3/2011 (May 21, 2012).

<sup>45</sup> Comm. on the Rights of Persons with Disabilities, *General Comment No. 4 on the right to inclusive education*, U.N. Doc. CRPD/C/GC/4, paragraph 41 (b) and 63 (h) (Nov. 25, 2016).

<sup>46</sup> Delia Ferri, *Reasonable accommodation as a Gateway to the Equal Enjoyment of Human rights: From New York to Strasbourg*, 6:1 *SOCIAL INCLUSION* 40, 42 (2018).

<sup>47</sup> Paul Harpur, *Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities*, 27:1 *Disability & Society* 1-14 (2012).

<sup>48</sup> *Supra* note 46 at 42-43.

reasonable accommodation.<sup>49</sup> Rachele Cera, referring to Kayness and French, points out that the reasonable accommodation evokes a change which may benefit others, such as other employees by making them more productive.<sup>50</sup> In this interpretation, the concept of reasonable accommodation seeks to accommodate the employee with disabilities but at the same time it aims to eliminate barriers in mainstream society as well.

As for its content, the concept of reasonable accommodation incorporates the assessment of fundamental rights and non-legal facts. For this reason, all the case law considering the examined laws<sup>51</sup> emphasizes that the concept of reasonable accommodation needs to be regarded on a case-by-case basis. In the following, the paper highlights two cases, which point out why the interpretation of reasonable accommodation encumbers judicial organs.

In the case of Ms. Marie-Louise Jungelin vs. Sweden,<sup>52</sup> Ms. Marie-Louise had a severe sight impairment, and the Swedish employer did not provide appropriate modification and adjustment to the workplace, such as adapting ITS through software, which may convert the information into synthesized speech or Braille. This case raised the question of whether the 2010 judgment of the Swedish Labor Court was discriminatory, as it did not take into account the possibility for the employer to take accommodation measures in the form of computer programs, nor the beneficial aspects of such measures for any possible future employees with visual impairments. The Swedish Labor Court considered that the expenses of the adaptation and support would be unreasonable for the employer and based its decision on a four-step analysis. According to the national legislation, the assessment mainly included the cost of the measures concerning the employer's ability to pay for them, the actual possibilities of implementing the measures, and the estimated impact of the measures on the person with disabilities.<sup>53</sup>

The CRPD Committee reached the same conclusion as the Swedish Labor Court, as it considered that State Parties enjoy a certain margin of appreciation in assessing the reasonableness and proportionality of accommodation measures. The dissenting opinion,<sup>54</sup> admitting the necessity of a case-by-case analysis of reasonable accommodation and the State Parties' margin of appreciation, highlighted that the different accommodation measures should have been analyzed from the perspective of the criteria set out in Article 5 of the CRPD, not in national legislation. On the grounds of the human rights model, as people with disabilities do not have equal opportunities, it is up to society to eliminate the obstacles and to treat them as a group with specific human rights. In this regard, the dissenting opinion stated that the test of reasonableness and proportionality should have included the following points:

- i. "the measures of accommodation were requested to promote the employment of a person with a disability, with the professional capacity and experience to perform the functions corresponding to the position for which he or she applied; and
- ii. the public or private company or entity to which the candidate applied can reasonably be expected to adopt and implement accommodation measures."

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<sup>49</sup> Rachele Cera, *Article 5* in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 168 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano ed., 2017).

<sup>50</sup> *Id.* at 169.

<sup>51</sup> For example, the CRPD Committee clarifies that reasonableness should be examined by taking into account the specific context of each case. Comm. on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination*, U.N. Doc. CRPD/C/GC/6, paragraph 26 (e) (Apr. 26, 2018).

<sup>52</sup> Comm. on the Rights of Persons with Disabilities, *Views adopted by the Committee at its twelfth session (15 September–3 October 2014), concerning Communication No. 5/2011*, U.N. Doc. CRPD/C/12/D/5/2011 (Nov. 14, 2014).

<sup>53</sup> *Id.* at paragraph 8.5.

<sup>54</sup> Comm. on the Rights of Persons with Disabilities, *Communication No. 5/2011, Views adopted by the Committee at its twelfth session (15 September–3 October 2014), Joint opinion of Committee members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (dissenting)*, U.N. Doc. CRPD/C/12/D/5/2011 (Nov. 14, 2014).

The dissenting opinion drew attention to an aspect that makes it possible for an individual with disabilities to work in assessing reasonableness and proportionality in compliance with the CRPD. In this regard, in addition to financial considerations, the assessment should include the right for the opportunity to gain a living by working in a labor market and work environment that is open and inclusive, in accordance with Article 27 of the CRPD.

The other case comes from the United States. The ADA imposes upon employers the affirmative obligation to “make reasonable accommodations to the known physical or mental limitations of a qualified individual” unless doing so “would impose an undue hardship on the operation of the business of the covered entity.” The only exemption from the duty of reasonable accommodation is if the employer can prove that making reasonable accommodation would impose an undue hardship on its operation.

The question arises whether an accommodation is “reasonable,” if the benefits are roughly proportional to the costs. The issue of cost-benefit balancing appears in *Vande Zande v. Wisconsin Department of Administration*.<sup>55</sup> In this case, Vande Zande, whose condition required the use of a wheelchair and to stay at home for weeks, requested, among other accommodations, a minor change in the kitchenette in her building from her employer, who refused to comply with it. She wanted the sink and the counter in the kitchenettes to be lowered from 36 inches to 34 inches because they were too high for her in a wheelchair. This meant she could only use the bathroom sink, which made her feel stigmatized. Judge Posner sided with the employer after considering the potential costs to the employer. He argued that the employer would have had to spend \$150 to lower the sink on Vande Zande’s floor; for all the kitchenettes, the cost of lowering the sinks would have been \$2000 (or perhaps less). Judge Posner recognized that \$150 is not a lot of money, but he nonetheless ruled in favor of the employer, on the ground that an employer does not have “a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and non-disabled workers.”<sup>56</sup>

There is a common trend to attempt to use the most objective criteria possible on how to measure reasonableness and undue hardship. The cost-benefit analysis can be a solution, but as the case above shows, it can be misleading if it considers fundamental rights in addition to non-legal facts. The paper agrees with Cass R. Sunstein’s argument,<sup>57</sup> which states that the cost-benefit analysis must take both expressive and symbolic harms into account. In the case above, Judge Posner disregarded the concerns of stigmatization, which cannot be in accordance with the purpose of the ADA.

In conclusion, it is necessary to assess reasonableness and proportionality in light of the concept of inclusive equality enshrined in the CRPD. The cases introduced here prove that it is quite a challenging task to create an objective set of criteria for the courts. First, such accommodations result in financial costs, which the employers have to bear.

Second, it seems the dilemma of how to interpret reasonableness and the undue burden is present because it involves the concept of inclusive equality and various non-legal facts at the same time. It also causes difficulties that, through the concept of inclusive equality, the enforcement of human dignity and the right for the opportunity to gain a living by working appear in the assessment. These cases point out the significance of the concept of horizontal application of fundamental rights, which the paper briefly introduced in Subsection 1. The concept of horizontal application of fundamental rights would give guidance in cases related to reasonable accommodation on how to involve fundamental rights in the assessment. The

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<sup>55</sup> *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7<sup>th</sup> Cir. 1995).

<sup>56</sup> *Id.* at 546.

<sup>57</sup> Cass R. Sunstein, *Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 325 JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS WORKING PAPER 15 (2007), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1140&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1140&context=law_and_economics).

Hungarian Constitutional Court's case law for example shows how human dignity assists the interpretation of fundamental rights, such as the anti-discrimination principle, extending the reach of their horizontal application. In this manner, courts have to realize their roles in the inclusion of people with disabilities.

#### 4. Specific measures, positive action or affirmative action

Measures promoting equal opportunity or equal results are labeled as positive actions or affirmative actions, which inherently serve to compensate given social disadvantages, therefore connecting to anti-discrimination by relating to some spontaneous inequality situation.<sup>58</sup> The concept of inclusive equality comprises all those legal and non-legal tools that aim to assure, in the different areas of life, that everybody gets on and prevails with equal opportunities and equal results as well. Equal opportunity means that the State ensures that disadvantaged individuals may practice the rights that all human beings are formally entitled to and those who belong to minority groups can start from similar circumstances as the majority.<sup>59</sup>

In Hungary, there are three cases where the Hungarian Equality Act allows differentiation. First, the principle of equal treatment is not violated "by such conduct, measure, condition, omission, instruction or practice which limits a fundamental right to enforce another fundamental right in an unavoidable situation, assuming that such a limitation is suitable for this purpose and is also in proportion to it."<sup>60</sup> Second, it is not violated either by a behavior "which is found by objective consideration to have a reasonable explanation directly related to the relevant relationship."<sup>61</sup> For example, it is not violated if the employer, in view of the employee's state of health, fails to pay the remuneration in part or in full due to their absence from work.<sup>62</sup> Finally, the third exemption covers cases, called tools of positive action, in which the legislature did not leave the assertion of reasonable ground for discrimination to the discretion of the authority or court. It considers those types of discrimination to be on "reasonable ground", which does not, ex lege, infringe on the principle of equal treatment.<sup>63</sup>

The positive legal measures are declared by the Fundamental Law of Hungary. Article XV. (4) and (5) of the Fundamental Law of Hungary<sup>64</sup> state that Hungary shall help to achieve equality of opportunity and social inclusion, and it shall protect people living with disabilities. This part of the concept the State may consider in the light of actual needs, its preferences, and capacity. Equal opportunity is not a subjective right, as the redistribution of goods cannot be enforced.

According to the definition posted on the Hungarian government portal, social inclusion "is a government action that aims to improve the living conditions, social status and promote the social integration of the Gipsydom, people living in impoverished areas, the under-educated and social groups who are barely or none-at-all employable due to their health

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<sup>58</sup> Katalin Szajbely, *A pozitív intézkedések fogalma és alkalmazásuk lehetősége a faji diszkrimináció elleni küzdelemben az Európai Unió tagállamaiban*, <http://jesz.ajk.elte.hu/szajbely19.html>.

<sup>59</sup> Krisztina Kovács, *A hátrányos megkülönböztetés tilalma* in EMBERI JOGOK 366-367 (Gábor Halmai & Gábor Attila Tóth ed. 2003).

<sup>60</sup> Section 7 a) of the Hungarian Equality Act.

<sup>61</sup> Section 7 b) of the Hungarian Equality Act.

<sup>62</sup> ZOLTÁN BANKÓ, GYULA BERKE, GYÖRGY KISS & GERGELY LÁSZLÓ SZÓKE, *NAGYKOMMENTÁR A MUNKA TÖRVÉNYKÖNYVÉRŐL SZÓLÓ 2012. ÉVI I. TÖRVÉNYHEZ (COMMENTARY OF ACT I OF 2012 ON THE LABOR CODE)* (2019), accessed through Hungarian Wolters Kluwer database (Hung.).

<sup>63</sup> Section 11 of the Hungarian Equality Act.

<sup>64</sup> Article XV of Fundamental Law of Hungary: "(4) Hungary shall take special measures to promote the realization of equal opportunities. (5) Hungary shall introduce specific measures to protect families, children, women, the elderly and the disabled."

condition, reduces inequalities resulting from geographic or demographic disadvantages or ethnic identity and promotes equal access to public services.”<sup>65</sup> It is important to clarify that according to the Hungarian Constitutional Court, Article XV. (4) and (5) of the Fundamental Law formulate state goals, which are addressed to state organs, not private companies. It does not mean that the State could not encourage companies executing programs for equal opportunity with various kinds of state benefits, but these preferential treatment programs could not limit fundamental rights or be discriminative. Consequently, it is possible to implement business policies, that introduce positive actions, but these actions must not infringe on the principle of non-discrimination or reinforce socially harmful stereotypes.<sup>66</sup>

Measures pursuing equal outcomes do not emphasize the equality of starting opportunities, but rather the proportionality of results. Such a measure, for example, is the application of quotas, such as the rehabilitation quota for employees with altered ability to work. According to Article 23 of Act CXCI of 2011, employers shall be obliged to pay a “rehabilitation contribution” to the state budget if they have more than 25 employees and the proportion of persons who have officially been recognized as having an altered ability to work within the workforce is below 5 percent. Despite its purpose, rehabilitation contribution does not fulfill its promise. Even though this provision promotes the employment of employees with reduced ability to work, this way it may not be in the employer’s interest to employ people with disabilities whose employment may be more expensive and requires accommodation.

Unlike Hungary, the United States supports only a limited justification for affirmative actions. For example, mandatory hiring quotas based on any protected factor may violate anti-discrimination laws. The Supreme Court interpreted Subsection 703 (j) of the Civil Rights Act of 1964, which regulates voluntary affirmative action plans. According to this subsection, the employer can establish a preferential treatment to any individual or any group to prevent and remedy inequalities based on race, color, religion, sex, or national origin. In *United Steelworkers of Am., AFL-CIO-CLC v. Weber*,<sup>67</sup> the Supreme Court established a three-pronged test to determine the appropriate voluntarily adopted affirmative action. First, the purpose of the plan must be to remedy traditional patterns of discrimination. Second, the plan must not unduly trammel the interests of applicants and employees who are not beneficiaries of the plan. Third, the plan must be temporary.

In addition to the above, there is the case law related to the ADA. In *U.S. Airways, Inc. v. Barnett*,<sup>68</sup> the Supreme Court ruled that an employer is not required to grant a disabled employee a higher seniority status to ensure that the disabled employee will keep their job when another qualified employee is entitled to the position based on the employer's seniority system.

In *Huber v. Wal-Mart Stores, Inc.*,<sup>69</sup> the Court based its decision on the case mentioned above. The plaintiff was an order filler earning \$13.00 per hour at Walmart who then permanently injured her right hand and arm and could no longer do the job. The plaintiff wanted to be automatically reassigned to a router job as an accommodation, but Walmart

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<sup>65</sup> MINISTRY OF HUMAN RESOURCES, STATE SECRETARIAT FOR SOCIAL INCLUSION, <https://emmiugyfelszolgalat.gov.hu/tarsadalmi-felzarkozas/tarsadalmi-felzarkozas> (last visited May 10, 2021) (Hung.).

<sup>66</sup> 3001/2016 (I.15.) Decision of the Constitutional Court, Opinion [44] (Hung.).

<sup>67</sup> The case of *United Steelworkers v. Weber* considered the validity of voluntary affirmative action programs in the employment field. In this case, a white employee of Kaiser Aluminum named Brian Weber had been rejected for a job training program for insufficient seniority, even though black employees with less seniority were accepted. *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979).

<sup>68</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).

<sup>69</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007).

made her apply and compete for the job. Finally, a person without disabilities, who was more qualified, got the job and the plaintiff was offered a janitor job for less money instead.

The Court found that Wal-Mart did not violate the ADA and concluded the following: “The ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate non-discriminatory policy of the employer to hire the most qualified candidate.”<sup>70</sup> The ADA is about non-discrimination, not a “mandatory preference act.” The janitor’s job was reasonable and did not have to be the employee’s preferred accommodation.

These cases stress the point that the ADA does not include mandatory affirmative action. Even though it imposes an obligation on employers to provide reasonable accommodation, often in the form of reassignment, this obligation does not extend to preferential treatment when competing with a more qualified person. In the cases above, the question was not the continuation of employment but in what manner it would be done, which, according to the Courts’ decision, is not covered by the ADA.

As the example of the United States shows, it is important to clearly distinguish positive measures from the concept of reasonable accommodation. Both are intended to increase the inclusion of people with disabilities in society, but while the concept of reasonable accommodation addresses a current barrier, positive measures seek to eliminate barriers coming from past discrimination. The CRPD Committee highlights that the difference between reasonable accommodation and specific measures is that specific measures are not a non-discrimination duty; they imply a preferential treatment of persons with disabilities over others to address historic and/or systematic exclusion from the benefits of exercising rights.<sup>71</sup> Moreover, there is no specific set formula for reasonable accommodation. The nature of the accommodation both requested and required will vary according to each person’s unique needs, and these needs must be considered, assessed, and accommodated individually. In contrast, the positive measures are to uplift socially disadvantaged groups, so they are tailored to the general need of the group.

Positive actions and affirmative actions (actions promoting equal opportunity and equal outcome and legal tools helping social inclusion), alongside legislation promoting equal treatment, are very important in the case of people with disabilities. Even though current Hungarian legislation includes various forms of positive actions, they still fail to be effective in a sufficient manner. The reason for this is that for positive actions to be able to live up to their promise, a well-thought-out disability policy is necessary, which reflects on the needs of people with disabilities and the human rights model. In the United States, the issue of affirmative action is divisive. However, as can be seen in Hungary, positive actions have their role in eliminating discriminatory practices, even if they are not part of the non-discrimination obligation.

## Conclusions

To create an open, inclusive, and accessible labor market, States must take a more proactive approach. Setting up appropriate steps on how to promote the rights of people with disabilities and prevent infringements is indispensable, but not enough. To fulfill the goal of making people with disabilities active members of society, it is necessary to review and reconsider legal concepts and measures in a way that are in accordance with the concept of inclusive equality.

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<sup>70</sup>*Id.* at 483.

<sup>71</sup> Comm. on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination*, U.N. Doc. CRPD/C/GC/6, paragraph 26(c) (Apr. 26, 2018).

The paper focuses on the concept of the horizontal application of fundamental rights, the obligation of equal treatment, the duty of reasonable accommodation, and positive action, which are all subject to various misconceptions and related to each other. The table below briefly reviews the examined legal concepts and their presence in the framework of CRPD, Hungary, and the United States.

<b>Legal concepts</b>	<b>CRPD</b>	<b>Hungary</b>	<b>United States</b>
<b>Horizontal application of fundamental rights</b>	✓	✓ indirect	state action doctrine
<b>The obligation of equal treatment</b>	✓	✓	✓
<b>Reasonable accommodation, as a form of discrimination</b>	✓	-	✓
<b>Positive actions</b>	✓	✓	limited

As the paper points out, and the table also shows, the most divisive tools are the concept of horizontal application of fundamental rights, the duty of reasonable accommodation, and positive actions. Interestingly, in Hungary, fundamental rights apply among private entities and individuals through interpretation of the general clauses, but Hungarian laws are not sufficiently clear on the duty of reasonable accommodation, and the case law does not provide guidance on what exactly is meant by the requirement of reasonable accommodation either. In contrast, in the United States, the fundamental rights only protect individuals against the State's actions, and the rules on the duty of reasonable accommodation are detailed at the legislative level.

Furthermore, for an outside observer, such accommodations might appear to be part of a welfare program or an affirmative action on behalf of the employer, as they overall depend on the employer's good intentions anyway. Although, as the paper points out, it is important not to interchange the concept of reasonable accommodation with positive actions. The concept of reasonable accommodation should be seen as a bridge between the human dignity of people with disabilities and their right to work in an inclusive workplace. In this regard, the assessment of reasonableness should take fundamental rights into account, which draws attention to the concept of horizontal application of fundamental rights. Shifting the emphasis on the concept of reasonable accommodation in this manner requires more appropriate measures from the State in promoting it and from the courts in interpreting it.

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**Szerkesztőség: Hoffmann Tamás, Mezei Kitti, Szilágyi Emese**

**Honlap: <http://jog.tk.mta.hu/mtalwp>**

**E-mail: [mta.law-wp@tk.mta.hu](mailto:mta.law-wp@tk.mta.hu)**

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