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Building an Inclusive Digital Society for Persons with Disabilities

New Challenges and Future Potentials

edited by
Carola Ricci

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Building an Inclusive Digital Society: Foreword

by Carola Ricci

This volume is one of the different outcomes of the fully curiosity-driven project titled «Building an Inclusive Digital Society for Vulnerable Persons: The Role of Social Media Tools in a Disability Human Rights Perspective» (hereinafter, 'BIDS Project' or 'the Project'), financed by the University of Pavia under the call *Blue Sky Research 2017 – Established Investigator.* My original intent, through the BIDS Project, as principal investigator, was to reflect on the main concerns emerging on the impact of new technologies in a disability human rights perspective, as well as to generate new synergies among disability experts on emerging topics such as digital inclusion, web accessibility and digital equality.[1] In particular, my ultimate ambition was to identify, together with the co-investigator, Silvia Favalli, a new global and transnational governance in determining the proper legislative framework for an effective legal protection of such vulnerable groups in order to guarantee both inclusive digital equality and access to Information and Communication Technologies' (ICTs') advantages to persons with disabilities without undue violation of their fundamental human rights.

The BIDS Project took the move from the consideration that every day new digital technologies are being developed, introduced and adopted, thus supporting, on the one side, both economic growth, scientific progress and innovative research, as well as, on the other side, the individual quality of life, promoting the full and equal enjoyment of multiple fundamental rights. In this light, focused digital strategies are developed at national, regional and global level, in order to foster coherent and sustainable policies in the digital arena supported by a comprehensive legal framework. The untapped potential of ICTs has fast become the privileged ground for research and development studies in multiple disciplines. In particular, the many benefits of the use of new digital technologies for the promotion and protection of human rights worldwide have been widely documented. Notably, ICTs represent an unprecedented opportunity to actively participate and be fully included in society for vulnerable groups at risk of social exclusion, such as persons with disabilities.[2]

In this vein, the achievement of 'digital inclusion' promoting a number of projects that specifically address the needs of persons with disabilities has become a priority. In particular, the diffusion of social media tools – *i.e.* online technologies and practices used to share opinions and information, to promote discussion and build relationships – has rapidly in-

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[1] For more information about the project *Blue Sky Research 2017* and the research activities carried out: URL: <https://blueskyresearch2017.wordpress.com/> [accessed on 15/12/2019].

[2] In this volume, the expressions 'persons with disabilities' and 'disabled persons' are to be intended as synonyms and are used interchangeably solely to avoid repetitions.

creased, so that they have become a usual part of everyday individual and community life, with particular reference to persons with disabilities. Hence, social media is progressively being used, for example, to circulate health information, to monitor and manage vulnerable persons' well-being, as well as to develop new kind of peer-to-peer online support.

Against this background, ICTs tools, including social media, also generate new challenges for the existing policy and legal framework, since new concerns addressing core human rights have been rapidly emerging. Namely, on the one hand, ICTs can represent a major risk of leaving persons with disabilities further behind, because not all the digital tools are accessible and usable, thus enlarging the already existing gap and intensifying the exclusion of such vulnerable groups from digital society. On the other hand, the threats to the protection of sensitive personal data from cyber-attack and cyber-bullying are increasing, as well as the risk associated to the processing of data (and metadata) in a predatory or exploitative way. Such considerations are strongly claiming for focused disability legal and policy interventions, with particular reference to the development of effective operational standards and guidelines of the current international and EU regulatory framework.

On the basis of these premises, within the BIDS Project an analysis of the relevant multilevel legal and policy framework has been conducted, while focusing on major concerns such as web accessibility, digital equality and privacy issues with the aim of identifying new policies for an effective legal protection of persons with disabilities, which can promote e-accessibility and inclusive digital equality.

In order to pursue this aim, the Project has developed an interdisciplinary research with 'participative' approach, involving researchers and experts of different disciplines (law, engineering, communication, computer science, sociology), including persons with disabilities and representative of both private sector and civil society.

The original intent of creating new synergies among different research centers in Italy and around Europe, on the one side, and civil society members, on the other, has been pursued throughout the entire duration of the Project. Our further aim was to propose the University of Pavia as an emerging pole for research on disability and ICTs in Italy, able to gather stakeholders and scholars and to boost the interest on such issues, consolidating a network of experts and stakeholders for future collaborations.

After a two-year intense activity, we can affirm that not only have we achieved all the original objectives, but we also succeed in realizing a social fallout which was not initially previewed. In fact, thanks to a fruitful cooperation with private sector and civil society, it has been possible to 'digitalize' the ancient courtyards of the University of Pavia through the planning and implementation of a pilot application, named «SI@unipv (Smart Inclusion at the University of Pavia)», a beacon-based navigation system connected to an easy-to-use app, with the purpose to ameliorating the access to the *Palazzo Centrale* by persons with visual impairment. SI@unipv has been realised together with the co-supervisor and Fondazione ASPHI onlus, an NGO representing persons with disabilities, specialised in developing e-accessibility and usability solutions. The implementation of the SI@unipv will also allow us to verify the theoretical assumptions we have reached.

Finally, it is important to point out that this book and all the activities of the BIDS Project are the result of the cooperation of many actors. I would like to express my gratitude to the University of Pavia as a whole, whose former Rector, professor Fabio Rugge, and actual Rector, professor Francesco Svelto, have encouraged the curiosity driven research through the *Bluesky research call* with the aim of sponsoring stimulating original proposals, that could allow the beneficiaries to acquire a stronger scientific expertise to be subsequently developed into the further submissions of other research projects, the final aim being promoting scientific autonomy as well as cooperation with the private sector and civil society.

A particular thank goes to Department of Political and Social Sciences whose Members have constantly offered me support, advice, organizational help and encouragement, and to my co-investigator, Silvia Favalli, together with whom I embarked in the BIDS Project since its drafting. The stronger expertise she gained and the stakeholders' network created thanks to the BIDS Project allowed her to recently submit an innovative and very comprehensive interdisciplinary research project having a specific social impact that will be financed for the next three years by *Fondazione Cariplo* («RISID − Realizing the rIght to Social Inclusion for persons with Disabilities through new tools of smart communication and sharing knowledge: from international to local effectiveness»). Such a recent award attests that another aim of the *Bluesky research call* has been achieved: its original intent will be further pursued and continued enhancing new potentials of ICTs toward full e-accessibility and e-quality of persons with disabilities in a 'win-win' cooperation between private and public sector. Follow us!

Emerging Challenges and Future Potentials for Persons with Disabilities in the Digital Era

Carola Ricci and Silvia Favalli

1. Scrutinising the Road to an Inclusive Digital Society

This volume collects contributions reflecting on the main concerns emerging from the new challenges and future potentials of digital technologies on the protection of human rights for persons with disabilities. It lays its foundations on the assumption that, for persons with disabilities, Information and Communication Technologies (ICTs) can represent, on the one side, an opportunity to actively participate and be fully included in society and, on the opposite, a possible means of exclusion − since some digital tools are not accessible and usable yet − and a threat to the protection of sensitive personal data from cyber-attack and cyber-bullying. The ambition is to pave the way forward an inclusive digital society, thus collecting different expertise to identify critical legal and social policy responses grounded to a disability human rights perspective, notably suggesting legislative interventions and best practices to be implemented for achieving solid improvements of the current regulatory framework.

In this respect, due to the highly qualified scientific content and the strong social impact of the interface between the ICTs and the human rights of persons with disabilities, the Authors involved in this editorial project are both Scholars in different disciplines (public and private international law, EU law, administrative law, disability law and policy, engineering) and representatives of private sector and civil society working on the implementation of ICTs for persons with disabilities. The interaction between such a varied network of disability experts and relevant stakeholders has been the cornerstone for the development of an interdisciplinary and 'participative' research approach, crucial to deal properly with the issue at stake in a more effective way.

All the Authors took part to an international and interdisciplinary network created as one of the outcomes of the project «Building an Inclusive Digital Society for Vulnerable Persons: The Role of Social Media Tools in a Disability Human Rights Perspective» (hereafter, the 'BIDS Project'), with the aim at improving new synergies, exchanges of ideas and awareness-raising on the cross-cutting issue under analysis.

Such a network has been consolidated on occasion of the international workshop, entitled «Building an Inclusive Society for Persons with Disabilities. New Challenges and Future Potentials in the Digital Era», organised within the context of the BIDS Project in Pavia at Palazzo Vistarino, on May, 20-21, 2019. The workshop resulted in an invaluable opportunity to foster the exchange of views among the involved Scholars, coming from around Europe and Italy, but also to consolidate the network created with the intention of enhancing future fruitful cooperation on common scientific projects. Most of the contributions collected in this volume have been presented during such event.

2. Structure and Contents of This Book

This volume is divided into three major Sections, which, respectively, set the scene of the relevant multilevel legal framework (Section I), focus on the major challenges emerging from the widespread of digital technologies (Section II) and, finally, analyse some of the best practices developed or to be developed to realize a 'digital-inclusive society', in compliance with the Sustainable Development Goals (SDGs) promoted by the United Nations (Section III).

2.1. Promoting Equality and Social Inclusion for Persons with Disabilities in the Digital Era: A Multilevel Approach

The first Section addresses the relevant legal and policy framework adopting a multilevel approach. In fact, it analyses the issue at stake from the perspectives of international law, EU law, and national law, while embracing a critical perspective.

Adopting such a multilevel approach, Lisa Waddington sets the scene of the relevant international and European legal framework referring to e-accessibility and digital equality, starting from the relevant provisions of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, 'CRPD'). The Author sheds a light on the emergence of a multilevel regulation of e-accessibility and digital equality within Europe, developed in the last few years. Consequently, Andrea Broderick, who adopts a EU law perspective, focuses on one of these most recent legislative initiatives, *i.e.* the European Accessibility Act (Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, hereinafter 'EAA'), which contains several substantive provisions related to digital inclusion. This contribution examines the inter-relationship between the key CRPD norms of equality and accessibility, and assesses the provisions of the EAA, seeking to determine whether they embody inclusive digital equality for persons with disabilities. Finally, descending to the national level, Vittorio Pampanin focuses on the Italian legal framework, with the purpose of presenting a brief overview of the relevant legal and policy initiatives that contribute to the national implementation of web accessibility, with particular reference to the active role both assigned and recognized to public sector bodies. It analyses the so-called 'Stanca Act' (Law 9 January 2004, No. 4, recently updated by the Law Decree 10 August 2018, No. 106), along with other relevant regulatory references to accessibility, as well as the role of the Italian Agency for Digital (AgID) in the implementation of web accessibility in Italy.

2.2. Accessibility, Human Dignity and Privacy Concerns

The second Section focuses on the new challenges related to accessibility, human dignity and privacy concerns emerging with the widespread diffusion of digital technologies among persons with disabilities. It embraces international human rights law issues, also at the regional European level, as well as private international law related issues.

Deepening the analysis of the relevant international human rights legal framework, the co-investigator of the BIDS Project, Silvia Favalli, analyses the most relevant challenges

that the widespread use of social media by persons with disabilities generates for the protection of their human rights. This chapter focuses on social media accessibility, freedom of expression and opinion, privacy and data protection, human dignity and autonomy in the international legal order, with a special focus on the relevant provisions of the CRPD, suggesting the necessity of adopting a different general approach in the protection of human rights in the digital environment. With reference to the system of protection of fundamental rights provided for by the European Convention on Human Rights (hereinafter, ECHR) within the framework of the Council of Europe, Federica Falconi considers hate speech against persons with disabilities as a case-study to examine the current European Court of Human Rights' approach in respect of hate speech and its possible developments. The paper undercovers the emergence of an extensive body of case law by the Strasbourg Court reflecting a growing awareness of the need to combat hate speech in order to guarantee to all individuals the full enjoyment of the fundamental rights enshrined in the ECHR. To this goal, restrictions to freedom of expression may be allowed especially when vulnerable people, such as persons with disabilities, are the target of these hateful expressions which qualify as 'more than insulting', running counter the underlying values of the ECHR as a whole.

With the purpose to tackle related private international law issues, Stefano Dominelli explores whether EU law rules on international civil procedure are adequate to cope with the right of access to courts that persons with disabilities might encounter to seek reparation for cross-border online defamation. The Author highlights that, whereas the current legal framework is not free from critiques from a private international law perspective, nonetheless the application of the existing rules as interpreted by the Court of Justice of the European Union seems sufficiently adequate to settle the needs at hand, whilst the creation of new rules to specifically cover the matter appears unfeasible. Finally, addressing the relationship between disability and the protection of personal digital data in health sector, Federica Persano focuses on the different concerns related to the protection of health data in the EU legislation, with particular reference to the so-called General Data Protection Regulation (hereinafter, GDPR), namely Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

2.3. Realizing Disability-Inclusive Development Through ICTs

The final Section collects relevant best practices realized by members of civil society, including members of representatives' association of persons with disabilities, academics, and private sector experts in ICTs, adopting a multi-stakeholder approach. The necessity of such a 'whole-of-society' approach is described in the opening contribution by the principal investigator (PI) of the BIDS Projects, Carola Ricci, who underlines that, while States are the primary duty-bearer called to protect the human rights of all individuals, civil society is required to participate actively as well, in a sort of 'multi-stakeholder alliance', in order to implement the human rights standards set within the CRPD with the

further aim of realising the UN Development Goals *for and with* persons with disabilities. The same approach has been adopted under the framework of the BIDS Project for the planning and implementation of a pilot application, named «SI@unipv (Smart Inclusion at the University of Pavia)», a beacon-based navigation system connected to an easy-to-use app, with the purpose to ameliorate the access to the ancient courtyards of the University of Pavia by persons with visual impairment or low vision. The PI has realised SI@unipv together with the co-investigator and Fondazione ASPHI onlus, an association representing persons with disabilities, specialised in developing e-accessibility and usability solutions, as presented by Ennio Paiella and Roobi Roobi. In their contribution, they introduce the main goals achieved by Fondazione ASPHI onlus, active since 1980 with the aim of promoting the integration and improving the quality of life of persons with disabilities through ICTs; its main activities include research, development, testing, promotion of new solutions, working in cooperation with public and private institutions, universities and research centres. In the same vein, Donato Matturro and Vito Disimino present the mission of *Joomla!*, a free and open-source Content Management System (CMS) for publishing web content, in fostering digital inclusion. *Joomla!* is one of the most popular website software, thanks to its global community of developers and volunteers, who make sure the platform is accessible, user-friendly, extendable, multilingual, responsive and search engine optimised.

Under the same Section, additional best practices realized by members of civil society, private sector experts in ICTs and academia are presented as well. Cristian Bernareggi describes a project supported since 2013 by the Sustain for Life Foundation, which is providing assistive technologies and training teachers for students with sight impairments in Western Uganda schools. Sustain for Life's aim is to provide assistance, training and education to some of the poorest and most underdeveloped communities in the world, to help them become economically and sustainably self-sufficient.

Finally, Alessandro Greco and Valentina Giacometti describe two projects of tactile maps developed by a research team of the Department of Civil Engineering and Architecture of the University of Pavia. These represent other two examples of good practices chosen among several projects developed at the University of Pavia for its heritage: the team, coordinated by Professor Alessandro Greco, has been working on accessibility and usability since 2006, with experiences on research, design and training activities, on both buildings and urban spaces.

3. What is the Way Forward to Digital Inclusion?

As mentioned before, the main ambition of the BIDS Project is to identify critical legal and social policy responses grounded to a disability human rights perspective, notably suggesting legislative interventions and best practices to be adopted for achieving concrete improvements of the current EU regulatory framework. Such a mission has been achieved through the invaluable synergies developed among the international network of disability experts, including both Scholars and members of civil society, created within the activities of the Project. In particular, the search for 'a way forward' to build a fully inclusive digital

society and foster disability-inclusive development through ICTs resulted in the emerging need for further action on interrelated topics. These particularly refer to web accessibility and digital equality, on the one side, privacy, data protection and freedom of expression, on the other side. Additional engagement should be promoted in order to guarantee the respect for the inherent dignity and individual autonomy (including the freedom to make one's own choices) of persons with disabilities in the digital environment, requiring further specific action in the European area, using the suggested methodology of a participatory approach.

3.1. Web Accessibility and Digital Equality

Accessibility and privacy together are preconditions to achieving equality and non-discrimination, which are in turn essential principles for the recognition of the equal right of persons with disabilities to live independently and be included in the digital community. To this respect, in the last few years several steps in the direction of digital inclusion have been undertaken, where different legislative measures have been implemented at the international, European and Italian level. Nonetheless, more action is still needed to fully include all users, with and without disabilities, in the enjoyment of the digital environment. Moreover, one of the peculiarities of the virtual world resides in the fact that, besides the key role played by States, also Non-State actors are emerging as new addressees of human rights obligations.

Notably, at the global level, the CRPD has been interpreted as recognizing web accessibility within the realm of human rights for people with disabilities, where the CRPD lays down an international obligation for States to design accessible websites and to provide public information in accessible and usable online formats. Nonetheless, such a duty is frustrated by the absence of a definitive standard by which web accessibility is gauged. This is because, in this context, the self-regulation of private entities prevails. As a consequence, accessibility guidelines and standards are set by standardisation organisations and are, by definition, merely voluntary.[1]

Also at the European level, it is possible to notice a major sensitivity and a growing interest towards digital inclusion and the accessibility of the digital environment. Hence, web accessibility has been prioritised within initiatives developed under the Digital Agenda, one of the seven flagship initiatives under the Europe 2020 Strategy. Accordingly, «a multilevel regulation of web accessibility and digital equality is emerging within Europe»,[2] where the EU has recently adopted a range of legal provisions addressing web accessibility and digital equality. Among these instruments, the most remarkable is the European Accessibility Act (EAA), which «has begun to pave the road towards digital inclusion and equality for European citizens with disabilities».[3] Nonetheless, this Directive

[1] See *infra*, Favalli S., *Disability and Social Media: Paving the Road to a Different Approach in the Protection of Human Rights in the Digital Era*.

[2] See *infra*, Waddington L., *Regulating e-Accessibility and Digital Equality in Europe from a Multilevel Perspective*.

[3] See *infra*, Broderick A., *The European Accessibility Act: A Paradigm of Inclusive Digital Equality for Persons with Disabilities?*

is still «somewhat deficient when compared to the CRPD's model of inclusive equality», with reference to some notable limitations and exceptions of its material scope.[4]

Finally, at the national level, a new sensitivity towards the necessity to guarantee to all citizens the accessibility to public bodies online resources arose. In the last few years, the legal framework on this issue has been developed throughout the adoption of a bunch of regulations and administrative acts. However, according to most recent statistics, the large majority of the Italian municipalities still present accessibility problems.[5]

Under such premises, it is argued that the adoption of the so-called 'nudging approach' in boosting both States and Non-State actors behaviours towards a 'virtuous' web accessibility-oriented policy and legislation represents the best way to really achieve digital inclusion. Hence, from the developed multilevel legal analysis it emerges that, despite the range of legislative initiatives adopted, it finally depends: (*i*) on the willingness of single States to recall as compulsory the international accessibility standards in its own legislation; (*ii*) on the sensitivity of private and public entities to address the accessibility concerns of their online platforms; as well as, (*iii*) on the awareness of individual users to adopt all the tips and methods able to improve the accessibility of their own accounts, especially with regards to social media platforms. To this extent, both the active involvement on the issues at stake of the civil society and the awareness-raising of private and public entities, as well as of all the citizens/users are crucial.[6]

3.2. Privacy and Data Protection

Privacy and data protection do constitute paramount concerns for all digital users. To date, in the digital environment, there are structural problems to the effective exercise of the principle of consent with reference to data protection, which may affect all digital contributors. In this context, the situation of users with disabilities is particularly delicate, due to security and anti-discrimination issues. Nonetheless, from the carried out analysis, it emerges that users with disabilities do not usually receive specific protection.

Within the EU legal order, a comprehensive reform of data protection rules is in due course, throughout the adoption of the so-called General Data Protection Regulation (GDPR), applicable as of 25 May 2018. The Regulation is aimed at ensuring the protection of natural persons with regard to the processing of personal data and on the free movement of such data. This is an essential step to strengthen citizens' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the digital single market. In this fast-changing digital age, the right to protect personal data must be safeguarded. Nonetheless, up to now, the EU regulatory framework is not coherently providing a fair balance between the use of online resources to collect personal data and

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[4] *Ibidem*.

[5] See *infra*, Pampanin V., *The Role of Public Administration in Promoting the Accessibility of Online Resources: The Italian Legal Framework.*

[6] See *infra*, Ricci C., *Realizing the Sustainable Development Goals for and with Persons with Disabilities through ICTs.*

the respect of the right to privacy of vulnerable persons, such as persons with disabilities. Most notably, the EU General Data Protection Regulation does not contain any provision directly protecting personal data of persons with disabilities. More generally, data concerning disability are included in the terms 'generic data' and 'health data'.[7]

Under such premises, the inclusion of the peculiar vulnerabilities of users with disabilities in the digital environment in the rationale of the progressive legislative reforms of privacy and data protection regulations in due course within the EU is crucial. In particular, consumers with disabilities must be actively involved in the relevant policy-making process in order to raise awareness on the specific threats to the protection of their data and ensure that the steps to effectively protect their privacy online are finally taken. In the same process, it is also necessary to duly take into consideration the provision of the CRPD, according to which the right to privacy of persons with disabilities must be read in combination with the recognition of the individual's legal capacity and in the respect of the person's autonomy, will and preferences, which is an essential part of the human dignity for persons with disabilities.

3.3. Hate Speech, Online Defamation and Freedom of Expression: A Wake-Up Call for Europe?

The analysis conducted by the PI and the co-investigator on freedom of expression and opinion in the digital environment related to the protection of the rights of persons with disabilities is twofold. On the one hand, this right is considered as strictly interconnected to web accessibility, as access to digital information and communication tools is considered as a precondition for the enjoyment of freedom of opinion and expression of persons with disabilities. In this vein, the CRPD encompasses in the freedom of expression and opinion, which is traditionally described as a 'negative right', also the States' obligation to provide public information in accessible and usable formats. On the other hand, the exercise of this freedom is considered in contrast with the respect of human dignity of persons with disabilities in the increasing cases of online disability hate speech. Hence, «while on the one hand the Internet has given a voice to disabled people, it has also exposed them to greater abuse».[8] In connection with this trend, an impressive increase in the phenomenon of online bullying against persons with disabilities has been also registered.[9]

In this delicate context, many questions are still pending as to the opportunity to enact legislative measures to prohibit hate speech, mainly referring to the need to counter-balance it with the exercise of the fundamental freedom of opinion and expression. Nonetheless, at the European level, a sort of 'judicial activism' is filling such a legislative gap. International legal standards have been judicially interpreted by the European Court of

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[7] See *infra*, Persano F., *Health and Disability in the EU General Data Protection Regulation*.

[8] See *infra*, Falconi F., *Addressing Disability Hate Speech: The Case for Restricting Freedom of Expression in the Light of the European Court of Human Rights' Case Law*.

[9] See *infra*, Dominelli S., *Disabilities, Cyber-Bullying and Defamation: A Uniform International Civil Procedure Perspective*.

Human Rights to ensure that people with disabilities are protected against incitement to hatred on an equal footing with others. Accordingly, in the European judicial space, the peculiar vulnerability of persons with disabilities victims of online bullying and defamation has been duly taken into account whereas they have the possibility to seise their *forum actoris*. In this vein, the current rules on international civil procedure, as interpreted by the Court of Justice of the European Union, appear adequate to cope with the increasing problem under exam.

However, it is impossible not to stress the need to address the social roots of the widespread of this kind of hateful behaviour. To this extent, the involvement of civil society and the awareness-raising of all citizens on the risks of vulnerability for human dignity in the digital environment appears now more than ever crucial in our society.

From the foregoing it follows that, in the digital era, it is of utmost importance to guarantee the full enjoyment of the many benefits deriving from the widespread use of new digital technologies to the whole population, including persons with disabilities. Fostering digital inclusion and digital equality means to recognize the equal right of all persons with disabilities to live and actively participate in the community, also benefitting from the unprecedented opportunities deriving from new technologies. ICTs could represent a means to improve the inherent dignity of persons with disabilities, widening their opportunities and ensuring their independence and autonomy, including their freedom to make their own choices.

Web accessibility and data privacy are necessary preconditions to reach such an achievement. On the one hand, all the appropriate measures must be taken to ensure that people with disabilities can perceive, understand, navigate and interact with websites and tools on an equal basis with others. In addition, ensuring access to digital information is crucial to guarantee the full enjoyment of the freedom of opinion and expression for persons with disabilities, which is also a prerequisite to exercise the freedom to make their own choices and living independently. On the other hand, the peculiar vulnerability of persons with disabilities must be duly taken into account to provide a proper privacy protection within the digital environment. This not only offers safeguards against discrimination on the ground of disability, but it is also an invaluable ally to combat cyber-bullying and other online hateful behaviours against persons with disabilities.

To this extend, mainstreaming cornerstone concepts such as digital inclusion, e-accessibility and digital equality in the current legal and policy framework is both crucial and urgent to develop a fully inclusive society. In this respect, persons with disabilities along with civil society must be actively involved in a 'multi-stakeholder alliance' to participate in the policy-making process, in order to foster the adoption of appropriate legislative reforms, to spread existing best practices and to raise awareness on such emerging topics among the whole society.

Section I

Promoting Equality and Social Inclusion for Persons with Disabilities in the Digital Era: A Multilevel Approach

Regulating e-Accessibility and Digital Equality in Europe from a Multilevel Perspective

Lisa Waddington

1. Introduction

This paper discusses means to promote equality and social inclusion of persons with disabilities from a multilevel perspective. In particular, it discusses international and European regulations relating to e-accessibility and digital equality, whilst also recognising that these regulations reach down to the national level. The paper begins by considering how international law, and specifically the UN Convention on the Rights of Persons with Disabilities (CRPD), addresses accessibility and equality from a digital perspective (section 1). The paper then proceeds to explore how EU law addresses equal access to digital products and services for people with disabilities (section 2). The EU has adopted a range of legal provisions addressing e-accessibility and digital equality, and there have been some important developments in 2018 and 2019. These EU rules are either directly applicable in all the Member States, or must be transposed into national law by the Member States. Moreover, the most recent EU instruments make explicit reference to the obligations in the CRPD. In this sense we can see an emerging multilevel regulation of e-accessibility and digital equality within Europe.

2. The UN Convention on the Rights of Persons with Disabilities

The CRPD was adopted by the UN General Assembly in 2006 and came into force in 2008. It is one of the UN's nine core human rights treaties and it tailors the human rights everyone has to the specific situation of people with disabilities. The CRPD seeks to ensure that people with disabilities have access to human rights on an equal basis with others, and to promote their full and effective participation in society on an equal basis with others. The Convention has been ratified by all EU Member States and the EU itself.

The Convention is based on a number of general principles, including non-discrimination, equality of opportunity and accessibility (Article 3). Accessibility is also addressed in a free standing article in the Convention – Article 9 – and this is of particular relevance to e-accessibility and digital equality. Article 9 obliges State Parties to «take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to …information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public …». It also provides that these measures «shall include the identification and elimination of obstacles and barriers to accessibility» and apply to «information, communications and other services, including electronic services and emergency numbers». State Parties are to «promote the design, development, production and distribution of accessible information

and communication systems at an early stage, so that these technologies and systems become accessible at minimum cost».

The relevance of the CRPD to this area and its broad reach is reinforced by General Comment No. 2 of the CRPD Committee on Accessibility. This states that 'ICT' is an umbrella term which includes any information or communication device or application and its content. This includes television, radio, mobile phones, computers, fixed lines, network hardware and software. The General Comment further highlights the importance of ICT accessibility, as it is capable of «open[ing] up a wide range of services, transform[ing] existing services and creat[ing] greater demand for access to information». It provides that any [ICT] good, product or service which is provided to the general public must be accessible to all, no matter if it is provided by a public authority or private enterprise.

Access to information presented in a digital format was also addressed in Individual Communication No. 21/2014, where the Committee on the Rights of Persons with Disabilities held that live travel information presented in a visual form on digital information displays on tram lines should be provided to persons with visual impairments on an equal basis to persons without visual impairments through digital audio information.

In line with Article 9 CRPD and General Comment No. 2, State Parties are required to review and adopt new laws to ensure that inaccessible services become accessible. State Parties are to remove existing barriers and make sure that newly produced goods and services are accessible to everyone. Furthermore, denial of access to ICT constitutes a discriminatory act, prohibited by Article 5 CRPD (prohibition of discrimination).

General Comment No. 7 of the CRPD Committee on participation with persons with disabilities in the implementation and monitoring of the Convention further emphasizes that in order to comply with the obligations under Article 4(3), *i.e.* to consult persons with disabilities through their representative organisations, State Parties must ensure «access to all relevant information, including the websites of public bodies, through accessible digital formats and reasonable accommodations when required». Moreover, as confirmed in Individual Communication No. 21/2014, «State Parties have the duty to provide accessibility before receiving an individual request to use a service». This Communication also confirmed that the «obligation to implement accessibility is unconditional» and may not be excused by «referring to the burden of providing access to people with disabilities». In its Concluding Observations on Bulgaria the CRPD Committee also emphasized the importance of European Union Public Sector Web Accessibility Directive (discussed further below) for the accessibility of websites when it stated that: «It [the Committee] is further concerned about insufficient implementation of the European Union Directive 2016/2012 on the accessibility of the websites and mobile applications of public sector bodies».

The CRPD clearly places great importance on e-accessibility and digital equality. However, the concept of accessibility is complex, as is Article 9 itself. The concept is not defined in the CRPD, but Stelios Charitakis[1] has argued that the term accessibility, as used in the Convention, covers five different elements:

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[1] Charitakis S., *Access Denied: The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities*, Cambridge-Antwerp: Intersentia, 2018.

Social or attitudinal accessibility – this involves combatting stigma and other negative behaviour and reactions that people with disabilities experience.

Economic accessibility or affordability – this involves ensuring that persons with disabilities can afford to purchase facilities, goods and services. It relates both to the price charged for those products and services, and the ability of persons with disabilities to generate the income needed to purchase those goods and services.

Physical accessibility – this relates to the accessibility of the physical environment, including the digital or online environment. It implies that facilities, goods and services should be useable by persons with disabilities without assistance and that persons with disabilities should be able to understand, navigate and interact with products and services. It implies that products and services should actually be available to persons with disabilities. Products or services should also be safe for use by persons with disabilities, and should be easy to use for persons with disabilities.

Information accessibility – this involves ensuring that persons with disabilities have access to information about facilities, goods and services, including information about the accessibility of the product. This concerns the content of the information.

Communication accessibility – this relates to the receipt of information in accessible forms, such as online text which can be recognised by software. This concerns the means by which the information is communicated.

All these elements of accessibility are relevant to e-accessibility and digital equality.

Having briefly explored how the CRPD addresses accessibility, including from a digital perspective, the paper will now proceed to examine how the EU addresses e-accessibility and digital equality. This discussion will take the different elements of accessibility identified by Charitakis into account. The EU is bound by the UN Convention, and some of the legal instruments which have been adopted recently explicitly refer to the UN Convention and the obligations regarding accessibility.

3. European Union Law

A number of EU instruments address e-accessibility and digital equality. This has been a specific area of interest for the EU for a number of years and, as result, there is a broad ranging legislative package in this field. This paper does not seek to give a complete picture of all EU initiatives in the field. Rather the paper concentrates on three instruments which have been adopted or revised in 2018 and 2019, as well as another recent instrument dating from 2016. This section firstly discusses the revised Audiovisual Media Services Directive, which sets accessibility requirements for television programmes and programmes provided on demand. The paper then considers the Electronic Communications Code, which sets accessibility standards for telecommunications. Thirdly, the paper discusses the Public Sector Web Accessibility Directive, which was adopted in 2016. Lastly, this paper briefly discusses the European Accessibility Act, which provides for acces-

sibility of a wide range of digital services and products. Other than the Public Sector Web Accessibility Directive, all instruments were adopted within a 12-month period running from 2018 to 2019. All four instruments explicitly refer to the CRPD and are intended, at least partially, to implement the Convention.

However, it is important to not simply present the legal rules. The paper therefore also discusses means by which these rules can be complied with; this is important because, although the legal instruments require or encourage accessibility for persons with disabilities in various areas of the digital world, they do not actually explain what such accessibility involves, at least not in a technical or process oriented sense. Instead, this is an area where European standards have an important role to play. The paper therefore also considers how such standards can be used, in combination with some of the aforementioned legal instruments, to understand what is required to achieve accessibility with regard to the content placed on the Internet.

3.1. The Audiovisual Media Services Directive

The European Union adopted its first Audiovisual Media Services Directive in 1989 to regulate certain elements of those services.[2] That was replaced by a new Directive in 2010[3] and, in 2018, that Directive was amended.[4] Member States must ensure that all media service providers in their jurisdiction comply with the rules set out in the Directive. This applies to companies and public bodies which broadcast television programmes or provide programmes on-demand.

The 2010 Directive included an accessibility clause which encouraged Member States to impose disability accessibility requirements on providers of audiovisual media services. However, this was not an obligation. In 2012 the Commission published a report on the application of the Directive which found that although all Member States had introduced rules to improve accessibility of audiovisual media services for persons with visual or hearing impairments, some had only very general provisions, or limited the scope of accessibility obligations to public service broadcasters.[5] There was consequently clearly

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[2] Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, [1989] OJ L 298, p. 23 ss.

[3] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95, p. 1 ss.

[4] Directive (EU) 2018/1808 of the European Parliament and the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administration action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, [2018] OJ L 303, p. 69 ss.

[5] First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU 'Audiovisual Media Service Directive' Audiovisual Media Services and Connected Devices: Past and

room to strengthen accessibility obligations on providers of audiovisual media services in some Member States.

In 2018 the Directive was amended to reflect changing market realities. The amended Directive, which is already in force, includes an explicit reference to the CRPD and tightens up the requirement to make audiovisual media services accessible for persons with disabilities. Specifically, while Member States were previously simply encouraged to adopt provisions to impose disability accessibility requirements on providers of services, they are now obliged to.

Article 7(1) of the Directive provides:

> Member States shall ensure, without undue delay, that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures.

Member States are also obliged to ensure that media service providers report on a regular basis to the national regulatory authority on the implementation of accessibility measures, and the Member States themselves are obliged to report to the Commission every three years from 2022. Member States are furthermore obliged to encourage media service providers to develop accessibility action plans. These should provide for continuously and progressively making their services more accessible to persons with disabilities. These action plans have to be communicated to national regulatory authorities. In addition, Member States must designate a single publicly available online point of contact for providing information and receiving complaints regarding any accessibility issues concerning audiovisual media services. This has to be easily accessible by persons with disabilities. Member States have to ensure that emergency information, including public communications and announcements in natural disaster situations, which is made available to the public through audiovisual media services, is provided in a manner which is accessible to persons with disabilities. Lastly, the Directive provides that audiovisual commercial communications shall not include or promote any discrimination based on disability.

These are quite wide ranging duties and, in the next few years, the results of these obligations should gradually become more apparent. However, it is interesting to note that the Commission originally proposed to delete all references to accessibility of audiovisual media services for persons with disabilities from the Directive,[6] since it was of the view

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Future Perspectives, COM(2012) 203 final. The Report states (section 2.3): «Accessibility of audiovisual media services for all EU citizens is a further key objective that the AVMSD pursues by requiring access for hearing and visually impaired people to improve over time. All Member States have introduced rules to that effect. The implementation of these rules, however, reflects the diversity of market conditions. While some Member States have very detailed statutory or self-regulatory rules, others have only very general provisions or limit the accessibility obligation to the services of public service broadcasters».

[6] Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287.

that the European Accessibility Act, which was then being discussed by European legislators, would cover the accessibility of audiovisual media services. European disability civil society organisations argued that it would be appropriate to address accessibility issues in both the Audiovisual Media Services Directive and the European Accessibility Act,[7] and proposed strengthening the respective provision in the former Directive.[8] This is in fact what has happened.[9]

In terms of the aspects of accessibility which the Directive addresses, the focus is primarily on physical accessibility of audiovisual media services. However, the Directive also addresses information accessibility, in that an accessible online information point must be established, and social or attitudinal accessibility, in that disability must not be portrayed in a discriminatory fashion in communications.

3.2. The Electronic Communications Code

The Electronic Communications Code is a Directive which was adopted at the end of 2018.[10] The Code aims to modernise EU telecoms rules and merges four existing telecoms Directives (Framework, Authorisation, Access and Universal Service Directives). It covers electronic communications networks, electronic communications services, associated facilities and associated services, and will enter into force in 2020. Whilst the Code is a very long instrument, it does pay some attention to the situation of persons with disabilities.

The Code states in its Preamble (recital 296):

> In line with… the obligations enshrined in the United Nations Convention on the Rights of Persons with Disabilities, the regulatory framework should ensure that all end-users, including end-users with disabilities, older people, and users with special social needs, have easy and equivalent access to affordable high quality services regardless of their place of residence within the Union.

Consequently, a key aim of the Directive is to:

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[7] See, for example, EDF's statement on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287. URL: <http://cms.horus.be/files/99909/MediaArchive/ICT/Final_EDF_Position_AVMSD_Revision.pdf> [accessed on 12/07/2019] and the European Union of the Deaf's position of the Audiovisual Media Services Directive. URL: <https://www.eud.eu/news/policy/audiovisual-media-services/> [accessed on 12/07/2019].

[8] See, European Disability Forum (2017), "EDF & Broadcasters draw up common proposal to improve access to audiovisual media services". URL:<http://www.edf-feph.org/newsroom/news/edf-broadcasters-draw-common-proposal-improve-access-audiovisual-media-services> [accessed on 12/07/2019].

[9] The European Accessibility Act also addresses aspects of accessibility regarding audiovisual media services. For example, it refers to electronic programme guides in recital 31.

[10] Directive (EU) 2018/1972 of the European Parliament and of the Council establishing a European Electronic Communications Code (Recast), [2018] OJ L 321, p. 36 ss.

> ensure the provision throughout the Union of good quality, affordable, publicly available services through effective competition and choice, to deal with circumstances in which the needs of end-users, including those with disabilities in order to access the services on an equal basis with others, are not satisfactorily met by the market and to lay down the necessary end-user rights. (Article 1(2)(b)).

The Directive therefore sets out rules intended to ensure that people with disabilities are able to access electronic communications, such as the telephone network and the Internet on an equal basis with others. The end goal is to achieve choice and equivalent access for users with disabilities (Article 3(2)(d)).

A number of obligations are imposed on Member States in this respect. They have to ensure that regulatory authorities take account of the views of users with disabilities (Article 24) and ensure that support is provided to persons with disabilities, so that equipment and services are available and affordable (Article 85(4)). National regulatory authorities may require providers of Internet services and of interpersonal communications services to publish information on measures taken to ensure equivalence in access for users with disabilities (Article 104(1)). Member States also have to ensure that access for persons with disabilities to emergency services is available and equivalent to that enjoyed by other end-users (Article 109(5)).

Article 111 explicitly addresses equivalent access and choice for end-users with disabilities. Paragraph 1 provides:

> 1. Member States shall ensure that the competent authorities specify requirements to be met by providers of publicly available electronic communications services to ensure that end-users with disabilities:
> (a) have access to electronic communications services, including the related contractual information …, equivalent to that enjoyed by the majority of end-users; and
> (b) benefit from the choice of undertakings and services available to the majority of end-users.

Therefore, the telecommunications regulatory authorities have to establish specific requirements relating to accessibility for persons with disabilities and service providers have to comply with these. The regulatory authorities can also require the service providers to report on what they are doing to ensure equivalent access for people with disabilities – although they do not have to do this. The European disability movement has described the new rules established by the Code as «encouraging».[11] In terms of aspects of accessibility, the Code addresses physical accessibility, but also communication accessibility and economic accessibility or affordability.

The Electronic Communications Code covers service providers, and requires that the services they provide are accessible – however it does not cover content at all. That means it does not establish accessibility requirements for what is placed on the Internet. Howev-

[11] European Disability Forum (2018), "Encouraging European Communications Code adopted by the European Parliament". URL: <http://www.edf-feph.org/newsroom/news/encouraging-european-electronic-communications-code-approved-european-parliament> [accessed on 12/07/2019].

er, two further EU instruments address e-accessibility of the content of the Internet: the Public Sector Web Accessibility Directive and the European Accessibility Act.

3.3. Public Sector Web Accessibility Directive

This Directive, which was adopted in 2016,[12] establishes mandatory accessibility requirements for websites and mobile applications of public sector bodies. It aims to ensure that the websites and mobile applications of public sector bodies are made accessible on the basis of common accessibility requirements (recital 9). The Directive contains a general definition of accessibility, which:

> should be understood as principles and techniques to be observed when designing, constructing, maintaining, and updating websites and mobile applications in order to make them more accessible to users, in particular persons with disabilities. (Preamble, recital 2).

Article 4 of the Directive provides:

> Member States shall ensure that public sector bodies take the necessary measures to make their websites and mobile applications more accessible by making them perceivable, operable, understandable and robust.

These four concepts are found in Web Content Accessibility Guidelines 2.1. (or WCAG 2.1).[13] These are international guidelines which include a wide range of recommendations for making web content more accessible. They have been produced by the World Wide Web Consortium, which is an international community which develops web standards.

Siteimprove, a multinational company that provides tools and services for website governance, has defined the four concepts in the following way:[14] 'perceivable' means that Web content can be perceived by the user's brain regardless of the senses they can use; 'operable' means that web content can be accessed and navigated regardless of the user's devices; 'understandable' means that web content can be understood as easily as possible through simple language and contextual information; and 'robust' means that web content can be accessed regardless of the user's operating system, browser, and browser version, including with the use of assistive technologies.

The Public Sector Web Accessibility Directive itself also addresses the meaning of these four terms in recital 37 of its preamble. It explains them in the following way: 'perceivability', meaning that information and user interface components must be presentable to users in ways they can perceive; 'operable', meaning that user interface components

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[12] Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L 327, p. 1 ss.

[13] URL: <http://www.w3.org/TR/WCAG21/> [accessed on 12/07/2019].

[14] Siteimprove (2019), "Democracy, Digital Accessibility, and the EU Member Parliament Websites", p. 7. URL: <https://siteimprove.com/media/5009/accessible-report-eu-democracy.pdf> [accessed on 12/07/2019].

and navigation must be operable; 'understandable', meaning that information and the operation of the user interface must be understandable; and 'robust', meaning that content must be robust enough to be interpreted reliably by a wide variety of user agents, including assistive technologies.

Whilst the Directive establishes a duty to provide accessibility, that duty is removed if making the website or application accessible would result in a disproportionate burden for the public sector body (Article 5).

Member States are to promote and facilitate training related to accessibility of websites and applications for relevant stakeholders and staff of public sector bodies (Article 7(4)) and raise awareness about accessibility requirements (Article 7(5)). They are also to monitor the compliance of websites and mobile applications of public sector bodies with the accessibility requirements (Article 8(1)) and put in place adequate and effective enforcement procedures (Article 9(1)). The Directive provides for phased transposition between September 2019 and June 2021 (Article 12).

The need for rules to regulate the accessibility of public sector websites is revealed by a recent analysis of the accessibility of the official websites of Parliaments of the 28 Member States and the website of the European Parliament carried out by the organisation Siteimprove. The report "Democracy, Digital Accessibility and the European Union"[15] found that of the 28 Member State Parliaments, 25 had websites which scored poorly in terms of accessibility. Only the Parliaments in the Netherlands and Denmark had websites providing good accessibility. The Parliament which received the lowest score was the European Parliament, which had itself voted for the Web Accessibility Directive in 2016. The assessments were made using WCAG 2.1, which defines how to make web content accessibility, and, as noted above, refers to the same four categories as mentioned in the Public Sector Web Accessibility Directive. Common problems identified by Siteimprove concerned inaccessible pdf files, image contents that were not correctly tagged, links identified only by colour, generic link texts and forms which were inaccessible.

This raises the question of how to achieve accessibility of web content. The Public Sector Web Accessibility Directive provides rather generic information on accessibility and does not refer, for example, to WCAG 2.1. In fact, it says:

> Several Member States have adopted measures based on internationally used guidelines for the design of accessible websites, but those measures often relate to different versions or compliance levels of those guidelines, or have introduced technical differences in respect of accessible websites at national level (recital 5).

This seems to indicate a view that such international guidelines are not appropriate in an EU context. This paper will shortly return to the Directive's view of how to achieve accessibility, and specifically what technical standards to follow; however, the paper will firstly briefly address the European Accessibility Act.

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[15] *Ibidem*.

3.4. European Accessibility Act

In 2015 the Commission adopted a proposal[16] for a Directive on accessibility requirements for products and services or, as it is more commonly known, the European Accessibility Act. After 3 years of inter-institutional negotiations, the Act[17] was adopted by the European Parliament in March 2019 and by the Council in April 2019. The Act regulates the accessibility of key products and services in the internal market, such as computers, smartphones, tablets, TV sets, banking ATMs and services, payment terminals, e-books and e-readers, e-commerce websites and mobile applications and ticketing machines. The European disability movement hailed the Directive as «an important step» that improves the accessibility of these kinds of products and services.[18]

While the Public Sector Web Accessibility Directive regulates the accessibility of websites of public organisations, the European Accessibility Act regulates *inter alia* the accessibility of e-commerce websites (Article 2(2)(f)), as well as the websites and applications of certain air, bus, rail and waterborne passenger transport services (Article 2(2)(c)). The Directive defines e-commerce services as services provided at a distance, through websites and mobile device-based services, by electronic means and at the individual request of a consumer with a view to concluding a consumer contract (Article 3(30)).

In some ways the overall approach in the European Accessibility Act is similar to that found in the Public Sector Web Accessibility Directive. Service providers are to ensure that they design and provide services in accordance with the accessibility requirements of the Directive (Article 13(1)), subject to a fundamental alteration or disproportionate burden test (Article 14). In terms of the websites which are covered by the European Accessibility Act, the same four principles referred to in the Public Sector Web Accessibility Directive are stated to be relevant: perceivability, operability, being understandable and robustness (recital 47). Annexes to the Directive provide some information on general accessibility requirements, but do not set out technical standards.[19] In contrast, such Annexes are not found in the Public Sector Web Accessibility Directive. Nevertheless, both Directives address physical accessibility of web sites.

3.5. European Standards Concerning Accessibility

While the Public Sector Web Accessibility Directive and the European Accessibility Act

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[16] Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, COM(2015) 615.

[17] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (European Accessibility Act), [2019] OJ L 151, p. 70 ss.

[18] See the European Disability Forum (2019), "European Accessibility Act: A Big Step Forward on a Long Journey". URL: <http://www.edf-feph.org/newsroom/news/european-accessibility-act-big-step-forward-long-journey> [accessed on 13/07/2019].

[19] General accessibility requirements related to all services covered by Article 2(2) of the Directive are addressed in Annex I, Section III.

establish requirements to provide accessibility of certain websites and applications, they provide little detail about how to do this. This nevertheless remains a legal obligation for providers of these services. The means by which to achieve such accessibility are at least partially addressed through European standards. Both Directives establish a presumption of compatibility (Article 6 Public Sector Web Accessibility Directive and Article 15 European Accessibility Act), which provides that if websites or applications comply with certain harmonised standards, which have been adopted by European Standardisation Organisations and published in the Official Journal of the EU, there will be a presumption that they meet the accessibility requirements set in the Directives. In practice this is a strong presumption, and it is unlikely that a website which met these standards would be regarded as inaccessible.

The relevant standards have been developed by the European Standardisation Organisations, which consist of national standardisation bodies from all the Member States. Three such Organisations exist, CEN, CENELEC and ETSI, each covering different fields. The bodies do not necessarily develop standards on their own initiative; instead the European Commission can issue them with mandates, or official requests, requesting that they develop standards on a particular topic and provides funding for them to develop the standard. The actual development of the standard is a long process which involves a lot of consultation. An EU regulation on standardisation confirms that European standards must be compliant with the CRPD and that Disabled Peoples Organisations, as well as other stakeholders, must be involved actively in the process of setting standards.[20]

The Standardisation Organisations have developed standards which are relevant in the context of web accessibility and the two Directives. The standard "Accessibility requirements for ICT products and services" was adopted by all three European Standardisation Organisations in combination. It is a highly technical standard and is 152 pages long. It defines accessibility as the:

> extent to which products, systems, services, environments and facilities can be used by people from a population with the widest range of characteristics and capabilities, to achieve a specified goal in a specified context of use (section 3.1, p. 13).[21]

Work on this standard was first prompted by the Commission Mandate 376[22] which was issued to the European Standardisation Organisations in 2005. It initially resulted in European standards on e-accessibility to be used in public procurement which were

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[20] Regulation (EU) No. 1025/2012 of the European Parliament and of the Council on European Standardisation, [2012] OJ L 316, p. 12 ss.

[21] Accessibility requirements for ICT products and services, EN 301 549 V2.1.2 (2018-08), ETSI, CEN, CENELEC. URL: <https://www.etsi.org/deliver/etsi_en/301500_301599/301549/02.01.02_60/en_301549v020102p.pdf> [accessed on 13/07/2019].

[22] Standardisation Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement of Products and Services in the ICT Domain, M 376 EN, Brussels 7 December 2005.

adopted in 2014,[23] and an implementation toolkit was published shortly thereafter.[24] However, in light of the Public Sector Web Accessibility Directive, the Commission issued a second mandate, Mandate 554, which asked the European Standardisation Organisations to revise the standard and make it a harmonised standard which was not confined to public procurement.[25]

As noted above, this has now been adopted and the standard specifies the functional accessibility requirements for ICT products and services, including web content.[26] It translates the four principles of accessibility set out in both Directives into testable success criteria[27] and establishes a common methodology to test the conformity of the content of websites and mobile applications with those principles. The standard sets out technical requirements and provides the detail on accessibility which is not contained in the EU Directives. Consequently this is the standard which applies to assess accessibility of websites for both the Public Sector Web Accessibility Directive[28] and the European Accessibility Act.[29]

A second standard is also worth mentioning in this context. That is the standard "Design for All – Accessibility following a Design for All approach in products, goods and

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[23] Accessibility requirements suitable for public procurement of ICT products and service in Europe, EN 301 549 V.1.1.1 (2014-05), ETSI, CEN, CENELEC. URL: <https://www.etsi.org/deliver/etsi_en/301500_301599/301549/01.01.01_60/en_301549v010101p.pdf> [accessed on 13/07/2019].

[24] URL: <http://mandate376.standards.eu/> [accessed on 12/07/2019].

[25] Commission implementing Decision (EU) 2018/2048 of 20 December 2018 on the harmonised standard for websites and mobile applications in support of Directive (EU) 2016/2102 of the European Parliament and of the Council, [2018] OJ L 327, p. 84 ss. The implementing Decision adopts European standard EN 301 549 V2.1.2 (2018-08), Accessibility requirements for ICT products and services, and resulted in its publication in the Official Journal of the EU, as required by the Public Sector Web Accessibility Directive.

[26] The Public Sector Web Accessibility Directive provides: «The European standardisation organisations have adopted European standard EN 301 549 V1.1.2 (2015-04), specifying the functional accessibility requirements for ICT products and services, including web content, which could be used in public procurement or to support other policies and legislation. The presumption of conformity with the accessibility requirements laid down in this Directive should be based on clauses 9, 10 and 11 of European standard EN 301 549 V1.1.2 (2015-04). Technical specifications adopted on the basis of this Directive should further detail European standard EN 301 549 V1.1.2 (2015-04) in relation to mobile applications» (recital 42).

[27] Public Sector Web Accessibility Directive (recital 37).

[28] Two additional implementing decisions in support of the Web Accessibility Directive have been adopted by the Commission: Commission implementing Decision 2018/1523 establishing a model accessibility statement in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies, [2018] OJ L 256, p. 103 ss., and Commission implementing Decision 2018/1524 establishing a monitoring methodology and the arrangements for reporting by Member States in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies, [2018] OJ L 256, p. 108 ss.

[29] The European Accessibility Act explicitly states that «The accessibility requirements of this Directive should be aligned to the requirements of Directive (EU) 2016/2102» (recital 46). For the purposes of the European Accessibility Act the Commission has also issued a number of other standardisation requests to the European Standardisation Organisations on Accessibility, such as standardisation mandates M/376, M/473 and M/420, which are relevant for the preparation of harmonised standards (recital 74).

services – Extending the range of users".[30] The Commission issued Mandate 473 in 2010[31] requesting that the European Standardisation Organisations develop such a standard. The standard was approved in late 2017 and finally published in March 2019. This is a process oriented standard in that it sets out requirements and recommendations to enable an organisation to design, develop and offer goods and services so that they can be understood and used by the widest range of users. It is intended to apply across all goods and services. Unlike the ICT standard, this standard is not publicly available, and must be purchased from the National Standardisation Bodies.

This standard is not mentioned in either the Public Sector Web Accessibility Directive or the European Accessibility Act, although "Design for All" is referred to in the Preamble to both Directives. Therefore, in terms of web accessibility, the standard on "Accessibility requirements for ICT products and services" is most relevant, while the "Design for All" standard has a more general application.

4. Conclusion

The EU has taken a number of steps in the field of e-accessibility and digital equality. All recently adopted legal instruments in this area refer to the CRPD and are intended to implement that, and the CRPD must also be taken into account in developing European standards. These instruments and related standards are impacting the national level, and we can see regulation occurring at multiple levels and being influenced by different regulatory regimes.

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[30] European standard EN 17161: 2019 "Design for All – Accessibility following a Design for All approach in products, goods and services – Extending the range of users".

[31] Standardisation mandate to CEN, CENELEC and ETSI to include "Design for All" in relevant standardisation initiatives, M/473, 1 September 2010. URL: <https://www.etsi.org/images/files/ECMandates/m473.pdf> [accessed on 14/07/2019].

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Commission implementing Decision 2018/1523 establishing a model accessibility statement in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies, [2018] OJ L 256, p. 103 ss.;

Commission implementing Decision 2018/1524 establishing a monitoring methodology and the arrangements for reporting by Member States in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies, [2018] OJ L 256, p. 108 ss.;

Directive (EU) 2018/1808 of the European Parliament and the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administration action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, [2018] OJ L 303, p. 69 ss.;

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Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (European Accessibility Act), [2019] OJ L 151, p. 70 ss.

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Devices: Past and Future Perspectives, COM(2012) 203 final;

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European Disability Forum (2017), "EDF & Broadcasters draw up common proposal to improve access to audiovisual media services". URL:<http://www.edf-feph.org/newsroom/news/edf-broadcasters-draw-common-proposal-improve-access-audiovisual-media-services> [accessed on 12/07/2019];

European Disability Forum (2018), "Encouraging European Communications Code Adopted by the European Parliament". URL: <http://www.edf-feph.org/newsroom/news/encouraging-european-electronic-communications-code-approved-european-parliament> [accessed on 12/07/2019];

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The European Accessibility Act: A Paradigm of Inclusive Digital Equality for Persons with Disabilities?

Andrea Broderick

Accessibility is an essential part of the new duty to respect, protect and fulfil equality rights.[1]

1. Introduction

The exponential increase in technological developments in recent decades has created both opportunities for, and barriers to, the full participation of people with disabilities in society on an equal basis with others.[2] On the one hand, Information and Communication Technologies (ICT), such as mobile application tools that assist people with visual impairments to access information, play a role in increasing access for people with disabilities to everyday activities. On the other hand, people with disabilities are hindered in accessing certain new ICT by the so-called «digital divide».[3]

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter, 'CRPD' or 'UN Convention') sets out the global legal standard on digital accessibility in Article 9 thereof. Digital accessibility (e-accessibility) refers to the ability of all individuals, including those with visual, auditory or cognitive impairments, to have equal access to, and use, mobile applications, electronic documents, self-service computer terminals, *inter alia*, on an equal basis with others.[4]

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[1] Committee on the Rights of Persons with Disabilities, *General Comment No. 2 (2014), Article 9: Accessibility*, 22 May 2014, CRPD/C/GC/2, para. 14 (hereinafter, 'General Comment No. 2 (2014)').

[2] See generally Scholz F., Yalcin B., Priestley M., "Internet Access for Disabled People: Understanding Socio-Relational Factors in Europe", *Cyberpsychology: Journal of Psychosocial Research on Cyberspace,* 11(1), 2017, pp. 1-4. See also Adam A., Kreps D., "Enabling or Disabling Technologies? A Critical Approach to Web Accessibility", *Information Technology and People*, 2006, 19, pp. 203-218.

[3] See generally Organisation for Economic Cooperation and Development (2001), "Understanding the Digital Divide", *OECD Digital Economy Papers, No. 49*. URL: <https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers_20716826/titledesc?componentsLanguage=en> [accessed on 12/09/2019]. See also Goggin G., *Disability and Digital Inequalities: Rethinking Digital Divides with Disability Theory*, in Muschert G.W., Ragnedda M. (eds.), *Theorizing Digital Divides*, New York: Routledge, 2017, pp. 69-80. See further Macdonald S.J., Clayton J., "Back to the Future, Disability and the Digital Divide", *Disability & Society*, 28(5), 2013, pp. 702-718.

[4] On this point, see generally, Ferri D., Favalli S., "Web Accessibility for People with Disabilities in the European Union: Paving the Road to Social Inclusion", *Societies*, 8(2), 2018, pp. 40-59.

The accessibility norm is inextricably linked with the equality norm contained in Article 5 of the UN Convention. The substantive provisions of the CRPD are underpinned by a human rights model of disability and a model of inclusive equality.[5] Together, these models not only view disability as a social construct,[6] recognising that «disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others»,[7] but also promote a greater understanding of the societal barriers faced by people with disabilities.

At European Union (EU) level, there have been many recent policy and legislative initiatives designed to lessen the digital equality gap, prompted (at least in part) by the conclusion of the CRPD by the EU in December 2010.[8] The CRPD entered into force for the EU in January 2011, and from that moment forth, the EU was bound by the obligations contained in UN Convention to the extent of its competences.[9] Favalli and Ferri state that «the [CRPD] has become the benchmark against which EU disability initiatives must be measured».[10] All EU Member States are also Parties to the Convention.

One of the most recent legislative developments at EU level – the Directive of the European Parliament and of the Council on the accessibility requirements for products and services, otherwise known as the European Accessibility Act (hereinafter, 'EAA' or 'Directive')[11] – contains several substantive provisions related to digital inclusion. This contribution examines the inter-relationship between the key CRPD norms of equality and accessibility, and assesses the provisions of the EAA from the perspective of realising inclusive equality. Ultimately, it answers the question as to whether the provisions of the EAA have the potential to contribute to ensuring the inclusion of people with disabilities in the digital society on an equal basis with others.

Following these introductory remarks, section 2 delineates the key components of

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[5] Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, 26 April 2018, CRPD/C/GC/6, para. 11 (hereinafter, 'General Comment No. 6 (2018)'). Inclusive equality is a term that had previously been coined by authors such as Colleen Sheppard and Sally Witcher (See, among others, Witcher S., *Inclusive Equality: A Vision for Social Justice*, Bristol: Bristol University Press, 2014).

[6] Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), para. 9.

[7] Preamble paragraph (e) of the CRPD must be read in conjunction with Article 1 CRPD, which has been termed a 'non-definition of disability'. See generally: Broderick A., Ferri D., *International and European Disability Law and Policy: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2019.

[8] See Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion of the UN Convention, [2010] OJ L 23, p. 35 ss.

[9] Waddington L., Broderick A., *Combatting Disability Discrimination and Realising Equality: A Comparison of the UN CRPD and EU Equality and Non-discrimination Law*, Luxembourg: Publications Office of the European Union, European Commission, 2018, pp. 31-32. See generally Ferri D., "The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective", *European Yearbook of Disability Law,* 2, 2010, pp. 47-71.

[10] Favalli S., Ferri D., "Defining Disability in the European Union Non-Discrimination Legislation: Judicial Activism and Legislative Restraints", *European Public Law*, 22(3), 2016, pp. 541-567, p. 553.

[11] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, [2019] OJ L 151, p. 70 ss.

the accessibility norm in the CRPD as well as the overlap between accessibility and equality. Section 3 analyses the key provisions of the CRPD from the perspective of the intertwined dimensions of inclusive equality, while section 4 contains concluding remarks.

This contribution employs legal doctrinal methodology,[12] which is generally of a «descriptive, evaluative and critical» nature.[13] In that vein, this piece examines the most relevant legal sources – legislative provisions, international human rights documents and academic scholarship, among others – systematically interpreting them in order to clarify and analyse the current state of the law.

2. Accessibility as a Means to Ensuring Equality

2.1. The Accessibility Norm in the United Nations Convention on the Rights of Persons with Disabilities and its Inter-Relationship with the Equality Norm

Article 9 CRPD, which should be read in conjunction with Article 21 of the UN Convention, requires Parties to the CRPD, including the EU, to adopt all measures necessary to ensure accessibility of the physical environment, transportation, ICT, and other facilities and services open or provided to the public, on a progressive basis. The text of Article 9(2)(b) and the interpretation provided by the Committee on the Rights of Persons with Disabilities (CRPD Committee) make it clear that Parties to the Convention must also ensure that the goods, services and facilities of private entities are accessible.[14] According to Ferri and Favalli, «this interpretation of Article 9 is premised on the need to promote and fulfil the principles of non-discrimination and equality».[15] Article 9(2)(f) and (g) set out the requirement to ensure that information is provided in accessible forms, by promoting «other appropriate forms of assistance and support to persons with disabilities to ensure their access to information»; and to promote access for persons with disabilities to new ICT and systems, including the Internet, respectively. In addition, Article 9(2)(h) targets the affordability of new technologies.

Article 9 CRPD is closely intertwined with Article 5, the UN Convention's equality and non-discrimination norm. The accessibility norm has been described by Ferri as a «pragmatic translation of the principle of equality».[16] During the discussions that took

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[12] Tiller Emerson H., Cross Frank B., "What is Legal Doctrine?", *Northwestern University Law Review*, 100(1), 2005, pp. 517-533, p. 518.

[13] Broderick A., *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Cambridge-Antwerp: Intersentia, 2015, p. 14.

[14] See Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), para. 13. See also Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v Hungary*, communication No. 1/2010, 21 June 2013, C/9/D/1/2010, para. 10(2)(a).

[15] Ferri D., Favalli S., "Web Accessibility for People with Disabilities in the European Union", p. 47.

[16] Ferri D., "The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU", p. 54.

place at the seventh session of the Ad-Hoc Committee tasked with drafting the CRPD, it was acknowledged that accessibility is a 'hybrid right', in that it is interlinked with equality standards.[17] The inter-relationship between the fundamental norms of accessibility and equality is also evident from the text of Article 9 itself, which states that Parties to the UN Convention should take appropriate measures to ensure that persons with disabilities have access to ICT and other facilities on an *equal* basis with others.[18] The CRPD Committee has stated that Article 9 clearly enshrines accessibility as the precondition for persons with disabilities to live independently, participate fully and *equally* in society.[19]

The accessibility obligation in Article 9 CRPD can be viewed as a vital tool for ensuring the equalisation of opportunities for persons with disabilities, according to the CRPD Committee.[20] In its General Comment No. 6 (on equality and non-discrimination), adopted in 2018, the CRPD Committee affirmed that accessibility is also «a precondition and a means to achieve» *de facto* equality for individuals with disabilities.[21]

2.2. Inaccessibility as a Breach of the Non-Discrimination Norm?

Accessibility obligations are complementary to the reasonable accommodation duty, which is an individualised and immediate duty. An unjustified failure to provide reasonable accommodation (*i.e.* where it is not shown to be a disproportionate or undue burden for the entity concerned) is a form of discrimination under Articles 2 and 5 of the UN Convention. By contrast, the accessibility duty under the CRPD is generalised (group-based) and anticipatory (not triggered by an individual request),[22] and it is not subject to a disproportionate or undue burden defence.[23] Furthermore, the obligation to ensure accessibility is progressively realizable, and Parties are required to use the maximum of their available resources to implement accessibility gradually.[24] Indeed, not every instance of

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[17] Ad-Hoc Committee, "Daily Summary of Discussions at the Seventh Session of UN Convention on the Rights of Persons with Disabilities, 31 January 2006", 8(12), 2006. URL: <https://www.un.org/esa/socdev/enable/rights/ahc7sum31jan.htm> [accessed on 12/09/2019].

[18] CRPD, Article 9(1) (emphasis added).

[19] Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), para. 14 (emphasis added).

[20] *Ibidem*, para. 1.

[21] Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), para. 40.

[22] Waddington L., Broderick A. (with the assistance of Poulos A.), *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States*, Luxembourg: Publications Office of the European Union, European Commission, 2016, p. 45.

[23] Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), para. 25.

[24] Charitakis S., *Access Denied: The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities*, Cambridge-Antwerp: Intersentia, 2018, pp. 45-62. See the criticisms of the CRPD Committee's General Comment No. 2 for its failure to allude specifically to the progressively realisable nature of Article 9 CRPD in its General Comment No. 2 on Accessibility: see Lawson A., *Article 9: Accessibility*, in Stein M.A., Bantekas I., Anastasiou D. (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford: Oxford

inaccessibility of the physical environment, technology or transportation can be viewed as a prohibited act of discrimination. As Quinn points out:

> Failure to have an [accessible] environment is clearly a form of discrimination. Using the non-discrimination tool it is possible to craft some *limited* positive obligations on States to undo this discrimination [...].[25]

The CRPD Committee affirms that there are two circumstances in which the inaccessibility of ICT, and other facilities and services, may amount to disability-based discrimination, namely: (i) where the service or facility was established after relevant accessibility standards were introduced; and (ii) where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation.[26] Following from point (i) above, Parties to the Convention have an obligation to prevent the unjustifiable emergence of new barriers. Therefore, placing inaccessible (new) technology on the market after the introduction of relevant accessibility standards would be at variance with the obligation under the CRPD to eliminate inequalities for persons with disabilities.

2.3. Inclusive Equality as the Global Normative Standard of the CRPD

The theoretical framework of equality in the CRPD is reflected in the social-contextual understanding of disability,[27] which underpins the entire Convention. This version of the social model[28] views disability as an interaction between persons with impairments and widespread barriers in society (physical barriers, as well as legal and attitudinal barriers, among others). The CRPD embraces the human rights model of disability, which builds on the social-contextual model, in that it recognises that «disability is a social construct»;[29] however, the human rights model goes further than a social model approach, in the sense that it conceives of disability as «one of several layers of identity», thereby taking into account intersectional disadvantage.[30] Unlike

University Press, 2018.

[25] Emphasis added. Quinn G., "The Interaction of Non-Discrimination with Article 9: Added Reasonment" (unpublished paper), cited by Lord J.E. (2010), "Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty under the CRPD. Presentation for the General Day of Discussion on Accessibility − CRPD Committee, UN Geneva, October 7, 2010". URL: <https://studylib.net/doc/7877627/accessibility-and-human-rights-fusion-in-the-crpd--assess...> [accessed on 12/09/2019].

[26] Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), para. 31.

[27] The CRPD's version of the social model was termed the 'social-contextual model' in Broderick A., *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities,* p. 77.

[28] The social-contextual model is a more refined elaboration of the 'pure' social model. On the latter model, see Shakespeare T., Watson N., "The Social Model of Disability: An Outdated Ideology?", *Research in Social Science and Disability*, 2, 2001, pp. 9-28.

[29] Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), para. 9.

[30] *Ibidem.*

the social-contextual model, which merely explains how disability arises, the human rights model has been deemed to be «a tool to implement the CRPD»[31] and to achieve social justice.[32]

The human rights model can be aligned with the model of 'inclusive equality' that underpins the UN Convention, including its accessibility obligations. According to the CRPD Committee, inclusive equality embraces four intertwined dimensions:

(i) An accommodating dimension: to make space for difference as a matter of human dignity.[33] This dimension can be deemed to require the adoption of various positive measures, including regulations on accessibility.[34] Any legislation adopted by Parties to the CRPD, including the EU, should be based on human rights principles, and should ensure respect for individual difference.

(ii) A fair redistributive dimension: to address socioeconomic disadvantage.[35] This dimension is reinforced by Charitakis' argument that accessibility incorporates an affordability dimension within its scope,[36] which refers, *inter alia*, to the economic capacity of people with disabilities to afford facilities, goods and services.[37]

(iii) 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.[38] This dimension implies that accessibility measures adopted by Parties to the Convention should have as their end goal that of ensuring participation and inclusion of all people with disabilities in society. Additionally, it signifies the necessity to ensure participation by people with disabilities in the adoption, implementation and monitoring of all measures adopted to ensure accessibility.[39]

(iv) A recognition dimension: to combat stigma, stereotyping, prejudice and violence, and to adequately take into account the dignity of human beings and their intersectionality.[40] This tallies with the social or attitudinal aspect of accessibility outlined by

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[31] Degener T., *A New Human Rights Model of Disability*, in Della Fina V., Cera R., Palmisano G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Cham: Springer, 2017, pp. 41-60, p. 41.

[32] Ead., p. 54.

[33] Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), para. 11.

[34] See generally, Ferri D., Giannoumis G.A., O'Sullivan C.E., "Fostering Accessible Technology and Sculpting an Inclusive Market Through Regulation", *International Review of Law, Computers and Technology*, 29(2-3), 2015, pp. 81-87.

[35] Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), para. 11.

[36] Charitakis S., *Access Denied*, pp. 26-28.

[37] Id., citing Levesque J., Harris M., Russell G., "Patient-Centred Access to Health Care: Conceptualising Access at the Interface of Health Systems and Populations", *International Journal for Equity in Health*, 12(18), 2013, p. 6.

[38] Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), para. 11.

[39] This is consistent with the CRPD Committee's General Comment No. 2 and also with its *General Comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, 9 November 2018, CRPD/C/GC/7.

[40] Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), para. 11.

Charitakis,[41] and is inextricably linked to the awareness-raising obligations in Article 8 CPRD.

3. The European Accessibility Act: A Paradigm of Inclusive Digital Equality?

3.1. The European Accessibility Act: An Overview

The EU has endeavoured to improve the accessibility of facilities, goods and services in the Member States for over a decade,[42] through soft law measures adopted in the fields of the built environment, transport and technology. In a similar vein to the CRPD, accessibility is prominent in the current European Disability Strategy 2010-2020 (EDS).[43] The EU institutions have also adopted hard law measures, such as sectoral legislation related to accessibility in the fields of transport and electronic communication services. Since the date of entry into force of the CRPD, the EU has undertaken a further series of hard law actions with the specific aim to implement the CRPD's accessibility requirements. Shortly before the adoption of the EU Web Accessibility Directive on Public Sector Websites and Mobile Applications (Web Accessibility Directive),[44] the European Commission put forward a proposal for a European Accessibility Act.[45] The road to enactment of the EAA has been a relatively long one since the Act was first proposed in 2015. In March 2019, the European Parliament finally gave its seal of approval to the EAA. The purpose of the EAA, having a legal basis in Article 114 of the Treaty of the Functioning of the EU (TFEU) – the internal market provision – is twofold: (i) to improve the proper functioning of the internal market through the harmonisation of laws, regulations and administrative provisions of the Member States, thereby eliminating barriers to the free movement of certain accessible products and services;[46] and (ii) to facilitate the implementation of Article 9 CRPD by providing common Union rules on the accessibility of those products and services.[47]

Equality and inclusion are core themes underpinning the Directive. This can be seen in the definition of 'persons with disabilities' contained in the Directive, which is in line

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[41] Charitakis S., *Access Denied*, pp. 25-26.

[42] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, COM(2010) 245 final/2. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe Communication from the Commission, COM(2015) 192 final.

[43] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

[44] Directive 2016/2102/EU on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L 327, p. 1 ss.

[45] Proposal for a Directive of the European Parliament and of the Council on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States as Regards the Accessibility Requirements for Products and Services, COM(2015) 615 final.

[46] EAA, Preamble, para. 8.

[47] EAA, Preamble, paras. 15 and 16.

with the CRPD.[48] Furthermore, the Preamble of the Directive states that it promotes «full and effective equal participation by improving access to mainstream products and services that, through their initial design or subsequent adaptation, address the particular needs of persons with disabilities».[49] Given that the Directive is premised on ensuring equality and inclusion in society, the sub-sections below examine the compatibility between the EAA and the CRPD's model of inclusive equality, which (as outlined above in section 2) underpins the accessibility norm in Article 9 of the UN Convention. In that regard, the EAA will be analysed from the perspective of the four dimensions of inclusive equality outlined in section 2.

3.2. The European Accessibility Act: Bridging the Digital Equality Divide?

3.2.1. An Accommodating Dimension

The accommodating dimension of inclusive equality requires Parties to the Convention to make space for difference, through the adoption of positive measures that are based on the human rights principles contained in the CRPD.

The EAA has a wide personal scope. The Directive obliges EU Member States to ensure that the goods and services falling within its scope comply with a set of accessibility requirements that are set out in Annex I thereof. Apart from the Member States themselves, the Directive imposes accessibility obligations on manufacturers, importers, service providers, and distributors of goods and services that operate within the internal market.[50]

The material scope of the EAA, as outlined in Article 2 of the Directive, is wide-ranging, at least from the perspective of digital products and services, although it clearly does not mirror the full material scope of the CRPD.

The EAA covers, *inter alia*, the following digital products: consumer general purpose computer hardware systems and their operating systems; self-service terminals related to the services covered by the Directive (such as automated teller machines (ATMs), check-in machines and ticketing machines); consumer terminal equipment with interactive computing capability, used for electronic communication services (*i.e.* smartphones and tablets capable of calling); consumer terminal equipment with interactive computing capability, used for accessing audiovisual media services (*i.e.* smart television sets); and e-readers.

In terms of digital services, the Directive covers electronic communication services (*i.e.* telephony services); e-commerce services and consumer banking services, among others. With regard to commercial websites, Easton maintains that the EAA represents an opportunity to harmonise web accessibility standards in relation to e-commerce websites.[51] Therefore, the EAA is meant to complement the Web Accessibility Directive,

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[48] EAA, Preamble, para. 3.

[49] *Ibidem*.

[50] EAA, Articles 7-13.

[51] Easton C., "Website Accessibility and the European Union: Citizenship, Procurement and the Proposed Accessibility Act", *International Review Law Computer Technology*, 27, 2013, pp. 187-199.

which covers a specific set of public sector body websites. In the context of air, bus, rail and waterborne passenger transport services, the EAA covers a wide range of digital services, including the delivery of transport service information through websites, mobile device-based services; interactive information screens, interactive self-service terminals, as well as check-in and ticketing machines. Notably, the EAA also fulfils an important request from disability organisations, namely that the 112 emergency number would become accessible to all individuals in the EU. The Directive also requires that the mechanisms providing access to audio-visual media services (*e.g.* websites or mobile application tools related to Netflix, for instance) are accessible, and it is complementary, in that regard, to the Audiovisual Media Services Directive.[52]

Importantly, the EAA not only views accessibility as a means for people with disabilities to access digital (and other) products and services, but it also adopts a rights-based approach to accessibility, by seeking to ensure that products and services incorporate at least one mode of operation that maintains privacy for those using features of a product or service that are provided for accessibility purposes, such as voice activation and recognition for people with visual impairments.[53] Likewise, the Directive specifies that products must be designed in a manner that makes communication possible by means of more than one sensory channel, and it requires that clear information be provided on product packaging.[54] In addition, the Directive adopts principles that implicitly underpin the CRPD, hinging on the criteria of perceivability, operability, understandability, and robustness of websites and services.[55]

Furthermore, as highlighted by the European Disability Forum (EDF), the EAA sets out functional requirements, *i.e.* the aspects of a product or service which must be accessible; but it does not specify how this functionality is to be achieved from a technical perspective, thereby providing flexibility in implementation. According to Ferri and Favalli, this is «likely to be one of the most positive aspects of the EAA» and aligns the Directive with the CRPD, since «it is essential that the EAA remains an instrument capable of adapting to the technical innovations» that emerge.[56]

A pivotal aspect of the accommodating dimension of inclusive equality is not only the adoption of legislation but also its implementation and monitoring. In that regard, the framework of the EAA is «detailed and well-elaborated», as noted by EDF,[57] and certainly stronger than previous implementation mechanisms related to accessibility. Article 20 of the Directive sets out the procedure to be put in place at the national level for dealing with products that do not comply with the applicable accessibility requirements. In that con-

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[52] Council Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, [2010] OJ L 95, p. 1 ss. (hereinafter, Audiovisual Media Services Directive).

[53] EAA, Section VII, k.

[54] EAA, Annex 1, Section 1.

[55] See the various Annexes to the EAA.

[56] Ferri D., Favalli S., "Web Accessibility for People with Disabilities in the European Union", p. 53.

[57] European Disability Forum (2019), "Analysis of the European Accessibility Act". URL: <http://www.edf-feph.org/newsroom/news/our-analysis-european-accessibility-act> [accessed on 12/09/2019].

nection, Member States are required to establish market surveillance authorities, which are mandated to carry out an evaluation of the compliance of products covered by the Directive with the accessibility requirements set out therein. According to Article 20(1) EAA, if the authorities find that the product does not comply with the requirements laid down in the Directive, they shall require the relevant economic operator to take all appropriate corrective action. Market surveillance authorities can also require the relevant economic operator to withdraw the product from the market if the operator has failed to take adequate corrective action within the period referred to in the Directive.[58] The EAA also sets out a measure of deterrence in Article 21, namely the Union safeguard procedure, which means that if one Member State demands the withdrawal of a product from the EU market on account of lack of accessibility, other Member States must do the same. With regard to ensuring the compliance of services with the provisions of the Directive, according to Article 23 Member States must «establish, implement and periodically update adequate procedures» for this purpose and follow up on complaints, as well as verify that the economic operator has taken the necessary corrective action. The method and timescale for ensuring compliance with services is therefore more undefined than that which applies to products. According to Article 29(1), however, Member States are required to put in place «adequate and effective» means to ensure compliance with the Directive, including by enacting provisions whereby a consumer with a disability, a public body or private entity which has a legitimate interest may take an action before the domestic courts or competent domestic administrative bodies to ensure that the national provisions transposing the Directive have been complied with.[59] As EDF remarks, the possibility for a representative entity to take action is «important because it lifts the sole burden of litigation off the individual consumer», considering that «many persons with disabilities have difficulties accessing the justice system», and that «court proceedings are costly and time-consuming».[60] In addition, the EAA allows for the imposition of penalties, which, according to Article 30(2) of the Directive, should be «effective», «proportionate» and «dissuasive», although it excludes procurement procedures, which are subject to other secondary EU legislation.[61]

In spite of these positive features, there are some notable limitations on the scope of the EAA. Firstly, the EAA does not cover the accessibility of the built environment related to the services that are included in the Directive.[62] Therefore, as pointed out by Charitakis, if an ATM is located inside a bank, for instance, even though the ATM itself is covered by the EAA, since the built environment is not, an inaccessible built environment will indirectly

[58] EAA, Article 20(1).
[59] EAA, Article 29(2).
[60] European Disability Forum (2019), *Analysis of the European Accessibility Act*, p. 15.
[61] See Directive 2014/24/EU or Directive 2014/25/EU.
[62] See Charitakis S., *Access Denied*, p. 276. According to Article 4(4) EAA, Member States may decide, in the light of national conditions, that the built environment used by clients of services covered by this Directive shall comply with the accessibility requirements set out in Annex III, in order to maximise their use by persons with disabilities.

hinder access to the ATM.[63] Secondly, while the EAA covers those websites which are connected to e-commerce, transport and banking services, the Directive does not include within its material scope all websites of private companies. This is in spite of the recommendation by the European Economic and Social Committee (EESC) to consider the inclusion within the scope of the Directive of websites and mobile applications made available by economic operators otherwise falling under the scope of the Directive.[64] According to Charitakis, the decision not to regulate the accessibility of all websites may give rise to problems for the functioning of the internal market «as a result of divergent (existing and subsequent) EU and national requirements and standards that implement Article 9 UNCRPD in the field of websites».[65] Thirdly, the Directive introduces a CE-marking for checking the compliance of digital (and other) goods with the Directive's accessibility requirements; however, the CE-marking does not apply to services. Another related shortcoming of the Directive is that the CE-marking is self-assessed by manufacturers, rather than being awarded by an independent body. Fourthly, the provisions on the transposition period of the Directive are relatively «complex» and, with respect to certain products and services such as ticketing machines, «disproportionally long».[66] According to EDF, «such delays greatly reduce the meaningful impact the Directive will have for many persons with disabilities»,[67] especially when one considers the short life span of ICT-related products and services.[68]

On the whole, and in spite of these limitations, one can conclude that the accommodating dimension of inclusive equality is largely satisfied by the provisions of the EAA, as demonstrated by the myriad of positive provisions in the Directive relating to digital accessibility.

3.2.2. A Fair Redistributive Dimension

The second dimension of inclusive equality is the requirement that is imposed on Parties to the CRPD to ensure a fair redistributive dimension with regard to all measures that they adopt.

While it is not the objective of EU law to engage in redistribution *per se*,[69] certain actions adopted at EU level can have a redistributive effect. In that regard, the EAA takes

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[63] *Ibidem*, pp. 272-273. For further elaboration on this point, see also Charitakis S., *Accessibility of Goods and Services*, in Ferri D., Broderick A., *Research Handbook on EU Disability Law* (forthcoming, Edward Elgar).

[64] Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, [2016] OJ C 303, p. 103, para. 5.1.

[65] See Charitakis S., *Access Denied*, p. 273.

[66] European Disability Forum (2019), *Analysis of the European Accessibility Act*, p. 15. See EAA, Article 31 (on transposition) and Article 32 (on transitional measures).

[67] *Ibidem*.

[68] Opinion of the European Economic and Social Committee, para. 5.4.

[69] Hvinden B., Halvorsen R., "Which Way for European Disability Policy?", *Scandanavian Journal of Disability Research*, 5(3), 2003, pp. 296-312, p. 305.

a universal design (UD) perspective, with the aspiration that all EU citizens, regardless of their ability, will be able to purchase or use the products and services covered by the scope of the Directive, with the modifications and accessibility options they require built in as standard.[70] This includes people with functional impairments and the elderly. Hvinden and Halvorsen argue that, to some extent, «new social regulations to promote accessibility through universal design might reduce the need for assistive technology», and this could have a redistributive effect; although as the authors point out, «one should probably not exaggerate the prospects of reducing public expenditure» in this manner.[71]

While much of EU disability policy does not have as its primary aim the redistribution of resources, the EU (as a Party to the CRPD) has the obligation not to contravene the provisions of the CRPD that relate to redistribution when it is enacting legislation. It is arguable that the EAA falls short of the paradigm of inclusive equality with regard to two vital aspects of its redistributive dimension.

In the first instance, according to Article 14, the accessibility requirements of the EAA apply only to the extent that they do not require a significant adjustment to an aspect or feature of a product or service that would result in the alteration of the basic nature of that good or service.[72] They also apply to the extent that they do not impose a disproportionate burden on the economic operator concerned, pursuant to the same Article.[73] The EAA sets out three criteria to determine whether compliance with accessibility requirements constitutes a disproportionate burden for economic operators. These are: (i) the *ratio* of the net costs of compliance with accessibility requirements to the overall costs for economic operators; (ii) the estimated costs and benefits for the economic operators in relation to the estimated benefit for persons with disabilities, taking into account the amount and frequency of use of the specific product or service; and (iii) the ratio of the net costs of compliance with accessibility requirements to the net turnover of the economic operator.[74]

The foregoing criteria can be deemed to be problematic in several respects. Firstly, as outlined in section 2 above, the CRPD's accessibility norm is not constrained by a defence of disproportionate burden, which attaches instead to the reasonable accommodation duty (and EU law has already enshrined such a defence related to the accommodation duty in the Employment Equality Directive).[75] While it is understandable that the EU institutions introduced the aforementioned exceptions to the Directive's accessibility requirements, it is essential that they are not used as a loophole to avoid compliance with the requirements

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[70] EAA, Preamble, para. 50.

[71] Halvorsen R., Hvinden B., Bickenbach J., Ferri D., Guillén Rodriguez A.M., *The Contours of the Emerging Disability Policy in Europe: Revisiting the Multi-Level and Multi-Actor Framework*, in Halvorsen R., Hvinden B., Bickenbach J., Ferri D., Guillén Rodriguez A.M. (eds.), *The Changing Disability Policy System: Active Citizenship and Disability in Europe*, Volume 1, London and New York: Routledge, 2017, pp. 215-234, p. 220.

[72] EAA, Article 14(1)(a).

[73] EAA, Article 14(1)(b).

[74] EAA, Annex VI.

[75] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303, p. 16 ss.

of the EAA and, by extension, those of the CRPD. EDF fears that this provision might jeopardise the implementation of the Directive; however, it has emphasised the fact that a safeguard exists, whereby receiving external funding for the improvement of accessibility does not allow economic enterprises to invoke the «disproportionate burden» clause in Article 14 of the EAA.

Another problematic aspect of the exceptions laid down in the EAA relates to the fact that economic operators are responsible for determining themselves whether compliance with the accessibility requirements contained in the Directive constitutes a disproportionate burden, according to Article 14(2). The organisation Inclusion Europe notes that this provision is problematic, since it is based on the self-assessment of the relevant economic operators, instead of a formal process whereby economic actors may seek to be exempted from their obligation in this regard under the EAA.[76] In addition, when it comes to the assessment of the frequency and duration of product use under point (ii) outlined above, Inclusion Europe contends that:

> it is of a great concern that operators might make their assessments based on the current situation and market behaviour. Individuals with intellectual disability are largely excluded from the market and it is not likely that market operators would realise the extent to which this group would use and benefit from a product or service if full accessibility was put in place.[77]

The second way in which the EAA falls short of the paradigm of redistributive equality envisaged in the CRPD lies in the fact that, under Article 4(5) of the EAA, microenterprises providing services within the scope of the Directive are exempted from complying with its accessibility requirements,[78] meaning that companies with less than ten employees do not have to make their services accessible. This exemption from the scope of the Directive means that a large number of service providers can lawfully continue to exclude potential customers as a result of inaccessibility.[79]

These limitations on the obligations set down in the Directive seem to have arisen (at least partly) out of concerns expressed in a report of the European Parliament, issued in May 2017, where it was argued that the EAA should strike 'the right balance' between the needs of persons with disabilities, and creating possibilities for innovative goods and services, as well as reducing disproportionate costs for companies.[80] At the time, EDF argued

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[76] Inclusion Europe, "Position about the proposed European Accessibility Act", *Inclusion Europe website*, 2016, p. 6. URL: <https://inclusion-europe.eu/wp-content/uploads/2015/03/IE_policypaper_EAA_final.pdf > [accessed on 12/09/2019].

[77] *Ibidem*, p. 6.

[78] See EAA, Article 4(5). See also EAA, Preamble, paras. 71-73.

[79] According to the European Commission's Annual Report on European SMEs 2016/2017, at pp. 11-12, microenterprises are, by far, the most common type of small-to-medium enterprise (SME), accounting for 93% of all enterprises and 93% of all SMEs in the non-financial business sector. European Commission, "Annual Report on European SMEs 2016/2017. Focus on Self-employment", 2017. URL: <http://ec.europa.eu/eurostat/cache/metadata/en/lfsq_esms.htm> [accessed on 12/09/2019].

[80] European Parliament, "Report on the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States

that the European Parliament seemed to consider the EAA to be a burden on enterprises, instead of an opportunity for enterprises to reach more consumers with disabilities.[81] Moreover, EDF posited that the opinion of the European Parliament did not give recognition to the full potential of the EAA as an instrument for implementing Article 9 CRPD by the EU and the Member States.[82]

On balance, therefore, the EAA does not satisfy the redistributive dimension of inclusive equality. In itself, this is understandable due to the fact that the Directive is a regulatory measure, rather than a redistributive one, and it is also not surprising given the limited redistributive potential of EU measures on the whole. Nonetheless, it is pivotal that the actions of the Member States are carefully monitored with regard to the various limitations on, and exemptions from, the scope of the Directive.

3.2.3. A Participative Dimension

The third dimension of inclusive equality under the CRPD is the participative dimension. With regard to the first element of the participative dimension, the EAA is certainly built on increasing the participation and inclusion of people with disabilities in the digital society. As demonstrated above,[83] the material scope of the EAA is wide-ranging, from the perspective of ICT products and services at least. Concerning the second element of the participative dimension, namely guaranteeing people with disabilities an opportunity to participate in the adoption, implementation and monitoring of accessibility measures, the EAA has also incorporated this participative dimension in certain respects.

In the first instance, representative organisations of people with disabilities are included in the implementation and monitoring process set out in the Directive through a Working Group envisaged under Article 28 of the EAA.[84] This should ensure a coherent application of the criteria pertaining to assessment of the exceptions contained in the EAA.[85] The Working Group will consist of representatives of market surveillance authorities, authorities responsible for compliance of services with the EAA requirements, relevant stakeholders and representatives of persons with disabilities. The purpose of the Working Group, of which EDF expects to be a member, is to exchange information, and to facilitate the cooperation of national authorities and provide advice to the Commission,

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as regards the accessibility requirements for products and services (A8-0188/2017)", 2017, p. 112. URL: <http://www.europarl.europa.eu/doceo/document/A-8-2017-0188_EN.html> [accessed on 12/09/2019].

[81] See, European Disability Forum (2017), "Opinion on the European Parliament's opinion on the proposed European Accessibility Act". URL: <http://www.edf-feph.org/newsroom/news/accessibility-act-business-over-people> [accessed on 12/09/2019].

[82] *Ibidem*.

[83] Section 3.2.1., above.

[84] This was encouraged by the European Economic and Social Committee. See Opinion of the European Economic and Social Committee, para. 5.10.

[85] European Disability Forum (2016), "Initial Response to the Proposal for a European Accessibility Act". URL: <http://www.edf-feph.org/sites/default/files/edf_initial_response_european_accessibility_act_feb_2016_-_final_1.pdf> [accessed on 12/09/2019].

particularly on future guidelines with regard to the exemption based on «disproportionate burden» and «fundamental alteration».[86] EDF expects the Working Group to be «a driving force» for the Directive's implementation at the national level and a «gateway» for disabled persons' organisations (DPOs) to contact the national authorities responsible for accessibility legislation.[87]

Participation of people with disabilities in standardisation processes pertaining to the accessibility of digital (and other) goods and services is also essential, since DPOs are often excluded from those processes, which are often dominated by industry.[88] Notably, the EAA refers to the relevant standardisation processes in Article 15 of the Directive.[89] In that vein, Preamble paragraph 77 of the EAA states that:

> with a view to establishing, in the most efficient way, harmonised standards and technical specifications that meet the accessibility requirements of this Directive for products and services, the Commission *should, where this is feasible*, involve European umbrella organisations of persons with disabilities and all other relevant stakeholders in the process.[90]

While it is positive that the EAA mentions people with disabilities and their representative organisations in the context of standardisation, the Directive does not guarantee participation of people with disabilities in standardisation processes, encouraging this only where it is feasible, and the EU Regulation on European standardisation mirrors the permissive language of Preamble paragraph 77 of the EAA.[91] Thus, while the participative dimension of inclusive equality is mostly satisfied through the Working Group envisaged under the EAA, it is vital to ensure that people with disabilities and their representative organisations can participate in all aspects of the Directive's implementation, including standardisation processes.[92]

3.2.4. A Recognition Dimension

The fourth, and final, dimension of inclusive equality is the recognition dimension, which aims to combat stigma, stereotyping, prejudice and violence, and to adequately take into account the dignity of human beings and their intersectionality.

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[86] EAA, Article 28(c).
[87] European Disability Forum (2019), "Analysis of the European Accessibility Act", p. 14.
[88] *Ibidem*, p. 12.
[89] On accessibility standards, see generally Matamala A., Orero P., "Standardising Accessibility: Transferring Knowledge to Society", *Journal of Audiovisual Translation*, 1(1), 2018, pp. 139-154.
[90] Emphasis added.
[91] Regulation (EU) No. 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, [2012] OJ L 316, p. 12 ss., states in recital 24 that: «the participation of persons with disabilities and of organisations representing their interests should be *facilitated* by all available means throughout the standardisation process» (emphasis added).
[92] On this point, see generally the remarks of Hosking D., "Promoting Accessibility for Disabled People Using EU Standardisation Policy", *European Law Review*, 42, 2017, pp. 145-165.

Areheart and Stein maintain that «[m]uch as physical access [...] was critical for social interaction and consequent equality of opportunity, virtual access is now critical for integrating people with disabilities and breaking down stereotypes».[93] In that vein, the EAA, with its focus not only on disability accessibility but also on UD, seeks to contribute to breaking down stigmatisation and prejudicial attitudinal barriers. According to Charitakis, UD is the «most appropriate method for dismantling the accessibility barriers that people with disabilities currently face, without the stigmatisation that Accessible Design might cause».[94]

In spite of this underlying aim of inclusive design, the EAA does not include any provision related to combatting stigma, as it is more focused on the content of digital and other services, unlike Article 9(1)(c)(i) of the Audiovisual Media Services Directive, according to which EU Member States are required to ensure that audiovisual commercial communications provided by media service providers in their jurisdiction shall not prejudice respect for human dignity. While the EAA does not contain any similar provision related to the scope of the products and services included in the Directive, it affirms (in Preamble, paragraph 20) that service providers should «ensure proper and continuous training of their personnel in order to ensure that they are knowledgeable about how to use accessible products and services». That paragraph also further specifies that «training should cover issues such as information provision, advice and advertising». This is an essential provision that will seek to ensure that economic operators are made aware of the capabilities and contributions of persons with disabilities, as well as the various barriers to access that they face, in order to break down prejudices and stigma.

Overall, the Directive partly satisfies the recognition dimension of inclusive equality. However, it is vital that training is provided on other aspects of the Directive, for instance, on the role of the market surveillance authority in the assessment of the disproportionate burden criterion for market operators.

4. Conclusion

Ferri and Favalli assert that «overall, the [CRPD] not only situates [digital] accessibility within the realm of human rights, but also qualifies it as a necessary precondition for equality, as well as acknowledging its importance as a tool for participation and social inclusion».[95]

The EAA represents a horizontal legal tool that can serve to complement sectoral legislation on digital accessibility in the field of audiovisual services and electronic communications, and ensure new EU-wide minimum accessibility requirements for a relatively broad range of digital (and other) products and services. The EAA is designed not only

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[93] Areheart B.A., Stein M.A., "Integrating the Internet", *University of Tennessee Legal Studies Research Paper No. 231*, *George Washington Law Review*, 83, 2015, p. 453, available also on line, URL: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2420510> [accessed on 12/09/2019].

[94] See Charitakis S., *Access Denied*, p. 100.

[95] Ferri D., Favalli S., "Web Accessibility for People with Disabilities in the European Union", p. 48.

to harmonise Member States' laws with regard to accessibility requirements but also to promote implementation of the CRPD's obligations on accessibility.

This article has analysed the EAA from the perspective of the model of inclusive equality that underpins the CRPD's provisions, including its accessibility obligations in Article 9. The CRPD's model of inclusive equality contains four intertwined dimensions, namely the accommodating, fair redistributive, participative and recognition dimensions.

It is argued throughout this contribution that the Directive largely meets the accommodating dimension of the CRPD's model of inclusive equality due to the wide personal and material scope of the EAA, and the fact that the Directive adopts a rights-based approach to accessibility and UD. Furthermore, the EAA sets out detailed and robust enforcement mechanisms, which seek to ensure that domestic surveillance authorities have the competence to hold private entities accountable for breaches of the Directive. In spite of these positive features, there are several notable limitations on the scope of the Directive, pertaining not only to the fact that it does not cover accessibility of the built environment related to the products and services regulated in the Directive, but also that it does not include within its material scope the websites of all private companies.

With regard to the redistributive dimension of inclusive equality, the Directive, by its very nature, was not intended to have a redistributive aspect *per se*. Nonetheless, it was noted above that the Directive is somewhat deficient when compared with the CRPD's model of inclusive equality due to the two exceptions that were included in the EAA. These exceptions relate, firstly, to the fact that economic operators do not have to comply with the requirements of the Directive where to do so would result in the fundamental alteration of a product or service, or in a disproportionate burden; and, secondly, to the fact that micro-enterprises providing services do not have to comply with the provisions of the Directive. It is important that these exceptions should be monitored carefully in EU Member States, which should create funds to provide assistance in instances where economic operators cannot cover the costs of implementing the requirements of the EAA, so as to promote CRPD compliance.

With regard to the participative dimension, this contribution argues that the EAA adopts a holistic approach to ensuring not only increased participation of persons with disabilities in society, through wide-ranging accessibility requirements, but also to facilitating their participation and active involvement in the adoption, implementation and monitoring of the Directive. However, the Directive does not contain a guarantee that DPOs can participate in standardisation processes pertaining to the EAA, encouraging their inclusion in such processes only where that is feasible.

Finally, concerning the fourth dimension of inclusive equality – the recognition dimension – the EAA does not include any provision related to combatting stigma; nonetheless, the Preamble of the Directive notes that accessibility training must be provided to service providers. It is submitted above that Member States should ensure more widespread training related to the mechanisms envisaged under the Directive, such as with regard to the role of the market surveillance authorities.

On the whole, this article concurs with the assessment of EDF, namely that the EAA reflects a «significant step in the journey» towards making the EU fully accessible for per-

sons with disabilities.[96] The Directive has begun to pave the road towards digital inclusion and equality for European citizens with disabilities. The EU institutions have adopted a holistic approach with regard to the regulation of accessibility, with a view to not only tackling the discriminatory impact of inaccessible digital goods and services, but also implementing the requirements of Article 9 CRPD, at least in the field of digital accessibility.

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[96] EDF (2019), "Analysis of the European Accessibility Act", p. 3.

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The Role of Public Administration in Promoting the Accessibility of Online Resources: The Italian Legal Framework

Vittorio Pampanin

1. Introduction

A large number of people do not have access to information and more generally to knowledge, the same access that is granted for the rest of the population, for the sole reason of suffering from physical, sensory or cognitive disability, or just being old.[1]

On the one hand, the rapid technological evolution and the increasingly widespread use of computers and the Internet have enabled rapid access to ever greater sources of information and services. On the other hand, it has also led to the emergence of new barriers and new consequent exclusions from the access to these online resources.

While a large part of the communication, information and services have moved to the Internet thanks to new technologies, a substantial part of the population is not in the position to use them, therefore remaining marginalized.[2]

In other words, what could represent a great opportunity for social inclusion, turns paradoxically into a further form of exclusion for those categories of citizens who could, instead, benefit more from new technologies.[3]

The phenomenon of the so-called *digital divide* can be reasonably related to the new inequalities that modern society must face and that are increasingly going beyond a merely economic dimension to involve other aspects of people's lives, often connected to the enjoyment of the so-called *citizenship rights*.

As known, in the fundamental provision of Article 3(2) of the Italian Constitution is enshrined the principle of substantial equality according to which it is the Republic's

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[1] See Eramo F., "La legge 9 gennaio 2004, No. 4, sull'accesso dei soggetti disabili agli strumenti informatici: prime osservazioni", *Famiglia e Diritto*, 4, 2005, pp. 439-448, where it is also clarified that disabilities can be traced to the following types: sensory disabilities, motor disabilities, psychic or cognitive disabilities. Often, to identify people with various disabilities we use a fourth category, that of multiple disabilities.

[2] The problem is closely linked to the complex and varied phenomenon of the digital divide, on which, with particular reference to people with disabilities, see Jaeger P.T., *Disability and the Internet. Confronting a Digital Divide*, Boulder, CO: Rienner, 2011; Dobransky K., Hargittai E., "The Disability Divide in Internet Access and Use", *Information, Communication & Society*, 9(3), 2006, pp. 313-334. On this topic see also Chiara G., *L'accesso a Internet dei soggetti diversamente abili: profili generali,* in Ciancio A., De Minico G., Demuro G., Donati F., Villone M. (a cura di), *Nuovi mezzi di comunicazione e identità. Omologazione o diversità?*, Roma: Aracne, 2012, pp. 57-76.

[3] See Addis P., *Persone con disabilità e web: altri spazi di esclusione?*, in Passaglia P., Poletti D. (a cura di), *Nodi virtuali, legami informali: Internet alla ricerca di regole*, Pisa: Pisa University Press, 2017, pp. 305-317, p. 306 ss.

task to remove the economic and social obstacles which, limiting in fact the freedom and equality of citizens prevent the full development of the human person and the effective participation of all workers to the political, economic and social organization of the country: it is therefore primarily for the public authorities to take actions to put all citizens, with or without disabilities, in the position to feel part of the social life of the country also thanks to the access to the new potential offered by modern communication tools (Internet and online resources above all).

It is not surprising, then, that the first initiatives aimed at favoring the full accessibility to the web, with particular attention to people with disabilities, have been addressed primarily to public administrations that first had to deal with this specific need.

Moreover, it is easy to see how some of the fundamental principles that guide the action of the public administration precisely respond – perhaps in an unintentional way – to the need for total accessibility to online resources and services even for disabled people (the so-called *web accessibility*). We are referring to the traditional constitutional principle of impartiality as well as to the principles of access and transparency, established only in more recent times in our legal system.[4] In fact, if we re-read them in 'modern' perspective, we are led to think that these principles could be sufficient to satisfy the need of all citizens to get in touch with the public administration and then establish a relationship with it, regardless of any personal disability.

On the one hand, impartiality no longer applies only to the moment of administrative decision, preventing any form of favoritism or discrimination, but it also relates to the relations between the administration and third parties (stakeholders), requiring that they are conducted fairly.[5] In this sense, then, it should be said to be 'fair' – and therefore truly impartial – only the behavior of an administration that, for example, in publishing the necessary information relating to the conduct of a tender procedure, took care to prepare adequate measures to guarantee everyone can learn about them and can participate (making them accessible to people with disabilities, for example).

On the other hand, if we consider access to administrative documents and transparency, understood as total accessibility of information concerning the organization and activity of public administrations (Article 1(1) of Legislative Decree 14 March 2013, No. 33), in the current historical context where even public information passes through the network, they do represent principles that, in order to be fully applied to all citizens, cannot but presuppose an effective accessibility also 'technical' of the content made available online.

The web accessibility therefore assumes a decisive importance in the context of the modern relationship between administration and citizens to the extent that it is instrumental to the transparency that is a condition for guaranteeing individual and collective freedoms, as well as civil, political and social rights, integrates the right to good admin-

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[4] See respectively Articles 22 ss. of Law 7 August 1990, No. 241 on new regulations regarding administrative procedure and right of access to administrative documents and Articles 1 ss. of Legislative Decree 14 March 2013, No. 33 on the reorganization of the regulations concerning the obligations of publicity, transparency and dissemination of information by public administrations.

[5] See in these terms Cerulli Irelli V., *Lineamenti del diritto amministrativo*, Torino: Giappichelli, 2012, pp. 255-256.

istration and contributes to the creation of an open administration, at the service of the citizen (Article 1(2) of Legislative Decree 14 March 2013, No. 33).

The purpose of this contribution is therefore to present a brief overview of legislative and administrative initiatives that contribute to the national discipline to promote the accessibility of the resources available online by persons with disabilities, with particular reference to the active role both assigned and recognized to public administration.

As we will try to highlight, the Italian discipline related to web accessibility is configured as a multilevel system that involves a plurality of subjects in the realization of the public purpose represented by the protection of the right of people with disabilities to access and use online resources and services (of the public administration) without limitations or discrimination related to their condition.

2. The Stanca Act and the Access of Persons with Disabilities to the IT Tools of the Public Administration

The interest in the issue of accessibility to websites for people with disabilities appears in the Italian legal order starting from 2001 through the adoption of some acts by the central administrative bodies, even before the issuing of specific regulatory provisions.[6]

Among the various initiatives promoted in those years, it is worth noting two circulars, respectively from the Ministry of Public Function and the Agency for Informatics in Public Administrations. They could represent an instrument with an innovative impact on the approach of public administrations to the problem of access to online resources for people with disabilities insofar as they explicitly referred to the guidelines on accessibility of the websites prepared by the World Web Consortium (W3C).[7]

This occurred in conjunction with the emergence of the topic of web accessibility at a European level. It became the subject of debate precisely in the early 2000s and it led to an initiative of the Council of the European Union that – with the aim of raising public awareness on the issues related to non-discrimination and integration – proclaimed 2003 the European year of people with disabilities.[8]

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[6] See the Circular of the Ministry of Public Function 13 March 2001, No. 3 containing "Guidelines for the organization, usability and accessibility of public administrations' websites" and the Circular of the Agency for Informatics in Public Administrations – Aipa, 6 September 2001, No. AIPA/CR /32 expressly dedicated to the "Criteria and tools to improve the accessibility of websites and IT applications to disabled people".

[7] On the various initiatives of the early 2000s aimed at facilitating the inclusion of people with disabilities into the information society, see Policella E.O., "Internet e disabili", *Diritto.it*, 2003 [online]. URL: < https://www.diritto.it/articoli/dir_tecnologie/policella4.html> [accessed on 30/10/2019]. The author also reports the Directive 30 May 2002 of the President of the Council of Ministers concerning the knowledge and use of the Internet domain ".gov.it" and the effective interaction of the national portal 'italia.gov.it' with public administrations and their territorial branches, that would have played an important role by requiring administrations willing to use 3rd level domain names, to be used within the '.gov.it' domain, to comply with the requirements on the accessibility.

[8] See Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities 2003.

The commitment of the national public authorities to guarantee accessibility to the resources and services offered by the Internet was officially established the following year through the approval of the Law 9 January 2004, No. 4 (the so-called Stanca Act, from the name of the promoter Minister). Thanks to this law, Italy became one of the first countries in Europe where access to IT tools for disabled people was promoted, with particular reference to the websites of public administrations. It was decided to give more strength to what was already foreseen with the two previously mentioned circulars that, due to the purely internal value of their effects, constituted only a first step – yet insufficient – towards the affirmation of a generalized web accessibility in the public administration.

In order to implement its provisions (a regulation and a ministerial decree), the Stanca Act was accompanied by further acts aimed at integrating and specifying the requirements necessary to satisfy the need for accessibility of websites also from a technical point of view, thus contributing to setting up a legal framework based on several levels: legislative, regulatory and administrative.[9]

Despite the fact that fifteen years have passed, the main reference to look for in the field of web accessibility, with regard to public administrations, is still represented today by the Stanca Act, as confirmed by the choice of the Italian legislator to implement the European Directive 2016/2102 on «the accessibility of the websites and mobile applications of public sector bodies» limiting itself to integrate and only partially modify the original text.[10]

Since the first version of 2004, the purpose of the Stanca Act is the recognition and protection of the right of every person to access all information sources and related services, including those that are articulated through IT tools (Article 1(1)).

In particular, the second paragraph of Article 1 states that the right of access to the computer and telematic services of the public administration and to public utility services by persons with disabilities is protected and guaranteed, in compliance with the principle of equality pursuant to Article 3 of the Constitution (Article 1(2)).[11]

With regard to the scope of the discipline, it includes not only public administrations, but also private companies that are public service concessionaires, as well as all the subjects that benefit from public grants or facilitations for the provision of their services through information systems or the Internet.[12]

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[9] See the Decree of the President of the Republic 1 March 2005, No. 75 containing the "Regulation implementing the Law to facilitate access by disabled people to IT tools" and the Ministerial Decree of 8 July 2005 concerning "Technical requirements and the different levels of access to IT tools".

[10] See Legislative Decree 10 August 2018, No. 106 of implementation of Directive (EU) 2016/2102 concerning the accessibility of websites and mobile applications of public bodies.

[11] See Caporale M., "L'accessibilità ai siti web e alle applicazioni mobili delle pubbliche amministrazioni", *Giornale di diritto amministrativo*, 3, 2019, pp. 357-367, p. 357 ss. where it is stressed that the provision of the Stanca Act, in unsuspected times, explicitly states a right to information declined in the right to access (and more precisely accessibility) to telematics and IT tools with respect to the PP.AA., in particular by persons with disabilities, before the digital administration code (CAD) and long before the reforms that recognize the right of 'anyone' to access the information of the PP.AA., which from the Legislative Decree 14 March 2013, No. 33 onwards occurs mainly through the websites of the PP.AA. thanks to the institutions of simple civic access and generalized civic access.

[12] See Article 3(1) which in turn refers to Article 1(2) of Legislative Decree 30 March 2001, No. 165,

In this respect, the provisions of the Stanca Act have always provided for an extensive application of the principles of accessibility that in some way anticipated and implemented what is still only a wish expressed in recital 34 of Directive (EU) 2016/2102.[13]

The recent transposition of the Directive introduced some completely new provisions in the text of the law that closely follows those of the European legislation, such as:

– the statement of the general principle of accessibility, according to which a website is accessible when perceptible, usable, understandable and solid (Article 3-*bis*);
– the provision of a waiver to the application of accessibility rules when it results in a disproportionate organizational or financial burden (so-called disproportionate burden) (Article 3-*ter*);
– the obligation to draw up and publish an accessibility declaration containing the indications on the contents not yet accessible as well as on any alternative accessibility solutions (Article 3-*quater*).

Regarding these new forecasts, for the analysis of which we refer to the influential opinion expressed in the volume, it seems useful here to observe how they contribute to characterize the discipline of protection of Internet access for people with disabilities according to an approach that indeed appears to be very similar to that already adopted by the Union in other areas of intervention. It is characterized by an intrinsic tension between conflicting needs, such as in the environmental field (where economic development and environmental protection are opposed) or in the field of the neutrality of the Internet access network (in which the promotion of technological innovation and services clashes with that of indiscriminate access to the network).

In the first case it is possible to find how the principle of proportionality acts as a limit to the environmental obligations imposed by the European legislation when excessive economic burdens may derive from this. In the second case, instead, it emerges how, when it is not possible to fulfill the neutrality obligations in accessing the Internet network (for various reasons, whether technical or related with security), the protection offered to users is essentially reduced to the provision of a duty to inform about the cases and the reasons that justify the non-fulfillment of the prohibitions of discrimination of access in respect of the general principle of transparency.

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where a definition of what is a public administration is not provided but a very detailed list of the various subjects considered public, including in particular all the administrations of the State, including institutions and schools at all levels and educational institutions, the companies and administrations of the State with autonomous regulations, the Regions, the Provinces, the Municipalities, the university institutions, the Chambers of commerce, industries, crafts and agriculture and their associations, all the national, regional and local non-economic public bodies, the administrations, companies and institutions of the National Health Service.

[13] See recital 34, according to which «Member States should be given the opportunity to provide services and services to the public, including healthcare, childcare, social inclusion and social security areas, as well in the transport and electricity, gas, heat, water, electronic communication and postal services».

In view of these broader provisions the regulation also identifies more specific obligations for public administrations, but it is still capable of expanding the scope of the provisions on web accessibility.

In fact, administrations must adequately take into consideration the accessibility requirements in all procedures for the purchase of goods and for the supply of IT services. While in the original text the consideration of these aspects represented only a reason to account for the preference among the different offers, other conditions being equal, in the current text it has become necessary. Thus it can be disregarded only in the hypothesis of disproportionate burden or for contents and services excluded from the ambit of application of the Directive (Article 4(1)). Otherwise, in the particular case of the creation or editing of a public administration website, the accessibility requirements are a necessary condition of legitimacy, with the consequence that the failure to provide for the described requirements is sanctioned with the provision of the nullity of the contract.[14] With regard to contracts in place, the obligation to adapt their content to the accessibility requirements identified by specific guidelines, to be carried out within 12 months of their adoption, is instead envisaged (Article 4(2)).[15]

The same obligations of compliance and adaptation to the accessibility requirements are then a condition for the release of economic benefits in favor of private subjects for the purchase of goods and services destined to persons with disabilities, be they employees or simple users (Article 4(3)).[16] It is therefore evident that the legislator immediately wanted to extend the field of application of the discipline beyond the mere public sphere by attempting to involve private subjects; in this way a general application of the rules of accessibility to online resources is encouraged, thus anticipating the very recent European Accessibility Act.

Another aspect to be emphasized in the discipline set by the Stanca Act is the fact that it is applicable both to the training and teaching material used in schools and to internal training activities in public administrations. In the first case it is also accompanied by the provision of agreements between the Ministry of Education and publishers in order to supply school libraries with copies of digital educational tools accessible to students with disabilities. In the second case, training activities must not only be carried out with accessible technologies, but must include accessibility and assistive technology studies in order to promote knowledge and awareness even among public employees.

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[14] In the text prior to the transposition of the Directive this represented the only concrete provision aimed at promoting the accessibility of public administration sites, so that the principle of accessibility was guaranteed only when the creation of a website of the public administration required the conclusion of a contract. In all other cases, which are, obviously, the majority, the principle of accessibility had no guarantee that it could be enforced. These observations are expressed by Galliani D., "L'accessibilità dei siti Internet delle pubbliche amministrazioni e la c.d. Legge Stanca", 11, 2008, p. 4 ss., *federalismi.it* [online]. URL:< https://federalismi.it/> [accessed on 30/10/2019].

[15] The system of obligations imposed by the Stanca Act is also binding thanks to the provision of a managerial and disciplinary responsibility that is imposed on public managers in the event of non-compliance with these regulatory provisions (Article 9).

[16] Similarly, even public employers must provide the employee with disabilities the hardware and software equipment and assistive technology adapted to their specific disability, in relation to the tasks actually performed (Article 4(4)).

In this way an attempt is made to promote the possibility of accessing Internet resources for people with disabilities by intervening not only through the imposition of obligations, but by acting directly on the educational and training level in order to favor the emergence of a true culture of accessibility, an indispensable element for the effective achievement of the objectives set by the legislation (and by the Directive).

2.1. Additional Regulatory References on Accessibility

The discipline that assigns to public administrations the task of facilitating access to the online resources for which they are responsible, even to persons with disabilities, is not exclusively regulated by the standards of the Stanca Act, but is also integrated by other legislative sources that contribute to strengthen its overall scope within our system.

We must take into account that the issuing of the Stanca Act was part of a wider process of digitalization of the public administration particularly promoted by the annual simplification law of 2001. This law delegated the government to adopt one or more legislative decrees to simplify and innovate the regulatory framework for digital administration.

The 'Code of Digital Administration' was issued in implementation of the delegation, that in several provisions refers to principles already expressed by the Stanca Act. These principles require compliance with the same accessibility requirements for online resources in broader terms.[17] First of all, among the general rules it is stated that public administrations, when organizing their own activity, must use information and communication technologies to achieve the objectives of efficiency, effectiveness, cost-effectiveness, impartiality, transparency, simplification and participation in compliance with the principles of equality and non-discrimination (Article 12(1)).

This norm identifies as objectives those fundamental principles that the action of the public administration must traditionally comply with (already expressed in Law 7 August 1990, No. 241) identifying the use of information and communication technologies as the privileged tool for their realization. In this way the use of ICT takes on a central value as it is intended to define the administration in a way that is significantly reflected on the internal organization of the public administrations.[18] In fact, provisions have been made within each (State) administration for a structure (management office) to act as 'responsible for the digital transition' that is entrusted with numerous tasks related to the implementation of the principles mentioned above.

It is interesting to highlight how this office is also entrusted with the task of supervis-

[17] See Legislative Decree 7 March 2005, No. 82. The delegation to the Government has been implemented in a further legislative *corpus*, represented by Legislative Decree 28 February 2005, No. 42 relating to the «establishment of the public connectivity system and the public administration's international network», pursuant to Article 10 of Law 29 July 2003, No. 229.

[18] This aspect is also confirmed by the provision of Article 15(1), according to which the structural and management reorganization of public administrations aimed at achieving the objectives referred to in Article 12(1), also occurs through the better and more extensive use of information and communication technologies in a coordinated strategy that ensures the consistent development of the digitalisation process.

ing the administration in order to guarantee access for disabled people to the tools and IT services provided, and more generally to guarantee the adaptation of the structures and services to the needs and the requirements imposed by the principle of accessibility.[19]

Moreover, the implementation of the accessibility principle is declined according to a double meaning: it is guaranteed both with reference to the digital contents that are accessible through the use of information and communication technologies, and with reference to the 'container' (such as websites).

In this sense, it is envisaged that public administrations create electronic documents or documents that can be used independently from people's disability, in compliance with the accessibility criteria established by the guidelines adopted to implement the Stanca Act (Article 23-*ter*(5-*bis*)). Besides, public administration sites must comply with the principles of accessibility, as well as high usability and availability, also by disabled people (Article 53(1)).

In light of the aforementioned provisions, it can therefore be stated that the guarantee of usability and accessibility of the online resources of the public administration – already affirmed by the Stanca Act for people with disabilities – assumes an even greater scope with the Digital Administration Code to the extent that these principles become a compulsory feature for all administrative actions and relationships with citizens through ICT.

Another legislative text that contributes to strengthening the implementation of the provisions on web accessibility is represented by the so-called Code of Public Contracts that contains numerous references to the accessibility requirements that administrations must take into account when they act as contracting stations for goods, services and works. Two of them are particularly relevant.

The first one relates to the procedures through which the tenders are held and provides that, when carried out using telematic systems, technologies are chosen in order to ensure accessibility for persons with disabilities, in compliance with European standards (Article 58(9)).

The second one concerns the selection criteria of the offer. It includes among the parameters of evaluation of the offers a few qualitative aspects such as the accessibility (of goods and services) for people with disabilities, and more generally the adequate planning for all users (Article 95(6)(a)).

3. The Italian Agency for Digital AgID and the Web Accessibility Implementation System

The central element in the discipline on accessibility of online resources for people with disabilities is represented by the concrete determination of the requirements that all administrations must respect and apply.

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[19] See Carloni E. (a cura di), *Codice dell'amministrazione digitale*, Santarcangelo di Romagna: Maggioli, 2005, p. 153 ss.

Within the Italian legal system, the competent subject for the drawing up of this important regulatory function is represented by the Italian Agency for Digital AgID that replaced a Department of the Presidency of the Council of Ministers.[20]

The Agency was therefore assigned the task of issuing specific guidelines for the technical criteria for the accessibility of IT tools, including websites and mobile applications. These guidelines, in compliance with European acts and Directives, are established in accordance with the principles of accessibility sanctioned by Article 3-*bis* of the Stanca Act.

This activity has resulted in many initiatives. Among these, it is necessary to point out the adoption of two circulars: the first one is No. 61/2013 that specified the obligations of public administrations in terms of accessibility of websites and IT services. Then, the second one is No. 1/2016 concerning the obligation to publish on the website the annual accessibility objectives to which each public administration must conform by Article 9(7), of Legislative Decree 18 October 2012, No. 179.[21] This last provision establishes that by March 31 of each year, public administrations are requested to make available on their website information on the state of adaptation of their sites and online services to accessibility legislation. The AgID provided a 'Self-assessment questionnaire' as well as a specific online application in order to support public administrations in defining and publishing accessibility targets for each year.

The Italian Agency for Digital is constantly committed to updating and integrating the technical rules necessary to guarantee web accessibility under different profiles, ranging from the creation of an accessible document, to the preparation of rules for planning and designing accessible online services.[22]

Finally, the new guidelines on accessibility of IT tools previously updated in accordance with the provisions of Directive 2016/2102 and recently implemented in our legal system, have been subjected to public consultation (from 8 August to 7 September 2019). In particular, the draft of this document provides useful indications for the evaluation of cases in which public administrations are exempted from compliance with the obligations regarding accessibility to online content and services due to a disproportionate burden.[23]

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[20] The AgID was established only with Decree Law 22 June 2012, No. 83 on "Urgent measures for the growth of the country", while previously the setting of the technical parameters of accessibility of public administrations depended on the Department for innovation and technologies. However, the Agency remains subject to the powers of guidance and supervision of the President of the Council of Ministers or the Minister delegated by him.

[21] Among others see also AgID Circular 23 September 2015, No. 2 on "Technical specifications on hardware, software and assistive technology of workstations available to the employee with disabilities"; AgID Circular 7 July 2017, No. 3, containing "Recommendations and clarifications on the digital accessibility of public services provided over the counter by the Public Administration, in line with the requirements of online services and internal services".

[22] See "Practical Guide for the creation of an accessible document: explanatory document as an aid to the creation of accessible documents that can be published online on public websites" (26 March 2018) and "Design guidelines for digital services of the Public Administration" (23 April 2018).

[23] See Article 3-*ter* of the Stanca Act according to which the responsible subjects carry out the evaluation relative to the existence of the circumstances that determine the disproportionate burden according to the Guidelines.

For example, it is specified that the provider must direct its evaluation, with regard to the existence or not of the disproportionate burden, at verifying the reasonable proportion between the costs necessary to ensure full accessibility and the benefits expected for people with disabilities. As regards costs, the provider must take into account that there are no new or greater burdens on public finance for the implementation of the legislation. Therefore, it must meet the new obligations with human, instrumental and financial resources that are available under current legislation.[24] As regards benefits, the provider must take into account the frequency and duration of use of the specific website or mobile application. The existence of a disproportionate burden can be invoked only after having adopted the aforementioned principle of strict necessity, *e.g.* after having verified that the actual use and the number of accesses to the website and to the mobile application is limited enough to make the cost necessary to guarantee the full accessibility of the service or information completely disproportionate.

In addition to these tasks, the Italian Agency for Digital also performs functions of monitoring of the state of implementation of the legislation against which also the figure of the digital Ombudsman can intervene to protect users. The Digital Administration Code provided the establishment at the AgID with a specific office for the digital Ombudsman, to which anyone can submit the reports relating to alleged violations of the Code itself and of any other regulation concerning digitalization and innovation of the public administration (Article 17(1-*quarter*)) through a special area on the Agency's institutional website.

In case the digital Ombudsman considers the complaint well-founded, it invites the administration responsible for the violation to promptly remedy the problem in no more than thirty days. At the same time, it signals the non-fulfillment to the competent office for the disciplinary procedures of each administration. Then, the protective role played by the digital Ombudsman is further strengthened by a rule introduced in the Stanca Act following the transposition of EU Directive 2016/2102: this is Article 3-*quinques*(2) that provides that in the event of a dispute over the accessibility declaration or in the event of an unsatisfactory monitoring the digital Ombudsman decides on the correct implementation of the law and arranges any corrective measures.

In light of the above, it is then possible to conclude by asserting the multilevel nature of the Italian legislation on accessibility of the online resources. This characteristic is due to the fact that the function of regulation (and related implementations) is exercised not only through interventions by part of the legislator, but also through administrative acts and initiatives (such as regulations, circulars, guidelines).

It can also be observed how the implementation of the discipline takes place according to a system that can also be defined as pluralistic for several reasons: on the one hand, the figure of the AgID as the main administrative authority competent in the field is flanked

[24] See "Guidelines on the accessibility of IT tools" (draft of 8 August 2019), point 6.1.2, p. 32, which also clarifies that in considering the resources available, each administration must take into account all forms of financing, such as incentives, facilities and other instruments, provided at European, national and regional level. All of these resources constitute an objective and essential parameter in the verification of proportionality referred to above.

by that of the National Observatory that exercises an important activity to promote the culture of accessibility and the diffusion of assistive technologies in favor of people with disabilities.[25] On the other hand, when each administration assumes the task of contracting station in the context of public procurement activities, it becomes itself the architect of the design and dissemination of online IT systems compliant with the accessibility parameters set by law, both in the preliminary phase of the preparation of the calls for tenders, and in the subsequent phase of the selection of the best contractor.

It can thus be said that a sort of widespread and shared model of implementation of the principles of accessibility of online resources in favor of people with disabilities is realized. This not only should ensure the progressive adaptation of the existing with respect to the current discipline, but also it ensures that accessibility is addressed starting from the service design phase, that is the most effective way to achieve the greatest benefits in favor of users with disabilities.

However, even though in the Italian system the attention to the problem of web accessibility was also present in the past, and today there is no lack of tools to achieve this goal within the public administration, some recent studies have shown how in reality most Italian municipal administration sites are not yet accessible according to the parameters required by the regulations.

Indeed, a research carried out in 2017 shows that out of 8057 analyzed Italian municipalities only 98 did not present accessibility problems, while among the remaining municipalities, 7947 show instead a plurality of problems that can be subdivided into 3 different categories depending on the progressive level of commitment required to solve them.

A possible explanation for this massive default by public administrations is that, as it often happens with regulatory reforms that directly involve public administrations, the legislation aimed to ensure web accessibility has not been accompanied by an adequate transfer of resources in favor of public administrations, neither in terms of personnel nor in strictly economic terms.

Therefore, much remains to be done.

We hope that the recent approval of the so-called European Accessibility Act, that is aimed not only to public administrations, it will succeed in triggering a virtuous process that puts in competition the large private service providers with public administrations, thus stimulating the adaptation of online resources to the required accessibility parameters.

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[25] See Addis P., *Poteri normativi del Governo e politiche della disabilità*, in Azzena L., Malfatti E. (a cura di), *Poteri normativi del governo ed effettività dei diritti sociali. Atti dell'incontro di studi (Pisa, 27 ottobre 2016)*, Pisa: Pisa University Press, 2017 pp. 71-85; Foggetti N., "Con la creazione dell'Osservatorio nazionale fatto il primo passo per adeguarsi alla disciplina", *Guida al Diritto*, 15, 2009, pp. 35-38.

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Section II

Accessibility, Human Dignity and Privacy Concerns

Disability and Social Media: Paving the Road to a Different Approach in the Protection of Human Rights in the Digital Era

Silvia Favalli*

1. Introduction

In the last decade, social media[1] – namely, websites and applications that enable users to create and share content or to participate in social networking – have acquired a primary role in individual and community life. In addition, for vulnerable groups at risk of social exclusion they represent an unprecedented opportunity to actively participate and be fully included in society. In this vein, persons with disabilities are increasingly turning to popular social media, taking advantage of interacting with social network platforms and benefitting from targeted mobile apps.

Correspondingly, the many benefits of social media use for the promotion and protection of human rights worldwide have been widely documented. Social media embody a powerful tool for human rights advocacy and awareness raising, as well as a new mean to promote health information, to monitor and manage vulnerable persons' well-being, to develop new kind of peer-to-peer online support. In particular, they offer new opportunities for care and communication specifically dedicated to persons with disabilities, who reports benefits from greater social connectedness and feelings of group belongings.

However, these tools also generate new challenges for the existing policy and legal framework, where new concerns addressing core human rights have been rapidly emerging. In this context, the situation of social media users with disabilities is particularly delicate.

Under such premises, the Project «Building an Inclusive Digital Society for Vulnerable Persons: The Role of Social Media Tools in a Disability Human Rights Perspective»,

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[1] The definition of the term social media is elusive. This research builds upon the understanding of social media provided by Kaplan and Haenlein, according to which there are different types of social media: collaborative projects (*i.e.* Wikipedia), blogs and microblogs (*i.e.* Twitter), social networking sites (*i.e.* Facebook), content communities (*i.e.* YouTube), virtual social worlds (*i.e.* Secondlife), Virtual game worlds (*i.e.* World of Warcraft). Kaplan A.M., Haenlein M., "Users of the World, Unite! The Challenges and Opportunities of Social Media", *Business Horizons*, 53(1), 2010, pp. 59-68.

financed by the University of Pavia under the call *Blue Sky Research 2017*, aims at making an original contribution to the issue of the legal and social dimensions of IT technologies, focusing on the crucial role of social media online tools in shaping the actual 'digital society' as a fully inclusive society for persons with disabilities. The research has been conducted adopting the viewpoint of persons with disabilities as privileged digital stakeholders, with the ultimate purpose to identify a new global and transnational governance in determining the proper legislative framework for an effective legal protection of such vulnerable groups in order to guarantee them access to IT technologies' advantages without suffering undue violation of their fundamental human rights. In particular, this paper analyses the most relevant challenges that the widespread use of social media by persons with disabilities generates for the protection of their human rights, focusing on social media accessibility, freedom of expression and opinion, privacy and data protection, human dignity and autonomy.

2. Human Rights in the Digital Age

In the last fifteen years, the interest on the interface between human rights and new digital technologies, with particular reference to the Internet and social media, has rapidly spread worldwide.

The United Nations World Summit on Information Society (WSIS) process 2003-2005,[2] which took place in two phases, respectively in Geneva (from 10 to 12 December 2003) and in Tunis (from 16 to 18 November 2005), is considered the first global attempt to translate human rights for the development and the global governance of the information society. For the first time, the UN declared its commitment to

> build a people-centred, inclusive and development-oriented Information Society… premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights.[3]

Following the WSIS Summit, the calls for the protection of human rights in the digital arena have resulted in various initiatives at the international and the regional levels.

At the global level, the WSIS Summit resulted in the creation of the Internet Governance Forum (IGF), an annual multi-stakeholder forum in which international agencies (*i.e.* UNESCO, ITU), international organizations (*i.e.* the African Union, the European Union, the Organization of American States, the OECD), governments, Internet professionals, businesses, NGOs and civil society organizations (*i.e.* W3C) focus on the development of the Internet, as well as its interaction with other areas of public policy. The United Nations Human Rights Council has since referred to human rights in the digital world in its reports

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[2] URL: <https://www.itu.int/net/wsis/index.html> [accessed on 05/09/2019].

[3] "Geneva Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium", adopted 10-12 December 2003, Geneva, WSIS-03/GENEVA/DOC/0004. URL: <https://www.itu.int/net/wsis/docs/geneva/official/dop.html> [accessed on 05/09/2019].

on the right to freedom of expression and opinion[4] and on the right to privacy in the digital age.[5] In 2009, the UNESCO commissioned a flagship series of publication on Internet Freedom to explore the changing legal and policy issues of the Internet and provide policy recommendations.[6] In 2013, the Internet Rights & Principles Dynamic Coalition – an international network of individuals and organizations based at the UN Internet Governance Forum – launched its flagship document, the Charter of Human Rights and Principles for the Internet, or 'Charter 2.0'.[7]

At the regional level, the African Declaration on Internet Rights and Freedoms,[8] launched during the 2013 African Internet Governance Forum, is a Pan-African initiative to promote human rights standards and principles of openness in Internet policy formulation and implementation on the continent. In Europe, both the Council of Europe and the European Union have respectively developed digital governance strategies. The Council of Europe has recently adopted its new Internet Governance Strategy 2016-2019.[9] The European Union has developed several initiatives under the Digital Agenda, one of seven flagship initiatives under the Europe 2020 Strategy.[10]

Nonetheless, to date, self-regulation of Non-State actors prevails, while there is no targeted global governance in determining a proper policy and legal framework regulating the digital world. In this context, the only international binding legal instrument expressly referring to the importance of access to new information and communications technologies and systems, including the Internet, is the 2006 United Nations Convention on the Rights of Persons with Disabilities (hereinafter, CRPD).

2.1. New Information and Communication Technologies in the United Nations Convention on the Rights of Persons with Disabilities

The CRPD, which is the UN human rights treaty most recently adopted, recognises the increasing role of new information and communications technologies and systems in the actual individual and community life, with particular reference to persons with disabil-

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[4] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27.

[5] Report of the Office of the United Nations High Commissioner for Human Rights, The Right to Privacy in the Digital Age, 30 June 2014, A/HRC/27/37.

[6] See the UNESCO website. URL: <https://en.unesco.org/unesco-series-on-internet-freedom> [accessed on 05/09/2019].

[7] See the UN Internet Governance Forum website. URL: <http://internetrightsandprinciples.org/wpcharter> [accessed on 05/09/2019].

[8] See the African Internet Governance Forum website. URL: <http://africaninternetrights.org/Articles/> [accessed on 05/09/2019].

[9] Internet Governance – Council of Europe Strategy (2016-2019), "Democracy, Human Rights and the Rule of Law in the Digital World". URL: <https://www.coe.int/en/web/freedom-expression/igstrategy> [accessed on 05/09/2019].

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245 final/2.

ities. In this vein, this Convention widely refers to information technologies in relation to various rights: equality and non-discrimination (Article 5), accessibility (Article 9), freedom of expression and opinion and access to information (Article 21), privacy (Article 22), health and rehabilitation (Articles 25 and 26), and participation in political and public life (Article 29).

More precisely, the CRPD does not expressly mention social media, presumably because at the time of its conclusion the social media phenomenon was not yet widespread. Nonetheless, more recently, the UN Committee on the Rights of Persons with Disabilities (hereinafter, CRPD Committee) has pointed out the peculiar role of social media in the actual individual and community life with reference to persons with disabilities. In General Comment No. 5 on independent living, the CRPD Committee has enumerated social media tools among the «non-disability-specific support services and facilities for the general population in the community», which «must be available, universally accessible, acceptable and adaptable for all persons with disabilities».[11]

3. Social Media Accessibility

Assistive technologies (for example, screen readers for Internet users with blindness) are indispensable tools for guaranteeing access to information technologies for persons with disabilities. However, for assistive technology to work effectively it is also essential that web content and apps are built in conformity with relevant accessibility standards. As a result, social media accessibility depends either on the possibility to use assistive technology and on the accessibility of social media websites, *i.e.* web accessibility. In this vein, following the entry into force of the CRPD, web accessibility has been brought within the realm of human rights for people with disabilities.

3.1. Social Media Accessibility: The Relevant Legal Framework

The CRPD lays down an international obligation for States to design accessible websites and to provide public information in accessible and usable online formats. Such a duty derives from Articles 9 (accessibility) and 21 (freedom of opinion and expression, and access to information) CRPD, to be read in conjunction with Article 4 (general obligations), Article 5 (non-discrimination) and 19 (independent living) CRPD.

3.1.1. Web Accessibility

The CRPD recognizes that access to the physical environment, to transportation, to information and communication, and to other facilities and services is indispensable to guarantee that persons with disabilities have equal opportunities for participation in society.

[11] Committee on the Rights of Persons with Disabilities, *General Comment No. 5 (2017) on living independently and being included in the community*, 27 October 2017, CRPD/C/GC/5.

In this connection, accessibility is enumerated among the principles on which the CRPD is grounded (Article 3(f)). Furthermore, accessibility is considered as «a precondition for persons with disabilities to live independently and participate fully and equally in society»[12] (Article 19), as well as «a means to achieve de facto equality for all persons with disabilities»[13] (Article 5).

In particular, from the CRPD it is possible to infer an international obligation for States Parties to take all appropriate measures to ensure that people with disabilities can equally perceive, understand, navigate, and interact with websites and tools, namely to guarantee web accessibility. According to Article 9 CRPD, States Parties are required to identify and eliminate barriers to access to, *inter alia*, «information, communications and other services» (Article 9(1)(b)). For this purpose, States are also required to encourage private entities and the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities. Hence, States must take measures to «develop, promulgate and monitor the implementation of minimum national standards for the accessibility of facilities and services open or provided to the public» (Article 9(2)).

3.1.2. Freedom of Expression and Opinion and Access to Information

Access to information and communication – including access to digital information and communication tools, *i.e.* web accessibility – is also a precondition for the enjoyment of freedom of opinion and expression, also guaranteed under the Universal Declaration of Human Rights (hereinafter, UDHR) and the International Covenant on Civil and Political Rights (hereinafter, ICCPR).

However, while under the above-mentioned human rights instruments the right to freedom of opinion and expression is qualified as a negative right (non-interference with personal opinion), the CRPD transforms such right into a positive one. More precisely, the CRPD 'reformulates' the right to freedom of expression and opinion, as encompassing the State obligation to provide public information in accessible and usable formats.

Hence, according to Article 21 CRPD, States Parties are obliged to provide information intended for the general public in accessible formats (and this clearly includes accessible websites) in order to ensure that persons with disabilities can exercise «the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice».

Correspondingly, according to Article 4(1)(g), States are required to promote the use of, *inter alia*, information and communications technologies and assistive technologies «at an affordable cost».

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[12] Committee on the Rights of Persons with Disabilities, *General Comment No. 2 (2014), Article 9: Accessibility*, 22 May 2014, CRPD/C/GC/2.

[13] Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, 26 April 2018, CRPD/C/GC/6.

3.2. Web Accessibility Standards

The duty to design accessible websites drawn down by the CRPD represents an international obligation, binding for all the numerous States Parties of the UN Convention. Nonetheless, such a duty is frustrated by the absence of a definitive standard by which web accessibility is gauged and, as a result, social media platforms are still mainly not accessible.

In a context in which the self-regulation of private entities prevails, accessibility guidelines and standards are set by standardization organizations. These are, in general, private bodies developing, issuing and revising standards, *i.e.* technical or quality requirements which specify the technical or normative requirements of goods, services and production processes. Currently, the main self-regulatory body is the World Wide Web Consortium (W3C), an international consortium where member organizations, full-time staff, and the public work in tandem to pursue the accessibility of the Internet.[14] The W3C created various working groups to develop web standards, guidelines and supporting materials within the realm of the Web Accessibility Initiative (WAI). In 1999, the W3C established the first accessibility standard for the Web (Web Content Accessibility Guidelines) WCAG 1.0. In December 2008, the WAI revised the WCAG guidelines and published an updated version (WCAG 2.0). In June 2018 the WAI published the WCAG 2.1, which are currently in use. WCAG 2.1 provides 17 additional success criteria to address mobile accessibility, people with low vision, and people with cognitive and learning disabilities. To date, the W3C's accessibility standards for the Web – the WCAG (Web Content Accessibility Guidelines) – are accepted as the primary standard by which accessibility should be measured. However, accessibility standards and guidelines – including the WCAG – are, by definition, merely voluntary.

In other words, it depends on the sensitivity of private entities to address the accessibility concerns of their online platforms, whereby the accessibility standards provided are not compulsory. However, it is in the self-interest of private entities to address accessibility concerns for their users, where one of the peculiarities of the virtual world is that the value of an online platform largely comes from the social networking provided by the participants. In this connection, in recent years there have been significant accessibility improvements in the most famous social media tools. For instance, in 2009, Facebook, in consultation with the American Foundation for the Blind, overhauled the platform to make it more accessible. The following year it became the most visited site on the web.

Nonetheless, this is not sufficient. It also rests on individual users to adopt all the tips and methods (*i.e.* using plain language, image descriptions, video captioning, link shorteners, etc.) that improve the accessibility of their own profiles on social media.

4. Social Media and Privacy Concerns

The CRPD partially reformulates and updates the right to privacy provided by other international instruments, such as the UDHR, the ICCPR, the Convention on the Rights of

[14] See the World Wide Web Consortium (W3C) website. URL: <https://www.w3.org/WAI/intro/usable> [accessed on 05/09/2019].

the Child (CRC), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), thus adopting a more disability-oriented perspective. In particular, it is emphasised the interconnection between the concepts of privacy (Article 22), legal capacity (Article 12) and individual autonomy as key aspects of human dignity for persons with disabilities.

4.1. Privacy and Data Protection: The Relevant Legal Framework

Article 22(1) CRPD broadly refers to the general protection of privacy and reputation of persons with disabilities. It protects personal and family privacy and reputation from arbitrary and unlawful interference with, *inter alia*, «correspondence and other types of communication» – which can surely include social networking platforms – «regardless of the place of residence or living arrangements». The latter specification purports to encompass the situation of persons with disabilities living in institutions or in any other arrangements where privacy losses might be prominent at the expenses of the autonomy and dignity of the individual.

Article 22(2) CRPD aligns with the most recent developments of the right to privacy, which includes an autonomous right to data protection. It provides protection to the privacy of «personal, health and rehabilitation information of persons with disabilities on an equal basis with others».

As clarified by the CRPD Committee,[15] this latter provision must be read in combination with Article 12 CRPD in relation to the recognition of the individual's legal capacity (*i.e*. the capacity to be both a holder of rights and an actor under the law[16]) and his/her equal protection under the law. Namely, legal capacity, which entitles a person to the full protection of his or her rights by the legal system, constitutes a prerequisite to receiving protection before the law on an equal basis with the other citizens in compliance with Article 12 CRPD. Traditionally, persons with disabilities have been denied their right to legal capacity throughout the imposition of so-called substitute decision-making regimes (such as guardianship or judicial interdiction), totally depriving the individual of his/her capacity to be recognised as a person before the law. In this vein, the CRPD Committee clarifies that, according to the CRPD, «States parties must holistically examine all areas of law» – including those relevant for privacy and data protection concerns – «to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others».[17] Hence, it derives from the CRPD that States are required to abolish those practices and to replace them with so-called supported decision-making regimes, which respect the person's autonomy, will and preferences. Namely, supported decision-making

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[15] Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014). Article 12: Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1, para. 47.

[16] *Ibidem*, para. 12: «Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships».

[17] *Ibidem*, para. 7.

regimes are not identified by the CRPD Committee, but can comprise various options. Overall, these regimes must be available to all, meaning that States have an obligation to facilitate the creation of support which is accessible and available at nominal or no cost, and must give primacy to the person's will and not on «what is perceived as being in his or her objective best interests».[18] In this vein, support in decision-making cannot be used as justification for limiting other fundamental rights (right to vote, to marry, to reproductive rights, to give consent for medical treatment, etc.), but it is necessary to ensure that the person have the right to refuse support and terminate or change the support relationship at any time.

This is relevant with reference to the protection of the right to privacy of persons with disabilities, whereas substitute decision-makers usually gain access to a wide range of personal and other information regarding the person under their custody. Consequently, States Parties are not only required to shift from substitute decision-making to supported decision-making systems (Article 12 CRPD), but they are also obliged to ensure that those providing support in the exercise of legal capacity fully respect the right to privacy of persons with disabilities (Article 12 in combination with Article 22(2) CRPD) in the respect of the individual autonomy of the person, including the freedom to make one's own choices.

4.1.1. Security Issues and Anti-Discrimination Protection

Privacy and data protection are paramount concerns for all social media users. Even though personal data cannot be lawfully harvested without users' autonomous consent, in the digital environment there are structural problems to the effective exercise of the principle of consent with reference to data protection. On the one hand, social media privacy policies are far too complicated for ordinary users, who mostly do not even read privacy policies, nor change the highly permeable privacy preferences prearranged. On the other hand, after being lawfully collected, data can be sold to other service providers so that users cannot truly foresee the effects of their consent, nor be aware of all the third parties their data are shared with.

In this context, the situation of social media users with disabilities is particularly delicate, due to security and anti-discrimination issues. Persons with disabilities tend to have more personal information stored than the average citizen does – for example, persons with disabilities rely heavily on geolocation on mobile devices for navigation and independence, with major risks of exploitation for malicious purposes. Moreover, besides the data protection concerns mentioned above, which are common to all users, social media contributors with disabilities suffer major risks of disclosure of personal information that may be used to discriminate against them. Namely, proper privacy protection also offers safeguards against discrimination, whereby undermining access by third parties to personal information can prevent their ability to discriminate. Meaningfully, the disability status

[18] *Ibidem*, para. 28.

itself is considered a piece of private information which persons with disabilities may decide to hide to prevent discrimination. For instance, restricting employers' access to information about the protected status of employees can reduce the chances of discriminatory conduct in the workplace. However, this information can automatically be discovered (and eventually stored) by web browsers. As users peruse web applications, they leave traces that can be used as 'fingerprints' to identify and track the user's behaviour. Many add-ons are designed for persons with disabilities, so their presence is often a good indication of a user's disability. For instance, it is possible to discover if a user is a person with blindness by detecting whether he/she is using a screen reader or accessibility-related plug-ins.

Moreover, in some cases, disability status can also be automatically discovered through the use of algorithms relying on metadata. This is the case with algorithmic identification of mental health issues of social media users. In other words, the identification of personal information such as mental health characteristics is feasible on the basis of easily available information on social media – *i.e.* timing, number and length of postings or the number of social connections – or on hidden information which are buried in the content produced – *i.e.* choice of colour filters or key phrases – that seem innocuous unless tied to other indicators, for instance, of depression.[19]

4.2. Privacy, Accessibility and Autonomy

In abstracto, accessibility and privacy together are preconditions to achieving equality and non-discrimination,[20] which are in turn essential principles for the recognition of the equal right of persons with disabilities to live independently and be included in the digital community.[21] However, *de facto*, addressing security and privacy threats can negatively affect the usability and accessibility of social media platforms while jeopardizing the autonomy of users with disabilities in social media use. Namely, each type of authentication method used by website platforms to protect the digital identity of users poses challenges for persons with specific disabilities.

For instance, password-based methods are the most common forms of authentication method, requiring a login ID and a password. Passwords are usually accessible for persons with sensory or physical impairments but, at the same time, they are not accessible for people with cognitive impairments. Human-interaction proofs, *i.e.* CAPTCHA, are considered the most challenging authentication method and have a low rate of success for persons with different types of disability – in fairness, they have also registered a low rate of success for persons without disabilities. Biometrics (fingerprint recognition, voice registration, retina or iris scanning), which are increasing in popularity, necessarily exclude at least persons with one type of disability from their users.

As a result, persons with disabilities are obliged to be dependent on a caregiver (or a

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[19] Felzmann H., Kennedy R., "Algorithms, social media and mental health", *Computers & Law*, 27(4), 2016, pp. 31-34.

[20] Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018)*, para. 40.

[21] Committee on the Rights of Persons with Disabilities, *General Comment No. 5 (2017)*, para. 2.

third person) to have access to some services, including social media platforms so that they are required to disclose passwords and private information. In other words, security concerns are emphasised at the expense of the individual autonomy of users with disabilities, revealing the existence of a sort of 'trade-off' between privacy and autonomy.

4.2.1. Privacy and Autonomy: A Trade-Off?

From the analysis above, it emerges a sort of 'trade-off' between privacy and autonomy for users with disabilities. Accordingly, social media users with disabilities are forced to choose between two options equally affecting their possibilities of living independently and actively participating in the digital society.

On the one hand, when choosing not to use social media, persons with disabilities risk being excluded from the growing digital society. On the other hand, when choosing to use social media, they accept to turn down their own autonomy to be part of the online society. At the same time, paradoxically, the lack of autonomy represents the main barrier in the participation of persons with disabilities as equal members of society and in the enjoyment of their fundamental rights.

How to solve such a conundrum? As this paper contends, a shift in perspective might be appropriate. Namely, adopting a disability-oriented approach in managing the new challenges that the protection of human rights is facing in the digital environment.

To date, in international human rights law, autonomy has been traditionally considered as an implicit characteristic of human beings – intended as individuals fully *capable* of enjoying human rights. Hence, autonomy is not mentioned in any international human rights instrument, apart from the CRPD. In particular, Article 3(a) CRPD recognises individual autonomy as a cornerstone of human dignity for persons with disabilities. The enunciation of the principle of individual autonomy as an essential part of human dignity is considered a specificity of the CRPD, where this concept generally refers to «the ability of persons with disabilities to do things on their own without the assistance of others and is linked to the right to be 'free to make one's own choices'».[22]

With reference to the issue at stake, though, autonomy might be correspondingly understood as the right of users to make their own decisions regarding the use of social media without the interference of third persons. In this vein, even though the situation of users with disabilities is particularly delicate, there is no substantial difference between users with and without disabilities. As emphasised above, new technologies – including social media – have made it possible to aggregate and process an impressive amount of personal data, which have become the main resources and commodities of online activities. In this context, personal data are constantly harvested by private and public entities (social media platforms, technology companies, public administration, intelligence services, etc.) without the possibility for individual data owners to exercise their own *capacity* of self-rule

[22] Mégrét F., "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?", *Human Rights Quarterly*, 30(2), 2008, pp. 494-516, at p. 511.

about their collection, analysis and trade. As a result, in the data ecosystem, all users (with and without disabilities) suffer a loss in their autonomy and capacity of self-rule.

In this connection, a new interest in the concept of autonomy as «a key element of human beings»[23] has been gradually emerging also in relation to the protection of human rights in the digital age, in particular with reference to the search for a new digital ethics.[24] In other words, new digital technologies are challenging the traditional construction of fundamental rights and values. However, while the principle of individual autonomy and its implications on the protection of fundamental rights are well-established in disability human rights law, by contrast the same issue is still at an early stage of development in the analysis of the new challenges that the protection of human rights is facing in the digital environment.

5. Conclusive Reflection

In the digital world, users both with and without disabilities are substantially deprived of their individual autonomy in managing their own data. All users experience different degrees of *loss of abilities* – and consequently a diminished autonomy – while not being able to control the circulation of their personal information online.[25]

However, while the principle of individual autonomy and its implications on the protection of fundamental rights are well-established in disability human rights law, by contrast the same issue is still at an early stage of development in the analysis of the new challenges that the protection of human rights is facing in the digital environment.

In this vein, as this paper contends, it is necessary to look for a different approach in the protection of human rights in the digital environment, thus considering the changing *capabilities* of individual users. The experience of disability rights with reference to the supported decision-making model is likely to be an invaluable point of reference for developing a more equal and human rights-oriented digital world. A disability-oriented approach might be an inspiring starting point to build a digital world which is more flexible and respectful of individual users' autonomy, will and preferences.

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Addressing Disability Hate Speech: The Case for Restricting Freedom of Expression in the Light of the European Court of Human Rights' Case Law

Federica Falconi

1. The Challenge to Reconcile the Legal Ban on Hate Speech with Free Speech: The Case of Disability Hate Speech

Although discrimination and hate speech has been always observed throughout history, there is a growing concern in the current scenario for the escalating of manifestation of hatred and intolerance both at national and international level.[1] The expression «hate speech» has entered common usage in the political and social discourse, yet its significant and regulatory scope as a legal category is not easy to determine. Within the international human rights framework, international soft law instruments provide guidance as to what qualifies as hate speech: this turns out to be a broad and rather undetermined concept, covering a wide range of hateful expressions which spread, incite, promote or justify hatred, violence and discrimination against individuals or social groups on grounds of race, religion, sexual orientation, transgender identity and many other different reasons including disability.[2] This is intended to be a non-exhaustive list and while reasons behind the words of hate may vary considerably depending on the context, one thing remains unchanged: single individuals or groups are targeted basically for who they are.[3]

Respect for equal human dignity in conjunction with the prohibition of any form of discrimination as the cornerstones of international human rights law provide a sound ra-

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[1] Hate speech is a challenge from which no country is exempted, irrespective of its political organization: clear evidence of the need to tackle hate speech at the global level is provided by the United Nations Strategy and Plan of Action on Hate Speech, May 2019.

[2] Cf. the Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to the Member States on 'hate speech' adopted by the Council of Europe Committee of Ministers on 30 October 1997 and the most recent General Policy Recommendation No. 15 on Combating Hate Speech which has been adopted by the European Commission against racism and intolerance on 8 December 2015, this latter specifically mentioning disability as a group-identifying characteristic.

[3] As it will be pointed out below, a number of international binding instruments address the topic of incitement to hatred, mandating contracting States to adopt criminal laws to sanction its manifestations, yet none of these provide a legal definition of what is hate speech. For a conceptual analysis of the term 'hate speech', see Brown A., "What Is Hate Speech? Part 1: The Myth of Hate", *Law and Philosophy*, 36(4), 2017, pp. 419-468. See also Post R., *Hate Speech*, in Hare I., Weinstein J. (eds.), *Extreme Speech and Democracy,* New York: Oxford University Press, 2009, pp. 123-138, p. 123, contending that a «certain degree of intensity» is needed for an expression to qualify as hate speech.

tionale for affirming the need to combat hate speech in all its manifestations.[4] This appears to have become even more pressing in the digital landscape due to the potentially worldwide spread of the harmful effect of online hate speech. Yet, reconciling freedom of information with the enactment of legal responses – including criminal laws – to combat incitement to hatred proves to be rather problematic.[5]

In the above scenario, a matter of specific concern is hate speech directed towards people with disabilities. Despite its being to a large extent underreported, there are reasonable grounds for believing that decision makers should not underestimate the seriousness of this phenomenon: whether in overt or subtle form, incitement to hatred is likely to produce severe negative and long lasting effects on the target people preventing them to fully enjoy their rights and to participate in society on an equal footing. This lead to social marginalization in addition to physical and psychological harm directly suffered by the victims. Moreover, people with disabilities often become targets of hate speech on multiple grounds, thus not merely because of their disabilities but also on other different grounds such as ethnic origin or religion.

As a general rule public incitement to hatred based on disability is not prohibited in the same way as incitement to hatred on the ground of race across European countries,[6] but recent changes to national criminal codes and legislative proposals as well do show a significant emerging trend towards including disability, physical or mental, as a further group-identifying characteristic. Among various initiatives, France, Belgium and Switzerland provide three virtuous examples, but also Italy has been moving along these lines.[7]

While enacting legal responses to disability hate speech particular attention is paid to the widespread dissemination of hate speech via social media motivated by the same peculiarities having led the Internet to become a unique tool for enhancing freedom of

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[4] For further analysis on the roots of international human rights standards, see Farrior S., "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech", *Berkeley Journal of International Law*, 14(1), 2006, pp. 3-98. See also Castellaneta M., *L'hate speech: da limite alla libertà di espressione a crimine contro l'umanità*, in Bariatti S., Venturini G. (a cura di), *Liber Fausto Pocar. Diritti individuali e giustizia internazionale*, I, Milano: Giuffré, 2009, pp. 157-172.

[5] See in this respect the Report on hate speech submitted on 7 September 2012 to the UN General Assembly by the former UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression, Mr. Frank La Rue.

[6] As a matter of fact, a number of international binding instruments mandate contracting States to prohibit by law (in certain cases specifically by criminal law) incitement to national, racial or religious hatred: following Article III(c) of the UN Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, see Article 20(2) of the UN Covenant on Civil and Political Rights, adopted on 16 December 1966, according to which contracting States are mandated to prohibit by law «any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence»; Article 4 of the UN Convention on the Elimination of all Forms of Discrimination, adopted on 21 December 1965; Article 13(5) of the American Convention on Human Rights, adopted on 22 November 1969. Cf. also the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, entered in force on 1 March 2006, and, within the EU framework, the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

[7] See Legislative Proposal No. 636 of 11 July 2018, still pending before the Parliament.

expression and freedom of information: indeed, its extraordinary diffusing capacity combined with the almost instantaneous transferring of information and the durability of all the contents uploaded by its users, just to mention a few, could turn to be very detrimental for the target people, especially for children and young people, amplifying the harmful effects and severely affecting their physical and psychological integrity.[8] A further matter of concern is related to hate-fueled violence, requiring to address the possible connection between hate speech and hate crime, this latter being a different category intended to cover crimes commited with a bias motivation.[9]

As noted above, the interplay between an alarming phenomenon such as hate speech and the law is no doubt a rather complex one, about which there has been much disagreement and clearly it could not be otherwise when it comes to curtail the exercise of a basic right such as the right to freedom of expression.[10] This paper is aimed to address the issue of disability hate speech from a legal perspective, focusing on the case law of the European Court of Human Rights (hereinafter, the ECtHR) which have been showed heightened sensitivity to the need to combat hate speech in all its forms.

2. Setting the Scene: Freedom of Expression as an International Concern

The paramount importance of freedom of expression, including freedom of information, has been constantly emphasized at the international level in the aftermath of the Second World War. As early as 1946 the UN General Assembly adopted during its very first session a resolution calling for an International Conference on freedom of information, where freedom of information is significantly affirmed as being «a fundamental human right and also the touchstone of all the freedoms to which the UN is consecrated».[11] No international convention on freedom of information has been eventually adopted in the absence of agreement between States; however, following the extraordinary impulse given by the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948, freedom of expression has been invariably enshrined, albeit with variations in content, in all the relevant international instruments both at universal and regional level.[12]

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[8] These two sides of the Internet between new opportunities and challenges for human rights is well illustrated in the Recommendation No. CM/Rec(2007)16 of the Committee of Ministers to the Member States on measures to promote the public service value of the Internet.

[9] Regarding this problematic issue, see the Report by OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Hate Crime Against People with Disability*, released in December 2016.

[10] About the epistemological differences in approaches between the ECtHR and the US Supreme Court, see Belavusau U., "Judicial Epistemology of Free Speech Through Ancient Lenses", *International Journal for the Semiotic of Law*, 23(2), 2010, pp. 165-183.

[11] UN General Assembly Resolution A/RES/59 of 14 December 1946.

[12] According to Article 19 UDHR, «[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers». In the wake of this influential, although not binding formulation, Article 19(2) of the United Nations Covenant on Civil and Political Rights (UN CCPR), states that «[e]veryone shall have the right to freedom of expression; this right shall include freedom to

Narrowing it down to the context of the Council of Europe, freedom of expression, as enshrined in Article 10 of the European Convention of Human Rights (ECHR), has been the subject of an extensive body of case law by the ECtHR throughout decades.[13] The common thread is the emphasis put on the paramount importance of freedom of expression: while it is in the first place a fundamental human right, which must be granted to all individuals without any discrimination on any grounds, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, it qualifies also as being one of the essential foundations of a democratic society and a basic condition for its progress and for the development of every man.[14] On the basis of this functional conceptualization, it is no surprise indeed that a special point of attention is dedicated to freedom of expression and information also within the framework of international sector-based treaties at the universal level. Among several different instruments, it is worth mentioning here the UN Convention on the Rights of Persons with Disabilities (CRPD) adopted on 13 December 2006: according to its Article 21

seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice». However, the exercise of the right set for in Article 19(2), as it «carries with it special duties and responsibilities» may be subject to certain restrictions, «but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals». A further limitation is provided by Article 20(2) cited above, fn. 6, as regards «any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence». As for the regional level, cf. Article 13 of the Inter-American Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights; Article 32 of the Arab Charter on Human Rights. Anyway, whether freedom of expression may qualify as a customary rule of international law is a debated issue: on this point, see Castellaneta M., *La libertà di stampa nel diritto internazionale ed europeo,* Bari: Cacucci, 2012, p. 64 ss. For an answer in the negative as specifically concerns hate speech bans, see Cohen R., "Regulating Hate Speech: Nothing Customary About It", *Chicago Journal of International Law*, 15(1), 2014, pp. 229-255.

[13] Among the most recent commentaries to Article 10 ECHR, see Zagrebelsky G., Chenal R., Tomasi L., *Manuale dei diritti fondamentali in Europa*, 2nd ed., Torino: Il Mulino, 2019, pp. 345-363; van Rijn A., *Freedom of Expression*, in van Dijk P., van Hoof F., van Rijn A., Zwaak L. (eds.), *Theory and Practice of the European Convention of Human Rights*, 5th ed., Antwerpen: Intersentia, 2018, pp. 765-811; Schabas W., *The European Convention on Human Rights: A Commentary*, Oxford: Oxford University Press, 2015, pp. 444-482. Under the European Union framework, freedom of expression finds its consecration in Article 11 of the EU Charter of Fundamental Rights, which largely corresponds to Article 10 ECHR. Addressing the topic of hate speech within the EU, see Belavusau U., "Fighting Hate Speech through EU Law", *Amsterdam Law Forum*, 4(1), 2014, pp. 20-34. Most recently, a meaningful example is provided by Directive (EU) 2018/1808 (the so-called new Audiovisual Media Services Directive), according to which «audiovisual commercial communications shall not… include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation». (Article 9(c)(ii)). Next to the Council of Europe and the European Union, the Organization for Security and Co-operation in Europe (OSCE) also contributes to freedom of expression protection: the institution of the Representative on Freedom of Media, the office of which is currently held by Mr. Harlem Désir, is much significant in monitoring OSCE States' fulfillment of their commitments regarding freedom of expression.

[14] Further on this point, see Flauss J.F., "The European Court of Human Rights and the Freedom of Expression", *Indiana Law Review*, 84(3), 2009, pp. 809-849.

> States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.[15]

Further evidence of the vital importance of guaranteeing effective freedom of expression is thus significantly provided, with a view to give all individuals the chance to fully participate in public life and develop their personality.[16]

3. The Scope of Application of Article 10 ECHR

Turning to the material scope of the protection granted by Article 10 ECHR to freedom of expression and freedom of information, the principles originally set out by the ECtHR in the *Handyside* judgment of 1976, are far from have their interpretative significance diminished. According to this landmark decision, freedom of expression is intended to be «applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population», based on the assumption that «[s]uch are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'».[17] Since its first statement, the *Handyside* formula has been constantly reaffirmed and validated by subsequent case law and extended in the early two thousands to the new digital media landscape: just as at the time when the *Handyside* judgment had been delivered, the ECtHR has found itself prevented to find a uniform European conception of morals in the legal and social orders of the contracting States. Therefore, a considerable margin of appreciation is given to each contracting State to evaluate which restrictions may be necessary in a democratic society in the interests of the protection of morals.[18]

Without diminishing its essential value, however, freedom of expression does not

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[15] The adoption of the CRPD and its Optional Protocol has marked a turning point bringing a new view according to which all persons with all types of disabilities are full subjects of rights and not merely 'object' of charity, medical treatment and social protection. On this premise, emphasis has been put on the capacity of people with disabilities of claiming their rights and making decisions for their lives as being active members of society: see on this point the Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on equality and non-discrimination, 26 April 2018, CRPD/C/GC/6.

[16] The same rationale had previously inspired the formulation of Article 5(vii) of the UN Convention on the Elimination of all Forms of Racial Discrimination, pursuant to which States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment, among many others, of the right to freedom of expression. Additionally, as already mentioned, under its Article 4, a specific ban on incitement to racial hatred and discrimination is imposed, mandating each contracting State to enact specific criminal law to this effect. In similar terms, the right to freedom of expression is enshrined in Article 13 of the UN Convention on the Rights of the Child adopted in New York on 20 November 1989.

[17] ECtHR, 7 December 1976, *Handyside v. The United Kingdom,* application No. 5493/72.

[18] ECtHR, 18 October 2005, *Perrin v. The United Kingdom*, application No. 5443/06.

qualify as an absolute right.[19] The wording of Article 10(2) ECHR provides immediate clarity as to the rationale for limiting the exercise of freedom of expression in certain circumstances: since it carries with «duties and responsibilities», the exercise of freedom of expression and freedom of information may be subject to «formalities, conditions, restrictions or penalties» provided that a set of three normative conditions are met.[20] More specifically, domestic authorities in any of the contracting States may interfere with the exercise of freedom of expression of anyone within their jurisdiction where the interference: (i) is prescribed by law; (ii) is aimed at protecting legitimate interests or values;[21] (iii) is necessary in a democratic society, due to the existence of a «pressing social need», this latter condition requiring in particular that any interference by national authorities must be proportionate to the (legitimate) aim pursued.[22]

4. Hate Speech in the European Court of Human Rights' Case Law: Hate Is Not an Opinion[23]

It is within this legal framework that the ECtHR has been developing a growing body of case law seeking to balance freedom of expression with the need to combat hate speech. Contrary to other binding international instruments such as in the first place Article 20(2) of the UN ICCPR,[24] it is worth noting that no explicit ban on hate speech is formulated in the ECHR. However, this was not hindrance for the Strasbourg Court, which has been constantly emphasizing that the Convention must be intended as a «living instrument» to be interpreted «in the light of the present-day conditions». To this goal, it is also relevant the ECtHR's commitment to grant all rights guaranteed by the ECHR as practical and effective and not merely as theoretical and illusory.[25]

On this basis, the ECtHR has gradually come to confirm the conventional compatibility of national restrictions to freedom of expression aimed at sanctioning a wide range of hatred expressions based on intolerance, including incitement to racial hatred or discrim-

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[19] This is true, of course, also of the other existing international instruments granting freedom of expression, cited above, fn. 12 and fn. 16.

[20] The exact scope of the above «duties and responsibilities» is clearly to be determined case-by-case depending on the personal quality of the author of the statements and the technical means used to make it public: in this regard, see the *Handyside* case, para. 49.

[21] Namely, restrictions to freedom of expression may be imposed in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[22] The last test concerning the necessity of the interference has proved in practice to be the most relevant within the ECtHR's scrutiny.

[23] 'Hate is not an opinion' is the translation of the motto chosen for the Italian Report released in March 2016 within the *BRICKS Project* «Building Respect on the Internet by Combating Hate Speech», co-financed by the European Union. URL:<https://www.bricks-project.eu> [accessed on 31/10/2019].

[24] See *supra*, fn. 6 and fn. 12.

[25] These interpretative principles have been elaborated by the ECtHR as key tools to carry out effectively its mandate: for further details, see Schabas W., *The European Convention on Human Rights*, p. 33 ss.

ination, anti-Semitism, incitement to ethnic or religious hatred and incitement to national hatred.[26] As anticipated above, no uniform definition is available under international human rights law as to what is hate speech neither within the existing international binding instruments mandating contracting States to prohibit by law certain manifestations of hate speech. It is reasonable to maintain that it neither would be desirable to confine judicial control within strict definition: as a matter of fact what is hate speech remains largely an empirical question that requires prudential judgment.[27]

Two different decision patterns have been followed by the ECtHR depending on the factual background of the case under examination. In some exceptional cases, when the hateful character of the expressions concerned was immediately-clear, the ECtHR has come to even declare inadmissible the application (incompatible *ratione materiae*) on the basis of Article 35(3)(a) ECHR. To achieve this outcome, the ECtHR has found the legal basis in the prohibition of abuse of rights set for in Article 17 ECHR, ruling that the applicants' behavior, far from being a genuine exercise of freedom of expression, ran blatantly counter to the underlying values of the Convention as a whole and of the Council of Europe itself, *i.e*. dignity, equality and non-discrimination.[28]

Holocaust denial is a paradigmatic example in this respect, being considered by the ECtHR as «one of the most severe forms of racial defamation of Jewish and of incitement to hatred of them».[29] An emblematic confirmation of this strict approach is provided by the

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[26] For a clear illustration, see ECtHR, 6 July 2006, *Erbakan v. Turkey*, application No. 59405/00, according to which «[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance ..., provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued». For a general overview of the ECtHR's case law on hate speech, see Weber A., *Manual on Hate Speech,* Strasbourg: Council of Europe, 2009; Castellaneta M., "La repressione del negazionismo e la giurisprudenza della Corte europea dei dritti umani", *Diritti umani e diritto internazionale*, 5, 2011, 65-84 ss.; Tulkens F., *When to Say Is to Do. Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights*, in Casadevall J., Myjer E., O'Boyle M., Austin A. (eds.), *Freedom of Expression: Essays in Honour of Nicolas Bratza*, Oisterwijk - The Netherlands: Wolf Legal Publishers, 2012, pp. 279-295; McGonagle T., *The Council of Europe against Online Hate Speech: Conundrums and Challenges,* Expert Paper No. MCM(2013)005, Council of Europe Conference of Ministers responsible for Media and Information Society, Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibility, Belgrade, 7-8 November 2013.

[27] Supporting this opinion, see Tulkens F., *When to Say Is to Do*, p. 281.

[28] As the application is declared inadmissible, Article 17 ECHR has been described as a «guillotine» provision: Flauss J.F., "L'abus de droit dans le cadre de la C.E.D.H.", *Revue universelle des droits de l'homme*, 3, 1992, pp. 461-468, p. 464.

[29] For the rigorous approach that the ECtHR has been following as concerns the Holocaust denial, from the well-known case of *Garaudy v. France*, 24 June 2003, application No. 65831/01, to the case of *Dieudonné M'Bala M'Bala v. France*, 20 October 2015, application No. 25239/13, let me refer to a previous contribution of mine: "*La repressione del negazionismo al vaglio della giurisprudenza di Strasburgo: percorsi consolidati e linee evolutive recenti"*, *Il diritto ecclesiastico,* CXXVIII(1-2), 2017, pp. 73-101. For a more recent example of this approach, see ECtHR, *Williamson v. Germany* (decision on the admissibility), 8 January 2018, application No. 64496/17.

Norwood judgement which was concerned with the public incitement to hatred against all Muslims in the United Kingdom: in this occasion, the ECtHR had no hesitation in rejecting the application on the ground that the applicant's behavior, who had sought to stir up hatred, discrimination and violence towards all Muslims, was incompatible with the basic values of the Convention.[30]

Borrowing the words used for the first time by the old European Commission of Human Rights, these are cases concerning hateful expressions which qualify as «more than insulting».[31] According to the same line of reasoning, incitement to violence and its glorification in support of terroristic activity has been constantly considered by the ECtHR to fall outside the scope of protection of Article 10 ECHR.[32]

However, it must be pointed out that no positive obligation is imposed on contracting States neither by Article 17 ECHR on its own nor by Article 10 ECHR: therefore, without prejudice to obligations arising out from other binding international instruments, each one of them may take all the steps they deem appropriate to cope with hate speech, including criminal sanctions, within the margin of appreciation they enjoy.

Nevertheless, this first decision pattern has given rise to controversy: rejecting the individual application at the stage of preliminary examination does not allow the ECtHR to scrutinize in a proper manner whether a fair balance has been achieved between the competing interests at stake.[33]

A different path, based on the ordinary triple test envisaged by Article 10(2), ECHR, is followed by the ECtHR where there is no clear evidence of an incitement to hatred or denigration toward an individual or a group of persons. This is essentially a case by case

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[30] ECtHR, *Norwood v. United Kingdom* (decision on the admissibility), 16 November 2004, application No. 23131/03. See also as regards anti-Semitism ECtHR, *Pavel Ivanov v. Russia* (decision on the admissibility), 20 February 2007, application No. 35222/04.

[31] ECtHR, Jersild v. Danmark, 23 September 1994, application no. 15890/89, para. 35. Cf. European Commission of Human Rights, *Glimmerveen e Hagenbeek v. Netherlands*, 11 October 1979, applications No. 8348/78 and No. 8406/78.

[32] ECtHR, *Surek (no 1) v. Turkey*, 8 July 1999, application No. 26682/95; *Gündüz v. Turkey*, 13 November 2003, application No. 35071/97. More recently, see ECtHR, *Belkacem v. Belgium*, 20 July 2017 (decision on the admissibility), application No. 34367/14; *Roy TV A/S v. Denmark*, 17 April 2018 (decision on the admissibility), application No. 24683/14. As regards incitement to violence, cf. Scottiaux S., "'Bad Tendecies' in the ECtHR's 'Hate Speech' Jurisprudence", *European Constitutional Law Review*, 7(1), 2011, 40-63; Buyse A., "Words of Violence: 'Fear Speech' or How Violent Conflict Escalation Relates to the Freedom of Expression", *Human Rights Quarterly*, 2014, pp. 779-797; Castellaneta M., "La Corte europea dei diritti umani e l'applicazione del principio dell'abuso del diritto nei casi di *hate speech*", *Diritti umani e diritto internazionale*, 2017, pp. 745-751.

[33] For an in-depth analysis of the drawbacks related to the application of Article 17 ECHR, cf. Cannie H., Voorhoof D., "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?", *Netherlands Quarterly of Human Rights*, 29(1), 2011, 54-83; van Drooghenbroeck S., "L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?", *Revue trimestrielle des droits de l'homme*, 46, 2001, pp. 531-566; Buyse A., *The Limits of Freedom of Expression from an Abuse of Right Perspective – Articles 10 and 17 ECHR*, in Brems E., Gerards J., *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights,* Cambridge: Cambridge University Press, 2013, pp. 183-208.

assessment which the ECtHR carries out in the light of the case as a whole and there is no simple decision rule to be given in advance. Anyway, a set of criteria has been formulated by the ECtHR to verify whether the interference by national authorities in the exercise of the right to freedom of expression has been «necessary in a democratic society», such as (i) the intention of the author of the statements or the content at issue; (ii) the specific context in which the impugned statements were published; (iii) their nature and wording; (iv) their potential to lead to harmful effects and (v) the reasons adduced by the national courts to justify the interference in question with particular attention also to the proportionality of the restricting measure.[34]

It is worth pointing out that the same decision pattern based on Article 10(2) ECHR applies when the utterances at issue, albeit not qualifying as hate speech, are able to cause wanton offence to others. For ease of understanding, one could label these latter expressions as 'merely insulting'. In this case, there is clearly no rationale for invoking the prohibition of abuse of rights laid down in Article 17 ECHR. Anyway, the restriction clause laid down in Article 10(2), is able to capture also this latter kind of expressions insofar as the protection of the right of the others, including of course respect the reputation of the single individual concerned, is covered among the legitimate aims contracting States may invoke to restrict freedom of expression. While respect for private life finds autonomous protection under Article 8 ECHR, the two competing rights must be properly balanced according to the factual circumstances of the case. As far as people with disabilities are concerned, Article 22 CRPD provides specific protection, stipulating that «no person with disabilities shall be subjected to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks».

Exploring in further detail the distinguishing features of the different decision patterns employed by the ECtHR when dealing with hate speech cases falls outside the scope of concise analysis. Anyway, the body of case law progressively developed by the ECtHR is clear evidence of a growing awareness of the importance to ensure that freedom of expression is not exercised to the detriment of the rights of others or of the interests of the whole society, thus opening the door – albeit cautiously – to the enactment by national authorities of legislation aimed at banning hate speech.[35]

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[34] ECtHR, Grand Chamber, *Perinçek v. Switzerland*, 15 October 2015, application No. 27510/08. Among the many commentaries to this judgment, see Lobba P., *Testing the "Uniqueness": Denial of the Holocaust vs Denial of Other Crimes before the European Court of Human Rights*, in Belavusau U., Gliszczynska-Grabias A. (eds.), *Law and Memory. Addressing Historical Injustice by Law*, Cambridge: Cambridge University Press, 2017, pp. 109-128; Della Morte G., "Bilanciamento tra libertà di espressione e tutela della dignità del popolo armeno nella sentenza *Perinçek c. Svizzera* della Corte europea dei diritti umani", *Rivista di diritto internazionale*, 99(1), 2016, pp. 183-189. Anyway, this outcome has been criticized for the disparity it introduces between the Holocaust denial and other genocides: Borgna G., "Il genocidio armeno (non) passa in giudicato: in margine al caso *Perinçek*", *Diritti umani e diritto internazionale*, 9(3), 2015, pp. 697-704.

[35] As contended by Tulkens F., *When to Say Is to Do*, p. 288, there is no conflict between this interpretative outcome and the *Handyside* formula, which is far from being a «magic or ritual» formula and «takes on its full meaning in the context of the case law relating to hate speech».

5. Recent Developments and Future Perspectives for Disability Hate Speech

While attention to the factual background of the case at issue is crucial in the domain of free speech restrictions, a general distinction may be draft. When dealing with political speech on issues of public interest, particularly where aimed at criticizing the policy of the government, there is very little room for limiting freedom of expression otherwise there might be a dangerous chilling effect to the detriment of the democratic society.[36] It seems reasonable to argue, on the other hand, that a less strict approach should be adopted when hatred expressions are directed against vulnerable or disadvantaged people, irrespectively of the reasons behind this condition.

The ongoing development of the ECtHR's case law in this field and its expansive potential are well illustrated by a recent application filed against Sweden which have prompted the Strasbourg Court to draw a clear analogy between racism and xenophobia – which have been the subject matter of much of the Court's jurisprudence, as noted above – and sexual orientation. According to this judgment

> sexual orientation should be treated in the same way as categories such as race, ethnicity and religion which are commonly covered by hate-speech and hate-crime laws, because sexual orientation is a characteristic that is fundamental to a person's sense of self. It is, moreover, used as a marker of group identity.

The ECtHR has further ruled that

> [w]hen a particular group is singled out for victimization and discrimination, hate-speech laws should protect those characteristics that are essential to a person's identity and that are used as evidence of belonging to a particular group.

Based on these assumptions, the ECtHR has come to the conclusion that

> restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult or incite hatred against persons or a class of person on account of their sexual orientation, so long as such restrictions are in accordance with the Court's well-established principles.[37]

Up to now, the case of hate speech against people with disabilities has not been specifically addressed, but it seems fair to argue that a similar line of reasoning principles should apply. The rationale for such an extension is clearly pointed out by the same ECtHR, when emphasis is put on the need to treat *in the same way* all the categories that may become the target of hate speech.[38] As noted above, however, it falls within the margin of appreciation

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[36] This principle has been recently reaffirmed by the ECtHR in the case of *Stomakhin v. Russia*, 9 May 2018, application No. 52273/07.

[37] ECtHR, *Vejdeland et al. v. Sweden*, 9 February 2012, application No. 1813/07.

[38] Pointing out the «new dimension» of ECtHR's case law arising out of this judgement and wondering whether such an extension would put it on a «slippery slope», see Tulkens F., *When to Say Is to Do*, p. 295.

of each contracting State whether to enact legal responses to prevent and combat hate speech, lacking a positive obligation in the Convention in this respect.

A further consideration closely concerning the issue of incitement to hatred against people with disabilities, which here can only be sketched, is related to the duties and responsibilities that should reasonably be imposed on the Internet service providers regarding the upload of hateful contents generated by users: in this respect, it is worth pointing out that according to the settled ECtHR's case law Member States are allowed to held the information service providers responsible when they fail to promptly remove the hateful contents at issue once they have received notice of them.[39] This is a crucial question to be addressed in order to avoid that hate speech targeting disabled people could turn to shrink the space they must be granted online.

6. Conclusions

Despite many questions are still pending as to the opportunity to enact legislative measures to prohibit hate speech, there can be no denying that hate speech against people who experience forms of disabilities is far from being a thing of the past. On the contrary, the impressive development of online communication technologies over the past two decades have made the legal debate about free speech restrictions all the more pertinent. While on the one hand the Internet has given a voice to disabled people, it has also exposed them to greater abuse not just on social networks, but also in web forums, newspaper comments sections and similar. International legal standard has been developing so as to ensure that people with disabilities are protected against incitement to hatred on equal foot as other categories, both online and offline.

Drawing a clear demarcation line between what is genuine freedom of speech, thus protected under Article 10 ECHR, what is 'merely insulting' speech and what instead qualifies as hate speech is no easy task, but the contribution given over the time by the ECtHR is extremely valuable. It remains for future case law in combination with further cooperation between States to develop existing principles further to tackle in a comprehensive manner with disability hate speech towards achieving better outcomes for all disabled people and contributing to a community where individual dignity and equality is granted to everyone, without unduly curtailing freedom of expression. To this goal, the legal instrument alone is definitely not enough and while its counter-productive effects must be carefully weighed, the social roots of the kinds of prejudice that lead to hate speech need likewise to be addressed.

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[39] Cf. ECtHR, *Delfi v. Estonia*, 16 May 2015, application No. 64569/2009; *Magyar and Index v. Hungary*, 2 February 2016, application No. 22947/13; *Phil v. Sweden*, 9 March 2017, application No. 74742/14; *Tamiz v. The United Kingdom*, 12 October 2017, application No. 3877/14. For an overview of this topic, let me refer to another contribution of mine: "La responsabilità dell'Internet service provider tra libertà di espressione e tutela della reputazione altrui", *La Comunità internazionale*, 71(2), 2016, pp. 235-254.

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Disabilities, Cyber-Bullying and Defamation: A Uniform International Civil Procedure Perspective

Stefano Dominelli

1. Foreword and Research Question

The ever-growing digital world and the widespread recourse to online social media increases the effects of human's behaviour,[1] both in its positive and in its negative dimension. With specific regard to online bullying and defamation of persons with disabilities, a recent article of The Guardian comments that online bullying of disabled persons is getting worse, and yet the matter is not «taken seriously».[2]

In 2007, it was reported that in the United Kingdom, eight out of ten children with disabilities have been victims of bullying[3] – additionally taking into consideration that the Internet bears the effect of casting real-life bullying into the intimacy of victims' houses.[4]

Whereas international, European Union and domestic legislations do take to some extent into consideration the special needs of persons with disabilities, the question is to what extent is uniform international civil procedure aware of the growing issue of online bullying and defamation, and, consequently, whether existing rules do settle peculiar necessities of disabled children who have been bullied online in order to ensure that civil actions do not become an excessive burden to the point they might be induced not to seise a court of law.

2. International Jurisdiction for Defamation under the Brussels I *bis* Regulation

In the development of an European judicial space, where judgements are allowed to

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[1] Bach I., "Klage von Online-Firmen auf Schadensersatz im Schadensland", *Neue Juristische Wochenschrift*, 70(47), 2017, pp. 3436 ss.

[2] Ryan F., "Online Abuse of Disabled People is Getting Worse – When Will It Be Taken Seriously?", *The Guardian* [online], May 10, 2019. URL: <https://www.theguardian.com/commentisfree/2019/may/10/online-abuse-disabled-people-social-media> [accessed on 31/10/2019].

[3] Mencap, The Voice of Learning Disability, "Bullying Wrecks Lives Report", 2016. URL: <https://www.mencap.org.uk/sites/default/files/2016-07/Bullying%20wrecks%20lives.pdf> [accessed on 31/10/2019].

[4] Anti-Bullying Alliance, "Cyberbullying and Children and Young People with SEN and Disabilities: The Views of Young People. SEN and Disability: Developing Effective Anti-Bullying Practice". URL: <https://www.anti-bullyingalliance.org.uk/sites/default/files/field/attachment/disabled-young-peoples-views-on-cyberbullying-report.pdf> [accessed on 31/10/2019].

'move' in between Member States,[5] uniform rules determine international jurisdiction[6] of the Member States in civil and commercial matters, if not territorial jurisdiction directly in some cases,[7] and common rules for the recognition and enforcement of such decisions in all the Union are given for all Member States.

Whereas the general head of international jurisdiction is given by the domicile of the defendant, a number of different (additional, alternative or exclusive) fora are foreseen to ground the jurisdiction of the court. These are taken into consideration either in light of a principle of proximity of the court with the case, as might be the case for jurisdiction over contracts and damages under Article 7 of the Brussels I *bis* Regulation,[8] or for exclusive jurisdiction over immovable properties,[9] or to pursue a given protection policy of the contractually weaker party – as in the case of insurance matters, consumers and employees.[10]

3. Jurisdiction over Actions for Non-Contractual Damages: The General Rule Is Not for the Protection of the Weaker or the Damaged Party

For cases of actions for damages in non-contractual matters, as an action for defamation might be, and acknowledging that 'contractual' and 'non-contractual matters' are subject to an autonomous interpretation based on the existence of a freely taken obligation from one party to another, rather than upon the existence of a contract,[11] the Brussels I *bis* Regulation recognises the jurisdiction of the court of the place «where the harmful event occurred or may occur» (Article 7(2)). Such a head of jurisdiction is alternative to the general ground for jurisdiction adopted by the Brussels I *bis* Regulation, *i.e*. the State of domicile of the defendant (Article 4). Where the latter seeks to promote foreseeability of the competent court[12] and to some extent follow a generally accepted principle of *actor*

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[5] Referring to the free movement of judgments as the 'fifth fundamental freedom' of the European Union, Franzina P., *La giurisdizione in materia contrattuale. L'art. 5 n. 1 del regolamento n. 44/2001/CE nella prospettiva della armonia delle decisioni*, Padova: Cedam, 2006, p. 84, and Porcelli G., *Ingiunzione di pagamento europea e 'mercato interno': un concetto da riformare?*, in Caratta A. (a cura di), *Verso il procedimento ingiuntivo europeo*, Milano: Giuffrè, 2007, pp. 87-118, p. 92.

[6] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351, p. 1 ss. (so called Brussels I *bis*, hereinafter indicated as 'Brussels I *bis* Regulation').

[7] Brussels I *bis* Regulation, Article 7(2), identifying the competence of court of the place of the harmful event.

[8] *Ibidem*, Article 7(1) and (2) respectively.

[9] *Ibidem*, Article 24.

[10] *Ibidem*, Ch. II, Section 3, 4 and 5 respectively.

[11] ECJ, judgment of 17 September 2002, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, C-334/00, EU:C:2002:499, para. 22 ss.

[12] Brussels I *bis* Regulation, recital 15: «The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction».

sequitur forum rei,[13] the former seeks to ensure a close connection between the competent court and the object of the dispute to be dealt with.[14] Yet, such a proximity principle always appears to be functional to the principle of foreseeability: if the court is the one that has a close connection with the dispute, this will be a court that could have been reasonably foreseen by the defendant.[15]

On the one side, this means that the plaintiff will be free to choose one of the two competent courts according to his or her own preferences,[16] but, on the other, that alternative heads of jurisdiction, as they depart from the general rule, have been subject to a restrictive interpretation in the case law of the Court of Justice of the European Union.[17]

For torts that are territorially dissociated, *i.e.* where the event is localised in one State and the damage resulting from such event occurs in another State, the first question that was dealt with by the case law related on which of the two elements had to be taken into consideration for the purposes of what is now Article 7(2). In its landmark case *Mines de Potasse d'Alsace SA*, the Court of Justice of the European Union adopted the so called principle of ubiquity[18] to interpret the provision at hand, in the sense that harmful event

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[13] For a critical study on the principle at hand, see Carrascosa González J., "Foro del domicilio del demandado y Reglamento Bruselas 'I-bis 1215/2012'. Análisis crítico de la regla *actor sequitur forum rei*", *Cuadernos de Derecho Transnacional*, 11(1), 2019, pp. 112-138.

[14] Brussels I *bis* Regulation, recital 16.

[15] Mankowski P., *Article 7*, in Magnus U., Mankowski P. (eds.), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Köln: Verlag Dr. Otto Schmidt, 2016, pp. 121-369, p. 263.

[16] Kropholler J., von Hein J., *Europäisches Zivilprozessrecht*, Frankfurt-am-Main: Deutscher Fachverlag GmbH, Fachmedien Recht und Wirtschaft, 2011, p. 212.

[17] Cf. ECJ, judgment of 27 September 1988, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, C-189/87, ECLI:EU:C:1988:459, para. 19. Nonetheless, such an approach to alternative heads of jurisdiction has been subject to critiques as «Article 4 is not a principle which may be derogated from only on grounds of absolute necessity. It would be unfortunate if such an approach would be established at the expense of overall coherence of the Regulation» (Mankowski P., *Article 7*, p. 155). Part of the case law has also argued that the two elements are as per their relationship in an equal position, rather than being in a position of general principle and exception to the rule («Sowohl Sitz als auch Erfüllungsort sind gleichrangige Gerichtsstände, die mit dem Gerichtsstand der Gewährleistungsklage konkurrieren, so daß die internationale Zuständigkeit schon dann gegeben ist, wenn nur einer von ihnen vorliegt»; LG Hamburg 27 May 1974 − 5 O 82/74, *unalex* [online], DE-674. URL:<https://www.unalex.eu/> [accessed on 14/11/2019]).

[18] A principle that, even though accepted in the context of the regulation on international jurisdiction, as does not militate against its necessity to ensure predictability, has not been transposed within the general conflict of laws rules in non-contractual matters contained in the Rome I Regulation (Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199, p. 40 ss.), on which see Ballarino T., Ballarino E., Pretelli I., *Diritto internazionale privato*, Milano: Wolters Kluwer, 2016, p. 282. With some exceptions (see Article 7 on environmental damage), when it comes to the identification of the applicable law, Article 4(1) Rome II Regulation rejects the ubiquity theory, which would give the damaged party the possibility to choose between a number of laws, and consequentially the right to choose the more convenient law. The provision prescribes that the non-contractual obligation is governed by the law of the State where the damage occurs (yet, different solutions were adopted for example under some domestic rules of private international law; cf. Law 31 May 1995, No. 218, "Riforma del sistema italiano di diritto internazionale privato", *Italian Official Journal*, General Series No. 128, 3 June 1995 – Ordinary Supplement No. 68,

can refer to both the place of the event, as well as to the event where the damage takes place.[19] Such a solution, that is not contrary to the overall consistency of the regulation, as both elements might express a significant element of proximity, also serves the purpose of ensuring the effectiveness of the provision, as the possible overlap between the place of the event and the place of domicile of the defendant (alleged tortfeasor), would in practice erase any utility of the additional head of jurisdiction if proceedings is started by the alleged victim.[20]

Where jurisdiction is based on the place of 'damage', the question thus becomes what has to be understood as damage. The Court of Justice follows an autonomous factual concept, which should make no reference to domestic laws to understand what 'damage' is.[21] Part of the scholarship has however highlighted that lack of reference to any law for the determination of the damaged and protected value requires «intuition» as per the identification of the protected value or assets, and thus to the relative damage to be localised.[22]

Additionally, only 'direct' damages are taken into consideration for the purposes of the provision, in the sense that consequential, indirect or financial damages that follow the first one do not ground the jurisdiction of the court, as this would lead to a court having possibly a weak connection with the case, or a court that is close to one party rather than to the dispute.[23] In other terms, the concept of damage (both in the Brussels I *bis* Regula-

Article 62, and former Czech Domestic laws, Act. No. 97/1963, Coll., "The Private International Law Act", according to whose Article 15 «[t]ort claims shall be governed by the law of the place where the damage or the harmful event occurred», on which see Pauknerova M., *Private International Law in the Czech Republic*, Alphen aan den Rijn: Wolters Kluwer, 2011, p. 124).

[19] ECJ, judgment of 30 November 1976, *Handelskwekerij G. J. Bier BV v Mines de Potasse d'Alsace SA*, C-21/76, ECLI:EU:C:1976:166, para. 19.

[20] *Ibidem*, para. 20.

[21] ECJ, judgment of 19 September 1995, *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, C-364/93, ECLI:EU:C:1995:289, para. 16 ss. («The German Government submits, however, that, in interpreting Article 5(3) of the Convention, the Court should take account of the applicable national law on non-contractual civil liability… It must, however, be noted that the Convention did not intend to link the rules on territorial jurisdiction with national provisions concerning the conditions under which non-contractual civil liability is incurred»). On the judgment, see Saravalle A., "Evento dannoso e sue conseguenze patrimoniali: giurisprudenza italiana e comunitaria a confronto", *Il Foro italiano*, 119(6), 1996, pp. 341-342, and Gardella A., "Diffamazione a mezzo stampa e Convenzione di Bruxelles del 27 settembre 1968", *Rivista di diritto internazionale privato e processuale*, 33(3), 1997, pp. 657-680.

[22] Mankowski P., *Article 7*, p. 304.

[23] ECJ, judgment of 11 January 1990, *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, C-220/88, ECLI:EU:C:1990:8, para. 21 («whilst the place where the initial damage manifested itself is usually closely related to the other components of the liability, in most cases the domicile of the indirect victim is not so related»). More recently, with regard to the lack of relevance of the damaged suffered by the bank account following damage, CJEU, judgment of 16 June 2016, *Universal Music International Holding BV v Michael Tétreault Schilling and Others*, C-12/15, ECLI:EU:C:2016:449, para. 35 ss. («In the wake of that case-law, the Court has also held that that expression does not refer to the place where the applicant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State ... It is true that in the case which gave rise to the judgment of 28 January

tion as well as in the Rome II Regulation on the law applicable to non-contractual obligations), follows the 'first impact rule': where the material immediate and direct negative consequence of the event arises, jurisdiction follows.[24] The most common example being a road traffic accident taking place in one country, and reparations to the vehicle made in the State of origin of the damaged party. Even if damages are repaired in the latter State, the non-contractual damage is localised for the purposes of jurisdiction at the side of the crash.[25]

As it stems from the above, the alternative head of jurisdiction has not as its policy goals the protection of the weaker party, or the protection of the (alleged) damaged party. As argued by the Court of Justice in the context of negative declarative actions, thus promoted by the alleged tortfeasor,

> The objectives, pursued by [the] provision and repeatedly stressed in case-law …, of ensuring that the court with jurisdiction is foreseeable and of preserving legal certainty are not connected either to the allocation of the respective roles of claimant and defendant or to the protection of either. Specifically, point [(2) of Article 7 of Regulation 1215/2012] does not pursue the same objective as the rules on jurisdiction laid down in Sections 3 to 5 of Chapter II of that regulation, which are designed to offer the weaker party stronger protection.[26]

2015 in Kolassa …, the Court found, in paragraph 55 of its reasoning, jurisdiction in favour of the courts for the place of domicile of the applicant by virtue of where the damage occurred, if that damage materialises directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts. However, as the Advocate General stated in essence in points 44 and 45 of his Opinion in the present case, that finding is made within the specific context of the case which gave rise to that judgment, a distinctive feature of which was the existence of circumstances contributing to attributing jurisdiction to those courts. Consequently, purely financial damage which occurs directly in the applicant's bank account cannot, in itself, be qualified as a 'relevant connecting factor', pursuant to Article 5(3) of Regulation No 44/2001. In that respect, it should also be noted that a company such as Universal Music may have had the choice of several bank accounts from which to pay the settlement amount, so that the place where that account is situated does not necessarily constitute a reliable connecting factor»). In the domestic case law, see Corte di Cassazione (IT) of 27 November 2015 No. 24245, *unalex* [online], IT-640, URL:<https://www.unalex.eu/> [accessed on 14/11/2019]; BGH (DE) of 6 November 2007, VI ZR 34/07, *ibidem*, DE-1573; Cour de Cassation (BE) of 28 February 2002, C.980065.N, *ibidem*, BE-19; Corte di Cassazione (IT) of 5 July 2011 No. 14654, *ibidem*, IT-747; Court of Appeal of Trieste (IT) of 23 September 2014, *ibidem*, IT-684; Corte di Cassazione (IT) of 13 December 2005 No. 27403, *ibidem*, IT-191; Tribunal of Treviso (IT) of 4 February 2016, *ibidem*, IT-742, and OLG Wien (AT) 16 May 2003, 13 R 82/03d, *ibidem*, AT-25.

[24] Yet, it should be noted, even though both instruments follow the same definition of 'damage', Article 4 of the Rome II Regulation prescribes that if the parties have their habitual residence in the same State, the law of that State shall govern the non-contractual obligation. The Brussels I *bis* Regulation has no such rule. If the parties have their common domicile in the same Member State, the plaintiff will thus have the possibility to seise a foreign court of law under Article 7(2) of the Brussels I *bis* Regulation.

[25] On the so called 'first impact rule' to determine jurisdiction under the Brussels I *bis* rules as the place of 'damage', in addition to the place of the 'event', and for the purposes of identifying the *lex loci damni* under uniform conflict of laws rules, see *ex multis* the scholarship quoted *infra*.

[26] CJEU, judgment of 25 October 2012, *Folien Fischer AG and Fofitec AG v Ritrama SpA*, C-133/11, ECLI:EU:C:2012:664, para. 45 s.

4. Mass Communication Tools and Cross-Border Defamation: A Declination of the General Rule

Defamation and violations of personality rights are a sub-category of damages. It should thus follow that actions can be brought at the choice of the person starting proceedings either at the place of the harmful event, or at the place of damage. However, in cases of cross-border infringements of personality rights by way of publications in newspapers, it could be the case that multiple direct and immediate damages to reputation take place in different Member States at the same time. In such a scenario, the ubiquity principle established by Article 7(2) of the Brussels I *bis* Regulation would pave the way for a *forum shopping*. Concentration of jurisdiction for all damages upon the court of one of the different direct damages would allow the alleged damaged party to choose the court s/he thinks is better placed to rule in her/his favour, most probably her/his own *forum actoris*.[27] In other terms, the provision at hand would become in substance a provision for the protection of the weaker or the damaged party, rather than being a provision seeking a neutral connecting factor.

To avoid such effect, in its landmark *Shevill* case,[28] the Court of Justice developed the well know 'mosaic approach', according to which general jurisdiction over all damages rests only with courts of the place of the harmful event, *i.e.* the courts of the place where the defamatory article is published, so this being the place where the publisher is established, whilst the courts of the place of the various direct damages only have competence over the damage that is localised in that specific Member State.

In this sense, where a traditional tool for mass communication infringes the dignity or reputation of a person in more than one Member State, the victim has no direct right to seek compensation for all damages in his own Member State, unless this overlaps with the general head of jurisdiction under Article 4 of the Brussels I *bis* Regulation or with the place of harmful event (and not the place of damage) under Article 7(2). This, in spite of the fact that damages to reputation in his own Member State might be significantly higher than other direct damages in other Member States. But, as the provision does not wish to protect the interests of the damaged party, this is only left with the possibility to start multiple parallel proceedings, or one 'universal' proceedings before the courts of the harmful event (which will in most cases overlap with the general head of jurisdiction).[29]

5. Online Cross-Border Defamation

In a series of decisions,[30] the Court of Justice has now specifically dealt with the issue of

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[27] Mankowski P., *Article 7*, p. 304.

[28] ECJ, judgment of 7 March 1995, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, C-68/93, ECLI:EU:C:1995:61.

[29] *Ibidem*, para. 26.

[30] CJEU (Grand Chamber), judgment of 25 October 2011, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, joined cases C-509/09 and C-161/10, ECLI:EU:C:2011:685; CJEU (Grand Chamber), judgment of 17 October 2017, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*,

online cross-border defamation and the applicability of Article 7(2) of the Brussels I *bis* Regulation. Yet, in such circumstances, the above-mentioned mosaic approach has been abandoned.

There appear to be a number of elements that point towards the inopportunity of transposing the mosaic approach in the context of online libel cases,[31] hence the reason for the Court of Justice not to do so.

As per the alleged victim, the only possibility to seek compensation for all damages without starting multiple proceedings is to sue the alleged tortfeasor at the domicile of this party. Should the defamatory content be accessible in all the Member States, the universality of the access to the content would make it burdensome to the victim to seek compensation before the courts of the damage. As the mosaic approach was intended to cope with damages following distribution of newspapers and magazines, universal accessibility (regardless of any intention to direct the content in one or more Member States)[32] of Internet pages changes the field upon which rules were thought of.

At the very same time, ubiquity of Internet pages turns the mosaic approach a burdensome technique for the alleged tortfeasor as well, as he might risk parallel proceedings in all Member States, with detriment to the principle of foreseeability of the competent court,[33] and the risk of obtaining diverging judgments. All obstacles that, in practice, might turn Article 7(2) Brussels I *bis* Regulation into a provision in favour of one party, rather than being the expression of a proximity between the court and the damage.

Lastly, the mosaic approach could create problems for courts requested to issue injunction orders to be given effect abroad. Some courts have shown restraint in issuing such orders if the conduct and harmful event was localised abroad, whilst other courts have been in the past less hesitant.[34]

It is in this specific context that the Court of Justice of the European Union adapted the mosaic approach to online defamation. Taking into consideration that «the alleged in-

C-194/16, ECLI:EU:C:2017:766; see also the Opinion of the Advocate General Szpunar delivered on 4 June 2019, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, C-18/18, ECLI:EU:C:2019:458, para. 82 ss.

[31] On which see in detail Lutzi T., "Internet Cases in EU Private International Law − Developing a Coherent Approach", *International & Comparative Law Quarterly*, 66(3), 2017, pp. 687-721, p. 691 ss.

[32] CJEU, judgment of 3 October 2013, *Peter Pinckney v KDG Mediatech AG*, C-170/12, ECLI:EU:C:2013:635, para. 42 («… unlike Article 15(1)(c) of the Regulation, which was interpreted in Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof [2010] ECR I-12527, Article 5(3) thereof does not require, in particular, that the activity concerned to be 'directed to' the Member State in which the court seised is situated»).

[33] Brussels I *bis* Regulation, recital 16 («In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation»).

[34] Lutzi T., "Internet Cases in EU Private International Law", p. 692, commenting in the first sense *King v Lewis* [2004] EWCA Civ 1329, and BGHZ 184, 313 in the second sense.

fringement is usually felt most keenly at the centre of interests of the relevant person, given the reputation enjoyed by him in that place», and that «the 'victim's centre of interests' reflects the place where, in principle, the damage caused by online material occurs most significantly», such courts are better placed for the purposes of Article 7(2) of the Brussels I *bis* Regulation to rule on all the damages. With the additional advantage of foreseeability of the competent court, for both parties.[35]

In this sense, the ubiquity of Internet defamatory pages concentrates universal jurisdiction upon the courts either of the domicile of the defendant by virtue of the general head of jurisdiction, or upon the court of the place of habitual residence, and not of the domicile, of the damaged party.

6. Final Remarks: The Courts for the Place of Habitual Residence Between Principles of EU Procedural Law and the Protection of Persons with Disabilities

Internet surely poses a number of challenges (also) to international civil procedure and conflict of laws,[36] and the development of the 'habitual residence' concept to avoid the mosaic approach appears the way of the Court of Justice of the European Union to cope with such problems.

The criterion of the habitual residence, however, has been subject to some criticism, as it seems that the Court has, in substance, introduced a *forum actoris* in favour of the victim, contrary to the idea that Article 7(2) of the Brussels I *bis* Regulation should not be a head of jurisdiction for the protection of one of the parties to the dispute.[37]

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[35] CJEU (Grand Chamber), *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, *supra*, para. 48 ss., and CJEU (Grand Chamber), *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, *supra*, para. 33 ss.

[36] In the literature, see other that the already quoted scholarship Mills A., "The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in 'Facebookistan'?", *Journal of Media Law*, 7(1), 2015, pp. 1-35, p. 2; Gössl S., *Internetspezifisches Kollisionsrecht? Anwendbares Recht bei der Veräußerung virtueller Gegenstände*, Baden-Baden: Nomos, 2014; Frigo M., *Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast of the Brussels I Regulation*, in Pocar F., Viarengo I., Villata F.C. (a cura di), *Recasting Brussels I*, Padova: Cedam, 2012, pp. 341-352; van Hoek A.A.H., "CJEU − Pammer and Alpenhof − Grand Chamber 7 December 2010, joined cases 585/08 and 144/09, not yet published", *European Review of Contract Law*, 8(1), 2012, pp. 93-107; Bogdan M., "Defamation on the Internet, *Forum Delicti* and the e-Commerce Directive: Some Comments on the ECJ Judgment in the *eDate* Case", *Yearbook of Private International Law*, vol. XIII, 2011, pp. 483-491; Zarra G., "Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo Internet", *Rivista di diritto internazionale*, 98(4), 2015, pp. 1234-1262; Carrea S., "L'individuazione del *forum commissi delicti* in caso di illeciti cibernetici: alcune riflessioni a margine della sentenza *Concurrence Sàrl*", *Diritto del commercio internazionale*, 31(3), 2017, pp. 543-571; Id., *La rete e il diritto internazionale privato: la legge applicabile in materia di diffamazione a mezzo Internet*, in Ivaldi P., Carrea S. (a cura di), *Lo spazio cibernetico. Rapporti giuridici pubblici e privati nella dimensione nazionale e transfrontaliera*, Genova University Press: Genova, 2018, pp. 51-88.

[37] Lutzi T., "Internet Cases in EU Private International Law", p. 696. On the necessity for proper justification for a departure from the *actor sequitur forum rei* principle, see Mankowski P., *Article 7*, p. 279.

Moreover, it remains unclear if such a theory effectively avoids parallel proceedings. In determining the competent court for violation of personality rights and actions for rectification, the court argued that

> in the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal …, an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage pursuant to the case-law resulting from the judgments of 7 March 1995, *Shevill and Others* …and of 25 October 2011, *eDate Advertising and Others*.[38]

In other words, it remains unclear whether the damaged party is prevented from following the mosaic approach should he wish to seek multiple parallel proceedings.[39] After all, the Court does not expressly reject the mosaic approach; it rather adheres to it,[40] and offers specific interpretation with the identification of a qualified place of damage.

However, if one changes the glasses and approaches the case law from the different field of investigation which seeks to answer the question whether EU international civil procedure settles peculiar necessities of persons with disabilities and who have been bullied and defamed online in order to ensure that civil actions do not become an excessive burden to the point they might be induced not to seek a court of law, the result of the investigation becomes more satisfactory.

Even if the *eDate* case law might be at odds with some of the fundamental principles of the Brussels I *bis* Regulation, the concentration of jurisdiction on the courts of habitual residence of the damaged party surely helps persons with disabilities to access a court of law to seek redress for cross-border defamation. Clearly, this was not the goal of the Court of Justice, but in practical terms the case law does settle in part their need to have a particularly close court to adjudicate the infringement of their personality rights.

Surely, recourse to the limitation of the mosaic approach in the case at hand does not offer an extensive protection to such a 'weaker party', in the sense that the plaintiff will only have the possibility to choose either between the courts of his habitual residence, or the courts of the State of domicile of the defendant. No specific protection is foreseen in case the allegedly damaging party starts negative declaratory proceedings, nor any limitation to party autonomy in case of choice of court agreements is given.

Such a circumstance clearly sets apart persons with disabilities that might encounter difficulties in entering foreign proceedings, from 'weaker parties' that in the Brussels I *bis* Regulation are offered specific protection in case of insurance matters, consumer contracts or employment contracts. Which, consequently, raises the question of whether the first group should also be offered similar protection in the regulation. In this sense, and at this stage, the question should however be answered in the negative, as it would in fact open a pandora box. Offering specific protection to persons with disabilities in the context of the

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[38] CJEU (Grand Chamber), *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, *supra*, para. 48.
[39] In these terms, Stadler A., "Die Crux mit der Mosaiktheorie", *Juristenzeitung*, 73(2), 2018, pp. 94-98, p. 96.
[40] Bach I., "Klage von Online-Firmen auf Schadensersatz im Schadensland", p. 3436.

Brussels I *bis* Regulation would require proper identification of protection-worthy classes, an uneasy task for the EU lawgiver as not all disabilities might affect their rights to seek a foreign court of law in the same way. Questions would also raise as per the 'damaging party' that should be the subject of protection. It cannot be excluded that the alleged tortfeasor is the person with disability. Should in such a case a specific rule for the compression of the rights of the damaged party be developed as well?

In the end, and in conclusion, whereas it seems unlikely – and tremendously difficult, up to the point of being possibly unfeasible also due to slippery-slope arguments – to develop specific sections that would be able to grant particular protection to persons with disabilities, the current rules on international civil procedure, as interpreted by the Court of Justice of the European Union, do seem sufficiently adequate to cope with the increasing problem of online bullying and defamation of persons with disabilities, as – in substance – they might seise their *forum actoris*.

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Health and Disability in the EU General Data Protection Regulation

Federica Persano

The relationship between disability and protection of personal digital data must be addressed focusing on the protection of health data in the EU legislation.[1]

From this point of view, the new European legislation on General Data Protection provide for an *ex ante* balancing judgment between the fundamental rights in game, as an attempt to prevent useless conflicts in a sector that is to protect in concrete cases.

The starting point of this paper is the consideration that development of emerging technologies takes on board the fact that persons with disabilities represent a significant number of the population (80 million only in Europe); and for those persons emerging technologies have the potential to increase inclusion, participation and independence, overcoming a range of barriers in access to health, transport, and many other areas of life, so creating new prospects.[2]

In this context, as it is known, at international level the United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted on 13 December 2006, is the first human rights treaty concerning this topic, entered into force on 3 May 2008, which recognizes, in Articles 3 and 9, 'accessibility', which means the right of persons with

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[1] For an analysis of this topic see, *inter alia*, Alpa G., "Privacy statuto dell'informazione", *Rivista di diritto civile*, 25(1), 1979, pp. 65-120; Bonfanti A., "Il diritto alla protezione dei dati personali come riconosciuto dal Patto internazionale sui diritti civili e politici e dall'art. 8 della Convenzione europea dei diritti dell'uomo: similitudini e difformità dei contenuti", *Diritti umani e diritto internazionale*, 5(3), 2011, pp. 437-481; Camardi C., "L'eredità digitale. Tra reale e virtuale", *Il Diritto dell'Informazione e dell'Informatica*, 1(1), 2018, pp. 65-93; Carta M., "Diritto alla vita privata ed internet nell'esperienza giuridica europea ed internazionale, *Diritto dell'Informazione e dell'Informatica*, 30(1), 2014, pp. 1-19; Della Fina V., Cera R., Palmisano G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, Cham: Springer, 2017; Di Stefano M. (a cura di), *La protezione dei dati personali ed informatici nell'era della sorveglianza globale*, Napoli: Editoriale Scientifica, 2017; Gaeta M.C., "La protezione dei dati personali nell'*Internet of things*: l'esempio dei veicoli autonomi", *Il Diritto dell'Informazione e dell'Informatica*, 24(1), 2018, pp. 147-179; Panetta R. (a cura di), *Circolazione e protezione dei dati personali tra libertà e regole del mercato. Commentario al Regolamento UE n. 2016/679 e al novellato d.lgs. n. 196/2003 (Codice Privacy),* Milano: Giuffrè, 2019; Terrasi A., *La protezione dei dati personali tra diritto internazionale e diritto dell'Unione europea*, Torino: Giappichelli, 2008; Rodotà S., *Il mondo nella rete. Quali i diritti quali i vincoli*, Roma: Editori Laterza, 2014; van der Sloot B., "Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of 'Big Data'", *Utrecht Journal of International and European Law*, 31(80) 2015, pp. 25-50.

[2] European Disability Forum (2018), "Plug and pray? A disability perspective on artificial intelligence, automated decision-making and emerging technologies". URL: <http://www.edf-feph.org/sites/default/files/edf-emerging-tech-report-accessible.pdf> [accessed on 12/11/2019].

disabilities to access information and communication technology, that should be ensured in the same way as for able-bodied people.[3] And at European level, in order to foster the inclusion of people with disabilities in society and to enable them to fully exercise their rights at European level, the EU Commission has adopted the European Disability Strategy (2010-2020), identifying eight areas for joint action between the EU and Member States, between which (i) 'accessibility': included their access to information and communication technologies, that must be ensured in the same way as for able-bodied people and; (ii) 'health': people with disabilities must benefit from equality of access to services and health facilities, including mental health facilities. And in order to safeguard this principle of equality, services must be affordable and appropriate to people's specific needs.

Technology has therefore increased independence in ways we could not have imagined just a decade ago: and if, on one hand, citizens are becoming aware of the potential of artificial intelligence, on the other hand, they are also becoming aware of the potential misuse of their data.

For persons with disabilities challenges and risks are connected with the fact that most emerging technologies require access to personal information, including sensitive information, so that ensuring user privacy and security are key priorities.

In this perspective, on 6 April 2016 the European Union agreed to a major reform of its data protection framework, by adopting the data protection reform package, comprising: (i) the so-called EU General Data Protection Regulation (EU GDPR), namely Regulation (EU) No. 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (in force since 24 May 2016 and applicable in all the EU countries since 25 May 2018)[4] and; (ii) the so-called Police Directive, namely Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.[5]

The reform introduces a harmonized legal framework leading to a uniform application of rules to the benefit of the EU digital single market: the Regulation realizes new transparency requirements and therefore more control over personal data for individuals; strengthened rights of information, access and erasure ('right to be forgotten').

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[3] Those goals are also present in the 2030 UN *Agenda for Sustainable Development*. UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, resolution adopted on 25 September 2015 on its seventieth session, UN Doc A/RES/70/1.

[4] Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (hereinafter, EU GDPR).

[5] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L119/89.

Thanks to this in the European Union citizens now have greater rights in relation to the protection of their personal data, but few people have practical knowledge of these rights, let alone how to exercise them. Emerging technologies and systems work with a lot of data, including very sensitive personal data and this is something that persons with disabilities should be particularly concerned about: a key recommendation of the International Disability Alliance Stakeholder Group of Persons with Disabilities is to «protect the data of all citizens, in particular those of persons with disabilities, including those deprived of their legal capacity».[6]

And the question is: do persons with disabilities receive a special protection according to the EU GDPR?

As mentioned before, with the EU GDPR the requirement to obtain consent to collect data on user behaviour should be upheld: in the field we are dealing with this is particularly important, for example, for hearing aids and implant users, but in practice it does not always happen and in addition there is a worrying trend where service providers restrict the use of hearing aids or implant apps if a user doesn't grant permission for data collection.

The European Federation of Hard of Hearing People told to the European Disability Forum that hearing care professionals often activate data login in hearing aids without specific consent from their patients.

Consumers with disabilities definitely need to get involved in debates so that they are sufficiently aware of what happens to their data and what steps they need to take to protect their privacy online, or when using emerging technologies.

They are worried about how this could affect their security and ask for support in this area.

However, in the EU GDPR there are not specific provisions directly protecting data of persons with disabilities.

Article 4 of the Regulation, concerning 'definitions', states, *inter alia*, that: (i) 'personal data' means any information relating to an identified or identifiable natural person ('data subject');[7] (ii) 'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;[8] (iii) 'genetic data' means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question;[9] (iv) 'biometric data' means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic

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[6] European Commission, EPTF Report, 15 May 2017. URL: <ec.europa.eu> [accessed on 12/11/2019].

[7] EU GDPR, Article 4 No. 1.

[8] *Ibidem*, Article 4 No. 11.

[9] *Ibidem*, Article 4 No. 13.

data;[10] (v) 'data concerning health' means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status.[11]

Data concerning disability are included in 'genetic data' and 'health data'.[12]

The Regulation introduces a wide definition of health data: data concerning health should deal with all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject,[13] including information about the natural person collected in the course of the registration for, or the provision of, health care services: a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes, information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples «and any information on, for example […] disability»,[14] independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.

It should also be added that genetic data and the data relating to health pertain to the most intimate sphere of a subject, since they are directly connected to his body and to his most personal ideologies:[15] by its nature, the processing of personal data requires the adoption of special precautions necessary to respect the fundamental rights of the interested parties, in order to prevent them from being prejudiced in the absence of explicit legal requirements and these 'cautions' find more space in the health field, where the right to privacy generically understood meets (or clashes) with constitutional rights of equal rank, such as public health or the right to health.

These considerations have therefore brought the European legislator to enter genetic data and health data in the category of sensitive data, with the consequent extension also to them of the applicable discipline and the protection regime envisaged. According to Recitals 51-53 and to Article 9 EU GDPR, the data pertaining to the health of the interested party benefit from the prohibition of treatment by third parties, except for cases in which such rights must bend to others of a higher rank; the hypotheses of derogation from the

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[10] *Ibidem*, Article 4 No. 14.

[11] *Ibidem*, Article 4 No. 15.

[12] *Ibidem*, recital 54 states: «The processing of special categories of personal data may be necessary for reasons of public interest in the areas of public health without consent of the data subject. Such processing should be subject to suitable and specific measures so as to protect the rights and freedoms of natural persons. In that context, 'public health' should be interpreted as defined in Regulation (EC) No. 1338/2008 of the European Parliament and of the Council, namely all elements related to health, namely health status, including morbidity and disability, the determinants having an effect on that health status, health care needs, resources allocated to health care, the provision of, and universal access to, health care as well as health care expenditure and financing, and the causes of mortality. Such processing of data concerning health for reasons of public interest should not result in personal data being processed for other purposes by third parties such as employers or insurance and banking companies».

[13] *Ibidem*, recital 35.

[14] *Ibidem*.

[15] The Italian Court of Cassation has defined such data as 'supersensitive'; see *ex multis*, Corte di Cassazione, judgment of 11 January 2016, No. 222.

general prohibition referred to in paragraph 1 are listed in paragraph 2 in which, in addition to the general limit of the public interest, various exceptions are introduced in favour of the treatment of health data for research, profiling and health purposes.

Article 9(1) states that data regarding health data are «special categories of personal data» and receive a special protection as the context of their processing could create significant risks to the fundamental rights and freedoms. Those personal data include personal data revealing racial or ethnic origin, whereby the use of the term 'racial origin' in this Regulation does not imply an acceptance by the European Union of theories which attempt to determine the existence of separate human races.[16]

And the rule for «special categories of personal data» is that processing of those personal data is prohibited (Article 9(1) EU GDPR): such personal data should not be processed, unless processing is allowed in specific cases set out in this Regulation, taking into account that Member States law may lay down specific provisions on data protection in order to adapt the application of the rules of the Regulation for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.[17]

Pursuant to recital 53, special categories of personal data which merit higher protection should be processed for health-related purposes only where necessary to achieve those purposes for the benefit of natural persons and society as a whole. Therefore, this Regulation should provide for harmonised conditions for the processing of special categories of personal data concerning health, in respect of specific needs, in particular where the processing of such data is carried out for certain health-related purposes.

Article 9(2) EU GDPR states that derogations from the general prohibition for processing such special categories of personal data can be provided, *inter alia*, if one of the following applies: (i) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes;[18] (ii) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of EU or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;[19] (iii) processing is necessary for reasons

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[16] The processing of photographs should not systematically be considered to be processing of special categories of personal data as they are covered by the definition of biometric data only when processed through a specific technical means allowing the unique identification or authentication of a natural person.

[17] Recital 51 and Article 9(1) EU GDPR.

[18] Except where EU or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject.

[19] According to recital 52 EU GDPR: «Such a derogation may be made for health purposes, including public health and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system, or for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. A derogation should also allow the processing of such personal data where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in an administrative or out-of-court procedure».

of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of EU or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;[20] (iv) where it is in the public interest to do so, in particular processing personal data in the field of employment law, social protection law including pensions and «for health security, monitoring and alert purposes, the prevention or control of communicable diseases and other serious threats to health».

These rules help processors and controllers to identify whether the data they collect constitutes health data in order to implement adequate safeguards and document their records adequately; and in this perspective the Regulation is the opportunity to simplify the legal environment, and so have fewer national rules and greater clarity for operators.

However, with regard to the processing of genetic data, biometric data or data concerning health Member States are allowed to maintain or introduce further conditions, including limitations, with regard to the processing, *inter alia*, of data concerning health.[21]

In implementation of the EU GDPR, Article 2-*septies* of the so-called Italian Privacy Code, concerning «guarantee measures for the processing of genetic, biometric and health data»,[22] states that personal data referred to in Article 9(1) cannot be disclosed:[23] genetic,

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[20] See EU GDPR, recital 51.

[21] *Ibidem*, Article 9(4). This should not hamper the free flow of personal data within the EU when those conditions apply to cross-border processing of such data limits in application of Article 9(4) are those of Article 8 of the EU Charter and of Article 16(2) TFEU.

[22] Legislative Decree 6 April 2003, No. 196, Codice in materia di protezione dei dati personali (so-called 'Codice privacy', Italian Privacy Code), updated by the Legislative Decree 10 August 2018, No. 101.

[23] Article 2-*septies* of the Italian Privacy Code states: «1. In attuazione di quanto previsto dall'articolo 9, paragrafo 4, del regolamento, i dati genetici, biometrici e relativi alla salute, possono essere oggetto di trattamento in presenza di una delle condizioni di cui al paragrafo 2 del medesimo articolo ed in conformità alle misure di garanzia disposte dal Garante, nel rispetto di quanto previsto dal presente articolo. 2. Il provvedimento che stabilisce le misure di garanzia di cui al comma 1 è adottato con cadenza almeno biennale e tenendo conto: a) delle linee guida, delle raccomandazioni e delle migliori prassi pubblicate dal Comitato europeo per la protezione dei dati e delle migliori prassi in materia di trattamento dei dati personali; b) dell'evoluzione scientifica e tecnologica nel settore oggetto delle misure; c) dell'interesse alla libera circolazione dei dati personali nel territorio dell'Unione europea. 3. Lo schema di provvedimento è sottoposto a consultazione pubblica per un periodo non inferiore a sessanta giorni. 4. Le misure di garanzia sono adottate nel rispetto di quanto previsto dall'articolo 9, paragrafo 2, del Regolamento, e riguardano anche le cautele da adottare relativamente a: a) contrassegni sui veicoli e accessi a zone a traffico limitato; b) profili organizzativi e gestionali in ambito sanitario; c) modalità per la comunicazione diretta all'interessato delle diagnosi e dei dati relativi alla propria salute; d) prescrizioni di medicinali. 5. Le misure di garanzia sono adottate in relazione a ciascuna categoria dei dati personali di cui al comma 1, avendo riguardo alle specifiche finalità del trattamento e possono individuare, in conformità a quanto previsto al comma 2, ulteriori condizioni sulla base delle quali il trattamento di tali dati è consentito. In particolare, le misure di garanzia individuano le misure di sicurezza, ivi comprese quelle tecniche di cifratura e di pseudonomizzazione, le misure di minimizzazione, le specifiche modalità per l'accesso selettivo ai dati e per rendere le informazioni agli interessati, nonché le eventuali altre misure necessarie a garantire i diritti degli interessati. 6. Le misure di garanzia che riguardano i dati genetici e il trattamento dei dati relativi alla salute per finalità di prevenzione, diagnosi e cura nonché quelle di cui al comma 4, lettere b), c) e d),

biometric and health data can be processed only in the presence of one of the conditions referred to in paragraph 2 of the same article «and in accordance with the guarantee measures arranged by the Guarantor».

The provision that establishes the guarantee measures referred to in paragraph 1 is adopted at least every two years taking into account: (i) the guidelines, recommendations and best practices published by the European Committee for data protection and the best practice regarding the processing of personal data; (ii) scientific and technological evolution in the sector covered by the measures; (iii) the interest in the free circulation of personal data in the territory of the European Union.[24]

The guarantee measures, adopted in compliance with the provisions of Article 9(2) of the Regulation, also concern the precautions to be taken in relation to: (a) vehicle markings and access to restricted traffic areas; (b) organizational and management profiles in the health sector; (c) procedures for direct communication to the interested party of diagnoses and data relating to their own health; (d) prescriptions of medicines.

The guarantee measures concerning genetic data and the treatment of health data for the purposes of prevention, diagnosis and treatment are adopted after hearing the Italian Minister of Health who, for this purpose, acquires the opinion of the Superior Health Council.

Limited to genetic and health data, the guarantee measures can identify, in the event of a particular and high level of risk, consent as a further measure to protect the rights of the data subject, pursuant to Article 9(4) of the Regulation, or other specific cautions.

In this way the combined provisions of the EU Regulation and of the Italian Privacy Code determine that: in general, for all personal data other than particular data (referred to in Article 9 EU GDPR), consent is one of the conditions that may allow the treatment.

For particular data, explicit consent is one of the conditions justifying their treatment pursuant to Article 6(a) EU GDPR.

With specific reference to health data, explicit consent is a sufficient but not necessary condition, if other conditions specifically listed by Article 9(2) of the Regulation are present; in the absence of explicit consent, the assumption of lawfulness of treatment is given by the requirements of preventive or diagnostic medicine or for reasons of public interest in the field of public health. In these cases, for the EU Regulation the consent of the person concerned is no longer required.

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sono adottate sentito il Ministro della salute che, a tal fine, acquisisce il parere del Consiglio superiore di sanità. Limitatamente ai dati genetici, le misure di garanzia possono individuare, in caso di particolare ed elevato livello di rischio, il consenso come ulteriore misura di protezione dei diritti dell'interessato, a norma dell'articolo 9, paragrafo 4, del regolamento, o altre cautele specifiche. 7. Nel rispetto dei principi in materia di protezione dei dati personali, con riferimento agli obblighi di cui all'articolo 32 del Regolamento, è ammesso l'utilizzo dei dati biometrici con riguardo alle procedure di accesso fisico e logico ai dati da parte dei soggetti autorizzati, nel rispetto delle misure di garanzia di cui al presente articolo. 8. I dati personali di cui al comma 1 non possono essere diffusi. La diffusione comporta, ai sensi del nuovo articolo 166, la possibile applicazione della sanzione amministrativa pecuniaria fino a 20 milioni di euro o, per le imprese, fino al 4% del fatturato mondiale totale annuo dell'esercizio precedente, se superiore».

[24] According to Article 2-*septies* of the Italian Privacy Code, the draft provision is submitted to public consultation for a period of not less than sixty days.

However, Article 2-*septies* of the Italian Privacy Code assigns to the Guarantor the duty to adopt guarantee measures and possibly further conditions on the basis of which the treatment is allowed: this is in line with the possibility offered by Article 9(4) EU GDPR, which allows Member States to maintain or introduce additional conditions and limitations concerning these data, as well as biometric and genetic data.

Also pursuant to Article 9(4)(f) EU GDPR, Article 2-*septies*(6) of the Italian Privacy Code allows the Guarantor to «identify consent in case of particular and high level of risk, as a further measure to protect human rights» in relation to genetic data and health, diagnostic and medical prescription data. It follows that the Guarantor will then be able to reintroduce the consent for the category of genetic data for the treatment of some specific data relating to health; while the same consideration does not apply to biometric data (as they are not expressly mentioned in Article 2-*septies*).

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Section III

Realising Disability-Inclusive Development through ICTs

Realizing the Sustainable Development Goals for and with Persons with Disabilities through ICTs

Carola Ricci*

> *"Persons with disabilities as* beneficiaries *and* agents *of change in society and development" – the central message of the work of the United Nations on disability since the 1980s' is taking increasingly concrete forms in global, regional, and national development agendas.*[1]

1. A Multi-Stakeholder Alliance for a Digital Inclusive Development

Disability-inclusive development is an essential condition for a sustainable future. In 2015, the United Nations adopted the 2030 Agenda for Sustainable Development, pledging to leave «no one behind» in the global efforts to realize seventeen Sustainable Development Goals (SDGs) and many targets.[2]

Disability has been included in various targets and as a cross-cutting issue in the 2030 Agenda for Sustainable Development, a soft-law instrument, setting the scene of the future goals and targets that the UN State Parties are willing to achieve. Against this background, recently, the UN Department on Economic and Social Affairs (UNDESA)[3] stressed the need to enhance common efforts to ensure that such goals and targets will be realised «by, for and with persons with disabilities».[4] Against the backdrop of all the available evidence

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[1] Ito A., *Afterwords*, in Gordon J.-S., Põder J.-C., Burckhart H. (eds.), *Human Rights and Disability: Interdisciplinary Perspectives*, London-New York: Routledge, 2017, at p. 171.

[2] See UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, resolution adopted on 25 September 2015 on its seventieth session, UN Doc A/RES/70/1.

[3] UN Department on Economic and Social Affairs (UNDESA), *Disability and Development Report. Realizing the Sustainable Development Goals by, for and with persons with disabilities − 2018*, 2019 (hereinafter, 'Disability and Development Report'). URL: <https://www.un.org/development/desa/disabilities/> [accessed on 15/12/2019]. It addresses, at the global level, the nexus between disability and the Sustainable Development Goals, on the basis of the analysis based on an unprecedented amount of data, legislation and policies from over one hundred countries to understand the socio-economic circumstances of persons with disabilities and the challenges and barriers they face in their daily lives.

[4] In the same UNDESA, *Disability and Development Report*, p. 31 ss., UNDESA presented an overview

collected in its Report, UNDESA identifies good practices and recommends urgent actions to be taken for the achievement of the Sustainable Development in line with the Convention on the Rights of Persons with Disabilities (CRPD).[5]

It emerges clearly from the legal framework, already described in the first Section of this work, that States are the primary duty-bearer called to realize the human rights of all the individuals, including persons with disabilities. Nonetheless, civil society is required to participate actively as well, in a sort of «multi-stakeholder alliance».[6] UNDESA promotes a 'whole-of-society' approach, in a spirit of 'win-win cooperation', not only to raise awareness and enhance knowledge of ICT accessibility, but also to address the challenges and the opportunities of building an inclusive society through shared responsibility. The aim being a co-production of disability-inclusive policies and rules that should be consistent with international law standards.

In particular, on the one hand, key stakeholders such as governments and decision makers, educators, statisticians, non-governmental organizations, particularly, organizations of persons with disabilities, and ICT industries in the public and private sectors must be alerted to the vast potential of, and urgent need for, accessible ICTs to improve the

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of selected SDGs from a disability perspective, discussing the relevant international normative frameworks; the current situation of persons with disabilities; and current practices on: poverty and hunger (SDGs 1 and 2); health and well-being (SDG 3); sexual and reproductive health and reproductive rights (targets 3.7 and 5.6); education (SDG 4); gender equality and empowerment of women and girls with disabilities (SDG 5); availability of water and sanitation (SDG 6); access to energy (SDG 7); employment and decent work (SDG 8); access to ICT (target 9.c); inequality (SDG 10); inclusive cities and human settlements (SDG 11); disasters, shocks and climate change (targets 1.5 and 11.5 and SDG 13) and, finally, violence against persons with disabilities, inclusive societies and institutions, representative decision-making, birth-registration and access to justice and to information (SDG 16).

[5] Cf. the entire chapter second of UNDESA, *Disability and Development Report*.

[6] Such an expression has been used in post-2015 development frameworks that incorporated the rights and well-being of persons with disabilities, and engaged the participation and contribution of persons with disabilities in the deliberation and development of relevant strategies in other contexts. The reference is precisely to the protection of all vulnerable migrants, including migrants with disabilities, offered by the 2016 New York Declaration for Refugees and Migrants and the 2018 Global Compact for Safe, Orderly and Regular Migration. See, for the first soft law act: UN General Assembly, *New York Declaration for Refugees and Migrants*, resolution adopted on 19 September 2016, UN Doc A/RES/71/1, respectively at: para. 61; para. 15, which reads as follows: «We invite the private sector and civil society, including refugee and migrant organizations, to participate in *multi-stakeholder alliances* to support efforts to implement the commitments we are making today» (emphasis added). Similarly, the Declaration refers to: «multi-stakeholder dialogue», at point 55; to «multi-stakeholder approach», at point 69 and in Annex I, at point 2. In the same vein, see also para. 85 and, within Annex II, para. 15; cf. Guild G., "The UN's search for a Global Compact on Safe, Orderly and Regular Migration", *German Law J.*, 2018, pp. 1779-1795. For the second soft law act, on 13 July 2018 the UN Member States finalized the text for the *Global Compact for Safe, Orderly and Regular Migration*, which was adopted in Marrakech the following 10 and 11 December 2018 (text available in all official languages at URL: <http://www.un.org/en/conf/migration> [accessed on 06/08/2019]). Few days later, on 19 December 2018, the General Assembly endorsed the Global Compact finalised in Marrakech (GA Res. 73/195, *Global Compact for Safe, Orderly and Regular Migration*); cf. Ricci C., "The Necessity for Alternative Legal Pathways: The Best Practice of Humanitarian Corridors Opened by Private Sponsors in Italy", *German Law J.*, 21(2), 2020 (forthcoming).

quality of life and to foster social inclusion of persons with disabilities. In the idea of UN-DESA, «methods to achieve this could include the development of academic programmes and training programmes highlighting ICT accessibility and Universal Design».[7]

In the same vein, a participation method should be adopted to involve directly the beneficiaries in all the phases regarding the measures having an impact on their rights, from decision-making, to standard-setting and monitoring. In order to properly understand the variety of needs and abilities that ICTs and social media can address, as well as necessary accessibility requirements, persons with disabilities must be involved at every stage of ICT development. One of the most effective ways to do this is to «work together with organizations of persons with disabilities, particularly those which have expertise in the field of ICT accessibility and connect them with ICT businesses for their input and insights».[8]

Finally, the UNDESA stresses the necessity to increase both involvement and funding by all relevant multiple stakeholders to support Universal Design, open-source software, and low-cost assistive ICTs worldwide. In the Report it clearly states that: «Governments, the private sector, and non-governmental organizations all have potential roles to play»,[9] and suggests that international cooperation and capacity-building in ICT accessibility should be promoted involving the private sector as well. In this vein, it is suggested for example that the «social responsibility departments of large corporations could also be an important part of this change by dedicating more resources to the issue of digital inclusion for persons with disabilities».[10]

2. The Full Potential of a 'Whole-of-Society' Approach

The UNDESA clearly calls for a broad partnership with States and all the relevant stakeholders in disability governance with the aim of realizing together the SDGs.

Such an approach encourages a sort of new active and dialectic perspective between, on the one hand, the States − traditionally conceived as both the primary subjects of international law and the *primary duty-bearers* ultimately accountable − and, on the other hand, all the different «forces that hustle international law»,[11] which might be referred to

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[7] See UNDESA, *Disability and Development Report*, litt. I, under target 9.c, point 1, p. 169 ss., spec. p. 187 s.

[8] *Ibidem*, litt. I, under target 9.c, point 2, p. 188.

[9] *Ibidem*, litt. I, under target 9.c, point 8, p. 189.

[10] *Ibidem*.

[11] Decaux E., *The Impact of Individuals and Other Non-State Actors on Contemporary International Law*, in Pisillo-Mazzeschi R., De Sena P. (eds.), *Global Justice, Human Rights and the Modernization of International Law*, Cham: Springer, 2018, pp. 3-16, at p. 10. In relation to the States' role as primary duty-bearers in realizing fundamental human rights of persons with disabilities, it is important to point out that, even if the 1966 Covenant on Economic, Social and Cultural Rights does not have provisions specifically aimed at advancing or protecting the rights of persons with disabilities, the Committee on Economic Social and Cultural Rights (CESCR) has adopted a specific General Comment outlining the content of their rights and corresponding obligations for other subjects. Reference is made to CESCR, *General Comment No. 5: Persons with Disabilities,* adopted at the eleventh session on 9 December 1994, spec. para. 11, stating that: «Given the increasing commitment of Governments around the world to market-based policies, it is

generally as Non-State actors, but also as «ancillary duty-bearers». This approach reconsiders the role of Non-State actors in shaping innovative solutions to respect, fulfil, and protect the fundamental human rights of all persons with disabilities, irrespective of their impairment, while promoting the development of all the communities involved. The principle of *participation* in public life should be intended very broadly in order to include the active and informed involvement of persons with disabilities in all the decision-making processes affecting their lives, so to ensure good governance and social accountability.

That is also why the principle of participation is well established under different human rights instruments.[12] The effective and meaningful participation of persons with disabilities, through their representative organizations, is actually at the very heart of the CRPD, as recognised in October 2018, by the Committee on the Rights of Persons with Disabilities and specified in the General Comment No. 7.[13]

The CRPD recognizes participation as both a general obligation and a cross-cutting issue. In fact, it is the binding source of obligation for the States Parties to closely consult and actively involve persons with disabilities (Art. 4(3)) also in the monitoring process (Art. 33(3)),[14]

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appropriate in that context to emphasize certain aspects of States parties' obligations. One is the need to ensure that *not only the public sphere, but also the private sphere*, are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to *both non-discrimination and equality* norms in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, *the ability of persons with disabilities to participate in the mainstream of community activities and to realize their full potential as active members of society* will be severely and often arbitrarily constrained. This is not to imply that legislative measures will always be the most effective means of seeking to eliminate discrimination within the private sphere» (emphasis added). See Odello M., Seatzu F. (eds.), *The UN Committee on Economic, Social and Cultural Rights. The Law, Process and Practice*, Abingdon-New York: Routledge, 2013, pp. 203-209, spec. p. 206. Cf. on the role and responsibilities of States as primary duty-bearer in general, CESCR, *General Comment No. 3 on the Nature of State Parties' Obligations (Art. 2, para. 1, of the Covenant)*, adopted on 14 December 1990, E/1991/23.

[12] The principle of participation is enshrined in Article 21 of the Universal Declaration of Human Rights and reaffirmed in Article 25 of the International Covenant on Civil and Political Rights; in Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination; in Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women; and in Articles 12 and 23(1) of the Convention on the Rights of the Child.

[13] Committee on the Rights of Persons with Disabilities, *General Comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, 9 November 2018*, CRPD/C/GC/7, point 3 (hereinafter, General Comment No. 7). On the participative dimension of inclusive equality under the CRPD, see *supra*, Broderick A., *The European Accessibility Act: A Paradigm of Inclusive Digital Equality for Persons with Disabilities?*, spec. para. 3.2.3.

[14] See General Comment No. 7, point 6. In particular, Article 33(3) implies that States Parties should support and fund the strengthening of capacity within civil society, in particular organizations of persons with disabilities, to ensure their effective participation in the processes of the independent monitoring frameworks.

as part of a wider concept of meaningful participation in public life.[15] Such a principle, efficaciously mirrored in the motto 'nothing about us without us', has shown to be an effective *modus operandi* in many occasions: since the negotiation phase of the CRPD, as well as in the preparation of States' initial and periodic reports to the Committee (in accordance with Articles 4(3) and 35).[16]

The Committee, however, continues to observe an important gap between the goals and spirit of Articles 4(3) and 33(3) and the degree to which they have been implemented.[17]

That is why it urges the States Parties to acknowledge the positive impact on decision-making processes and the necessity of involving and ensuring the participation of persons with disabilities, through their representative organizations both while setting the standards in all decision-making contexts, and during the implementation and monitoring phase of the CRPD in advancing the 2030 Agenda for Sustainable Development and its goals.

The representatives' organisations of persons with disabilities, as specific entities of the private sector and civil society composed by, for and with persons with disabilities, are identified[18] as the closer entities to the same individuals and communities who would require an intervention, as the subsidiarity principle openly vindicates. In particular, such representative organisations can operate at the same level in which the persons with disabilities live and cohabitate.

This is notably because of their lived experiences and knowledge of the rights to be implemented, so that they are able to properly identify and understand their actual needs in their specific physical and virtual environment − in respect of the fulfilment and protection of fundamental rights − and to advocate their necessities more effectively. The communities are considered as the collective dimension «in which alone the free and full development of the personality» of any individual is possible.[19] From this basic principle, solemnly confirmed in the 1948 Universal Declaration of Human Rights − specifically, Article 29, paragraph 1−[20] and re-affirmed fifty years later in a specific declaration adopted *per consensus*

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[15] As confirmed in the General Comment No. 7, «the participatory processes and the involvement of persons with disabilities, through their representative organizations, in the negotiation and drafting of the Convention proved to be an excellent example of the principle of full and effective participation, individual autonomy and the freedom to make one's own decisions. As a result, international human rights law now recognizes unequivocally persons with disabilities as 'subjects' of all human rights and fundamental freedoms» (point 6).

[16] The Committee notes the progress made by States Parties to implement the provisions under Articles 4(3) and 33(3) over the past decade, such as granting financial or other assistance to organizations of persons with disabilities, including persons with disabilities in independent monitoring frameworks established pursuant to article 33(2) of the Convention, and in monitoring processes (see General Comment No. 7, point 7).

[17] See General Comment No. 7, point 8.

[18] The characteristics that should identify a representative organisation are indicated in Section II, part A of the General Comment No. 7, points 10-12, while part B is dedicated to the distinction between organizations of persons with disabilities and other civil society organizations (points 13-14).

[19] Decaux E., *The Impact of Individuals and Other Non-State Actors*, p. 10.

[20] Under Article 29(1) of the Universal Declaration of Human Rights (UN General Assembly Resolution 217A, adopted on 10 December 1948 at its hundred and eighty-third plenary meeting): «Everyone has

by the General Assembly,[21] it follows that all members of society, individuals, families, local communities, non-governmental organizations, civil society organizations, and the private business sector should be globally involved, through the States, in collective negotiations so to share best practices and elaborate common rules. These should be agreed upon jointly in compliance with international law and in a manner conducive to respecting the fundamental rights of all the vulnerable people, including persons with disabilities.

The adoption of a full and effective participation approach would thus result, on the one hand, «in greater effectiveness and equal use of public resources, leading to improved outcomes for such persons and their communities» and, on the other hand, it could also become «a transformative tool for social change, and promote agency and empowerment of individuals».[22] In fact, it «strengthens the ability of such persons to advocate and negotiate, and empowers them to more solidly express their views, realize their aspirations and reinforce their united and diverse voices», in order to combat discrimination against them while improving «transparency and accountability, making them responsive to the requirements of such persons».[23]

3. Some Suggestions for the Way Forward

Full and effective participation entails the inclusion of persons with disabilities in different decision-making bodies, both at local, regional, national and international levels, and in national human rights institutions, *ad hoc* committees, councils and regional or municipality organizations.[24]

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duties to the community in which alone the free and full development of his personality is possible».

[21] Cf. UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, resolution adopted on 9 December 1998, UN Doc A/RES/53/144. Similar considerations can be found in: CESCR, *General Comment No. 5: Persons with Disabilities,* adopted at its eleventh session on 9 December 1994, spec. para. 11 (quoted *supra*, note 11); Id., *General Comment No. 12. The Right to Adequate Food (Art. 11)*, adopted at its twentieth session, 26 April-14 May 1999, specifying that: «While only States are parties to the Covenants and are thus ultimately accountable for compliance with it, all members of society, individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector have responsibility in the realization of fundamental rights. States should provide an environment that facilitate implementation of these responsibilities» (para. 20); see Saul B., Kinley D., Mowbray J., "Article 11: The Right to an Adequate Standard of Living", in Saul B., Kinley D., Mowbray J. (eds.), *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford: Oxford University Press, 2014, pp. 861-976, spec. p. 872. As underlined by Decaux E., *The Impact of Individuals and Other Non-State Actors on Contemporary International Law*, pp. 7-8, the original wish of «the international law's pioneers» at the end of the nineteenth century for a real co-making of law, meant «not only 'traité-loi', but collective negotiations between 'social partners'», a two pillar model of political society and civil society, which was never realized − not even for ILO and UNESCO − «since States are unwilling to lose their monopoly on legal force, the overhang position of the rulers over the governed».

[22] See General Comment No. 7, points 32-33.

[23] *Ibidem*.

[24] *Ibidem*, point 31.

Recently, following the aim proclaimed by the Committee, disability organizations, policymakers, governments, bi-lateral, multi-lateral and civil society organizations, experts, academics and other relevant stakeholders gathered at the Doha International Conference on Disability and Development.[25] Such a high-level political forum was devoted to reflect on «how to rationalize, consolidate, contextualize, and streamline the nexus between the UN SDGs and the UN CRPDs, based on the co-production of social policy between civil societies and governments».[26] It represented a global platform where public and private sector could share their views and experience on how best to combine the two approaches for a disability-inclusive future.

The outcome of the Conference being the Doha Declaration, is offering another reference point at the international level for policy development on human rights and sustainable development in the context of disability.[27] It offers different guidelines for the way forward, paved by the legal obligations arising from the CRPD and the view of SDGs as guiding principles in implementing new effective actions. These two global instruments are defined as «two powerful instruments reflecting the values of change and each, in their own way, driving that process of change», being aware that «*complementary* action as between the two can help create a more inclusive future for all persons with disabilities».[28]

The *interoperability* and *interdependence* of the two instruments cannot be achieved without mainstreaming the participation approach. In fact, the multi-stakeholder participants to the Doha Conference concluded that «all duty-bearers must prioritize the representation of all persons with disabilities as leaders, active *citizens* and active *agents* of change in the community, country, and international level, thus reaffirming the principle of 'nothing about us without us'. Encourage governments, civil society and others to innovate with new methods of *co-production of policies*»,[29] specifically welcoming the active participation of the private sector as a key partner in realizing the CRPD and SDGs.[30] Moreover, the underlined priority in the common action must be accessibility to address and eliminate barriers in the physical, digital and social environment.[31]

4. From Manifesto to Action: Transforming the Aspiration into Accountable Action for All Generations

Against this theoretical background, our project felt the need and urgency to involve different members of civil society, including members of representatives' association of per-

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[25] The Doha International Conference on Disability and Development, held on 7-8 of December 2019, was focused on "Harnessing the Power of Sustainable Development Agenda to Advance the Human Rights of Persons with Disabilities". URL: < https://www.dicdd.qa/> [accessed on 15/12/2019].

[26] See "Conference Booklet of the Doha International Conference on Disability and Development", p. 12.

[27] Doha Declaration, 7-8 December 2019. URL: <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/Doha-Declaration-Disability2019.pdf> [accessed on 15/12/2019].

[28] See the preamble of the Doha Declaration, third "whereas".

[29] See Doha Declaration, point 4 (emphasis added).

[30] *Ibidem*, point 10.

[31] *Ibidem*, point 11.

sons with disabilities, academics, and private sector experts in ICT. Some of those have been so kind to present their actions, projects and products realized in their respective field of expertise in this volume.

Each of the presented contributions exactly aims at render some specific SDGs and targets more effective, namely, pursuing at ensuring universal access: to equitable quality education (goal 4); to information (target 16.10); and to safe, inclusive, accessible and sustainable public spaces (target 11.7), that are to be intended as university buildings as well. The latter constitutes a universal (material and immaterial) cultural heritage to be shared by all the members of the society, including person with disabilities, by providing information through sign language, braille, footpaths, ramps, tactile maps and, hopefully in the future, beacon-based navigation systems.

Each and all the following interventions suggest that the proposed multi-stakeholder approach can really result in a win-win cooperation between private and public sector.

This Section shows that there are many best practices that can and should be shared. Although lack of resources cannot justify inaction, financial constraints to implement physical, structural and virtual adaptation in cities are still a hurdle to increase accessibility, but there are low-cost options which could be scaled up.

In this vein, we believe that ICTs and social media can play a pivotal role. In fact, as the contributions to the first Section of the present work have shown,[32] accessibility to a 'virtual environment' is considered instrumental to achieve other SDGs for persons with disabilities, on the basis of the consideration that: «For most people, technology makes things easier. For persons with disabilities, technology makes things possible».[33]

ICTs, including social media,[34] can represent a powerful opportunity to improve quality of life, enhance inclusion and social engagement and make independent living possible: ICTs can offer persons with disabilities opportunities for education, work, leisure, social interaction and political participation as well as provide access to public services and information. Online access to public services, e-learning materials which can be adapted to the needs of students with disabilities, and text-to-voice devices, among others, are indeed giving persons with disabilities the ability to further engage in society.

As it has been already highlighted, information and communication move increasingly online, digital technologies present an unprecedented opportunity for the inclusion of

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[32] Waddington L., *Regulating e-Accessibility and Digital Equality in Europe from a Multilevel Perspective* and Broderick A., *The European Accessibility Act: A Paradigm of Inclusive Digital Equality for Persons with Disabilities?*, both *supra*.

[33] Radabaugh M.P., Director of IBM National Support Center for Persons with Disabilities, 1988.

[34] The United Nations World Summit on Information Society (WSIS) process 2003-2005, held in Geneva (from 10 to 12 December 2003) and in Tunis (from 16 to 18 November 2005), for the first time considered the relevance of the human rights perspective to achieve a sustainable development and global governance of the information society, «to build a people-centred, inclusive and development-oriented Information Society». See spec. "Geneva Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium, adopted on 10-12 December 2003", Geneva, 2003, WSIS-03/GENEVA/DOC/0004. URL: <https://www.itu.int/net/wsis/docs/geneva/official/dop.html> [accessed on 15/12/2019] and Favalli S., *Disability and Social Media: Paving the Road to a Different Approach in the Protection of Human Rights in the Digital Era*, *supra*, spec. para. 2.

persons with disabilities. At the same time, «they also present a major risk of leaving persons with disabilities further behind, in cases where these technologies, products, content and services are not created with accessibility in mind».[35] That is why we referred to a specialised organisation, ASPHI, to develop our common pilot project of a beacon-based navigation system, which we hope could constitute a good practice to share in the future. Such a pilot project, called «SI@unipv (Smart Inclusion at the University of Pavia)», represents a fruitful cooperation with Fondazione ASPHI onlus to ameliorate access to our ancient University buildings and to share culture and scientific knowledge to promote the participation of persons with disabilities (and whoever would like to download our free app) in the community living in Pavia.[36]

The *Palazzo Centrale* is the main University building: its architectural complexity is due to its big dimensions and composite structure, with eleven courtyards and nine different entrances. Moreover, it is one of the rare examples of 'passing architecture' allowing people to cross the building from the cardo of the Roman grid of Pavia, Corso Strada Nuova, towards other important architecture spots. Moreover, GPS and Wi-Fi signals cannot operate through the ancient courtyards of the University of Pavia, so that experience of walking within the University buildings cannot be autonomously pursued.

For these reasons *Palazzo Centrale* presents several problems of accessibility and orientation, for students, visiting scholars and cultural tourists, but most of all for persons with visual impairment or low vision. To tackle this problem, the research group is developing the already mentioned SI@unipv Project, in collaboration with Fondazione ASPHI onlus, for the installation of vocal aids helping the orientation through selected paths. The Project is aimed at providing a smartphone APP able to intercept the signals emitted by small e-beacons and receive voice information enabling users to move easily and independently through a selected accessible path, while enjoying the architectural environment. The vocal aids will use the architectural elements to characterize the space, underlining not only the obstacles to be avoided but also the points of interest for historical, architectural and academic reasons.

Once tested, this solution could be widespread also to other University buildings, creating more accessible, inclusive and thus sustainable value environments for students and tourists, in compliance with the international standards. As the University of Pavia, all around Italy and the 'old Continent' many public buildings with huge areas and courtyards are scarcely accessible for visually impaired persons and the beacon-based navigation could overcome such a situation with low costs, mostly in case the best practice could be shared and improved thanks to persons with disabilities and their representatives' organizations. The open-source software which has been developed offers many advantages. It can be acquired free of cost, and can be adjusted according to different user needs and languages; moreover, the participation of Fondazione ASPHI onlus and its associates gave

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[35] Cf. UNDESA, *Disability and Development Report*, under litt. I, target 9.c, p. 169; for further details, see *supra* the already mentioned contributions by Favalli S. and Broderick A.

[36] See the blog of our BIDS Project, created and managed by Favalli S. URL: <https://blueskyresearch2017.wordpress.com/> [accessed on 15/12/2019].

the programmers with disabilities a chance to directly define the characteristic of both the software and the exact localisation of the beacons themselves.

Finally, such a beacon-based navigation system, as other recent developed digital technologies, have proved to be successful not only to largely facilitate inclusion and independent living in the modern society of persons with disability, but also to reduce the gap among generations and marginalisation of older people, if accompanied by a proper training and awareness raising actions. E-accessibility can promote equality and social inclusion for *all* the generations. In fact, even if, on the one hand, longevity and significant gains in life expectancy have been achieved in the last decades, on the other hand, living longer often does not necessarily mean the years gained are productive and healthy. On the opposite, experts predict different patterns of time trends in old-age disability prevalence.[37] These evidences show cross-sectionalities between disability and ageing.[38]

In this context, the United Nations are urging the Member States to review and further explore the complementarities between the discourses on ageing and on disability in the development of their policy and legal framework under the 2030 Agenda for Sustainable Development, as it emerges from the specific document elaborated thereon.[39]

With the growing proportion of older persons in the global population, there is greater acknowledgement of the importance of ageing and recognition of the rights of older persons, as the CRPD is clearly applicable in relation not only to accessibility (Article 9), but

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[37] Population ageing is a major global trend that affects all countries, albeit at a different pace and levels. See World Bank Group, *Global Monitoring Report 2015/2016: Development Goals in an Era of Demographic Change*, Washington, DC: World Bank, 2016. Against this background, prejudice and discrimination towards elderly at individual and institutional levels undermines older persons' status as rights holders including their right to autonomy, participation, access to long life training, health and social care, security.

[38] See the data from UNDESA-Population Division, *World Population Prospects: the 2015 Revision*, UNDESA/P/WP.241. On the one hand, it has been registered higher disability rates among older persons, as a result of health risks due to disease, injury, and chronic illness accumulated across a lifespan. In addition, the global trends in ageing populations and the higher risk of disability in elderly are likely to lead to further increases in the population affected by disability. On the other hand, the number of elderly has increased substantially in recent years in most countries and regions, and such a growth is projected to accelerate in the coming decades.

[39] See UNDP, *Ageing, Older Persons and the 2030 Agenda for Sustainable Development*, 2017. URL: <https://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/ageing--older-persons-and-the-2030-agenda-for-sustainable-develo.html> [accessed on 15/12/2019]. The issue brief on ageing was prepared by E. Dugarova (UNDP) under the supervision of R. Kalapurakal with inputs from P. Conceição and B. Horvath (UNDP); R. Lane, K. Schmid, A. Rafeh and L. Ainbinder (UNDESA); M. Herrmann (UNFPA); S. Staab (UN Women); K. Hujo (UNRISD); J. Beard (WHO); X. Scheil-Adlung (ILO); A. Warren-Rodriguez (UNDOCO); T. Aura (UN-Habitat); S. Beales Gelber (Independent Consultant). In Section 1, these experts underline that: «Preparing for an ageing population is vital to the achievement of the integrated 2030 Agenda, with ageing cutting across the goals on poverty eradication, good health, gender equality, economic growth and decent work, reduced inequalities and sustainable cities. Therefore, while it is essential to address the exclusion and vulnerability of − and intersectional discrimination against − many older persons in the implementation of the new agenda, it is even more important to go beyond treating older persons as a vulnerable group».

also to independent living and inclusion in society (Article 19), personal mobility (Article 20), health (Article 25) and rehabilitation (Article 26).

Therefore, it is essential to prepare for the economic and social transformations associated with ageing and ensure that the necessary conditions are developed to enable older persons to lead self-determined, healthy and productive lives, and empower them to exercise their right to make decisions and choices in all areas that affect their lives.

To this aim, ICTs can ensure progress towards implementing the SDGs, thanks to modern inclusive, fully accessible and usable digital tools, realised having in mind the already binding standards of protection set within the CRPD, to the benefit of all generations of any community, that can profit of the advantages of co-production of policies and common actions realised and implemented together.

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Persons with Disabilities, Digital Technologies, Accessibility: Best Practices from Civil Society

Ennio Paiella and Roobi Roobi

1. Introduction

Digital technologies are affecting our businesses, our homes and how we access public services and present great opportunities for Person with Disabilities (PwD), who are often early users of technology. For these persons, and more in general for persons with some special needs (like elderlies, immigrants and others), the digital technologies can be very useful to increase their inclusion, independence, participation in the school environment, in the working environment, in their everyday life.

However, in order to exploit all these opportunities, a key point is the 'accessibility' of the technologies, namely the capability to supply information and services to everybody, also to those that may have some physical, sensorial, cognitive difficulties.

2. Fondazione ASPHI Onlus

Fondazione ASPHI onlus[1] is a non-profit organisation in operation since 1980 with the aim of promoting the integration and improve the quality of life of persons with disabilities (PwD) exploiting ICTs (Information and Communication Technologies).

ASPHI's main activities include research, development, testing, promotion of new solutions, working in cooperation with public and private institutions, universities, research centres.

The focus of ASPHI's activities is not on a specific kind of disability. The organization addresses different types of disability (physical, sensorial, cognitive); during the years, the scope has been broadened to include persons with special needs, who are not officially classified as PwD.

It is worth mentioning that ASPHI organizes every two years a national event, called Handimatica,[2] with an exhibition section where developers and manufactures of digital assistive technologies present their state-of-art products and an information and training area where conferences, debates, workshops, seminars are held addressing various aspects of the ICT technologies for PwD.

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[1] See the Fondazione ASPHI onlus website. URL: <www.asphi.it> [accessed on 3/10/2019].

[2] See the Handimatica website. URL: <www.handimatica.com> [accessed on 3/10/2019].

3. Persons with Disabilities (PwD)

As already said, ICT technologies must be 'accessible' in order to be effectively used by PwD. To better understand why this is a very important issue, let's see some figures referring the persons that may be impacted. It is very difficult to give precise figures, but a very recent report[3] states that

> One in six people in EU has a disability: that's an estimated 80 million PwD in Europe and 1 billion worldwide. Over a third of people aged over 75 have disabilities that restrict them to some extent… Taking into account demographic ageing, it's expected that there will be approximately 120 million persons with some disabilities in EU by 2020.

These numbers are impressive, as they represent a meaningful percentage of the total population, that means that 'accessibility' involves a meaningful percentage of the total population.

4. Digital Accessibility

One definition of accessibility that refers to the web environment, but may be generalized, is the following:

> Digital accessibility is the ability of a website, mobile application or electronic document to be easily navigated and understood by a wide range of users, including those users who have visual, auditory, motor or cognitive disabilities.

Here is another way to see it: if you want to get an accessible digital system, you must get rid of its internal digital barriers. This is something similar to the removal of the architectural barriers that limit or prevent people with disabilities from obtaining the goods or services that are offered.

Some examples of digital barriers (in the web environment):

- If in a synchronized media no captions are provided for all audio contents, that's a barrier that excludes persons with hearing impairments;
- If colours are used as the only visual means of conveying information, indicating an action, prompting a response, distinguishing a visual element, or if the colour contrast between the foreground and background is low, these situations may create strong difficulties for persons with visual impairments;
- If some functionalities are not operable through a keyboard, they may become barriers for persons that can't use the mouse, for instance because of hand impairments;
- If no text descriptions are provided for non-text elements, this is a problem for persons

[3] European Disability Forum (2018), "Plug and pray? A disability perspective on artificial intelligence, automated decision-making and emerging technologies", 2018. URL: <http://www.edf-feph.org/sites/default/files/edf-emerging-tech-report-accessible.pdf> [accessed on 03/10/2019].

with blindness using 'screen readers' as assistive technology, because screen readers can only read text;
– If part of the content blinks or flashes at a certain frequency, this may cause seizures to persons prone to it.

5. Digital Usability

The examples listed above are just some of the possible internal barriers you must get rid of to make digital systems accessible to PwD. In addition, there's another very important attribute of them to consider, that is their 'usability'.

Usability is the degree of ease with which products such as software and web applications can be used to achieve required goals effectively and efficiently.

Usability assesses the level of difficulty involved in using a user interface, therefore a product is usable if it is efficient to use (takes less time to accomplish a particular task), it is easy to learn (operation can be learned by observing the object), it is satisfying to use. It goes without saying that usability is not only something of interest for PwD, but it is a key requirement that benefits every user.

6. Accessibility/Usability Evaluation

After having introduced the accessibility/usability concepts, let's see how we can evaluate them, with reference to the web/mobile environment.

The process for assessing accessibility, called 'technical verification', develops in checking that the system is compliant with a set of technical requirements. In Italy the requirements are listed in the implementation documents of a specific national law (so-called Stanca Act) that addresses these topics, that is: Law 9 January 2004, No. 4, issued in 2004, updated in 2018.[4]

The requirements set by the Stanca Act are aligned with the Web Content Accessibility Guidelines[5] (WCAG 2.1), which are the guidelines, universally accepted, developed by the World Wide Web Consortium[6] (W3C), the main international standardization organization for the World Wide Web.

The technical verification is a process that requires good expertise and the support of some automatic tools.

In February 2019, a survey[7] was conducted to evaluate the accessibility of the home pages for about 1,000,000 web sites using automatic tools: the results paint a not so exciting picture of the current state of web accessibility for individuals with disabilities.

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[4] Law 9 January 2004, No. 4. URL: <https://www.agid.gov.it/it/node/79271> [accessed on 03/10/2019].
[5] See the World Wide Web Consortium (W3C) website. URL: <https://www.w3.org/TR/WCAG21/> [accessed on 03/10/2019].
[6] *Ibidem*.
[7] WebAIM, "The WebAIM Million. An accessibility analysis of the top 1,000,000 home pages", February 2019. URL <https://webaim.org/projects/million/> [accessed on 03/10/2019].

The most common errors, that is non-conformance to the W3C Guidelines (WCAG 2.1) are the following

WCAG Failure Type	**% of home pages**
Low contrast text	85.3%
Missing alternative text for images	68%
Empty links	58.1%
Missing form input labels	52.8%
Missing document language	33.1%
Empty buttons	25%

While failures are prevalent, the types of common errors are relatively few. Simply addressing these few types of issues would have a significant positive impact on web accessibility. It emerges that there is still a long way to get an acceptable level of accessibility.

Given its experience and competence, ASPHI is one of the 'Accessibility Technical Evaluator' mentioned by AgID, the Italian Agency for Digitalization.[8]

Different is the approach to evaluate the usability because this is a subjective evaluation depending on the user behaviour: therefore, to check the accessibility you have got to involve users. There are many ways to run a usability test, and ASPHI has developed its own methodology, with the involvement of PwD, already used in hundreds of situations.

This methodology develops in three steps and uses a predefined set of forms.

The first step consists in the selection of a panel of PwD with different types of disability and the definition of a set of tasks appropriate to check the most common functionalities of the system to test.

In the second step, the PwD selected execute the tasks on their own, acting as normal users, using their equipment and assistive technologies. For each task they report a set of information and comments and at the end they give a global evaluation of some characteristics, such as ease of use, ease of learning, flexibility, efficiency, etc.

In the third step, all the forms are collected, analyzed and summarized in a report that points out the problems faced executing the tasks, the suggestions to solve them, the strengths and weaknesses of the system being tested and any other comments that may be useful.

7. How to Pursue Accessibility/Usability

After this short introduction of the accessibility/usability topics, let's see a simple diagram showing the key activities to consider, based on the experience ASPHI has developed during the past years.

One key point is education and training, as these matters are not yet well known,

[8] See the Italian Agency for Digitalization website. URL:<https://www.agid.gov.it/it/design-servizi/accessibilita-siti-web/elenco-valutatori-accessibilita> [accessed on 03/10/2019].

therefore many non-accessible systems are such because nobody knew that they had to be accessible.

It is important to work following two paths: present the subject to companies and convince them of their importance not only from a social point of view, but also from a business point of view (more customers, better image and reputation on the market).

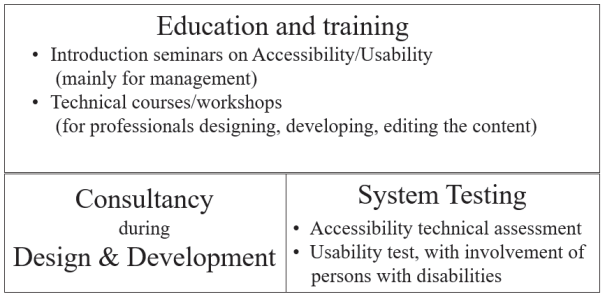
Then the professionals designing the system, implementing it, editing the content have to be trained to know the accessibility rules.

During the design/implementation of a new system is strongly suggested to make periodical checks involving PwD that can verify if the accessibility/usability aspects have been taken into consideration.

These checks are very productive as they can save time and expenses that otherwise would be necessary to correct and modify systems built without the proper accessibility/usability level.

The accessibility/usability level can be verified by running the technical assessment for accessibility and usability test, as described above.

Finally, it is important to keep in mind that every user has to take care continuously of accessibility/usability, not only once in a while, because any actions on the system can impact accessibility/usability.



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The Mission of the International Joomla! Accessibility Team is to Break Down Digital Barriers

Donato Matturro and Vito Disimino

1. The Web Evolution

The web was almost fully accessible for the first few years after its appearance.

People with disabilities were able to use the web with relative ease. This includes people who are:

– blind or have limited vision;
– deaf or hearing impaired;
– impaired physically, for example those with limited use of their arms;
– living with cognitive disabilities.

Assistive technologies worked relatively faultlessly; most websites were coded by hand using standards. Assistive technologies could easily convert web text into audible, synthetic speech that people with blindness could hear.

As the web has grown it has unfortunately shown us that:

– accessibility has never been properly understood and/or addressed by developers and web designers;
– very few web authoring tools introduced since the mid-1990s have been built to produce standards compliant code;
– in recent years, many powerful 'widgets' have been released to enhance the presentation of content such as tabs, sliders, carousels, accordions, etc. These have made embedding dynamic elements on web pages easy, but sadly provide little or no accessibility to users with disabilities.

This means that the web ceased to be based on standards-compliant mark-up, disabled users now find that their access to technologies does not work as expected. This results in isolation from a significant number of web services.

2. Joomla! Accessibility Statement

Joomla! means 'all together'. Inclusion is in our heart. As a community, we do our best to accept and welcome everyone. As such, we are committed to being accessible to the widest possible audience, regardless of ability or technology.

Joomla! is a free and open-source content management system (CMS)[1] for publish-

[1] A CMS is an application (web-based) that provides capabilities for multiple users with different permission levels to manage (all or a section of) content, data or information of a website project, or intranet ap-

ing web content. Over the years Joomla! has won several awards.[2] It is built on a model-view-controller web application framework that can be used independently of the CMS that allows you to build powerful online applications.

Joomla! is one of the most popular website software, thanks to its global community of developers and volunteers, who make sure the platform is user friendly, extendable, multilingual, accessible, responsive, search engine optimized and so much more.

Joomla! key values are freedom, equality, trust, community, collaboration, usability and transparency.

Joomla! is used all over the world to power millions of websites of all shapes and sizes.

We are volunteers from every part of the world, people willing to take action, programmers, testers and auditors, translators, authors of tutorials, project managers.

Our contributions comprise of testing, translating, writing tutorials, making PR, programming solutions.

2.1. Joomla! Evolution

Hundreds of developers have been improving Joomla! since the first version (1.0) was released in 2005. This immense effort has made Joomla! very popular, easy to use, stable and secure. It has thousands of free extensions and templates allowing end users to customize every site to fit a variety of specific needs.

With regard to the different versions released through the years and their main characteristics, they can be summarized as follow:

- Joomla! 1.0
  - Checklist for implementation WCAG 1.0
  - Joomla! Accessibility Statement
- Joomla! 1.5
  - Template overrides
- Joomla! 1.6 / Joomla 2.5
  - Andrea Tarr's Hathor Accessible Admin (backend) Template
    - Skip to Content
    - Accessible Menu
    - Accessible Submenus
    - Toolbars in a list
    - Appropriate structural headers
    - Colours pass WCAG 2.0 AA tests
    - Labels for form fields
    - Titles on form fields for tabular data

plication. Managing content refers to creating, editing, archiving, publishing, collaborating on, reporting, distributing website content, data and information. See Joomla! website for more details. URL:<https://docs.joomla.org/about-joomla.html> [accessed on 30/10/2019].

[2] See Joomla! website. URL:<https://docs.joomla.org/Joomla!_Awards> [accessed on 30/10/2019].

    - Removal of various jump menus
    - Removed tables that were only for layout
  - Beez Template (front-end)
    - Simple
    - Properly structured
    - Font size widget
- Joomla! 3.x
  - RWD (responsive implementation)
- Joomla! 4.x – next version
  - The Joomla! 4.0 core has been completely rewritten with accessibility guidelines contemplated in the core elements.

  In addition:
    - Bootstrap 4 framework
    - Sass preprocessor
    - Mobile first
    - Simplified installation procedures
  - New backend template (pc and mobile version) fully accessible
  - Brick-code for development of front-end template end extensions fully accessible.

2.2. Joomla! Team Mission

Our common mission is to make Joomla! accessible for all people by providing the CMS and Framework as a fully accessible foundation compliant with ATAG 2.0 (Authoring Tool Accessibility Guidelines), as well as providing tools and information for creating accessibility content compliant with WCAG 2.1 (Web Content Accessibility Guidelines). We hope to make Joomla!, as a whole, a beacon for accessibility in the world.

Our intent is to mobilize Joomla extensions providers to make their products accessible. Beyond that, we will mobilize and work with extension and template providers to make all parts of the Joomla! ecosystem accessible.

We aim at raising Joomla! community awareness of web accessibility. Then we will infect our community with the accessibility virus!!!

2.3. Joomla! Team Organizations

We can identify four key features for our work organization:

- Advice and guidance
  - Joomla! accessibility documentation as tutorial, specification of UI components, testing procedures
  - Joomla! accessibility portal
    - Intro to accessibility
    - Understanding A11Y

    - Standards and law
    - Accessibility design
    - Accessibility contents
    - Accessibility templates
– Testing and auditing
  • Testing procedure for
    - UI components (user interface)
    - Admin templates (to develop Joomla! Websites)
    - Site templates (to show Joomla! Websites)
– Improving
  • We will be preparing audit websites in joomla.org domain
  • We are preparing PR (Github Pull Requests)
– Implementation
  • Development of improvements
  • Development of new accessibility plugins, modules

2.4. Joomla! 4.0 Accessibility

With Joomla! 4.0, our next milestone, we are determined to push further down the road for accessibility. With this in mind, we will strive to ensure full accessibility of all modern dynamic user interface elements.

We will, first and foremost, ensure full accessibility of Joomla!'s backend so that those with disabilities can use Joomla! to create, administer and maintain sites in the most barrier-free way possible.

Please always keep *accessibility* in mind!

Supporting Inclusive Education in Uganda

Cristian Bernareggi

1. Introduction

Uganda is one of the low-income East African countries that has been adhering to an inclusive education model over the last two decades both signing international conventions and enacting laws for disability at national level.

Actually, Uganda is one of the signatory countries of international acts and conventions for rights of people with disabilities. Among the others, Uganda signed the Salamanca Statement and Framework for Action on Special Needs Education (1994). In particular, this statement includes provisions concerning the right of all children, including those with temporary and permanent needs for educational adjustments to attend school, the right of all children to attend school in their home communities in inclusive classes, the right of all children to participate in a child-centered education meeting individual needs and the right of all children to participate in quality education that is meaningful for each individual. Moreover, Uganda signed the United Nations Convention on the Rights of Persons with Disability and its Optional Protocol in 2007 and ratified both instruments in 2008 without reservations.

At national level, Uganda's legislation directly and indirectly addresses disability. The main acts that specifically address disability include The Persons with Disabilities Act (2006) that has provisions for the elimination of forms of discrimination against persons with disabilities and it calls for equal opportunities and The National Council for Disability Act (2003) that establishes the National Council for Disability to act as a body through which the needs, problems and concerns of persons with disabilities can be communicated to governmental and non-governmental agencies.

Also, acts that specifically do not concern with disability provide indirect provisions for persons with disabilities. In particular, The Employment Act (2006) calls for protection and equality of all employed persons, The Business, Technical, Vocational Education and Training Act (2008) that aims to facilitate equal access to education and training for all social groups, The Uganda Communications Act (1998) promoting development and use of communication technologies including those for hearing-impaired people, The Uganda National Institute of Special Education Act (1998) that establishes the Kyambogo National Institute of Special Education in charge of training teachers for children with special needs and The Universities and Other Tertiary Institutions Act that provides for assistive actions during admission of persons with disabilities to public education institutions.

Despite the legislation to ensure rights for people with disabilities is consolidated and continuously growing in Uganda, still many problems remain for people with disabilities, especially concerning primary education.

UNESCO estimates that 90% of children with disabilities in low-income countries do not attend any school in scholar age.[1]

As far as Uganda is concerned, The Uganda National Household Survey of 2009/2010 estimated that about 16% of the Ugandan population (about 5 million out of 31 million) have a form of disability according to the World Health Organization ICF classification. Among people with disability, 2,5 million are children but only about 9% of them attend primary school, compared to the national average of 92%, and only 6% of them go on studying after primary school.[2]

Many different reasons account for the low school enrolment and high dropout rate of students with disabilities.

Due to budget constraints, Ugandan schools do not provide sufficient assistive tools and accessible educational resources. In particular, assistive technologies for learning (*e.g.*, screen readers, Braille displays, magnifiers), that are widely and effectively adopted in many countries, are almost absent in Ugandan schools.[3] This is due not only to high costs of assistive technologies, but also to the unstable and unreliable provision of electric power to many schools in rural villages.

Moreover, in many schools, teachers are not properly trained for students with disabilities and have no previous experience in teaching to students with disabilities. Hence, it turns out to be very hard for students with disability to communicate with teachers (*e.g.*, Braille is not read by most teachers), to understand explanations based on visual presentations and to produce written works.

Another issue concerns school sites. Many schools are hard to reach by students who do not live in the school village because of unmaintained rural roads and unavailability of any public transport. This problem is even more severe for students with disability. So, most children with disability who live in rural villages can attend only boarding schools. Actually, boarding school's fees often are too high for many families which have to look for a sponsorship to let their children go to school.

2. Supporting Inclusive Education through Assistive Technologies

In order to overcome some of the issues concerned with the lack of accessible educational resources and teacher training, *Sustain for Life Foundation* has supported since 2013 a project to provide assistive technologies and to train teachers for students with sight impairments in Western Uganda schools.

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[1] UNESCO, *The Flagship on Education for All and the Right to Education for Persons with Disabilities: Towards Inclusion*, 2014.

[2] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, resolution adopted on 25 September 2015 on its seventieth session, UN Doc A/RES/70/1.

[3] Wanambwa B., Wasike S., Mankind J., Nandutu M.A., *Equal Employment Policy and Access to Formal Employment of People with Disabilities in Uganda: Case Study of Eastern Uganda,* Eldoret: Moi University Press, 2014; Eide A.H., Øderud T., *Assistive Technology in Low-Income Countries*, in MacLachlan M., Swartz L. (eds.), *Disability & International Development*, Springer, 2019, pp. 149-160.

Before the project kickoff, an analysis of requirements was conducted in two schools: Kisoro Demo school and Kabale Hornby High School. Both the schools aim to become inclusive schools teaching blind and sight impaired students together with other students. It emerged that both the schools especially needed accessible and reusable educational resources to enable students to learn in particular oral and written English as well as basic scientific subjects (*e.g.*, natural sciences). Actually, in these schools, the only available learning resources were few paper Braille books that students could read taking turns. Moreover, in order to have the project sustainable on the long run, the resources had to be cheap and reusable by many students for years.

Based on these considerations it was chosen to provide audio resources that can be read by listening to audio files on mainstream audio players.

The model for each schools consists in one laptop that works like a server that provides audio files. The laptop archives all the audio resources and it is equipped with software to create audio files from digital documents. In particular, very simple audio players were chosen. They are totally operable without a display and they can be bought at about ten dollars on many online stores. The free DSpeech software was installed on a laptop computer. The teacher transfers audio resources from the laptop to the audio players according to the needs of students. Moreover, the teacher can transform some digital documents into speech audio files. This is especially useful to produce lesson notes and tests. Once adapted, these materials can be stored for future use.

These tools were provided in schools together with Internet connection for the laptop. This allowed to remotely monitor the project, to provide assistance and to remotely transfer additional audio resources. Moreover, specific audio resources were adapted by experts in education for blind people. For example, some explanations about biology were prepared, as well as early English lessons were adapted to be read at the proper speed and with audio landmarks that aid non-visual learning.

Two weeks training were conducted at the early beginning of the intervention to train teachers to use the audio players and the laptop with software and to students to operate audio players.

The project has monitored for five years through semi-structured interviews at the end of each year to students and teachers.

It emerged that the audio resources are getting used by students both for school subjects and to learn in further detail many new subjects. For example, some students have been asking for novels to listen to in their spare time and they are willing to learn more about technologies. Furthermore, the teachers reported that tests are administered through audio files and that after two years all tests were available in audio format for all school grades.

Both teachers and students expressed interest in learning how to use the laptop with a screen reader.

3. Conclusions and Future Work

This project proves that in low-income countries an education model based on use and in-home production of audio resources can highly improve the quality and availability of

learning resources, ultimately facilitating inclusive education. Future work aims to scaling up to other schools in Eastern Uganda and to enrich the repository of audio resources of all the schools.

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Heritage Accessibility and Valorisation: Tactile Maps for a More Inclusive University

Alessandro Greco and Valentina Giacometti

1. Introduction

The Italian normative framework for the overcoming of architectural barriers is exhaustive and complete, but there is still the lack of wide-ranging policies aiming at the full and conscious individual emancipation and social inclusion of people with disabilities.

The temporal evolution of the national and international normative framework also corresponds to a conceptual and terminological evolution of the concept of 'disability'. This evolution is marked by the World Health Organization meetings in 1980 and 2001 and the relative classification models. From the concept of 'handicap' as a physical impairment that makes 'invalid', the concept switches to 'mobility and sensorial disabilities' as a linear result of the disease, until reaching the 'bio-psycho-social' approach, which combines the condition of disability to personal and environmental factors. This new approach, defined by the International Classification of Functioning (ICF) model of 2001, underlines for the first time the concept of 'activity' instead of the 'impairments', highlighting the strict dependence of disability on the contextual factors in which the person lives.

The UN Convention on the Rights of Persons with Disabilities (2006) remarks that the 'health conditions' of any person, at any time of life, can turn into 'disabling conditions' if contextualized in an unfavourable environment. This means that the 'disability' is caused by the «interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others».[1]

According to this definition, it is clear that architects, engineers and designers in general, who are able to study, understand and modify the environment in relation to the different needs of users, have to be aware of the importance of their role in the society.

As defined in the Italian Ministerial Decree 14 June 1989, No. 236 , the 'architectural barriers' are not only the 'physical obstacle' (source of discomfort for the mobility of anyone and in particular people with permanent or transitory mobility impairments), but also the «lack of measures and signs allowing the orientation and recognition of places and sources of danger for anyone and especially for blind, visually impaired, deaf and hard of hearing people».[2]

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[1] See Preamble paragraph (e), which must be read in conjunction with Article 1, of the United Nations Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 during the sixty-first session of the General Assembly by Resolution A/RES/61/106 (hereinafter, CRPD). URL: <https://treaties.un.org/doc/Publication/CTC/Ch_IV_15.pdf> [accessed on 30/11/2019].

[2] See Article 2 of the Italian Ministerial Decree 14 June 1989, No. 236, on "Prescrizioni tecniche neces-

Despite this new awareness, the concept of disability is still often associated only to a disable person forced to use a wheelchair: also the symbol indicating the presence of a service for people with disability is the figure of the man on a wheelchair. This represents a conceptual error that hinders the diffusion of the real knowledge of disability and, consequently, the development of inclusive design solutions addressed to the largest number of users.

Creating easily accessible and safely usable buildings and urban spaces for as many people as possible, regardless of their abilities or weaknesses, is one of the most complicated but also stimulating challenges for designers.

2. Accessibility, Conservation and Valorisation

Guaranteeing the accessibility and the safe usability of buildings and urban spaces with particular historical, cultural and architectural values is even more complicated and stimulating.

The conservation and the wide fruition of the heritage is fundamental, also because it helps the transmission of values and memories of the past for future generations.

People, regardless of their abilities or weaknesses, have to have the same possibilities to visit and experience the heritage and «to take part on an equal basis in cultural life».[3] As affirmed by the architect Amedeo Bellini, «we have several difficulties […] trying to imagine a building which is not made for people, which is preserved in itself, like an abstraction, and not to be used. […] It is not heritage if it is not usable, the mere contemplation does not belong to architecture».[4]

This does not mean getting accessibility every time and everywhere: «there are cases in which interventions turn out to be a real forcing, altering architectural elements, emptying of the historical message and obtaining as only result to draw a widespread sense of rejection by the public opinion».[5] But also when it is not possible to achieve the whole accessibility, it is necessary to deepen the study of alternative aids and solutions able to help the fruition of people with disabilities and special needs, even if with partial or not completely exhaustive ways.

Therefore, ensuring accessibility and usability of historical buildings and urban spaces implies more complex aspects and constraints than in case of new constructions. The detailed analysis of the context, case by case, and also the engagement of experts from different disciplines and representatives of the final users, is fundamental to study and develop proper architectural solutions helping people with disabilities and special needs, but also preserving and valorising the historical features of the heritage.

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sarie a garantire l'accessibilità, l'adattabilità e la visitabilità degli edifici privati e di edilizia residenziale pubblica e sovvenzionata e agevolata, ai fini del superamento e dell'eliminazione delle barriere architettoniche".

[3] See Article 30 CRPD.

[4] Bellini A., "La pura contemplazione non appartiene all'architettura", *TeMa*, Como: Edizioni New Press, 1998, p. 2.

[5] Arenghi A. (a cura di), *Edifici storici – turismo – utenza ampliata. La gestione dell'accessibilità nelle città d'arte*, Como: Edizioni New Press, 2000.

Provisional solutions with poor quality materials or non-inclusive mechanized aids (such as the stairlift, which is addressed only to people using wheelchairs), are not the proper answers to achieve these goals.

The requirement of *reversibility* – defined as the possibility to easily return to the pre-intervention situation – represents the key concept in order to respect the existing and also allow future modifications, if future technologies prove to be more appropriate.

For these reasons, as also underlined by many studies, the instances of accessibility «have to be considered as ordinary elements of the project, such as safety, structural soundness, thermo-hygrometric comfort, buildings and urban codes, financial resources, the same guiding principles of the restoration: distinguishability, reversibility, physical and chemical compatibility, expressive authenticity».[6]

Furthermore, the *participatory design*, that means involving experts from different disciplines and representatives of the final users, especially people with disabilities and special needs, is fundamental starting from the very beginning of the design process, in order to develop proper inclusive solutions preserving and valorising the heritage.

3. The Role of the Technology

It is known that the technology always influenced the way people live. According to the United Nations, today technology becomes crucial for the future of over a billion people in the world who live with some form of disability. In particular, in discussing the "Sustainable Development: The Promise of Technology" (2014), the UN states that technology «has raised the standard of living of people around the world and their access to goods and services». The celebration of the International Day of Persons with Disabilities, 3 December, aims to highlight how the power of technology can promote inclusion and accessibility «to help achieve the full and equitable participation of people with disabilities in society».[7]

As concerning the accessibility of buildings and urban spaces, the technology is leading to new devices, aids and architectural solutions helping to answer the needs of a large number of users: home automation, lifting platforms, 3D printing technology, mobile devices for people with blindness are only some examples of the progresses in this field.

4. Tactile Maps: Example of Good Practices at the University of Pavia

4.1. Tactile Maps for Palazzo Centrale

More than ten years ago, the Department of Civil Engineering and Architecture of the University of Pavia started an important research focused on the realization of tactile maps

[6] Carbonara G., *Adeguamento del patrimonio storico ed archeologico*, lecture held on occasion of the 10th edition of the course "Progettare per tutti senza barriere architettoniche", Rome, 2002. URL: <www.progettarepertutti.org> [accessed on 30/11/2019].

[7] United Nations Secretary General, *Message on the International Day of Persons with Disabilities*, 3 December 2014.

to help the fruition of *Palazzo Centrale*, the main building of the University, for students or visitors with blindness or low vision.

Palazzo Centrale is a building of over 33,000 square meters, mostly articulated on two levels. It hosts educational, research and administrative activities and prestigious historical rooms. This historical building is located in the historical centre of Pavia and it is open every day of the year. Furthermore, its morphology allows the full permeability of its structure: from its main entrance on Corso Strada Nuova (the *cardo* of the Roman grid) it is possible to reach directly the square Leonardo da Vinci. It is estimated that every day about 7,000 people attend the building, including students, employees and occasional tourists.

The *first step* of the project (2009) is the development of a tactile map on the ground floor of the building, with the plan of the construction and the urban surroundings in relief and the indication of the main functions written both in relief and in Braille language. The map is made of aluminum, 100x60 cm in size with a lateral legend of 20x60 cm. It has black background and white information and it is placed at the main entrance of the building, adjacent to the main staircase. It is put on a sloping stainless steel lectern to allow an easy use for all users. In order to facilitate its identification, a tactile guide was installed on the paving: about 12 m of LOGES[8] guides people with blindness from the main entrance to the tactile map. In order to preserve the historical paving in stones it is fixed with special glues which does not change the features of the original material. The fixing of the LOGES was carried out after having 'saturated' the joints of the paving, with adequate resins to guarantee a coplanar support surface without ruining the stones.

The *second step* (2012) is the realization of a tactile map on the first floor of the building, similar to the first one. The map is 95x60 cm, with the legend 25x60 cm and it is placed adjacent to the main staircase, to intercept the greater flow of people. The design choices for the contents and the morphology are consistent with the first map. The height of the main walls is 12 mm, significantly greater than the map for the ground floor in order to make people feel that they are on the first floor.

The *third step* (2013) is the realization of six specific tactile maps for the main historical rooms and important spaces of the building: Aula Scarpa, University History Museum, the main public toilets, Aula Volta, Aula Foscolo and Saloni del Rettorato. The maps of the historical rooms are 20x30 cm and represent the floor plan in scale 1:250. Working with different heights of masonry representations and fixed furnishings in order to provide the perception of different spaces. The presence of a wooden amphitheater, the detailed decorations (busts, columns, pilasters, etc.), the prestigious furnishings and the historical chairs require a careful study of the thicknesses and colours of the elements represented. The furnishings are 3.2 mm high, the windowsills 5.6 mm and the 'full' walls 11 mm. The steps and the decorative elements have variable heights to allow the perception of the small details. A lot of attention is given to the choice of colours in order to help the reading of the map even by visually impaired people: the mottled background is contrasted with the white colour for the walls, while the necessary chromatic gap between the furniture and

[8] The word LOGES is the Italian acronym of 'Linea di Orientamento Guida E Sicurezza' (Line of Orientation, Guide and Safety).

the decorations from the floor is obtained using different saturations of the background colour: respectively 70% and 30%, also depending on the height of the different elements. The specific tactile map of the University History Museum is instead 40x50 cm in size and it is in scale 1:100. The complexity of the layout of the Museum, the presence of small rooms and different furnishings, led to the need of a specific legend, which shows the various indications of the rooms in block letters and in Braille. Finally, the map of the main toilets is 30x20 cm, it is made with a black background and white walls and furniture, without significant differences in height. It is important to underline that even if toilets have no historical values or architectural qualities, the installation of this specific map is also fundamental, as all the others, to help the building fruition in conditions of autonomy and safety for people with blindness or low vision.

All the tactile maps for *Palazzo Centrale* are realized by the company Happy Vision SRL with its founder Federico Zonca, who undertook a constructive and participatory work process with the research team of the University. This process led to the study of the technical details (dimensions, positions, locations, colours, shapes, etc.) of each tactile map and all the elements reported into.

Furthermore, particular attention was paid to the realization of the lectern and the related methods of anchoring to the historical paving of the building: for the map on the ground floor, the lectern is just leaning on the paving in order to preserve the historical stones and the map is identified by a reversible LOGES path; the other maps of the building are tessellated to the wall.

This project received considerable interest and have become an important reference not only for students with disabilities but for all students attending the building, and also for occasional visitors and tourists who can consult the tactile maps to understand the complicated and interesting structure of *Palazzo Centrale* and its main historical rooms.

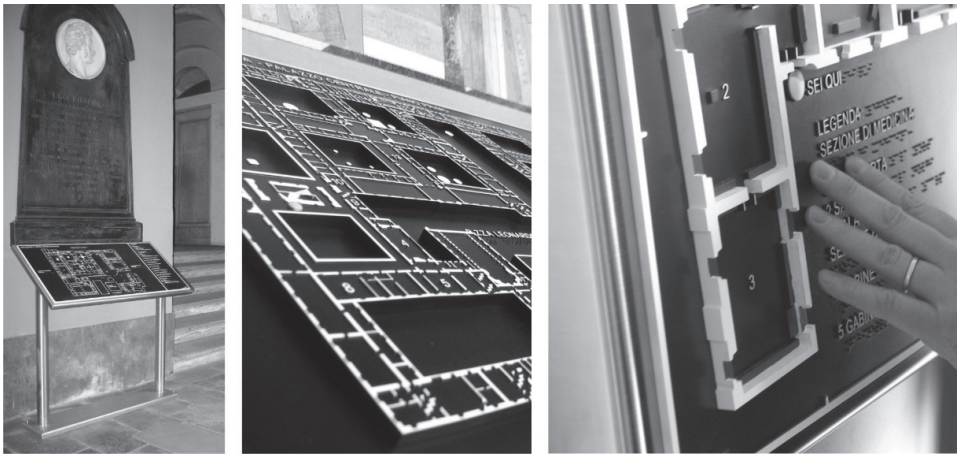

Fig. 1 Tactile maps for *Palazzo Centrale* of the University of Pavia: on the left, the tactile map of the ground floor; in the middle, a detail of the tactile map of the first floor; on the right, the tactile map of the History Museum.

4.2. 3D Printed Tactile Map for MTE

In 2017 the director of the Museum of Electrical Technology (MTE) of the University of Pavia asked the Department of Civil Engineering and Architecture how to improve the accessibility of the museum for visitors with blindness or low vision.

This museum, built in 2007 (therefore quite recently and with all the regulations about accessibility already in force), is mostly a big open space (about 3,200 sqm open to visitors), all structured on the ground floor.

It is easily accessible for people with mobility impairments due to the lack of differences in level or obstacles along the five sections of the exhibition, but there are no devices for people with blindness or low vision.

The research team of the Department of Civil Engineering and Architecture decides to focus on the realization of a tactile map, reporting information about the main elements of the museum and its exhibition.

Unlike the technology chosen for the realization of the tactile maps for *Palazzo Centrale* (aluminum in mold from specific matrices), the research team immediately focuses on the use of the 3D printing technology.

The map is designed by Valentina Giacometti and Alessandro Greco and realized in collaboration with the laboratory 3D@UniPV ProtoLab, with Gianluca Alaimo, Stefania Marconi, Valeria Mauri whose activities were coordinated by Ferdinando Auricchio.

The map (60x60 cm size) is divided into two parts: on the left there is the building plan in scale 1:200, with the main museum objects and the exhibition path; on the right there is the symbol legend, with descriptions both in relief and in Braille language.

In order to identify the best materials, printer settings, levels, heights, shapes, positions, dimensions and textures of the elements, an experimental process based on several testing steps is applied. Three main iterative phases can be identified:

1. *design*, the map contents are chosen and organized and a 3D virtual model is realized;
2. *realization*, different 3D printing technologies (in particular Binder Jetting and FDM - Fused Deposition Modeling) are tested;
3. *partial tests*, to select the best materials, printer settings, and features of the single elements of the map, four different tests are carried out. This phase is supported by Nicola Stilla, the Regional President of the Italian Union of Blind and Visually Impaired People. His help is fundamental to understand the special needs of people with blindness.

The choice to use the FDM technology with three extruders, guarantees both to obtain a surface particularly pleasant to the touch and long-lasting and to use three different printing colours for an adequate chromatic separation helping visually impaired people. In particular, the following colours are selected: *blue* for the background, *white* for the walls of the building, *yellow* for the exhibited works and information. The gap between the big dimensions of the map (60x60 cm) and the small dimensions of the printing plate of the 3D printer (16x16 cm) forces to divide the object into 16 different tiles.

In order to guarantee a reading hierarchy, the relief heights are different: 2.5 mm for external walls, 1.25 mm for internal walls and 1 mm for texts, symbols and numbers. The

exhibition path is identified by a continuous yellow line, 0.5 mm height, which starts from the 'you are here' point and links all the museum sections.

The whole map is put on a steel inclined lectern realized by SHOWall: minimum height 80 cm, maximum height 95 cm. This inclination allows its easy tactile fruition for everybody, also for children and people on wheelchair.

After several tests, the research team can assert that the FDM technology with three extruders is the best solution for these goals. In fact, this technology lets obtain successful results about:

– *details accuracy*, fundamental to realize a tactile map, which needs clear information for people with blindness. In particular, the Braille language requires precise standard features to be respected;
– *touch pleasing*, fundamental for people with blindness to use and enjoy the tactile map;
– *colours combination*, necessary to let also visually impaired people use the map, together with children and all the interested visitors;
– *durability*, necessary to guarantee the tactile consultation by the great number of people visiting the museum each year;
– *short time and flexibility of realization,* necessary to guarantee the possibility to change some parts or the whole object, if damaged or if there will be some modifications along the exhibition. In particular, in this specific case, it is estimated an average of nine hours to realize one of the 16 tiles of the tactile map.

Short time and flexibility of realization mean also lower costs than the maps realized with a mold matrix, which is advantageous only for a great number of equal objects. 3D printing technology means modelling by 3D software, without matrices, so it is particularly indicated for unique objects. It is also easier to carry out partial tests aimed at trying different settings and choose the proper solutions also together with people with blindness.

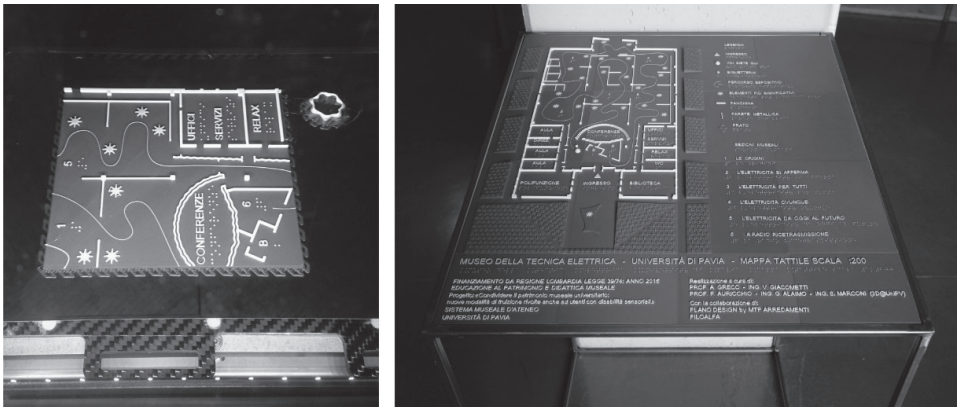

Fig. 2 The tactile map made by the 3D printing technology for the Museum of Electrical Technology (MTE) of the University of Pavia. On the left, one of the 16 tiles in the 3D printer; on the right, the tactile map installed at the entrance of the museum.

5. Conclusions

Accessibility must be considered no longer as a problem but as an opportunity to improve the environments (buildings and urban spaces) for everyone. Moreover, only thanks to the continuous and iterative comparison between the designers and the various actors it is possible to get really inclusive solutions.

In the specific case of buildings and urban spaces with historical-artistic peculiarities, guaranteeing the autonomy and safety accessibility for as many people as possible, regardless of their capabilities, means also preserving and valorising the heritage.

In the case of tactile maps for *Palazzo Centrale* of the University the research team continuously interfaced with the Happy Vision SRL company and its founder Federico Zonca, and also with the Superintendence for the Cultural Heritage in order to find the best solution to preserve the historical features of the building.

Similarly, for the tactile map realized with 3D printing technology for the Museum of Electrical Technology, the research team was helped by the precious collaboration of Nicola Stilla, the Regional President of the Italian Union of the Blind and Visually Impaired. This close collaboration allowed the experimentation of this innovative technology applied to a poorly tested field of application.

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Authors

Cristian Bernareggi is Scientific Collaborator at the University of Milan and Assistant Professor at the University of Turin. He holds a PhD, a Master in computer science from the University of Milan, and a first level Master in e-learning from the Tuscia University. His principal investigation topic is assistive technology in education. Since 2013 he has been managing projects for Sustain for Life Foundation in inclusive schools in Uganda and Sierra Leone.

Andrea Broderick is Assistant Professor in international and European law at Maastricht University, having previously been a Marie Curie Early Stage Researcher there. She is also the National Director and European Master's Programme Director (on behalf of Maastricht University) of the European Master's Programme in Human Rights and Democratisation (Venice) in the Global Campus of Human Rights. She holds a PhD in international and comparative disability equality law from Maastricht University. Her PhD thesis was nominated for the Max van der Stoel Human Rights Award 2016. She received the Edmond Hustinx Prize for Science 2018. She has published widely in academic journals and books. She has written and co-written major thematic reports for the European Commission and the Council of Europe on disability issues. In 2019, she has co-authored the first academic textbook on international and European disability law (with Dr. Delia Ferri, Maynooth University).

Vito Disimino is CEO at Moqui.it and project manager/developer team leader on SAP ERP and Web Accessible Site project. He is also member of the Joomla! Accessibility Team, Joomla! teacher and CoderDojo champion. He was CEO at Cidieffe snc and developer with many languages on various IT infrastructures (for over 30 years, from big mainframe at Mobile APPs). He holds an Italian high school leaving qualification in Industrial Electronics and attended many courses in PM and IT environments. He works as a project and delivery manager in the Joomla! Accessible Template Project and as a project manager and trainer in courses on web digital accessibility since 2015. He also worked as a project manager and trainer in course programmes on SAP ERP from 1999 to 2018. In addition, he participated in several social projects, such as the «Be Fair Take Care» social project under the 2018 Lombardy Region financial plan and in the organisation of the event «GAAD – Accessibility Day 2018» at Binario 7 conference center in Monza.

Stefano Dominelli is Junior Researcher in public and private international law in the Department of Political Science (DISPO) of the University of Genoa, where he teaches international law (Department of Law) and advanced EU conflict of laws (Department of Political Science). He holds a PhD in international and EU law from the Department of

Law of the University of Genoa. He is author of two monographs, respectively on party autonomy and insurance contracts and on cross-border service of documents in private international law, as well as of several articles and case notes covering various topics of public and private international law and human rights law, with particular attention to the protection of 'disadvantaged parties' in EU private international law.

Federica Falconi is Junior Researcher at the Department of Law of the University of Pavia, where she currently holds the course on European information law next to a module of the course on international organizations law. She is also member of the restricted Scientific Board of the interfaculty PhD Course in Public Law, Criminal and International Justice offered by the Department of law of the University of Pavia. She holds a PhD in 'Criminal law, International law and Fundamental Rights' from the Department of Law of the University of Pavia. She is author of a monograph devoted to the applicable law to insurance contracts according to Regulation (EC) No. 593/2008 and of several articles and case notes covering various topics of international law, such as EU conflicts of laws and international human rights law, with particular attention to freedom of expression and information.

Silvia Favalli is Post-Doc Research Fellow in international law at the Department of Political and Social Sciences of the University of Pavia. She is co-investigator of the Project entitled: «Building an Inclusive Digital Society for Vulnerable Persons: The Role of Social Media Tools in a Disability Human Rights Perspective» (2017-2019), financed by the University of Pavia under the call *Blue Sky Research 2017*. She is currently principal investigator of the research project «RISID – Realising the rIght to Social Inclusion for persons with Disabilities through new tools of smart communication and sharing knowledge: from international to local effectiveness», financed by Fondazione Cariplo (February 2020-January 2023). She holds a PhD in 'Public Law, Criminal and International Justice' from the Department of Law of the University of Pavia. In 2017 and 2019, she conducted part of her research at the Department of Law of Maynooth University (Ireland). She is completing a monograph in international disability human rights law. She is author of several articles and chapters covering various topics of public international law, human rights law, international disability law and policy, with a focus on access to justice of vulnerable groups in international law.

Valentina Giacometti is Post-Doc Research Fellow at the Department of Civil Engineering and Architecture of the University of Pavia. She is also Assistant Professor in building technologies at the University of Pavia and tutor of several international design workshops. She holds a PhD in civil engineering and architecture from the University of Pavia. She was visiting professor at the Technische Hochschule Mittelhessen University of Applied Sciences of Giessen. She has been selected to present her researches in several national and international conferences. She is author of several academic publications, with a focus on the accessibility of historical buildings. She is currently focusing her research on the development of assessment tools and solutions to improve the accessibility of historical buildings and urban spaces.

Alessandro Greco is Professor of building technologies in the Master Degree in Building Engineering and Architecture at the Department of Civil Engineering and Architecture (DICAr) of the University of Pavia. He is also Director of the Golgi College (one of the public college in Pavia, with more than 250 students) since 2016, and Rector Delegate for Buildings since 2019. He is currently the coordinator and scientific director of several projects and researches on the accessibility of buildings and urban spaces. He holds a PhD in urban techniques from the Politecnico di Milano. He was visiting professor at the Universidad Central de Chile (Chile) and the THM of Giessen (Germany), as well as lecturer and scientific coordinator in several international design workshop and speaker in national and international conferences.

Donato Matturro is CEO at Rilevant, digital marketing and communication group, and senior digital branding and marketing specialist. He is also President of Joomla!Lombardia Association, project manager/designer team leader on Web Accessible Site project, Joomla! Accessibility Team member, Joomla! and digital marketing teacher and member of the board of DESBRI district. He held different professional roles, such as CEO at PMI2.0, art director and graphic designer freelance, vice president of Expertone Association and teacher in professional digital communication schools. He holds an Italian high school leaving qualification in graphic design and attended many specialistic courses at DAMS Bologna University, as well as many courses in PM and IT environments. He works as a project manager in Joomla! Accessible Template Project and as a project manager and trainer in course programmes on web digital accessibility, web marketing, web design, social management since 2001. In addition, he participated in several social projects, such as the «Be Fair Take Care» social project under 2018 Lombardy Region Financial Plan and in the organisation of the event «GAAD − Accessibility Day 2018» at Binario 7 conference center in Monza.

Ennio Paiella works as a volunteer and consultant in Fondazione ASPHI onlus since 2003. He was formerly employed in IBM, where he held a leading role (technical support planning director, 'direttore pianificazione supporto tecnico'). He graduated in engineering at the Politecnico di Milano.

Vittorio Pampanin is Junior Researcher in administrative law at the Department of Law of the University of Pavia, where he teaches public health law and regional law. In the past years he also collaborated with the chair of communication law of the course in Professional Communication and Multimedia (CPM) of the same University. He holds a PhD in public law from the Department of Law of the University of Pavia. He is the author of several publications on information pluralism (also on new media) and on the regulation of Internet access and digital information, with special attention to the public regulation of access to Internet services and the protection of pluralism and freedom of information on the web.

Federica Persano is Senior Researcher and Adjunct Professor of international law at the Department of Law of the University of Bergamo. She teaches international law, conflict of laws, EU law and international and comparative law in both the Department of Law and

the Department of Economics of the University of Bergamo. She hold a PhD in international law from the University of Milan. She is author of two monographs, respectively on energy in international and EU law and on the international cooperation in information exchange on tax matters, as well as of several articles and chapters on topics of public international law, private international law and EU law, including a chapter recently published on the protection of persons deprived of legal capacity under private international law.

Roobi Roobi is attending the Languages and Cultures for International Communication and Cooperation graduate course at the University of Milan. She works as a volunteer and a web accessibility analyser in Fondazione ASPHI onlus, where she follows different projects on technologies for people with disabilities (*i.e.*, organisation of events and specific courses to inform companies, schools and other organisations). She also collaborates with Rotary Club Ancona and participates as assistive technologies teacher for students and adults with visual impairments. In addition, she travels to Uganda every year and trains blind and visually impaired students and their teachers on assistive technologies. She holds a BA in linguistic and intercultural mediation.

Carola Ricci is Associate Professor of international law at the University of Pavia with tenure (courses on public international law, human rights and international justice) at the Department of Political and Social Sciences; previously Senior Researcher and Post-Doc Research Fellow of international law at the Faculty of Law of the University of Milan (respectively, 2005-2008, 2002-2005). She holds a PhD in international law from the Faculty of Law of the University of Milan, where she graduated. She is member of the restricted Scientific Board of the interfaculty PhD Course in Public Law, Criminal and International Justice and member of the first level Master Course on Migration and Family Models, both at the University of Pavia. She is the principal investigator (PI) of the Project entitled «Building an Inclusive Digital Society for Vulnerable Persons: The Role of Social Media Tools in a Disability Human Rights Perspective» (2017-2019), financed by the University of Pavia under the call *Blue Sky Research 2017*. Starting from February 2020, she will be co-investigator for the international law unit in the Project «RISID – Realising the rIght to Social Inclusion for persons with Disabilities through new tools of smart communication and sharing knowledge: from international to local effectiveness», financed by Fondazione Cariplo (February 2020-January 2023). She had been PI on different research projects on the multilevel protection of the right to adequate food and on human rights of migrants; she has been external expert for various European Union DG Justice Programs on EU private international law (especially in family law). She is a member of the board of a highly ranked law journal (peer reviewed), *Rivista di Diritto Internazionale Privato e Processuale* (since 1997). She has been visiting scholar at Boalt Hall School of Law at Berkeley, University of California (Berkeley, California); at the British Institute of International and Comparative law (London, United Kingdom); at the Max Planck Institut (Hamburg, Germany); invited visiting fellow at Nairobi University (Nairobi, Kenya) for the a.y. 2020-2021. She is author of two monographs (and a third one is under publication) and has published extensively in academic journals and books, as well as edited different

collective works, especially on economic, social and cultural rights of vulnerable people in a multilevel perspective, and on private international law (with a specific focus on EU judicial cooperation in civil matters and EU private international family law).

Lisa Waddington holds the European Disability Forum Chair in European disability law. She is currently coordinating Maastricht University's participation in the Marie Sklodowska-Curie Innovative Training Network DARE (Disability Advocacy Research in Europe 2019-2022). She is a board member of a number of networks and organisations, including the European Network of Legal Experts in Gender Equality and Non-Discrimination. She has been a visiting professor at the University of British Columbia, Vancouver, the University of Melbourne and Leeds University. She has published widely in academic journals and books, with a focus on topics related to European and comparative disability law, the UN Convention on the rights of persons with disabilities, and European and comparative equality law in general.

Building an Inclusive Digital Society for Persons with Disabilities. New Challenges and Future Potentials in the Digital Era

Edited by Carola Ricci

New digital technologies represent an unprecedented opportunity to actively participate and be fully included in society for vulnerable groups at risk of marginalisation. Notably, Information and Communication Technologies (ICTs) have the potential for making significant improvements in increasing the social inclusion of persons with disabilities.

Nonetheless, these innovative tools also generate new challenges for the existing policy and legal framework, since new concerns addressing core human rights have been rapidly emerging. Namely, on the one hand, ICTs can represent a major risk of leaving persons with disabilities further behind, since some digital tools are not accessible and usable yet. On the other hand, the threats to the protection of sensitive personal data from cyber-attack and cyber-bullying are increasing, as well as the risks associated to the processing of data (and metadata) in a predatory or exploitative way are improving.

Against this background, the volume analyses new challenges and future potentials of digital technologies on the protection of human rights for persons with disabilities. The ambition is to identify a new global and transnational governance in determining the proper legislative framework for an effective legal protection in order to guarantee both inclusive digital equality and access to ICTs' advantages to persons with disabilities without undue violation of their fundamental human rights. For this purpose, it collects contributions developed by Scholars and stakeholders taking part to a network of experts created within the context the Project titled «Building an Inclusive Digital Society for Vulnerable Persons: The Role of Social Media Tools in a Disability Human Rights Perspective», financed by the University of Pavia under the call *Blue Sky Research 2017*. The majority of the contributions has been also presented during the international workshop organised in Pavia on 20-21 May 2019 dedicated to: «Building an Inclusive Society for Persons with Disabilities. New Challenges and Future Potentials in the Digital Era».

This collective work is divided into three major sections. The first one addresses the relevant legal and policy framework adopting a multilevel approach (encompassing the international, European and national levels). The second one focuses on the new challenges related to accessibility, human dignity and privacy concerns emerging with the widespread diffusion of digital technologies among persons with disabilities. Finally, the third one collects relevant best practices realized by members of civil society, including members of representatives' association of disabled, academics, and private sector experts in ICTs, aimed at achieving a 'digital inclusive society' *for and with* persons with disabilities, in compliance with the Sustainable Development Goals (SDGs) promoted by the United Nations.

Costruire una società digitale inclusiva per le persone con disabilità. Nuove sfide e potenzialità future nell'era digitale

A cura di Carola Ricci

Le nuove tecnologie digitali rappresentano per i gruppi vulnerabili a rischio di emarginazione un'opportunità senza precedenti per la piena inclusione e per l'attiva, diretta e indipendente partecipazione alla società. In particolare, le tecnologie dell'informazione e della comunicazione (indicate spesso con l'acronimo inglese 'ICT') hanno il potenziale per accrescere significativamente l'inclusione sociale delle persone con disabilità.

Tuttavia, questi strumenti innovativi generano anche nuove sfide legate alla tutela dei diritti fondamentali delle persone con disabilità, nella misura in cui si sviluppano più rapidamente del quadro di tutela giuridica esistente. Gli strumenti giuridici in vigore a livello nazionale, europeo e internazionale, infatti, risultano tuttora spesso inadeguati a fornire una tutela effettiva alle persone con disabilità. Da un lato, infatti, le tecnologie digitali spesso non sono ancora rese accessibili e utilizzabili dalle persone con disabilità, aumentando la loro esclusione e dipendenza dalla società. Dall'altro, sono sempre più diffuse e preoccupanti le minacce alla protezione dei dati personali derivanti da attacchi informatici e *cyber* bullismo, così come il rischio associato all'elaborazione di dati (e metadati) in modo predatorio. Questi fenomeni richiedono interventi urgenti di *governance* mirati, con particolare riferimento allo sviluppo di standard operativi, linee guida e interventi legislativi, in ambito nazionale e sovranazionale, che siano sufficientemente flessibili da adeguarsi al veloce sviluppo tecnologico e permettano un accesso effettivo alla giustizia di quanti subiscano una violazione dei diritti fondamentali.

In questo contesto, il volume analizza le nuove sfide e le potenzialità future delle tecnologie digitali in una prospettiva di tutela dei diritti delle persone disabili a diversi livelli normativi (nazionale, europeo e internazionale) con l'obbiettivo di identificare le buone prassi già sviluppate e gli interventi legislativi in grado di garantire alle persone con disabilità, su basi paritarie rispetto a tutti gli altri individui, l'accesso ai vantaggi delle ICT senza subire un'indebita violazione dei loro diritti fondamentali.

A questo fine, il volume raccoglie i contributi di studiosi e *stakeholder* che hanno preso parte ad un gruppo di esperti sviluppato nell'ambito del progetto di ricerca «Building an Inclusive Digital Society for Vulnerable Persons: The Role of Social Media Tools in a Disability Human Rights Perspective», finanziato dall'Università di Pavia nell'ambito del bando *Blue Sky Research 2017*. La maggior parte degli scritti è stato inoltre presentato durante il *workshop* internazionale intitolato «Building an Inclusive Society for Persons with Disabilities. New Challenges and Future Potentials in the Digital Era», organizzato a Pavia il 20 e 21 maggio 2019.

Il volume è diviso in tre sezioni principali. La prima analizza il quadro giuridico rilevante e, adottando un approccio multilivello (internazionale, europeo e nazionale), evidenzia le scelte di *governance* sottostanti evidenziandone punti di forza e di debolezza. La seconda si concentra sulle nuove sfide legate all'accessibilità, alla dignità umana e alla *privacy* che emergono a causa dell'enorme diffusione delle tecnologie digitali tra le persone con disabilità. L'ultima sezione, infine,

raccoglie alcune buone pratiche realizzate da membri della società civile, compresi esponenti di associazioni di persone con disabilità, studiosi ed esperti di ICT appartenenti al settore privato, finalizzate alla diffusione di una società digitale inclusiva *per e con* le persone 'diversamente abili', secondo gli obbiettivi di sviluppo sostenibile promossi dalle Nazioni Unite.