

# DISABILITY AND REASONABLE ACCOMMODATION: EU LAW AND UNCRPD

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## INTRODUCTION

- Introduction
- Disability as a human rights issue: United Nations, Council of Europe, European Union
- Concept of disability
- Reasonable accommodation

# DISABILITY AS A HUMAN RIGHTS ISSUE

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## United Nations

- Concept of disability evolved over time: from medical model to social model.
- Social model: any factor in society which imposes restrictions on persons with disabilities
- Reflected in CRPD:
  - Article 1 Concept of disability
  - Article 8 Awareness-raising
  - Article 9 Accessibility
  - Article 12 Equality before the law

# DISABILITY AS A HUMAN RIGHTS ISSUE

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## European Court of Human Rights

- *Glor v. Switzerland* No. 13444/04, payment of military service tax
- *Alajos Kiss v. Hungary* No. 38832/06, voting rights for person under partial guardianship
- *Kiyutin v Russia* No. 2700/10, residence permit for HIV positive person
- *Çam v. Turkey* No. 51500/08, inaccessibility of musical academy building

# EUROPEAN UNION LAW ON DISABILITY

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- Article 19 TFEU: mandate to legislate
- Charter of Fundamental Rights
  - Article 21: prohibition of discrimination based on (a.o.) disability.
  - Article 26: right of persons with disabilities to independence, integration and participation.
- Framework Directive 2000/78
- Pending since 2008: Broad Directive (access to goods and services)

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# EUROPEAN UNION LAW ON DISABILITY

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- Latest developments
  - Accessibility Act: rules for marketing goods and services. IT systems, smartphones, TV equipment, banking, e-commerce, transport. Adopted by the Council on 9 April 2019. Implementation period of 3 years starts after publication in Official Journal.
  - Directive 2016/2102 on accessibility of public sector websites and apps.

# CONCEPT OF DISABILITY

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- Disability as an evolving concept in CJEU case law:
  - From medical to social model: Chacon Navas to HK Danmark
  - Direct or indirect discrimination: Ruiz Conejero
  - Disability, yes or no: Kaltoft, Z and Daoudi
  - A different concept: Coleman

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## FROM MEDICAL TO SOCIAL MODEL - I

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- *Chacon Navas (C-13/05)*:
  1. Court defined disability as:  
*'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.'*
  2. Disability is different from sickness: a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down by Directive 2000/78.

## FROM MEDICAL TO SOCIAL MODEL - 2

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- Revised concept of disability in EU case law: *a limitation which results in particular from long-term 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*. Reference to Article 1 UNCRPD
- *HK Danmark/Ring and Skouboe Werge (C-335/11 and C-337/11)* and *Kaltoft (C-354/13)*.

## DIRECT OR INDIRECT DISCRIMINATION?

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- *Ruiz Conejero (C-270/16)*
- Absent from work because of health condition: degenerative joint disease and polyarthrosis, aggravated by obesity. Spanish law permits dismissal on grounds of absence from work caused by sickness.
- Preliminary question: Does the law discriminate on grounds of disability?
- CJEU:
  - Law applies to all workers – no direct discrimination. But, a worker with a disability is more exposed to the risk of being dismissed than a worker without a disability – indirect discrimination.
  - National court must apply objective justification test.

## DISABILITY, YES OR NO?

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- *Daouidi vs. Bootes Plus SL (C-395/15)*
- Kitchen worker fell and dislocated his elbow; is dismissed.
- Preliminary question: is a temporary, but long-term limitation a disability?
- CJEU: Temporary incapacity does not mean in itself a disability; long-term limitation and disability *may* exist
  - If the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress;
  - Courts must use objective evidence, such as medical and scientific documents, to verify 'long-term'.

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## DISABILITY, YES OR NO?

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- *Z. (C-363/12)*
- Female employee, had a child through surrogate pregnancy - she was unable to bear a foetus herself. Applied for maternity leave, which was refused.
- Preliminary question: Discrimination on grounds of sex or disability?
- CJEU: No discrimination. '*The health state of Mrs. Z was not of the nature that limited her from full and effective participation in professional life on an equal basis with other workers*'.
  - Critics: CJEU applies medical approach.



## A DIFFERENT CONCEPT

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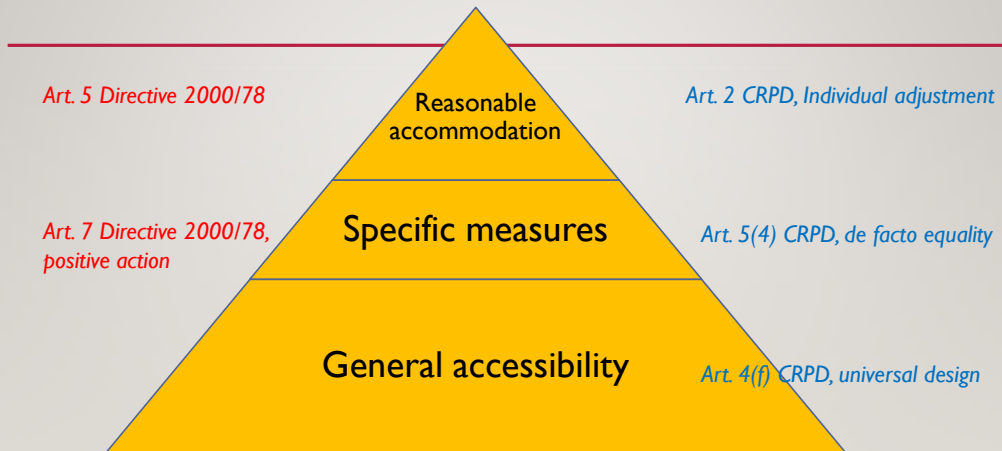
- *Coleman v Attridge Law* (C-303/06)
- Newborn son with disabilities; made redundant because as the primary carer she needed to spend time with the child.
- CJEU: 'discrimination by association'. Directive 2000/78 aims to prevent all forms of discrimination on grounds of disability, not just against disabled persons.

## REASONABLE ACCOMMODATION

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- Key element of Directive 2000/78
- 'an appropriate measure to enable a person with a disability to have access to, to participate or to advance in employment'
- Aims at substantive equality
- Refusal to provide RA is defined as discrimination.

## REASONABLE ACCOMMODATION



## REASONABLE ACCOMMODATION

- Appropriate measure?
  - Recital 17: Directive does not require the recruitment, promotion, maintenance of an individual who is not competent, capable and available to perform the **essential functions** of the post.
  - Recital 20: effective and practical measures to adapt the workplace to the disability, concerning premises and equipment, **patterns of working time**, the distribution of tasks or the provision of training or integration resources.
- *HK Danmark*: reduction of working hours may constitute an accommodation measure.



## REASONABLE ACCOMMODATION

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- Disproportionate burden?
  - Recital 21: Account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.
  - Article 5 Directive: 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.

## REASONABLE ACCOMMODATION: EXAMPLES

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### Case law in NL:

- Student at nursing school with dyslexia – was refused alternative type of testing. Discrimination, because school did not investigate alternative tests (2014-169).
- Employee with visual impairment was refused 23-inch laptop. Discrimination (2014-138).
- Employer did not investigate what accommodation was needed for worker with sleeping disorder. Discrimination (2018-148)

Source: mensenrechten.nl

## CONCLUSION

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- Disability rights are human rights.
- An important driver for this development is the paradigm shift from the medical to the social model of disability.
- The Court of Justice of the European Union has incorporated the UNCRPD as a tool to interpret the concept of disability in EU legislation. In most cases, the Court applies the social model.
- The duty to apply reasonable accommodation has been fully incorporated in EU case law.

# THANK YOU!

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