

The UN Convention on the Rights of Persons with Disabilities

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CRPD in Context

- The UN Convention on the Rights of Persons with Disabilities (CRPD)
 - Adopted 13 December 2006, entered into force 3 May 2008
 - Present Status of Convention
 - Signatories 149
 - Ratifications 103
 - Optional Protocol
 - Establishes the competence of the Committee to examine claims of violations of the CRPD and issue its suggestions and recommendations to the State concerned
 - Signatories 90
 - Ratifications 62



CRPD in Context

- The structure of the CRPD
 - Modelled on the already existing catalogue of internationally protected human rights
 - ICCPR, ICESCR, CRC, ECHR etc.
 - A mixture
 - Civil/political and socioeconomic rights
 - Substantive rights and non-discrimination
 - 3 parts
 - General provisions
 - Articles 1-9
 - Note, however, Articles 5 and 9 as substantive rights in and of themselves
 - Substantive rights
 - Articles 10-30
 - Implementation, monitoring and enforcement
 - Articles 30-50...
 - ...and the Optional Protocol



CRPD in Context

- The CRPD and the EU
 - The EU is a party to the CRPD
 - Was active during the negotiations
 - First human rights treaty the EU becomes a party to
 - Signed 30 March 2007
 - Ratified 23 December 2010
 - Not party to the Optional Protocol
 - Article 44(1) CRPD
 - “Regional integration organizations” shall declare the extent of their competence with respect to matters governed by the Convention...
 - ...and subsequently inform the depositary of any substantial modification thereto
 - References to “States” and “States Parties” in the CRPD includes the EU
 - But only to the extent that EU competences reach



CRPD in Context

- The EU Declaration regarding competences
 - http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&abid=2&mtdsg_no=IV-15&chapter=4&lang=en#EndDec
 - The Declaration
 - Notes that “The scope and exercise of Community competence are, by their nature, subject to continuous development and the Community will complete or amend this Declaration, if necessary...”
 - Restates/explains the basics of Community competences and lists the relevant acts adopted by the European Community
 - “The extent of the European Community’s competences ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.”
 - The list of Acts illustrates the area of Community competence
 - » Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
 - » Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast)
 - » Transportation, telecommunications, public procurement etc.

CRPD in Context

- The EU Reservation
 - http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-15&chapter=4&lang=en#EndDec
 - The Reservation
 - Pursuant to Directive 2000/78/EC “the Member States may, if appropriate, enter their own reservations to Article 27(1) of the Disabilities Convention [the right to work, including non-discrimination] to the extent that Article 3(4) of the said Council Directive provides them with the right to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive. Therefore, the Community states that it concludes the Convention without prejudice to the above right, conferred on its Members States by virtue of Community law.”

CRPD in Context

- The status of international treaties in the EU legal order
 - Hierarchy of norms of the EU legal order
 - Below primary law (general principles of Union law and treaties), but above secondary legislation and other acts of the EU institutions
 - Joined cases C-402/05 and C-415/05 *Kadi and Al Bakaraat International Foundation* [2008] ECR I-6351, paras. 306-308
 - This means that the validity of secondary legislation and other acts of the EU institutions can be measured against norms of international law - under two conditions:
 - The international norm must be binding on the EU
 - The nature and logic of the international norm must not preclude this, and it must be both unconditional and sufficiently precise to allow this effect
 - Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paras. 42-45
 - » UNCLOS “does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights and freedoms capable of being relied upon against States...” (para. 64)
 - But what about human rights conventions that are indeed intended to confer this kind of rights and freedoms upon individuals?
 - » Unconditional and sufficiently precise?

CRPD in Context

- But, in any case, there is an effect on interpretation
 - The EU is bound by the Convention
 - Under the international law principle of *pacta sunt servanda*
 - Under Article 216(2) TFEU (previously Article 300(7) TEC)
 - Convention forms “an integral part of the Community legal order”
 - » Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, para. 82
 - In relation to secondary legislation and other acts of the EU institutions
 - Interpretative effect arises out of the higher ranking of the CRPD in the internal hierarchy of norms
 - Cases since before adoption/ratification:
 - » Case C-13/05 *Sonia Chacón Navas* [2006] ECR I-6467
 - » Case C303/06 *Coleman v. Attridge Law and Steve Law* [2008] ECR I-5603
 - In relation to primary law
 - As a human rights convention, it can be expected that the CRPD will enter into a close interpretative relationship with fundamental rights within the EU
 - Similar to the (pre-accession) case law on the interrelationship between the ECHR and fundamental rights?
 - No case-law yet

Key theoretical themes

- From a medical model of disability to perceiving disability as a social construct
- From a dichotomy to the indivisibility of civil and political rights on one hand and economic, social and cultural rights on the other
- From formal to substantive equality

From a Medical to a Social Understanding

- Disability as a social construct
 - “...the existence of character X is not determined by the nature of things. X is not inevitable. X was brought into existence or shaped by social events, forces, history, all of which could have been different”

(Ian Hacking, *The Social Construction of What?* (Harvard University Press 1999) 6-7)



From a Medical to a Social Understanding

- WHO, “Towards a Common Language for Functioning, Disability and Health”, Geneva 2002:
 - “The *medical model* views disability as a feature of the person, directly caused by disease, trauma or other health condition, which requires medical care provided in the form of individual treatment by professionals. Disability, on this model, calls for medical or other treatment or intervention, to 'correct' the problem with the individual.”
 - “The *social model* of disability, on the other hand, sees disability as a socially created problem and not at all an attribute of an individual. On the social model, disability demands a political response, since the problem is created by an unaccommodating physical environment brought about by attitudes and other features of the social environment.”
 - “On their own, neither model is adequate, although both are partially valid.”



From a Medical to a Social Understanding

- WHO, International Classification of Functioning, Disability and Health (ICF), Geneva 2001:
 - Biosychosocial model
 - “Disability and functioning are viewed as outcomes of interactions between **health conditions** (diseases, disorders and injuries) and **contextual factors**. Among contextual factors are external **environmental factors** (for example, social attitudes, architectural characteristics, legal and social structures, as well as climate, terrain and so forth); and internal **personal factors**, which include gender, age, coping styles, social background, education, profession, past and current experience, overall behaviour pattern, character and other factors that influence how disability is experienced by the individual”

From a Medical to a Social Understanding

- CRPD
 - “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,”
 - Preamble (e)
 - “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.”
 - Article 1(2)



From a Medical to a Social Understanding

- EU law
 - Case C-13/05 *Sonia Chacón Navas* [2006] ECR I-6467
 - “...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)
 - Impairment and hindrance from full participation in society
 - But no reference to the role of attitudinal or environmental barriers like in Article 1(2) CRPD
 - The individual is conceptualised as the “problem”, not social structures
 - “There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.” (para. 46)
 - Long-term like in Article 1(2) CRPD

From Dichotomy to Indivisibility

- The dichotomy thesis
 - Civil and Political Rights
 - Negative, duty to respect, immediately effective, low cost, justiciable
 - Economic, Social and Cultural rights
 - Positive, duty to protect and fulfil, progressively implemented, high cost, non-justiciable
- The indivisibility thesis
 - VDPA (1993)
 - “All human rights are universal, indivisible and interdependent and interrelated”
 - Significance of the difference overstated
 - All types of state duties exist under both categories
 - Examples from practice



From Dichotomy to Indivisibility

- An integrated treaty
 - CRPD, Preamble (c)
 - “Reaffirming the universality, ***indivisibility, interdependence and interrelatedness*** of all human rights and fundamental freedoms...”
 - CRPD, Preamble (y)
 - “Convinced that a comprehensive and ***integral international convention*** to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the ***civil, political, economic, social and cultural spheres*** with equal opportunities, in both developing and developed countries”



From Dichotomy to Indivisibility

- Rights from both categories divided across the CRPD
 - CRPD, Articles 5, 9 and 10-30
- Also makes explicit socioeconomic or positive aspects of classical civil and political rights
 - CRPD, Article 21
 - “States Parties shall take all appropriate measures to ensure that persons with disabilities **can exercise** the right to freedom of expression and opinion” Including
 - Providing information intended for the general public ... in accessible formats
 - Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication...
- Optional Protocol to CRPD
 - Makes both kinds of rights semi-justiciable through an individual complaints procedure
 - Signed by 90 States, ratified by 62
 - Now also Optional Protocol to ICESCR (10 December 2008)
 - Signed by 36 states, ratified by 3



From Dichotomy to Indivisibility

- But the CRPD maintains the division that one category of rights is immediately applicable whereas the other is subject to progressive implementation
 - CRPD Article 4(2)
 - “With regard to ***economic, social and cultural*** rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to ***achieving progressively the full realization*** of these rights, ***without prejudice to those obligations contained in the present Convention that are immediately applicable*** according to international law.”
 - To be elaborated in Committee practice...

From Formal to Substantive Equality

- Two basic premises of the Convention
 - A principle of equality and non-discrimination
 - CRPD, Article 1
 - “...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”
 - CRPD, Article 3
 - Previous efforts unsuccessful in fact
 - Article 14 ECHR, Articles 2 and 26 ICCPR (1960) and soft law guidance for social policy
 - CRPD, Preamble (k)
 - “...**despite these various instruments and undertakings**, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights...”

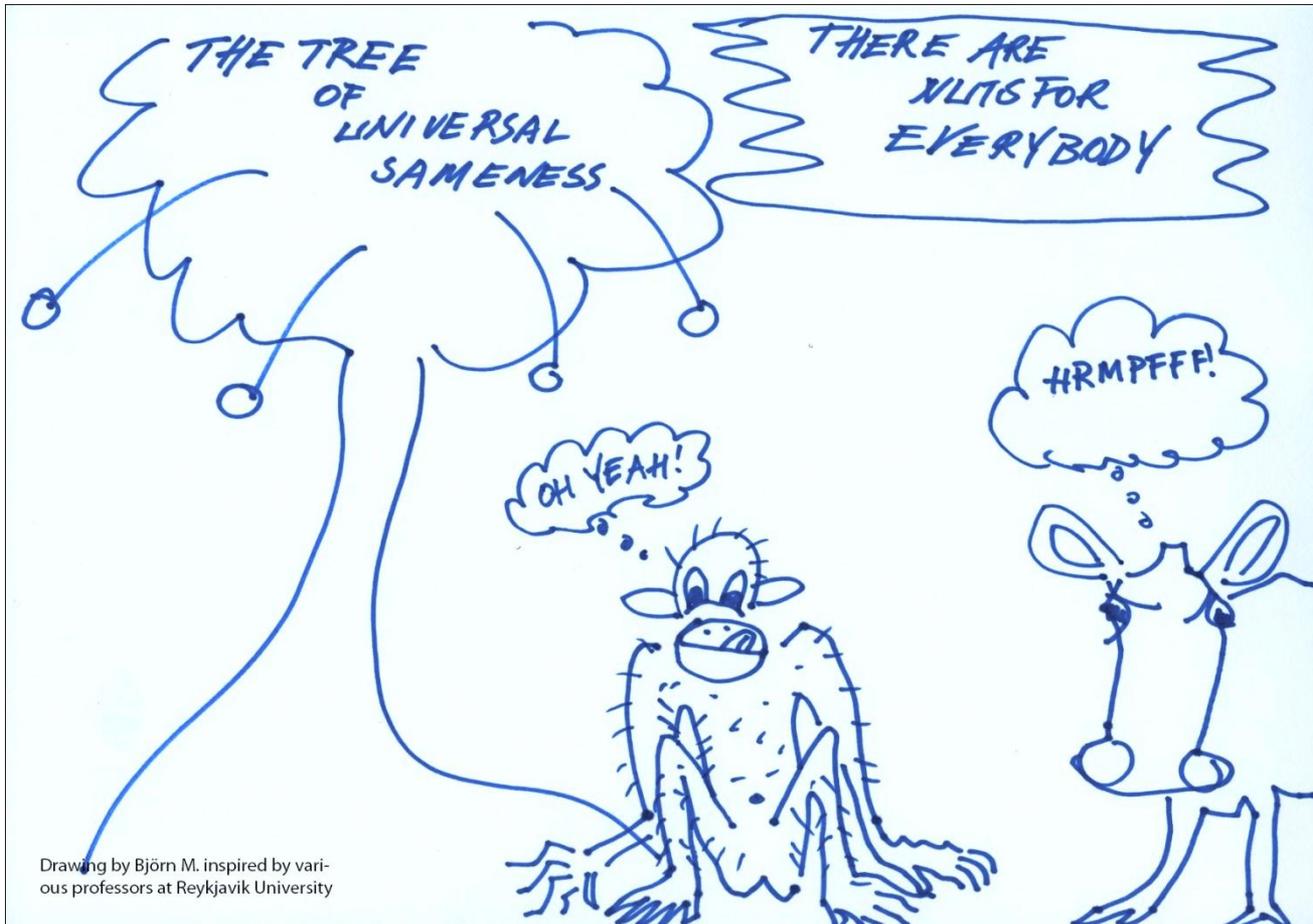


From Formal to Substantive Equality

- Formal equality
 - “Equals shall be treated equally...”
 - “Sameness” (comparability to prevailing unquestioned norm)
 - Symmetry
 - Indirect discrimination excluded
 - Reasonable accommodations and positive action excluded
 - Positive obligations excluded



Formal Equality



Drawing by Björn M. inspired by various professors at Reykjavik University

From Formal to Substantive Equality

- Substantive equality
 - “...and differences shall be treated differently”
 - Individual difference and/or contextual structural disadvantage
 - Asymmetry
 - Indirect discrimination
 - Reasonable accommodations and positive action
 - Positive obligations
 - Multidimensionality/multiple forms of discrimination



From Formal to Substantive Equality

- Definition of the concept of discrimination
 - “...includes all forms of discrimination, including denial of reasonable accommodation”
 - Article 2
- Right to equality / positive obligations
 - “...States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”
 - Article 5(3)
 - “Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination...”
 - Article 5(4)



From Formal to Substantive Equality

- The (biopsychosocial) understanding of disability also informs this development
- And so does an awareness of multidimensionality
 - “Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination...”
 - Preamble (p)
 - “States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures...”
 - Article 6



Conclusions

- The advent of the CRPD is an interesting new development in EU law
 - But much is yet to be clarified by the CJEU
- The CRPD is representative of current developments in international human rights law
 - “Paradigmatic” changes attending to the deep structure of the law, which
 - “...open the conceptual space for legal thinking and argumentation, [but] also close it off from essentially different ways of thinking and arguing legally.”

(Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002) 193)