



Universiteit Leiden  
The Netherlands

## Discrimination on the grounds of disability

Prof.dr. Aart (A.C.) Hendriks  
Prague, 23 April 2015 (09.15-10.00)  
*Applying EU Anti-Discrimination Law*

Universiteit Leiden. University to discover.

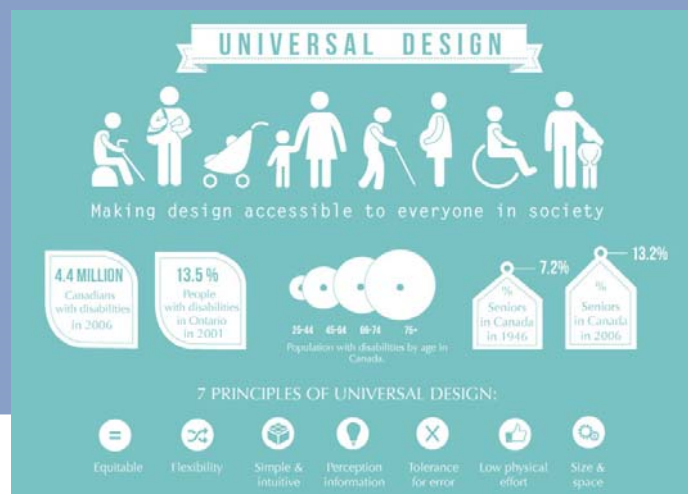
## How do you say 'disability' in your language?



## Disability discrimination or not?



## How do we design our physical and social environment?



## Disability discrimination is ...

Discrimination on grounds of disability.

Only against persons WITH a disability?

What is a disability?



## Disability (1)

### 1 Medical model;

Disability is an individual characteristic ('a person that can not be cured')

### 2 Social model;

Disability is a social construct >  
Caused by social and physical environment ('lack of universal design')

## Intermezzo (1)

**Case C-363/12 Z v Government Department**  
(18 March 2014)

Woman without uterus and maternity leave

## Intermezzo (2)

- "EU law does not provide for commissioning mothers to be entitled to paid leave equivalent to maternity leave or adoption leave";
- "a refusal to grant maternity leave to a commissioning mother does not constitute discrimination on grounds of sex";
- "a refusal to grant paid leave equivalent to adoption leave to a commissioning mother is outside the scope of the Equal Treatment Directive".

## Disability (2)

### 1 WHO International Classification of Impairments, Disabilities and Handicaps;

'a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being'

### 2 WHO International Classification of Functioning, Disability and Health (2001)

Disability is a universal human experience. Focus shifted from cause to impact.

## Disability (3)

### (Framework) Directive 2000/78/EC

No definition.

## Disability (4)

### CRPD 'Disability Convention' (2007)

'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)

## Disability (5)

ECJ

(Chacón Navas, 2005)

'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.'

## Disability (6)

ECJ

(Ring & Skouboe Werge [HK], 2013)

'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.'**

## Disability (7)

ECJ

(Z, 2014)

Woman without uterus

'the concept of 'disability' within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers.'

## Disability (8)

ECJ

(FOA, 2014)

'the obesity of a worker constitutes a "disability" within the meaning of th[e] directive where it entails a limitation resulting 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.'

## Disability (9)

ECTHR

No definition.



## **Disability (10)**

### **Conclusion**

No precise definition.  
Combination of medical and social model.  
Focus on participation (in working life) and  
equality.

## **EU and disability discrimination**

TFEU (Art. 10 & 19)  
Charter Fundamental Rights (Art. 21 & 26)  
Directives (notably Framework)  
Acceded to CRPD (2010)

What type(s) of discrimination are forbidden under EU law?



## Direct and indirect discrimination



## Direct or indirect discrimination?



## Direct or indirect discrimination

*Lack of resources, lack of care*  
*ECtHR 2014: Valentin Câmpeanu v Rumania*  
*(GC), no. 47848*



## Reasonable accommodation

The concept of reasonable accommodation emerged in response to barriers erected by the physical or social environment resulting in an inability to perform a function in a conventional manner.



## What is a RA (1)

First recognised with respect to religion, later with respect to disability.

## What is a RA (2)

Many countries now have legislation prohibiting the denial of a reasonable accommodation – either as a (part of a) general norm for employers or as a form of discrimination / measure to ensure compliance with the principle of equality.

## What is a RA (3)

Reasonable accommodation in Directive 2000/78/EC entails a combination of both approaches, but above all obligation for **employers**

## What is a RA (4)

In CRPD less clear who is the duty holder.

(Parties ensure that r.a. is provided)



## How does RA relate to discrimination?

Reasonable Accommodation is (also) a *sui generis* form of discrimination

For individual cases

Own rules burden of prove and justifications

## Discrimination by association

Possible???

What is the scope ratione personae  
of non-discrimination law?

## Discrimination by association (2)

ECJ

(Coleman, 2008)

'...Directive 2000/78, which seeks to combat all forms of discrimination on grounds of *disability* in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in Article 1'

'discrimination on grounds of disability and to *any association* which that employee has with a disabled person.'

## Discrimination by association (3)

**ECtHR**

(Đorđević v. Croatia, 2012)

'the continuing harassment of the first applicant – her disabled son, for whom she has been taking care – and the incidents of harassment which also concerned her personally, even in their milder forms, caused disruption to her daily life and her routines, which had an adverse effect on her private and family life.'

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**What type(s) of discrimination are forbidden under EU law?**

**Various!**

More important:

**Formal or substantial equality**

(do we only look at form of treatment or the outcome of a treatment?)

**Questions or Comments????**