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## From *Navas* to *Kaltoft*: The European Court of Justice's evolving definition of disability and the implications for HIV-positive individuals

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## Treaty on the Functioning of the European Union

- Article 19 of the Treaty provides:

"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

## Framework Directive

- Article 2(1) provides:

“For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.”

- The grounds referred to in Article 1 are religion or belief, disability, age and sexual orientation.



## *Navas v Eurest Colectividades SA* Case C-13/05 [2006] ECR I-6467

- “Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.” (para. 43)



## United Nations Convention on the Rights of Persons with Disabilities

- Article 1 of the UN Convention:
- "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."



## Models of disability

- The **medical model** locates disability within the individual. Disability is a medical condition and consequently, like all other conditions it can be treated by doctors to ensure that its symptoms are, ultimately, alleviated or eradicated.



## Models of disability

- According to the **social model**, disability is any societal factor which imposes restrictions on disabled people. These can range from individual prejudice to institutional discrimination and from inaccessible public buildings to inaccessible transport systems



## Models of disability: The social model

- “The cultural habit of regarding the condition of the person, not the built environment or the social organization of activities, as the source of the problem, runs deep. For example, it took me several years of struggling with the heavy door to my building, sometimes having to wait until a person came along, to realize that the door was an accessibility problem, not only for me, but for others as well. And I did not notice, until one of my students pointed it out, that the lack of signs that could be read from a distance at my university forced people with mobility impairments to expend a lot of energy unnecessarily, searching for rooms and offices. I interpreted it, automatically, as a problem arising from my illness (as I did with the door), rather than as a problem arising from the built environment that has been created for too narrow a range of people and situations.” (p.46)
- Wendell S (1996) *The Rejected Body: Feminist Philosophical Reflections on Disability*. New York: Routledge.

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*HK Danmark, acting on behalf of Jette Ring*  
Joined Cases C-335/11 and C-337/11,  
[2013] 3 CMLR 21.

- "...the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers **may** hinder the **full and effective** participation of the person concerned in professional life on an equal basis with other workers." (para 38).
- Emphasis added

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Advocate General's Opinion – *HK Danmark*

- "34. The present cases concern physical impairments that manifest themselves inter alia in pain and lack of mobility. The distinction between sickness and disability is therefore easier to draw in these cases than in the case on which the Supreme Court of the United States of America had to rule, where it held that even an asymptomatic HIV infection may constitute a disability within the meaning of the ADA 1990. Whether a person's complaints constitute a limitation in a particular set of circumstances is a matter for assessment by the court of the Member State."
- 35. There is nothing in the wording of Directive 2000/78 to indicate that its scope of application is limited to a certain degree of severity of disability. Since, however, this issue has been neither raised by the referring court nor discussed by the parties to the proceedings, it does not need to be definitively resolved here."

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## A retreat from the social model?

*Bragdon v Abbott* 524 U.S. 624 (1998)

The Americans with Disabilities Act 1990 defines disability at section 1202 as:

“(A) a physical or mental impairment that substantially limits one or more of the major life

activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.”



## A retreat from the social model?

*Z. v A Government department and The Board of management of a community school* [2013] EUECJ C-363/12

“the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z.’s condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity. In those circumstances, it must be held that Ms Z.’s condition does not constitute a ‘disability’”. (paras 81 and 82)



## A retreat from the social model?

*Fag og Arbejde (FOA), acting on behalf of Karsten Kalsoft, v  
Kommunernes Landsforening (KL), acting on behalf of the  
Municipality of Billund, [2014] EUECJ C-354/13*

“an illness requiring particular attention, continuous medication and control may be a physiological or psychological burden to the person concerned, but not render impossible the full and effective carrying out of work, or hinder participation on an equal basis in professional life in general.” (para. 38).

