

Reasonable accommodation, interpreting services and Independent Living

– An investigation concerning paths to participation in parity for the deaf and hearing impaired, and for those with deaf- blindness, in working life and beyond

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for Independent Living Institute, on behalf of Disability Rights Defenders Sweden with funding from Independent Living Utveckling.

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“Independent Living means that we demand the same choices and control in our everyday lives that our non-disabled brothers and sisters, neighbours and friends take for granted.”

- Adolf Ratzka

“Whether they are demanding redistribution or recognition, claimants must show that the social changes they seek will in fact promote parity of participation.”

- Nancy Fraser

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1. Introductory words and the structure of the report

The Convention on the Rights of Persons with Disabilities was adopted by the General Assembly of the United Nations in 2006. The Convention has been ratified by Sweden, and became binding under international law in 2009. Article 2 of the Optional Protocol regulates the opportunity for individuals to submit complaints to the UN Committee on the Rights of Persons with Disabilities in the event that Sweden is claimed to have violated a person's rights in accordance with the Convention. This protocol has also been ratified by Sweden.

Having complained to the Committee on the Rights of Persons with Disabilities, Richard Sahlin was informed of the conclusions of the action in September 2020. Among other things, this included an assertion that Sweden had failed to comply with its international obligations and that Richard Sahlin had been de facto discriminated against.¹ The case is grounded in several legal questions concerning the rights of persons with disabilities to a sign language interpreter in their working life, to non-discrimination, and to reasonable accommodation in order to create individual accessibility within an organisation.

This report has been produced against the background of this case and the principles of Independent Living. The purpose is to draw attention to the importance of a rights-based approach in various societal processes in order to ensure inclusivity in working life and social situations. The report has also been produced from a perspective that is grounded in the concept of collective responsibility for the creation of social justice and that persons with disabilities are continually subjected to discrimination.² For further discussion regarding the relationships between the various legal sources, reference is made to the detailed legal literature.³

The dimension concerning international law involves values such as dignity, equality and a new model for justice for persons with disabilities (Human Rights Model of Disability, and Inclusive Equality – see General Comment No 6 of the Convention on the Rights of Persons with Disabilities). The legal discussion should be read in the context of a broader discussion of social justice.⁴ Different international regulations and systems build upon similar values.⁵ The idea that justice forms the basis of questions concerning disability rights is supported by the government's national objective:

“The proposition outlines the government's policy concerning disability-related obstacles that is based on Sweden's international commitments concerning human rights. The policy concerning disability-related obstacles is part of the work to ensure a more equal society, where

¹ CRPD/C/23/D/45/2018, final decision in CRPD comm. 45/2018.

² Preamble to the Convention on the Rights of Persons with Disabilities, particularly (k) and (w), as well as the articles, particularly Article 4.

³ Bernitz, Ulf, et al., *Finna rätt - juristens källmaterial och arbetsmetoder*, 15 ed. Norstedts Juridik, 2020, and Källström, Kent, Malmberg, Jonas, *Anställningsförhållandet - Inledning till den individuella arbetsrätten*, 5 ed. Iustus förlag AB, Uppsala, 2020 (Cit. Källström 2020) and Grahn-Farley, Maria, *Fördragskonform tolkning av MR-traktat*, SvJT 2018 p. 450.

⁴ See (e.g.) Fraser, Nancy, *Recognition without Ethics?* in *Theory, Culture & Society* 2001 (SAGE, London, Thousand Oaks and New Delhi), Vol. 18(2–3): 21–42.

⁵“Whereas universal and lasting peace can be established only if it is based upon social justice” are the words that introduce the Constitution of the International Labour Organisation; the UN statutes build upon the principles of human rights and universal rights and opportunities.

people's different backgrounds or circumstances shall not determine their ability to participate in society.”

However, the question of individually controlled forms of support linked to disability-related obstacles is not clearly addressed in the national objective, and has been neglected for several years.⁷

The structure of both responsibility for the interpreting service within different societal areas and other connected systems must therefore be reformed.⁸ According to the Independent Living ideology, the principle of cash support (direct payments from public funds in order for an individual to personally purchase a requested product or service) is of key importance to ensure that those persons who are in need of support are given power over that support. The question can be asked whether the cash support principle could have an impact in the field of interpreting services to increase the agency of the individual, compared to the current arrangements.

The second part of the report explains the legal actions in Sweden and the Committee on the Rights of Persons with Disabilities in the case of Richard Sahlin vs. Sweden. Part 3 examines Swedish and international law with a focus on the issues brought to light by the legal case. This forms the basis of part 4, which includes an analysis of Swedish labour law in comparison with the conclusions of the Committee on the Rights of Persons with Disabilities. Part 5 examines how the right to a sign language interpreter in working life and certain other societal areas is regulated. This is followed in part 6 by a discussion about the Independent Living principles, and how they can be applied to the area of interpreting services. With this structure, the issues are addressed systematically in relation to the various areas of rights that affect the situation for the deaf, the hearing impaired and those with deaf-blindness, in the labour market and beyond. The report concludes with some reflections over the interaction between labour law and social law, and how the issues should be addressed in the future.

The terminology used in the report should be given some form of explanation. In the unofficial Swedish translation of the Convention on the Rights of Persons with Disabilities, the term ‘persons with disabilities’ is used to define those who are entitled to rights in accordance with the Convention, and ‘disability-related obstacles’ is used to shift the focus to the need to change society. This terminology is now well-established in Swedish public life and in social movements concerning the rights of persons with disabilities and the obstacles they face. These terms are used in order to maintain legal linguistic consistency, although the alternative expression ‘norm-breaking functional ability’ may often be appropriate as this more clearly emphasises the need for societal reform.

One concept that is of central importance to much of this report is ‘reasonable accommodation’, which is taken from the official English text of the Convention on the Rights of Persons with Disabilities. The term ‘skälig anpassning’ (roughly translated as *proportionate modification*) is used in the unofficial Swedish translation. With an understanding of the concept’s concrete meaning (not least following the clarification of equality and non-discrimination in General Comment No 6), the term ‘rimligt tillmötesgående’ (more closely translated as *reasonable accommodation*) has been used. As well as being closer to the direct, semantic translation, this

term is also free of connotations with other Swedish legal

⁶ Government proposition 2016/17:188 Nationellt mål och inriktning för funktionshinderspolitiken.

⁷ See (e.g.) consultation response of disability rights organisations to investigation according to the Act concerning Support and Service to Persons with Certain Functional Disabilities (LSS).

⁸ See (e.g.) Noori, Kave, Skuggutredningen:

Rätt till tolk – ingen tolkningsfråga!

<https://www.sdr.org/dokumentarkiv/vad-vi-gor/684-ratt-till-tolk-ingen-tolkningsfraga/file>, accessed 04/02/2021.

A governmental investigation into interpreting services is also being conducted, see Dir. 2020:79 Förstärkt tolktjänst för jämlikhet och delaktighet, which is to report by 15 January 2022.

concepts, and places an emphasis on the dynamics that arise between an individual and an organisation, where the focus is on the right of the individual to articulate inadequacies and to receive a response to requests.

Particular thanks go to Frida Inghamn and Lars Lindberg for your insightful discussions at the beginning of this project, to Linda Robertsson for your perceptive comments and corrections towards the end of the project, to Susanne Berg for continually acting as an ideological sounding board, and to Richard Sahlin for the continuing legal battle and your comments regarding a working draft of this text.

2. The case of Richard Sahlin vs. Sweden: The employment process to the present day – the issue of discrimination remains unresolved

This part describes the events surrounding Richard Sahlin's application for work at Södertörn University in spring 2016, the various legal actions in Sweden, and the conclusions of the Committee on the Rights of Persons with Disabilities' investigation that were published in August 2020, which asserted that he had been subjected to discrimination and that Sweden had failed to fulfil its international obligations.

2.1 Richard Sahlin applied for work at Södertörn University, but was not awarded the position

Södertörn University is a provider of higher education and conducts research within four academic schools. It is a public university and is mainly funded by means of the national budget. In 2016, Södertörn University had 70 academic programmes and around 250 courses to offer students. There were 695 full-time employees, of which 64 were employed as professors, 74 were employed as doctoral students, and 39 were employed as library staff. 64% of the teachers had a doctoral degree. In the financial year 2016, there was a surplus of SEK 12 million, as well as SEK 187 million in unused contributions.

Richard Sahlin is a reader in public law, and he is deaf. In spring 2016, he applied for a position as senior lecturer in social law at Södertörn University. Before this, Richard Sahlin had been employed at various universities, including at Södertörn University as a visiting lecturer and externally financed researcher, after having obtained his PhD in law at Stockholm University. The recruitment process in spring 2016 initially went well for Richard Sahlin. He was considered to be the best qualified of all the applicants for the position, and he was invited to give a trial lecture as part of the recruitment process. He gives his lectures using Swedish sign language that is translated into spoken Swedish, and he communicates with colleagues and students using sign language interpreters and written Swedish.

During the later stage of the recruitment process, he was informed by Södertörn University that there were concerns regarding the costs involved with sign language interpreting, and he was asked whether it was possible to apply for support services outside of Södertörn University. Richard Sahlin suggested various ideas about how the position could be organised in order for it to still be practicable by means of several possible alternative measures. Among these

proposals were a redistribution of work among colleagues, a ‘flipped classroom’, more written elements with options to chat via computers, and the prerecording of lectures with text subtitles. Södertörn University terminated the recruitment process, stating that it would be too expensive to finance the cost of the sign language interpreters that were deemed to be necessary. Consequently, Richard Sahlin was not awarded the advertised position of senior lecturer.

2.2 An appeal to the Higher Education Appeals Board and the courts did not result in any change

Richard Sahlin appealed against the decision to terminate the recruitment process to the Higher Education Appeals Board. The Higher Education Appeals Board dismissed the complaint on the basis that the decision was not appealable, in accordance with the Higher Education Ordinance (1993:100). Richard Sahlin requested for the case to be transferred to the Administrative Court. The Administrative Court of Stockholm received the case, and its decision was to dismiss the case on the basis that it was a case related to labour law, and did not concern civil rights or obligations in accordance with Article 6 of the European Convention. Richard Sahlin appealed this judgement to the Administrative Court of Appeal, which did not grant permission for an appeal. Following the advice of the Equality Ombudsman, Richard Sahlin did not appeal against the judgement of the Administrative Court of Appeal.

2.3 The Equality Ombudsman lost the legal action for compensation for Richard Sahlin in the Labour Court, AD 2017 No 51

In parallel with the appeal against the decision to terminate the recruitment process for a senior lecturer in public law, Richard Sahlin contacted the Equality Ombudsman to request support and to report a case of discrimination. The Equality Ombudsman has the power to initiate supervision or to bring a legal action on the grounds of discrimination, which occurs in a few of the instances where reports are received by the authority. On the basis of Richard Sahlin’s report, and with his permission, the Equality Ombudsman decided to bring a civil law claim for discrimination compensation against Södertörn University at the Labour Court. The basis of the claim was that Södertörn University had discriminated against Richard Sahlin in the form of inadequate accessibility, in contravention of the prohibition of discrimination in working life.

The claim was dismissed on the basis that it was deemed to be too costly to demand that Södertörn University must pay the costs for sign language interpreters amounting to up to SEK 520,000 per year. A more detailed account of the reasoning is presented below.

The Equality Ombudsman demanded that Södertörn University should pay SEK 100,000 in discrimination compensation to Richard Sahlin. The basis for this claim was that there is an obligation for anyone who contravenes a ban on discrimination to pay discrimination compensation to the person who has been subjected to the discrimination, in accordance with Chapter 5, Section 1 of the Discrimination Act (2008:567; DL). The prohibition of discrimination in the field of the labour market is stated in Chapter 2, Section 1 of the Discrimination Act, and applies to employers. The actual form of discrimination stated in the case was inadequate accessibility (more information about the discrimination form is presented

in 3.1.4).

The Equality Ombudsman's claim focused on the question of whether the costs for sign language interpreters that Södertörn University claimed were necessary for Richard Sahlin to be able to perform his work as senior lecturer were reasonable to demand. The reasonable measures for accessibility that had been examined by the Labour Court were thereby entirely focused on the costs for sign language interpreting.

The Labour Court asserted that the parties were in agreement regarding which measures would be able to resolve the work situation. The parties were not, however, in agreement that the measure to finance the sign language interpreters to the extent stated was reasonable to demand of an employer, or that the failure to do this would constitute discrimination in the form of inadequate accessibility.

The adjudication focused on whether the costs that had been presented by Södertörn University were reasonable to demand. The Labour Court (AD) also compared this situation with AD 2010 No 13, which concerned the question of a relatively large single-payment cost to change internal IT systems at the Swedish Social Insurance Agency (Försäkringskassan) so that they would be functional for blind people who use screen reader technology. The Labour Court asserted that it would not have been reasonable to demand that Södertörn University would finance the cost of sign language interpreters amounting to up to SEK 520,000 per year. This sum was to correspond with the salary for Richard Sahlin's employment, excluding employer's fees – in practical terms, almost a doubling of the costs involved in employing a hearing person. The Labour Court found that “neither the UN Convention, the Work-Life Balance Directive, the Discrimination Act nor their legislative histories provided support for it to be reasonable to demand that an employer, in such a situation as this, should be responsible for accessibility measures of this type at an annual cost of over SEK 500,000. The court has taken into consideration that this is a question of permanent employment with a public authority with a large budget for personnel costs. Neither does the ordinance from 2001 provide support for it to be demanded, in accordance with the Discrimination Act, that the University must adopt the measures in question.”

The question of the functioning organisation of the work, and of the nature of the discrimination, was broadly left untouched by the Labour Court. A contributing factor to this was the presentation of the parties' legal actions; a ruling may not be founded on circumstances other than those that were cited by the parties in the proceedings.⁹ The Equality Ombudsman stated that “We wanted to have as pure an examination as possible in order to see the reasonability of this, instead of an examination on the basis of alternative measures. This was a strategic decision based on how we want our praxis to be formulated.”¹⁰ The principle of *jura novit curia* – the court knows the law – means that a legal qualification of the circumstances and the demands was not demanded of the party.¹¹

2.4 Richard Sahlin complained to the Committee on the Rights of Persons with Disabilities with the support of organisations – action against the state

Richard Sahlin was not satisfied with the outcome of AD 2017 No 51. Together with the

Swedish National Association of the Deaf and Disability Rights Defenders Sweden (formerly known as Med lagen som verktyg), a complaint was submitted to the Committee on the Rights of Persons with Disabilities in January 2018.¹²

The substance of the complaint was that Sweden had not fulfilled its international obligations in accordance with the Convention on the Rights of Persons with Disabilities, and that Richard Sahlin's rights had been violated. Several aspects were identified in the complaint. One point of complaint was that the decision of Södertörn University to terminate the employment process, with reference to the costs of sign language interpreters as being part of Richard Sahlin's ability to perform his role constituted illegal discrimination and a contravention of the right to work, in accordance with Articles 5 and 27 of the Convention on the Rights of Persons with Disabilities. It was further asserted that it was inadequate to not engage in further negotiations regarding alternative solutions for the performance of the role, in accordance with the obligation to not deny the reasonable accommodation of persons with disabilities in accordance with Articles 2 and 5. The complaint also claimed that the state had not ensured that the economic and social rights to work had been progressively implemented in Sweden; the absence of a support system for sign language interpreting for the deaf in work was, in itself, an infringement of the right to work for Richard Sahlin and represented a failure to fulfil Sweden's positive obligations in accordance with the Convention on the Rights of Persons with Disabilities.

⁹ Code of Judicial Procedure (1942:740) Chapter 17, Section 3, and the Labour Disputes Act (1974:371) Chapter 5, Section 3.

¹⁰ <https://www.lag-avtal.se/arbetsratt/jag-var-for-dyr-for-sodertorns-hogskola-6899321>, accessed 09/02/2021.

¹¹ See Nja 1993 p. 13.

¹² This communication was assigned number 45/2018 in the Committee on the Rights of Persons with Disabilities.

The state's defence was clear in that the state's attitude was in fact that no rights had been violated, and that Sweden had fulfilled its international obligations in accordance with the Convention on the Rights of Persons with Disabilities. The defence included a response to the claims of infringements of rights, and a demand that the complaint be dismissed. The demand for the dismissal was mainly based on the claim that Richard Sahlin had not exhausted national legal remedies, which is a requirement for the right to bring an action before the Committee on the Rights of Persons with Disabilities. The state claimed that Richard Sahlin should have appealed against the Administrative Court of Appeal's decision to dismiss the appeal against the decision to terminate the employment to the Supreme Administrative Court. In addition, the state claimed that the parts of the complaint that concerned negotiation and alternative measures had not been tried in the Labour Court, and there would therefore not have been sufficient conditions to try these parts before the Committee on the Rights of Persons with Disabilities. Furthermore, the state asserted that the complaint was clearly unfounded, and should therefore be dismissed. The defence also included the response to the claims of the infringements of rights. The state's main argument was that the examination that had been performed by the Labour Court was adequate, and had featured the careful weighing up of Richard Sahlin's interest in the right to work and the state's interest in exerting control over its own and employers' expenses. The state also clarified the nature of Södertörn University's financial conditions in 2016, when the employment process was terminated.

According to the annual accounts of Södertörn University for 2016, there was a surplus from various items and of varying sizes. In its defence, the government explained that certain funds from external financiers that had remained (unused contributions) were intended to be used for research and were not available to cover the costs of Richard Sahlin's employment as a senior lecturer. Even so, the annual accounts were still positive, and there was a surplus of almost SEK 12 million. During the legal process, the government maintained that no money was available that could have been used to finance the cost of sign language interpreters that would have made it possible for Richard Sahlin to perform the role of senior lecturer without any other measures.

There was an additional exchange of written communication between the parties.

2.5 The Committee on the Rights of Persons with Disabilities criticises Sweden – Richard Sahlin's rights have been violated

In September 2020, the Committee on the Rights of Persons with Disabilities announced its final decision in this case.

The Committee on the Rights of Persons with Disabilities' analysis began with the question of the admissibility of the complaint in the Committee on the Rights of Persons with Disabilities. It was asserted that the Labour Court had been an effective legal remedy that Richard Sahlin had exhausted, and that appealing to the Supreme Administrative Court or pursuing other legal remedies were not available options. The complaint, therefore, should not have been dismissed on these grounds. The Committee on the Rights of Persons with Disabilities also asserted that Richard Sahlin had cited the circumstances, including alternative measures instead of sign language interpreters, for the Swedish authorities. The fact that no legal qualification had been made led to the absence of another assessment on the basis that the principle of *jura novit curia* applies in Swedish courts. The complaint could therefore have been accepted for adjudication in its entirety. The Committee also found that the key circumstances that Richard Sahlin did not get the position for which he had applied and that the Labour Court had not examined alternative solutions were sufficient to assert that the claim was not clearly unfounded. Overall, there was no reason to dismiss the complaint, and it was announced as admissible for evaluation.

The evaluation that followed focused on the questions of whether Richard Sahlin had been denied reasonable accommodation during the employment process, and whether the Labour Court's ruling was consistent with the requirements made of the state by the Convention on the Rights of Persons with Disabilities in accordance with Articles 5 and 27. It was asserted that the right to work in accordance with Article 27 includes the right to not be subjected to discrimination in various aspects of the work situation, including recruitment processes. It was also asserted that Article 5 features a definition of discrimination that includes a denial of reasonable accommodation in a situation where a person with disabilities identifies inadequacies in an aspect of accessibility in relation to a legal right. A dialogue shall subsequently follow between the party responsible for an activity or organisation (in this instance, an employer that had initiated a recruitment process) and the person who has articulated the inadequacy.

The Committee on the Rights of Persons with Disabilities criticised Södertörn University for not having provided information about the intention to terminate the recruitment as a consequence of the assessment that the costs would have been too large if Richard Sahlin – the best qualified candidate – had been employed, and that the decision to terminate the recruitment was taken before there had been any dialogue concerning alternative solutions that would have enabled Richard Sahlin to perform the role in question. Failings with regard to investigation and dialogue were characteristic of the subsequent contact with the authorities and of their treatment of the situation. The Equality Ombudsman, the Labour Court and Södertörn University were criticised for having failed to pursue all available measures in order to promote the right to work of persons with disabilities.

The Committee also found that the authorities had not sufficiently clearly taken into consideration the positive implications of employing a deaf person for colleagues and students' attitudes towards diversity in society, and for future applications for work by deaf applicants. Overall, the Committee on the Rights of Persons with Disabilities found that the actions of the authorities involved created and upheld a denial of reasonable accommodation, and that

Richard Sahlin had de facto been subjected to discriminatory exclusion from the position for which he had applied in contravention of Articles 5 and 27.

Finally, the Committee on the Rights of Persons with Disabilities also asserted that the state had not fulfilled its obligations in accordance with Articles 5 and 27 of the Convention on the Rights of Persons with Disabilities, and recommended that the state take certain actions in relation to Richard Sahlin and other actions in relation to the general public in order to prevent similar infringements in the future.

The decision included a recommendation that Sweden should provide an effective legal remedy to Richard Sahlin, including awarding him compensation for the violation of rights and for the legal costs that the legal actions in Sweden and before the Committee on the Rights of Persons with Disabilities entailed. It was also recommended that the state should publish the conclusions of the Committee on the Rights of Persons with Disabilities, and share them widely in accessible formats throughout all societal sectors.

The Committee on the Rights of Persons with Disabilities also recommended that the state should take concrete steps to ensure that the right to work of persons with disabilities is promoted in practice, including the performance of systematic dialogue with a person with disabilities in order to facilitate the realisation of his/her rights on the same basis that applies for others. An additional recommendation was for the state to provide training for the judicial system, including the Labour Court, concerning the content of the articles in the Convention, with particular focus on Articles 9 and 27.

The state was to provide a written response to the recommendations within six months of the decision.

2.6 A reflection on access to justice

In the period since he was informed by Södertörn University that he would not be given employment, Richard Sahlin has undertaken several legal actions. These have not resulted in him being given entitlement to employment, compensation or the knowledge that he will be able to demand reasonable measures for accessibility in future employment processes. He has not received support from a trade union, and the support that was provided by the Equality Ombudsman was inadequate in relation to his hopes and wishes.

With the appeal not having given any results, and the loss in the civil law claim in the Labour Court, there was a lack of other effective legal remedies. The action before the Committee on the Rights of Persons with Disabilities was time-consuming – both with regard to the length of time it took and the amount of time that was invested in the presentation of the action. Although Richard Sahlin is a Doctor of Law, he still requires legal support in legal actions – especially those before the courts and in the Committee on the Rights of Persons with Disabilities, as well as in any future actions. The counterparty in the Labour Court was Södertörn University with legal representation by a lawyer, and the counterparty in the Committee on the Rights of Persons with Disabilities was the Swedish state with highly experienced presenting officers from the Ministry for Foreign Affairs' Department for International Law, Human Rights and

Treaty Law (UD FMR). In the Labour Court, the Equality Ombudsman acted as a party in the action with Richard Sahlin's consent, although the presentation of the action was not conducted in accordance with his wishes.

For most people, it is practically impossible to bring an action with the Equality Ombudsman or a trade union acting as a party, because the risk that the legal costs will become so extensive in the event the case is lost means that a private individual may risk having to pay hundreds of thousands of kronor. In the Committee on the Rights of Persons with Disabilities, Richard Sahlin was represented by three non-profit organisations: Disability Rights Defenders Sweden (formerly *Med lagen som verktyg*), the Swedish National Association of the Deaf, and the Swedish National Youth Association of the Deaf. The presentation of the action was primarily prepared by lawyers working on a pro bono basis in close consultation with Richard Sahlin. At the present moment, there is no established effective legal remedy that would enable Richard Sahlin to claim damages from the state for discrimination. Even if it were theoretically possible to sue the state for the violation of rights, there is no established praxis or description in the Tort Liability Act (1972:207) or the Discrimination Act concerning this kind of discrimination.¹³ Because it had already been examined in substance by the Labour Court before the United Nations' criticism was issued, it is unlikely that it will be possible to claim damages for the situation in accordance with the rules on legal force; it may perhaps be possible to consider an application for a new trial due to the incorrect legal application in the ruling of the Labour Court, AD 2017 No 51. Ex gratia compensation may be awarded by the government, but this is not a legal right.¹⁴

Overall, it can be asserted that Richard Sahlin has found it difficult to gain access to justice using the forums that have been available. There is a need for a review of the rules concerning legal costs in discrimination and rights cases, a review of the responsibilities of courts and other authorities to ensure that there is no recurrence of any de facto discrimination that has taken place, and that they provide compensation to anyone who is subjected to discrimination in the future. There is a need for a better form of the structure of redress, and this must be accessible without being associated with the off-putting risk of high costs.

3. Swedish and international labour law – employment law and organisation of work

In simple terms, labour law can be divided into collective and individual elements. Individual labour law concerns the relationship between employers and individual employees, whilst collective labour law concerns the relationship between the parties in the labour market, unions and employers. Both elements are to a large extent characterised by the parties in the labour market negotiating to find solutions to issues that arise in working life and to finalising collective agreements. The primary role of the state is to pass legislation and to provide courts to resolve disputes related to labour law. Some of the fundamental bases include the freedom of association for employees, the employer's right to lead and allocate work, and an established order of negotiation between the parties, where combative action and legal processes are final resorts. The right to freedom of employment for employers has, in practice, long been the main rule and has been recognised by the larger trade unions since the early 1900s.¹⁵ This part

examines the various key national and international sources of law, focusing on employers' right of employment and how an initiated contract of employment affects the employer's responsibility to organise the work in order to cater for the employee's various needs in conjunction with disability.

¹³ Cf. Article 13 of the European Convention, European Court of Human Rights' judgement in Kudla vs. Poland [GC], No 30210/96, 26 October 2000, and Scordino vs. Italy [No 1] [GC], No 36813/97, 29 March 2006, and NJA 2005 p. 462, NJA 2007 p. 295, NJA 2007 p. 584 and NJA 2009 N 70 etc. The right to damages has been codified in Chapter 3, Section 4 of the Tort Liability Act (1972:207).

¹⁴ See SvJT 2009 p. 325 Bengtsson, Bertil, *Om ex gratia-ersättning*.

¹⁵ Källström, Kent, et al. *Den kollektiva arbetsrätten - En lärobok*, 2 ed. Iustus förlag AB, Uppsala, 2020 (Cit. Källström 2019) p. 17.

3.1 Swedish laws

There are several pieces of legislation that regulate labour law. Having previously been relatively unregulated in legal terms, the rights of employees were strengthened by legislators in the 1970s and 1980s.¹⁶ A brief overview of the Employment Protection Act (1982:80; LAS), the Employment (Co-Determination in the Workplace) Act (1976:580; MBL), the Work Environment Act (1977:1160) and the Discrimination Act follows below in order to provide a broad framework concerning the issues of the entering into employment and of what may be demanded regarding the organisation of the work.

3.1.1 The Employment Protection Act

The Employment Protection Act mainly consists of provisions that regulate employment contracts – the relationship between an individual employee and the employer. It includes regulation intended to prevent arbitrary terminations of employment; the employer must have objective grounds for terminating employment. Objective grounds include personal reasons or a shortage of work. The Employment Protection Act does not include regulation of the entering into of employment, although it does feature the requirement that an employer must provide written information to the employee within one month after the initiation of the contract of employment (Section 6 c). The act also includes rules for the right of priority concerning re-employment for employees given notice of termination due to a shortage of work, which is a limitation of the right to freedom of employment.¹⁷

3.1.2 The Co-Determination in the Workplace Act

The Co-Determination in the Workplace Act regulates the relationship between the parties in the labour market, and forms part of collective labour law. The act includes the regulation of collective agreements, the freedom of association, and the obligation for the employer to negotiation with trade unions in accordance with an established procedure. One very important element is the duty of peace that applies where there are collective agreements, and the regulation concerning how combative actions may be legally taken. The Co-Determination Act forms the basis of negotiations and agreements between the parties at various levels of working life. It enables the extensive regulation of various issues as a complement to labour law as expressed in laws, legislative histories and case law.

3.1.3 The Work Environment Act

The Work Environment Act contains a broad framework for the regulation of the work environment, with the intention of preventing work-related ill-health and accidents. It places requirements on employers to work systematically to prevent work-related ill-health and accidents. The Swedish Work Environment Authority issues instructions and conducts supervision of the law. One important regulation concerns individual work modification – see AFS 1994:1 (replaced 1 June 2021 by AFS 2020:5). One condition is that there is dialogue with the employees in order to create a good work environment: “[the] employee shall be given the opportunity of participating in the design of his own working situation and in processes of change and development affecting his own work” (Chapter 2, Section 1(3) Work Environment Act). In accordance with Chapter 3, Section 3(2) of the Work Environment Act, the employer is obliged to make allowance for the employee’s special aptitudes for the work by modifying working conditions or taking other appropriate measures, and in the planning and arrangement

of work, to pay due regard to the fact that individuals have differing aptitudes for the tasks involved.

¹⁶ Källström 2019 p. 20.

¹⁷ Källström 2020 p. 112.

3.1.4 The Discrimination Act

The main Swedish legal regulation concerning discrimination is the Discrimination Act. This came into force in 2009, and represented an amalgamation of seven civil law acts that featured the prohibition of discrimination on various grounds, including disability.

Working life is a central societal area where there is a prohibition of discrimination in the sense of civil law. The right to employers' freedom of employment has been recognised by the trade unions since the early 1900s,¹⁸ and the anti-discrimination law represents a limitation of the right to freedom of employment for employers.¹⁹ Several legally binding international norms form the background of the prohibition of discrimination in the labour market on the basis of disability and the emergence of accessibility inadequacies as a form of discrimination. These will be examined in more detail in 3.2.

The overall structure of the Discrimination Act builds upon:

- 1) definitions of which bases are protected from discrimination, and what is meant by discrimination in a legal sense,
- 2) civil law prohibition of discrimination in various societal areas that will result in an obligation for the discriminating party to pay discrimination compensation to the person being discriminated against, as well as certain other legal consequences in the areas of working life and contract law.
- 3) a public law regulation of the obligations of employers and education-providers to work preventively using active measures against discrimination and a mandate for the Equality Ombudsman to exercise certain supervision to ensure compliance with the law,
- 4) procedural regulations of which physical and legal persons may legally bring various actions on the basis of the Discrimination Act, and the form such actions shall take.

Direct and indirect discrimination, harassment, sexual harassment, reprisals and instructions to discriminate are prohibited, which is consistent with the structure of EU law.²⁰ Accessibility inadequacies as a form of discrimination is only linked to the basis of disability, and was actively included in the legislation in 2015.²¹ The regulation is included in Chapter 1, Section 4 of the Discrimination Act, which regulates all forms of discrimination. Inadequacies in accessibility as a form of discrimination is point 3 in the above-mentioned section. This form is listed as follows:

“3. Inadequate accessibility: that a person with disability is disadvantaged through a failure to take measures for accessibility to enable

¹⁸ Källström 2019 p. 17.

¹⁹ Källström 2020 p. 112.

²⁰ See 3.2.2 for more information about the EU law.

²¹ For more information about the implications and background of this form of discrimination, see Hellborg, Sabina, *Diskrimineringsansvar: En civilrättslig undersökning av förutsättningarna för ansvar och ersättning vid diskriminering*, Iustus förlag, Uppsala, 2018 and Chöler, Maria, et al. *Motverka funktionsdiskriminering och förändra samhället – med lagen som verktyg*, Exellent Print & Design, Stockholm, 2018.

the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to

- the financial and practical conditions,
- the duration and nature of the relationship or contact between the operator and the individual, and
- other circumstances of relevance.”

Discrimination in the form of inadequate accessibility applies to all societal areas that are subject to a prohibition of discrimination, with certain minor exceptions that are explicitly stated in Chapter 2 of the Discrimination Act. The Discrimination Act from 2008 included obligations to take certain measures for accessibility in the area of work and education, and these were included in the new provision concerning inadequate accessibility.²² This stated:

“To ensure the employer is able to fulfil their obligations, the situation may be such that the employee should inform the employer of the nature of their disability, and state the extent of their needs for support and modification measures. The individual can often be expected to know best which limitations are caused by the disability, and will at least be able to provide a general estimation of the type(s) of measures that may be appropriate. The employer does not, however, have the right to adopt a passive approach and merely wait to receive information from the employee. An employer that has knowledge that an employee has a disability should take the initiative to initiate a dialogue with the employee, and investigate the possibility of support and modification measures to eliminate or reduce the limitations caused by the disability.”

In other societal areas, the government stated that it is “considered to be in the nature of the thing that there must, to a greater extent, be requirements that a measure should be considered to be reasonable only once a person with a disability has articulated their need for special support or modification.”

One case of particular relevance for this report is AD 2020 No 3, in which a deaf job applicant was denied employment as a receptionist at an interpreting centre on the basis that the employee would need to use a speaking telephone at certain times. The Labour Court found that this did not constitute discrimination in contravention of the Discrimination Act. With similarities to Richard Sahlin’s case against Sweden, this case actualises several issues concerning interpreting services and reasonable accommodation for persons with disabilities when they articulate an inadequacy in accessibility in working life.

3.2 International labour law

The content of labour law is often reproduced in international sources. The relationship to the formulation and application of Swedish law can be said to be complicated and unpredictable. Interpretation in conformity with the law is one method for the application of the law where the international law can

²² For more information, see the government's proposition 2013/14:198 Bristande tillgänglighet som en form av diskriminering p. 70
f. and 73 ff. P. 72 includes the reasoning concerning the opportunity for the employer to choose from several alternative measures that could give the desired result.

gain precedence in the event of a conflict with Swedish law, or when a Swedish rule is interpreted in such a way that it can be applied in harmony with the international law. Maria Grahn-Farley explains that there is a strong variant that is applied in the event of a conflict of norms with central parts of the European law, such as the European Convention and EU law, and a weak variant that is applied in the event of a conflict of norms with other public law, including the UN Declaration on Human Rights and the ILO Conventions.²³

3.2.1 International Labour Organisation – ILO

The International Labour Organisation (ILO) has existed since 1919 and its work builds upon a tripartite collaboration between governments, employers and workers.²⁴ The preamble of the ILO's constitution states that "universal and lasting peace can be established only if it is based upon social justice". An important document that complements the constitution is the 1944 Declaration of Philadelphia, which includes the recognition of human rights and states that the presence of poverty anywhere is a danger to prosperity everywhere. This international approach with three-party collaboration in the field of work is the primary means of achieving social justice. Conventions, recommendations and technical support in the spirit of consensus are important tools. Following a modernisation initiative within ILO, eight conventions were classified as core conventions that are regarded as being binding for all member states – even those that have not ratified them.²⁵ The ILO's C111 convention, which is one of the core conventions, prohibits discrimination in working life, and states that special measures designed to meet the particular requirements of certain groups shall not be deemed to be discrimination.²⁶

3.2.2 EU law – Work-Life Balance Directive

Sweden's membership of the EU has many implications for the labour market, social policy and other policy areas. This has had a major impact on discrimination law in Sweden. Directive 2000/78 includes the prohibition of discrimination on various grounds, including discrimination in working life on the grounds of disability. This directive should be read together with directives 2000/43 and 2006/54. It must be noted that there is no collective directive that applies to most of the established bases for discrimination in several central societal areas, which leads to the conclusion that the EU legislative protection against discrimination is fragmented.²⁷

The Employment Framework Directive 2000/78 includes a right to individual measures for reasonable accommodation for the right to employment in Article 5:

“Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with

²³ Grahn-Farley, Maria, *Fördragskonform tolkning av MR-traktat*, SvJT 2018 p. 450.

²⁴ For more information, see Herzfeld-Olsson, Petra, et al, *Sverige och ILO Hundra år av trepartiskt samarbete för*

ett bättre arbetsliv, Elanders Sverige AB, Stockholm 2020 (Cit. Herzfeld-Olsson) p. 23 ff. for an overview of the ILO.

²⁵ Herzfeld-Olsson p. 29 f.

²⁶ See particularly Articles 1-5.

²⁷ For more information, see COM (2008) 426 with proposals for broader protection against discrimination in EU law.

a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

3.2.3 Convention on the Rights of Persons with Disabilities: accessibility, reasonable accommodation and individual support

The Convention on the Rights of Persons with Disabilities is often said to represent a paradigm shift rather than the creation of new human rights. It came into being because there was a need to strengthen the understanding of the fact that the concept of human rights also applies to persons with disabilities. The Convention expresses human rights in the context of disability, with human diversity as its basis. Article 3 lists the fundamental principles, which are:

- a) respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons,
- b) non-discrimination,
- c) full and effective participation and inclusion in society,
- d) respect for differences and acceptance of persons with disabilities as part of human diversity and humanity,
- e) equality of opportunity,
- f) accessibility,
- g) equality between men and women,
- h) respect for the evolving capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identities.

The principles stated in Article 3 shall permeate how the rights and obligations that are regulated in Articles 5-30 shall be read. Article 4 stipulates the general obligations that states have to comply with the Convention and fulfil their obligations, by means of passing legislation, adopting action plans, allocating budgets and ensuring the independent monitoring of compliance with the Convention throughout the country.

The right to accessibility for persons with disabilities is based on a non-discriminatory approach that is tracked to Article 25 (c) of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, which ensures the right of every citizen to “have access, on general terms of equality, to public service in his country”. The International Convention on the Elimination of All Forms of Racial Discrimination guarantees all persons the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks, in accordance with Article 5 (f). The right to accessibility for persons with disabilities is often prevented as a consequence of technical and environmental obstacles, which in most cases are caused by humans.²⁸

²⁸ See General Comment No 2 for the Convention on the Rights of Persons with Disabilities p. 3 (2014).

In order to counter the exclusion and discrimination of persons with disabilities, the concept of *universal design* shall guide the creative aspects of society. This means “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.” When this process is not applied, any obstacles to accessibility shall be removed by working with a systematic approach. In the event of the exclusion or disadvantaging of a person with disabilities, despite the systematic work to ensure the universal design of society and to remove obstacles to accessibility, *reasonable accommodation* shall be ensured in order to resolve the inadequacy that caused the exclusion or disadvantaging. Accommodation cannot be demanded if involves an *undue burden* for the person responsible for the activity or organisation.

A new construction (although perhaps not representing a new right) is the right to live independently and be included in the community, included in Article 19 of the Convention on the Rights of Persons with Disabilities. This is centred on the equal right of all persons to have agency in their own lives and to not be subjected to segregation on the basis of their ability/disability. The right to choose their place of residence, their form of residence and with whom they reside, individually tailored disability support, and the equal right of access to community services that are available to the general population are key aspects to the right to live independently and to be included in the community, in accordance with points a), b) and c) in Article

19. Closely connected to this is the idea of representation and active involvement of disability rights organisations in decisions concerning the implementation of the Convention and the supervision of the implementation.

A couple of new concepts that can be traced to the paradigm shift and the development of the equality model with a basis in Article 5 are “inclusive equality” and the “human rights model of disability”. These are based on the right of the individual to not be subjected to discrimination and on what constitutes the conditions for equality in practice. The human rights model of disability asserts that disability is a social construct, and that disability does not represent an acceptable ground for the denial or restriction of human rights. Inclusive equality is a complex concept that includes a fair *redistributive* dimension to address socio-economic disadvantages; a *recognition* dimension to combat stigma, stereotyping, prejudice and violence, and to recognise the dignity of human beings and their intersectionality; 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; and an *accommodating* dimension to make space for difference as a matter of human dignity.²⁹

²⁹ For more information, see General Comment No of the Convention on the Rights of Persons with Disabilities p. 11, and the entire document for the further development of these concepts. Before the Convention on the Rights of Persons with Disabilities was adopted, it had been written that dignity, autonomy, equality and solidarity are key values in the area of human rights for persons with disabilities – see Bruce, A., Quinn, G., Degener, T., Burke, C., Quinlivan, S., Castellino, J., Kenna, P., & Kilkelly, U. (2002), *Human rights and disability: the current use and future potential of United Nations human rights instruments in the Context of Disability*, United Nations

Press, p. 14 ff.,

<http://lup.lub.lu.se/search/ws/files/11124103/HRDisabilityen.pdf>, accessed 08/03/2021.

The right to accessibility and the state's obligation are stated in more detail in Article 9. The right to work is stated in Article 27, which is reminiscent of the right to not be subjected to discrimination in working life and a clarification of the obligation to "ensure that reasonable accommodation is provided to persons with disabilities in the workplace".

4. Analysis: Is Sweden's employment law in line with international law?

The concept of an employer's right to freedom of employment remains the default position, even though it is associated with a number of limitations in Swedish law. The right of priority to re-employment in accordance with Sweden's Employment Protection Act, and the prohibition of discrimination in accordance with the Discrimination Act, are important exceptions that apply to both the public and the private sectors. The conclusions in CRPD Comm. 45/2018 highlight a conjunction of the right to freedom of employment and the right to not be subjected to discrimination, both in Sweden and internationally. Questions concerning rights of an economic or social nature, such as the right to an interpreter, are included below, particularly in sections 5 and 6.

4.1 Is there need for reform?

The discrimination reform that took place in relation to i AD 2017 No 51 concerned discrimination in the form of inadequate accessibility. The legislative histories address both questions about the removal of obstacles to accessibility in the environment and certain individual support as a specific measure for the achievement of equality. Because inadequate inaccessibility was added as a form of discrimination in conjunction with the implementation of Sweden's international agreements in accordance with the Convention on the Rights of Persons with Disabilities, it is natural to refer to the content of the Convention. However, there appears to be some degree of conceptual confusion between Swedish and international law.

The concept of accessibility that is described in the Convention on the Rights of Persons with Disabilities has its origins in the ideas of non-discrimination and equality. Every individual shall have the right of access and admission to what is offered to the general population. At the same time, there are two dimensions to this concept that are actualised by what is referred to as accessibility in the societal structure – when no inadequacy is articulated, and when an inadequacy is articulated. The latter instance results in a more extensive obligation for reasonable accommodation. As explained in General Comment No 6, the concept of reasonable accommodation includes an obligation for the duty bearer of the activity or organisation to enter into dialogue with the individual who articulates the need for remedial measures to be taken. This is also expressed in terms of negotiating with the person as a result of the articulation in order to find a solution to the situation that excludes or otherwise disadvantages the person.

In Sweden's Discrimination Act and other legislation that regulates accessibility for persons with disabilities, the focus is on an obligation for the party that is responsible for an activity or organisation to take measures to ensure accessibility. As stated above in 3.1.4, the legislative

histories for the Discrimination Act include a dimension whereby a person with disabilities must, in certain situations, articulate an inadequacy in order to be able to demand remedial measures. In working life in particular, there are indications of an obligation for an employer to engage in dialogue with the person who has articulated an inadequacy, even if this obligation has not been explicitly expressed in the legislation. It can therefore be claimed that,

in Swedish law, there is no explicit right for a person who has been disadvantaged to negotiate with the employer or the organisation in another societal area in order to identify a solution.

With particular regard to how the Committee on the Rights of Persons with Disabilities expresses itself in its criticism of Sweden's lack of dialogue concerning possible measures for accessibility, it becomes clear that the right of a person to negotiate on solutions is not sufficiently strongly regulated in Swedish labour law, nor for other areas of rights. In practice, the right to accessibility and reasonable accommodation, in accordance with the Convention on the Rights of Persons with Disabilities, includes an element of dialogue and negotiation concerning possible, reasonable and proportional measures in order to accommodate the person's needs as part of the creation of an inclusive society on a foundation of human diversity and individual agency.

4.2 What form could reform take?

There is a need for the reform of Swedish law in order for Sweden to address the criticism that it has received from the Committee on the Rights of Persons with Disabilities and to fulfil its international obligations. Such reform could be conducted in several ways. This text only suggests ideas, rather than complete proposals for reform.

Reform by means of a more established case law requires that more similar cases are pursued via the courts. By identifying strategic cases, they can be pursued in order for certain situations and circumstances to be tried that will complement or challenge the established praxis. It should be remembered that, as seen in 2.6, legal actions are associated with economic risks. In addition, it is unclear whether case law will develop in line with the conclusions of the Committee on the Rights of Persons with Disabilities, even though AD 2017 No 51 indicates that the Committee's conclusions shall form the basis of an interpretation in conformity with Swedish labour law.

The parties in the labour market can negotiate on solutions via collective agreements that state in more detail how such negotiations would take place in practice. Central organisations should be able to take an important role in the development of models that are brought in by their members via contract negotiations.

To ensure a change, the state can regulate the issue with legislation. It should be possible to ensure the codification of the obligations to identify solutions by negotiating with job applicants with disabilities by means of an amendment to the Employment Protection Act, particularly as the right to freedom of employment is currently restricted by the right of certain employees to re-employment. A more detailed investigation would be needed to determine the nature of the regulation. Another idea is to regulate it via the Discrimination Act, but because this doesn't address the right to employment in broad terms, this could create systematic confusion even if the issue clearly concerns discrimination – how employment processes should be conducted in order to avoid de facto discrimination on the basis of disability. The legislative path is also consistent with the general commitments for the state to pass legislation as a measure to protect and ensure human rights in accordance with Article 4 of the Convention on the Rights of Persons with Disabilities.

5. The right to an interpreter for the deaf and hearing impaired and for those with deaf-blindness in Sweden

The regulation of interpreting services in Sweden is included in several different laws that regulate different societal areas. An overview of the regulation follows below. For a more detailed analysis or further information, please see Skuggutredningen: Rätt till tolk - ingen tolkningsfråga! samt flera statliga utredningar och departementspromemorior.³⁰

5.1 Everyday interpreting – obligation for the regions

Chapter 8, Section 7 of the Health and Medical Services Act (2017:30) regulates an obligation for the regions to provide interpreting services for the everyday needs of those who became deaf either in childhood or adulthood, the deaf-blind and the hearing impaired. The same paragraph outlines the obligation for the regions to provide assistive aids to person with disabilities, as well as habilitation and rehabilitation. The regions apply the provisions in different ways, and it is difficult to predict whether interpreting will be granted in a specific instance after the application, and “a county council’s decision that an interpreter will not be provided in a specific instance cannot be appealed”.³¹ In practice, the regions organise services for everyday interpreting via central interpreting organisations. Their assignment “is primarily the mediation and implementation of sign language interpreting, written interpreting, sign-supported interpreting and interpreting for the deaf-blind”.³² In practice, delimitation problems often arise with regard to who is to finance the interpreting in a specific instance if there is an external actor that arranges an activity – for more information about the principle of responsibility and finance, see 5.5

5.2 Interpreting in working life – no standardised regulation

Sweden has no standardised regulation for interpreting in work situations. According to the principle of responsibility and finance (see 5.5), it is the employer who must finance the interpreting service if such is required for a person with disabilities to be able to perform their work. The Ordinance on Special Contributions for Persons with Disabilities Entailing a Reduced Capacity for Work (2017:462) features certain provisions concerning the possibility for an employer to apply via the Swedish Public Employment Service for compensation of up to SEK 150,000 for interpreting costs when the employee who requires an interpreter takes part in training as part of their employment. The regulation of economic support provided to employers in order to employ a person with disabilities is included in the same ordinance. The regulation is aimed at the employer to compensate for certain costs for employment, development within the employment, or security within the employment; the various forms of compensation apply for different times, and different conditions must be fulfilled.

³⁰ See (e.g.) SOU 1992:52 Ett samhälle för alla, slutbetänkande från Handikapputredningen; SOU 1991:97 En väg till delaktighet och inflytande: tolk för döva, dövblinda, vuxendöva, hörselskadade och talskadade; delbetänkande från Handikapputredningen; SOU 2011:83 En samlad tolktjänst, Ds 2016:7 Tolktjänst för vardagstolkning.

³¹ Ds 2016:7 Tolktjänst för vardagstolkning p. 33.

³² SOU 2011:83 En samlad tolktjänst p. 76.

5.3 The Act concerning Support and Service to Persons with Certain Functional Disabilities – limited capacity for interpreting

The Act concerning Support and Service to Persons with Certain Functional Disabilities (1993:387, LSS) gives certain individuals the right to assistance in the form of special support and special service in accordance with Section 9 (1-9) if they require such help in their daily lives and if their needs are not catered for in other ways.³³ The deaf, hearing impaired and people with deaf-blindness should be considered to be included in this group: “examples of persons with such disabilities can include people with pronounced impairments of movement, with serious injury affecting sight or hearing, or with severe effects of illness, such as diabetes or cardio-vascular diseases”.³⁴

The entitlement to assistance measures afforded by inclusion in this group is conditional upon that “they need such assistance in their daily lives and [...] their needs are not satisfied in some other way”.³⁵ The right to assistance measures shall lead to the person being ensured good living conditions, the measures shall be lasting and coordinated, and they shall be adapted to the individual needs of the recipient and be framed in such a way that they are easily accessible for those who need them and enhance the ability of the latter to live an independent life in accordance with Section 7 (2 and 3) of the Act concerning Support and Service to Persons with Certain Functional Disabilities. The measures listed in Section 9 do not include interpreting services. The legislative histories state that the shortage of interpreters as a reason to regulate the interpreting service is an obligation for principals to provide rather than a right.³⁶

With regard to personal assistance, which is a measure that is regulated by Section 9 of the Act concerning Support and Service to Persons with Certain Functional Disabilities, the element of communication is included. It is possible to perform certain interpreting if the person receiving the personal assistance employs individuals who can interpret or trains employees to interpret. On the other hand, the need for tactile sign language interpreting as an element of the communication does not constitute grounds for entitlement to personal assistance in the form of a “fundamental need” for persons with deaf-blindness in accordance with HFD 2018 ref. 44 (as an additional criterion, a person must have a certain amount of help requirements that relate to the technical legal construction of “fundamental needs” in order to be granted access to personal assistance). HFD 2018 ref. 44 includes reasoning concerning that which is expressed in the legislative histories for the Act concerning Support and Service to Persons with Certain Functional Disabilities stating that interpreting services are not written into the legislation, and states that investigations have taken place since then without subsequent legislative measures.

Overall, the Act concerning Support and Service to Persons with Certain Functional Disabilities is not sufficiently strongly formulated to give the deaf, the hearing impaired or those with deaf-blindness the right to an interpreter.

5.4 The Social Services Act – a legal framework without clarity regarding interpreting services

The Social Services Act (2001:453; SoL) can best be described as a combination of a framework law and a rights law. It constitutes a framework for what will be offered within the

municipal social services, supplemented with refinements that have been added over the years. It also gives those who cannot cater for their own needs or have their needs catered for in any other way the right to aid from the municipal social welfare committee for their self support and for their daily lives.

³³ See Sections 1 and 7 of the Act concerning Support and Service to Persons with Certain Functional Disabilities.

³⁴ Prop. 1992/93:159 p. 55. See also (e.g.) RÅ 2001:33 concerning a four-year-old deaf child who was included in the group.

³⁵ Section 7 (1) of the Act concerning Support and Service to Persons with Certain Functional Disabilities.

³⁶ See prop. 1992/93:159 p. 152 ff. for the legislation's reasoning.

See Chapter 4, Section 1 of the Social Services Act. It is unclear whether and to what extent interpreting services are arranged for different societal areas in different municipal regions on the basis of the Social Services Act; the absence of regulation and statistics suggests this does not happen.

5.5 The principle of responsibility and finance – is it relevant and adequate?

When a need for a particular measure arises and there is no obvious system to resolve the issue at hand, the assumption is that the party that has responsibility for an activity or organisation shall also finance the measure. In the context of policy concerning disability-related obstacles, reference is often made to the ‘principle of responsibility and finance’. This term is used in several political and legal documents concerning social governance, including legislative processes.³⁷ Dir. 2020:79 Förstärkt tolktjänst för jämlikhet och delaktighet includes a brief reference to the principle of responsibility and finance:

“another important national starting point is the principle of responsibility and finance, which means that each sector in society is responsible for ensuring that the activity or organisation is accessible to all persons, including persons with disabilities”.

The principle has also been mentioned in the legislative histories for the Discrimination Act’s regulation of inadequate accessibility as a form of discrimination,³⁸ and in SOU 2019:23 *Styrkraft i funktionshinderspolitiken*.³⁹ The principle can be said to be consistent with the notion that legal requirements shall be implemented by those who are to follow the law.⁴⁰ There is, however, opposition in municipal and regional interests in that financing shall accompany increased obligations from the legislator.⁴¹ The term “sector in society” generates a certain amount of linguistic confusion as it does not identify a specific activity/organisation or which legal subject is referred to. Problems can arise in practice, if an organisation does not fulfil its responsibility to implement measures in accordance with statutory requirements or the principle of responsibility and finance.

It is also stated that, in relation to the principle of responsibility and finance, it is not the intention that certain actors who do not have economic resources to implement certain measures shall be forced to take such measures, but rather they can constitute an exception or the public sector can become involved.⁴² This may result in a need for different systems to ensure rule-compliance, such as market controls, supervision, individual rights of complaint, and legal remedies for those who have been subjected to an infringement of their rights. In the area of policy concerning disability-related obstacles, and with regard to necessary changes in the environment and the provision of individual support, it may be insufficient to merely maintain uphold the principle of responsibility and finance as a guiding form of governance when this is not followed by changes.⁴³

³⁷ See (e.g.) SOU 1992:52 *Ett samhälle för alla : slutbetänkande från handikapputredningen* p. 5.

³⁸ Prop. 2013/14:198 *Bristande tillgänglighet som en form av diskriminering*, p. 112.

³⁹ See (e.g.) p. 92 f. and references to Prop. 1999/2000:79 *Från patient till medborgare*.

⁴⁰ Cf. (e.g.) technical requirements in accordance with the Planning and Building Act (2010:900) Chapter 8, Sections 1 and 4.

⁴¹ SKR states that “[the implication of the principle of finance] is that municipalities and county councils shall not need to raise taxes or reprioritise another activity or organisation in order to finance new state expenditure”. <https://skr.se/ekonomijuridikstatistik/ekonomi/finansieringsprincipen.1709.html>, accessed 08/02/2021.

⁴² Se (e.g.) prop. 2013/14:198 p. 112 and prop. 1999/2000:79 p. 30.

⁴³ Cf. dir. 2017:133, which meant that the investigation that submitted its final report via SOU 2018:23 Styrkraft i funktionshinderspolitiken was prevented from submitting proposals that would involve increased costs for the private or public sectors.

In the field of working life, the principle of responsibility and finance is not regulated clearly. The obligations are more clearly formulated in the Work Environment Act and the Discrimination Act. These establish more of a framework for the demands that can be made of an employer. AD 2017 No 51 means that it is not possible to demand finance for sign language interpreters amounting to almost the costs of salaries, although without the addition of employer's fees that the employee entails for the employer. In the legal case in question, the principle of responsibility and finance did not result in the inclusion of Richard Sahlin in working life, compared with the legislation relating to labour law. It is therefore possible to question the effect of this principle with regard to individuals' needs for sign language interpreting in working life.

There is nothing to prevent an employer from employing interpreters. The public sector already procures the necessary interpreting services in accordance with the Public Procurement Act (2016:1145; LOU). It has also been discussed whether the Act on Free Choice Systems (2008:962; LOV) could be used to create greater freedom and choice for primary users of interpreting services.⁴⁴

5.6 Shadow investigation by the Swedish National Association of the Deaf

The Swedish National Association of the Deaf has produced a comprehensive report on the right to interpreting services (Skuggutredningen: Rätt till tolk – ingen tolkningsfråga!), which was published in 2020. This examines the current state of the regulation and how it has developed since interpreting services first began to be available in Sweden's public sector, and proposes how interpreting services can be better organised in the future.

On page 10, the shadow investigation asserted that it is “necessary to, as soon as possible, transfer responsibility for interpreting from the regions, employers, private providers of education and municipalities (Komvux) to the state”. It also asserts that a standardised order of prioritisation is taking place in everyday interpreting services that is based on the Health and Medical Services Act's paradigm concerning needs and that the individual has nothing to say other than to submit a request for an interpreter in various instances, and that too little money is being invested with the regions. The investigation identifies overall inadequacies in the conditions for primary users of interpreting services to exercise self-determination in their lives on equal terms as others without disabilities; people with deaf-blindness in particular get caught between The Act concerning Support and Service to Persons with Certain Functional Disabilities and the Health and Medical Services Act, because different dimensions of ability/disability generate a response from different legislation.

Perhaps the most important message of the investigation is that there is a need for a rights law compared to the current regulation of the obligations of the regions and other principals. The investigation proposes that one authority (or several authorities) shall have responsibility for interpreting services in different areas.

5.7 Reflection on the practical organisation of the interpreting services

The quality of interpreting services is not specifically regulated in the legislation, and the organisation is clearly fragmented in different societal areas, with different actors being responsible for different aspects.

⁴⁴ SOU 2011:83 En samlad tolktjänst – samordning och utveckling av tolktjänst för barndomsdöva, vuxendöva, hörselskadade och personer med dövblindhet.

Procurements concerning the regions' provision of everyday interpreting services often set the parameters for what is included and how the services are organised.

Following dialogue with primary users and people who have worked in the coordination of interpreting services, it has emerged that regional rules are made that govern the interpreting services more closely, which may involve orders of priority, the number of disposable hours, and whether or not preparation time for the interpreters is included in different situations. Historically, there have been shortages of interpreters, and there is a risk that there will not be enough interpreters to meet all future needs for interpreting services.

The system's focus on the obligations of authorities instead of on the rights of individuals creates a relationship of dependency for the primary users of interpreting services with regard to the capabilities of authorities and other actors in the various societal areas to provide and organise the interpreting services. It can be questioned whether there is a need for a shifting of the power relationships within the field of interpreting services.

6. Independent Living for all?

Independent Living is a movement, a philosophy, a practice and a right. The Convention on the Rights of Persons with Disabilities includes a right to self-determination and inclusion in the community. This right applies to all persons with disabilities; diagnoses are not a determining factor in how the right is to be protected and fulfilled.

As stated above, the right to live independently and to be included in the community (Article 19 of the Convention on the Rights of Persons with Disabilities) is not a new right, but is rather a new formulation of basic human rights. Article 19 is based on the equal right of all persons to have agency in their own lives and to not be subjected to segregation on the basis of their ability/disability. Not all persons with a disability need the right to individually tailored support described in Article 19 b),

but this is a right that is required when it is needed in order to ensure the right to live an independent life with inclusion in the community. The right of accessibility to community services for the general population is another key aspect. These rights-based dimensions must be implemented progressively by the member states, which means that each state must draw up action plans and allocate budgets with all available means.

To the extent that this refers to Article 19 b), interpreting services belong to the category of economic and social rights, which means that the rights are to be implemented progressively. Similar to Article 19, the right to work is a right that includes dimensions of both direct applicability and progressive implementation. Non-discrimination and reasonable accommodation as part of the protection against discrimination are directly applicable. There is therefore a direct obligation to ensure reasonable accommodation, as well as interpreting services to the extent this can be related to reasonable accommodation within Articles 5 and 19 c).

The Committee on the Rights of Persons with Disabilities explains the obligations in p. 97 k in

General Comment No 5 to Article 19, where there is a requirement for “the development of appropriate and sufficient *person-directed/’user’-led and self-managed support services for all persons with disabilities, such as personal assistance, guides, readers and professionally trained sign language or other interpreters*”

[author's italics]. This obligation is characterised by a duty to act directly for a progressive implementation of the rights with all available means.

In a wider perspective, reference can be made to the human rights model of disability and the right to inclusive equality, as discussed above in 3.2.3. The state shall also ensure that the person receives the support they need in accordance with a needs assessment that respects the person's human rights.⁴⁵ With regard to working life and Article 19, the Committee on the Rights of Persons with Disabilities has, in General Comment No 5 (91), stated that:

“[t]he existence of individualized support services, including personal assistance, often is a precondition for effective enjoyment of the right to work and employment (art. 27). Furthermore, persons with disabilities should also become employers, managers or trainers in disability-specific support services. Implementing Article 19 will thus help to phase out sheltered employment.”

The right to work includes the right of everyone to the opportunity to gain his living by work, which he freely chooses or accepts, fair wages and safe and healthy working conditions.⁴⁶ The right to live an independent life with inclusion in the community will be severely undermined if it is not made possible for persons in need of individually tailored support to receive this in their working life or in other societal areas.

6.1 Independent Living in principle and in practice

The movement, philosophy and practice of Independent Living has existed since long before the right for persons with disabilities to live independently and to be included in the community was defined in terms of human rights and was enshrined in an international convention on human rights.⁴⁷ A fundamental idea within Independent Living is that individuals have the most expertise concerning their own personal needs. There is therefore a need for solutions that come from these people themselves, rather than from social or medical professions. Personal assistance is the best known and most successful form of service to have emerged from the Independent Living movement. The basic premise is that personal assistance is personally customised in its construction and implementation, and that it builds upon a relationship between the person entitled to the assistance and the person providing the assistance. The principle of cash support is of central importance to the ability to control the service and to create the conditions for a well-functioning relationship; the cash support must be sufficient that it covers market-level salaries and additional wage costs, and the costs of administration, education and training for both the users and providers of the assistance.⁴⁸ Since personal assistance has been practised in several countries,

⁴⁵ A human rights approach to disability assessment, Waddington, Lisa and Priestley, Mark, *Journal of International and Comparative Social Policy*, Volume 37, Issue 1, March 2021, pp. 1-15, Cambridge University Press. Accessed 20/02/2021: <https://doi.org/10.1017/ics.2020.21>

⁴⁶ See (e.g.) Articles 6-9 in the International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (ICESCR).

⁴⁷ For more information, see *Rätten till ett självbestämt liv i samhällsgemenskapen – En essä om grunderna i Funktionsrättskonventionens Artikel 19*, and *Independent Livingideologin* by Susanne Berg and Ola Linder June 2019, accessed 23/02/2021, <https://lagensomverketvg.se/wp-content/uploads/sites/4/2019/06/Essa%C3%A4-artikel-19-CRPD-och-ideologi-In>

[dependent-Living.pdf](#)

⁴⁸ For more information, see General Comment No 5 for the Convention on the Rights of Persons with Disabilities p. 16 c and

<https://enil.eu/independent-living/definitions/>, accessed 23/02/2021.

legislation in this area has been added; in Sweden the right to personal assistance or the financing of personal assistance is regulated in the Act concerning Support and Service to Persons with Certain Functional Disabilities and Chapter 51 of the Social Insurance Code.

6.2 Is there a need for greater individual power over interpretation?

Overall, the principle of responsibility and finance and the fragmented regulation of obligation with regard to interpreting services results in the limitation of the right to live independently and to be included in the community, including in working life.

The regulation of interpreting services is conducted on a basis that is considerably further removed from the needs of the individual than those for personal assistance and certain other forms of support in accordance with the Act concerning Support and Service to Persons with Certain Functional Disabilities. At the same time, communication and the right to an interpreter are rights in accordance with the Convention on the Rights of Persons with Disabilities where no distinctions are made between the various elements of the individual support for disability-related obstacles. The question can therefore be asked whether it is reasonable that there is such a large difference in the level of control that an individual has over the service specifically for disability-related obstacles that is based on the type of disability that person has, and in accordance with which legislation that corresponds to the Swedish practice.

In its shadow report, the Swedish National Association of the Deaf asserts that the current arrangements for interpreting services for the deaf, hearing impaired and persons with deaf-blindness do not provide sufficient conditions for self-determination concerning which prioritisations are made within the interpreting service, and that a medical/paternalistic perspective characterises the order of priority within most of the interpreting service. It has previously been asserted that the regulation is fragmented in various areas, and is characterised by the absence of a rights-based perspective. The interpreting service that is provided is mainly determined by the regions' prioritisations and procurements. In contrast to personally customised forms of assistance, such as personal assistance, there is considerably less personal customisation in interpreting services. One positive element of the interpreting service is that the person can apply again when needed, although the person has no right to steer the service to ensure that it is delivered in accordance with their preferences and their own assessment of their needs. Furthermore, the design and performance of the interpreting service cannot be influenced to any great degree by the individual. It can be questioned whether the regulation is sufficiently person-centric to enable the agency described by the Committee on the Rights of Persons with Disabilities in the procedures concerning reasonable accommodation in individual situations. Furthermore, the interpreting service is in certain ways more closely related to the various forms of support that are to be ensured by the state in accordance with Article 19 b).⁴⁹

6.3 Can cash support be introduced to fund participation in parity and self-determination?

According to the principles of Independent Living, the orientation of the service is best steered by the person by whom the service is required. The current situation is that there is a lack of

individual control over the prioritisations within the interpreting service, and there is no rights law. The principle of cash support should also be able to function in the area of interpreting services – particularly if the person in need of an interpreter is able to choose from different practitioners and perhaps even employ interpreters in accordance with need, similar to the current situation for personal assistance. At the same time, it can be important that a certain interpreting capacity be guaranteed within the public sector, in order to ensure that interpreting can be implemented within certain areas such as

⁴⁹ For more information, see General Comment No 5 concerning the right to independent life and inclusion in the community.

the judicial system, social services and healthcare. With similarities to personal assistance, a municipality, region or authority should bear the ultimate responsibility for the performance of interpreting if the individuals themselves do not, for whatever reason, employ interpreters or commission practitioners to perform the interpreting.

There are several advantages to the principle of cash support. Several people can coordinate the interpreting between themselves, if they wish to do so. There is also a greater opportunity to (continually) design services that do not currently exist. By having money, the person finds themselves in a stronger negotiating position to find a functioning work situation in the event of a discussion about reasonable accommodation.

The question of how the implementation of the principle of cash support is to be balanced must be the subject of further investigation. The criteria for needs assessments that will need to be regulated must respect human rights, and should be able to form the basis of the development of a model.⁵⁰

7. The path forwards – reforms for individual rights

It is clear that the rights of the deaf, the hearing impaired and those with deaf-blindness need to be guaranteed in Sweden in a better way than is currently the case. This report has asserted that there is a need for reform of the right to employment, as a result of CRPD Comm. 45/2018 and the criticism that has been aimed at Sweden. There are several ways in which this can be performed, including by means of cooperation between disability rights organisations and the parties in the labour market, and by the consideration of legislation to combat the discrimination against persons with disabilities by the denial of reasonable accommodation in employment processes and ongoing employment.

A closely related aspect is the interpreting service that, to a certain extent, currently makes it possible for the deaf, the hearing impaired and those with deaf-blindness to live an independent life and to participate in the community. The system needs to be reformed in order to be better able to provide individual control over the interpreting service's design, which could potentially create better conditions for actual self-determination and autonomous participation in the community. The principle of cash support should be playing a guiding role in this work.

This report has identified needs for reform and has identified a few directions. If these are to be able to lead to change, there will be a need for cooperation between organisations and other societal actors by means of detailed investigations and mobilisation in order to make demands. The state's investigation Förstärkt tolktjänst för jämlikhet och delaktighet, dir. 2020:79; S 2020:11 is currently under way. This represents an important political opportunity in the question of interpreting services. Greater awareness must be raised – both in considerably more detail and systematically – about the correlation between labour law and person-centric support to compensate for disability-related obstacles in working life. Questions can also be raised about

⁵⁰ For more information, see A human rights approach to disability assessment, Waddington, Lisa and Priestley, Mark, *Journal of International and Comparative Social Policy*, Volume 37, Issue 1, March 2021, pp. 1-15, Cambridge University Press. Accessed 20/02/2021 <https://doi.org/10.1017/ics.2020.21>. The author does not share the view about ICF, but recognises the value in many of the arguments and recommendations featured in the article.

the principle of cash support's relevance to areas other than where it is currently found by means of assistant-compensation and the area of the interpreting service that is studied in this report.

Participation is sometimes discussed as an important aspect of policy concerning disability-related obstacles, and 'full participation' is often seen. One question that can be asked is, which participation? The human rights model of obstacles to disability and the right to inclusive equality that are discussed above and have been developed by the Committee on the Rights of Persons with Disabilities provide a conceptual path forwards. Nancy Fraser⁵¹ has reflected upon the idea of participation:

“Since I coined this phrase in 1995, the term ‘parity’ has come to play a central role in feminist politics in France. There, it signifies the demand that women occupy a full 50 percent of seats in Parliament and other representative bodies. ‘Parity’ in France, accordingly, means strict numerical gender equality in political representation. For me, in contrast, ‘parity’ means the condition of being a peer, of being on a par with others, of standing on an equal footing. I leave the question open exactly as to what degree or level of equality is necessary to ensure such parity. In my formulation, moreover, the moral requirement is that members of society be ensured the possibility of parity, if and when they choose to participate in a given activity or interaction. There is no requirement that everyone actually participates in any such activity [author’s italics].”⁵²

In summary, this report should be regarded as a challenge to politicians, representatives within the movement, and other allied parties to work to ensure the reform of labour law and interpreting services to ensure that the deaf, the hearing impaired and those with deaf-blindness shall receive the right conditions to steer the course of their own lives within working life and beyond, and in parity with others.

⁵¹ Henry and Louise A. Loeb Professor of [Philosophy](#) and [Politics](#) at the New School for Social Research.

⁵² Recognition without Ethics? Nancy Fraser Theory, Culture & Society 2001 (SAGE, London, Thousand Oaks and New Delhi), Vol. 18(2–3): 21–42, endnote 11.

Recommendations for further reading

“What is Independent Living?”

Independent Living is a philosophy and a movement of people with disabilities who work for self-determination, equal opportunities and self-respect. Independent Living does not mean that we want to do everything by ourselves and do not need anybody, or that we want to live in isolation. Independent Living means that we demand the same choices and control in our everyday lives that our non-disabled brothers and sisters, neighbours and friends take for granted. We want to grow up in our families, go to the neighbourhood school, use the same bus as our neighbours, work in jobs that are in line with our education and interests, and start families of our own.

Since we are the best experts on our needs, we need to show the solutions we want, we need to be in charge of our lives, and think and speak for ourselves – just like everybody else. To this end, we must support and learn from each other, organise ourselves, and work for political changes that lead to the legal protection of our human and civil rights.

We are profoundly ordinary people sharing the same need to feel included, recognised and loved.

As long as we regard our disabilities as tragedies, we will be pitied.

As long as we feel ashamed of who we are, our lives will be regarded as useless.

As long as we remain silent, we will be told by others what to do.”

– Adolf Ratzka 2005, <https://www.independentliving.org/>

Committee on the Rights of Persons with Disabilities: General Comment No 6 (2018) on equality and non-discrimination, General Comment No 5 (2017) on living independently and being included in the community, General Comment No 2 (2014) Article 9: Accessibility.

Recognition without Ethics? Nancy Fraser Theory, Culture & Society 2001 (SAGE, London, Thousand Oaks and New Delhi), Vol. 18(2–3): 21–42.

The UN Convention on the Rights of Persons with Disabilities in Practice – A Comparative Analysis of the Role of Courts, edited by Lisa Waddington and Anna Lawson, Oxford University Press, 2018.

[Rätten till ett självbestämt liv i samhällsgemenskapen - En essä om grunderna i Funktionsrättskonventionens Artikel 19 och Independent Livingideologin](#) by Susanne Berg and Ola Linder June 2019.