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Digital Equality – An inquiry into UK digital
accessibility regulations

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August 2021

Abstract

The impact of COVID-19 has highlighted the rising significance which the digital space has within social, economic and political spheres. This shift from a physical to a digital society bears great advantages in terms of remote working and greater online connectiveness. Nonetheless, in this time of change old, vested barriers in the physical world must not be replicated in the digital world for disabled people in the UK.

In this thesis, I aim to take the UK's Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018 as an example to showcase the impact of Martha Minow's social-relations approach (1990) in the digital space. In particular, regarding the recognition of difference as well as avoiding the sameness dichotomy. I will utilise Minow's line of thought in two ways, firstly, to show the difficulties misconceptions of equality and disability have caused to date in UK digital accessibility law, and secondly, how Minow's social-relations approach can be used to expand equal access in the web. This could be done by perceiving equality and disability no longer purely through a medicalised formalistic lens, but through a social and substantive as well as transformative and human rights lens.

I conclude by suggesting, that this work is not intended to solve any major debates within the spheres of digital access, equality and disability, as these are incredibly wide ranging and complex. Nonetheless, I hope to show the importance of further research in this area and provide readers with a first glance into digital accessibility from a disability and equality perspective whilst also drawing on my own first-hand lived experiences as a disabled researcher.

Contents

- Abstract 2
- Abbreviation 5
- Acknowledgements 7
- Legislation..... 8
- Case Law 9
- Introduction..... 10
- Part 1: The Right to Digital Access 24
- Chapter 1: “The Development of Digital Accessibility” 27
 - Section 508 of the US Rehabilitation Act 29
 - The World Wide Web Consortium..... 36
 - The UNCRPD 2006 and the Right to Digital Access 38
 - Article 4..... 40
 - Article 9..... 43
 - Article 21..... 45
- Chapter 2: ‘The Public Sector Bodies’ Accessibility Regulations’ 50
 - Regulation 3 (1)..... 52
 - Regulation 5 56
 - Regulation 6..... 58
- Part 2: Relations in the Digital World..... 63
- Chapter 3: “The Social-Relations Approach” 65
 - Making all the Difference..... 66
 - The *Cleburne v Cleburne* (1985) case 74
 - The Abnormal-Persons Approach 75
 - The Rights-Analysis Approach..... 77
 - The Social-Relations Approach 79
- Part 3: Disability, Equality, and the Digital Space..... 84
- Chapter 4: “The Medical Model of Disability and Formal Equality” 86
 - The Medical Model of Disability 87
 - Formal Equality 92
 - Westen’s Criticism of Equality 94
- Chapter 5: “The Social Model of Disability and Substantive Equality” 103
 - The Social Model of Disability 104
 - The Development of the Social Model..... 104
 - Criticism of the Strong Social Model..... 109

Substantive Equality.....	112
Equality of Outcome	112
Equality of Opportunity	114
Equality of Dignity.....	117
Chapter 6: “The Human Rights Model of Disability and Transformative Justice”	122
The Human Rights Model of Disability.....	123
Transformative Justice	131
Conclusion	140
Bibliography.....	146

Abbreviation

ADA 1990 – Americans with Disabilities Act 1990

BBC – British Broadcasting Corporation

CA – Court of Appeal

CDDO – Central Digital and Data Office

CJEU – Court of Justice for the European Union

CLC – Cleburne Living Centre

DA – Disabled Alliance

DIG – Disablement Income Group

ECtHR - European Court of Human Rights

EHRC – Equality and Human Rights Commission

ICT - Information and Communication Technology

JAWS – Job Access with Speech

PSBAR 2018 - The Public Sector Bodies (Websites and Mobile Applications) (No. 2)

Accessibility Regulations 2018

RNIB – Royal National Institute of Blind People

RNID – Royal National institute for the Deaf

SC – Supreme Court

UK – United Kingdom

UN – United Nations

UNCRPD 2006 – United Nations Convention on the Rights of Persons with Disabilities 2006

UPIAS – Union of the Physically Impaired Against Segregation

US – United States

W3C – World Wide Web Consortium

WCAG - Web Content Accessibility Guidelines

WHO – World Health Organisation

Acknowledgements

A big thank you to everyone that supported me along this journey and helped me in some form or another to complete this piece of work. I appreciate you all so much! Thank you to my family for being very supportive during this incredibly difficult time and my mum for always listening to me ranting about things that bothered me. Thank you to Ben Watson from the University of Kent Student Support and Wellbeing for bending over backwards to provide me with as many of the books and papers I needed in digitally accessible versions. I always remember the time when he ran up to campus and scanned in Martha Minow's book in only one or two days. That was incredible. Thank you also for my brilliant library support assistants from the Student Support. Thank you to Libby Peatman for helping me research papers online and giving me emotional support and advice. Thank you also to Lizzy Sharpe for jumping in and saving me by helping me to format the thesis as well as my footnotes in the last weeks of this project. Another big thank you to my supervisors Stephen Pethick and Diamond Ashiagbor for shaping my initial ideas into something that I can look back at and be proud of. Thank you to everyone else that helped me along the way during this year, good friends that I had for years and new friends that have just come into my life and already made a big difference. I could not have done this without you all!

Legislation

21st Centuries Communications Act 2010

Americans with Disabilities Act 1990

Convention of the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (UNCRPD 2006).

'Council directive 2016/2102/EC on the accessibility of websites and mobile applications of public sector bodies' (2016) *Official Journal* L 327.

Disability Discrimination Act 1995

Disabled Persons Employment Right Act 1944

Education Act 1944

Equality Act 2010

European Accessibility Act 2019

Rehabilitation Act 1974

The Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018, SI 2018/952 (PSBAR 2018).

United Nations Declaration on the Rights of Mentally Retarded Persons (adopted 20 December 1971) UNGA Res 2856 (XXVI).

Case Law

Brown v Board of Education (1954) 347 US 483.

Board of Education v Rowley (1982) 458 US 176.

California Federal Savings & Loan Association v Guerra (1987) 107 SCt 683.

Chacón Navas v Eurest Collettiside's SA (2006) C-13/05.

City of Cleburne v Cleburne Living Center (1985) 473 US 432.

DeFunis v Odegaard (1974) 416 US 312.

GLOR v SWITZERLAND App no 13444/04 (ECtHR 2009).

HK Danmark Werge v Dansk Arbejdsgiverforening (2013) C-335/11 & C-337/11.

Palmer v Thompson (1971) 403 US 217.

Sweatt v Painter (1950) 339 US 629.

Introduction



Image Description: The object is of round shape and oval at the top. Its general design resembles a dome made of glass. It consists of a pair of double-convex lenses as well as a plastic ribbon around the edge. When placing it on a flat surface it triples the size of the image, text or structure that it is placed upon.



Image Description: The object is of rectangular shape, with a touch screen covering one side and a metallic cover covering the other. It has an apple-shaped emblem that has a piece bitten out at the top of the apple which symbolises the company Apple. On the back, in the upper right corner, there are four camera lenses that can be used to take pictures or videos.

As a blind person, I was given different technologies in class in order to participate in the same way as my peers during my first years at school. For the most part, this comprised of a digital camera attached to a large screen enabling me to zoom in on different books or worksheets that we were given. However, this made me heavily reliant on the equipment and restricted me to the desk that it was assembled at for the whole four years of my primary school education. Additionally, I was given a large magnifying glass that I could use in order to read the materials wherever I wanted to. Despite the advantage of being able to

carry this object around with me, it still felt like I had to carry a burden at all times. The glass was extremely heavy, and I had to bend over in order to read the texts. It was also more of a tool which set me apart from my peers than an aesthetically pleasing, handy gadget that others may want or have. Most importantly, I still took almost three times as long as other students, as seeing only one letter at the time significantly slowed down my reading speed. During my final years at school and throughout my time at university, I started using a laptop with screen reading software.¹

With this technology, for the first time, I was able to keep up with the reading speed, similar to everyone else. Nonetheless, having a screen reader solved only part of my problem; the other part was to gain access to the same number of materials at the same time as my course mates. This was mainly related to the lack of digitally available resources such as books or articles, which I either had to order from a specific company or I had to use my own personal time to scan in different documents and transform them into accessible versions.

Through further advancements in the technological sphere and in particular with the iPhone and the iOS operating system my situation changed again. Suddenly, I was able to carry a phone around with me at all times that provided me with an inbuilt screen reader as well as well functioning speech-to-text software. Additionally, larger amounts of information were made available online through, for example, blogs or online journals. Consequently, I used the iPhone more and more to engage in the digital world, creating social media accounts as well as reading online news pages. Having this small device and being able to use it at any

¹ A screen reader is a text-to-speech programme that works with a great range of different operating systems. It provides for any text, folders, icons or other visually displayed information to be read out to the user. A screen reader mainly works with keyboard shortcuts and can either read the information out aloud to the user or translate it into braille if the user has attached a braille key-board to their computer (Watson no date).

time, without having to wait for any documents to be scanned or having to purchase an expensive screen reader and install it, gave me the freedom I often wished for growing up.

Making the digital sphere accessible will provide great amounts of disabled people access to social, economic and cultural spheres they have so far been excluded from. However, in order to achieve this aim, it is necessary to analyse the framework and workability of digital accessibility regulations in the United Kingdom (UK) and their relation to disability as well as equality. Using the magnifying glass as well as the iPhone as examples, there is much more to it on a substantial level regarding approaching matters around disability and equality. The magnifying glass was something I as an individual had to carry around with me at all times, whereas there should have also been the option for the system to provide me with, for example, printed texts in larger font sizes or audio recordings of the required readings. Thus, it did not work to simply treat me the same as other students. This also relates to the difficulties in approaching equality in a symmetrical way, which I will be elaborating on in greater depth later on. Moreover, the technological development regarding the iPhone provides important insights into the great opportunities these devices can bring for disabled people in accessing the digital world without having to purchase additional hard- or software. It provided the opportunity to engage into the digital sphere using a device that was commonly used by a great range of people. Importantly, the device did not just use a one-size-fits-all approach, but allowed for individuals to make use of the accessibility features in a way that was benefitting them the most according to their own needs and circumstances. For example, this could mean increasing the font size, light intensity, using a text-to-speech programme and so on. Hence the different treatment became no longer something that was ignored, but valued as it could better adapt to each individual in an asymmetrical way. Nonetheless, despite these advantages and the benefits they brought for

many disabled people, there are still a number of barriers that exist in the legal sphere and must be removed in order for disabled people, such as myself, to participate equally in the web.

The main aim with this thesis is to investigate whether Martha Minow's social-relations approach, from her book published in 1990, can be used to expand equal access in the digital sphere for disabled people using the example of the UK's Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations No. 2 2018 (PSBAR 2018). I argue that the difficulties in relating disability to equality in the digital sphere can be explained drawing on the argument Minow raised in relation to the recognition of difference as well as the equal or sameness treatment dichotomy. Using the PSBAR 2018 as a case study, many of the problems the regulations are associated with could be explained using Minow's line of thought. Consequently, in the following thesis there will be an analysis of digital accessibility in the law, particularly regarding models of disability and their relation to different conceptions of equality in approaching digital access. Inducing Minow's social-relations approach into this examination will aid the move away from unclear regulations and provide for interim solutions on how future legal frameworks in the UK could be structured to accommodate disabled people's needs more efficiently. As there is a general lack of scholarly work regarding digital access rights in the UK, and so far there have been no legal papers published on the PSBAR 2018, this is an incredibly recent as well as important area of research. Nonetheless, this thesis is not meant to provide one single solution to the great range of problems associated with expanding access for disabled people in the digital sphere. It is more rather meant to provide a first glance into this field of research and, by drawing on concepts around equality, disability and digital access, provide the reader with a

general understanding of this area as well as its potential for legal thought and future policy projects.

As already discussed, Minow's social-relations approach generally argues that many of the difficulties for marginalized groups in the law are vested in the relations the individuals form with other members of society or its institutions. By acknowledging that difference is not inherent in the individual, but socially constructed, as well as realising that equal treatment is constantly measuring the individual against a pre-set norm, these relations can be better understood and used to avoid similar problems in the future (Minow 1990). Additionally, the main distinction for the purposes of this thesis in regard to equality is between formal and substantive equality. Formal or procedural equality is primarily based on the Aristotelian principle of treating likes alike. However, as Peter Westen (1982) points out, this is in itself based on a moral judgement on which characteristics are to be treated alike, creating ambiguous outcomes depending on how it is invoked. Substantive equality on the other hand is aimed at providing more structural change. It includes, for instance, equality of outcome, opportunity and dignity. The notion to move towards a more substantive conception of equality, and thereby enabling a path towards transformative justice, can be related to the problem that different people in relation to, for example, disability, gender, sexuality, race or ethnicity, which have different starting positions or circumstances and therefore do not benefit from a strict formalistic alike treatment in the same way as the standard of a non-disabled cis straight white man (Fredman 2016). In terms of disability, the main distinction for the purposes of my argument can be drawn between the medical model of disability – viewing the disability as the responsibility of the individual and making them seek a 'cure' for their impairment to adapt to mainstream society –, the social model of disability – which shifts the responsibility to society arguing the reason for the disablement is

the environmental barriers people with impairments are facing –, and the human rights model of disability – which perceives disability through a combined lens realising the environmental and attitudinal barriers as well as the impact of the impairment as such on the disabled person (Oliver 1990a, pp. 2 – 3; Goodley 2017, pp. 23-25; Kakoullis and Ikehara 2018, pp. 53-58). In the following thesis, referring to disability mainly relates to the description of disability by the United Nations Convention on the Rights of Persons with Disabilities 2006 (UNCPRD 2006) enshrined in Article 1, ‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’ The term includes blind people and wheelchair users as well as people with dyslexia and autism. Thus, there is a large spectrum of disabilities existing today, which are included in the term (Citizens Advice 2020).

The difficulty is that disability as a subject matter is viewed as being incredibly complex and wide ranging. Thus, often disabled people are overlooked when it comes to achieving transformative change. For example, in the sphere of human rights, it took until 2006 with the adoption of the UNCRPD 2006 for their human rights to be recognised. In addition, even more than 20 years after the first Disability Discrimination Act 1995 was passed in the UK, disabled people are still at a substantial disadvantage compared to non-disabled people (EHRC 2017).

I intend to establish that relating disability to equality has mainly resulted in treating disabled people the same as non-disabled people, despite it not being possible to make that comparison. This is in itself related to different misconceptions of disability, which I will be investigating throughout the thesis. All of this has translated into the digital sphere being in large parts inaccessible to many disabled people. Consequently, I argue that Minow’s

criticism around the different treatment of minority groups based on socially constructed stigmas, as well as the difficulty in justifying different treatment by focusing on the sameness argument of equality law, is still a problem and impacts the digital sphere. Thus, it is even more important to rethink the current regulatory framework and recognise the value in accommodating difference as well as the possibilities for further social as well as individual development. Ergo, adopting Minow's social-relations approach can be used to open up discussions around the need for more transformative as well as multi-dimensional approaches in the treatment of disability and equality in the digital world.

In addition, throughout this research project, I have realised the significance of digitally available resources. Despite having support available to me from the University and digital platforms such as RNIB (Royal National Institute of Blind People) Bookshare, my access to resources is still highly restricted. Therefore, I will be using a limited number of footnotes and resources throughout this thesis, most of which can be found in digitally accessible formats online. Creating digital accessibility not only affects the public and private sector as a whole, but also requires a fundamental rethinking when it comes to the set standards in academia that scholars follow. In my case, this means designing my own research in a way that is accessible to me as a disabled researcher. As a result, since the underlying aim of this thesis is to contribute to legal thought as well as policy, and therefore increasing awareness of digital accessibility, this thesis can be viewed as an example for this per se.

Starting an analysis of digital accessibility laws in the UK is long overdue, especially since estimates by the World Health Organisation (WHO) and the World Bank predict that around fifteen percent of the global population have a disability (cited in Goodley 2017, p. 1).²

² This means over one billion people world-wide have a disability, of which a majority lives in the world's poorest countries, subject to conflict and crises.

There are also more disabled people in the global south than global north (ibid.).

Furthermore, most disabilities are a result of injury or illness than from a pre-existing condition (ibid.). Disabled people are also more likely to be ostracized from society by being denied access to education, legal protection, and the right to participate equitably in the social and political sphere (ibid.). According to the charity, Scope, there are around fourteen million disabled people living in the UK (Department for Work & Pensions 2020 cited in Scope Charity no date). Despite these incredibly high numbers, these statistics only give an estimation of the disabled population in the world and the UK. There are other factors, such as people being afraid to be classed as disabled, the method of collecting data and the general cultural and social environment, that give rise to the assumption that the number of disabled people living today is much higher (Kanter 2015, pp. 26-29).

So, if we assume that the number of disabled people is at least fourteen million in the UK, which makes up around a fourth of the whole population, the question remains: Why is there not a more open discussion around issues relating to disability and access? Why are disabled people and their needs often overlooked or disregarded, paid less attention to and simply seen as not as valid and the concerns of the majority? This is related to various cultural, social, economic and political lenses through which the disabled person is presented often times as the 'other' or the 'less worth' (Oliver 1990b, pp. 1-9). The way forward, so I argue, is to create a greater number of digitally accessible spaces. In my opinion, this gives the opportunity to promote equality and decrease exclusion of disabled people across the world and within the UK. The civil right to access – particularly in times where the digital landscape presents so many different opportunities – is one of the most fundamental rights for disabled people and needs to be paid greater attention to.

Why this is important is hopefully obvious to most readers. We as a society start moving more and more towards becoming digitised and place more emphasis on aspects around information and communication technology (ICT). The disabled population cannot be left out of this progress. It is no secret, that physical accessibility, such as ramps and tactile pathing is still far from perfect for disabled people. There are numerous instances in the news and other online forums, where people with mobility impairments point out the number of barriers they are facing on an everyday basis. There are instances where wheelchair users are left on a train or are refused to board certain trains at all (BBC News 2014; Pidd 2018). There are examples of blind people being denied entry because they are using a guide dog (ITV News 2021). Only recently, a blind person fell off a train station platform due to the lack of tactile pathways and safety barriers and died as a result of the injuries obtained (Desouza 2021). These examples show that there are still numerous instances in which disabled people are discriminated against in the physical world. Most importantly, even by accessing the news platforms to find these examples using my screen reading software, I had immense difficulties reading the page and understanding its content, because of the lack of a proper structure, coded headings and links as well as described images. Thus, even websites addressing issues around acts of discrimination against disabled people are using inaccessible web content to convey these messages, continuing the discrimination into the digital world.

I believe that the creation of an accessible physical environment for disabled people will take time. But, as I am disabled myself, and a blind researcher currently stuck inside like everyone else, I believe it to be important to increase digital access for disabled people as fast and as effective as possible. Of course, there could be the argument raised that nothing can ever be made fully accessible. This statement has some validity to it. Taking the example from a

town I have been going to University in Germany, where there was a large disabled population, wheelchair users preferred ramps whilst blind people preferred stairs. Nonetheless, both of these issues can be addressed in my opinion. This, however, is not in the sense of the physical world as we perceive it, but in the form of the digital world. I argue, that in contrast to the physical world, the digital sphere can be made accessible more efficiently and therefore provide a modified and user focused interface for individual disabled people, giving recourse to their individual needs more efficiently. As I have mentioned before, access to the digital world is even more important since many employment and educational opportunities are now moving online. Additionally, the online shopping services offer an easier way of having products delivered right to one's doorstep, without having to take inaccessible public transportation, leading to the inaccessible shop, using the inaccessible payment system. The digital world has great significance for the disabled population in the UK and across the world. It can be the gateway for disabled people to finally be more visible in our society and their needs being properly met. It could mark a change in the constant fight of disabled activists for equality. Nevertheless, in the digital world there is still a long way to go. Access to the necessary hardware and software, as well as broadband, is one part of the problem. The other part is accessing websites and services that people without disabilities can use, but that are not programmed in a way that is usable for many disabled people.

Moreover, as pointed out by the House of Common's Women and Equalities Committee (2019), the Equality and Human Rights Commission (EHRC), the main body tasked with enforcing the PSBAR 2018, is not using its specific powers to enforce violations of the Equality Act 2010 and is lacking human as well as financial resources. Additionally, the regulations are criticised for lacking the necessary teeth to encourage organizations to adopt

Web Content Accessibility Guidelines 2.1 (WCAG 2.1 2018) standards, as there is no option to impose strict penalties for non-compliance (Policy Connect 2018). Lastly, the regulations through using language such as 'disproportionate burden' can give public sector bodies the ability not to comply if a cost for making a website accessible is deemed too high. This results in disabled people still being excluded from accessing their content (Central Digital and Data Office 2020).

These examples show that it is of fundamental importance to investigate the clarity and effectiveness of digital accessibility regulations within the UK. Nonetheless, I will not be able to address all of the difficulties, the advantages and disadvantages and possible improvements the current regulatory and conceptual framework possesses. I am, however, hoping that through opening up the discussion and elaborating in greater detail on the relation of disability and equality in the digital world, more attention will be paid to this subject area. Since disability rights and digital accessibility rights in particular are a highly under researched topic within the UK, I aim to provide more clarity in this area of law.

Analysing the relation of different models of disability with different conceptions of equality can aid understanding the principles of equal access in the digital sphere. Additionally, it can provide an interim guideline for courts, practitioners as well as disabled people and their representative organizations. Furthermore, an investigation of digital accessibility rights will provide important new insights regarding equality and disability in the law, specifically regarding the necessity of valuing difference and moving away from the sameness dichotomy imposed on to disabled people by the equal treatment principle. It can lead to the expansion of digital accessibility regulations to also extend to the private and not only the public sector and provide organizations access to government funds if resources are not sufficiently available. The research could therefore be important for legal scholarly work as

well as latter policy-oriented projects in the UK and beyond. Most importantly, it will most likely be the first scholarly research concerned specifically about the right to digital access and the PSBAR 2018.

In the following thesis, I will primarily draw on the theoretical frameworks around disability and equality as well as Minow's argument regarding the social-relations approach of 1990. Furthermore, I intend to elaborate in greater detail on specific parts of digital accessibility as well as the conceptual background behind the technical standard. The research will also have socio-legal implications, regarding the focus on the sociological side in approaching the stigma and treatment of disabled people as well as their reflectiveness in the current legal framework. Besides this, I intend to occasionally draw on my own first-hand lived experiences as disabled researcher, to show the significance of these regulations for disabled individuals.

In the first chapter of the thesis, I will provide a general overview of the development of digital accessibility regulations on an international level, starting with the United States (US) regulatory framework as the first legal system to adopt anti-discrimination provisions for disabled people in the digital sphere. Later on, I will also elaborate on the core articles in the UNCPRD 2006 that provide the civil right of access. For the second chapter, my focus will then turn specifically to the UK regulatory framework and the PSBAR 2018. I will centre on three of the core regulations that aim to make the public sector more accessible to disabled people and analyse the more prominent difficulties emerging from the regulation. In the third chapter, I will turn to examine Martha Minow's arguments around the recognition of difference, the sameness dichotomy as well as her own social-relations approach as a way forward in greater detail, drawing mainly on her book published in 1990 as well as the *Cleburne v Cleburne* (1985) case. The fourth chapter, I will turn to examine the first model of

disability, namely the medical model, and relate it to the formalistic conception of equality which the regulations suffer from. In the fifth chapter I will then turn to the social model of disability and its relation to more substantive conceptions of equality. Finally in my sixth chapter, I will analyse the last model of disability, the human rights model, and its connectiveness to transformative justice in the digital sphere. I will conclude on the possible way forward in approaching digital accessibility laws in the UK by focusing on the advantages the social-relations approach has.

Part 1: The Right to Digital Access

In the first part of my research thesis, I intend to establish the groundwork for my later conceptual analysis of disability and equality in regard to digital accessibility regulations in the United Kingdom (UK). This part is designed to convey a general understanding of digital accessibility, the development of the first digital accessibility regulations in the United States (US) and the implications for the civil right to digital access on an international level, regarding the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD) 2006. I will then centre my focus specifically on the UK regulatory framework and analyse the Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations No. 2 2018 (PSBAR 2018) as the first regulatory attempt to advance digital accessibility beyond the core anti-discrimination provisions enshrined in the Equality Act 2010 (Cabinet Office, Government Digital Service and Hart 2019).³

As I have already suggested in my introduction, my intention with this thesis is to show the difficulties in extending the concept of equality to disability in terms of enabling equal access to the digital world using the example of the UK regulatory framework. I argue that by using Martha Minow's (1990) social-relations approach, which I will further elaborate on in the second part of this thesis, the gap between these two incredibly diverse and wide-ranging concepts can be bridged more efficiently, mainly, through recognising difference and solving the sameness dichotomy. As a result, this will lead into the digital world being made more accessible to disabled people and the law reflecting the multi-dimensional needs of current

³ The Government Digital Service has since renamed itself Central Digital and Data Office (CDDO).

users more appropriately. Thus, beginning by critically analysing the development of digital accessibility regulations in this part will assist the later theoretical and conceptual interrogation of equality and disability. This may seem unconventional, as in many instances the conceptual analysis of disability and equality would have preceded the engagement with digital accessibility and Minow's approach. Nonetheless, providing a general understanding of the fundamentals of digital accessibility on an international and national level is vital, as both concepts of equality and disability cover an exceptionally large area of research. Therefore, establishing a groundwork for their analysis will enable a more nuanced interpretation as well as avoiding the expansion of their investigation beyond the scope of my argument. Furthermore, the subject matter of digital accessibility may appear easy to grasp on a superficial level, however, investigating it from a disability perspective requires a more substantive understanding of this significant area, which is another reason why I intend to discuss it in the first part of this thesis. Additionally, it is necessary to analyse the US framework on a substantive level in the first chapter of this thesis, as it was the first country to adopt anti-discrimination provisions in regard to disability (Brown and Hollier 2015, Policy and the Goal of an Accessible Web).⁴

This resulted in it influencing many of the currently existing legal frameworks regarding digital accessibility around the world (ibid). Nonetheless, my intention in this part is not to directly compare the US to the UK framework, but to show where the civil right to access

⁴ As I have already mentioned, it is important to consider the different approach to footnoting I needed to take over the course of this project in order to make academic research more accessible to me as a disabled scholar. This also extends to the difficulty in finding precise page numbers in documents that were available online. Thus, in particular in this chapter there will be instances in which footnotes will refer to the subheading instead of concrete page numbers.

originated from and its development on an international level before specifically focusing on the UK.

Consequently, in the first chapter I will focus on the US Rehabilitation Act 1973. Later I will briefly elaborate on the technical standards of website accessibility provided by the World Wide Web Consortium (W3C). Lastly, I will analyse the approach the UNCRPD 2006 has used in relation to digital accessibility. In the second chapter of this part, I will more closely examine the UK regulatory system and in particular three of the core regulations of the PSBAR 2018 to show the highly restrictive nature of the UK framework in contrast to current developments of digital access rights on an international level. This will then provide the basis for a critical evaluation of the provisions and their treatment of disability and equality in light of Minow's arguments around the recognition of difference and the sameness dichotomy, which I will turn to in the second and third part of my thesis.

Chapter 1: “The Development of Digital Accessibility”

Over the last decades, access to the digital world has become increasingly important. The more different spheres around education, employment and product and service placement are moving online, the more important it is to create an equal playing field for everyone. Unfortunately, recent studies show the digital divide between disabled and non-disabled people in the European Union (EU), as well as in the United Kingdom (UK), is extremely high (Scholz, Yalcin and Priestley 2017). There are only a few disabled people that have the necessary hardware and software to gain internet access and even fewer benefit from accessible web content and mobile applications. Influenced by factors such as age, gender, general house-hold composition and financial situation and taking variant numbers across Europe into consideration, disabled people are still 62% less likely to have internet access compared to non-disabled people in similar circumstances (ibid., pp. 7-10). Specifically, during times of COVID-19 many more service providers have shifted their emphasis to remote, instead of in-person, opportunities in the digital sphere. This presents great opportunities for disabled people, as it allows flexible working arrangements as well as an easy way to order goods to their doorstep (Patrick and Barbareschi 2020). Nevertheless, if these services are not made accessible, the barriers, stigma and exclusion disabled people face in the physical world will further be replicated in the digital world, leaving disabled people excluded from the transformational phase from a physical to a digital society (Yu et al., pp. 3-7). To fully understand the significance of digital accessibility and its wide-ranging effects, I will now turn to an examination of the origins of access to technology and its way into the legal frameworks.

This chapter will start by discussing the United States (US) digital accessibility framework, with a focus on the Rehabilitation Act (1973), as the first legal provision that provides the

right to digital access (Brown and Hollier 2015, Policy and the Goal of an Accessible Web).

The main part of this section is to investigate the strengths and weaknesses of the US system, as it will be useful for further discussions of the UK regulations, which are influenced by the US system by way of for example the standard of web accessibility adopted as well as the impact of 'undue' or 'disproportionate' burden exemptions. However, the development as well as criticism around the US framework should be only perceived as a brief overview of the legal framework, as it is not the purpose of this thesis to dive into a in depth comparative analysis of the two legal systems. Additionally, it is important to convey a summary of the Web Content Accessibility Guidelines (WCAG) 1.0 (1999), 2.0 (2008), and 2.1 (2018) which the World Wide Web Consortium (W3C) has created in response to the Rehabilitation Act (Brown and Hollier 2015, Policy and the Goal of an Accessible Web). Since they are attempting to create a set technical standard for web accessibility, which many modern regulatory systems use as a means of orientation, it is important to gain a general understanding of their content (ibid.). It is not necessary to specifically analyse the technical parts of the guidelines in greater detail, but convey a general summary of their purpose and eventual usefulness in the digital world. Finally, I will turn to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) 2006 and its treatment of digital accessibility. I will primarily consider Articles 4, 9 and 21, as they are discussing the subject of digital access in greater depth and can be regarded as a benchmark in assessing the validity of the regulatory systems adopted by its signatory states (Goggin 2015, The Entwined Careers of Accessibility and the Internet). The analysis of the UNCRPD 2006 articles will provide a groundwork in understanding the potential scope and effectiveness on how the national digital accessibility framework can be established further in the UK.

Section 508 of the US Rehabilitation Act

In terms of digital accessibility, the US regulatory framework had a significant impact on the mainstreaming of set technical standards (Brown and Hollier 2015, Policy and the Goal of an Accessible Web). The first document enshrining the 'right to access' into law was the US Rehabilitation Act 1973, section 508. It prohibited discrimination against disabled people by the government or its contractors. Discrimination, as stated in the regulation, can also extend to the use of technology, which was initially only relating to telecommunications (Rehabilitation Act 1973, s 508). Later, the Americans with Disabilities Act (ADA 1990) extended the right to access. In this Act, Title III establishes that any public body that provides essential services to the public must be made accessible (ADA 1990). At the time, this was understood to relate to digital platforms (Jaeger 2014, Current Efforts to Improve Accessibility). Through the amendment of the Rehabilitation Act in 1998 set standards for website accessibility were also included. These advancements showed the rising significance of digital accessibility. The main point of reference was WCAG 1.0 and later 2.0 and its updated versions of 2.1 (Brown and Hollier 2015, Policy and the Goal of an Accessible Web). Lastly, in 2010 under the Obama administration, the 21 Centuries Communications Act was signed into law. It effectively extended the reach of previous regulations as well as using WCAG 2.0 as a new set standard to convey a better grasp of the development of the digital world, which is no longer just telecommunication-focused but further extended to digital platforms and mobile applications (Jaeger 2014, Current Efforts to Improve Accessibility).

After digital accessibility regulations, namely the Rehabilitation Act, were passed in the US, service providers such as Microsoft and Apple started implementing accessibility features in their respective native hardware and software systems (Brown and Hollier 2015, Policy and the Goal of an Accessible Web). Drawing on the example in the introduction, digital

accessibility in terms of the Apple iPhone includes speech-to-text software, automated captioning, and image description, changing the colour contrast as well as changing the font size on the device. With later updates these technologies were further developed and included voice navigation options and other assistive functions (ibid., The Rise of Mainstream Consumer Accessibility). Additionally, the developments in the US resulted into the W3C adopting the Web Content Accessibility Guidelines (ibid., Policy and the Goal of an Accessible Web). Moreover, many of the digital access regulations nowadays are taking the Rehabilitation Act as a template and refer often times to the WCAG standard when it comes to web accessibility (ibid.). Since the US system has been so influential in creating technical standards and serving as a template on an international level, it is even more important to begin this chapter by analysing the possible difficulties their legal system had in including digital accessibility.

In contrast to these positive developments in the sphere of technology, which can be related back to the enactment and amendment of the Rehabilitation Act, the digital right to access is still very much unrecognised (Brown and Hollier 2015, Policy and the Goal of an Accessible web). Disabled people in the US are still more likely to drop out of university, be unable to find jobs or make use of the variety of different services that exist today (Jaeger 2014, Inaccessibility and the Internet). Jaeger argues that the difficulty with the US regulatory framework is its strict adherence to the technical standards developed by the W3C and pays too little attention to usability in individual circumstances (ibid., Policy Harmonisation and Accessibility). Among other factors, this can be attributed to the confusion of the regulatory bodies when it comes to the differences between physical and digital accessibility. Meaning, simply by setting technical standards, the barriers are not simply elevated and are often falling behind technical progress (ibid.). Although the system is now moving more to focus

on performance rather than technical standards, this is still not enough, as regulatory bodies confuse the physical with the digital environment by setting strict standards that are not able to adapt to rapid technological developments (ibid.). Jaeger therefore points out that in terms of digital accessibility, there must be a distinction between physical accessibility, meaning the technical standard in order to access specific websites, the intellectual accessibility, meaning the opportunity for the user to also understand the content on the page, and finally the social accessibility, meaning the usability by the user in different social environments (ibid., Access, Accessibility and the Law). Jaeger argues that regulations are focused on the first part of this tripartite of access, creating a set technical standard to solve the problem at hand, however there is much more to it when looked at in greater detail. It is not simply enough to have people using screen readers, mouth sticks or other assistive technology to access a website in the first place, but also to make use of it in a social and intellectual sense (ibid.). Returning to the example I began my thesis with, being provided with a magnifying glass or a screen reader does not automatically mean the intellectual as well as social barriers I face in accessing certain texts simply disappear. I was still often times behind in terms of the reading speed compared to my classmates or needed to invest more time in either scanning or reformatting specific documents in digital versions that were accessible to me. All of this also transcends into the digital sphere. The iPhone provides me with the needed speech-to-text software and a mostly usable interface. Nonetheless, browsing through purely technically accessible websites, ergo websites that formally comply with the current WCAG standards, can still present a challenge, as an unstructured representation of information or a great range of links and tabs are harder to make sense of if they are reliant purely on an audio representation of digital content. It could be compared with standing in front of a shopping aisle in a supermarket without seeing the different items

displayed in the row before oneself and having to listen to the assistant naming each individual item randomly without following a left-to-right structure or focusing on items that are dairy products before turning to bread and meat. Even if one could then ask to repeat the items over and over again or go back and forth between items, collecting the shopping that one would need for preparing for example dinner could still take an exorbitant amount of time, which is not only physically but also mentally draining.

As a result of the critique of a strictly technical standard, scholars point out that the difference between accessible hardware and software and accessible web content needs to be analysed more closely (Brown and Hollier 2015, Introduction). As already shown with the example of the iPhone from before, purely by having a screen reader or assistive technology, does not mean one can easily access a specific website or app on the same device, as the website will only be accessible to the technology if its design complies with certain technical standards in order to be accessible as well as usable (ibid.). The difficulty remains that in contrast to the advances made in terms of inbuilt hardware accessibility solutions, which creates an alternative for disabled people having to purchase expensive hardware and software for their operating systems, many websites are still not usable or compliant with technical standards (ibid., The Rise of Mainstream Consumer Accessibility). This, according to Brown and Hollier, is related to the lack of awareness from many public and private entities. They suggest that it is easier to understand physical accessibility, whereas understanding digital accessibility can represent a cognitive barrier, particularly for non-disabled people (ibid., Awareness More than Technology?). Thus, enhancing awareness and proving that it could benefit society as a whole could lead into smaller as well as larger businesses to increase their digital accessibility overall (ibid.). This is necessary, as recently it has shown

that despite the W3C adopting a new standard in form of WCAG 2.0, the implementation of it has proven difficult across many countries (ibid., Accessibility and Government).

In addition, the US regulations are criticised for using an anti-subordination approach to disability, hence the person needs to prove their disability in order to claim their right to access (Wentz, Jaeger and Lazar 2011, *The Accessibility Dichotomy*). This only creates additional barriers for disabled people, as often times disabled people's claims were rejected on the grounds of them being not disabled enough or creating more difficulties when it comes to the enforcement of their rights (ibid.). This hinders disabled people in attempting to have an equitable online experience and is something that is in stark contrast to the difference model that is used for other members of marginalised groups (ibid.). Additionally, exemptions in the regulations such as claiming 'undue burden' gives organisations the opportunity not to comply if the cost of making a website accessible is too high (ibid., *Undue Burden*). This paired with very unclear enforcement proceedings often leaves digital accessibility as an afterthought, rather than something that is proactively considered by organizations and institutions across different sectors at the outset (ibid., *Retrofitting Technology Access; Policy Recommendations and Conclusion*). Most of the current US's regulations are also argued to primarily relate to people with sensory impairments, such as blind and deaf/hard of hearing individuals, ignoring the needs of people with intellectual or mental impairments that would require, for example, easy-read versions of website content in order to make use of it in the same way (ibid., *Current Efforts to Improve Accessibility*). Ellcessor, however, points out that technology such as the iPhone has also changed the interaction of accessibility and disability (2015, *Convergent Media Technologies*). Initially, disabled people needed to purchase additional hard- or software in order to fully access Information and Communication Technology (ICT). In my case this related to me having to

buy a licence for a screen reader software, such as JAWS (Job Access With Speech), or a licence for a screen magnifying software, such as Dolphin Computer Access, in order to understand the content presented to me on my laptop. This changed, as already elaborated upon, with inbuilt accessibility settings in iOS devices such as the Apple iPhone. However, in the beginning, the provided accessibility features yet again mainly related to people with sensory or mobility impairments (ibid.). Nonetheless, with the progress of technology and more recent updates to the Apple operating system the settings were soon improved and also adapted to people that had for example motion sickness or got headaches due to the light intensity on their devices (ibid., Accessibility Without Disability). Ellcessor, suggests that accessibility moves away from being strictly related to disability, as everyone can be temporarily or situationally impaired (ibid.). Although this may be one way of considering the dichotomy around accessibility and disability, another way of advancing the spheres around digital accessibility and improve the usability of digital content could be through the widening of the concept of disability in relation to equality, equally paying tribute to sensory, mobility, mental as well as intellectual impairments. This is something I will be investigating in greater depth in the third part of my thesis.

Furthermore, Wentz, Jaeger and Lazar state that in terms of disability and through offering accessible alternatives with fewer features than the original, disabled people are still being treated under the separate but equal notion that was rejected in the famous US case of *Brown v Board of Education (1954)* (2011, The Accessibility Dichotomy). They even go further and suggest that in terms of disability and through the inherent nature of accessibility being retrofitted in or provided with fewer options, it is separate but unequal (ibid). Many disabled people have to use 'lite' versions of websites as they are more accessible with assistive technology, such as screen readers or mouth sticks, and these 'lite' versions often only

provide a fraction of the functionality of the original website, leaving the disabled person with fewer opportunities than their non-disabled peers (ibid., Two Separate Applications). This also counts for the provision of e-resources. Often, disabled students receive digital accessible versions of their books far too late into the course for them to use them efficiently as a means of participation in seminars or lectures. Thus, placing them at a disadvantage to their non-disabled peers (ibid., Undue Burden). Moreover, the fact that organizations can claim 'undue burden' in order not to comply with accessibility standards when the cost of making content accessible is too high means accessibility is yet again only considered as an afterthought that is not treated in an equal way to other matters (ibid.).

Overall, something needs to be done to improve the current framework. Although my thesis is primarily focusing on the scholarly aspects around disability, equality and digital access, an improved theoretical framework will undoubtedly lead into improved policy reform projects in the future. As scholars such as Ellcessor seem to suggest, disability and accessibility are becoming more frequently interlinked with the further development of the world wide web (2015, Introduction; Delineating Accessibility & Disability). Thus, technical as well as legal standards and the opening up of concepts of disability and accessibility is needed (ibid.). Therefore, it is important not to purely focus on technical standards or the creation of so-called universal design, which I will return to later in this chapter, but on the relations that technology allows disabled people to form with their environment and therefore to focus on individual needs in specific circumstances (ibid., Conclusion: The Utility of Accessibility). In that regard I believe taking the social-relations approach to disability and technology, as originally discussed by Martha Minow (1990), recognising difference as something that is not less or inherent in the person, as well as moving away from the constant sameness treatment of individuals, would provide an opportunity to further expand digital accessibility

and make it the assistive tool that it is meant to be. I will turn to elaborate on this notion in greater detail in the second and third part of this thesis. Now it is important to turn and analyse the commonly applied web accessibility standards of WCAG, as they have been used by the US as well as UK as a template to assess compliance with digital accessibility.

The World Wide Web Consortium

From early on in its development, disability activists were campaigning to make the web more accessible. It started in the 80s and 90s in the US. There, many disabled people were arguing to improve access to information and communication services, which were seen as providing great advantages to the disabled community (Goggin 2015, *The Entwined Careers of Disability and the Internet*). Later, this transpired into campaigning to make the world wide web more accessible to persons with disabilities by the end of the century (ibid.). As a result, in 1999 W3C created WCAG 1.0. This was the standard of accessible online services created by experts in the field to conform digital services and make them more useable for disabled people. It comprised of fourteen principles and was assessed using three checkpoints of priorities. WCAG 1.0 attempted to create a set digital standard to enable disabled people access to the digital world. For example, through the provision of captions to deaf/hard of hearing people in videos or any other visually displayed information, by providing image descriptions for blind/visually impaired users that use their screen readers and for any other disabled person using assistive technology, including for instance mouth sticks to navigate a webpage. It also included colour contrast for colour blind individuals as well as changing the text fonts for people with dyslexia or dyspraxia (W3C 1999). However, with the further emergence of the internet and the development of new technologies, WCAG was seen as no longer being sufficient to create an accessible digital experience (Brown and Hollier 2015, *WCAG 2.0 and the Shift Back to a Content Focus*). Thus, in 2008 the

W3C published the WCAG 2.0 standards. Further versions of this standard are what many regulators have taken as a guideline in assessing if web content is accessible (ibid.).

There are few differences between WCAG 1.0 and 2.0 standards on a technical level. Both attempt to achieve digital accessibility for a great range of users with different disabilities.

WCAG 2.0 uses twelve principles as well as employing four key guidelines. These guidelines were called POUR, which relates to perceivable, operable, understandable, and robust.

Perceivable means that a webpage needs to be able to be perceived by the user. Operable, that the content can be navigated without any barriers for the user. Understandable, that its content can be understood by anyone using it. Lastly, robust means that it is technically robust to stand and transform with the emergence of new technologies (W3C 2008). Despite the fact, that in its essence WCAG 1.0 and 2.0 are the same, the underlying intention has changed significantly. Whereas WCAG 1.0 tried to create a set technical standard to enable disabled end users' access to the digital world, WCAG 2.0 moves away from this and focuses more on the result, meaning the four core guidelines. Consequently, it tries to be more flexible in its approach of new technologies and in giving the programmers the freedoms to work on different websites in formats that fulfil the purpose of becoming digitally accessible, whilst also keeping up the rapid technological development (Brown and Hollier 2015, WCAG 2.0 and the Shift Back to a Content Focus).

Despite the more recent WCAG versions of 2.0 and now 2.1 appearing to attempt to move away from a strict technical standard in approaching web accessibility, the adherence to a great range of different check points is still highly restrictive. Moreover, as already elaborated upon in the context of the US framework, the promotion of the WCAG 2.0 or more recently 2.1 standard appears to be met with enormous difficulties that can be related to a great range of problems including the inaccessibility of the advice provided. This seems

quite paradoxical, as inaccessible advice for a method that attempts to provide disabled users with accessible web content is not a great first step in mainstreaming matters around digital accessibility in the public as well as private sector. This thesis is however not concerned with providing an in-depth critique of the WCAG standards or their usability in a strictly technical sense. It is more important to understand that despite these advancements in the digital world, the barriers do not seem to disappear. This makes it more and more apparent that the problem is not only technical, but also social and legal, which makes a conceptual analysis of disability and equality necessary, which I will turn to in the third part of this thesis. After having established the general origins of the right to digital access in the US as well as having provided a general understanding of the WCAG standards, it is time to turn to the UNCRPD 2006 and its treatment of equal access in the digital world. This will be especially important since the UK is part of the signatory states of this convention.

[The UNCRPD 2006 and the Right to Digital Access](#)

Since the beginning of the international human rights movement, it has been difficult to expand the protection of human rights to include disabled people. Notwithstanding the fact, that every human being should have the equal enjoyment of their civil and political rights, such as the right not to be tortured, the right to life, freedom of expression and more recently economic, cultural, and social rights, including access to education, health care and a certain standard of living (Kanter 2015, pp. 6-7; pp. 21-26). This lack of impact for disabled people across the globe was attributed to what Lawson calls 'the traditional invisibility of disabled people' (Lawson 2008, p.17). This relates to the fact that disabled people have always been excluded from mainstream society and would only be able to enjoy their human rights if they adjust properly through receiving some form of 'cure' or treatment for their disability (ibid., pp. 17-18). Additionally, disability was seen as hard to define on a global

scale, as it is heavily context-dependent such as the different historical, cultural, and social factors in different countries and regions. For example, in the US fifteen percent of the population identifies as disabled, whereas in India it is only 0.2 percent. This can be related to multiple reasons, including variant perceptions on disability, the difficulties of the gathering of statistical data in that regard and the fear of many to identify as disabled due to the social stigma that is attached to it (Kanter 2015, pp. 26-29). Even the provisions passed by the United Nations (UN) that paid regard to disabled people after the Universal Declaration of Human Rights were often criticised for being non-binding and enforcing the medical perspective on the disabled person, which I will elaborate on in my fourth chapter, as the United Nations Declaration on the Rights of Mentally Retarded Persons 1971 showed. It was the first document by the UN extending international human rights to disabled people, however, it viewed disabled people as inherently dependent on state help and not being able to live an autonomous and dignified life (ibid., pp. 31-32).

The situation shifted in the early 2000s when the UNCRPD was adopted in 2006 and entered into force in 2008. It effectively extended the human rights enshrined in the UN to disabled people. Therefore, it is not aimed at giving disabled people any additional rights, but attempts through specific formulations and provisions to make human rights accessible to disabled people (Lawson 2008, pp. 25-27). The main points within the UNCRPD 2006 were a fight for greater inclusion, participation, autonomy, and equality for disabled people across all nations. Overall, it related civil and political rights of disabled people with social, economic, and cultural rights, stating that both are interdependent on one another (ibid., pp. 27-29; Kanter 2015, pp. 7-10; 48-49). I will return to the UNCRPD 2006's treatment of disability in my later analysis. For the time being, the three Articles that are of relevance in the context of promoting digital accessibility are Articles 4, 9 and 21.

Article 4

Article 4 describes the 'General Obligations' state parties agreed to when ratifying the treaty. It is intended to provide proper guidance regarding the interpretation of the more substantive provisions included later in the treaty. The article is therefore general in its description and prohibition of discrimination on the bases of disability as well as specific in relation to issues connected to the promotion of staff training (Broderick 2018, pp. 106-139). It is set to create the first step for state parties to properly implement the rights of disabled persons within their respective federal or state frameworks. By stating in Article 4 section 1, that it is the state party's obligation to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities', it creates a positive duty on the state to become active and take responsibility for the recognition of disabled people's rights (ibid., pp. 116-117). It goes on to prohibit discrimination of any kind when it comes to matters relating to disability. This shows the open and broad stands that the committee has taken in relation to discrimination reflecting a more substantive approach to equality and therefore a social and human rights approach to disability (ibid., pp. 117-119). As I mentioned before, I will turn to a closer examination of theories around equality and disability in the third part of this thesis. This will also include an in-depth explanation of the social model of disability and substantive equality in chapter five and the human rights model of disability and transformative justice in chapter six.

The main sections of relevance in terms of digital accessibility in Article 4 are section 1, subsections (f), (g) and (h). Subsection (f) states that state parties must 'undertake or promote research and development of universally designed goods, services, equipment and facilities' (UNCRPD 2006, Art 4 s1). Universal design for the purposes of this thesis means, 'design of products, environments, programmes and services to be usable by all people, to

the greatest extent possible, without the need for adaptation or specialized design’ (UNCPRD 2006, Art 2).⁵

As it can be seen, the main part that is relevant in this section, is the obligation on the state party to actively promote universal design and make it available and usable for disabled people in an affordable manner, which enables them to participate in society. Promote relates to the raising of awareness, whilst undertake relates to other positive actions. Besides this, the section is still sought to be giving states a greater margin of appreciation in terms of their approaches to these principles (Broderick 2018, pp. 122-127). Subsection (g) states:

To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost. (UNCPRD 2006, Art 4 s1).

As it uses again ‘promote’ and ‘undertake’ it gives states also a greater margin of appreciation in terms of their implementation. However, it must be read in line with other substantive provisions that I will consider later, namely Article 9 and specifically subsections (g) and (h). This subsection is also relevant as to its mentioning of affordable assistive technology, which is a great part of the needed fundamental services disabled people

⁵ Universal Design can be critically analysed as such. However, this would go beyond the scope of this thesis and does not serve the purpose of the argument I will convey over the course of my following chapters. I nevertheless thought it of interest to be pointed out for any readers that are interested in engaging with the subject of creating a one size fits all approach on a more universal level. It is remarkable that the section also refers to their availability and use, which can be linked to principles of usability and accessibility for disabled people. Furthermore, another point is the promotion of universal design in the development of standards and guidelines. It is one of the standards that has been created in order to promote universal design from the beginning and has consequently been used by a great number of different countries and private entities to promote digital accessibility, including the UK.

require in accessing the internet (Broderick 2018, pp. 127-128). The last subsection of relevance in Article 4 is subsection (h) in section 1 which states, 'To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities' (UNCRPD 2006). This subsection is stronger in its impact than the two mentioned above. It is clear that the production of assistive technology is happening in the private sector. Therefore, the right must be read together with the rights contained in Articles 21 and 9, specifically Article 9 section 2 subsection (f). All information provided to the public must be accessible to disabled people (Broderick 2018, *ibid.*, p. 129). Additionally, it is worth mentioning that the UNCRPD 2006 does not define what is meant by public authorities or institutions. This relates to the fact that it should be left to the member states to decide whether or not an organization falls under this remnant. Nevertheless, it is made clear that the substantive provisions, including the accessibility provision of Article 9, applies to public entities (*ibid.*, p.129). Another interesting aspect can be drawn from section 1 subsection (e), as it includes private entities within the scope of this article. This shows that any organization providing services to the public should not be discriminating against disabled people and if so, that the state should provide adequate remedies to combat this. It presents the horizontal approach to human rights, where also private entities are included in the prohibition of discrimination against a specific group. It also shows that accessibility cannot be achieved from one day to another, but that it should be continuously worked on and that there should not be any more barriers created throughout the process (*ibid.*, pp. 122-125).

Article 9

Article 9 is the article of the UNCRPD 2006 that specifically relates to the provision of accessible goods and services. It makes clear that for disabled peoples human rights to be fully recognised there must be the provision of 'equal access to all relevant goods and services. This includes not only public facing entities, but also private organizations and companies that are providing services to the public. State parties are encouraged to enforce and monitor a set standard of accessibility, not only for physical environments but also regarding ICT as well as tele communicator providers. Inaccessibility is the main source of exclusion of disabled people and if implemented, benefits disabled and non-disabled people alike. For example, ramps for someone carrying a parcel and digitally accessible information for someone needing to instantly search for specific information (Lawson 2018, pp. 259-261). Article 9 starts by stating 'To enable persons with disabilities to live independently and participate fully in all aspects of life.' This shows the importance of accessibility for disabled people in terms of their ability to live as equal citizens in society (Lawson 2018, pp. 268-269). Already in section 1 the Article presents a clear mandatory requirement on the state parties to:

Take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public. (UNCRPD 2006, Art 9).

ICT in this thesis relates to any hardware, software or other form of technical device that is used or may be used by the public in order to engage into the digital sphere. This is even specified in subsection (b) which relates to 'Information, communications and other services,

including electronic services and emergency services.’ ‘Appropriate measures to ensure’ relates to proper monitoring and enforcement of accessibility standards (ibid., p. 269). This was seen as particularly problematic in terms of providing for concrete penalties for non-compliance as well as the technical expertise of local authorities in terms of digital accessibility in general (ibid., pp. 269-272). The focus is also on access to, and not accessibility, as it is seen as one of the fundamental rights in the UN Charter, namely the freedom of movement (ibid., pp. 273-274). Information technology then relates to any form of communication, written, spoken, signed or through any other means of digital communication (ibid., pp. 275-277). As it again relates to services that are provided to the public, it makes clear that it can also extend to privately owned houses and transport, if used by the public (ibid., pp. 277-278).

Article 9 section 2 states having to take ‘appropriate measures’ for several different services. In subsection (a) and (b) it is again referring to a concrete standard for accessible services that need to be promoted and implemented, including private facing entities under the condition that they provide services to the public, such as banks and other services (Lawson 2018, pp. 281-283). This is also continued in subsection (f) with its reference to ‘Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information.’ In subsection (g) ‘promote access for persons with disabilities to new information and communications technologies and systems, including the Internet’, the UNCRPD 2006 is explicitly mentions the internet and thereby showing the significance of an accessible digital space moving forward for disabled people. Another point is then again picked up in ‘(h) Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.’ This relates to the hardware,

such as assistive technology, that many disabled people need. These articles are clearly meant to promote equality and inclusion of disabled people and ensure that accessibility is considered from the start and not simply fit in retroactively (ibid., pp. 284-286).

Interestingly, accessibility is not defined in Article 9. This is to leave states a greater margin of appreciation in terms of awareness raising and implementation of the provisions.

However, the individual duties laid out in the article give a strong indication of what accessibility in specific settings can amount to (ibid., pp. 279-281).⁶

Article 21

The final Article of relevance for the further analysis of digital accessibility is Article 21. It is concerned with the right to freedom of expression and opinion as well as access to information. It thereby ensures disabled people the right to receive accessible information. Additionally, it shows the significance of the provision of accessible services by private contractors as well as government representatives.

Article 21 begins by stating ‘freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.’ It shows a substantive understanding of equality, which I will explain further in chapter 5, as it requires more positive and proactive rather than reactive actions by the signatory countries (Varney 2018, pp. 586-590). This is then more in detail related on in the subsections. In subsection (a) the need is concretely pointed out, to ‘Providing information intended for the

⁶ This thesis is also not meant to discuss the subject of accessibility in greater detail. I therefore orientate myself heavily on the provisions in article 9 as well as the tripart height of physical, intellectual and social accessibility proposed by Jaeger.

general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional costs.’ This relates to government services and therefore also includes government websites. Having information now accessible can be relevant for a great variety of purposes. Since many services are moving online, having accessible websites could enable disabled people to pay their taxes online or seek appropriate government advice (ibid., pp. 590-595). It reflects a social understanding of disability, not simply taking technology to fix the disabled person, but to look for technical solutions to the diverse range of problems disabled people encounter. It also resonates with Articles 4 and 9 which aim to make universal design the goal and not simply an add-on. As Article 4 also points out, the technology that is used must be affordable to disabled people, which aligns with the accessible, usable, and affordable principles of ICT (ibid.). It is more than just passively using services as consumers, but actively engaging as citizens in our modern democratic and social structures (ibid., pp. 582-583). Subsection (b) also relates to the right to understand and be understood in any official communication (ibid., pp. 595-596). Another important point is raised in subsection (c), which describes the duty of ‘Urging private entities that provide services to the public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities’ (although it has been criticised for only using the phrase ‘encourage,’ hence not making it strictly mandatory). Considering Articles 4 and 9 this is an important provision showing the need of the services to also expand to the private sector (ibid., pp. 596-599). This also includes, as pointed out in (d) to ‘Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities.’ Yet again, this shows how important accessible information is for disabled people, not only on an everyday bases as consumers in a

capitalist society, but also as citizens in an increasingly digitalised state, with a great variety of opportunities that are opening up and must be recognised for disabled people (ibid., pp. 599-601).

The fact that the three Articles 4, 9 and 21 are interdependent on one another and all aim to achieve a greater amount of digital accessibility for disabled people shows the importance of perceiving digital accessibility not only as a one-dimensional technical problem, but as something that is multi-faceted and that needs to be flexible enough to encompass the great range of different disabilities that are existing today. It also provides a general benchmark for assessing whether or not national frameworks around digital accessibility are complying with international standards. Nonetheless, the UNCRPD 2006 is only one legal document attempting to mainstream digital accessibility, which often times take a longer period of time to be fully implemented on a national or regional level. However, it is nonetheless a significant and wide-ranging document, which by providing a general suggestion on what digital accessibility can amount to and should include, sends out a clear message of the rising importance of this subject matter, effecting its signatory states, including the UK. Of course, this is only a brief summary of the main articles that relate to digital accessibility and there is much more to say about each individual article on a more substantive level. This would however go beyond the scope of this thesis. Nonetheless, as already pointed out before, it provides an indication on what the right to digital access can include and what equal access to the digital sphere should amount to, which will be helpful with the later analysis of the UK framework as well as the conceptual analysis of disability and equality. Most importantly, as I have already suggested, the articles show that there is a need to tackle digital accessibility on multiple levels, including providing assistive technology at an affordable cost, access to

the internet and the possibility for disabled people to make use of the digital sphere similarly to non-disabled people.

In sum, the rapid development of the internet has led to the W3C adopting different standards in order to increase the ability of programmers to improve digital accessibility to the disabled population. This is of fundamental importance, as the examples at the beginning of this chapter show. The significance has also resonated particularly into US regulations that have constantly improved over the last decades in order to adapt to the expansion of the digital world. Most importantly, the UNCRPD 2006 has adopted an indicative standard when it comes to the provision of accessible services and enshrined it into three of the core articles, making digital access not only a civil, but also a human right. Nonetheless, as the example of the US shows, disabled people are still facing numerous barriers in their realisation of their fundamental right to digital access. This can be partly, as scholars suggest, related to the strong focus on setting a strict technical standard as well as the lack of proper enforcement of guidance in specific sectors. This is, however, only a small part of a bigger problem. The main difficulties originate from a misconception of disability and equality in approaching digital spaces. Framing accessibility as a matter of equality, as Jaeger suggests, could aid the current problem of recognising the civil right to digital access, increase compliance standards and could aid to shift the discourse (2015, *Accessibility and Equality*). However, before I turn to the theoretical investigation of these concepts, it is necessary to provide an overview of the core difficulties of the digital accessibility regulations in the UK. After having already established the difficulties of the US regulatory framework, which heavily influenced the UNCRPD 2006 as well as the impact of the WCAG standards, the problems of the UK framework should be fairly obvious to detect and will be incredibly useful in the later theoretical analysis. Moreover, after having considered the

international and national frameworks of digital accessibility, the advantages of Minow's relational approach as well as its influence on the treatment of disability and equality will be more apparent in approaching the UK regulatory framework.

Chapter 2: 'The Public Sector Bodies' Accessibility Regulations'

As I have mentioned before, the difficulties in providing the right to digital access within the United States (US) legal framework can be related to a number of misconceptions. The question now remains, whether the United Kingdom (UK) digital accessibility framework, similar to the US, has difficulties in providing clear regulations that hold potential in decreasing the gap between disabled and non-disabled people's access to the web.

In 2018 the United Kingdom (UK) government published the Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations No. 2 2018 (PSBAR 2018) to provide disabled people a more efficient means of accessing the digital environment. This marked the first time where digital accessibility regulations were passed in the UK and therefore presented a significant step towards the recognition of the right to digital access for disabled people (Cabinet Office, Government Digital Service and Hart 2019). Nonetheless, the United Nations Committee on the Convention on the Rights of Persons with Disabilities criticised the UK in 2018 for their lack in promoting digital accessibility (EHRC 2018). These assessments take place every five years and present an opportunity for the states to show their commitment to the treaty. Consequently, it is time to investigate the regulations in greater detail and determine their usefulness in promoting equal access, as the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) 2006's Article 9 establishes.

In this chapter, I will primarily focus on determining the clarity of three clauses included in the PSBAR 2018 as their main purpose is set to enable disabled people an equitable digital experience. I have chosen the UK PSBAR 2018, as they are the first, and so far the only, regulations that have been instigated by the government in line with the EU 'Council

directive 2016/2102/EC on the accessibility of websites and mobile applications of public sector bodies' (2016) to promote digital accessibility standards across the UK public sector.⁷

In doing so, they are creating an extension to the principles that are already included in the Equality Act 2010 for England, Scotland and Wales and the Disability Discrimination Act 1995 for Northern Ireland.⁸

In addition, not fulfilling the requirements set out in the PSBAR 2018 could constitute a violation of the duty to make reasonable adjustments under the Equality Act 2010 (Vipan 2018), and PSBAR 2018 regulation 11 (a). Thus, it is of great importance to investigate the clarity of the regulations and their treatment of disability and equality in the digital sphere, drawing primarily on the arguments raised in the beforementioned chapter on the US framework around digital accessibility and the UNCRPD 2006. This will aid in gaining a general understanding of the current framework of UK digital accessibility regulations, their scope and potential effectiveness. Importantly, starting to show some of the difficulties of the UK framework will be essential to trace the underlying conceptual misunderstandings in

⁷ The EU has for a long time attempted to create a single market that is accessible to the vast disabled population living within their member states. It therefore created a specific directive that should include making the digital world more accessible after ratifying the UNCRPD, 2006 and the explicit norms included in Article 4, 9 and 21. The EU directive was meant to create a set standard for public facing entities and promote Web Content Accessibility Guidelines (WCAG) 2.0 across the public sector as well as to private providers that serve the public interest. However, there was some criticism in regard to the strict focus on physical disabilities, as well as the listing of exemptions and disproportionate burdens, which I will turn to later.

⁸ The UK's Equality Act 2010 includes access to technology and therefore prevents discrimination in that regard. The duty to make reasonable adjustments already provides a means to achieve accessibility in some respects. However, it is said that there needed to be more done to further the widespread mainstreaming of digital accessibility standards across all entities (Easton 2012). Easton suggests that in contrast to the US, where class-action lawsuits are quite common, the UK legal framework is still lacking behind what the UNCRPD (2006) is attempting to create. This could be mainly related to organizations not understanding the economic value of including disabled people through accessible services in their regular customer sphere as well as complicated and unclear enforcement mechanisms. Therefore, Easton makes a point that further clarification is needed in order to strengthen the digital accessibility framework within the UK (ibid.) Thus, the duty to make reasonable adjustments in section 20, as well as the Public Sector Equality Duty in section 149 are also applicable in the digital world.

UK digital accessibility law, which can be shown through using Martha Minow's (1990) social-relations approach regarding the recognition of difference and equal treatment dichotomy.

Before starting this chapter, it can be noted that due to the very recent nature of the regulations, there is a significant lack of legal scholarship in this area as well as a lack of generally available information regarding possible clarifications of specific parts and phrases. This in itself constitutes an argument, in my point of view, demanding for greater research and analysis in this area. Thus, through the following brief analysis of some parts of the regulations, I hope to begin the legal examination of the UK regulatory framework and open up the discussion for more research.

I will mainly focus on three of the PSBAR 2018 core regulations, namely 3 (1), 5 and 6. These present a good example of the general construction of the regulations and give rise to questioning the position of equality and disability, which I will further elaborate on in the third part of this thesis. With this, I aim to show that the regulations could need reform and since the UK has departed from the EU it is now up to the regulatory body and the government to further decrease the digital divide and promote the standards of Web Content Accessibility Guidelines (WCAG) 2.1 and create a more equal digital experience (W3C 2018).

Regulation 3 (1)

Regulation 3 (1) begins by stating that 'These Regulations apply to a website or mobile application of a public sector body, except a website or mobile application' (PSBAR 2018). I will return to the specification of the extension to only public sector bodies in the next part of my analysis. However, here it already is made noticeably clear that these regulations will not be providing for a cross-sectional accessibility standard that is compulsory. It begins by

stating there are already several exemptions that can apply, limiting the scope and effectiveness of the regulations right from the start.

The section goes on and specifies the different exceptions that can be applied without any further apparent proof of 'disproportionate burden', which I will turn to in the last part of the analysis. To not let this analysis, go beyond the scope of my intended research, I will focus on the first subsection of the third regulation. Here, the regulation lists that 'public service broadcasters and their subsidiaries, and of other bodies or their subsidiaries fulfilling a public service broadcasting remit' are exempt of complying with the set WCAG 2.1 standard (PSBAR 2018, reg 3 (1)(a)). It can be noted that public sector broadcasting organizations do not have to make their websites and mobile applications accessible in accordance with international and national standards of web accessibility. In terms of the UK, this could, for instance, mean that the British Broadcasting Corporation (BBC) and their whole range of news outlets, including their news applications and their televised addresses, do not need to comply with programming instructions that make their services operable, perceivable, understandable, and robust, as suggested by the most recent standard, WCAG 2.1, developed by the World Wide Web Consortium (W3C 2018). It is no doubt important for disabled people across the country to access information and communication technologies and it is mentioned in the UNCRPD 2008 Article 21, the freedom of expression and the freedom to participate on a political level is of fundamental importance to fulfil the purpose of the human right of freedom of opinion. This does include public as well as private broadcasters and their media outlets, at least in terms of the UNCRPD 2006. Nevertheless, the UK took the step to restrict the application of the standard, limiting the scope of the regulations and thereby possibly denying disabled people sufficient access to media and news outlets that are vital to form their political opinions. This does not mean that the BBC's

websites and mobile applications do not fulfil certain accessibility standards. For the most part, the main news websites as well as the mobile version of the BBC news digital app are digitally accessible and in line with several of the WCAG 2.0 guidelines (BBC News, no date). However, this position is so far up to the BBC to uphold and improve over the next years. Thus, besides the positive aspects of it so far, having a clearer legal framework would provide a safety net for disabled people to fall back on if the standard is not upheld for the future. Most importantly, the BBC is only one example of a news platform, in order to have a diverse range of opinions and perspectives, disabled people should be able to choose any of the publicly available news outlets, which all should fulfil certain accessibility standards. So that they can make use of their content in a similar way to other non-disabled citizens. As I have already pointed out before, even by searching for acts of discrimination against disabled people I have encountered a great range of online news outlets that do not comply with digital accessibility standards making it almost impossible for disabled people that use assistive technology such as screen readers to access these kinds of information in the first place.

The next exemption PSBAR 2018 regulation 3 (1) (b) relates to 'non-governmental organisations, unless they provide services that—' either '(i) are essential to the public; or (ii) specifically address the needs of, or are meant for, persons with disabilities.' This section is highly interesting as it provides for non-governmental organizations to be excluded from the accessibility guidelines unless they are providing 'essential' services to the public or are specifically meant for disabled people. The two subsections of the exemption do not give a great amount of clarity as to what organizations can be called an 'essential' service provider to the public. On the most essential level, everything regarding disabled people's human rights, as mentioned in the UNCRPD 2006, could be considered an 'essential' service. This

could extend to all sections of the private sector, including for example supermarkets and other facilities that provide services and goods to the public (UNCRPD 2006, Art 9 s 1 (a), (b)). Nonetheless, the government has not specifically extended the reach of the regulations to the websites and digital services of, for example, supermarkets and other service providers, although research shows that they would be considered 'essential' (Rhodes & Jarvis-Smith 2020). The essential service provisions therefore only serve the purpose of giving non-governmental organizations the opportunity to reject complying with the regulations by stating they are not essential to the public. However, what 'essential' means to the public, and that access to essential or deemed essential services could be different for disabled people in comparison to non-disabled people, again downplays the need and rights of disabled people in the UK. Additionally, regulation 3 (2) in PSBAR 2018 stating 'unless they provide services that ... are specifically ... meant for persons with disabilities' objectively seems to relate to the care sector or other support mechanisms by charities or organizations that aid disabled people. Nonetheless, I believe this, on a more substantive level, contradicts the earlier subsection as it regards essential services to the public and services specifically meant for disabled people as two different types of services. This could suggest that disabled people do not have essential needs and therefore only have a right to claim services specifically meant for them to be accessible; hence they are not part of the public as such, but of a subsection of the public that has only the right to the services meant for them. Additionally, the underpinning phrasing of the exemption must be paid attention to. What amounts to be a non-governmental organization is up to the government to decide. The definition can be seen as quite narrow and only extending to a restrictive sector of private entities that provide services to the public. However, there is not yet any officially provided examples from the Central Digital and Data Office (CDDO), as to what organizations could be

deemed non-governmental and providing essential services to the public or specific services to disabled people.

The last of the exemptions in regulation 3 (1) (c) does state that 'schools or nurseries, except for the content of their websites or mobile applications relating to essential online administrative functions' are also excluded from having to comply (PSBAR 2018).

Nonetheless, giving another large proportion of the public body a potential excuse not to comply does not further the message that the regulations should be portraying.

Giving these three core sectors, broadcasting services, non-governmental organizations as well as schools and nurseries, a blanket provision in such a way already contradicts with the general purpose of equalising the access for disabled people as stated in Articles 4, 9 and 21 of the UNCRPD 2006. As already mentioned in the previous chapter, the argument around providing disabled people in the US with separate and unequal services when it comes to the digital world also appears to resonate into UK regulations (Wentz, Jaeger and Lazar 2011, The Accessibility Dichotomy). Already restraining access to a great range of services, which are mostly left undefined, can provide for immense difficulties for the Equality and Human Rights Commission (EHRC) as well as the CDDO in enforcing and monitoring these regulations and providing the needed advice to public sector bodies. Accessibility yet again seems to be considered as more of an afterthought, which is only applicable for a small minority of people that are not in need of an equal online experience.

Regulation 5

The next section of the regulation states that 'Subject to Regulation 6, public sector bodies must take the necessary measures to make their websites and mobile applications more accessible by making them perceivable, operable, understandable and robust' (PSBAR 2018,

reg 5). With this, it highlights the perceived exemption of the digital world to disabled people and shows a commitment to the four core guidelines developed in the WCAG 2.0, which are seen to be the current international standard for web development. Interestingly, the main point I would like to focus on in this section is not the WCAG compliance or the exemption in regulation 6, which I have already covered in the previous section, but the intended reach to only cover public entities.

As already shown by analysing regulation 3 (1) of the PSBAR regulations, the exemptions already covered a broad band of public entities as well as non-governmental organizations. Nevertheless, the most significant restriction of the current regulations is the extension of it to only cover the public sector. According to the regulations interpretation segment this includes '(a) the State; (b) regional or local authorities; (c) bodies governed by public law; or (d) associations formed by one or more of the authorities in paragraph (b) or one or more of the bodies in paragraph (c) if those associations are established' (PSBAR 2018, reg 3 (1)). This shows that the regulations only extend to the public sector, hence the Public Sector Bodies Accessibility Regulations. However, this does not negate the fact, that the large sector providing disabled people with employment opportunities, education and goods and services is left out of the remnant of the regulations, the private sector. The UNCRPD 2006 clearly makes mention in Articles 9 and 21 that it shall also extend to private entities. Nonetheless, the UK has implemented regulations that try to increase compliance with web accessibility across the public sector with some notable exceptions, as mentioned before. This again leaves out an exceptionally large field of cultural and economic rights for disabled people that are protected under human rights law. This of course was only the implementation of the EU Council directive 2016/2102/EC (2016) in the framework of the UK. Nonetheless, it is vital to generally understand the impact of having a regulation that

only extend to parts of the public sector to enable disabled people access to the digital world in the year of 2018. Moreover, the EU has already moved past these requirements by creating the European Accessibility Act 2019, which the UK, having left the EU, does not need to implement anymore.

Regulation 6

The final section analysed in this chapter is regulation 6. This section starts by stating in subsection (1) that 'Regulation 5 does not require a public sector body to apply the accessibility requirement if doing so would impose a disproportionate burden on the public sector body' (PSBAR 2018, reg 6). This suggests that besides the exceptions mentioned in regulation 3 (1) that already have been pointed out and the restrictive nature of the regulation to the public sector, there is another incident in which bodies do not have to comply. However, in doing so, subsection (2) continues and suggests that 'A public sector body must perform an initial assessment of the extent to which compliance with the accessibility requirement imposes a disproportionate burden' (ibid.). This is further clarified in subsection (3), 'In undertaking a disproportionate burden assessment, the public body concerned must take account of relevant circumstances, including...'. On the one hand it means that, '(a) the size, resources and nature of the public sector body concerned' play a role in assessing whether it does impose a disproportionate burden on the public sector body. This seems very closely aligned with the 'undue burden' exemption that I referred to in my previous chapter, which was mainly criticised for yet again providing separate and unequal services to disabled people (Wentz, Jaeger and Lazar 2011, Undue Burden). The size, resources and nature of the body are the core factors of not having to comply. This could extend to the body not having enough financial or human resources available. Moreover, it could account for public sector bodies, such as parish councils, that are commonly not

exceptionally large in terms of the staff they employ. Lastly, the nature of the body could lead to a disproportionate burden claim, which could again relate to the position of the body in a more minor administrative function. Furthermore, it also includes when '(b) the estimated costs and benefits for the public sector body concerned in relation to the estimated benefits for persons with disabilities, considering the frequency and duration of use of the specific website or mobile application' (PSBAR 2018, reg 6 (1)). This gives further grounds for disproportionate burden claims by public sector bodies that do not have frequent contact with disabled people to claim their services are not used in a significant enough manner. However, this yet again could be related to the fact that they have not been made accessible to disabled people in the first place. Hence claiming that something has not been used enough by disabled people, only because it has not been accessible, to further argue it should be remaining inaccessible is an outright contradiction.

The last part of the regulation 6 states in (4) that:

If, following a disproportionate burden assessment, a public sector body determines that compliance with the accessibility requirement would impose a disproportionate burden, it must— (a) explain in its accessibility statement the parts of the accessibility requirement that could not be complied with; and (b) where appropriate, provide accessible alternatives to documents held by that public sector body that are not available on their website or mobile application. (PSBAR 2018).

Thus, the only recourse that the body must take is mentioned they claim disproportionate burden for specific or all services on their website in the accessibility statement, which will not be able to be assessed or used by disabled people if the website is inaccessible.

Furthermore, they can where appropriate give alternatives to documents that are on their

website and mobile applications. This yet again strikes me as a more mimicked version of the service, providing disabled people less features and less options and the bare minimum required. This in no way amounts to giving them the equal access as non-disabled people, as already pointed out in the previous chapter on the US regulations (Wentz, Jaeger and Lazar 2011, Undue Burden).

The regulation on disproportionate burden shows yet again the inconsistency of the new regulations on digital accessibility. The public sector can, through the exemptions mentioned before, claim disproportionate burden if the service is too expensive to be made accessible. However, there are two main points of critique that should be considered under this section. Firstly, the linguistic use of 'disproportionate burden' to claim for something to not having to make it accessible to disabled users gives rise to the stigma around disabled people being a burden to society. Secondly, even if they claim disproportionate burden successfully, the disabled people in the local parish that would like to use the service, presently or in the future, will be denied access without any recourse or alternative. The only alternative they could be granted is a delivered, accessible document. This is problematic on various levels as on one side it shows exactly what Wentz, Jaeger and Lazar already describes as the separate but unequal dilemma that many disabled people face, and on the other side, it yet again provides no equality to the disabled in the UK (2011, The Accessibility Dichotomy).⁹

⁹ Alongside this there could be the point raised regarding how far proportionate and disproportionate are similar as well as how far the proportionality test originating from civil law frameworks is applicable here. This thesis is however not concerned with creating a more precise test for disproportionate burden, as I believe it to represent a very conservative and not needed view on disability, making it obsolete for any further reform projects.

In conclusion, the regulations, although intending to provide greater access to the digital sphere for disabled people also seem to create a great number of difficulties concerning the scope of their applicability and general treatment of disabled rights. As it is still based on the Equality Act 2010 there will be different remedies available to disabled people on top of the PSBAR 2018. Nonetheless, it can be called into question that the regulations are going to have a significant impact on disabled people's lives in the UK, as it does not further many of the principles developed within the UNCRPD 2006 Articles 4, 9 and 21. As the United Nations Committee on the Convention on the Rights of Persons with Disabilities in its 2018 report for the UK pointed out, there are significant shortcomings when it comes to providing disabled people sufficient access to the internet (EHRC 2018). It can therefore be called into question that these difficulties will be addressed in the appropriate manner until the next assessment in 2023. Most importantly, looking at the regulation as a whole, it appears to be that they are more relating to giving organizations the opportunity not to comply with web accessibility standards, whereas their purpose should have been to enable more disabled people access to the digital world. Bearing in mind that this is only an initial, very brief assessment mainly relating to the phrasing and potential scope of the regulations, the interim conclusions drawn are worrisome. As I have already suggested in my first chapter, the difficulties with expanding the right to digital access for disabled people are wide ranging and seeing these types of regulations only present the very top of the underlying problem. The question remains, why are these regulations so restrictive and suffer from unclear and vague terminology? As I have already pointed out before, this is in my opinion related to significant underlying misconceptions on equality and disability, which if addressed, should aid in advancing the right to digital access for disabled people. Thus, I will now turn to Minow's social-relations approach in more detail to open up the discussion on concepts of

equality and disability, as I believe that Minow was right in suggesting that the sameness dichotomy as well as the recognition of the different still impact the treatment of disability in today's world and in the digital framing of their rights.

Part 2: Relations in the Digital World

As I have already elaborated upon during my introduction and the previous two chapters, expanding access to the digital world for disabled people appears to be rooted in a great range of different problems. For the purpose of this thesis, my main focus will be on the impact of the core models of disability and their impact on the equal treatment dichotomy. So far, I have argued that Martha Minow's social-relations approach could be used to aid this difficulty, because much of the digital accessibility law problems are still struggling with the sameness dichotomy as well as the recognition of difference. As a result, I will use the second part of my thesis to explain Minow's approach in greater detail, mainly drawing on her book published in 1990. This is going to be vital for the further parts of my thesis, as it will provide the foundation for a better conceptual understanding of the following chapters and their interdependence on several of the core matters addressed here. Elaborating on Minow's approach in greater detail before the conceptual analysis will be particularly useful, as several of the core matters Minow addresses in her book will serve as a guideline helping to navigate through the conceptual framing of equality and disability in the digital world. Thus, in this chapter I will first explain the dilemma of difference as Minow points out in her book. Later, I will turn to examine the case of *Cleburne v Cleburne* (1985). The case, also used by Minow in her book, will be important as it can show the differences of the three core approaches to disability, namely the abnormal-persons, rights-analysis and social-relations approach. All three of which I will be examining more closely to show the advantages the relations approach has in comparison to the former two. These approaches will be essential to understand, as the following chapters will reflect a similar strain of analysis, moving from chapters on the medical model and formal equality presenting the abnormal-persons approach, to chapters on the social model and substantive equality showing the rights-

analysis approach and concluding with chapters on transformative justice and disability relating more to the relations approach. All of which will aid to expand the right to digital access and widen the scope around disability and equality in the United Kingdom (UK).

Chapter 3: “The Social-Relations Approach”

As the previous chapters have shown, the right to digital access is still not fully recognised and faces a great range of different barriers. However, many of the problems do not relate primarily to the technical standard, but to the lack in understanding and several misconceptions on disability and equality. Investigating these misconceptions will help in expanding the right to digital access and aid to clarify and reform current provisions, including the Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations No. 2 2018 (PSBAR 2018). Before turning to an in-depth discussion on different models of disability, their relation to different conceptions of equality and the impact on digital accessibility, it is now important to explain Martha Minow’s social-relations approach in greater detail. Consequently, in the following chapter I will mainly focus on Martha Minow’s approach regarding social relations in the legal system that she covered in her book of 1990. I believe the social-relations approach will give the necessary understanding and comprehensiveness to the notion of extending different conceptions of equality to disability in the context of the digital world. I argue that it does not require a strict definition or categorisation of disabled people, as it does not take disability as the only causal link for the barriers disabled people face. It also provides an adequate premiss for the necessity to apply equality in a ‘different but equal way’ when it comes to disability and posing it as a natural extension of the concept as a whole. It is not about further separating different concepts from one another, but to define and clarify certain propositions and bring them align with current perceptions on disability. Therefore, I will first explain what Minow refers to as the ‘dilemma of difference’ by investigating the problems of difference and different treatment as well as the underlying assumptions attached to it. Afterwards, I will turn to the *Cleburne v*

Cleburne (1985) case which Minow has analysed using her relational approach to highlight its practical implications in the legal system. Lastly, I will reiterate in more detail what Minow's approach can be used for as well as some of the difficulties the other two approaches, namely the abnormal-persons approach as well as the rights-analysis approach, used in the case struggle with. Having an in depth understanding of Minow's approach will be essential for the following chapters as well as the impact the social-relations approach can have on expanding the right to equal access to the digital world for disabled people in the UK.

Making all the Difference

In the first part of her book, Minow (1990) investigates the concept of 'difference' or 'the different' from different sociological, economic, political and cultural perspectives and their influence on the legal system in the United States (US). According to Minow, in order to understand the dilemma of the difference, the underlying comparisons that the law draws must be investigated. These are mainly regarding measuring individuals or groups that do not have the power against the standard imposed on to them by the group that has power. Difference in that circumstance is context dependant and results from the categorisation of groups of people (Minow 1990, pp. 19-23). The core problem with difference to Minow is, 'when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis?' (ibid., p. 20). The problem remains that ignoring as well as noticing difference can lead to exclusion. To prove this, Minow uses three examples taken from the educational sphere. In the case of *Brown v Board of Education* (1954) in the US, where segregation from black and white schools was ended, the lawyers did not fight the separate but equal norm applied, but rather focused on the fact that black schools had less resources and were therefore less able to educate their

students. However, even after the segregation of schools ended, black students were still at a disadvantage, either through living in the wrong area of town or facing the stigma that society attached to them. Later on, activists campaigned for more community-controlled faculties, but these actions only further isolated the community. Thus, both segregation and integration could not overcome difference. Consequently, it is necessary for the majority to give up some of its power in order to include marginalised communities (Minow 1990, pp. 23-26). Similar problems arose with bilingual education of students from immigrant families. Despite a ruling by the US Supreme Court (SC) making it a prerequisite for schools to offer bilingual courses, in times of patriotism English was prioritised and non-English native students were made ashamed of their heritage. Thus, if the majority does not recognise the difference of the minority it leads to further exclusion, also denying the majority the ability to grow and diversify (ibid., pp. 26-29). The same problem arose in the area of special education, where, also through *Brown v Board of Education* (1954), the segregation of schools was ended or demanded to provide better special education. But although more students were diagnosed with disabilities, the segregation as well as integration further stigmatised and disadvantaged the students (Minow 1999, pp. 29-31). Thus, integration and separation can bring difficulties. Regarding bilingual students, integration could lead into them feeling inferior due to their heritage, but segregation could lead into them not being able to enter the job market. In regard to disabled students, the integration could lead into improved social interaction as well as the removal of stigma around different disabilities, but the students may fall behind in the class. The segregation could provide special teaching, but the student will be left socially isolated. So, both integration as well as segregation in the short term could lead into exclusion and disadvantages in the long-term (ibid., pp. 31-40). As I have already pointed out in the introduction, the difficulty many teachers had when

approaching me during my primary and secondary school education was that by attempting to integrate me into the class through treating me the same as the other students they placed me at a disadvantage. This mainly related to the tasks I was given or materials I needed to access, creating the necessity for me to spend hours of my time after school scanning in different documents and also not being able to follow the classes during school, as to the lack of accessible materials at the time. However, I did not want to point these problems out due to the fear of being further isolated or sent to a special educational facility for blind students. As this example shows, both through noticing as well as ignoring difference, old, vested prejudice can continue for minorities and marginalized groups such as women, black and Jewish communities. So, either assimilate and live the disadvantages or point out and encourage the stigma. The problem is also vested in the perceived neutrality of the law where judges themselves are not neutral and often times par to the dominant class reflecting the stigma they grew up with. Thus, either ignore the difference and leave the disadvantage or reinstate it and result into further categorisations (ibid., pp. 40-47). Minow states that the way forward and to tackle this dilemma is to investigate the meaning of difference in greater detail (ibid., pp. 47-48).

The aforementioned examples show that difference in itself can be the source of the problem if both neutrality and preferential treatment can lead to discrimination. Ergo, the underlying assumptions of difference need to be analysed closer. So, the core question is, difference of what? Difference of the unspoken norm is often not elaborated upon. As pointed out by Minow right from the beginning, 'If to be equal one must be the same, then to be different is to be unequal or even deviant' (1990, p. 20). Minow divides the difference treatment into five unstated assumptions. The first one is to see difference as intrinsic and not a comparison. Difference is not something inherent in the person, but something that is

socially constructed. This is also reflected in judicial decisions where there are comparisons regarding similarities or differences to earlier judgments. Thus, it is not an impartial process, but rather a socially constructed one. It gives new meanings or reinstates old, vested assertions by continuously drawing boundaries and categories (ibid., pp. 50-56). The second assumption is that difference is often stated in reference to an unstated norm. Minow here takes the example of the women's rights movement in the US when women demanded to be treated the same in terms of, for example, access to the employment market. However, later on this resulted into difficulties when women tried to go on maternity leave, as it was viewed as different treatment and therefore not allowed. The difficulty in cases originating from this problem was often times that the standard of comparison was that of a man, which was often unseen and unstated and resulted ambiguous judgments and unclear wordings of acts and regulations. Thus, the equal treatment principle, meaning treating similar things similar and different things differently, mainly looks at the consequence rather at the antecedent, hence different to what, similar to what? This results into a great range of problems (ibid., pp. 56-60). The third assumption relates to the perceived impartiality of the judiciary. Judges supposed to be able to apply norms from a neutral perspective. However, often times judges are themselves part of the powerful in society and reflect their own stigmas and stereotypes within their judgements. Not realising this difficulty, the judgments often times reflect the point of view of the majority and the powerful against the position of the minority and the powerless (ibid., pp. 60-65). This results into the fourth assumption, that the other perspective is often seen as less worth than one's own. This often times leads into judges sympathising more with people they share characteristics with, hence the majority, and therefore the perspective of the other is less valuable and therefore wrong (ibid., pp. 66-70). The final assumption is that the status quo in itself is seen as something

natural, non-coerced and good. No matter how many minorities attack this attitude, the status quo argues to remain desirable and non-preferential. However, as pointed out before, the status quo does not work for members of marginalised groups as the employment example of women showed, as it is measured against the standard of the dominant male norm, which does not work for people that are different. Despite it sometimes is realised, the status quo often times remains unchallenged and leaves the stigma and underlying assumptions in place (ibid., pp. 70-74). Minow summarises it quite neatly by saying, 'And if the status quo is natural, good, and chosen, then efforts to alter its differential burdens on people will inevitably seem unnatural, undesirable, and coercive' (ibid., p.74). Thus, it is challenging for governments to forge change in regard to deciding differently or maintaining the status quo. Thus, it is a better solution to tackle the underlying discriminatory systems rather than the individual on the bases of their difference. Otherwise, it does not matter who has the power, as the same assumption will be applied over and over again. The way forward is thus to acknowledge and recognise difference (ibid., pp. 74-78). Also, from my own experience as disabled student and now researcher, I often times found that the standard that I was measured against reflected the standard of a non-disabled scholar, hence asking for documents in different versions, different exam arrangements or alterations were often viewed as giving me an unfair advantage to other students, whereas it is simply about needing a different form of access or treatment in order for me to participate equally.

For Minow, the difficulty then arises on how to challenge difference that has been seen as the unstated norm in society? Mainly, this relates to the institutions and not to the people as such, as the institutions were created already reflecting a specific norm, which makes the world easier to understand for some, but harder for others. Thus, difference is already

embedded in the institution and therefore took away some of the independence of thought people would have otherwise been undergone (Minow 1990, pp. 79-80). People need to change their perspective, from seeing the other as different, to seeing the other's perspective on the system and thereby acknowledging the importance of relations within the law (ibid., pp. 80-81). Minow then uses the example of the US case of *Board of Education v Rowley* (1982) brought forth by parents of a deaf student that has been integrated into a hearing school. The school provided initial training for the deaf student to participate in class, however the parents argued that the student still only understands half of the content and therefore would require a sign language interpreter during all classes. The courts agreed with the school saying that according to the act the school has provided the needed requirements for the participation in class. However, both the school and the parents saw the problem not in the system, but in the difference of the individual. Both used the sameness approach, either the parents on an educational level or the school on the level of treating the student like all other students. But even with a sign language interpreter the student would have had difficulties communicating with their classmates, as part of the relational aspect of difference. Thus, why not tackle the problem on an institutional level and have everyone learn sign language? Then the student can follow in class similar to the other students and participate educationally as well as socially. This is of course not a solution for every problem, but it shows that analysing the relations matter for everyone and can create benefits for inclusion and diversity for the whole student community (Minow 1990, pp. 81-86). In regard to the example of maternity leave from before, taking the example of another US SC case, *California Federal Savings & Loan Association v Guerra* (1987), the difficulty here again was that the standard of comparison was a man as well as the fear of many women to fall again under old gender stereotypes. Thus, it resulted in

controversial outcomes whether or not it should be allowed. Asking for paid maternity leave yet again reflected the superior and inferior dichotomy in society, whereas it is actually a problem of society as a whole. If it is no longer seen as problem the individual has to take care of, but that the system needs to shift, it could lead into flexible working hours, day care facilities and men taking over specific childcare responsibilities. Consequently, it is about collectively working on the removal of stigmas and not only viewing it as an individual problem (Minow 1990, pp. 86-90). So, if difference is not located in the individual but in the relations between the institutions and other individuals, so must the solutions. Nonetheless, addressing these differences can also run the risk of reinstating old, vested assumptions (ibid., p. 90). Despite members of marginalised groups now adopting a stronger relation to their difference and identify under it as a symbol of pride, inequalities still continue even after the civil rights movement. This can be related to members of marginalised groups not filing discrimination complaints, although their difference has caused them problems in the first place. For example, women refuse to take maternity leave, as they are afraid to be excluded from promotions or disabled students refuse to go into special education out of fear to be constantly treated differently. Even if they do not take any action, it could yet again be viewed as their autonomous decisions. Thus, the problem is seen as an individual and not a social problem. This leads into the beforehand attached label of the victim, to be refused by members of these groups, as it is also enshrined in the provisions that seek to protect them (ibid., pp. 90-94). The institutionalisation of difference has wide ranging consequences especially in the legal system that keeps making comparisons and perceives of the other as less worth or less capable. It is argued that there were problems when everyone is simply to be treated as they were different. Firstly, on an epistemological level, how we perceive things, specific categorizations and attaching specific rights to specific people is to

aid us make sense of the complexity of the world. However, as seen in the maternity leave case, despite the comparative nature of it, the shift in perspective could result into better outcomes in the long run, whilst not having to break down all the categories. Secondly, the arguments are often that it is too costly. For example, with providing individual special education to students, although already more than eighty percent of students are estimated to have a learning disability, Thirdly, some people are just argued to be less capable. This however can all be disproven, as the social benefits in the long run outweigh the difficulties, with disabled people contributing to the economy. Nonetheless, there is still a long way to go (ibid., pp. 94-97).

Recognising the difference of another person not as something inherent or less worth is vital to move forward in expanding digital accessibility in the law. As the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD 2006) also stated, the norms enshrined in the convention are interdependent on one another, as every aspect of social, political, economic and cultural rights are reliant on the others to exist in order for disabled people to become fully recognised citizens. However, as the example of the PSBAR 2018 shows, the difficulty still seems to be that digital accessibility is mainly viewed as something for the different or the other person, that the majority will not benefit from, without actually investigating in greater detail the importance of having digitally inclusive spaces for a great range of different disabled and non-disabled people. This can also be related in the regulations attempting to achieve some form of sameness, either sameness of outcome by providing a set technical standard or sameness of treatment by enabling organizations to avoid complying if they feel it imposes a disproportionate burden on to them. This avoids resolving the matter at hand on a more relational level, paying tribute to the relations the

individual forms with others as well as with the institutions and the gains that can result from it for the wider society.

The Cleburne v Cleburne (1985) case

Now it is important to turn to a specific example to show how difference in is embedded within the law and how the legal system struggles with the expansion of the principle by reusing old arguments in a newly designed case. This leads, according to Minow, to a reinstatement rather than an elimination of difference (1990, pp. 101-102). The case that Minow discusses in her book is the *Cleburne v Cleburne* (1985) case brought forth to the US Supreme Court. It is a remarkably interesting example, as there are a number of dissenting judgments that are using or attempting to use different approaches, some of which could even be considered employing relational elements. In way of a brief summary of the case. The main issue was that Cleburne Living Centre (CLC) filed for a permit to build a living centre for the 'mentally retarded,' a derogatory term for people with mental disabilities, close to a local city. The city refused the permit out of the fear expressed by the nearby property owners regarding the damage mentally disabled people could cause to their property. The case went to the federal court and the judges on the bench decided, that it was legitimate for the city to refuse the permit on these grounds. Consequently, CLC went to the Court of Appeal (CA) challenging the earlier court's decision. The CA rejected the argument raised by the federal court. They found that the rejection of the permit was unlawful. They treated the inhabitants of the centre as quasi suspects on the second level of scrutiny usually employed in the US judicial system and therefore and due to their inherent dependency on others the permit was refused unlawfully. Later on, the case went to the SC and here yet again the judges changed their approach. They held up the general notion of the permit being refused unlawfully, but disagreed with the line of reasoning the CA

employed. They decided that, sold on the bases of rationality, the refusal to grant the permit was unlawful, as the motivating factor in reusing the permit was not grounded on any factual bases, but that it was the abstract, irrational fear of the local residence that resulted in the rejection. These were grounded in stigma, so the permit refusal was unlawful. As already pointed out, the judges employed a number of different approaches tackling difference also included in their dissenting judgments. Some of which viewed difference as inherent in the person, others perceiving difference as an error and matter of the institution and yet again others viewing it as a result of the relations within the law and society (Minow 1990, pp. 102-105). To a closer examination of these three approaches is what I will now turn to.

The Abnormal-Persons Approach

The abnormal-persons approach is vested in the historically manifested distinction of normal and abnormal persons. Normal persons effectively related to people that have mental capacity and can be held accountable for their action. Abnormal persons are those who do not have the necessary mental capacity to be hold accountable for their actions, but as a result can also be denied their basic rights arguably to protect them from society and themselves. The view of the normal and abnormal person has also impacted the judgment in *Cleburne v Cleburne* (1985). All judges perceived the mentally disabled as a singular distinct group, that has more in common with one another than with the rest of society. Ergo, government actions based on this difference are not suspicious but necessary, as to protect the mentally disabled people from society due to their inherent difference (Minow 1990, pp. 105-107).

The abnormal-persons approach shows that the move from status to individual rights has not extended to everyone (Minow 1990, p. 121). Historically, in feudal times everyone had a

certain hierarchical status, with the one having a lower status being dependent on the one with higher status. Through the renaissance this shifted to rights that every individual possesses as a protection from interference from the state and to safeguard one's own freedoms. Influenced by thinkers such as J.S. Mill with their libertarian theories, the rights were often connected to the possession of property relating back between the formation of a contract between two equals. However, women, children, ethnic minorities and disabled people were not viewed as equals and denied these rights. Consequently, the view of the normal and the abnormal person emerged. The normal person as rights-holder and the abnormal person as in need of protection by the state, not being able to make informed decisions. Thus, some people were over time branded legally disabled which led into them not having the right to claim freedom of interference by the state (ibid., pp. 121-128). So historically manifested hierarchical structures were simply rebranded. What before was status became capable and incapable, competent and incompetent people. So that minority groups were left out of the theory of the strong, separate individual. Later on, the medical profession also tried to label specific groups according to their differences. All of which shows the subjectivity of history. The civil rights movements in the US demanding equal rights for women, disabled people and people of colour shifted the mindset for many (ibid., pp. 128-132). This shifted the approach and the medical profession started to be challenged by virtue of many being unaware of specific disabilities and not aiding, for instance, mentally disabled people in being included in society. So, doctors and social workers campaigned for different treatments and different wordings in the regulations. Thus, the theory of equal rights then extended to mentally disabled people. Nonetheless, if the rights-analysis approach applies the sameness argument to the fullest, it will help to deinstitutionalise mentally disabled persons, but also hinder access to special treatment in individual

circumstances to deal with the often times complex environments. Thus, the problems are not in the individual, but in the rights as such, as they are based on autonomy and rationality; if one fits those assertions one can benefit from them (ibid., pp. 132-139).

The Rights-Analysis Approach

This approach was taken over by most judges on the bench. The rights-analysis approach is grounded on the civil rights movement and the necessity of some people to be equipped with additional rights remedying the disadvantage they have been subjected to. However, this approach yet again focuses on the difference of the individual, rather than the relations within the law and society that label them being different. Moreover, the approach starts with the assumption that everyone's rights are equal and that some just need additional rights to remedy structurally imposed disadvantages or individual circumstances. However, the difficulty then occurs where to draw the line between acceptable and unacceptable behaviour, when does discrimination occur and when not. The line is difficult to draw and according to Minow this is also what many judges in the case struggled with. Viewing mentally disabled people as inherently different, with access to equal rights protection, but the necessity of them having special rights to remedy their circumstances, appears a rather inconsistent approach causing blurred lines (Minow 1990, pp. 107-110).

In the end, the rights-analysis approach only benefits those that are presumed autonomous and rational, as through the equal treatment principles those who are different are denied any special treatment. Different legal theories tried to tackle this problem, but the underlying difficulties remain (Minow 1990, pp. 146-147). The difficulty remains that the legal system is based around two central political theories, namely the social contract and the fundamental rights theory. Both developed by libertarian thinkers, including Hobbes, Locke and Mill. The difficulty, as already pointed out, is that autonomy and rationality is at

the core of these theories which is in itself used to exclude others, despite John Rawls (1971) attempt to shift the focus to pay greater attention to difference by starting the mental experiment with the veil of ignorance. However, even behind the veil of ignorance people from more privileged positions have a harder time thinking of themselves as the least fortunate and what measures to adopt in that case. Thus, the assumed standard again is used to exclude minority groups from the range of protection it granted (Minow 1990, pp. 148-157). After the Second World War greater emphasis was placed on the separation of power. This however resulted in the judiciary mainly focusing on legal process and its legitimacy and not the more substantive rights underpinning it. However, although superficially this distinction might be pointed out, substantially similar conceptions on anatomy and rationality are employed in the legal framework as well, even regarding specific bodies having the competence to act in specific areas (ibid., pp.157-159). Later on, theorists mainly coming from economics started applying economic principles to the law, suggesting judges are mainly motivated by cost-benefit analysis and economic efficiency. Thus, focusing on profit making as well as leaving it to the individual what to pursue with their own resources. However, similar to the rights-analysis theory it is also focusing on the individual and its capacity to make their own choices. The law should only intervene when there are disadvantages. However, the needs of people that are different are not considered, but rather treated as they need protection from interference from outside. It is more based on utilitarian principles and creating incentives, however already well-off communities would not need to agree to incentives in the first place. Thus, it focuses on the individual as different and again does not recognise the relations of the individual with the system and other groups of people (ibid., pp.159-163). Also, the theorists coming from critical legal theory did not fully acknowledge the value of difference and the benefits its recognition can

bring in the short- as well as long-term. Despite scholars from this line of thought criticising the law for being focused on the individual, as well as being very formalistic and lacking neutrality, the full opportunity of the difference has not been fully acknowledged (ibid., pp. 164-172). Fredman (2011), for example, talks about law as a power dynamic, those who have knowledge and those who have not. Kanter (2015) on the other hand talks about the model of capacity and how everyone to some respects is capable and incapable, which needs to be analysed in light of the specific circumstances.

The Social-Relations Approach

The social-relations approach has similarities with the two approaches stated prior, but it also has differences. For one, the social-relations approach also acknowledges the difference of the individual, but does not perceive it as the fault of the or responsibility of the individual. It is rather seen as a label that society attached to that person, which can be related back to the power dynamics in society, hence they were labelled from someone in a position of power to someone in a position of weakness. In a way, it then also draws on the theory by John Rawls (1971) regarding a theory of difference, in which the relations in the law were described as reflecting specific power dynamic and certain manifested beliefs. The theory then however analyses the relations between the individuals as well as the institutions to show that the difference has been attached onto the person by someone else from a position of power in order to deny them specific rights. Thus, despite judges being mainly part of the powerful in society, this approach would encourage a rethinking of vested stigmas and stereotypes and attempting to perceive the situation from the perspective of the other person (Minow 1990, pp. 110-114). In the *Cleburne v Cleburne* (1985) case there were two judges differing from the opinion of the majority. Justice Stevens, for one, attempted to see the situation from the perspective of the mentally disabled people, saying

that no rational member of their community would see the refusal as justified. Thereby, he attempted to combine something that judges are familiar with, the rationality argument, with something they perceive as different, mentally disabled people. Thus, he is influenced by the social-relations approach. However, he then goes on to focus on the equal treatment principle and the rights-analysis approach, that again tries to remedy the disadvantage without acknowledging that it has been attached by a position of power in the first place. Justice Marshall on the other side, saw the similarities between the mentally disabled people and members of other marginalised groups. He pointed out that through the constant separation of them from society, the fear and prejudice towards them have grown. He thus, also shows that individuals and institutions develop relations and attempts to show that through their isolation assumptions and stereotypes have further increased. Nonetheless, he then also turns to the rights-analysis approach without realising that the attribution of difference again happens from a position of power, that has been historically manifested and that different relations within the law and their development need to be examined more closely (Minow 1990, pp. 114-120).

As a result of the difficulties with the rights-analysis approach, the field of sociology developed the labelling theory. This meant a person is not treated a specific way due to their own individual behaviour or circumstances, but due to the label that society attaches to them. The labelling theory does not, for example, look for the specific facts or reasons of mental disabilities, but focuses rather on the social consequences and constructed realities attached to people with mental disabilities and how being treated a specific way is internalised by them. However, the theory was later criticised for overlooking the interaction between specific groups and the labels as well as the underlying assertions that come with it (Minow 1990, pp. 174-177). Especially in the 20th century, more studies emerged looking at

the interdependence on people's perspective on the world and how this impacts the view on reality and people's treatment and behaviour. Everything is argued to be interdependent and based on interactions and relations. For example, philosophers such as Kant argued that we imagine how the world is supposed to be and then act accordingly, forgetting that we imagined it ourselves in the first place. Thus, mainly through empirical work scholars attempted to prove that humans are interconnected and that our behaviour depends on the relations we form and the conceptions we employ, the knowledge we acquired and the experiences one has (ibid., pp. 177-182). In line with the first American school of philosophy, scholars such as William James (1975) argued that experience is shaped by habit, which is shaped by social custom. Thus, the school points out the interaction of knowledge and experience and its relation to truth, which can only be achieved through placing oneself into the other person's shoes. According to James, knowledge is highly subjective and only through these interactions the truth of certain objects can be determined (Minow 1990, pp. 182-184). Drawing on anthropology scholars in sociology then argued for a deconstruction of categories and seeing the interconnectedness. However, they realised that perspective on one's own culture as well as language is already socially constructed. Thus, the difference between the observer and observed was pointed out and its impact on the power dynamic in society (ibid., pp. 184-189). However, these relational approaches were still very abstract and applied in abstract ways. A first difference could be noted in the approach the feminist movement took in relation to the recognition of oneself, the power dynamics in society and the relations that they are vested in (ibid., 192-193). In the 1960s and 70s feminist scholarly work showed the different power dynamics, exclusion and inclusion through socially constructed stereotypes, the autonomy principles, creating the unstated standard of a man that women were measured against (ibid., pp. 193-198). Historical feminist scholars were

the first to look beyond the line of gender, looking to race, ethnicity and other socially constructed views. They realised the significance of relations and the discovering of unknown histories. They focused on the whole and not only on part of the pattern, rejecting the possibility of a central answer and point out the relation between the observant and observed in discovering knowledge and truth (ibid., pp. 198-202). In the law the relational model showed how the constant exclusion has led into the powerlessness of some groups, which is based upon their perceptions as different or less worth. In the *Cleburne v Cleburne* (1985) case, there were already two judges attempting to emphasise the relations. Seeing one's own perspective as shaped by stigmas and stereotypes aids the emphasis of the relations even the judges have to the claimants. Thus, the label is no longer the problem, but the social institution that attaches it to them. Even after the living centre was formed, the inhabitants were described as good neighbours by local residents and the mentally disabled people created a new self-identity as a result of it (Minow 1990, pp. 211-214). The relational approach allows for a recognition of difference and the finding of solutions which benefits both sides. It is not seeing the difference as natural and necessary, such as the abnormal person's approach. Also, the rights-analysis approach, despite trying to move away from the social hierarchy, attempts to provide for equal rights. But the categories of groups and their difference remains, not recognising who is assigning the label and in what context. The main problem is that the rights-analysis approach struggled where it focuses on the assignment of equal or special rights, as it takes an individualist stance. The difficulty is also in the employment of the sameness argument, as if all rights are the same everyone can claim some form of sameness and therefore get attributed different rights in different situations. The social relations approach attempts to perceive situations more context dependent, showing that it is a socially constructed reality. Everything is dependent on the relations

people had, their underlying assumptions and their perception on the different. The relations approach therefore conceptualises the individual in the larger pattern of the social system, criticising the neutrality of the status quo and leave the ones that apply the law questioning their own position in the pattern with their own prejudice against groups. Thus, it allowed for a recognition of difference on both sides and the finding of solutions that benefit everyone (ibid., pp. 214-215).

In the end, the social-relations approach appears to also be able to better deal with the difficulties disabled people may have in demanding equal access to the digital world. Specific wordings in the regulations around disproportionate burden for instance, appear to suggest that disabled people are still something abnormal and something incapable that is more of a burden than aid to society as a whole. It, therefore, at least in part, reinstates the difference dichotomy also into the UK regulatory framework. Although the rights-analysis approach is also reflected in the regulations, the difficulty around providing disabled people additional rights in the digital sphere can also run the risk of governments struggling with to what extend different treatment is allowed. Thus, the restrictive nature of the regulations can be explained at least in part. Moreover, the sameness problem again shows that everyone can claim some form of sameness, which in that instance also relates to different organizations that do not need to comply with specific accessibility standards if it is to financially restrain for the body. Thus, the relations-approach needs to be further investigated, as it could provide better solutions in tackling these issues by acknowledging that the label as disabled has been assigned by a position of power and that the relations of the individual with the system have to be further analysed and made sense of. Therefore, I will now use the relations approach as a guideline when it comes to assessing different models of disability and their relation to different conceptions of equality in the third and last part of this thesis.

Part 3: Disability, Equality, and the Digital Space

In order to better understand the fundamental misconceptions of disability and equality digital accessibility regulations in the United Kingdom (UK) are representing today, it is now necessary to dive into a more in-depth analysis of different so-called models of disability that are influencing the current legal framework. Establishing an increased awareness of the complexity of the subject area around disability, the development and the controversies surrounding it, are of vital importance, in particular, detecting the negative consequences misconceptions of disability has up to this day in British disability law and digital accessibility regulations. Most importantly, I argue, that a better grasp of the meaning of disability would impact the understanding and interpretation of the term equality, particularly how different models of disability are arguably reflecting different conceptions of equality. Both subject areas are immensely complex and wide ranging. Therefore, I will limit the scope of my investigation and choose three of the most common models of disability. I will then compare them to forms of equality which, in my understanding, are reflected by each of them. To narrow the scope of my argument down, I will use the most commonly applied models of disability as starting point and from there on draw on a specific theory or conception of equality. Thus, it is not my aim to entirely elaborate on the concept of equality or solve any major debates in that area. It is my sole intention to connect conceptions of equality to disability in order to show the different impacts of different conceptions on the treatment of disability and equality in the digital world. Moreover, I argue, that the core difficulty in extending equality and equal access to disability vests in a general portrayal of the disabled person as the different as well as in the attempt to continuously treating them the same in terms of the outcome or the starting point as a non-disabled person. This relates back to the

criticism by Martha Minow (1990) that I have been analysing in the previous part of my thesis. Using her relations approach will aid the connection of disability and equality in the digital world as well as providing for a better grasp of the current misconceptions on a more fundamental level.

The three approaches to disability I intend to discuss and compare to different conceptions of equality in this section are the medical model, the social model, and the human rights model. All of which are relevant to the UK currently and are influencing different parts of legislation. Following this, I will elaborate in greater detail on how each of these approaches reflects a certain perception on equality, namely formal, substantive, and transformative equality. As I have already pointed out in the previous part of my thesis, the structure of my argument will follow Minow's line of thought in analysing the abnormal-persons approach, the rights-analysis approach as well as the relations approach. Thus, the abnormal-persons approach reflects the medical formalistic perspective that disabled people are branded with, which I will elaborate on in the following chapter. The rights-analysis approach will reflect the move away from simply viewing disabled people as 'the other' and attempting to extend special rights to them in the form of the social model and substantive equality. This, however, also runs the risk of replicating old, vested assumptions in terms of leaving difference unrecognised and struggling to draw the line between what is discriminatory and what is non-discriminatory behaviour. Lastly, the move towards the human rights model of disability and transformative justice reflect the approach Minow has taken in relation to using the relations between the individual and the system in order to determine the best possible outcome.

Chapter 4: “The Medical Model of Disability and Formal Equality”

As the previous chapters of my thesis have shown, there are a great number of difficulties in extending the right to digital access to include rather than to exclude more areas of the digital sphere. In the first chapter, I have suggested some of the underlying difficulties from the standpoint of the system in the United States (US), which can be related to the adherence to a strict technical standard, without acknowledging the other facets of digital accessibility. Moreover, the strong impact the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD 2006) had seems to have been gone unseen by the new Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations No. 2 2018 (PSBAR 2018) in the United Kingdom (UK). Many of the reasons around why the regulations are so restrictive in their nature and unclear in terms of the extent to which digital accessibility has to be provided, is in my opinion related to fundamental misconceptions around disability and equality. Thus, Minow’s criticism, besides having her book published in 1990, appears to be still resonating into modern disability and digital accessibility regulations. The recognition of difference as well as the equal treatment dichotomy appear to also relate to the difficulties in the UK regulatory framework. Thus, it is now time to further investigate and clarify what disability or models of disability are and to what respect they reflect a specific perception on equality. This will be vital to realise the importance of Minow’s critique and its significance in advancing towards transformative justice and the human rights model of disability in the digital sphere.

In this chapter I will start discussing the medical model of disability in greater detail and its relation to the stigmatised view of disabled people that resonates up until this day into UK accessibility legislation and regulations. Most importantly, I intend to show the relation of

the medicalised view of the disabled person to a very formalistic account of equality. I will thus start elaborating on the historical development of the medical model, its origins in modern science as well as its criticism by disability activists. Later on, I will turn to consider its relation to a formalistic account of equality by drawing on the critique of equality by Peter Westen (1982), which declares that equality is a very formalistic concept, confusing rather than enhancing substantive rights. Additionally, it will be interesting to see how far the different models of disability and conceptions of equality analysed in this part are indeed recognising difference and dealing with the sameness dichotomy in order to open up the field of digital accessibility to a greater range of people in line with Minow's relational approach.

The Medical Model of Disability

In the time period after the Second World War, greater emphasis was placed on the welfare state. As a consequence, several acts were passed in order to advance the inclusion of disabled people in the UK into different social and institutional structures. For example, The Disabled Persons Employment Right Act of 1944 intended to ensure disabled people access to the employment market through training and rehabilitation courses. Furthermore, the Education Act 1944 enshrined the right to education for every child according to their needs and capacities into law (Barnes 1991a, pp. 11-17). Despite these improvements for the disability community in the UK, adequate inclusion into society was still viewed as being too difficult. The main answer to the equal recognition of disabled people from state and government bodies was again to treat them as objects of welfare and inherently less capable than a non-disabled person (ibid.). Only through organizations such as the National League of the Blind and Deaf, which later became the RNIB (Royal National Institute of Blind People) and RNID (Royal National Institute for the Deaf), were disabled people educated and given

the chance to participate in society (ibid.). However, this was not the case for a number of other disabilities, which were still seen as incapable of social inclusion and therefore were placed into special needs facilities. The disabled people there were seen as lazy, unproductive, incapable of independent living, etc.

Alongside this, one of the major changes for disabled people was the emergence of modern medicine. The development of certain drugs and treatments did for the first time bring positive change for disabled people, for instance, in the treatment of pain and other chronic conditions (Oliver 1990b, pp. 46-49). Nevertheless, it did not remedy the social stigma that people have been subjected to. Before, the disabled person had to turn to religion to seek healing and ask for a miracle in order to fit in society; now it was the medical treatment that promised disabled people a cure from their abnormality (Goodley 2017, pp. 5-11). The view emerged that only through constant medicalisation disabled people would be able to participate in society. Thus, this further categorised the disabled person by measuring them against the standard of the fit normal body, as it was happening throughout the industrial times of early and mid-capitalism (Goodley 2013, pp. 632-634).

This turn to medicine as one of the wonders of modern society is what disability scholars are today referring to as the medical model of disability. In this approach the core value is the finding of a cure for the disabled person, no matter their impairment or social and environmental circumstances. To better grasp the rationale behind this medicalisation of disabled people, one needs to look at the underlying purpose of modern medicine. As Michael Oliver (1990b) argues, much of it was based on the germ theory, which took a proactive medical approach trying to cure the individual from the invasive virus. This was consequently also applied to the disabled person. Meaning measures such as rehabilitation and alternative technologies or methods of transport such as wheelchairs, were not seen as

important as the fully adaption to the norm with the help of certain drugs or treatments (Oliver 1990b, pp. 49-54). This has, amongst other things, contributed to the exclusion of disabled children from mainstream education and left many disabled adults dependent on the welfare state as means of support. Consequently, disabled people were brought up to be not independent by virtue of them simply needing a different approach to access and inclusion (ibid., pp. 78-83). Moreover, the welfare support was provided by the government to determine the 'deserving from the undeserving welfare recipients' (Goodley, 2017, pp. 5-11). It therefore made it necessary for disabled people to have a diagnosis of their condition, which is seen as severe enough by the doctor or the administrative body, to be categorised as worthy of additional support. Hence, it was very much focused on the individual as an object instead of a subject. Mainly, through this approach diagnosis was frowned upon by disability activists. It again showed the power dynamic in society. The shift in focus that a view could dictate rules for a group of people based on stereotypes and assumptions on how they have to be living their lives was criticised for being oppressive and ignorant towards the persons individual circumstances (Oliver 1990b, pp. 4-6).

Nevertheless, the medical model of disability, although continuously criticised by disabled people and their representatives since the disability activist movement started, resonates until today into UK disability law. For example, the Equality Act 2010 or its precursors, the Disability Discrimination Act 1995, use the medical model of disability in the definition enshrined in section 6. It says that disability is any long-term adverse effect on an individual that substantially impairs their ability to participate in day-to-day life (Equality Act 2010, s 6). It can already be noted that this definition views the disabled person again as an object with the need of remedy for this disadvantage by the law. It does not mention the environment or attitudinal barriers disabled people face besides the effect of their impairment. Thus,

again reflecting the stigma of disabled people as vulnerable medical category, which is reserved for only a small proportion of disabled people. It narrows the disabled person down to someone that has a 'long-term' condition which has an 'substantial adverse' effect on their lives. Disabled people therefore have to prove that they have an impairment and are 'really disabled' (Goodley 2017, p. 6). All of which is subject to interpretation by courts, administrators, or medical professionals, that most likely do not have any experience with the specific disability, which is more commonly referred to as not having the first-hand lived experience that a disabled person would have. The result is placing the disabled person again at the mercy of someone else, strengthening the power of the medical profession through the medicalisation of disabled people's lives, instead of encouraging a collaboration between the two (Oliver 1990b, pp. 4-6).

Similar to the turn to medicine in order to 'cure' the disabled person from the illness, the turn to modern technology seems to have taken a similar approach. Simply by having a set technical standard, for example, Web Content Accessibility Guidelines (WCAG) 1.0 (1999), providing closed captions, transcripts, image descriptions or texts in different font sizes or colour contrasts, the disabled person is set to automatically be able to access every digital service without any additional barriers. The scope now simply shifted from turning to the medical profession to ask for support, giving them a more privileged position in relation to the disabled person, to turning to programmers of web content and web design, making them the people disabled people are reliant upon in order to participate in the digital society (Varney 2018, pp. 590-595). In the end, the responsibility seems to be falling onto the disabled person. They, for example, have to purchase expensive screen reader software such as a JAWS (Job Access with Speech) licence and then be able to access the website if it is obeying a certain standard. This, however, overlooks the problem that the websites also

need to be useable, and that assistive technology should not be something disabled people have to purchase themselves to make up for the fact that they are disabled. This has been attempted to be solved by the flexibility of WCAG 2.0 (2008) and its later updated version of 2.1 (W3C 2018), which tries to give programmers greater flexibility in making websites perceivable, operable, and robust. Nonetheless, the difficulty remains that as Jaeger suggested, the physical access component of the multi-dimensional barriers disabled people face in the digital world are only one part of the problem (Jaeger 2014, *Access, Accessibility and the Law*). Therefore, objects such as the iPhone, besides now containing inbuilt and freely usable assistive technology as well as accessibility, is a step into the right direction, but more needs to be done. The web design as well as the different accessibility features need to be also made accessible to disabled people in a social and intellectual sense. Otherwise accessing a WCAG 2.0 (2008) compliant website with a screen reader can still feel immensely difficult and increase the time and effort disabled people have to put into understanding and using the content, that non-disabled people do not. Yet again creating immense difficulties in the use of the websites for so many.

In the end, the medical model of disability 'others' the disabled person in a category that is meant to deem them incapable or abnormal in comparison to other people. In that regard, it does not recognise that difference is something that has been socially constructed and that reflects the power dynamic in society, as Minow suggested. Thus, the different treatment of disabled people was justified by virtue of them being perceived different on a societal level, leaving their needs to be not as important as their perceived needs from the medical profession. It therefore appears to be aligned with the abnormal-persons approach that impacted the judgements in the *Cleburne v Cleburne* (1985) case. This approach, as I have

explained before, considers the disability as inherent in the person and the different treatment as justified due to the perceived otherness of the person with an impairment.

Formal Equality

The notion of focusing on the disability per se treating it as the problem, instead of focusing more closely on the other environmental and social aspects that might influence the disabled persons life, does not only reflect a medicalised view on disability. In my opinion, it also reflects a very formalistic account of the equal treatment principle leading to ambiguous and unclear comparisons of disabled and non-disabled people in the digital sphere.

As I have already discussed in regard to the creation of the rights-analysis approach to disability in the *Cleburne v Cleburne* (1985) case, the idea of equality is something that established itself more prominently in the time of mercantile capitalism. Beforehand, it was perceived acceptable for marginalised groups such as women, children, disabled people and other ethnic and racial minorities to be viewed as less worth and less capable to make their own informed decisions. Through developments such as the industrialisation ideas from libertarian thinkers such as John Locke sparked regarding the equality of all men. Many of these theories were based on the theory around fundamental rights, for Locke (1988) these extended to liberty, property and happiness. Furthermore, social contract theory influenced these lines of thought, as the contractual relationship between two property holders is meant to be occurring between two equals (Fredman 2011, pp. 4-8). Nonetheless, equality at this stage did not mean equality for everyone. For women, black and disabled people it took up until the late 20th century until their rights to hold property and participate in the legislative sphere was enshrined into law. However, access to justice was not seen as enough to promote equality. There also needs to be negative as well as positive measures to combat discrimination as well as to forge structural change in society. Otherwise, other marginalized

groups would continuously be excluded on the bases of them lacking the necessary rationality or autonomy, which they have been denied by the powerful in society in the first place. This notion of equality was attempted to be reflected in the Equality Act of 2010, with positive duties as well as negative duties on the state to prevent different forms of discrimination. Since there are, however, still significant differences in healthcare, income and education for many minority groups, this notion of equality as equal treatment based on the treating likes alike dichotomy must be further questioned (ibid.). Much of what comes to mind when thinking about equality is the Aristotelian notion of treating likes alike. This relates to paying only regard to the merit of the situation and having disregard to someone's age, disability, gender, race, etc. This however raises the problem that many of these groups that are part of a protected characteristic get influenced by their social, economic and political situation on the bases of this characteristic as well as by the characteristic itself. However, ignoring a person's background does not work, especially when the only choice for minority groups is to conform with mainstream practices in order to be accepted into society. The difficulty around the equal treatment or treating likes alike dichotomy also relates to the confusion about thinking about equality as fairness and that fairness means a constant alike treatment in way of equality before the law. Thus, there is the need to move away from this formalistic account of equality (ibid., pp. 8-14). This shows again the difficulties that Minow (1990) pointed out in the recognition of difference: noticing as well as ignoring difference can lead to exclusion rather than inclusion when the sources of difference are not paid greater attention to. Similar to the problem around the equal treatment problem, sameness can be attached to a multitude of factors in different situations, resulting in problems of what needs to be treated similarly or to what extent different treatment is allowed. Especially, and as Minow suggested, if the standard that has been set is not

analysed, and women are measured against the standard of a men or disabled people against the standard of a non-disabled person.

To better understand the underlying difficulties in formal equality and their effects on disability and the expansion of the right to equal access in the digital world, I will now turn to one of the more prominent criticisms of equality by Peter Westen (1982). I believe this criticism will also be important to see the concrete impact Minow's line of thought has up until this day in digital accessibility regulations in the UK. In order to prevent this section from going beyond the scope of my argument, I will primarily focus on part one and three of Westen's paper about equality from a United States (US) standpoint. Although this will present only an overview of Westen's primarily philosophical as well as rhetorical account of formal equality, his analysis is an accurate representation of many of the difficulties that still resonate into modern British disability law, making it necessary to be investigated further.

Westen's Criticism of Equality

In his article, Westen begins by distinguishing between rights as individual remedies available to an individual or group of individuals and equality as the treating likes alike proposition as well as its opposite of treating un-likes unlike. Westen therefore states that equality analysis will necessarily lead to rights-analysis as well as using equality in rights-analysis will only lead to confusing and ambiguous outcomes (1982, pp. 537-542). Westen concludes his introduction by stating, that, 'Equality, therefore, is an idea that should be banished from moral and legal discourse as an explanatory norm' (ibid., p. 542).

In the first part Westen begins by stating that much of the discourse around equality theories begins with Aristotle and Plato. For Aristotle, equality in morals relates to the treating likes alike principle or its opposite of treating un-likes unlike. Additionally, Aristotle

declares that justice and equality are the same, what is just is equal and what is unjust is unequal (Westen 1982, pp. 542-543). The difficulty in approaching equality as treating likes alike is that it is tautological to Westen. Mainly, as treating likes alike has both a determinative and a moral component, ergo it needs to be determined what characteristic or group of people needs to be treated alike based on a moral standard. However, the problem is that everyone is alike to some respect. Therefore, the alike treatment is only working when it is narrowed to be focusing on a specific metric and a specific norm. However, this is then leaving the determinative component to be also based on an 'ought' instead of an 'is' (ibid., p. 543). Consequently, treating likes alike is to achieve a norm conveying a specific moral ideal, which has been already determined by set moral ideal in the first place, making equality chase its own tale. Therefore, as it is a tautological *a priori* moral truth, Aristotle was right in suggesting equality and justice are indeed the same (ibid., pp. 543-548). Moreover, equality does not precede rights-analysis, as without rights-analysis equality would not have anything to compare. Additionally, when rights-analysis is the antecedent and not the consequence, equality yet again is only meant to further establish an already established moral rule. Westen states that it is unnecessary to forgo with an analysis of equality, as this can also directly be achieved through using the substantive rights at hand. The difference is simply whether to use rights directly or indirectly and to recognise that rights are also comparative or non-comparative in nature that can convey certain remedies based on conditions without drawing on equality (ibid., pp. 548-556). Therefore, Westen suggests that Aristotle was correct in declaring equality and justice as the same. This is mainly related to both propositions being reliant on further moral substance that is inferred from the party that uses them. Thus, treating likes alike is based on a moral rule to which then people will be normatively treated the same. Similar to justice, meaning giving

everyone their due, what due is needs to be morally established before people are normatively treated accordingly (ibid. pp. 556-559).

In the third part of his paper, Westen reiterates again that he established that equality is a purely formalistic concept, void of any substantive value on its own. Nonetheless, some scholars suggest that despite its circular and empty nature, equality can still entail value in terms of, for example, the provision of flexible remedies and protection of people's rights (Westen 1982, pp. 577-580). Westen, however, argues that equality confuses rather than provides a clearer or more flexible approach to rights-analysis and grounds his argument on four points. The first fallacy he points out is regarding treating equality as independent norm. As already shown, equality can be used to interpret substantive rights, however it ends up being the same result as the interpretation of the individual right as such would have resulted in. Moreover, using equality and the treating likes alike principle creates the difficulty that anyone is alike to some respect and therefore the outcomes can be variant (ibid., pp. 580-581). The second fallacy, Westen points out, is one of equivalence. This is mainly related to using equality in the same way as the mathematical equal sign. This results into difficulties because while cases are morally and legally equal to some respect does not mean they are morally and legally equally in all respects. Westen illustrates this by taking the example of a black applicant who was refused entry to the law school in Texas due to his skin colour in *Sweatt v Painter* (1950). The court therefore crushed the prohibition on the bases of the law school treating the applicant different on the bases of race. In a case in Washington, *DeFunis v Odegaard* (1974), a white applicant was refused entry because of the colour of his skin. However, here the underlying purpose was to diversify the pool of students. Hence using these cases and treating them equally simply because they are morally and legally equal to some respect, misses the substantive underlying point of the

admissions process (Westen 1982, pp. 582-584). The third fallacy is one of equal scrutiny. Hence using equality confuses the different levels of scrutiny that are applied when approaching different rights in the context of the United States. For example, Westen points to cases of sex discrimination for women and for men. He states that the equal scrutiny could give an equal weight for their cases, ignoring the structural problems at hand (ibid., pp. 584-587). The last fallacy according to Westen is the assumption that equality by itself provides for fungible remedies. However, as the *Palmer v Thompson* (1971) case in the city of Jackson shows, a swimming pool for whites only was closed down in order to treat them the same to blacks. This again misses the underlying point. Simply by closing the pool down and treating blacks and whites the same in that respect does not thoroughly address the right to equal protection under the law. As the real problem at hand was that blacks were refused entry as to the pool, treating them as racially inferior. Thus, treating everyone the same and placing everyone at a similar advantage or disadvantage only works if the substantive right at hand is also considered (Westen 1982, pp. 587-592).

Western concludes by stating, 'The explanation is quite simple: although equality is derivative, people do not realize that it is derivative, and not realizing it, they allow equality to distort the substance of their decision making' (1982, p. 592). Therefore, one could achieve the same result without the confusing nature of equality by simply using the substantive rights at hand. The difficulty with equality in a rhetorical sense is, however, that whoever uses equality in an argument has a morally higher position and forces the other person into arguing against it. However, if equality is seen as a concept that morally can represent anything, everyone can invoke it. Thus, for Westen the way out would be to reframe from using equality after all (ibid., pp. 592-596).

Westen creates a noticeably clear message in declaring equality as a confusing rhetorical feature. As many times demanding equality leads to the sameness dichotomy and the claimant is able to pick which factors of a specific treatment shall be legally or morally equal, automatically meaning they are all morally or legally equal.

All of this very much resonates with Minow's criticism from 1990. When formal equality is applied and the equal treatment principle is invoked the individual is still perceived as different and less worth in the circumstance, without recognition that the label of the different has been attached to them by the powerful. Thus, it is necessary to move past the treatment of disabled people simply as disabled because of their socially constructed reality as well as recognising that the standard has already been set by someone else, hence, as early feminists suggested, women were compared to men and now disabled people are compared to non-disabled people.

Focusing on the underlying intention of the PSBAR 2018 there are a multitude of issues that can be related to the more formalistic perception of equality that Minow criticises. On the one hand, the disability is still perceived as the inherent other, the less worth or the burden on society. This is not only made clear through the use of the language around disproportionate burden, but also through the restrictive nature of the regulations. The digital sphere seems to be made for non-disabled people and taking them as the comparator supports the move away from a cross-sector digital accessibility requirement for all public and private facing entities. The comparison to the non-disabled person could yet again lead to the assumption, that setting a concrete technical standard will be enough to solve the structural disadvantages disabled people face. However, access to the needed software as well as the awareness to navigate the internet and access to broadband is not discussed at all. Moreover, the essential services dichotomy followed by the requirement to make

services that are meant for disabled people accessible seems paradoxical in itself. It 'others' disabled people again from mainstream society. Overall, it yet again looks as if the standard has been set by non-disabled people, taking non-disabled people as a comparator, and perceiving disabled people as inherently different and less worth by virtue of them being different and needing a different form of access. Therefore, the different form of access is automatically less important, less clear, and harder to understand or promote across different websites. Leading to the conclusion that disability is perceived in a formalistic sense of equality in the PSBAR 2018. Another example of treating disabled people differently in order to relate to their disability, is that the disability as such is simply a natural cause which does not impinge on the formalistic view on equality. This argument does not stand in the current moral discourse and also does not relate to the principles that were developed later on and to which I will turn to in my following chapter.

When it comes to the digital world the main point could be that since the internet is mainly comprising of ones and zeros and is left to the different programmers and web designers, the ability of it to provide an equally accessible experience for disabled people could be much higher. Everything could be specifically tailored to disabled people's needs and as I have already pointed out, iOS already has significantly improved their accessibility settings. With all of these different technological advancements and benefits for the disabled community, it is extremely concerning how little access there is actually provided. However, as I have pointed out before, this can be mainly related to a great range of different factors. Simply starting by providing accessible web content and adhering to specific guidelines is not enough and uses a curing approach to disability. What is needed is the multi-factorial approach to the digital world, providing for assistive technology, usable and accessible web content as well as awareness training and sufficient internet access. This matter, as already

discussed in the section on the UNCRPD 2006, provides a different approach to equality. Nonetheless, looking more in detail into the regulations again, we can see that they have not incorporated a great number of these issues or have not paid enough tribute to them. A large number of public-facing entities are still exempt. Furthermore, the regulations are vague and inconsistent in their approach to what is meant by 'essential' services or why disabled people are still perceived as a burden by using 'disproportion burden.'

Consequently, it reflects a very formalistic account of equality. It mainly reflects the difficulties that have been pointed out by Westen and Minow. Disabled people are treated equally to non-disabled people because they receive the exact same services. However, receiving the same services does not work, as most times disabled people would need different services, services that are respecting their individual needs more efficiently. It is no longer enough to set a technical standard to deal with these issues, but there needs to be broader structural change. Purely relying on light alternative versions of webs or apps, or on the fact that disabled people need to prove their disability to receive additional access is also too formalistic. They are again treated as the 'other' or the 'different,' using a comparator of a non-disabled person or even a comparator of an only sensory impaired person disregarding intellectual and mental impairments that may contribute to additional user difficulties in the use of websites.

For disability it could be interesting to take the civil right to digital access as an independent norm, as Westen suggested, treating it without perceiving it through the lens of equality. By simply taking the provisions as such, namely Articles 4, 9 and 21 of the UNCRPD 2006 and take them as individual substantive rights. Consequently, it soon becomes clear that access to service providers, no matter if they are private or public, is essential for disabled people in every circumstance. There should not be the requirement of them having to prove their

disability first; they do not need to be compared to anyone. It is purely about the individual's right to fully enjoy the civil, political, economic, and cultural rights that every human possesses. Therefore, applying Western's methodology could aid in perceiving the rights in the UNCRPD 2006 in a different light and support the move towards a more inclusive digital space. It could also help avoid the fallacies that employing formal equality and the equal treatment principal causes.

Lastly, having a set technical standard for websites and mobile applications, as the new 'cure' for the disability, could also be viewed through a determinative as well as moral lens, similar to the components of formal equality. For one, the description of what the standard should amount to, what websites should be covered, what has to be done to make them accessible, can be seen as descriptive in nature. However, the standard itself is prescriptive, as it is based on the specific view of the government entity, attempting to achieve digital equality for disabled people. Being unaware of this dichotomy could lead into confusing outcomes for both government bodies as well as disabled people themselves, as it assumes that a descriptive technical standard does not have any prescriptive implications for the wide range of disabled people. Thus, becoming more aware of this problem would support the notion the WCAG 2.1 (2018) is trying to accomplish by providing flexible technical guidelines that can be modified in accordance with the individual's needs and specific circumstances.

In conclusion, formal equality does not have to be abandoned completely. It just needs to be seen as what it is. A rhetorical feature, void of any real substantive rights. A lens through which other fundamental rights can be viewed.² But if the comparative nature and the specific determinative and moral elements are not specified, it can lead to highly ambiguous and ambivalent outcomes. Courts and practitioners struggled with these notions for the last decades. If different treatment is allowed, then where do we draw the line in how far

different treatment should be allowed before it becomes discrimination in itself. These problems can be avoided if the specification is carefully considered, which was the main reason that I started considering some of the unique features of formal equality in the context of disability. It also very much coincides with the points raised by Minow (1990) around the five assumptions of the different in order to justify the lesser treatment without acknowledging its origins in a socially constructed position imposed on to people in a weaker position. Consequently, both the medical model of disability and formal equality on its own are presenting the abnormal-persons approach that Minow discussed in her book, perceiving the disabled person as the 'other' and justifying different treatment based on this otherness. Nonetheless, there could also be another solution to broaden the equal access dichotomy in the digital world, mainly as there are other conceptions of equality that could be aiding the move away from the restrictive nature of the regulations and the treatment of disability in the digital world. Consequently, I will now turn to the social model of disability and the substantive forms of equality that intend to move away from the strict comparative nature of equality demanding greater structural change. This could also lead to greater access in terms of digital accessibility and to the tackling of the problem from multiple angles and thereby further reducing the digital divide between disabled and non-disabled people.

Chapter 5: “The Social Model of Disability and Substantive Equality”

After establishing that many of the shortcomings in approaching the equal treatment principle pointed out by Martha Minow (1990) can also be related back to the medical model of disability, as well as its reflexion of a formalistic account of equality, it is now time to turn to the social model of disability and substantive equality. A closer investigation of these two conceptions could enable a more structural shift in the treatment of disability and therefore also alleviate any of the problems in accessing the digital sphere, which I have pointed out before. As a result, in the first part of this chapter I will focus mainly on elaborating on the social model of disability, its historical development, its advantages compared to the medical model as well as criticism towards the social model. In the second part I will then examine substantive equality and its relation to disability in the digital world in greater detail. My main focus will be on the three core distinctions made within substantive equality, hence analysing equality of outcome and opportunity as well as dignity in approaching digital accessibility matters. Showing the potential outcomes when relating the social model of disability to substantive conceptions of equality will aid the further investigation of the equal access dichotomy as well as Minow’s critique around the rights-analysis approach. The main question I intend to answer is, to what extent the social model of disability and substantive forms of equality represent a shift from a rights-analysis to a social-relations approach in the digital sphere? Or if they also struggle in terms of the difference dichotomy, to what extent should different treatment be allowed or not?

The Social Model of Disability

The Development of the Social Model

Change happened during the late 20th century when the social models of disability emerged and were campaigned for. For the first time this meant the responsibility to seek a cure or help was not on the disabled person but on society. Disability was no longer seen as part of the person but as a consequence of the barriers in society (Shakespeare 2014, pp. 12-13).

One of the first organizations standing up and demanding disabled rights in the United Kingdom (UK) was the Union of the Physically Impaired Against Segregation (UPIAS). The two most prominent figures from this organization were Paul Hunt and Vic Finkelstein, both arguing for independent living for disabled people and greater consumer representation. They were heavily influenced by the civil rights activism from the US and Norway and the black liberation movement in South Africa, attempting to form a disabled identity and arguing for the abolition of segregation and exclusion of disabled people (ibid., pp. 15-16). As stated in their policy statement published in 1974, the union aimed to fight barriers in their everyday life: 'We find ourselves isolated and excluded by such things as flights of steps, inadequate public and personal transport, unsuitable housing, rigid work routines in factories and offices, and a lack of up-to-date aids and equipment' (UPIAS 1976a, para 1, cited in Shakespeare 2014 p. 15). From the beginning, and due to concerns of the organization being taken over, only physically disabled people were allowed to become members of UPIAS (Shakespeare 2014, p. 15). Alongside this, the Disablement Income Group also started to campaign for the economic participation through improved social security benefits of disabled people. However, they did not criticise the residential segregation and other discriminatory factors faced by the disabled community (ibid., p. 14). The Disabled Alliance (DA) then was the first organization in the UK not only campaigning for disability

rights, but also placing disabled people in charge of their campaign and letting them take the lead instead of non-disabled people (ibid., p. 15). Through collaboration between the DA and UPIAS, Paul Hunt wrote down the so called 'fundamental principles' regarding disability matters, presenting the first beginnings of a move from a medical to a social perception on disability. Disability was defined as:

[A] situation, caused by social conditions, which requires for its elimination, (a) that no one aspect such as incomes, mobility or institutions is treated in isolation, (b) that disabled people, should with the advice and help of others, assume control over their lives, and (c) that professionals, experts and others who seek to help must be committed to promoting such control by disabled people. (UPIAS 1976b, p.3 cited in Shakespeare 2014 p. 15).

Moreover, there was now a distinction between the disability and the impairment, which later became one of the core features of the strong social model:

Thus, we define impairment as lacking all or part of a limb, or having a defective limb, organism or mechanism of the body and disability as the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities. (UPIAS 1976b, cited in Shakespeare 2014, p. 16).

This activist movement, starting in the UK around the 1960s and 70s, reflected the civil rights movement that was occurring in the United States (US). It brought disabled people and their organizations together and put pressure on the government to shift their stance on disability. Until this point, the government repeatedly stated that they did not see any

reason why disabled people are subject to discrimination or exclusion, despite the fact that the majority of disabled people in the UK were amongst the poorest parts of the population and were lacking access to the employment market (Barnes 1991b, p. 2). The main arguments raised against an anti-discrimination bill for disabled people were (1) Disability would be too complex to define, (2) Disabled people are indeed less productive than non-disabled people in the employment market, (3) Such an anti-discrimination law would be too complicated to draft and (4) Such legislation would only deepen the divisions between disabled and non-disabled people in the UK (ibid., pp. 4-5). Interestingly, similar kinds of argument were often times raised regarding the creation of a legal document providing disabled people with the needed protection, as I will also show later when discussing the human rights model of disability and the UNCRPD 2006.

During this time, two influential disability activists, namely Mike Oliver and Christian Barnes, started to create what is known today as the strong social model. In this approach to disability there is a distinction between the impairment and the disability. Oliver and Barnes argued that there was the biological condition that the person with an impairment had, but that it was the barriers in society that created the disability (Oliver 1990b, pp. 2-4). Their aim was to exemplify how the capitalist society and its goal of creating norms and being productive were leaving disabled people behind. Thus, there must be greater economic inclusion of disabled people and a better stand on inclusive education (Oliver 1990b, pp. 4-11). Within the strong social model there is a distinction between the social constructivist and social creationist model. Both approaches saw the disability as a social problem. Social constructivists mainly found the difficulty in the mindset of the abled bodied people, treating the disabled people as inferior. In contrast the social creationists, such as Oliver, saw the problem within the institutionalised exclusion of the disabled person, arguing that

change can only be achieved if powerful organizations and the government take concrete and concise action (ibid.). The introduction of the strong social model marked a milestone in the disability rights movement, as the burden to adapt was suddenly removed from the disabled person and shifted to society as a whole. Now it was seen as a prerequisite for buildings to be equipped with facilities such as level access, disabled toilets and busses that are fitted ramps and have reserved seating arrangements for disabled travellers. The notion that it was the barriers in society that made the person disabled, and not any more the impairment itself, attacked the stigmas that the medical or individual models placed on the disabled community. Through the strengthened views the social model created for disabled people, the demands grew for an equal recognition of their right to access facilities, services, and provisions.¹⁰

As a result, their efforts and the different campaigns lead into the creation of the Disability Discrimination Act in 1995, which was the first document extending equality law to disability in the UK. It created the Disability Rights Commission to enforce violations of the rules set in the Act and introduced the rights for reasonable adjustments, the right not to be discriminated against and proactive measures to remove barriers for disabled people (Lawson 2008, pp. 4-9).

The strong social model can also be applied in the digital context. It is not necessary, in my opinion, to distinguish between whether the social creationists or the social constructivists

¹⁰ It also needs to be pointed out, that many of the disability activists in the late 20th century were influenced by Marxist theory. Thereby, finding the exclusion of disabled people mainly through the capitalist notion of needing productive and fit workers and the states response to nationalise, disenfranchise and ostracize the disabled person and branding them as unfit (Oliver 1999).

were closer to the reason for the exclusion of many disabled people, both are relevant. As discussed before, the lack in awareness of creating accessible digital content is contributing to the difficulties in creating a more accessible web across the private and the public sector. Furthermore, the lack of the strength of the regulations and their restrictiveness also further divides the disabled from the non-disabled in accessing the internet. Most importantly, yet again people can have the biological condition that makes them impaired, meaning sensory, mentally, intellectually, or physically, but they are only disabled through the lack of accessibility in their environments. In this case this would mean the lack of accessible web content and available assistive technology is creating the disability, which could when looked at from the different perspective also led to the conclusion that disability can be seen as a much wider term. Many elderly people or people from low socio-economic backgrounds are lacking sufficient access to the digital world, creating a barrier that makes them disabled in that regard.

In addition, the move way from perceiving the impairment as the only causal link for the disability and taking the environmental barriers as reason for the disablement of people, shows the first move towards a recognition of difference. Similar to what Minow suggested, suddenly the socially construction of the difference was recognised by disabled people in the UK. For example, recognising that the standard layouts of public and private infrastructure were meant for people that do not have any mobility impairments. Therefore, it is necessary to rethink these strategies and assumptions, recognising that difference is not inherent in the disabled person, but that through the constructed reality of them being disabled leaving the environment accessible was justified. However, by starting to realise that these have been imposed by the powerful on to the powerless, based on the label that the powerful have of the disabled people, the arguments to create a barrier free world become more of a

social problem and the disabled person is less perceived as the different or the other. This could also be applicable in the digital context, through which it is no longer the purely technical standard helping the disabled person, but that there is a need for a multitude of different adjustments in the digital sphere.

Criticism of the Strong Social Model

Regardless of the advantages the strong social model brought for the further demand for disability rights, it also had its difficulties. One problem was that it was grounded on the premise that disability is equal to oppression. As a result, since there are no barrier free spaces, every person with an impairment is oppressed by the system. This created the stereotype that every person with an impairment is disabled, hence oppressed by society, meaning there is no prospect of a person with impairment ever to be non-oppressed if there is some form of inaccessibility (Shakespeare 2014, pp. 17-19). Moreover, Oliver and Barnes, together with others such as Finkelstein, were all white men with spinal injuries, which increased pressure on other disabled people to criticise the system in the way it was presented to them and not diverge from the frontline of thought (ibid., p. 17).¹¹

As a result, the fact that the disability rights movement in the UK was led by people in wheelchairs, shaped the perception of society on what a disabled person needs.

Furthermore, the creation of the social model by mainly wheelchair users and the focus on physical barriers led to the further exclusion of people where the impairment has an effect and is not remedied through the removal of barriers (ibid., pp. 17-19; pp. 21-25). Take, for example, people with intellectual disabilities or people with chronic illnesses: no matter how

¹¹ For instance, Finkelstein used a thought experiment to explain that if a village were only inhabited by wheelchair users, every building would have ramps. This meant if non-disabled people would visit, they would have to adjust to a village that is accessible for everyone (Shakespeare 2014, pp. 33-34). The problem is that not every disabled person, not even every wheelchair user is only in need of ramps or physical wheelchair accessibility (ibid., p. 37).

barrier free an environment is, the person will be impacted by their impairment. Thus, it is not enough to remove environmental barriers or to grant disabled people access to the economy. The focus on social barriers and forgetting about the biological effects of the impairment was a huge problem for the movement. The fact that some people needed medical treatment and rehabilitation was suddenly frowned upon, making it difficult for people with conditions that needed treatment to be part of the disability rights movement and their ideals, as well as giving themselves the place to exist (ibid., pp. 21-25). As pointed out by Shakespeare, this also resulted in criticism of the strong social approach to disability, due to its inflexibility and rejection of encompassing ideas from other minority groups such as queer theory and feminist theory (ibid., pp. 20 - 21). It was argued that a distinction between the impairment and the disability is simply not realistic. For example, a blind person will always be impacted by their lack of sight when talking to a neighbour, no matter how accessible the environment is (ibid., pp. 26-33). Additionally, as the US shows, despite the implementation of the Rehabilitation Act and later the Americans with Disabilities Act to remove physical barriers, disabled people are still part of the poorest in the community. Showing that removal of barriers and claiming that the disability will be remedied through this does not reflect the educational, economic, and social difficulties disabled people are facing besides the environmental barriers. Thus, reasonable adjustments only adjust a part of the barriers disabled people face (ibid., pp. 34-36). This can again raise the importance of looking past the focus on setting a strict technical standard in achieving accessibility in the digital sphere. It is not enough to code headings and buttons properly or to provide websites with different colour contrasts. This strict standard does not alleviate other barriers disabled people face in accessing websites, that are yet again more related to their intellectual and social accessibility.

One other aspect of the social model was that it created a new political identity around disability. However, similar to the medical view on disabled people and the focus on the most 'severely' and visibly disabled people left out a large range of hidden disabilities, such as neurodivergence, mental illness, diabetes, and other cognitive disabilities. The label as a disabled person now shifted from being forced onto people, to being accepted and encouraged to take on (Shakespeare 2014, pp. 95- 97). The negative side effect was that yet again disability activists were only the minority of the general population of disabled people and thus started adopting a strict categorisation of the disabled person in contrast to the non-disabled person, making it more difficult for hidden disabilities and people that have impairments and are able to fit into mainstream society to get accepted into the movement. As a result, the medical category around disability was simply rebranded now by disabled people themselves (ibid., pp. 97-99). The problem remained that it yet again was an exceedingly small group of the general disabled population that placed their ideas on to others, further categorising disability, instead of opening it up to a greater variety of impairments. It simply changed the emphasis but continued the victimisation of disabled people, now no longer externally, but by themselves, in contrast to the fact that the primary aim of the majority of disabled people was to be accepted into society (ibid., pp. 99-101).

Thus, as Shakespeare points out, the strong social model is a remnant of its time and in the 1970s a means to an end. It was a tool to encourage rethinking the stigmas around disabilities at the time. However, its inflexibility has made it obsolete. Now, there needs to be a focus on the individuals' impairments and the resulting needs, tackling stigmas and accepting medical intervention and treatment, besides focusing on the removal of barriers (Shakespeare 2014, pp. 42-46). There is no doubt the necessity to dive into a more succinct conceptual analysis of disability in which these different perspectives need to be analysed.

Nonetheless, I believe the social model is still of relevance in order to forge greater practical and everyday change for disabled people in the physical as well as in the digital world.

Substantive Equality

The notion that much of the disability rights movement took rejected the medicalised view on disability as well as the formalistic and procedural account of equality discussed in my earlier chapter. Thus, it started moving more towards substantive forms of equality.

Consequently, it is now important to consider different forms of substantive equality in greater detail. I will mainly focus on equality of outcome, opportunity and dignity showing their advantages as well as disadvantages in enhancing the right to digital access for disabled people. The social model, in my point of view, with its focus on the social barriers disabled people face, is reflective of the move from a rights-analysis to a social-relations approach formulated by Minow (1990). Thus, it is important to investigate them more closely to determine their usefulness in improving digital access rights and whether the solutions they offer are enough of a tool in recognising difference as well as dealing with the problems of the equal treatment principle.

For the purposes of this segment and in the context of disability, the most interesting are equality of opportunity and equality of dignity, which I will turn to after briefly considering equality of outcome.

Equality of Outcome

Equality of outcome attempts to extend procedural equality to a more substantive form of equality by focusing in on the specific outcome in a given situation or field. For instance, when there is an accurate representation of a marginalized group in a specific field, which matches its proportions the wider societal level, then no discrimination has occurred.

Additionally, if the representation is not matching the proportion of society and the path towards the result does not reveal any forms of discrimination, then the lack of representation is attributed to the individual's own choices. Equality of outcome can be achieved through many measures, including better training, education as well as preferential treatment in situations. However, although the quantity of a given minority group seems to be sufficient, the quality can still be insufficient. For instance, the people that are represented may have gotten there by conforming to mainstream practices. Moreover, despite it being quantitatively equal, the representation can still lack quality by having a payment gap between two groups. According to Sandra Fredman, equality should not simply be adapting to mainstream practices, but to accommodate diversity and rethink already existing structures in society (2011, pp. 14-17). Although there are scholars suggesting that equality of outcome has a future by its interdependence on equality of opportunity (Phillips 2004), this disagreement is not of great impact for this brief overview. I will turn to a further examination of equality of opportunity below, making the interdependence or distinctiveness discussion irrelevant for my argument.

In terms of the digital world, as I have already suggested earlier, the difficulty remains that by simply providing a set technical standard for disabled people, equality in the web is still far from being achieved. There are other factors, such as broadband internet access, sufficient training as well as the usability of the page in an intellectual as well as social sense that are also influencing factors. Moreover, the focus on mainly sensory impaired persons and creating an equal outcome for them in the digital world, leaves a great range of other disabilities out of the scope of the current digital accessibility framework in the UK. Thus, achieving equality in the web by providing accessible websites is only one part of the problem. Even if this would mean that the other spheres around intellectual as well as social

accessibility are considered, the risk of attempting to treat disabled people the same in terms of achieving an equal or similar result could struggle to fully acknowledge difference as well as dealing with where to draw the line regarding different treatment.

Equality of Opportunity

Equality of opportunity is regarding creating an equal starting position for everyone.

Supporters of this theory attempt to combine the consistency element of formal equality with the more substantive aims of equality of result, whilst also paying greater attention to the structural disadvantages some groups of people face from the beginning. Thus, through both substantives, hence positive actions, as well as procedural, hence anti-discrimination actions, an outcome is hoped to be achieved. Nonetheless, much of equality of opportunity is still around mainly reducing barriers within the process without paying enough tribute to people's individual circumstances (Fredman 2011, pp. 18-19).

Linda Barclay (2019) takes an interesting approach in regard to dividing the distribution of resources into two separate strands to achieve equal opportunities. Firstly, distributive justice that is achieved through the allocation of resources. This version is based on the fair and equal distribution of material resources, such as wealth or money. There are several possibilities in order to decide how much everyone will receive. John Rawls (1971) supported the claim that everyone has to stand behind the veil of ignorance, not knowing how well off they are going to be in their life before deciding the metric of distribution and allocation.

Ronald Dworkin (1981) took the example of people standing on a deserted island and having to build up a whole new social sphere by distributing the resources available to them (Barclay 2019, pp. 45-47). Both theories however are mainly regarding material wealth, which does not aid disabled people in the same way as non-disabled people. For instance, structural disadvantages cannot be tackled through the allocation of certain resources. Also,

the difficulty of accessibility needs is not properly addressed in that circumstance. Thus, other disability scholars argued to exchange it with a package of social resources that every member of society should be allocated to achieve equality in the end. However, this approach is also difficult, as the question remains regarding who decides the social resources that are allocated. People use the social resources differently. Who gets what according to what ability or disability? However, despite it advancing human dignity and one's status in society, the difficulty remains that the resources as such are not completely able to remedy the disadvantage of disabled people (ibid., pp. 47-54). On the other hand, a different approach to distributive justice could be not based on a general numeric or proportional allocation of wealth, but to adapt the value that we relate to opportunities and freedoms to the capabilities of people. This would mean that disabled people could have more resources and non-material resources allocated to them in order to advance their opportunities and freedom to do certain specific issues, including the right to live a decent life and access to the cultural and educational sphere. All of this could contribute to the benefit of disabled people and presents a better metric as simply looking objectively at the persons circumstances and distributing resources (ibid., pp. 64-54). However, the problem here is that the list of capabilities is either overly open and can include anything or highly restrictive making it difficult, for instance, for people with intellectual or severe cognitive disabilities (ibid., pp. 68-75). This approach also has its downsides. There needs to be a combined approach of resources as well as capabilities that are in line with current human rights values in order to create an equal status amongst disabled and non-disabled people. A lot of the discussion hereby is based on human dignity and disabled people's dignity, which is of the essence when treating people with the needed respect and humanity that they deserve by virtue of being human (ibid., pp. 75-77). I believe, as pointed out by Linda Barclay (2019),

both approaches share common advantages and disadvantages. Therefore, they need to be viewed through a combined lens. Equality confuses too many of the standards that are applied and seems rather complex to define so that people can actually benefit from it in their everyday lives. Therefore, a different lens through which to view distributive justice in order to achieve the recognition of fundamental rights of all people is necessary. Barclay attributes this to the concept of dignity or the equal status of people, which has linked it itself to the different positions dignity now reaches in terms of its value in different constitutional and legal settings. However, I believe exchanging dignity with equality does not bring forth actual real-life change, as it simply replaces one overly complex and disputed subjective concept with another. If one agrees with the notion that concepts such as equality and dignity are highly context dependent and subjective, the difficulty remains that we cling to defining these complex concepts, whereas we should rather define the subjectivity and the context more in detail. Thus, this moves right to the fundamental problem instead of attempting to extend the concept to every single individual case, either making it too specific or too generic. This is related to the problem of disability: either one defines it too closely and people fall out of the category that need help or one defines it too loosely and everything disability related is overlooked. I believe none of these approaches leads to the recognition of just and equal treatment as disabled people would require it in terms of the distribution of certain resources or capabilities in order to realise their right to access. The most fundamental problem therefore is vested in the relations people form with one another, as Minow's approach shows.

In my opinion, this brief overview of equality of opportunity could give rise to different approaches to disability in the digital sphere. It could mean that anyone will receive the needed assistive technology as well as the training in order to participate successfully as

digital citizen. Nonetheless, despite, for example, having broadband access, the necessary hard- and software as well as set technical standards to have websites conform with the latest WCAG standard, disabled people may still face barriers. Especially, as everyone's technical knowledge is different and some people may prefer different formats, websites versions, etc. in order to access them or might be needing individually tailored hardware, that is not readily available on the market. Thus, equality of opportunity also has its difficulties in recognising that the difference is not the responsibility of the individual and that making alternatives available does not mean that it is of less worth or less practical. Especially, since what equal opportunity amounts to still runs the risk of being decided by someone in an entirely different position and is therefore not applicable in the circumstances the disabled person may find themselves in.

Equality of Dignity

In terms of equality of dignity, the difficulty remains with how to define dignity. Dignity both could aid the difficulty with the levelling down of provisions and by being entrenched in, for example, the European Charter of Human Rights and German Constitution becomes more and more important. However, as the Supreme Court of Canada observed, 'human dignity is an abstract and subjective notion that ... has proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be' (*R v Kapp* 2008 SCC 41 cited in Fredman 2011, p.24). Thus, dignity is now seen as creating another barrier and achieving different outcomes based on the judge's perception of dignity (Fredman 2011, pp. 19-23).

The difficulty is also in how to define dignity in front of the context of disability. As Eva Feder Kittay (2005) points out, the concept of dignity has to be thoroughly considered in terms of people with severe cognitive disabilities. She uses the example of her daughter who is

wheeled out of a bathroom wrapped in only a towel. The director of the home sees it and demands that she requires a room closer to the bathroom, so that she does not have to be wheeled through public area whilst not wearing any clothes (Kittay 2005, pp. 95-97). Dignity has been long not afforded to members of marginalised groups. However, until recently, dignified treatment in relation to gender, race or class has been related to socially constructed prejudice, while disability or impairment has remained to be viewed as a natural rather than a social result. This has been challenged by disabled people and resulted in widespread anti-discrimination provisions. However, disabled people are still stripped of their dignity even when access is provided, as they, for instance, have to take a separate way into a building or cannot use a bathroom if it is not accessible. Additionally, people with severe cognitive disabilities even lack what is referred to as capacity to engage into moral reasoning, which other disabilities have no problem with. Nonetheless, the daughter in the scenario can still engage into meaningful relationships, experience life and love, simply in a different way. Thus, dignity must be reconsidered in a different light (ibid., pp. 97-100). In terms of dignity and equality, there is the constraint view on dignity, showing that every human being should be receiving dignity as to their capacity of making rational and informed decisions. This should prevent others from intervening in their lives. Additionally, the empowerment view on dignity perceives it more on an individual level. Presenting it as something singular attached to the person by virtue of being human. However, the author points out that much of dignity in equality is based on having or having had or will be having the capacity to make one's own rational and informed decisions as agents of society, as Rawls (1971) and Kant pointed out. This however is not possible for some people with severe cognitive disabilities. Thus, most of what people perceive to be dignified treatment is then projecting one's own views of capacity and rationality on to the other person, which in itself

again creates a specific power dynamic (ibid., pp. 100-107). As the capabilities approach suggests that it is vested in achieving certain political capabilities or the approach by Rawls (1971) and Kant that it is vested in moral reasoning of some sort, both would exclude people with severe cognitive disabilities. Therefore, any norm that sets out requirements or poses a threshold or description of dignity will exclude some people from it. It is thus necessary not to look into specific capabilities or traits an individual must possess, but in the relations they form with others (ibid., pp. 107-111). Consequently, we need to look into the motivation behind our relationships, an expression of mutual care, the care we give to other people by virtue of our belief in an equal worth of all human beings, based on the care we received and gave, of the relationships we form. This would show the form of dignity that is needed, no matter a person's attributes or other characteristics (ibid., pp. 111-113). The author then proposes an alternative to the equality-based form of dignity where a property needs to be found that every person possesses and this will lead into an equal distribution of resources, capabilities, treatment or worth. A better approach would be to say, 'I too am some mother's child.' This invokes a property one has only in relation to another person. Thus, everyone is to an extent some mother's child and needs to be treated with dignity and with care. It is a contrast to the philosophical discourse around dignity that is currently ongoing, but provides arguably equal if not more moral and political strength (ibid., pp. 113-118). In terms of the digital sphere, the expression of mutual care based on one's own self-worth as a human being could lead into a great variety of different alternatives. This could not only relate to having assistive technology to access specific websites, but also to have in-person support available as an alternative. Having someone else there to support a disabled person in accessing the web according to their own needs would create another fundamental addition to the current regulatory framework and enable increased participation of a great range

of different people in the digital world. Additionally, viewing everyone also as 'some mother's child' could aid reducing the stigma attached to disability and enhance the general level of accessibility provided. When it is assumed that everyone has a shared level of dignity and deserves a certain quality of living, this could be related to their status as equal human beings.

However, despite the fact that dignity could be used to take over the place of rationality in equality law and avoid restricting equality to specific groups, as it is based on their common human dignity, it also created the problem that people now had to prove their status as human beings, creating an additional barrier (Fredman 2011, pp. 19-25). This is similar to the anti-subordination approach in equality law, where disabled people have to prove their disability in order to receive access provisions.

A good example towards the end can be to look again at the technical advantages the iPhone has undergone through the updates in their operating system towards implementing more accessibility features from the get-go. This, despite being a very costly product, would enable disabled people to not have to purchase expansive assistive technology in advance and tailor their own interface to their individual needs. It then only would require the applications and websites to be accessible, which no doubt presents a great first step. Thus, it can be seen as a more structural approach to equality, no longer excluding disabled people or needing them to buy expensive additional soft- or hardware. Thus, also reflecting a more social perspective on disability as a whole.

In sum and as the brief consideration of the complexity of equality in the earlier chapter reveals, there is more than enough debate around substantive forms of equality. Mainly, they can be summarised into categories of equality of outcome, equality of opportunity and

equality of dignity. The examples provided for the digital sphere show, that all of these conceptions of equality can bare advantages for disabled people in accessing the web. Nonetheless, taken individually, many of the approaches still have difficulties in relation to the extent to which different treatment is allowed. Consequently, these approaches make the same mistake that the judges made in the *Cleburne v Cleburne* (1985) case in attempting to provide mentally disabled people with additional rights, not recognising that they are still perceiving them as the different without recognising their own status within society and the socially constructed stigma attached to disabled people.

Therefore, as Fredman (2016) also observes, there is the need of a multi-faceted concept of equality, which I will turn to analyse in my last chapter together with the human rights approach to disability. Perceiving these connections through a combined lens could alleviate the current difficulties they still seem to have in terms of the expansion of the principle of digital accessibility and the right to equal access. Thus, I will now turn to examine the human rights model of disability as well as Fredman's multi-dimensional approach in greater detail.

Chapter 6: “The Human Rights Model of Disability and Transformative Justice”

As the previous two chapters have shown, both the medical model and formal equality as well as the social model and substantive equality are still struggling to fully recognise difference as well as with the move away from the sameness treatment of disabled and non-disabled people in the digital sphere. Additionally, the medical model appears to suggest being more closely aligned with the abnormal-persons approach, perceiving the difference of the disabled person as something inherent in the person per se whilst thereby also justifying the lesser or different treatment compared to non-disabled people. The social model appears then to move away from this standpoint and recognises the socially constructed ideology around the disabled person and the significance of the barriers in the everyday-lives of many disabled people. Nonetheless, as the examination of different conceptions of substantive forms of equality have shown, the difficulty around where to draw the line and to what extent different treatment should be allowed or not still results in some ambiguity in approaching matters of disability and digital accessibility. All of this is, as I pointed out before, of course only intended to provide an initial glance into this incredibly complex area and therefore necessarily contains only a small proportion of the theories that tackle these issues on different levels. Nonetheless, it can most certainly show the significance of Martha Minow’s (1990) line of thought, particularly around the difficulties of the rights-analysis approach, as it can be shown through the judge’s difference in opinion in the *Cleburne v Cleburne* (1985) case. Consequently, it is now time to move further and approach the model of disability and conception of equality, which I deem the most closely aligned with Minow’s social-relations approach.

In this chapter I will now turn to the final model of disability I intend to discuss in this thesis, the human rights model of disability. It is interesting as it combines the social and medical model with other models of disability into a multifaceted construct. As I have pointed out before, in particular regarding equality, this could aid the relation of disability and equality, as equality in itself also seems to have multiple conceptions and needs to be viewed through a combined lens. It would also be the first approach that recognises difference and approaches disability and equality in the digital sphere from a social-relations perspective, as suggested by Minow in her book. Thus, I will firstly discuss Article 1 of the United Nations Convention for the Rights of Persons with Disabilities (UNCRPD 2006), in which the human rights model of disability is described. Afterwards I will turn to consider some of the advantages and disadvantages of the model before turning to align it with the multi-dimensional approach Sandra Fredman (2016) spoke of in her most recent article. Lastly, I will consider its usability in the equality context and determine its implication when applied digitally.

[The Human Rights Model of Disability](#)

Article 1 paragraph 2 of the UNCRPD 2006 provides a description of disability. It states that, 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (UNCRPD 2006, Art 1 para 2). The formulation of the description shows that Article 1 has both influences from the more medical model approach taken within the Disability Discrimination Act 1995 and the Equality Act 2010, but also the more social approach taken by the definition used by Union of the Physically Impaired Against Segregation (UPIAS) and other United Kingdom (UK) disabled persons organisations (DPO). Remarkably, the UNCRPD 2006 is one of the few human rights

treaties that use a description of their target group. However, it is not an official definition, as preambular paragraph (e) describes disability as an ever-evolving concept (Kakoullis and Ikehara 2018, pp. 53-54). Nonetheless, the UNCRPD 2006's description of disability marks a paradigm shift in the global disability rights movement. It is heavily influenced by the social model and emphasises both environmental, attitudinal, and social barriers as well as the impairment (ibid., p. 54). First and foremost, the changes from the linguistic side can be noted. The UNCRPD 2006 uses a person first approach to disability, which is closely aligned with the minority model used for example in the United States (US). Thus, the view of disabled people as an oppressed minority group and the possibility of them self-identifying as disabled is reinstated here (ibid., pp. 54-55). Furthermore, it includes a list of several disabilities, such as 'long-term physical, mental, intellectual or sensory impairments' (UNCRPD 2006, Art 1 cited in Kakoullis and Ikehara 2018, p. 55). This shows the distinction of the approach taken by the UNCRPD 2006 from a strong social model, as it emphasises the impairment as such. Additionally, the list is not exclusive and extends to other forms of disabilities (Kakoullis and Ikehara 2018, pp. 55-57). Later, the use of 'which in interaction with various barriers' shows the influence of the social model (UNCRPD 2006, Art 1 cited in Kakoullis and Ikehara 2018, p. 57). The description uses the term 'various' instead of 'environmental, attitudinal or social' barriers, as during the drafting of UNCRPD Article 1 there was no consensus as to what barriers to include (Kakoullis and Ikehara 2018, p. 57). However, reference to environmental, attitudinal, and social barriers are included within preambular paragraph (e), which aids in that regard (ibid.) The next section on 'may hinder their full and effective participation in society,' importantly included the word 'participation' as an extension to the principle of the equal recognition and enjoyment of disabled people's rights (UNCRPD 2006, Art 1 cited in Kakoullis and Ikehara 2018, p. 58). It was primarily used

to distinguish between the impairment and the barriers that may impact disabled people's rights (ibid., pp. 57-58). The final part refers to 'on an equal basis with others' (UNCPRD 2006, Art 1 cited in Kakoullis and Ikehara 2018, p. 58), yet again emphasising that the convention does not intend to give disabled people additional rights, but rather enable them the full enjoyment and recognition of their human rights (Kakoullis and Ikehara 2018, p. 58). Additionally, it can be noted that despite the strong influence of the social model, the UNCPRD 2006 adopts what is commonly referred to as a 'human rights-based approach to disability.' This approach differs from the social model in six core points. First of all, the social models focus on the disablement of the person, whereas the human rights model focuses on the recognition of the persons dignity. Secondly, the human rights model extends legal protection given to disabled people not only to their civil and political rights, but also their social, cultural, and economic rights, moving beyond mere anti-discrimination provisions. Thirdly, in contrast to the social model, the impairment does play a role in the spectrum of disability and has an effect on a person's life, which makes it important to be considered. Fourthly, it also provides the person first approach, reflecting the opportunity on identity politics and the self-identification as disabled, which is mainly regarded as component of the minority model. Lastly, the human rights model does refer actively to the human right to health, as it is highly relevant for many disabled people and it has the final aim to achieve social justice (ibid., p. 58).

The approach the ad hoc committee involved with drafting of the UNCPRD 2006 has taken in combining several models to disability in order to grasp the complexity of the subject matter, can also be related to issues around digital accessibility. In the chapters before in terms of the medical model, it seemed like setting a technical standard would automatically solve the problems disabled people face, taking the technical standard as a cure instead of

the medical treatment. Later on, the social model showed that society has also an obligation to alleviate any additional barriers, which could for instance relate to the provision of assistive technology as well as affordable hard- and software as well as sufficient internet access. However, both seem to be only taking care of a different part of the problem. Similar to the approach the human rights model of disability took, it is necessary to tackle the problem of digital accessibility on multiple levels. This is, in my opinion, what the UNCRPD 2006 strives to achieve but we are still very much at the beginning of its impact. Having awareness training, as well as flexible technical standards that are focused on the user and collaborating with disabled people in setting specific standards can all be part of the entire process. This combined with providing for already inbuilt accessibility settings in, for example, the iPhone, to stick with the example from the beginning, would enable a mostly barrier free online experience for disabled people. I personally do not believe there could ever be something that is fully accessible, but, as I pointed out before, creating set user focused interfaces could aid this parameter as well. Then it is nothing abnormal anymore to have special settings on the mobile phone or the website, but it is seen as prerequisite for these things to exist and be used by a great margin of people. It would not start by asking to completely define disability or pass a certain margin of disablement, but to define what equal access would amount to and by achieving this goal also reduce the foremost perceived complexity of disability.

Besides the changes the human rights model brought forth on a conceptual level, it also made significant changes to more practical aspects of international human rights treaties. One point that is viewed as highly significant, is the inclusion of disabled people's organizations within the negotiation and drafting process during the ad hoc committee meetings of the UNCRPD 2006 (Kakoullis and Ikehara 2018, pp. 39-40). Therefore, it became

the first human rights treaty that effectively included their target groups within the negotiation processes, leading to many disabled people travelling from all over the world to participate and engage within the processes of the treaty formulation (Kanter 2015, pp. 7-11; pp. 298-303). Moreover, the UNCRPD 2006 is the first human rights treaty that specifies enforcement and monitoring procedures that the implementation process requires. Articles 31 and 33 therefore also mark a shift in international human rights law, recognising the challenges that the lack of direct impact could bring (ibid., pp. 7-11). Furthermore, in the organization of the different paragraphs of the UNCRPD 2006 it can be seen that intersectionality gained greater importance. The term intersectional mainly relates to persons with disabilities that are also part of another or multiple minority groups, including ethnic minorities, women, and members of the LGBTQ+ community. This notion reflects a post structural and postmodern take on disability and disability studies, attempting to extend the category to a great variety of people (Goodley 2013, pp. 636-38). It also emphasises again, that being disabled as such can lead to discrimination and exclusion. However, being disabled and black, or disabled and a woman, does not mean that discrimination can only occur on the bases of one of the characteristics, but that there can be discrimination on multiple levels, making it even harder for the person to fight for inclusion into society (ibid., pp. 636-38). The best examples of the attempt to emphasise intersectionality can be seen in the articles of the UNCRPD 2006 that focus on the rights of disabled women and children, which are affected in more ways than their adult male counterparts. Nevertheless, as Lawson (2008) points out, there is no specific referral to, for example, ethnic minorities within the articles.

This incredibly open notion and the focus on enforcement as well as including disabled people is something that future reform projects for the PSBAR 2018 could benefit from. For

one, it could aid clarifying why the drafters have adopted the language use in the EU Directive 2016 referring to disproportionate burden, which could be taken as if disabled people are yet again burdensome on society. Additionally, it could aid the awareness in terms of imposing strict enforcement procedures as well as penalties for non-compliance. Lastly, the problem of intersectionality also extends into the digital world and has not been mentioned within the regulations as something that could also aid the development of digital accessibility in minority groups further. Otherwise, one dividing element is simply exchanged for another, leading to future exclusion of more people from different backgrounds that have the right to participate in the digital sphere.

Although the UNCRPD 2006 adopted a quite open notion to disability, creating an approach that does not relate to only the most 'severely' disabled, but emphasising the impacts of disability and intersectionality on a diverse range of people, there has been also criticism towards the human rights approach. For example, during the commission's ad hoc meetings it was heavily debated whether or not to include a definition of the term disability. A conclusion was finally reached during the 7th meeting, but the focus still remained on long-term disabilities, without an expansion to short-term or situational conditions or disabilities (Kakoullis and Ikehara 2018, p. 40; pp. 55-57). The mentioning of psychosocial and neurological disabilities was removed and replaced with mental disabilities, which arguably confuses a wide range of different disabilities and does not portrait the preferred terminology representative organisations are identifying under. Consequently, the focus on 'long-term' also made it harder for persons with HIV or psychosocial conditions to fall under the margin of disability, as they were commonly not protected under disability rights (ibid., pp. 55-57). This shows yet again the categorisation of disabled people and the reluctance to expand the concept around disability. The compromise between many states, some of which

argued for a more medical approach, others for a more social approach, and yet again others did not want to include a definition at all, was the inclusion of a description not in the definition section of Article 3 but into the purpose section of Article 1 and the emphasis on barriers as well as effects of the impairments (ibid., pp. 44–48). Furthermore, disability is argued to be context dependent. Although many of the existing models are overlapping, the geographical and historical background of different countries and regions is especially important. For example, the social model from the UK cannot be applied as it is in countries such as Australia, as the indigenous people there have their own history of oppression and colonisation making different responses necessary (Goodley 2017). Nonetheless, this does not mean there cannot be comparisons and that studying different models does not assist the creation of different approaches. However, it is important to bare the context of the disability movement and the history of the country in mind when speaking of certain approaches to disability (ibid.).

In terms of the direct impact of the UNCRPD 2006 now, the difficulty still remains that many signatory countries still use the medical model of disability in their national disability laws, including the UK (Kakoullis and Ikehara 2018, pp. 58-62). Furthermore, some countries such as Iran are still using derogatory language, such as insane and mentally ill within their disability legislation, which according to the UNCRPD 2006 needs to be removed (Kanter 2015, pp. 39-45). Furthermore, by virtue of being an international treaty the UNCRPD 2006 is subject to the doctrines of international law, hence it is either a self-ratifying treaty or a non-self-ratifying treaty. Most common law countries require additional legislation to implement those treaties into their domestic legal system. Civil law countries often already have constitutionally stated, that ratified international treaties enter into force automatically (Kanter 2015, pp. 1-2). Moreover, some countries may have only chosen to verify the treaty

to boost their image and reputation. Overall, the signing and ratifying of a treaty remains a cost-benefit analysis for countries and the current difficulties of the disabled community show that many have not been active in the sense as it was required by the UNCRPD 2006 (Kanter 2015, pp. 292-298).

Nevertheless, the influence of the UNCRPD 2006 should not be underestimated. On the one hand, many disabled people that travelled to participate in the creation of the treaty fought for greater inclusion and recognition of their rights in their respective home countries after their return (Kanter 2015). On the other hand, the UNCRPD 2006 also starts impacting judicial decisions, in particular on the European level. Whereas in the case of *Chacón Navas v Eurest Colectividades* in 2006 the Court of Justice for the European Union (CJEU) still used the medical model of disability, it shifted its stance after the EU had ratified the UNCRPD 2006 in the case of *HK Danmark Werge v Dansk Arbejdsgiverforening* (2013) besides the fact that both decisions used the same directive for their interpretation of the judgement. In the case of *HK Danmark Werge v Dansk Arbejdsgiverforening* (2013), the CJEU for the first time explicitly referred to the UNCRPD 2006 and the need to interpret disability in light of the description provided in Article 1 (Kakoullis and Ikehara 2018, pp. 61-62). It therefore not only adopted an approach to disability that is more closely aligned with the human rights model of the UNCRPD 2006; but also mentioned the 'long-term' effect of disability. Since the UK has now left the EU, it is not clear how these cases will influence UK judgments.

Nevertheless, the European Court of Human Rights (ECtHR) has also more recently started to expressly refer to the UNCRPD 2006 and found a need to protect disabled people within the European sphere from discrimination. In *Glor v Switzerland* (2009) the court used a combined approach of Articles 14 and 8 of the ECtHR to expand their protection to disabled people (Kakoullis and Ikehara 2018., pp. 61-62). As the UK is still a member of the Council of

Europe, judgements developed by the ECtHR can become a benchmark for the expectations that claimants have towards UK courts and legislators. This can then again also impact the treatment of cases surrounding digital accessibility, which have not been discussed in the UK legal system yet.

Overall, the different facets the human rights model of disability analysis reveals reflect the recognition of the difference in the most accurate way. It is not merely viewing the environmental and attitudinal barriers as causal links for the barriers disabled people face but also the impairment as such. It hence places the individual within relations to the different intentions as well as other individuals recognising that it is not the difference that makes them less worth, but the stigma that has been attached to them by society as well as their treatment by different institutions. This shows, in my opinion, the first move toward the social-relations approach Minow has suggested in her book as well as the recognition of the different not as less worth, but as an equal member of society, which simply needs a different form of access and inclusion compared to someone in a different position with a different or no impairment.

Transformative Justice

The notion to view disability through a combined lens to solve the diverse range of problems from multiple angles can be seen as a reflection of an approach to transformative justice. Especially, when it comes to the approach designed by Fredman (2016). In a more recent article Fredman elaborates again on her multi-dimensional construct of equality. She argues that the fluidity of equality and the diverse range of problems that need to be tackled through it need a more substantive approach tackling problems on different levels (Fredman 2016, pp. 714-716). Moreover, Fredman argues that direct and indirect discrimination, adjustments as well as affirmative action are still part of the greater concept of equality and

are simply expressing different forms of equality on different levels (ibid). She divides her approach into four main steps: firstly, the redressing of a disadvantage. With this step Fredman speaks to address the comparative nature and the perceived neutrality of equality law, by taking explicitly asymmetric stands, requiring that not the individual has to adjust but that the disadvantage as such needs to be addressed. Defining the disadvantage in particular settings can be difficult, as it can be socio-economic, but is in, for example, the disability context, further reaching (ibid., pp. 728-730). Secondly, she states there needs to be redressing of stigma, stereotyping and humiliation. Taking this step, Fredman inserts a test that can be compared to the dignity approach taken by other equality scholars. However instead of focusing on a more ambiguous concept of dignity, Fredman takes a similar approach to Hegel in terms of focusing on recognition. Recognition of certain groups of people presenting their individuality and thereby either presenting them as equals or stripping them of their power is a more nuanced approach in defining the common way of addressing humiliation and other forms of discrimination. It is not based on a moral construct, but more on relational theory around recognition of peoples worth (ibid., pp. 730-731). The third step is described by Fredman is the participative dimension. This is mainly concerned with two parts of participation. The first is political participation, which marginalised groups have been systematically denied, and the second one is social or communal participation in people's social life. Fredman refers here to scholars such as Hugh Collins who try to develop a social inclusion theory or others that extend principles around solidarity to increase participatory dimensions (ibid., pp. 731-732). The last of Fredman's steps is relating to accommodating difference and structural change. This relates to the fact that difference is always seen as less worth and people that are different need to assimilate to the standard that is imposed on them. However, when focusing on accommodating

difference the negative stigma is removed and the pool of opportunities is widened. This could aid, for example, the difficulty of constantly asking who is to blame, but rather taking responsibility as a collective society. It also could aid the fact that mainly disabled people or members of minority groups must bear the cost of their difference, whereas there should be a way of the community to take them on as a whole. It does not mean every difference requires to change the entire system, but that they are properly given the chance to be accommodated (ibid., pp. 732-734). This approach, to Fredman, gives the necessary equipment to sustainable equality in dealing with the symmetrical difficulties formal equality and individual forms of substantive equality have to deal with and could give aid to many of the short coming's equality struggles with, in particular when it comes to in how far different treatment should be allowed or not (Ibid., pp. 734-738).

As Fredman in her work also points out, her multi-dimensional approach is quite closely aligned with the approach to equality taken by the UNCRPD 2006. The recognition dimension is closely aligned with the right to autonomy and independence, as, for example, the convention places an emphasis on the rights of disabled children to preserve their identities. Moreover, the distributive dimension clearly shows that access to healthcare, employment and cultural spheres does not only include removing the barriers for disabled people to access these spheres, but also to pay tribute to their individual needs that are caused by their disability to find alternative arrangements in that regard. The transformative dimension can be seen in the emphasis on valuing difference and promoting the duty to make reasonable accommodations. Lastly, the participatory dimension is seen in the duty on states to ensure full and effective participation of disabled people in the political, economic, social, and cultural sphere (Fredman 2011, pp. 97-99).

This approach as a reflection of the human rights model of disability can also then be related to the digital world. It does not only require the removal of barriers in the digital sphere by creating accessible websites and mobile applications, but it also needs to have more proactive and structural changes. There needs to be more awareness around disability and the stigma originating from it, so that more people are able to step forward and identify as disabled in order to gain the accessibility features they require in accessing online content. Moreover, there needs to be a combined approach of having already inbuilt accessibility available, assistive technology provided, as well as having individual adjustments whenever they occur, so that there are different layers of support and adjustments people can rely upon to tailor their online experience to their individual needs.

This yet again then makes it even more clear that the social-relations approach Minow (1990) was talking about in her book also resonate within the multi-dimensional approaches to equality. It is necessary to tackle the problems disabled people face on multiple levels, whilst also recognising one's own position of privilege. It will negate the difficulties the sameness treatment of formal equality struggled with, as well as the problem of where to draw the line in the more substantive forms of equality. Combining these approaches and removing the difference as well as the complexity of the subject area, will lead into a greater expansion of the digital world. For instance, the second step of Fredman's multi-dimensional approach clearly shows the move away from tying certain protection to abstract concepts such as dignity and use purely the concept of recognition of the difference in order to accommodate diversity. It also shows the different layers that Minow has attached to difference or the different, mainly regarding perceiving difference as inherent in the person without recognising that it has been structurally imposed on to people from a position of power. Fredman's multi-dimensional approach therefore combines both the attempt to

recognise difference as well as dealing with the difficulties around the equal or sameness treatment dichotomy, which many of the individual conceptions of substantive equality or formal equality struggle with.

As I stated before, I argue Minow's (1990) approach can be used in the digital sphere, in order to avoid never-ending discussions around models of disability or equality, as the legislator in the current regulations seemed eager to extend the right to digital access to disabled people, but leaving large parts of the digital world untouched by its legal applicability. Furthermore, the difficulty remains, what do we mean when talking about 'essential' services to the public as well as why would we need disproportionate burden assessments if it in itself again hinders disabled people from equally participating in the digital sphere? I will now turn to each regulation from the beginning and show how approaching it in the sense of social relations can solve the difficulty and clarify the provisions.

PSBAR 2018 Regulation 3 (1) (a) exempts public bodies that are part of public broadcasting corporations from the requirement of making their services more accessible. As I have already pointed out in the beginning, this can be seen as in stark contrast to the provisions laid out in the UNCRPD 2006, specifically in Article 21. However, it can also be approached from a social-relations perspective. More actively looked upon, having the access to broadcasting systems is a valued part of human life and enables not only political participation, but also cultural as well as economic awareness of the current national and international events. It is therefore giving people the needed information to participate in day-to-day discourse. Thus, if it is made accessible to all disabled and non-disabled people alike, this would then itself again enable a better understanding of the current situation for everyone, hence a greater engagement from different talent pools and different opinions,

that could be further supporting and improving people's lives by seeing things from different perspectives.

PSBAR 2018 Regulation 3 (1) (b) then exempts non-governmental organizations unless they provide 'essential services' to the public or specifically are meant to address the needs of disabled people. This whole section could be simply taken out when looked at from a social-relations perspective as every service is meant also for disabled people, because otherwise it would mean that disabled people can only benefit from specific services segregating them from the non-disabled. Moreover, what is deemed essential is highly dependent on the individual circumstances of the person and of their general interaction in their regular social sphere. Thus, leaving it open ended can be helpful, but their needs to be the understanding that for some it may amount to supermarkets, for others the local shop around the corner, a cinema or other private entities that provide services to the public. Yet again also making these websites and applications more accessible in itself gives people greater opportunities across a whole range of issues.

This would then also count for PSBAR 2018 regulations 3 (1) (c), as schools and nurseries should be included as well as their essential administrative functions. What if, for example, someone with a disability wishes to work in a central administrative function in those schools and nurseries? It would improve awareness of the staff members and the comfort of different customers with potential disabilities. Therefore, having accessible administrative functions enables more disabled people to make use of them and work in these positions. It would in itself also promote a greater cross-sector awareness when it comes to disability and accessibility.

In PSBAR 2018 regulation 5 it is again important to consider the Web Content Accessibility Guidelines (WCAG) 2.0 (2008) guidelines of making a website or online service perceivable, operable, understandable, and robust. These principals can by themselves of course indicate to orientate one at the WCAG 2.0 standards or the AA or AAA requirements. However, it can also be used in a more relational approach. When looking at these standards, a closer collaboration between programmers as well as disabled people seems to be a great solution to further understanding and robustness of the different websites. Thus, having inbuilt accessibility can already help a large amount of people, but making it actually perceivable, operable, understandable, and robust requires more than that. It requires the collaboration of web content designers and staff together with disabled people or hiring disabled people in the process of making these websites as well as consulting Disabled People's Organizations (DPO's) in the process. It could help to bring in different options for different individual needs, as everyone has their preference, however, in a way that it is not a less featured alternative of a website, but an equally featured version of a webpage that is concretely layered according to the individual's needs. This could help the aging population as well as the younger populations in understanding different web content more clearly and enable sensory as well as intellectually or mentally impaired people to gain and contribute to the web.

Lastly, PSBAR 2018 regulation 6 applying Minow's approach would completely eliminate the necessity of performing a self-assessment of whether or not it is possible for a public body to claim disproportionate burden. If the body does not have the needed human or financial resources, they should be able to claim a government fund in order to aid this problem. By simply claiming disproportionate burden and stating it in the accessibility statement, the disabled person will still not have access to a potentially highly relevant resource. If that

would be applied it would simply be separate and unequal as Jaeger (2014) suggests and therefore hinder the forming of relations between disabled and non-disabled people in the digital world.

In conclusion, applying Minow's approach helps in regard to not having to clearly define disability or the conception of equality that needs to be applied in the specific contexts. It is important to be aware of the different models of disability and their relation to equality, which is why I discussed them in the earlier chapter. However, I argue that in order to move forward it is extremely helpful to use the social-relations approach. It avoids the rhetorical force and confusion of equality as well as the conceptual ambiguity of dignity and opportunity, but rather looks into the concrete relations and individual circumstances of people attempting to use the web. All of this again reflects the argument I have raised in the beginning. Disability as such is extremely difficult to describe in the context of digital accessibility. There are more dimensions that are needed to be tackled and although Fredman (2016) does not specifically relate her argument to digital accessibility it can nonetheless be applied. There needs to be an approach on different spheres and levels and even what Jaeger (2014) suggested may be beneficial. There are perhaps even more spheres to accessibility than physical, intellectual, and social. It needs to be opened up more. Nevertheless, having examined multiple forms of equality and measuring them against different models of disability also shows the overwhelming number of opportunities that exist to form a concept of disability that fits a specific form of equality. This can in itself take up much more space than this thesis is meant to be. However, for the more practical everyday change that disabled people need this may not achieve enough in the near future. I believe that focusing on the social relations approach in the digital context could enable a better understanding of the perceivable, operable, understandable, and robust principles of

the WCAG 2.0 (2008) and WCAG 2.1 (2018) standard, which already attempt to move away from a strict technical standard but still shows a great number of different technical principles. Purely focusing on social relations could, in my opinion, get rid of this point based focused technical standards and open up to more transformative forms of accessibility, equality, and disability.

Conclusion

Taking a step back and focusing in again on the example of the magnifying glass I started this thesis with, I hope it is now more apparent to the reader that the treatment of disabled people and the perceived complexity on how to advance equality in that sector is mainly attributed to current misconceptions that are prevalent within our society and reflected in the legal system. It should not be the case that students have to carry magnifying glasses around as if it is a burden. Therefore, the symmetrical treatment meant disadvantaging me and that there may have been better outcomes with asymmetrical alternatives which recognised difference. Nonetheless, the magnifying glass taught me one thing: that it is sometimes necessary to perceive things through one combined lens in order to see the bigger picture. This is what I argue needs to happen in terms of disability and equality when the digital sphere is approached. The idea of disability is far-reaching and complex, exemplifying the wide-ranging effects and the dependency on the disability, the individual and the circumstance when determining what the law should require. However, one does not have to gain a complete understanding of every area or every controversy. It is more important to bear an open mind and see the different approaches and the backgrounds in the context of which they were developed. Every model of disability has its use, but only through a combined lens we will be able to fully comprehend the impact of each of them. For instance, the medical model, although heavily criticised, if taken as part of the human rights model still has its place. Diagnosis by doctors and medical treatment are important for some disabled people, especially when combined with the social model and its consideration of the attitudinal and environmental barriers disabled people face. Today there is the possibility of a balancing act that has not existed before. Thus, it is important not to reduce

and categorise disability and equality. Collaboration and intersectionality in society gain greater importance and the core values enshrined in the human rights approach give great opportunities for inclusion and the recognition to the right for accessible services. As Shakespeare (2014) points out, there is the need to view disability not as a reductionist construct, but as a multi-factorial subject matter. Only through a more anthropological approach – hence how things really are – as opposed to an epistemological approach – hence how we perceive things – change can be achieved in a more practical way (Shakespeare 2014, pp. 72-74). Therefore, it is necessary to combine various models of disability in order to encompass the idea more efficiently, similar to what the United Nation’s Convention of the Rights of Persons with Disabilities (UNCRPD 2006) strived to achieve in Article 1.

This also counts for the different conceptions of equality in relation to disability. As I have pointed out in the third part of my thesis, many of the misconceptions on providing access to disabled people in the digital sphere can also be related to a misplacement of disability in the context of equality and equal access. Consequently, seeing equality not purely through a formalistic lens, but viewing it as a multi-dimensional construct, similar to the one proposed by Fredman (2016), gives great opportunities in providing the needed hardware and software as well as creating websites that are accessible to a large number of different disabled people. These concepts need to be not simply reduced to a singular conception of the sorts, but kept as flexible and open as possible in order to achieve long lasting change and not struggle with the sameness dichotomy and the recognition of the difference as pointed out by Minow (1990). Similar to the Web Content Accessibility Guidelines (WCAG) 2.0 (2008) and 2.1 (2018) standard, the law and the concepts employed in it must remain perceivable, operable, understandable and robust. Thus, it is necessary to trace back the

origins of the different conceptions of equality and models of disability in order to understand the underlying problems and not only address the symptoms originating from it.

As the example of the *Cleburne v Cleburne* (1985) case showed, the difficulties around focusing on disability matters from an abnormal-persons approach does further manifest than remedy the barriers disabled people face, as it perceives the disability as natural in the person. Furthermore, using rights-analysis in order to achieve structural change and providing disabled people with additional rights creates the problem of where to draw the line between acceptable and unacceptable behaviour and methods of creating an equal playing field for all. Thus, using the social-relations approach is immensely beneficial, as it realises the position of difference in our society, the way it has been attached to marginalised groups and how through engaging in the relations the individual forms with the community and the institutions is the cause, but can also present the solution for the problems disabled people face. This although written and explained by Minow in 1990 is highly relevant up to this day, as the analysis of the United Kingdom (UK) digital accessibility regulations revealed.

Be that as it may, it is essential to realise that the stigma around disability still continues into the modern age. not only through different definitions used in the law, but also in the restriction and continued categorisation of disabled people which leaves many still excluded rather than included in society. Thus, its controversies and the discussions surrounding it are by no means remnants of the past. They are still ongoing and the examination of different approaches to disability showed that its perceived complexity is one of the core difficulties and that there is the need for further research in this area. For example, the problem remains, that disability is highly context dependent. Additionally, the principle of accessibility is very subjective, and some scholars raise the point that nature in itself is

inaccessible. Universal design is time-consuming and creating an accessible environment for everyone seems a distant dream in the future. Therefore, the concept of adjusting to special needs of certain individuals seems a more realistic aim, although this might be disliked by some disability scholars and activists. Although equally it could be argued that it needs to be properly enforced and involve disabled people in the process (Shakespeare 2014, pp. 36-42).

As Jaeger suggests, moving forward, there is the necessity of having a clear enforcement structure with a body that has the financial and human resources to tackle the problem of inaccessibility on multiple levels, not purely focusing on technical standards, but also recognising the different spheres of digital access and making the hardware, software and user interfaces more accessible (2014, Implementing and Enforcing Internet Justice). Having clear guidance available as well as shifting the burden to prove something is inaccessible from the disabled person, would also lead to provisions such as 'undue burden' or 'disproportionate burden' to be unnecessary (ibid.). Disabled people cannot be left out of the technological progress any longer. There needs to be a move away from strict technical and performance standards as well as the inflexibility and retro activeness of the regulations (Jaeger 2014, Conclusion). As the example of the United States (US) shows, besides having the first anti-discrimination regulation available that protects disabled people and serves the purpose of enabling them an equal online experience, much still needs to be done (Jaeger 2014, Introduction). In the end, the use of the anti-subordination approach to disability, separate but equal dichotomy and the undue burden exemption, means that accessibility will always only be considered as more of an afterthought than proactively considered (Wentz, Jaeger and Lazar 2011, Retrofitting Technology). This needs to change in order to achieve full inclusion of disabled people into the digital sphere in the UK.

Most importantly, the binary nature of the digital world (comprising of ones and zeros), means that it is not inherently accessible or inaccessible. It is down to the programmers and website designers to create the best user experience for the largest group of people (Wentz, Jaeger and Lazar 2011, Introduction). Disabled people in the US make up around fifteen percent of the whole population, hence the economic benefits outweigh any cost-benefit analysis. In addition to that, the older a person gets the more likely it is for them to become disabled, hence having usable technology available at an affordable price enabling participation in the digital world is of fundamental importance for everyone (ibid.)

Furthermore, as Minow's relational approach shows, ignoring as well as recognising difference can lead to exclusion rather than inclusion. Therefore, it is necessary to establish a middle ground, that is often related to the direct relations people can form with one another. The main difficulty however remains that the judge of these situations, if it is a government official or a legal professional, needs to be aware of their own position of privilege and attempting to perceive the matter from the perspective of the disabled person in the specific circumstance. Through these steps, reform projects including the Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018 could be handled much better and more efficiently.

Having a debate about the clarity and effectiveness of disability rights and anti-discrimination provisions is long overdue, as only a third of the world's countries have so far adopted anti-discrimination provisions for disabled people and even the existing provisions are criticised for their lack in clarity and efficiency (Goodley 2017, p. 2). Especially, since disabled people are the fastest growing minority in the world (Kanter 2015, p. 21). In the end, some argue the most important impact on the UK in its treatment of disability rights will be the UNCRPD 2006 and its shift in conceptions on disability and the recognition of

disabled peoples civil, political, socio-economic and cultural rights. Most importantly, the commission's frequent assessments of the UK will be influential in shifting the political focus away from only supporting a narrow category of disabled people. Case law that originates in Europe through the CJEU and the ECtHR can also have an impact on the UK domestic sphere. Despite this progress, there is still a great number of difficulties and stigmas that the law around disability contains and that impacts the treatment of disabled people in the digital sphere in the UK to this day. Through the impact of the UNCRPD 2006 as well as the EU and the European Accessibility Act 2019, the UK hopefully will also adopt more substantive forms of equality as well as human rights and social approaches to disability. Consequently, expanding the protection of digital access rights across the public as well as private sector and providing for clear enforcement proceedings for any violations.

Overall, this investigation of the UK digital accessibility regulations and different models of disability and conceptions of equality have shown the significance of this area of research. There is still much to do in order to fully remedy the impact of the equal treatment principle as well as the full recognition of difference as not something that is less worth, but something that is socially constructed. In addition, through employing Minow's relational approach during this thesis the different stages the judges went through in assessing the *Cleburne v Cleburne* (1985) case become clearer. The move away from perceiving disabled people as abnormal, towards attempting to provide them with special rights and lastly focusing in on the individual and the relations they form with different institutions or the community as a whole. Despite Minow having published her book in the 1990s it is still relevant to this day and can aid in clarifying problems in the digital sphere. Nonetheless, there is definitely the need for more research, especially more empirical socio-legal examinations of this area of law and its impact on the disabled population as a whole.

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