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## Speakers' presentations

# EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Seminar for legal practitioners, NGOs and Equality Bodies,  
Academics

Trier, 26-27 September 2016



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# EU Disability Law and the UN Convention on the Rights of Persons with Disabilities

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ERA Conference Centre  
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## The UN Convention on the Rights of Persons with Disabilities: Key Features

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## Outline

- Purpose, general principles and rights in the UNCRPD
- The monitoring role of the UN Committee on the Rights of Persons with Disabilities: State reporting and individual complaint procedures

## A little bit of history...

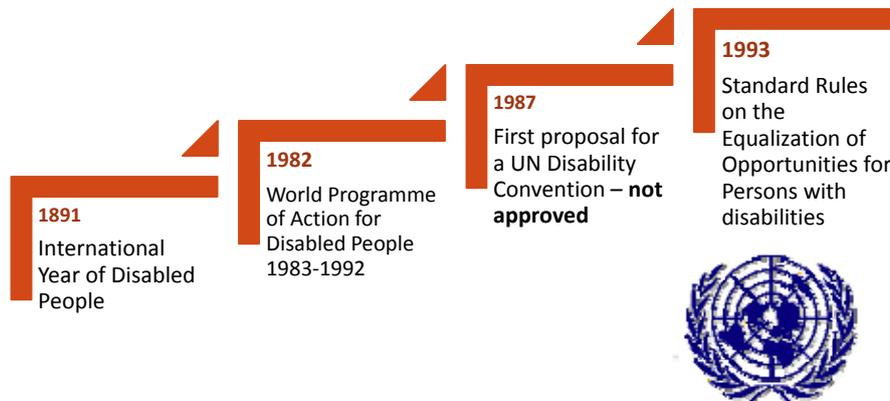
- Universal Declaration of Human Rights (1948)

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

### Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

## Disability in the UN System



Why a new international treaty to promote and protect the rights of persons with disabilities?



The existing human rights treaties were not enough?

## Timeline of the CRPD



- An *ad hoc* Committee is established to develop the new Convention - 2001
- The CRPD is adopted by the UN General Assembly - 13 December 2006
- The CRPD opens for signature - 30 March 2007 (89 signatures)
- Entry into force - 3 May 2008

Germany - signed up 30 March 2007; ratified 15 August 2007

## What's unique about this Convention?

- It's a human rights and a development treaty
- It mainstreams disability across all sectors
- It's legally binding

## Purpose of the CRPD (art. 1)

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

## A paradigm shift...

- The Convention recognizes:
  - The inherent **dignity** of persons with disabilities (e.g. art.3);
  - That persons with disabilities are not objects of charity, social protection or medical treatment but **subjects of rights** capable of making decisions based on informed and free consent and able to make contributions for society (eg. arts.3, 12, 15,...);
  - That persons with disabilities are entitled to the **supports** needed in order to access and exercise their rights (arts.12, 19, 21, 24, 27,...)

## A paradigm shift...

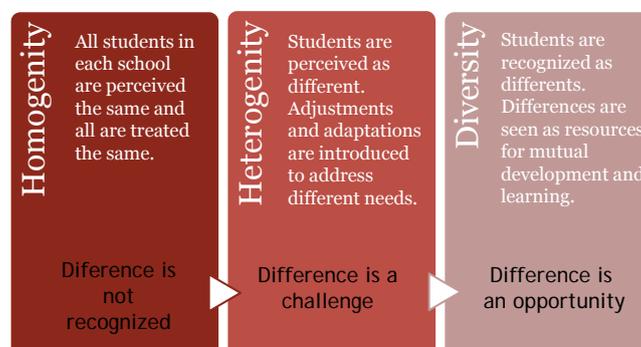
- From the individualized and medical model - disability as a “personal tragedy” ...
- ... Through the social model - disability as a social construct...
- To the human rights model

## A paradigm shift...

The human rights model:

- Emerges from the social model
- Recognizes disability as part of **human diversity**
- Emphasizes the conditions that are needed to promote access and exercise of rights
- Focuses on the participation of persons with disabilities

## Ex.: Paradigm shift in Education From homogeneity to diversity



Adapted from OECD, 2010. Educating Teachers for Diversity: Meeting the Challenge

## What is disability?

- The CRPD does not define disability:

### Preamble

(e) Recognizing that disability is an **evolving concept** and that disability **results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others...**

## What is disability?

### Article 1 Purpose

2. 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.**

## What is disability?

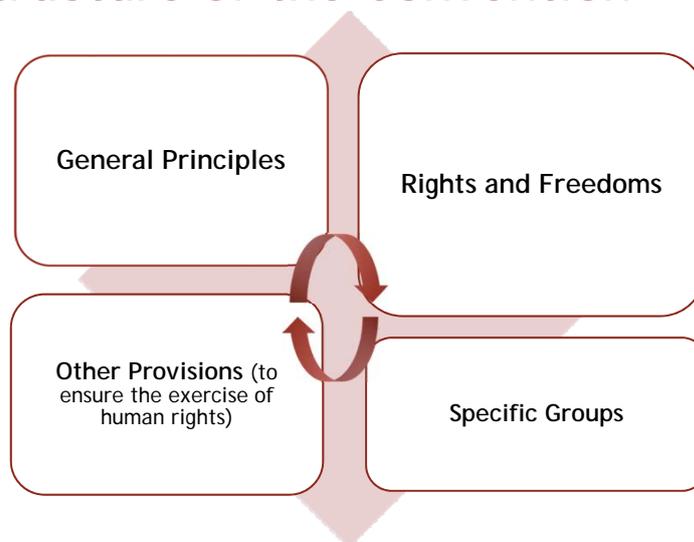
Disability is the outcome of an interaction between a non-inclusive society and the individual

Ex.: A person that uses a wheelchair may not find a job, not because she is unable to work but because of social and physical barriers.

Ex.: A blind child may flunk in school not because he's unable to learn but because there are no books in braille to study from.

The focus is on discrimination and its impact on people's lives

## Structure of the Convention



## General Principles (art.3)

- a) Respect for **inherent dignity, individual autonomy** including the freedom to make one's own choices, and independence of persons;
- b) **Non-discrimination**;
- c) Full and effective **participation and inclusion** in society;
- d) **Respect for difference** and acceptance of persons with disabilities as part of human diversity and humanity;
- e) **Equality of opportunity**;
- f) **Accessibility**;
- g) Equality between men and women;
- h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

## Participation and Inclusion

- Participation is important for the empowerment of individuals.
- Full and effective participation in society is recognized in the CRPD:
  - as a **general principle (art.3)**
  - as a **general obligation (art. 4)**
  - as a **right (arts.19, 24, 29, 30)**
- Participation and inclusion are essential to the human rights approach. They're not just ends in themselves but also **means to achieve social equity**. With inclusion persons with disabilities become more visible in society and persons without disability have the chance to learn and change.

## Non-discrimination

- A principle (art.3) and a fundamental human right (art.5);
- Includes **direct** and **indirect** discrimination;
- **Reasonable accommodations** must be provided to persons with disabilities:
- “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

## Accessibility

- Important means for empowerment and inclusion;
- A general principle (art.3) and an article on its own (art.9);
- Accessibility should be ensured:
  - In justice (art.13)
  - In the community (art.19)
  - In communication and information systems (art.21)
  - In education (art.24)
  - In health (art.25)
  - In habilitation and rehabilitation (art.26)
  - In employment (art.27)
  - In social protection (art.28)
  - In public and political life (art.29)
  - In cultural life, recreation, leisure and sport (art.30)

## Rights and Freedoms

- Equal recognition before the law (art. 12)
- Right to life (art.10), liberty and security of the person (art. 14)
- Freedom from torture (art.15)
- Freedom from exploitation, violence and abuse (art.16)
- Protection of the integrity of the person (art.17)
- Liberty of movement and nationality (art.18)
- Right to live independently and being included in the community (art.19)
- Freedom of expression and opinion (art. 21)
- Respect for privacy (art. 22)
- Respect for home and the family (art. 23)
- Right to education (art. 24)
- Right to health (art. 25)
- Right to work (art. 27)
- Right to social protection and an adequate standard of living (art. 28)
- Right to participate in public and political life (art. 29)
- Right to participate in cultural life, recreation, leisure and sport (art. 30)

## Special Groups

- Children with disabilities (art.7)
- Girls and women with disabilities (art.6)



## Other Provisions (to ensure exercise of rights)

- General obligations (art.4)
- Awareness-raising (art.8)
- Accessibility (art.9)
- Situation of risk and humanitarian emergencies (art.11)
- Personal Mobility (art.20)
- Habilitation and Rehabilitation (art. 26)
- Statistics and data collection (art. 31)
- International cooperation (art. 32)
- Monitoring (art.33)

## Implementation and Monitoring (art 33)

- To ensure the implementation of the Convention, State Parties shall designate **one or more focal points** within government;
- States Parties shall maintain, strengthen, designate or establish a **framework, including one or more independent mechanisms**, as appropriate, to promote, protect and monitor implementation of the present Convention.

## Implementation and Monitoring (art 33)

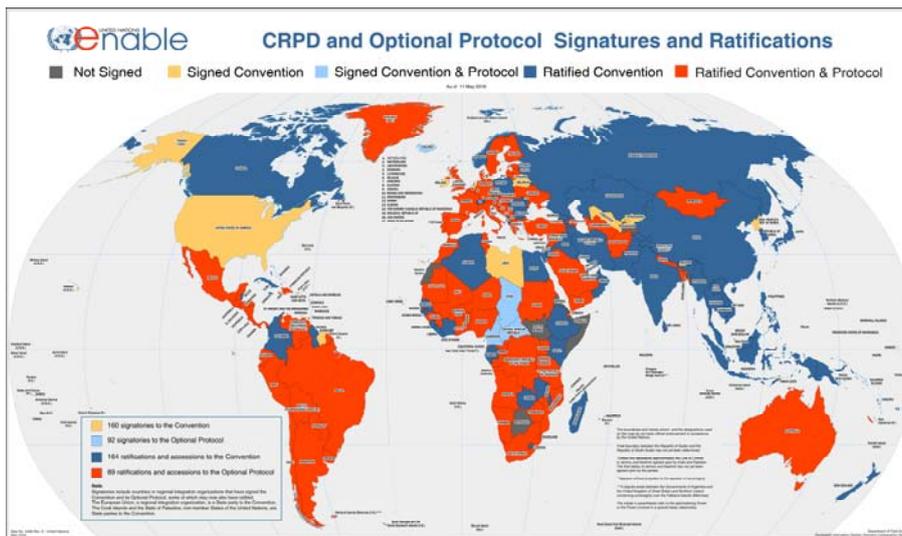
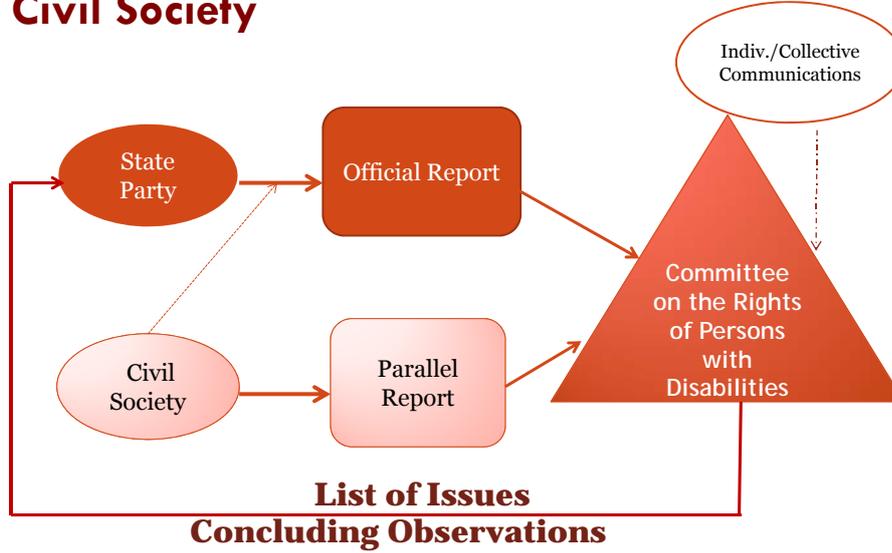
- Civil society, in particular **persons with disabilities** and their representative organizations, shall be involved and participate fully in the monitoring process

**Nothing about us without us!**

## Optional Protocol

- 18 articles; enables individuals and groups to submit complaints to the CRPD Committee when all domestic remedies have been exhausted;
- **Individual/Group communications** - the Committee considers communications from or on behalf of individuals or groups of individuals who claim to be victims of a violation by a State Party of the provisions of the Convention.
- **Inquiries** - members of the committee may conduct an inquiry in a State Party, to investigate information related to systematic and serious violations of the Convention

## Monitoring Mechanisms and the Role of Civil Society





# The Relationship between the UN CRPD and EU Law

Richard Whittle

presented on 26 September 2016

ERA Seminar on  
“EU Disability Law and the UN Convention on the Rights of Persons with Disabilities”  
Trier



## The immediate legal context

- Council Decision 2010/48/EC, its declaration of competence (Annex II) & reservation to Article 27(1) (Annex III)
- Legal bases – Article 19 TFEU (combatting discrimination) and Article 114 TFEU (achieving the internal market)
- As of 23 December 2010, the EU formally ratified the UN CRPD



## A quasi-constitutional status

- With EU accession, the UN CRPD
  - bound the EU institutions & its Member States (Article 216(2) TFEU)
  - formed ‘an integral part of [EU] Law’ (Case 181/73 *Haegeman*) and thus
  - acquired a quasi-constitutional status, meaning
    - it is beneath the Treaties but above secondary EU law (Case C-239/03, *Etang de Berre*)
    - secondary EU law must be interpreted, as far as possible, in line with the UN CRPD (Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge*).



## A mixed agreement

- ‘Mixed’ because part of the agreement falls within the scope of EU powers & part within the powers of the Member States
- Types of EU competence
  - Exclusive
  - Shared
  - Competence to support, coordinate or supplement
- Declaration of Competence (Annex II of Council Decision 2010/48/EC)



## Direct effect?

- Case C-363/12, *Z v. A*
  - The provisions of the UN CRPD are not unconditional and sufficiently precise
  - Pointed to Article 4(1) and 4(3) UN CRPD as evidence of its programmatic nature
  - But note Article 44(2) and Article 4(1)(b) UN CRPD
- Article 5(2) UN CRPD
  - “State Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”
  - CF. Article 18 TFEU



## Interpretative value

- The meaning of ‘disability’ as a prohibited ground at EU-level, currently interpreted as:
  - an impairment
  - that is “long-term”
  - and which, in its interaction with professional life, hinders an individual’s access to, participation in, or advancement in employment  
(Joined Cases C-335/11 and C-337/11, *Ring and Skouboe Werge*; Case C-363/12, *Z v. A*; Case C-354/13, *Kaltoft*)
- Article 1 CRPD
  - 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



## Going forward

- The importance of collective management
  - the particular role of NGOs
- Meeting existing commitments
  - proposed Directive to combat discrimination outside of employment & occupation
  - proposed European Accessibility Act
- Going beyond 'legal' recognition
  - the importance of 'market' recognition
  - the value of 'standards' & the role of the internal market



## For any Queries

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**Thank you for your attention!**





**Implementation of the CRPD in the EU –  
the definition of disability**

**Richard Whittle**

Workshop held at the Academy for European Law (ERA), Trier, Germany  
on 26 September 2016

## 1. Being clear as to the purpose of the law

The CRPD - and the range of its provisions - demonstrates the pervasive nature of disability as a policy matter. As an emanation of policy, the potential application of the law (and thus the potential range of 'disability law') is similarly expansive.

However, when most people think of disability law, they generally think of two types of legal regulation (i) disability welfare law,<sup>1</sup> (ii) disability anti-discrimination law.

A key element to both (in terms of their mechanics) is the definition of disability. Both types of disability law require a definition of their intended beneficiaries in order to be operationalised. In this sense, the definition of disability acts as the gatekeeper to the benefits or protection provided by these laws.

**Task:** Identify the respective 'benefits' under the two types of disability law described above. By so doing you will be identifying the purpose of the law.

**Question:** Should this difference in purpose have any impact on the definition of disability?

## 2. The CRPD definition of disability

As the CRPD touches on various policy domains including those regulated by both disability anti-discrimination law and disability welfare law, its definition of disability needs to be suitable for the purposes of each type of law.

This workshop is concerned with the definition of disability in the context of anti-discrimination law. Our task is to consider whether the definition of disability in the CRPD and, in particular, the interpretation afforded to it by the Court of Justice of the European Union (CJEU) is appropriate for this purpose.

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<sup>1</sup> Specifically, laws regulating disability assistance and insurance programmes.

**The four elements to Article 1.** The CRPD’s definition of disability is in Article 1. It opens with the words: “Persons with disabilities include“ (emphasis added), which suggests that there is room for this definition to be expanded or clarified.

For the reasons explained below, expansion and clarification is arguably necessary.<sup>2</sup>

There are four elements to the definition and they expressly include:

1) “physical, mental, intellectual or sensory impairments”

but only where those impairments are:

2) “long-term”, and which

3) “in interaction with various barriers”

4) “may hinder [an individual’s] full and effective participation in society on an equal basis with others” (emphasis added).

**Applying the elements.** This definition therefore requires not only the identification of an ‘impairment’, which is necessarily defined at group-level (first and second elements), but an individual-level assessment as to the ‘quality’ of that impairment and the activity limitations that result (first and third elements). It also invites an assessment as to the extent to which those limitations generate participation restrictions in the personal and social environments of the individual (the fourth element). I say “invites” because the inclusion of the word “may” at the beginning of the fourth element arguably allows an adjudicator to ignore this element should they deem it appropriate to do so.

Whilst the term “various barriers” in the third element is yet to be defined, other aspects of the CRPD (including the fourth element to this definition) suggests that it will encompass barriers not only from the built environment but the organisational and attitudinal environments as well.<sup>3</sup>

The phrase “long-term” (in the second element of the definition) arguably raises the bar on the type of impairments included in this definition. However, in the context of

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<sup>2</sup> A General Comment from the Committee on the Rights of Persons with Disabilities would be an appropriate vehicle for the expansion and clarification of the definition.

<sup>3</sup> See paragraph (e) of the Preamble, the definition of discrimination in Article 2 and the guiding principle in Article 3 (c) of the CRPD.

anti-discrimination law, one could argue that this element should be ignored given the third and fourth elements to the definition and, in particular, the likely interpretation of the term “various barriers”. In the event that this term is held to encompass attitudinal barriers, and thus the attitudes and beliefs of others, it is reasonable to assume that it will also encompass impairments that do exist but are incorrectly perceived as existing. If so, there will be no need for an actual impairment in this context, let alone one that is “long-term”.

One should note, however, that an alternative (albeit contrived) interpretation of these elements is to allow the inclusion of incorrectly perceived impairments but require that the incorrect perception relates to an impairment that is “long-term” in nature. Such an approach will likely impose significant evidentiary difficulties.<sup>4</sup>

### **3. The CRPD definition and anti-discrimination law**

The intended beneficiaries in the context of anti-discrimination law are often described as the ‘protected class’, and a term that is often used to designate a class, and to distinguish it from other protected classes, is the ‘prohibited ground’.

The inclusion of ‘individual-level’ considerations within the definition of a prohibited ground (as encouraged by the CRPD) would be problematic for any ground of discrimination, including disability. It is problematic because it conflates key elements within two different stages of the legal analysis; stages that would ideally be kept separate in the mind of the adjudicator. I refer to these stages as the ‘opening’ and ‘merit’ stage of the legal analysis.

***The ‘opening’ and ‘merit’ stages.*** The opening stage of the legal analysis relates to the ‘material’ and ‘personal’ scope of the prohibition. The material scope is concerned with whether or not the dispute occurs within a context that the prohibition extends to (employment and occupation, for example). Whereas the personal scope of the prohibition is concerned with whether or not the complainant shares the essential characteristics of the protected class. The more restricted the material scope is, and the fewer in number the prohibited grounds are, the more important this stage of the legal analysis becomes.

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<sup>4</sup> A similar interpretation was initially applied by the courts to the “regarded as” prong under the Americans with Disabilities Act 1990.

The 'merit' stage of the legal analysis, in contrast, focuses on matters pertaining to the substance of the complaint. In a discrimination claim, for example, this stage will focus on whether less favourable treatment can be established, or whether it is objectively justified for a reason unrelated to the prohibited ground or excused by an explicit exception in the anti-discrimination law.

Whilst the merit stage of the legal analysis needs to be open to individual-level considerations to operate successfully, the opposite is true as regards the personal scope of the prohibition and its role in the legal analysis. The level of an individual's religious observance or impairment may well be relevant therefore to determining whether less favourable treatment has occurred in a given scenario but these factors should not influence whether an individual should be included as part of the protected class. To be clear, the definition of the prohibited ground must exclude individual-level considerations if it is to function correctly.

***Individual-level criteria and the protected class.*** Even the most limited reference to individual-level criteria in a prohibited ground can generate problems for its protected class. In the context of disability, such a reference will inevitably generate at least a minimal degree of assessment as to the qualitative nature of the impairment. Ultimately, at the heart of any such assessment is the question: "how disabled are you?"

Where the criteria have been drafted or interpreted to require evidence of substantial functional limitations, a 'catch-22' situation can occur. Early case law under the Americans with Disabilities Act (1990) in the context of employment is replete with examples of complainants having to show, on the one hand, that they have substantial limitations in respect of a major life activity and, on the other, to prove that - despite these limitations - they are able to perform the requisite job tasks.<sup>5</sup> Similar observations can be made in respect of early case law from Great Britain interpreting what was then the Disability Discrimination Act (1995).

The 'catch-22' situation is arguably the most obvious example of the problems that occur when individual-level criteria are included within the definition of the prohibited ground. However, it is not the only example. The CJEU ruling in Case C-363/12, *Z v. A* is another, albeit more subtle, example. Here the court accepted

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<sup>5</sup> See, for example, Burgdorf, R. "Substantially limited" Protection from disability discrimination: the special treatment model and misconceptions of the definition of disability." (1997) *Villanova Law Review* 42 345.

that the complainant has an impairment appropriate for the prohibition in Directive 2000/78/EC but additionally required her to show functional limitations flowing that impairment that interacted with her 'professional life' in such a way that it could be said to hinder her full and effective participation in that context. As the complainant was unable to meet that requirement, the Court did not explore whether the absence of a statutory requirement for paid leave following the birth of a child through surrogacy was indirectly discriminatory to commissioning mothers on grounds of disability.

It is perhaps only when the approach of including individual-level criteria within the definition of the prohibited ground (and explicitly the "how disabled are you?" question) is applied to a different protected class that one can fully appreciate the problem with it. It is incumbent therefore to question how useful and appropriate it would be at the opening stages of the legal analysis to ask the complainant of discrimination on grounds of religion or belief: "how religious are you?" Should the extent of her religious adherence be a consideration that bars her from making a claim on the merits or encourages the court to afford only a cursory consideration to this stage of the legal analysis?

That is not to say that the level or extent of someone's religious adherence (or lack of it) will always be irrelevant to the legal analysis in anti-discrimination law. If the complainant is seeking an adjustment to what is normally a strict schedule of work in a given industry to enable them to adhere to the Sabbath but in truth plans to use the claimed day of rest to play golf, then it would be appropriate for a court to take the extent their religious adherence (or lack of it) into account. Equally, there will be occasions where no reasonable adjustments can be made to enable individuals with certain impairments to be qualified for certain jobs and it would therefore be appropriate for the court to take into account the extent of their functional limitations when adjudicating on a claim of disability discrimination in employment. The crucial point to note for our purposes, however, is that the court in both of these examples would be applying this reasoning at the 'merits' stage of the legal analysis - specifically, in its assessment as to whether the requested adjustments are reasonable.

In the context of anti-discrimination law, therefore, the CRPD definition of disability should not be applied without some modification or purposive interpretation being accorded to its elements in the light of this particular context.

With a view to obtaining further clarity as to the causes of the problems identified above and the solutions that might be applied, recourse is now made to the model of disability in the International Classification of Functioning, Disability and Health.

#### **4. The ICF and anti-discrimination law**

Since 2001, an international common language has existed for describing the universal human conditioning of functioning and disability. This is the World Health Organisation's "International Classification of Functioning, Disability and Health" (ICF, 2001).

**The ICF model.** The ICF classifies disability as having three main elements, namely:

- (i) impairment (deviation or loss in terms of body structure and/or functioning)
- (ii) activity limitation (person level impact of such deviation or loss – problems carrying out actions and tasks, simple and complex)
- (iii) participation restrictions (barriers to participation in the social and built environment – problems in the actual performance of actions and tasks in the actual physical, organisational or attitudinal context).

Importantly, these elements are not dependent on each other and are capable of interacting in various ways. For example, a person may have an impairment (muscular wastage), which leads to an activity limitation (inability to lift arms to shoulder height), which in turn leads to a participation restriction (unable to stack shelves in a supermarket).

Alternatively, a person may have an impairment (cancer in remission/severe facial disfigurement) that does not lead to any activity limitation but which nonetheless leads to participation restrictions as a result of ignorance, fear or prejudice.

Similarly, a person may experience participation restrictions under this model despite not having an impairment or any activity limitations simply due to a mistaken belief that they have an impairment.

Finally, it is possible for a person to have both an impairment (paraplegia) and an activity limitation (inability to stand/walk) and yet face no participation restrictions if the appropriate assistive technologies and accommodations (wheelchair, sufficient ramp access to buildings, wide doors etc.) are provided.

***Applying the ICF to anti-discrimination law.*** Each of these elements can help clarify when and how the different components of disability are relevant to the legal analysis in an anti-discrimination law claim. I briefly illustrate this observation by highlighting the relevance of each element of the ICF model in reverse order.

The element of 'participation restrictions' equates to considerations that fall within the merits stage of the legal analysis. For example, being refused employment as a shelf stacker in a supermarket constitutes a barrier to participation in the context of employment. If the refusal is on grounds of an individual's actual or perceived impairment then it constitutes a participation restriction under the ICF and potentially less favourable treatment under disability anti-discrimination law.

Whether it amounts to discrimination will depend on a number of factors, including whether reasonable accommodations could be provided to enable the individual to perform the essential functions of the job. The element of 'activity limitations' is relevant to this consideration. It can help us assess what would be a reasonable and effective accommodation to enable an individual to perform the essential functions of the job (providing a mechanical lifting device or by allowing the person to only stack the lower shelves, for example). As with participation restrictions, the element of activity limitations under the ICF model equates to considerations that fall within the merits stage of the legal analysis.

One should note, however, that this element is not relevant to every case of alleged discrimination. For example, where an individual is refused employment due to the employer's prejudice towards facial disfigurements, the question of accommodations does not arise as there will be no activity limitations.

In contrast, what is essential to any successful claim of disability discrimination is the element of 'impairment'. In all cases, it is the impairment - whether the individual's actual impairment, the employer's misunderstanding of the impairment or the employer's incorrect assumption as to the existence of an impairment - that has led to the participation restriction and, consequently, the less favourable treatment.

Without impairment playing this role, one cannot say with any certainty that disability discrimination has occurred – the participation restriction (less favourable treatment) could otherwise have arisen due to any number of other factors, such as gender, age, poverty or religious belief.<sup>6</sup> Impairment is therefore the ‘locus’ of the discriminatory treatment in the context of disability and, as such, should be the sole criterion in defining the protected class.

***The inherent “how much?” question.*** In order to come within the ICF definition of impairment, the individual's body-level ‘condition’ has to constitute a "significant deviation" in body structure or functioning.<sup>7</sup> So it is correct to say that there is an inherent question of extent (or “how much?”) in this determination too. However, the vital difference between this context and the contexts described above is one of degree. The determination in this context does not involve searching individualised inquiries into how the deviation in body structure or functioning interacts with our environmental and personal contexts. There's less contestable space in this determination and thus less room for interpretation. The ‘condition’ or body-level deviation in structure or functioning either meets recognised classifications as an impairment or not.

## **5. The purpose of anti-discrimination laws**

At the beginning of this workshop you were asked to identify the purposes of disability anti-discrimination law and disability welfare law and to determine whether those purposes were different and, if so, whether that difference matters to the definition of disability under those laws.

Whilst both types of law are ultimately concerned with respecting and promoting the inherent dignity of people with disabilities, their immediate purposes are different. Disability welfare laws have as their immediate purpose the distribution of finite public resources according to need. Whereas, disability anti-discrimination laws – like anti-discrimination laws on other prohibited grounds – have as their immediate purpose the distribution of opportunities according to merit.

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<sup>6</sup> Similarly, not all activity limitations can be said to inevitably flow from impairments. For example, the inability of men to naturally conceive and carry a baby is an activity limitation in the task of becoming and being pregnant but is not an impairment because the absence of a uterus (among other key equipment) does not represent a significant deviation in body function or structure among the male population.

<sup>7</sup> ‘Significant’ in a scientific sense which does not, therefore, impose the same meaning that may be accorded to this term by lawyers.

As disability welfare laws<sup>8</sup> are concerned with the allocation of finite public resources according to need, it is appropriate and necessary that they employ a definition of disability with individual-level criteria in order to distinguish between different types and severity of need.

In contrast, disability anti-discrimination laws are concerned with the distribution of opportunities. As opportunities should be equally available to all who merit them, it is appropriate and necessary that disability anti-discrimination laws employ a definition of disability that encompasses everyone who might be treated less favourably simply because of impairment.

Whereas the test of 'need' in disability welfare laws is applied at the opening stages of its legal analysis, the test of 'merit' in anti-discrimination law is applied at the substantive or "merit" stage of its legal analysis.

At their core, anti-discrimination laws pursue the removal of irrelevant considerations (that are sufficiently connected to a prohibited ground) from the decision-making process. Disability anti-discrimination laws are no different from the counterparts in terms of their core functionality.

However, the "relevance/irrelevance" enquiry can often require a more thorough examination in the context of disability. What might first appear to be a relevant consideration (inability of job applicant to type the minimum words per minute due to disability) may in fact be an irrelevant consideration when we enquire a bit further (use of an adapted keyboard enables disabled job applicant to exceed the minimum words per minute).

It is correct to observe that the purchase of an adapted keyboard generates a cost for the employer that they would not have if they employed an individual who did not need an adapted keyboard. However, it would be naive to think that anti-discrimination laws on other prohibited grounds do not generate costs. The frequency and size of these costs may be greater in the context of disability but this is only due to the pervasive and systemic nature of disability discrimination. The need for such action does not alter the fundamental character of the law and the right that it protects.

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<sup>8</sup> Correctly referred to as disability assistance and insurance programmes.

Thus, provided that disability anti-discrimination laws remain true to their immediate purpose, there is no need to treat them - and consequently the definition of their prohibited ground - differently. The problem, however, is that some disability anti-discrimination laws are, on occasion, being applied in a manner that exceeds that purpose and perhaps this is contributing to what appears to be a misunderstanding as to the nature of such laws.

## **6. CJEU's interpretation of disability in the context of anti-discrimination law**

Currently, the CJEU's interpretation of disability as a prohibited ground of discrimination can be summarised as:

- an impairment (undefined)
- that is "long-term" (undefined)
- and which, in its interaction with professional life, hinders an individual's access to, participation in, or advancement in employment.

It would appear therefore that the CJEU does not consider it necessary to rely on the word "include" at the start of the CRPD's definition of disability and use it to justify a tailored approach in the context of anti-discrimination law. Similarly, it would appear that the CJEU does not consider the fourth element to the definition of disability in the CRPD as an optional criterion.

On a positive note, the CJEU appears to recognise that the complainant of disability discrimination does not need to show an actual impairment or at least that the less favourable treatment being alleged is connected to an impairment that they have. However, the CJEU does require that the impairment in question is interacting with the complainant's access to, participation in, or advancement in employment (thereby conflating considerations of 'personal' scope with those pertaining to the 'material' scope of the prohibition).

Finally, it should be noted that the CJEU (or at least some members of the Court) appear to be overly sensitive to the cost implications of disability anti-discrimination law and, in particular, the reasonable accommodation duty; a sensitivity that is perhaps based on a misunderstanding as to the intended role of that duty.

**Task:** Consider whether decisions from the UK such as *Archibald v. Fife Council* [2004] UKHL 32 and, more recently, *G4S Cash Solutions (UK) Ltd v. Powell* UKEAT/0243/15/RN go beyond the intended purpose of anti-discrimination law and are contributing to the apparent concern about costs?

## 7. Recommended solution

For the purposes of anti-discrimination law, disability should be defined solely by the concept of impairment.

The concept of impairment should be comprehensively defined and capable of including conditions that become recognised as impairments in the future. It must avoid phraseology that would encourage individual-level criteria to be included and thus an assessment being made as to the 'quality' of the impairment, the extent of an individual's functional limitations or its interaction with the physical, organisational or attitudinal environment.

The definition of impairment must include past, perceived and future impairments within its scope.<sup>9</sup>

Additionally, to avoid uncertainty, the anti-discrimination law should include 'discrimination by association' as a prohibited behaviour and that aspect of the prohibition should include within its coverage a person who has a past, present, future or perceived impairment.

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<sup>9</sup> The above recommendation was outlined in Whittle, R. (2002) 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective' *European Law Review* 27 (3) 303 at 321-323.

## 8. The scope of the definition under disability anti-discrimination: the difficult cases

### Questions:

- (i) Should paedophilia, exhibitionism, voyeurism, pyromania, kleptomania, alcoholism or other substance abuse disorders, fall within the protective remit of disability anti-discrimination law?
- (ii) Should gender dysphoria be protected?
- (iii) Should obesity be protected?

**Task:** Consider your immediate reaction to each of the above questions and why you reached the conclusions you did.

### Questions:

- (iv) Each of the above conditions has been excluded in at least one of the countries that have so far enacted disability-anti-discrimination laws (typically by legislative design but occasionally by judicial decision). All of the above conditions have been medically recognised as impairments – a key feature of any definition of disability. Does this observation change your response to questions (i)-(iii) above?
- (v) The majority of conditions listed in question (i) above are frequently excluded from the protective remit of disability anti-discrimination law. Occasionally, a distinction is drawn in the context of alcoholics and other substance abuse disorders between individuals that are under ‘current use’ and those in ‘recovery’. Those in ‘recovery’ are included within the protective scope of the Americans with Disabilities Act 1990. Do you think that a similar distinction can and should be made in respect of the other conditions listed in question (i) above?

## 9. Dealing with difficult or boundary cases

The above questions pertain to what might be described as difficult or boundary testing cases in the personal scope of disability anti-discrimination law. Irrespective of the view one has in terms of whether to include the above conditions within the protective remit of the law, your view pertains to ‘groups’ – should paedophiles be protected, alcoholics, arsonists etc.

This process is not unique to disability. It has already taken place under what was the British Race Relations Act 1975 (are Rastafarians protected (no), gypsies (yes), Muslims (no)).<sup>10</sup> Prohibited grounds such as race, religion or belief, like disability have fuzzy edges and it is important to decide what the boundaries are in order to retain the laws credibility and ensure its observance by the wider community.

However, in jurisdictions such as the Great Britain and the United States, the legislative definition of disability has (previously) generated a judicial pre-occupation that has delayed, if not precluded, serious consideration of these issues. This preoccupation is concerned not with whether a particular type of impairment (and thus group of persons) should fall within the protective remit of the anti-discrimination law, but whether the nature of an individual’s impairment and the extent of the barriers they encounter in their day-to-day activities justifies their inclusion within that remit. As a result, even those individuals with the most obvious and uncontroversial impairments have been denied protection. When individuals are being treated less favourably because they have conditions like cancer, bulimia nervosa, clinical depression, epilepsy, haemophilia, or multiple sclerosis and are then told by a court that they do not have a disability within the meaning of the anti-discrimination law, then surely something is wrong.

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<sup>10</sup> The Equality Act 2010 prohibits discrimination on various grounds including ‘religion or belief’. It is this category of prohibition that now protects Rastafarians and Muslims against discrimination in Great Britain.

**Task:**

- (i) compare the original statutory definitions of disability under the Americans with Disabilities Act 1990 and the Australian Disability Discrimination (in Annex II below). Note that the definition in the British equivalent was a similar but watered down, and thus weaker, version of the American definition and the Australian definition was and remains very similar to its equivalent under the Irish anti discrimination law.
- (ii) read section II of 'The Impact of the Supreme Court's Americans with Disabilities Act Decisions on the Rights of Persons with Disabilities (Policy Brief Series – No.7) US National Council on Disability (Feb 2003)  
<http://www.ncd.gov/publications/2003/February252003>

## 10. No definition - an alternative solution?

The problems experienced with the definitions of disability in the Americans with Disabilities Act and what was previously the (British) Disability Discrimination Act,<sup>11</sup> have been largely mitigated by regulatory amendment. However, not all of the problems have been resolved and the amended provisions continue to add an unnecessary level of complexity to the legal analysis.

Apart from adopting a definition of disability like that in the Australian Disability Discrimination Act, The New Zealand Human Rights Act, and the Irish Employment Equality and Equal Status Acts, one option might be to follow the Canadian approach in not defining disability and relying on the appellate courts to focus not on the body-level condition but the problematic response to it.

**Note:** Section 15 of the Canadian Charter (the prohibition of discrimination) lists a large number of prohibited grounds and enables the judiciary to create new prohibited grounds by analogy with those already listed (analogous grounds). Consequently, there is less pressure on the prohibited grounds in Canada with less frequent attempts by individuals to squeeze themselves (perhaps artificially) within a particular ground of discrimination.

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<sup>11</sup> Today incorporated with amendments into the Equality Act 2010.

**Task:** read *Granovsky v. Canada* [2000] SCC 28 – focusing on paragraphs 25-41 of the decision under the heading: VII Analysis.

**Question:**

- (i) does the approach in *Granovsky* provide an effective and sustainable solution to the definition of disability under anti-discrimination law?
- (ii) If so, would it translate well within the legal order of EU?

■ ■ ■

Annexes separate

## Annex I

### UN CRPD

(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

### Americans with Disabilities Act 1990

(Section 12102)

Defines disability as:

- (i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (ii) a record of such impairment; or
- (iii) being regarded as having such an impairment.

Physical or mental impairment means (28 CFR 41.31):

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

### Australian Disability Discrimination Act (Cth) 1992

(Section 4(1))

*Disability*, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

*and includes* a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

## Annex II

### Case scenarios for the ‘opening stage’ of the legal analysis

1. Brian was until recently a police officer. He suffered a work-related injury to his left ring finger and he is no longer able to perform law enforcement jobs that require forcible arrests or involvement with potentially combative situations. He also has difficulties performing manual tasks such as buttoning his shirt. He has been dismissed because of his restricted ability to perform law enforcement duties.
2. Sandra has acute visual myopia. She tests 20/200 in one eye and 20/400 in the other. She sought employment with a global commercial airline. She met all of the requirements for employment except one. The policy of the airline in question is that pilots must have an uncorrected vision of 20/100 or better. With corrected lenses Sandra’s vision was better than 20/20. Sandra was not offered a pilot position, and she now wishes to challenge the decision on grounds of disability.
3. Stephen was until recently employed as a pharmacist. He has Type I diabetes and is prone to hypoglycaemic episodes. He injects himself with insulin three times a day, tests his blood sugar numerous times a day, and has to eat certain foods at certain times of the day. Stephen made a formal request to his employer. He requested that he be provided with another employee to manage the pharmacy for 30 minutes each day or be allowed to close the pharmacy for this period each day so that he could administer his medications and eat his lunch uninterrupted. Following this request, Stephen was dismissed.

### Case scenarios for the ‘merits’ stage of the legal analysis

1. Bob suffered a back injury that prevented him from being able to continue his employment as a single-line maintenance engineer. It is not disputed that he has a disability within the meaning of the anti-discrimination law. Because he is no longer fit for jobs involving heavy lifting or work in confined spaces he could no longer work within the same company as an engineer. He was subsequently transferred to the newly created and temporary role of “Key Runner” within the same company. This job involved driving from the depot to various locations to deliver keys and parts to engineers. It did not require engineering skills of the kind that were demanded in his previous post. The

employer is prepared to make the Key Runner role permanent but only with a reduced rate of pay (reduction by approximately 10% compared to Bob's previous job). Bob refused and was subsequently dismissed.

2. Helen was employed as a road sweeper for a number of years. Recently she underwent minor surgery as a result of which she was unable to walk. She was therefore unable to carry out her duties, which required her to be physically fit. Steps were taken by her employer to explore whether there was any suitable alternative employment available. A number of alternative sedentary posts were identified but these were at a higher grade than the grade of a road sweeper. In accordance with the employer's redeployment policy this meant that Helen had to undertake competitive interviews for the posts. She unsuccessfully applied for over 100 alternative posts, and eventually she was dismissed.

■ ■ ■



Guardianship  
v. supported  
decision-  
making

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## MDAC

International human rights NGO

Uses law to secure equality, inclusion and justice for people with intellectual disabilities and people with psychosocial disabilities worldwide

[www.mdac.org](http://www.mdac.org)

@MDACintl



## Today...

1. What is legal capacity?
2. What is guardianship?
3. What is required by international human rights law?
4. What is supported decision-making?
5. How can lawyers support civil society's call to action?







## What is legal capacity?

A construct that enables law to recognise and validate the decisions and transactions that a person makes

## Domestic law

Variety of provisions and sources

- Autonomous decision-making
- Informal supports
- Substituted/proxy decision-making (guardianship) – treats adults like children
- Supported decision-making



## International law

In particular the UN Convention on the Rights of Persons with Disabilities (CRPD)

## 4 important parts

1

We have the **right to make our own decisions** (autonomous decision-making)

– Article 12(2)

2

States have an **obligation to provide supports** (where needed) to help someone exercise legal capacity.

- Article 12(3)

### 3

States must provide safeguards -  
Article 12(4)

States must protect against  
**exploitation, violence and abuse**  
- Article 16

### 4

States must ensure  
accommodations are provided –  
Articles 5 and 2

## CRPD Committee

### General Comment No. 1 (2014) on Legal Capacity

#### Substitute decision making

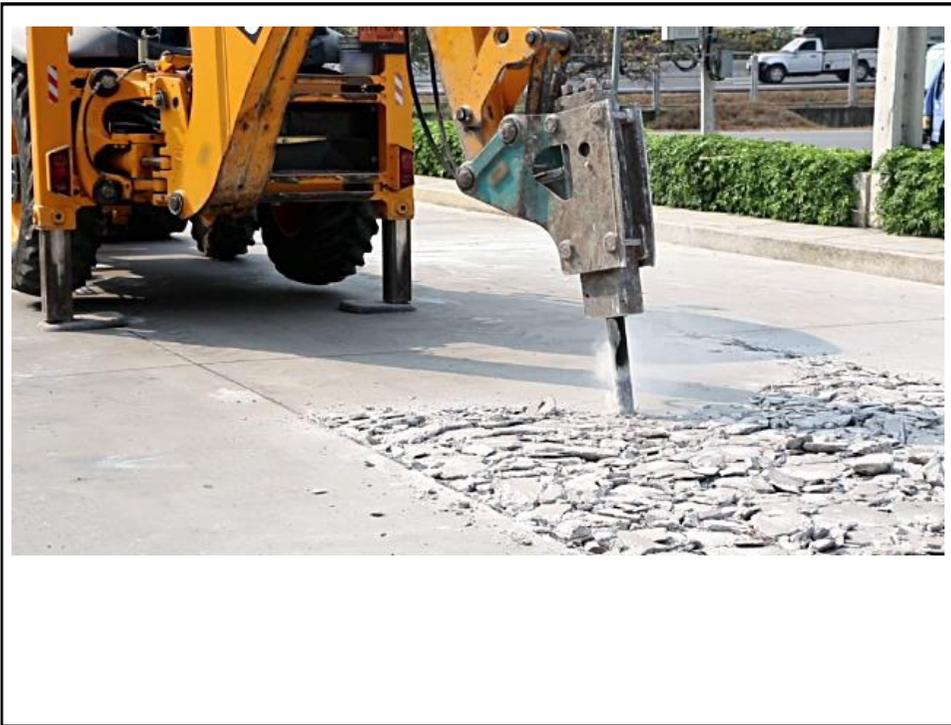
- legal capacity removed from P if this is in respect of decision;
- a substitute decision maker can be appointed by someone other than P and this can be done against P or her will;
- And any decision made by a substitute decision maker is based on what is believed to be in the best interests of P, as opposed to being based on P's own will and preferences.

## Critique

1. How to protect against exploitation and abuse of people whose will and preference are not known or knowable?
2. Is substituted decision-making always morally unjustifiable?
3. Contains few policy guidance several States find feasible
4. Process ignored submissions on the draft

## ECHR

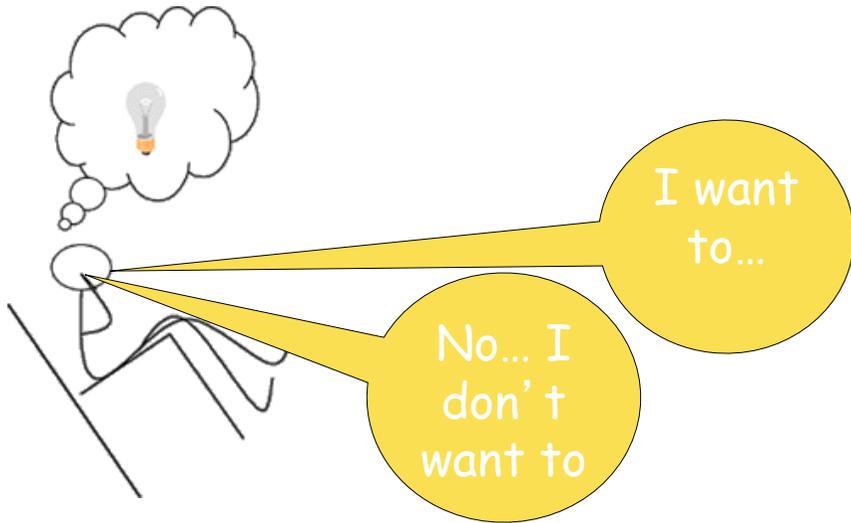
- **Psychiatry:** *Shtukaturv v. Russia* (2008)
- **Social care institutionalisation:** *Stanev v. Bulgaria* (2012), *DD v. Lithuania* (2012), *Kedzior v. Poland* (2012), *Stankov v. Bulgaria* (2015)
- **Marrying, parenting:** *Lashin v. Russia* (2013), *Kocherov and Sergeeva v. Russia* (2016)
- **Access to justice:** *Shtukaturv v Russia* (2008), *Salontaji-Drobnjak v Serbia* (2009), *X and Y v Croatia* (2011), *Sýkora v the Czech Republic* (2012), *Mikhaylenko v Ukraine* (2013), *Ivinovic v. Croatia* (2014)



Article 12 says we need other  
ways to recognise and  
support the right to  
legal capacity

Not just 'mental capacity'

## Expressing will and preferences to others



## Being known by others as a full person

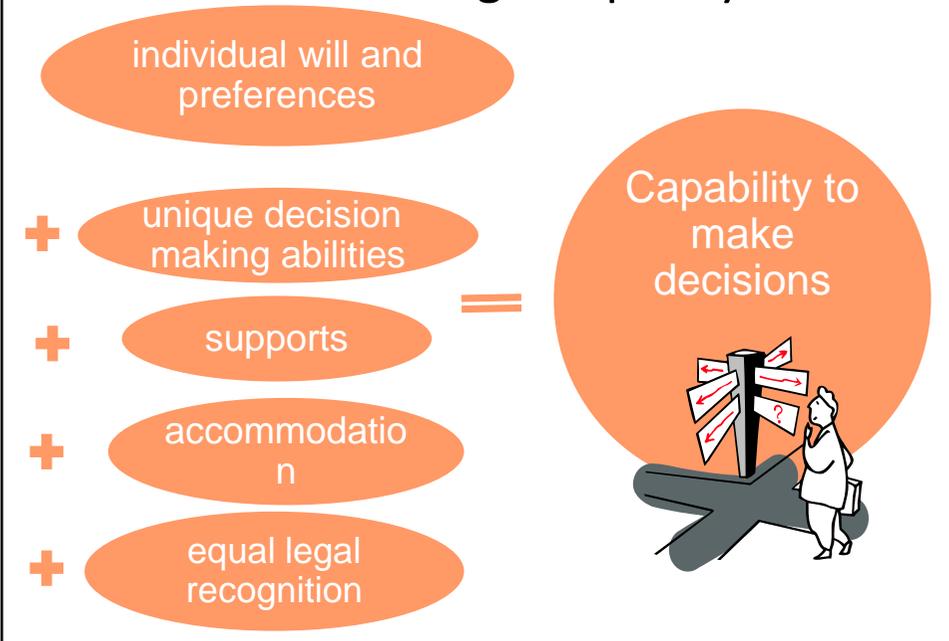
People you trust and who are committed to you

SCHOOL OF DISABILITY STUDIES



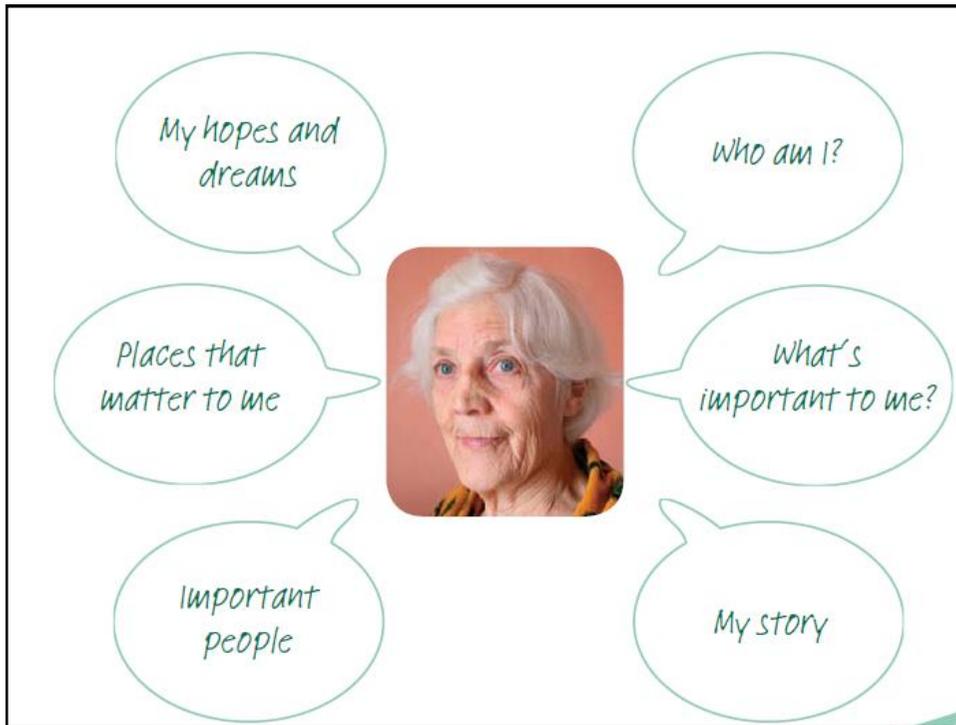
VISION  
PASSION  
ACTION

## A new formula for legal capacity



## What's in the formula?

- Legal capacity  $\neq$  'mental capacity'
- What P wants is at the centre
- Focus is on supports and accommodation
- When people have different ideas about what P may want, they talk to figure out the 'best interpretation of P's will and preference', not 'best interests'



## What is a supported decision-making network?

A group of trusted others to assist in:

- Expressing will and preferences
- Making and acting on decisions



## Who appoints supporters?

- By P
- When P is not able, others apply to be P's supporters on the basis of trust, personal knowledge and commitment

## Types of support

- Decision-making supporters
- Peer support
- Communication assistance, interpreters
- Plain language, alternate formats
- Independent advocates

## Types of accommodation

- More time (by a doctor or financial institution) with P and supporters
- More time to make a decision
- Providing more information, different formats, plain language
- Including P's supporters in the decision-making process

## Safeguards

- Powers to investigate
- Monitors
- Rights advisors in the mental health system
- Some decisions have to be reviewed by a tribunal
- Mediate conflict between supporters
- Where a doctor or financial institution disagree with supporters, seek a tribunal order
- Prove legal independence – at the Tribunal

## Government should appoint/fund community agencies to:

- Identify need for supports
- Facilitate a personal network
- Help professionals accommodate your own way of making decisions
- Promote the right to decide and supported decision making
- Help people make crisis plans and advance directives

A new way	
From	To
A 'presumption of capacity'	A presumption to act independently
Capacity assessment	Assessing need for supports and 'alternative course of action'
Detention	Exploration of alternatives
Finding of incapacity	Finding of need for support
Substitute decision making	Supported decision making and power to appoint
Best interest test	Best interpretation of will and preference

## What is civil society calling for?

1. Legislate for the right to supports in decision making and government duty to establish
2. Prohibit on findings of incapacity, substitute decision making and detention where alternatives exist
3. Legal Obligation to explore alternatives
4. Duty of 'third parties' – doctors, banks to accommodate you
5. Rights advisors in mental health system
6. Government to engage disability community in developing and delivering supports

## Strategies for law reform

- Build a coalition
- Be clear about demands
- Proposals to government
- Strategic litigation
- Pilot projects
- Stories in the media
- Activate public directly



“I’m not an object,  
I’m a person.  
I need my freedom.”

Rusi Stanev, at the  
European Court of  
Human Rights,  
November 2010

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Lawyers in group A represent the person whose name begins with A. Lawyers in group B represent the person whose name begins with B.

In groups, develop your arguments. You should use at least two sources of international human rights law to justify your answer. You may also use provisions of your country's domestic law and of course you can use common sense arguments.

Each group should **prepare a 5-minute presentation** on behalf of your client. You have **20 minutes** to prepare.

Alberto is 78 years old. Three years ago he was diagnosed with dementia, which has become gradually worse. He is a proud man who values his independence, and lives in a 5-bed house in a town where he has always lived. His wife died last year, and Alberto has been quite depressed since then. Although he would not admit it to anyone, he is struggling to cope, but is stoic and struggles on. He goes shopping twice a week, but sometimes he forgets to take enough money. At the supermarket he sometimes stands in the aisle for several minutes because he has forgotten what he needs to buy.

1(i)

Alberto's only child is Barbara. Aged 41, she lives in another town with her husband and three children. She cannot afford to buy a good car, so it takes her three hours in her old Fiat Punto to visit her dad, a journey she makes approximately every two months. She has become anxious that Albert cannot manage to live alone without support. She is also worried that unscrupulous people may try to take financial advantage of Alberto because of his dementia. She knows he has significant savings.

1(ii)

In order to protect her father's interests, she files an application to the local court to place him under her guardianship. She plans to take control of his finances and order groceries online and have it delivered so he doesn't need to go out. "It's what mum would have wanted", she says to herself. Barbara is also researching reasonable priced nursing homes near to her house, so that she can move him soon. "His dementia is only going to get worse", she says.

1(iii)

Angela is a 48-year old woman. She is married to Ben and they have two adult children. Angela has had issues with her mental health since she was a teenager. She does not use the words “problem” or “illness”. Twenty years ago her psychiatrist diagnosed her with schizophrenia, which has been confirmed by three other psychiatrists since then. She has been on medication for many years, and although she has some side effects, the medication has kept her quite stable. Because she sometimes has no problems for several months, she thinks that she does not need to take her medication. Three months ago she stopped taking her medication. She did not tell her doctor or her family. Each evening she pretended to take a pill, but actually secretly flushed it down the toilet.

2(i)

Ben began to notice something was wrong in mid-July. Angela started saying things about aliens invading her body. He supported her, but over the next couple of weeks she became more agitated. Ben suspected that it was her mental health issues. He asked her whether she had been taking her medication. “Yes, of course I have. Don’t you trust me?” she replied. Another couple of weeks went by, and by mid-August, Angela became more vocal and agitated.

Ben called her psychiatrist who advised him to bring Angela in to see her during the last week of August. At the appointment, Angela explained to her psychiatrist about the aliens, and kept pointing to her left breast. Ben said this was very strange and she had never done that before, so the psychiatrist referred Angela to her family doctor who gave her an appointment on 8 September. During that appointment, the family doctor examined Angela’s breast and felt a lump. He advised her to go for an x-ray, which took place on 15 September.

2(ii)

Since then Angela has been saying that the big white machine has driven the aliens out of her body, and she is back to normal, and has never felt better. However, the radiologist's report said that the lump could be malignant. Ben persuaded Angela to have a biopsy which was done by an oncologist on 19 September. The results came back on 21 September to say that the lump was indeed cancerous. The oncologist advised that Angela needed surgery to remove the lump and then a course of chemotherapy.

Ben and Angela sat down last weekend to discuss this. Angela's view was that she is a healthy woman with no problems and that there is no lump in her breast, and even if there was, it doesn't matter. She said "I will not have someone cutting me up!"

Ben was horrified to hear this, and the more he talked about cancer, the more she disengaged. He told their two daughters, who were really worried. The younger daughter summed up the view of Ben and both daughters: "That's mum's mental illness talking. She loves life. We obviously need to save her life." Without consent, the doctors cannot proceed with the surgery.

2(iii)

Ahmed is a 19-year-old young man. Last year he graduated from a special school for children with autism and learning disabilities. He did not get any qualifications, and did not like school. He does not have many friends, and has never been given the opportunity to form a friendship with someone without a label of an intellectual disability. He is a quiet person and likes to be by himself. His parents, Baaz and Badeeda, have brought him up in a very careful way, always taking care to follow his wishes. "He will never be normal", Baaz said to Badeeda quietly over breakfast, adding, "But we must do the best we can for him".

3(i)

Ahmed hates people touching him. While he was a small child Badeeda managed to brush his teeth twice a day. But as Ahmed went through puberty, she found it increasingly difficult to force him to do this. She has recently noticed that he shouts when he drinks cold drinks, and sometimes he does not eat her cakes (he *loves* her cakes) because he says it hurts. She realises he has not been to the dentist since he was 12. She calls a friend of the family, who is a dentist, and invites him round for tea. She hides the cakes (she does not want to be judged). During this visit, Ahmed allows the dentist to have a quick look in his mouth. The dentist says that he can see two black teeth at the back of Ahmed's mouth that obviously need to be treated.

Ahmed asks him what this means. The dentist replies, "You will come with your mum to see me in my office. You will sit in a comfy chair, and I will give you a small a local anaesthetic. This means that your jaw will feel numb. It will be fine! Then I will use a drill to remove the horrible part of your tooth, and then I will put in a new part. You will feel much better!" 3(ii)

Ahmed, not understanding all of this, but picking up on the word DRILL, screams and runs to his bedroom, slamming the door behind him.

The dentist explains to Badeeda that an untreated tooth can lead to an abscess or destruction of the inside of the tooth, and if this happens the tooth will need to be extracted. He explains that he has other patients with intellectual disabilities, and everyone is entitled to the best dental health available. He tells Badeeda that other parents choose to sedate their children (and adult children) with intellectual disabilities so that the treatment can proceed. This is something he can offer at his dental office and recommends this course of action to Badeeda.

Later that day watching TV, Badeeda suggests this to Baaz, and he agrees with her. "No son of mine should have rotten teeth!", he adds.

3(iii)

## **Instructions for groups 1A and 1B**

*Lawyers in group A represent Alberto. Lawyers in group B represent Barbara. In groups, develop your arguments. You should use at least two sources of international human rights law to justify your answer. You may also use provisions of your country's domestic law and of course you can use common sense arguments. Each group should prepare a 5-minute presentation on behalf of your client. You have 20 minutes to prepare.*

Alberto is 78 years old. Three years ago he was diagnosed with dementia, which has become gradually worse. He is a proud man who values his independence, and lives in a 5-bed house in a town where he has always lived. His wife died last year, and Alberto has been quite depressed since then. Although he would not admit it to anyone, he is struggling to cope, but is stoic and struggles on. He goes shopping twice a week, but sometimes he forgets to take enough money. At the supermarket he sometimes stands in the aisle for several minutes because he has forgotten what he needs to buy.

Alberto's only child is Barbara. Aged 41, she lives in another town with her husband and three children. She cannot afford to buy a good car, so it takes her three hours in her old Fiat Punto to visit her dad, a journey she makes approximately every two months. She has become anxious that Alberto cannot manage to live alone without support. She is also worried that unscrupulous people may try to take financial advantage of Alberto because of his dementia. She knows he has significant savings.

In order to protect her father's interests, she files an application to the local court to place him under her guardianship. She plans to take control of his finances and order groceries online and have it delivered so he doesn't need to go out. "It's what mum would have wanted", she says to herself. Barbara is also researching reasonable priced nursing homes near to her house, so that she can move him soon. "His dementia is only going to get worse", she says.

## Groups 2A and 2B

*Lawyers in group A represent Angela. Lawyers in group B represent Ben. In groups, develop your arguments. You should use at least two sources of international human rights law to justify your answer. You may also use provisions of your country's domestic law and of course you can use common sense arguments. Each group should prepare a 5-minute presentation on behalf of your client. You have 20 minutes to prepare.*

Angela is a 48-year old woman. She is married to Ben and they have two adult children. Angela has had issues with her mental health since she was a teenager. She does not use the words "problem" or "illness". Twenty years ago her psychiatrist diagnosed her with schizophrenia, which has been confirmed by three other psychiatrists since then. She has been on medication for many years, and although she has some side effects, the medication has kept her quite stable. Because she sometimes has no problems for several months, she thinks that she does not need to take her medication. Three months ago she stopped taking her medication. She did not tell her doctor or her family. Each evening she pretended to take a pill, but actually secretly flushed it down the toilet.

Ben began to notice something was wrong in mid-July. Angela started saying things about aliens invading her body. He supported her, but over the next couple of weeks she became more agitated. Ben suspected that it was her mental health issues. He asked her whether she had been taking her medication. "Yes, of course I have. Don't you trust me?" she replied. Another couple of weeks went by, and by mid-August, Angela became more vocal and agitated. Ben called her psychiatrist who advised him to bring Angela in to see her during the last week of August. At the appointment, Angela explained to her psychiatrist about the aliens, and kept pointing to her left breast. Ben said this was very strange and she had never done that before, so the psychiatrist referred Angela to her family doctor who gave her an appointment on 8 September. During that appointment, the family doctor examined Angela's breast and felt a lump. He advised her to go for an x-ray, which took place on 15 September.

Since then Angela has been saying that the big white machine has driven the aliens out of her body, and she is back to normal, and has never felt better. However, the radiologist's report said that the lump could be malignant. Ben persuaded Angela to have a biopsy which was done by an oncologist on 19 September. The results came back on 21 September to say that the lump was indeed cancerous. The oncologist advised that Angela needed surgery to remove the lump and then a course of chemotherapy.

Ben and Angela sat down last weekend to discuss this. Angela's view was that she is a healthy woman with no problems and that there is no lump in her breast, and even if there was, it doesn't matter. She said "I will not have someone cutting me up!". Ben was horrified to hear this, and the more he talked about cancer, the more she disengaged. He told their two daughters, who were really worried. The younger daughter summed up the view of Ben and both daughters: "That's mum's mental illness talking. She loves life. We obviously need to save her life."

Without consent, the doctors cannot proceed with the surgery.

## Groups 3A and 3B

*Lawyers in group A represent Ahmed. Lawyers in group B represent Badeeda and Baaz. In groups, develop your arguments. You should use at least two sources of international human rights law to justify your answer. You may also use provisions of your country's domestic law and of course you can use common sense arguments. Each group should prepare a 5-minute presentation on behalf of your client. You have 20 minutes to prepare.*

Ahmed is a 19-year-old young man. Last year he graduated from a special school for children with autism and learning disabilities. He did not get any qualifications, and did not like school. He does not have many friends, and has never been given the opportunity to form a friendship with someone without a label of an intellectual disability. He is a quiet person and likes to be by himself. His parents, Baaz and Badeeda, have brought him up in a very careful way, always taking care to follow his wishes. "He will never be normal", Baaz said to Badeeda quietly over breakfast, adding, "But we must do the best we can for him".

Ahmed hates people touching him. While he was a small child Badeeda managed to brush his teeth twice a day. But as Ahmed went through puberty, she found it increasingly difficult to force him to do this. She has recently noticed that he shouts when he drinks cold drinks, and sometimes he does not eat her cakes (he *loves* her cakes) because he says it hurts. She realises he has not been to the dentist since he was 12. She calls a friend of the family, who is a dentist, and invites him round for tea. She hides the cakes (she does not want to be judged). During this visit, Ahmed allows the dentist to have a quick look in his mouth. The dentist says that he can see two black teeth at the back of Ahmed's mouth that obviously need to be treated.

Ahmed asks him what this means. The dentist replies, "You will come with your mum to see me in my office. You will sit in a comfy chair, and I will give you a small a local anaesthetic. This means that your jaw will feel numb. It will be fine! Then I will use a drill to remove the horrible part of your tooth, and then I will put in a new part. You will feel much better!".

Ahmed, not understanding all of this, but picking up on the word DRILL, screams and runs to his bedroom, slamming the door behind him.

The dentist explains to Badeeda that an untreated tooth can lead to an abscess or destruction of the inside of the tooth, and if this happens the tooth will need to be extracted. He explains that he has other patients with intellectual disabilities, and everyone is entitled to the best dental health available. He tells Badeeda that other parents choose to sedate their children (and adult children) with intellectual disabilities so that the treatment can proceed. This is something he can offer at his dental office and recommends this course of action to Badeeda.

Later that day watching TV, Badeeda suggests this to Baaz, and he agrees with her. "No son of mine should have rotten teeth!", he adds.

# Access to justice

Dr Oliver Lewis

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## Outline

1. Victim rights in EU law (Directive 2012/29/EU)
2. Access to justice rights in the CRPD
3. Lawyers' actions and requests

## Directive 2012/29/EU

### **Establishing minimum standards on the rights, support and protection of victims of crime**

- 25 October 2012 – adopted
- 15 November 2012 - entered into force
- 16 November 2015 – deadline for Member States to transpose the provisions into national laws
- 28 September 2016 – you will use it in courtrooms across the EU

## 2 + 1

- The Directive
  - Paragraphs 1 to 72
  - Articles 1 to 32
- “DG Justice Guidance Document related to the transposition and implementation” of the Directive (Dec 2013)

## Purpose

Ensure that victims

1. Receive appropriate information
2. Receive appropriate support
3. Receive appropriate protection
4. Are enabled to participate in criminal proceedings

Art. 1

## New rights and obligations (1/3)

- **Family members of deceased victims** benefit from all rights in the Directive.” Family members are widely defined and include also non-married intimate partners (Art. 2)
- **Accessible and understandable information** – All communication with victims must ensure that they understand (linguistically or otherwise) (Arts 3-7)
- **Child-sensitive communication** – Recorded interviews; “special representative” (Arts 24)
- **Review decision not to prosecute** – Victims have the right to be informed. Right to instigate a review of that decision (Art. 11)

## New rights and obligations (2/3)

- **Access to victim support** – Not dependent on the victim having reported the crime. Police should refer to victim support. Minimum:
  - a) Info and advice about rights (incl on accessing compensation for criminal injuries, role in proceedings etc)
  - b) Info about referral to specialist services
  - c) Emotional and “where available” psychological support
  - d) Advice on financial and practical issues arising from the crime
  - e) Advice relating to the risk and prevention of secondary and repeat victimisation, of intimidation and retaliation

Article 9

## New rights and obligations (3/3)

- **Individual assessment to identify vulnerability and special protection measures** – To determine whether person is vulnerable to secondary or repeat victimisation or intimidation during criminal proceedings. If they have specific needs, a range of special measures should be put in place to protect them. (Art. 22)
- **Specialist support services** - Minimum is shelters and targeted and integrated support for victims with specific needs incl. victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling. (Arts. 18-24)

## Victims with disabilities

“...are able to benefit fully from the rights set out in this Directive, on an equal basis with others, including by facilitating the accessibility to premises where criminal proceedings are conducted and access to information.” (para. 15)

## Information

Information and advice provided by competent authorities, victim support services and restorative justice services should, as far as possible, be given by means of a range of media and in a manner which can be understood by the victim. Such information and advice should be provided in **simple and accessible language**. (para. 21)

It should also be ensured that the victim can be understood during proceedings. In this respect, the victim's knowledge of the language used to provide information, age, maturity, **intellectual and emotional capacity**, literacy and any **mental or physical impairment** should be taken into account. Particular account should be taken of difficulties in understanding or communicating which may be due to a **disability** of some kind, such as **hearing or speech impediments**. Equally, limitations on a victim's ability to communicate information should be taken into account during criminal proceedings. (para. 21)

## Risk of...

- secondary victimisation
- repeat victimisation (or revictimisation)
- intimidation
- retaliation

## Victims with disabilities at risk

Victims with disabilities and child victims tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation.

Particular care should be taken when assessing whether such victims are at risk.

There should be a strong presumption that those victims will benefit from special protection measures.

(para. 57)

- Victims who have been identified as vulnerable to secondary and repeat victimisation, to intimidation and to retaliation should be offered appropriate measures to protect them during criminal proceedings. The exact nature of such measures should be determined through the **individual assessment**, taking into account the **wish** of the victim. The extent of any such measure should be determined without prejudice to the rights of the defence and in accordance with rules of judicial discretion. The victims' **concerns and fears** in relation to proceedings should be a key factor in determining whether they need any particular measure. (para 58)

## In your country?

1. How are at-risk victims with disabilities identified?
2. What support is offered to them?
3. To what extent does the support meet the requirements of the Directive?

## CRPD Article 13

Goal: to “facilitate [people’s] effective role” in legal proceedings

Obligation: to “ensure effective access to justice”

How? Innovations such as

- procedural and age-appropriate accommodations
- training for justice professionals, incl police and prison staff

Questions:

1. Which roles can people with disabilities play in legal proceedings?
2. What are accommodations in legal proceedings?

## Connecting CRPD rights

- Prohibition of discrimination – Art. 5
- Legal capacity – Art. 12
- Evolving capacity of children – Principles in Art. 3
- Reasonable accommodation in detention – Art. 14(2)

## CRPD Committee on the EU (Oct 2015)

### Access to justice (art. 13)

38. The Committee is concerned about discrimination faced by persons with disabilities in accessing justice, owing to the lack of procedural accommodation in European Union member States.

39. The Committee recommends that the European Union take appropriate action to combat discrimination faced by persons with disabilities in accessing justice by ensuring that full procedural accommodation and funding for training justice personnel on the Convention are provided in its member States.

## Reasonable accommodation

- [N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 2, CRPD

## What sorts of accommodations will you (lawyer) provide / request?

1. 34-year-old man, wheelchair user, single parent. The local authority wants to take his daughter into care, and he is resisting the application
2. 15yo girl who is Deaf, accused of theft
3. 22yo man with autism who is accused of hacking into government websites
4. 25yo trans person you suspect has intellectual disabilities who has been found guilty of criminal damage. With 3 other people, they drew graffiti on a bank, but the others ran away and were not caught by police
5. 85yo woman with dementia whose house was burgled. She saw the burglar and you are calling her to give evidence at trial

# Participation in Public and Political life: Substantive obligations under the UN Convention on the Rights of Persons with Disabilities

## EU Disability Law and the UN Convention on the Rights of Persons with Disabilities

Trier, 26-27 September 2016

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### 1. Introduction

Persons with disabilities have been excluded from enjoying human rights on an equal basis with others. This exclusion includes enjoyment of the right to political participation. This paper examines the origins of the right to political and public participation under international human rights law before exploring the substantive obligations contained in Article 29 of the UN Convention on the Rights of Persons with Disabilities (CRPD). The paper then examines how Article 29 seeks to remove the barriers facing persons with disabilities in exercising their right to participate in political and public life. The paper then reflects upon the interconnection between Article 29 with other provision in the CRPD such as Article 12 (Equal Recognition Before the Law), Article 9 (Accessibility), Article 6 (Women and Girls) and Article 24 (the Right to Inclusive Education).

### 2. The Right to Political Participation Under International Human Rights Law

The right to political participation is set out in a number of international human rights instruments, the first of which was the Universal Declaration of Human Rights (UDHR). Article 21 of the UDHR provides as follows:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 the International Covenant on Civil and Political Rights (ICCPR) subsequently made the right to political participation legally binding. Essentially Article 25 of the ICCPR guarantees the right of citizens to political participation and requires a level of democratic accountability on the part of the state.<sup>1</sup> In addition Article 25 sets out aspects of the right to political participation such as the right to the right to vote and the right of

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<sup>1</sup> See Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2<sup>nd</sup> ed, 2005).

access to public service. The text of Article 25 of the ICCPR reads as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The UN Human Rights Committee (HRC) adopted a General Comment on Article 25 of the ICCPR in 1996.<sup>2</sup> In its General Comment the HRC described the importance of the right as follows:

“Article 25 of the Covenant recognizes and protects the rights of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”<sup>3</sup>

The HRC stated that the right to vote at elections and referenda must be established by law and can only be subject to reasonable restrictions, (giving the example of setting a minimum age limit for the right to vote). Of particular relevance for this paper is the HRC’s statement that it would be “unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements”.<sup>4</sup> The HRC noted that restrictions on the right to vote are only permitted when they are based upon “objective and reasonable” criteria and specifically required State Parties to detail such restrictions in their reporting on the ICCPR.<sup>5</sup> Nevertheless the HRC stated that “mental incapacity” could be a ground for restricting the right to vote or hold public office.

“Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.”<sup>6</sup>

While the HRC interpreted the ICCPR as permitting the restriction of the

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<sup>2</sup> ‘General Comment No 25: Article 25’ (UN Human Rights Committee, adopted 27 August, 1996).

<sup>3</sup> Ibid, at para 1.

<sup>4</sup> Ibid, at para 10.

<sup>5</sup> Ibid, at para 14.

<sup>6</sup> Ibid, at para 4.

right to political participation on the basis of mental incapacity the Committee did state that “positive measures” akin to reasonable accommodations should be taken to “overcome specific difficulties” faced by certain citizens in exercising their right to political participation.<sup>7</sup> These difficulties were identified as illiteracy, language barriers, poverty and impediments to freedom of movement that stopped persons entitled to vote from exercising their right.<sup>8</sup> The HRC also stated that information and materials about voting should be available in minority languages and that accommodations such as photographs and symbols, should be used to ensure that illiterate voters have adequate information on which to base their vote.<sup>9</sup> The Fundamental Rights Agency has suggested that the HRC’s interpretation of Article 25 in this General Comment will “need to evolve in order to take due account of the developments in international human rights protection in the disability area”.<sup>10</sup> As we will see below the HRC’s assertion that “mental incapacity” was a “reasonable and objective” criteria upon which to restrict the right of political participation and hold office is at odds with the CRPD, in particular Article 12 (equal recognition before the law) and Article 29 (the right to participation in public and political life).

### **3. The UN Convention on the Rights of Persons with Disabilities**

The United Nations since its establishment in the wake of World War II to the end of the last millennium created 7 core human rights Conventions.<sup>11</sup> The CRPD was the first UN Convention of this millennium. It was felt that a specific Convention was needed to deal with the human rights of persons with disabilities as the existing UN human rights treaties were not specifically inclusive of disability and were considered insufficient in challenging national laws that excluded the rights of persons with disabilities.<sup>12</sup> The purpose of the CRPD was to clarify the existing human rights law as it relates to persons with disabilities as opposed to the

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<sup>7</sup> Ibid, at para 12.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> ‘The right to political participation of persons with mental health problems and persons with intellectual disabilities’ (Luxembourg: Publications of the European Union, European Union Agency for Fundamental Rights, 2010) at page 9.

<sup>11</sup> The core human rights instruments include the International Covenant on Civil and Political Rights (New York, 16 December 1966); International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984); Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979); International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990); Convention on the Rights of the Child (New York, 20 November 1989).

<sup>12</sup> Quinn, Degener et al “Human Rights and Disability: The Current Use of the Potential of United Nations Human Rights Instruments in the Context of Disability” (Office of the United Nations High Commissioner for Human Rights, 2002).

creation of new rights.<sup>13</sup> The new vision of disability espoused by the social model of disability has been very influential in impacting policymaking at the domestic and international level. There is no doubt that the CRPD has adopted the approach of the social model of disability.<sup>14</sup>

The requirement that State Parties to the CRPD ensure “full and effective participation and inclusion in society” and “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” are very important aspects of the CRPD.<sup>15</sup> They are not new revolutionary concepts, rather they are the legacy of human rights theory and law.<sup>16</sup> However, the application of these principles in the context of disability is considered innovatory.<sup>17</sup> The CRPD represents a sea change in how persons with disabilities are seen.<sup>18</sup> Persons with disabilities are no longer to be viewed as “objects” requiring charity and care, rather as “human subjects” enjoying human rights on an equal basis with everyone including the right to political participation.<sup>19</sup>

Before considering the substantive obligations of Article 29 of the CRPD is worthwhile reflecting upon the meaning of participation and inclusion. The principles of participation and inclusion are weighty concepts as can be seen from the text of the CRPD. The preamble to the Convention states “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>20</sup> The preamble also notes that despite different instruments and undertakings by State Parties, persons

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<sup>13</sup> See Quinn “Resisting the ‘Temptation of Elegance’: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?” in Aranardóttir and Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff, 2009) at page 215; Quinn, Degener et al “Human Rights and Disability: The Current Use of the Potential of United Nations Human Rights Instruments in the Context of Disability” (United Nations: Office of the United Nations High Commissioner for Human Rights, 2002).

<sup>14</sup> Mexico the State Party that is widely seen as the driving force behind the initial proposal for a disability rights Convention, was committed proponent of the social model of disability. Mexico was also committed to ensuring that persons with disabilities and the organisations that represent them were included in the Convention process. See de Burca “The European Union in the negotiation of the UN Disability Convention” (*European Law Review*: 2010, 35(2), 174-196) at page 183 and 188.

<sup>15</sup> See Quinn, and O’Mahony ‘Disability and Human Rights: A New Field in the United Nations’ in: Krause and Scheinin (eds) *International Protection of Human Rights: A Textbook* (Turku: Åbo Akademi University Institute for Human Rights, 2012) and Lord and Stein “The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities” (*University of Washington Law Review*: 83, 2008, pages 449-479).

<sup>16</sup> Quinn “Resisting the ‘Temptation of Elegance’: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?” in Aranardóttir and Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff, 2009) at pages 215-216.

<sup>17</sup> *Ibid.*, at page 216.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> See Preamble to the CRPD section e.

with disabilities continue to face barriers in their “participation as equal members of society and violations of their human rights in all parts of the world”.<sup>21</sup> As such the principle of participation as set out in the convention essentially seeks to engage persons with disabilities at all levels of society and to ensure that they have opportunities on an equal basis with others to be involved in decisions that are relevant to them and others.<sup>22</sup> The Office of the High Commissioner for Human Rights has noted that inclusion “is a two-way process: persons who have no disabilities should be open to the participation of persons with disabilities”.<sup>23</sup>

The values or principles of the convention are set out in Article 3.<sup>24</sup> They include respect for inherent dignity, autonomy including the freedom to make one’s own choices and independence, non-discrimination, full and effective participation in society, respect for difference, equality of opportunities, accessibility, equality between men and women and respect for the evolving capacities of children with disabilities. These values are important in understanding the right to public and political participation in Article 29 (as the text of the CRPD contains many ambiguities, which can be resolved with reference to these principles).<sup>25</sup>

Article 4 of the CRPD sets out the general obligations of States Parties in addition to the more specific obligations contained in its substantive provisions.<sup>26</sup> These general obligations include an undertaking to adopt fresh legislation and other appropriate administrative measures where needed to implement the convention, to modify or repeal laws, customs or practices that constitute discrimination, to mainstream disability into all relevant policies and programmes, to refrain from any act or practice that is inconsistent with the convention, to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise. Article 4 on general obligations also requires effective consultation with persons with disabilities and their representative organisations in the development and implementation of legislation and policies to implement the convention.<sup>27</sup> Thus Article 4 gives clear legal expression to the slogan ‘nothing about us without us’, which informed the

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<sup>21</sup> See Preamble to the CRPD section k.

<sup>22</sup> “From Exclusion to Equality Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol Conclusion” (Geneva: United Nations Office of the High Commissioner for Human Rights, 2007) at page 16.

<sup>23</sup> “From Exclusion to Equality Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol Conclusion” (Geneva: United Nations Office of the High Commissioner for Human Rights, 2007) at page 16.

<sup>24</sup> For a discussion on this see Quinn, and O’Mahony ‘Disability and Human Rights: A New Field in the United Nations’ in: Krause and Scheinin (eds) *International Protection of Human Rights: A Textbook* (Turku: Åbo Akademi University Institute for Human Rights, 2012).

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

negotiation of the CRPD and is essential in ensuring the persons with disabilities are included and participate in public and political life.

#### **4. Participation in Political and Public Life: Article 29 of the CRPD**

Article 29 (the right to participation in political and public life) can be categorised as a right of access and participation. The rationale for including rights of access and participation such as Article 29 in the CRPD is that other rights aimed at preventing abuse of persons with disabilities and restoring autonomy and legal capacity were insufficient by themselves to address all of the human rights restrictions.<sup>28</sup> Essentially rights in the CRPD that deal with access and participation seek to tackle barriers in general as well as in the specific contexts such as access to political life, access to justice and access to the cultural life of the nation. This aspect of the convention is considered to be very innovative as these rights serve to identify and remove obstacles that make participation, something taken for granted by most, a reality for persons with disabilities.

Thus Article 29 on access to the political arena for persons with disabilities is very important since persons with disabilities have lacked political impact (despite their large numbers). This is due in part to the extremely high costs of engaging in political life (for many persons with disabilities their time can be taken up with mere survival), but it is also due to the lack of accessibility of the political arena for persons with disabilities. The most obvious example is inaccessible voting and polling stations as well as the lack of political information (such as party manifestos) in accessible formats. Therefore, Article 29 seeks to remove these and other barriers. It requires that voting procedures, facilities and materials are appropriate, accessible and easy to use. It protects the right to vote by secret ballot with appropriate assistance and to stand for election. A key to exercising effective political influence is the right to form civil society groups and Article 29 requires States Parties to promote an environment where persons with disabilities can effectively and fully participate in political parties and other groups as well as specifically in organisations of persons with disabilities themselves. The text of Article 29 is as follows:

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- a Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
  - i Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
  - ii Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation,

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<sup>28</sup> Examples of rights that are aimed at preventing abuse of persons with disabilities and restoring autonomy and legal capacity Article 12 (Equal Recognition before the Law), Article 16 (the right to be free of exploitation violence and abuse) and Article 19 (the Right to Community Living).

- and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
  - iii Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;
- b Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:
- i Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;
  - ii Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 29 has already proven its importance in challenging the exclusion of persons with disabilities from political participation. In 2010, the European Commission for Democracy Through Law (the Venice Commission) issued a regressive statement in relation to the eligibility of persons with disabilities to vote and stand for election. It stated that “[n]o person with a disability can be excluded from the right to vote or to stand for election on the basis of her/his physical and/or mental disability unless the deprivation of the right to vote and to be elected is imposed by an individual decision of a court of law because of proven mental disability”.<sup>29</sup> This resulted in a campaign that challenged the Venice Commission’s position; the campaign was entitled “Save the Vote”.<sup>30</sup> The advocacy around the campaign focused on the CRPD, in particular, Articles 8, 12, 13, and 29.<sup>31</sup> The Venice Commission eventually amended its position as a result of the campaign and pressure from the Council of Europe.<sup>32</sup>

## **5. General Comments & Concluding Observations of the Committee on the Rights of Persons with Disability**

To date the UN Committee on the Rights of Persons with Disabilities (the

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<sup>29</sup> See European Commission for Democracy Through Law (Venice Commission), Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, 21 October 2010) (doc. CDL-AD(2010)036), para. 2.

<sup>30</sup> The Mental Disability Advocacy Centre (MDAC) supported by a coalition of human rights organisations led the campaign.

<sup>31</sup> The Council of Europe Committee of Ministers issued Recommendation CM/REC(2011)14 of 16 November 2011, on the participation of persons with disabilities in political and public life. The recommendation aims to remove barriers and create conditions for active citizenship, without discrimination, for all and in all life settings. It stresses that all persons with disabilities are entitled to express their views and should not be deprived of their right to vote or stand for election on the basis of disability.

<sup>32</sup> See ‘Venice Commission Backs Right to Vote’, MDAC, News, <[http://mdac.info/19/12/2011/venice\\_commission\\_backs\\_right\\_to\\_vote](http://mdac.info/19/12/2011/venice_commission_backs_right_to_vote)>.

body responsible for monitoring implementation of the CRPD) have issued 4 General Comments. These General Comments have explored Article 12 (Equal Recognition Before the Law), Article 9 (Accessibility), Article 6 (Women and Girls) and Article 24 (the Right to Inclusive Education). The Committee in all 4 General Comments dedicated text to explaining the interconnection with these rights and the right to political and public participation, which will be discussed below.

The Committee in its Concluding Observations to State Parties and in General Comment No 1 on Article 12 (Equal Recognition Before the Law) highlighted that deprivation of legal capacity is one of the most significant impediments to enjoyment of the right to political and public participation. While law in many jurisdictions has been designed to respect individual autonomy including in the area of political participation, persons with disabilities are at risk of having their decisions ignored. Mental capacity is a concept used to define the line between legally effective and legally ineffective decisions. If a person is considered to have mental capacity they are considered to have legal capacity to act - meaning their decisions or choices will be respected including choices about political expression.<sup>33</sup> If a person is not considered to have mental capacity they will not be considered to have legal capacity to act meaning that their decisions are at risk of being disregarded and decisions can be made by others on their behalf (this is known as substitute decision-making). Article 12 of the CRPD provides for “universal legal capacity” while providing for differences between persons with disabilities through strategies such as reasonable accommodation and support.<sup>34</sup>

The Committee has noted that persons with disabilities have historically been denied their right to legal capacity in many areas in a discriminatory manner.<sup>35</sup> As such they have called on States Parties to holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Where these restrictions exist they “must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others”.<sup>36</sup> Accordingly in General Comment No 1 on Article 12 (Equal Recognition Before the Law) the Committee has highlighted that the denial of legal capacity is one of the most serious impediments for persons with disabilities in exercising their right to political and public participation and State Parties are required to take urgent measures to address the denial.<sup>37</sup>

“Denial or restriction of legal capacity has been used to deny political

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<sup>33</sup> See Richardson “Mental Capacity in the Shadow of Suicide: What can the law do?” *International Journal of Law in Context* 9, 87-105, 2013.

<sup>34</sup> See Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’, *Syracuse Journal of International Law and Commerce* 34 (2007): 2, 429-62.

<sup>35</sup> See ‘General Comment No. 1: Article 12 (Equal Recognition Before the Law)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, adopted 11 April, 2014) at para 7.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

participation, especially the right to vote, for certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). This means that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.

State parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referenda without discrimination. The Committee further recommends that State parties guarantee the right of persons with disabilities to stand for elections, to effectively hold office and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity.”<sup>38</sup>

The Committee in its Concluding Observations have also identified accessibility of polling stations as a major impediment for persons with disabilities in exercising their right to political participation. For example in its Concluding Observations to Brazil on its compliance with Article 29 the Committee expressed its concern that many polling stations are not accessible to persons with disabilities, and that voting information is not provided in sufficient accessible formats.<sup>39</sup> Therefore, the Committee recommended that Brazil increase its efforts to ensure that voting procedures, facilities and materials are fully accessible.<sup>40</sup> The problem of accessibility was further addressed in General Comment No 2 on Article 9 (Accessibility) where the Committee highlighted the requirement to make the electoral system accessible from voting to holding office.<sup>41</sup>

“Article 29 of the Convention guarantees persons with disabilities the right to participate in political and public life, and to take part in running public affairs. Persons with disabilities would be unable to exercise those rights equally and effectively if States parties failed to ensure that voting procedures, facilities and materials were appropriate, accessible and easy to understand and use. It is also important that political meetings and materials used and produced by political parties or individual candidates participating in public elections are accessible. If not, persons with disabilities are deprived of their right to participate in the political process in an equal manner. Persons with disabilities who are elected to public office must have equal opportunities to carry out their mandate in a fully accessible manner.”<sup>42</sup>

The Committee in General Comment No 3 on Article 6 (Women and Girls)

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<sup>38</sup> Ibid, at para 44-45

<sup>39</sup> See for example Concluding Observations to Brazil (Geneva: UN Committee on the Rights of Persons with Disabilities, 29 September, 2015) at para 52.

<sup>40</sup> Ibid, at para 53.

<sup>41</sup> ‘General Comment No 2: Article 9 (Accessibility)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, adopted 11 April, 2014).

<sup>42</sup> Ibid, at para 43.

noted that women and girls with disabilities have historically “been silenced and thus women and girls with disabilities are disproportionately underrepresented in public decision-making”.<sup>43</sup> The Committee identified that power imbalances and multiple forms of discrimination have meant that girls and women with disabilities have fewer opportunities to establish or join organisations that can represent their needs as women, children and persons with disabilities.<sup>44</sup> Similarly the Committee in General Comment No 4 on Article 24 (the Right to Inclusive Education) identified that participation in political and public life is enhanced through the realisation of the right to inclusive education.<sup>45</sup> The Committee recommended that curricula for all students must include the topic of citizenship and promote the skills of self-advocacy and self-representation, as these skills are a fundamental basis for participation in political and public life.<sup>46</sup> The Committee also noted that public affairs include forming and participating in student organisations such as students’ unions. Therefore, the Committee recommended that States Parties should promote an environment where persons with disabilities can form, join and effectively and fully participate in such student organisations and provide accommodations (such as all forms of communication and language of their choice).<sup>47</sup> Additionally the Committee expressed concern that persons with intellectual or psychosocial disabilities are excluded from political participation.<sup>48</sup> For example in its Concluding Observations to Australia the Committee recommended that the Australian government “enact legislation to restore presumption of the capacity of persons with disabilities to vote and exercise choice, and ensure that all aspects of voting in an election are made accessible to all citizens with disabilities”.<sup>49</sup>

## 6. Conclusions

The formulation of Article 29 on the right to participate in political and public life must be seen as an innovative provision in an innovative human rights treaty. Article 29 requires that the electoral process is designed and administered in a manner that is non-discriminatory. As such State Parties to the CRPD are required to make accommodations so that persons with disabilities can exercise their right of political participation on an equal basis with others. To date an inadequate amount of attention has been given to Article 29 of the CRPD with most work focusing on the “validity and scope of exclusions” of persons from voting.<sup>50</sup> It has also been noted that both the courts and legislators have not given sufficient attention to

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<sup>43</sup> ‘General Comment No 3: Article 6 (Women and Girls with Disabilities)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, adopted 26 August, 2016).

<sup>44</sup> *Ibid*, at para 60.

<sup>45</sup> ‘General Comment No 4: Article 24 (Inclusive Education)’ (Geneva: UN Committee on the Rights of Persons with Disabilities, adopted 26 August, 2016).

<sup>46</sup> *Ibid*, at para 55.

<sup>47</sup> *Ibid*.

<sup>48</sup> See Concluding Observations to Australia (Geneva: UN Committee on the Rights of Persons with Disabilities, 21 October, 2013) at para 50.

<sup>49</sup> *Ibid*, at para 51.

<sup>50</sup> See Janet Lord, Michael Stein & Janos Fiala-Butora “Facilitating an Equal Right to Vote for Persons with Disabilities” (Journal of Human Rights Practice 6(1), 2014, 115-139).

supporting and facilitating persons with disabilities to exercise their vote.<sup>51</sup> Provisions in the CRPD dealing with issues of access and participation, seek to remove barriers in general as well as in the specific contexts of access to political life, access to justice and access to the cultural life of the state. These provisions are essential in identifying and removing obstacles that make political participation – something taken for granted by most – a reality for persons with disabilities. The Committee on the Rights of Persons with Disabilities have been very clear that the denial or restriction of legal capacity and the subsequent blocking of political participation is prohibited. State Parties have a clear obligation to protect and promote the right of persons with disabilities to access support in order to participate in political life without discrimination.

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<sup>51</sup> Ibid.

## Disability in Employment

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## Disability in Employment

- Right to work
- UNCRPD articles
- Directive 2000/78
  - Scope
  - Discrimination
    - Direct
    - Indirect
    - Harassment
      - Associative discrimination
  - Reasonable accommodations

## UNDHR

- Article 23 1.
  - right to work,
  - free choice of employment,
  - just and favourable conditions of work and
  - protection against unemployment.
- 2. equal pay for equal work.
- 3. - right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity –
- 4. Everyone has the right to form and to join trade unions for the protection of his interests.

## UN Covenant on Economic, Social and Cultural Rights

- Article 6 states recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

## UN Covenant on Civil and Political Rights

### Article 26

- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## Community Charter of the Fundamental Social Rights of Workers

- Principles of the Community Charter of the Fundamental Social Rights of Workers form the basis for Directive 2000/78.
- A4 Charter
  - “Every individual shall be free to choose and engage in an occupation according to the regulations governing each occupation.”
  - Article 26 “All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration.”

## Using the Charter

- Article 6(1) of The Lisbon Treaty - "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 ... which shall have the same value as the Treaties."
- Equal Treatment is a general principle, similar to the Charter rights corresponding to the rights under the Convention on Human Rights and Fundamental Freedoms **Åklagaren v Åkerberg Fransson** (Case C-617/10)
- If interpreting a directive and the Charter CJEU will answer in terms of the interpretation of the directive (**Mario Vital Pérez v Ayuntamiento de Oviedo** C416/13 ).
- **Association de mediation sociale v Union locale des syndicats CGT** (C-176/12) If national law conflicts with the Charter it must be disapplied in a claim litigated between private individuals

## Helsinki Employment Guidelines for 1999

- 9 – a labour market open to all- is designed to make integration easier for people with disabilities, for people from ethnic minority groups and for many groups and individuals who experience difficulties in acquiring skills and access to the labour market.

## UNCRPD

Article 1 - the aims of the UNCRPD - to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

**"Reasonable accommodation"** means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

## UNCRPD

- **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

- Article 2 provides **definitions of discrimination**. "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

## Reasonable accommodation in UNCRPD

- "**Reasonable accommodation**" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

## Directive 2000/78

- Material scope Article 3
- Concept of Direct Discrimination Article 2(2)(a)
- Concept of Indirect Discrimination Article 2(2)(b)
- Harassment Article 2(3)
  - All can be associative? **CHEZ case**
- Reasonable accommodation Article 5

## Direct

- “Direct discrimination is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation” (on the ground of disability)
- C-303/06 **Coleman v Attridge Law** can be associative (as can harassment)

## Indirect discrimination

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

## Indirect discrimination and reasonable accommodation

- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

## Reasonable accommodation

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

## Case Law

- Mainly has examined the concept of disability.
- Chacon Navas C-13/05
- HK Danmark C-312/11
- FOA C-354/13
- Z C-363/12

## ECHR case law and reasonable accommodation

- ECHR case law:
- *Çam v. Turkey* (application no. 51500/08) Art 2 P 1 + Art 14: discrimination on grounds of disability also extended to the refusal to make reasonable accommodation to facilitate access by persons with disabilities to education. Such accommodation was vital for the exercise of human rights. By refusing to enrol Ms Çam without considering the possibility of accommodating her disability, the national authorities had prevented her, without any objective and reasonable justification, from benefiting from a musical education, in breach of the Convention.

*CASE STUDY – A small off shore tax haven story of disability*

**Instructions for delegates - Please read these and the case studies in advance**

The aim of this workshop is to consider the application of EU anti-discrimination law in a domestic case. You are the judge.

If the scenario seems implausible in light of legal or social factors in your jurisdiction, try to consider how situations of this sort might in principle be considered in such circumstances. The case study involves issues which might arise under EU equality law, and the workshops focus on using that law and the circumstances in which you must or may apply it.

There will be a little over an hour to discuss the case study. There will then be a coffee break followed by a plenary session for presentation of conclusions and further discussion as necessary.

Your small group will be asked to present back to the plenary session.

*Smallislandia*

1. Smallislandia is an offshore EU state. Smallislian employment law states that there is an obligation on an employer “to consider the needs of disabled persons in general when making arrangements in the workplace.” Failure to do this can result in an employer being liable for civil damages before the labour courts.
2. Smallislian law says it implements Directive 2000/78 by stating that all rights under the Directive form part of Smallislian law. Smallislian courts have interpreted this as meaning that employers are obliged only to consider the needs of persons with disabilities to the extent of whether the employer’s arrangements would inhibit persons with disabilities in general from taking up employment with the employer, or remaining in employment if they become disabled whilst in employment.
3. The Smallislian supreme court now has the case of Mr Bojo v Idioat plc & Smalislandian Tax Pantheon before it. Mr Bojo has worked for himself for many years as a tax adviser. He was (for 3 months) an “unpaid intern” at the tax advisory company Idioat Plc.
4. His internship was due to last 18 months but was terminated prematurely by Idioat plc. He arranged he would attend Idioat 4 days a week, leaving him one day a week to run his small tax advice practice as a self employed tax adviser. Idioat Plc’s arrangements for persons with disabilities include accessible buildings (wheelchair accessible lifts and markings on the stairs for sight impairment).

*Mr Bojo and his impairments*

5. Mr Bojo has a physical impairment which Smalislians call “emanon”. He was diagnosed with this 6 months before his internship started and it lasted until a month after his internship ended.
6. The impairment causes him sudden dizziness, pain, and sleepless nights (in turn having an impact on his ability to concentrate). For most people it only has intermittent symptoms. Mr Bojo would have infrequent bouts of these symptoms (approximately one bout every six weeks), but they are made worse by stress.

7. He also has been diagnosed for a long time as having claustrophobia, a condition which means he cannot use lifts without experiencing panic attacks and he avoids small enclosed spaces such as a crowded metro.

#### *The Smallislandia Tax Pantheon*

8. This is an elite body of tax advisers in Smallislandia. Its qualification is an indicator that the holder is at the very top of his or her profession. The Smallislandia Tax Pantheon (STP) runs the examinations for the qualification. For Mr Bojo this is a post graduate (specialist) tax exam which would allow him to hold himself out not just as a tax adviser but a member of the Smallislandian Tax Pantheon and accordingly allow him, for example, to charge more for his self-employed work, or obtain better employment. It is a valuable qualification in the labour market in the field of tax in Smallislandia.

#### *Mr Bojo and his exam stress*

9. In the run up to his latest attempt to take the STP exam he suffers his emanon symptoms much more frequently than usual. The exam results are notified immediately as it is an electronic online examination involving multiple choice questions. So he learns immediately that he has failed the paper, and tells Idioat immediately.

10. One of the requirements for the qualification is set by the STP examining body. It is that all of the exams in the qualification must be passed within 3 years of sitting the first paper. Mr Bojo has passed all of them apart from one, but his first exam paper passed was at 3 years before the internship was terminated. Due to his impairment he could not concentrate sufficiently to revise. Mr Bojo can continue to practice as a tax adviser but cannot hold himself out as having the MSTP qualification and will now need to start the qualification again from the beginning.

#### *The end of the internship*

11. Idioat Plc tell him that his voluntary work for them has come to an end saying that this is because he has failed to pass the STP exam and they do not consider him to be suitable to carry on the internship. He complains that passing the exam was never part of the conditions for his undertaking the internship. All those working full time for Idioat have this qualification.

#### *Complaint against the STP body*

12. Mr Bojo complained against the STP body that it failed to make reasonable accommodations for him by extending the period within which he could satisfy the requirements of the exam.

13. STP reply that the law does not apply to them because the Directive 2000/78 contains no obligation to make reasonable accommodations on them as they are not his employer and besides the Smallislandian "Get-a-Qualification-Get-a-Life" law (2435/2010) exempts qualification bodies from any duty to make adjustments for persons with disabilities in respect of the qualifications themselves. STP says that having an up to date knowledge of the tax system is essential and it cannot extend the period available to pass the exam without compromising that principle. Mr Bojo has not asked for, nor have STP offered any other changes to the exam or

qualification. He wanted a further 6 months in order to be able to take the last paper at the next exam sitting. He complains that the qualification is a type of vocational training.

#### *Complaint against the Idioat Company*

14. Mr Bojo complains against Idioat Plc that it has discriminated against him by terminating his internship. He says that they would not have done this had he not been a person with a disability (namely emanon). He also says that he asked them to install hand rails on the staircases as soon as he started because of the risk that he would become dizzy on the stairs and sustain a fall. They refused and, throughout his time there, he was in dispute with them. He says that he thinks they may have terminated the internship (and therefore victimised him) because he complained that they were not giving him the handrails. Idioat accepts that he asked for this, but said that they were under no duty to give it to him. He brought a claim for victimisation.

15. They say that he was a volunteer and therefore he does not fall within the scope of the law which applies to employees, trainees and applicants for employment. Mr Bojo argues that there is evidence that all of the last 20 people to have been taken on for paid work by this prestigious tax advising company have come from the ranks of their unpaid interns who become familiar with their systems and standards during the internship.

16. Idioat Plc says, and this is accepted by Mr Bojo, that they always advertise externally for candidates. They were advertising a vacancy at the time his internship was terminated and Mr Bojo says that he intended to apply for the post if his internship had not been terminated.

17. Mr Bojo says that the company treats the internship as an extended interview for the job. This is denied by the company which points to the fact that Mr Bojo, during the internship, has no contractual agreement with them, can, within reason, simply declare that he is not attending for work without penalty and does not have to conform to any disciplinary or other requirements (apart from professional duties of confidentiality).

18. Mr Bojo says that he did not attend work on a few occasions, that this was the subject of adverse comment, and that he believes that he was the subject of disability discrimination because there was in fact a requirement to attend work with a sanction of termination available to the company if he did not. He says that his internship was ended because he has a disability or because the company was worried that he would become a disabled person with rights under Smallislian law. He claims that he has lost the opportunity to obtain the highest paid employment in this field.

#### *Question of whether disabled*

19. Idioat Plc and STP deny that Mr Bojo is a disabled person for the purposes of Smallislian law, which requires that an impairment must cause the claimant "serious difficulty" in the workplace to constitute a "disability" for that law for a period of at least 18 months. They also say that his only evidence of his impairment relates to inability to concentrate on newspapers and television, and he

did not bring evidence of an effect whilst at work. Mr Bojo argues that Smallislian law does not comply with EU law.

20. Mr Bojo has lost at all stages up to the supreme court. He argues that he has been discriminated against by virtue of Article 2 (direct and indirect discrimination) and by virtue of article 5. He has brought these allegations against both defendants. He also says that he suffered victimisation and harassment.

You sit on the highest court in Smallislandia (Supreme Court) hearing the case.

In relation to Mr Bojo:

1. Does he have any rights under Smallislian law on these facts?
2. Has he been the subject of direct discrimination by either or both of the qualification body or the employer?
  - (a) What was the less favourable treatment?
  - (b) How was it on the grounds of disability?
3. Has he been the subject of any indirect discrimination by either or both of them?
  - (a) What was the provision criterion or practice in each case?
  - (b) How does it place people with his impairment at a particular disadvantage compared with those without that impairment in similar circumstances?
  - (c) How does it place Mr Bojo at that same disadvantage?
4. What justification could STP give for the provision criterion or practice?
5. What justification could Idioat give for the provision criterion or practice applied by them?
6. In both STP and Idioat's case what factors would the court need to consider:
  - (a) What aim does the provision criterion or practice pursue in each case?
  - (b) Are the means adopted to pursue that aim appropriate
  - (c) Are the means adopted to pursue that aim reasonably necessary?
7. Has Mr Bojo been the subject of harassment?
8. Could Mr Bojo's case be regarded as a case of victimisation under the Directive?
9. In what respects, if any, is there a material mismatch between the scope of the EU law and that of the UNCRPD and/or Charter?
  - (a) What tools could you use to avoid there being a material mismatch between the scope of the EU law and that of the UNCRPD?
10. What questions (if any) should you refer to the CJEU? In formulating any questions what use could you make of
  1. The UN Convention on the Rights of Persons with Disabilities?
  2. The EU Charter on Fundamental Rights?