

416DV83

Speakers' presentations

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

SEMINAR FOR MEMBERS OF THE JUDICIARY

Trier, 24-26 October 2016



Funded by
the European Union

This seminar series has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information please consult: ec.europa.eu/social/easi

With the support of the EFC European Consortium of Foundations on Human Rights and Disability and the EDF European Disability Forum, and in cooperation with the European Commission (Contracting Authority). The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.

Table of contents

UNCRPD: key features

Facundo Chavez Penillas

Discrimination on the basis of disability

Facundo Chavez Penillas

Disability in EU law

Pekka Pohjankoski

National Judges and Preliminary References before the Court of Justice

Pekka Pohjankoski

Workshop exercise

Pekka Pohjankoski

Equal recognition before the law under the CRPD

Facundo Chavez Penillas

Access to justice under the CRPD

Facundo Chavez Penillas

Reasonable Accommodation : What does it entail ?

André Gubbels

Workshop: Guaranteeing the enjoyment of rights and freedoms by disabled people – the role of national judges

Inés de Araoz

Dolors Torrents

Detention of persons with disabilities: EU Law and the UN CRPD

Jean-Sébastien Blanc

Disability and Employment

André Gubbels

Ingewahrsamnahme von Menschen mit Behinderungen: Unionsrecht und die BRK

Jean-Sébastien Blanc

Détention des personnes handicapées: droit européen et convention de l'ONU

Jean-Sébastien Blanc

What is disability?

Module 1



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

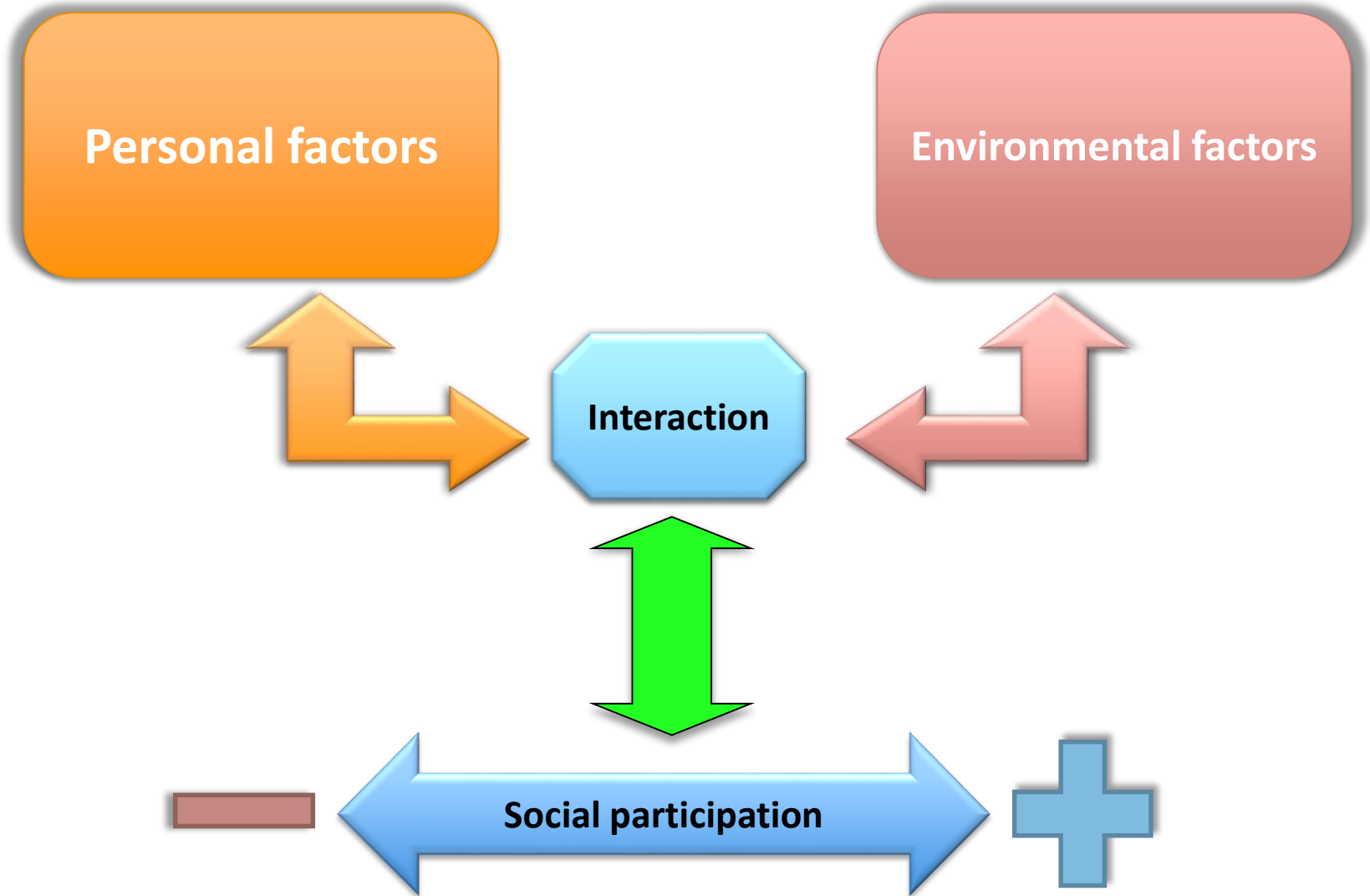
Objective

- Introduce participants to the current human rights approach to disability and explain the evolution of other approaches

Module flow

- How disability works
- Approaches to disability
- Charity approach
- Medical approach
- Consequences of charity and medical approaches
- Social approach
- Human rights approach
- Key principles of a rights-based approach
- Convention's concept of disability
- Language and terminology

How disability works



Some personal factors

Physical (inherent)

male/female

skin colour

visual impairment

hearing impairment

physical impairment

intellectual impairment

psychosocial impairment

fit / not fit

Socioeconomic (individual impact)

rich

middle class

poor

connected

isolated

educated

illiterate

Environmental factors

Accessibility of environment (physical and informational)

- Hilly / flat
- Lack of accessibility
- Partial accessibility
- High levels of accessibility

Legal/policy

- Charity approach
- Anti discrimination
- Supportive
- Measures (quotas...)
- Good enforcement
- Poor enforcement

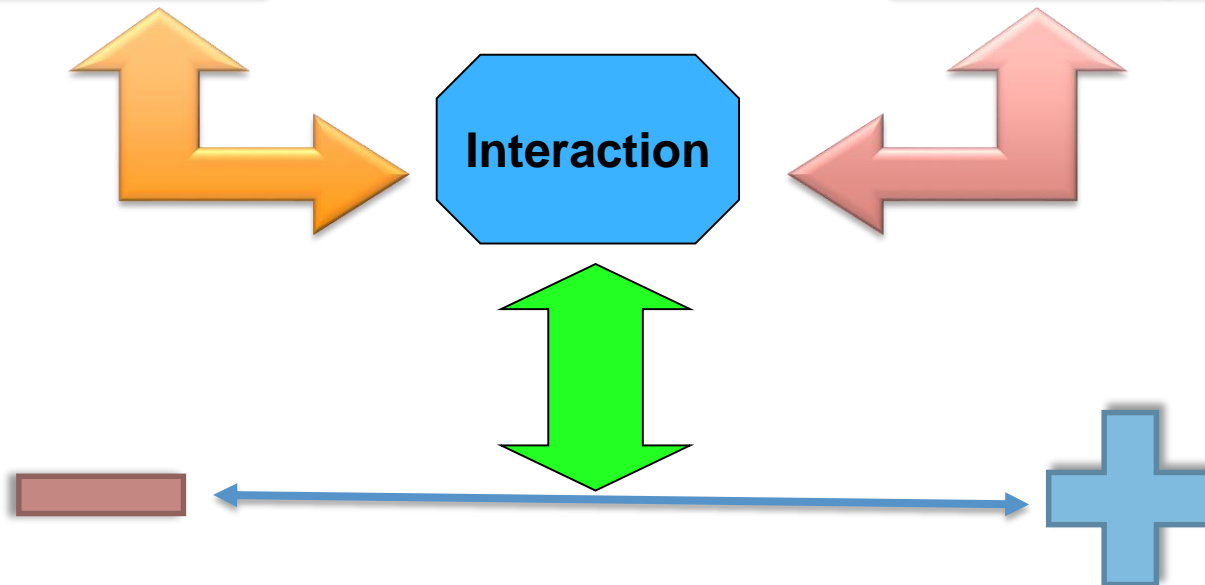
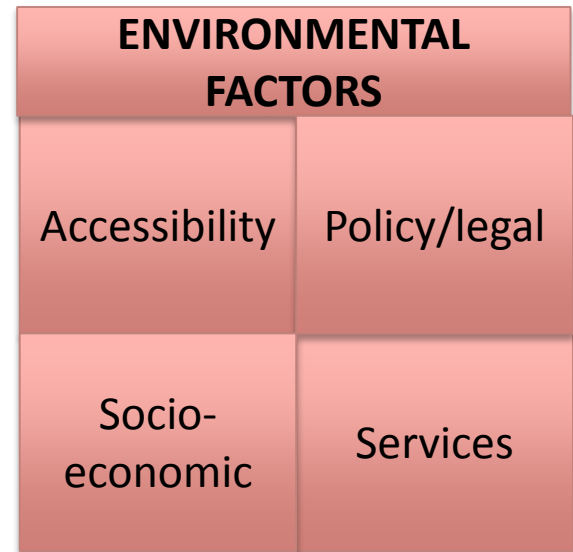
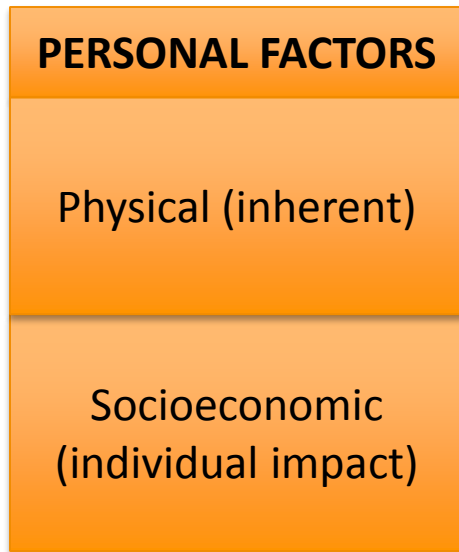
Socioeconomic

- Rural / city / big city
- Rich / poor
- Strong negative attitudes and prejudice
- Positive awareness
- Open to change / closed
- Pro poor

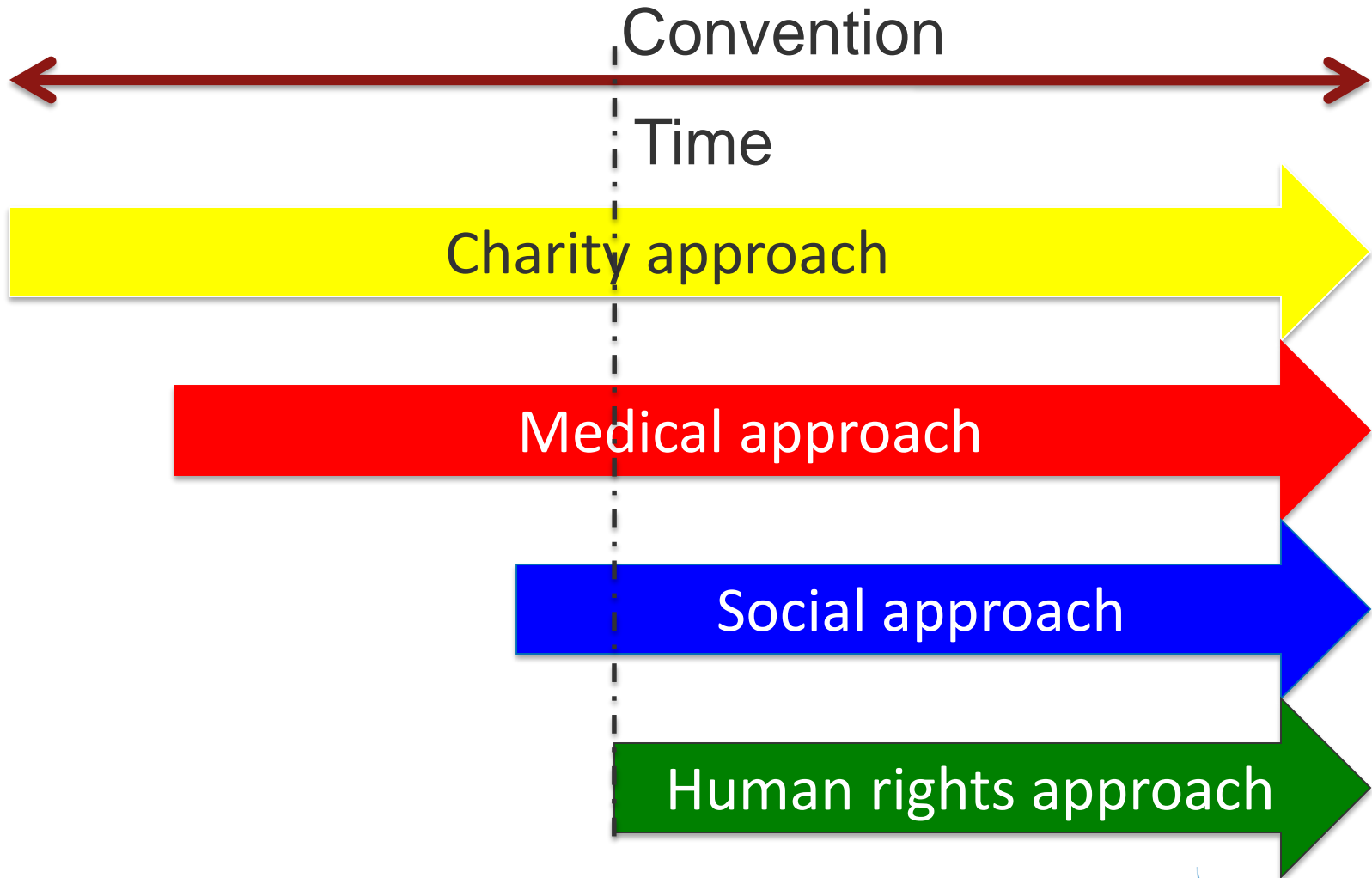
Services

- Inclusive school/not inclusive
- Inclusive health care/not inclusive
- Inclusive youth centres/not inclusive
- Inclusive livelihood support/not inclusive
- Technical aids
- Community based services
- Social support services
- Public / private
- Affordable

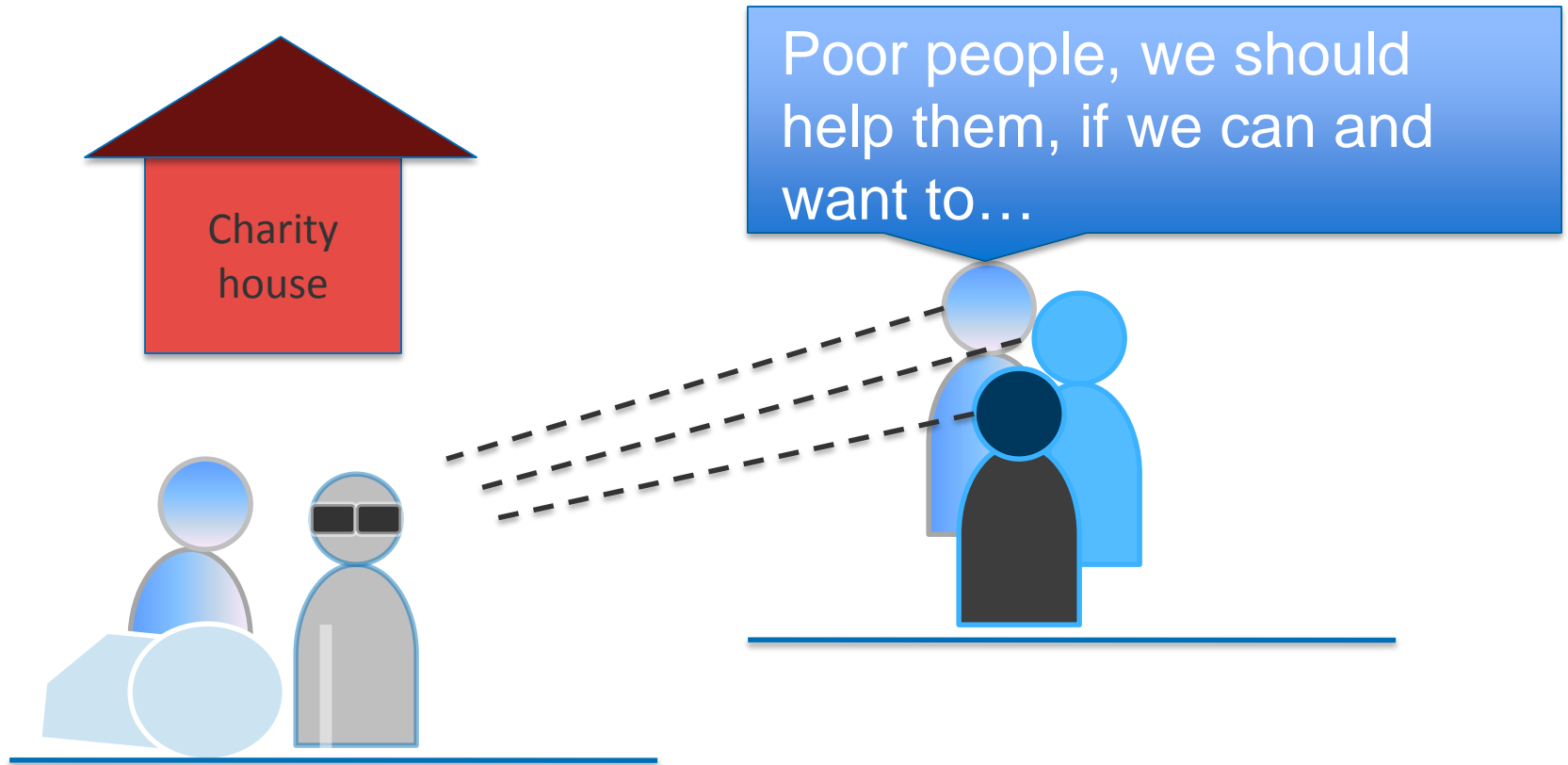
The interaction



Four approaches to disability



Charity approach



Charity approach

How this approach sees disability:

Persons with disabilities are in a tragic situation

Persons with disabilities cannot take care of themselves

Persons with disabilities inspire compassion

Persons with disabilities are objects of benevolence

How this approach proposes to treat disability:

They need our help, sympathy, charity...

Collect and give money to provide for persons with disabilities.

The quality of the “care” is less important

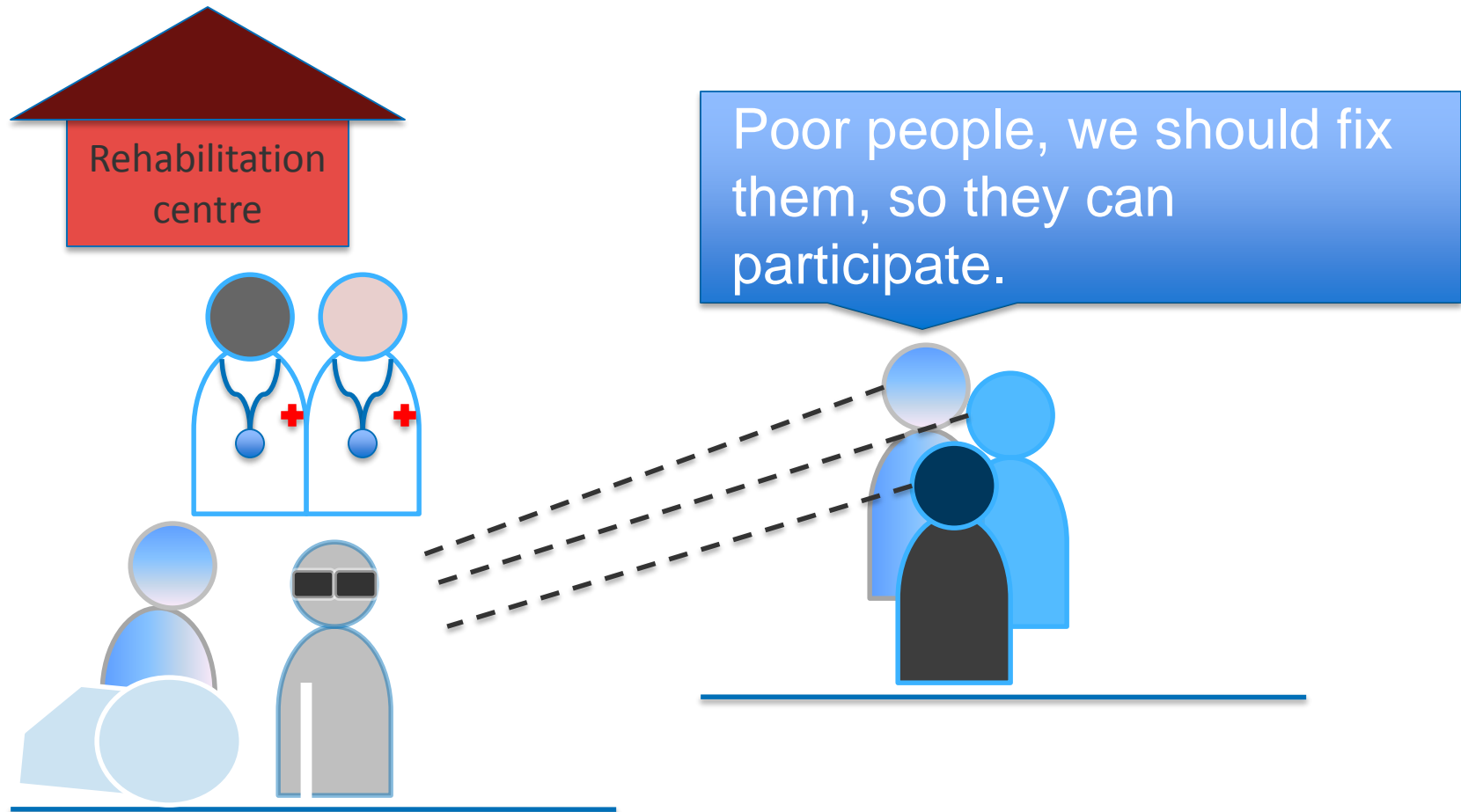
Who is the duty bearer on disability issues:

Benevolent persons, charity houses, homes, foundations, religious institutions ...



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Medical approach



Medical approach

How this approach sees disability:

Persons with disabilities need to be cured

Persons with disabilities play the passive role of patients

Persons with disabilities are considered abnormal

Persons with disabilities are unable to live independently

How this approach proposes to treat disability:

Persons with disabilities need as much rehabilitation as possible to reach the best extent of normality, in order to access rights and participate in society

Who is the duty bearer on disability issues:

Doctors and health authorities

Often health ministry



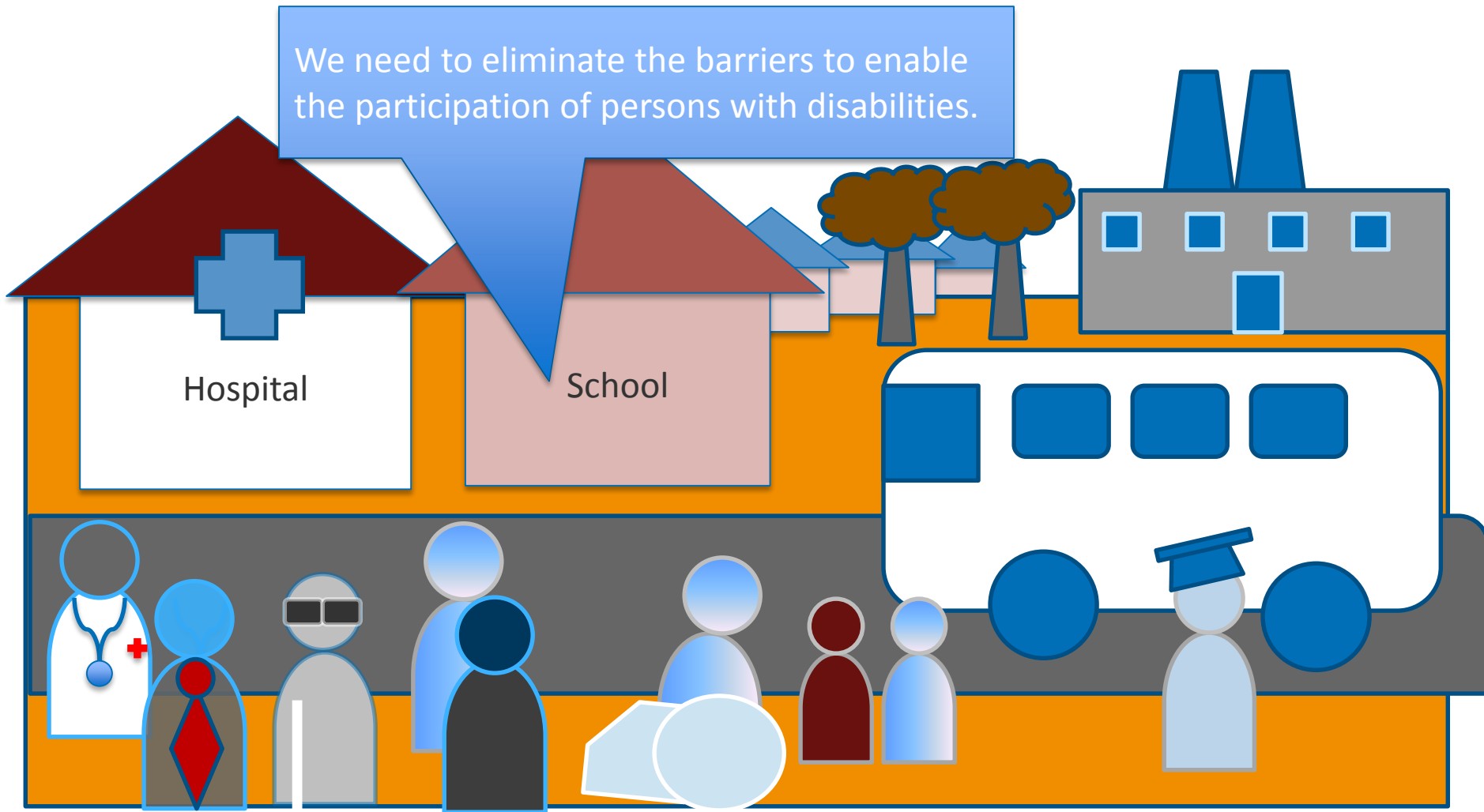
UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Consequences of charity/medical approaches



Social approach

We need to eliminate the barriers to enable the participation of persons with disabilities.



Social approach

How this approach sees disability:

Disability is the result of a wrong way of organizing society: thus, persons with disabilities face bias and barriers that prevent their equal participation

Disability is not an individual problem and mainly lies in the social environment that can be limiting or empowering depending on many factors

Persons with disabilities can and should participate in society

How this approach proposes to treat disability:

Eliminate environmental barriers that constrain the participation of persons with disabilities, including attitudinal barriers

Enable the participation of persons with disabilities in public policymaking

Make all public services and policies accessible and inclusive

Ensure accessibility

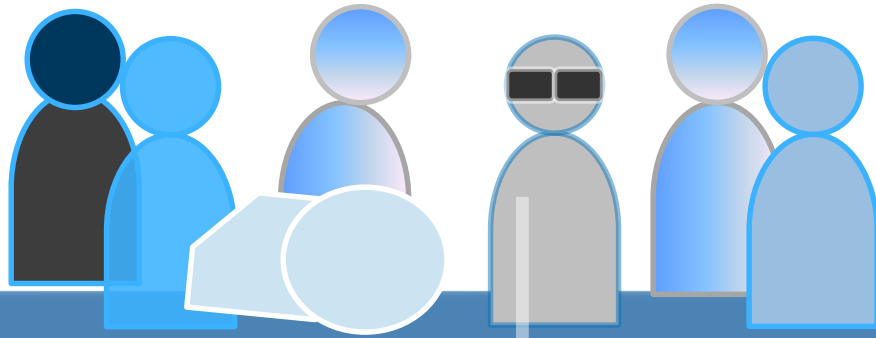
Who is the duty bearer on disability issues:

State, all ministries, society



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Persons with disabilities are part of human diversity



Being human has a broad spectrum of possibilities

MANY WAYS OF
WALKING

MANY WAYS OF
SEEING

MANY WAYS OF
THINKING

MANY WAYS OF
COMMUNICATING

MANY WAYS OF
INTERACTING

Etc.

Human rights approach



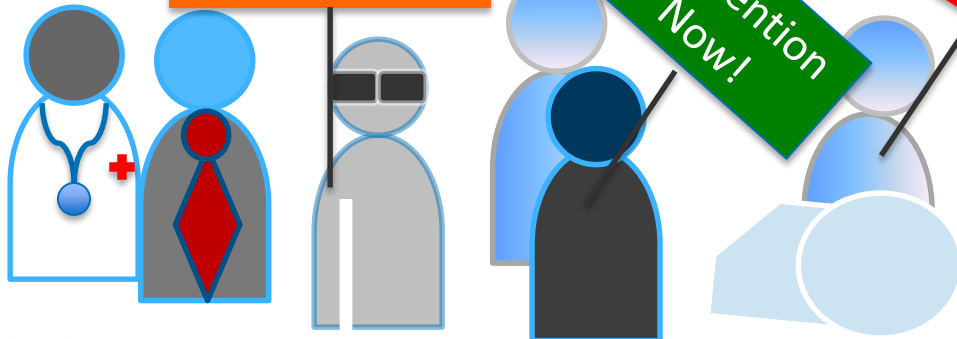
We, persons with and without disabilities, are part of the same society and we have the same rights and obligations

State

Equal participation

Convention Now!

Non-discrimination



Human rights approach

How this approach sees disability:

Ensures full and equal enjoyment of all human rights to persons with disabilities, and promotes respect for their inherent dignity

Focuses on equal opportunities, non-discrimination on the basis of disability and participation in society

Requires authorities to ensure rights and not restrict them

Views persons with disabilities as rights-holders

How this approach proposes to treat disability:

Enforce laws to ensure full inclusion in all social aspects (school, family, community, work, ...)

Apply policies to raise awareness

Respect equal recognition before the law

Regulate the private sector

Who is the duty bearer on disability issues:

State, all ministries and society



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Key principles of a human rights approach

Inclusion

Participation

Accessibility

Non-
discrimination

Respect for
difference and
diversity

Equality of
opportunities

Respect for
inherent
dignity



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

The Convention's concept of disability

Disability is an evolving concept and results from the **interaction** between **persons with impairments** and **attitudinal and environmental barriers** that hinders their full and effective **participation in society on a equal basis with others**



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Language and terminology

Outdated	Suggested
Victim of...	Person with...
Suffering from... Afflicted by...	Person with...
Invalid	Person with disability
Mentally handicapped	Person with an intellectual impairment
Mentally ill	Person with a mental or psychosocial impairment
Manic depressive	Person with bipolarity
Epileptic	Person with epilepsy
Spastic	Person with cerebral palsy
The blind	Person who is blind, blind person, person with visual impairment
The deaf	Deaf person
Disabled parking/disabled toilet	Accessible parking/accessible toilet

Sources

- Convention on the Rights of Persons with Disabilities
- OHCHR, United Nations Department of Economic and Social Affairs and Inter-Parliamentary Union, *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* (HR/PUB/07/6)
- OHCHR, FAQ on the Convention on the Rights of Persons with Disabilities
www.ohchr.org/EN/Issues/Disability/Pages/FAQ.aspx
(accessed 2 August 2012)

Discrimination on the basis of disability

Module 5



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Objective

- Understand how discrimination on the basis of disability manifests itself
- Recognize different forms of discrimination against persons with disabilities
- Understand the link between non-discrimination and equality
- Understand who is responsible for combating discrimination and what measures they should take

Module flow

- Group activity – the power walk
- Forms of discrimination
- Non-discrimination in the Convention
- Reasonable accommodation
- Examples of discrimination on the basis of disability
- Specific measures to promote equality
- Who's responsible?

Discrimination on the basis of disability

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 encompasses **all forms of discrimination**, including denial of reasonable accommodation



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Forms of discrimination

What is new under the CRPD?

No condition
apply

New scope to
“specific
measures”

Multiple and
intersecting
discrimination

Discrimination
by association

Reasonable
accommodation in
all areas of law

Reasonable accommodation

*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*



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Reasonable accommodation

Elements

- Applies to all rights
- Is of immediate realization
- Applies in individual cases
- Applies upon request of a person with disability
- Implies an objective reasonableness test



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Reasonable accommodation

Objective reasonableness test

Elements

- Request
- Dialogue
- Objective justification
 - Relevant
 - Proportional
 - Possible
 - Financially feasible
 - Economically feasible



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Reasonable accommodation

Objective justification

- The responsible party for providing the accommodation has to prove that at least one of the objective criteria were not met to avoid responsibility for discrimination on the basis of disability
 - Relevance
 - Proportional
 - Possible
 - Financially feasible
 - Economically feasible

Discrimination on the basis of disability

Civil life

Denial of legal capacity
Forced institutionalization
Forced sterilization

Social and cultural life

Segregated education
Forced medical treatment
Exclusion from the community
Inaccessible environments
Negative attitudes

Political life

Denial of the right to vote

Economic life

Denial of reasonable
accommodation
Denial of property rights

Disability in EU law



Academy of European Law (ERA), 24 October 2016

Pekka Pohjankoski
Legal Secretary (*Référéndaire*)
Chambers of Judge A. Rosas
Court of Justice of the EU

Structure of the presentation

I. Official texts on disability in EU law

- Treaties, international agreements, legislation

II. Case law of the EU Court of Justice

- Definition of disability
 - Illness/disability
 - Reasonable accommodation
 - Validity review of EU acts
 - Scope of EU law as a limit to protection
- 



I. Official texts on disability in EU law

Treaties, international agreements and legislation

Disability in primary EU law



- Mainstreaming provision: **Article 10 TFEU**
 - (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on ... disability”)
- Competence provision: **Article 19 TFEU**
 - (“...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 ... disability”)
- Fundamental rights of the disabled:
 - **Articles 21 (Non-discrimination) and 26 (Integration of persons with disabilities) of the Charter of Fundamental Rights**

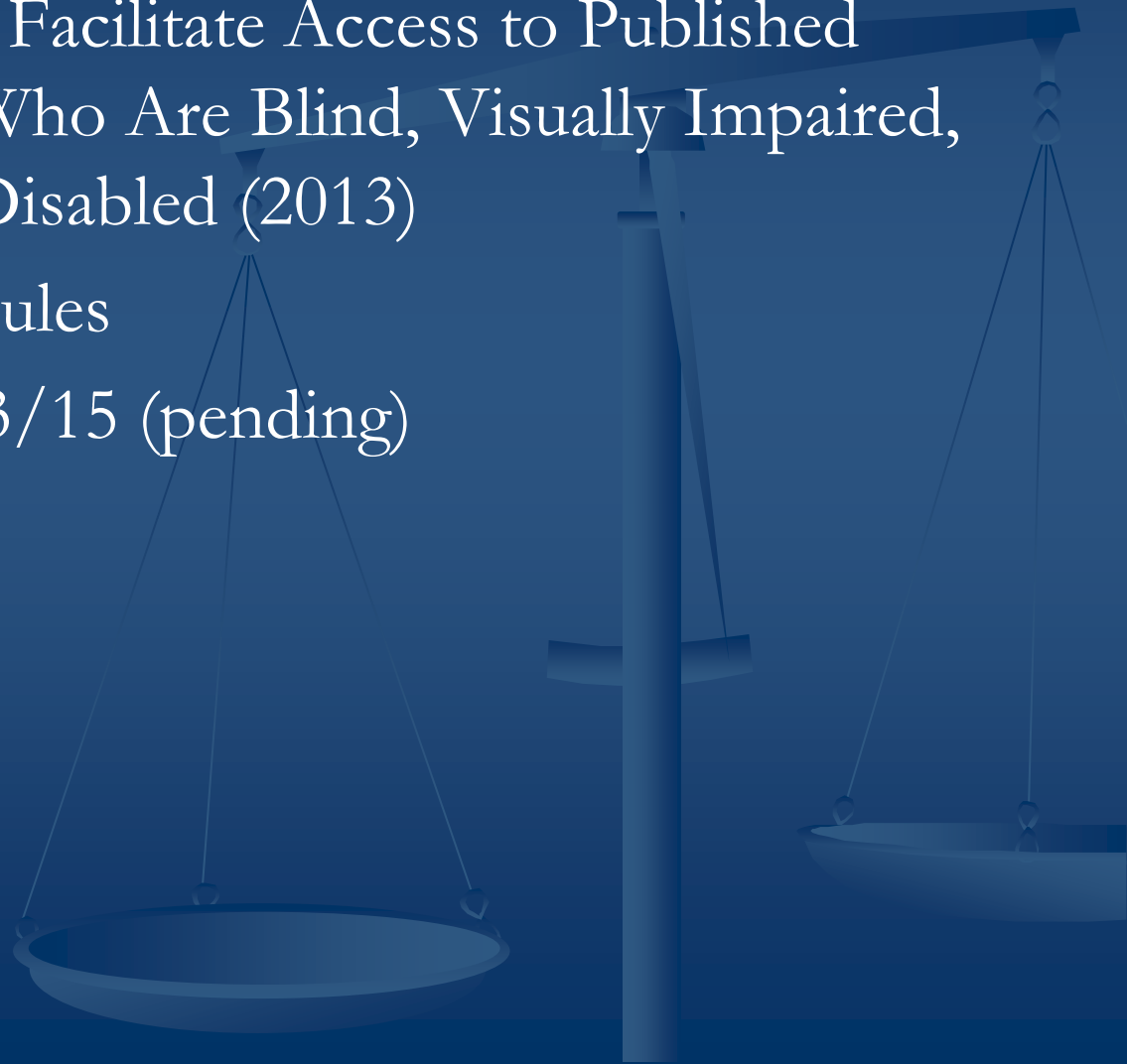
International agreements concluded by the EU

United Nations Convention on the Rights of Persons with Disabilities

- Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities
- Annex II of the Decision lists EU acts on matters governed by the UN Convention
- Mixed agreement
- Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (OJ 2010 C 340/08)
- UN Convention does not have direct effect (“programmatic” nature)
- However, obligation of consistent interpretation of EU acts

Other international agreements

- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013)
- Primarily copyright rules
- Opinion procedure 3/15 (pending)



Disability in secondary EU law

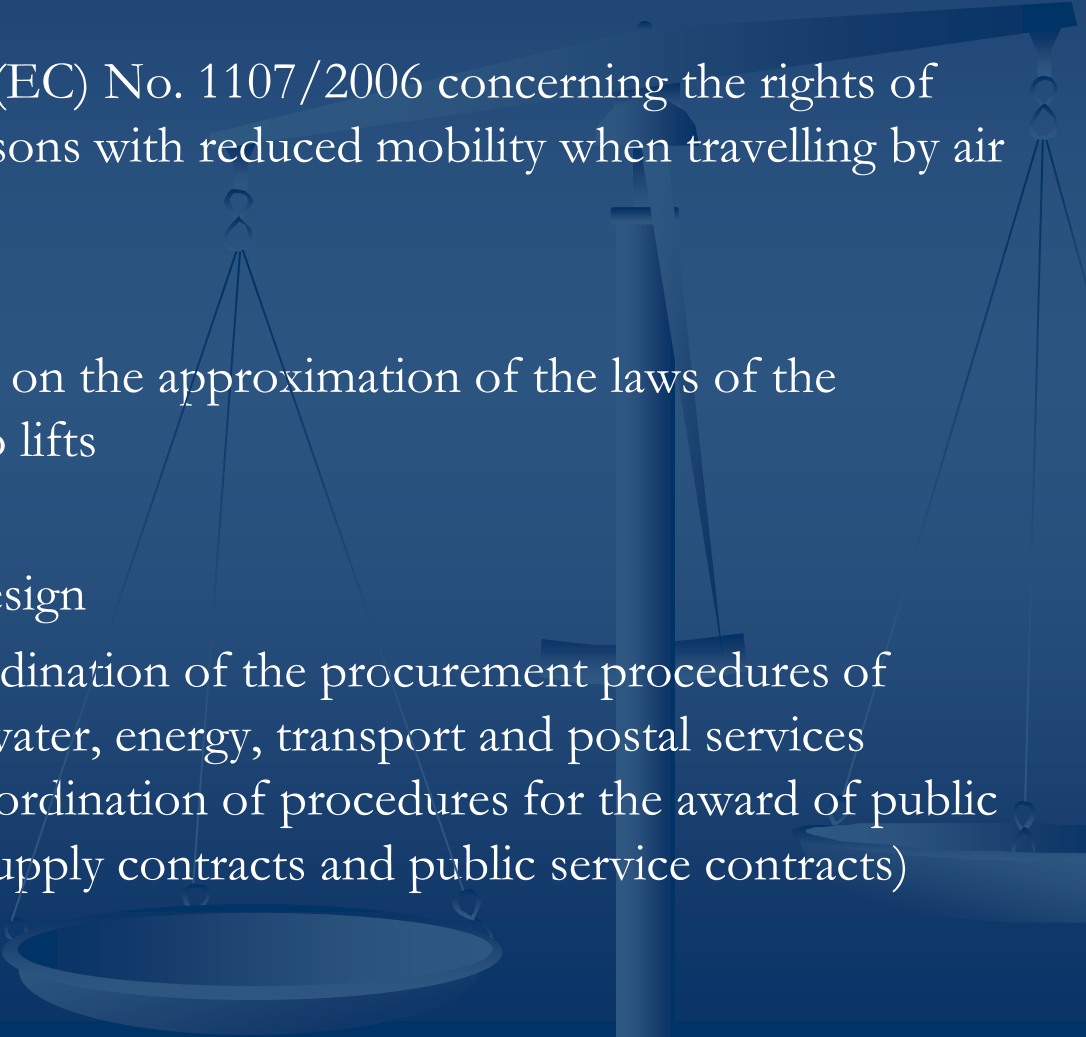
Employment Equality Directive 2000/78

- Art. 2: no discrimination on grounds of disability at work
 - direct discrimination (“on [...] the grounds [of disability]”)
 - indirect discrimination (“where an apparently neutral provision, criterion or practice would put persons having [...] a particular disability[...] at a particular disadvantage compared with other persons [...]”)
 - In case of disability, may be remedied through reasonable accommodation which eliminates the effects
 - Instruction to discriminate and harassment (in certain circumstances) is also discrimination

Employment Equality Directive 2000/78 (cont.)

- Art. 4.1: Genuine and determining occupational requirements permitted (+ legitimate aim and proportionality)
- Art. 5: Obligation for employers to provide reasonable accommodation (more on this later)
- Art. 7: Member States may take affirmative action/positive discrimination measures
- Art. 7.2: “With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”

Other sectorial legislation - examples

- Transport
 - In particular, Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air
 - Driving licence directives
 - Internal market
 - E.g. Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts
 - Public procurement
 - Accessibility; universal design
 - Directives 2004/17 (coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors) and 2004/18 (coordination of procedures for the award of public works contracts, public supply contracts and public service contracts)
- 

II. Case law of EU Courts



“The impact an anti-discrimination law may have on society depends, to a large extent, on the attitude of the judiciary rather than on the text of the legislation itself.”

- *Theresia Degener,*

Legal Expert to the UN High Commissioner for Human Rights as co-author of the background study to the UNCPRD

Relevant case law of the ECJ on disability discrimination 2006-2016

- C-13/05, *Chacón Navas* (dismissal from work; first definition of disability)
- C-303/06, *Coleman* (direct discrimination on grounds of disability of another person)
- C-152/11, *Odar* (age discrimination + disability discrimination in the context of a company pension scheme)
- C-335/11 & C-337/11, *Ring and ors* (dismissal from work; impact of UN Convention on definition of disability; reduced working hours as reasonable accommodation)
- C-312/11, *Commission v Italy* (large interpretation of reasonable accommodation for the purposes of Dir. 2000/78)
- C-363/12, *Z.* (lack of uterus not a disability in context of Dir. 2000/78)
- C-356/12, *Glatzel* (validity review of Driving Licence Directive; visual impairment)
- C-354/13, *Kaltoft* (obesity as disability)
- C-406/15, *Milkova* (national regulation on civil servants with disabilities, pending)

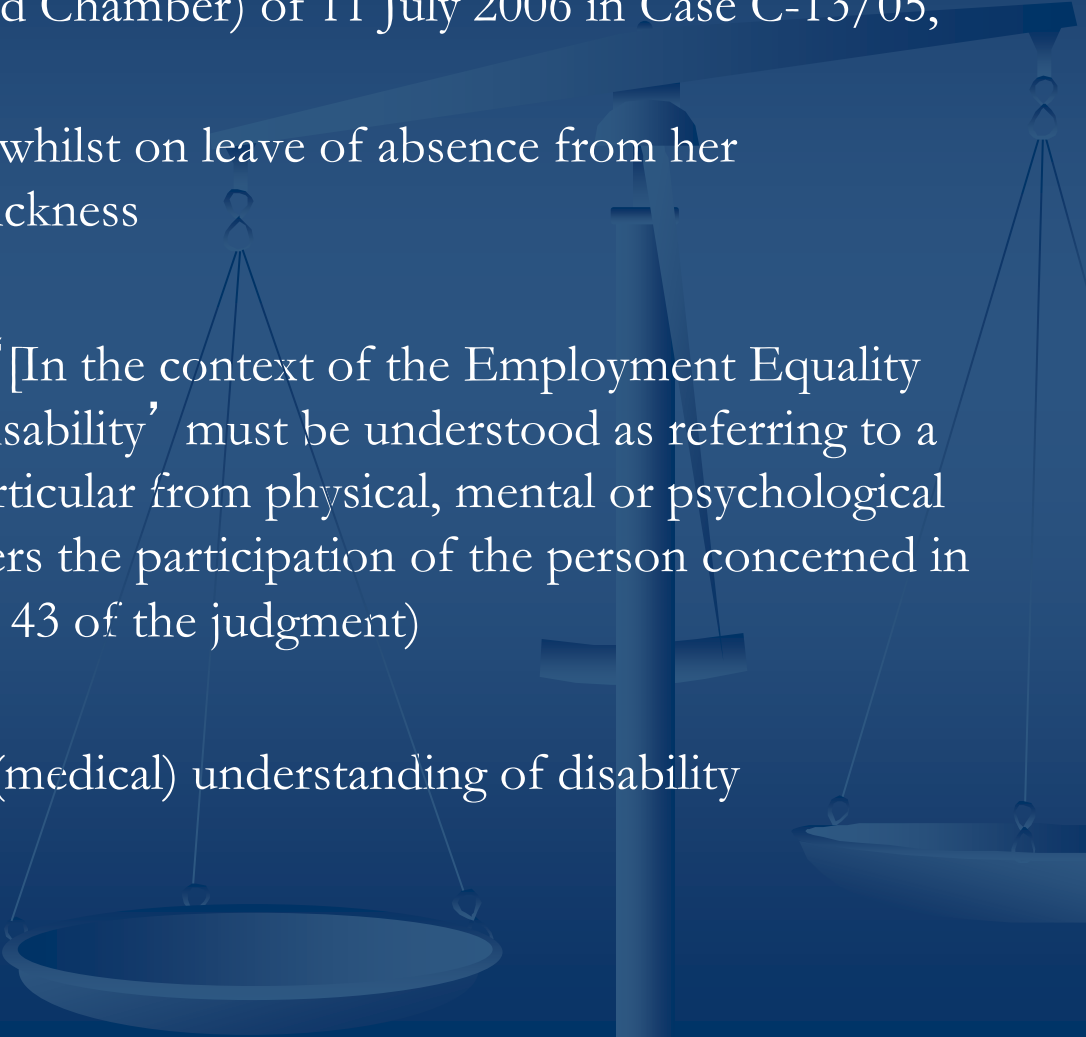
Themes in Case Law

- Mostly re Employment Equality Directive (2000/78)
 - (Re)definition of disability
 - Illness or disability?
 - Reasonable accommodation
 - UN Convention on Rights of Persons with Disabilities
 - Validity review of EU acts – persons with disabilities in the Charter of Fundamental Rights
- 

Definition of disability in EU law

- Initially no definition
 - EU Court of Justice provides one in Case C-13/05, *Chacón Navas*
- Impact of UN Convention: Court moves from “medical” towards “social” understanding of disability
 - New definition in Joint Cases C-335/11 and C-337/11, *Ring and ors*

Definition of disability #1.0

- Judgment of the Court (Grand Chamber) of 11 July 2006 in Case C-13/05, *Chacón Navas*
 - Context: dismissal of worker whilst on leave of absence from her employment on grounds of sickness
 - First definition of disability: “[In the context of the Employment Equality Directive], 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.” (Paragraph 43 of the judgment)
 - Criticised because of limited (medical) understanding of disability
- 

Definition of disability #2.0

- Judgment of the Court (Second Chamber) of 11 April 2013 in Joined Cases C-335/11 and C-337/11, *Ring and ors*
- Context: dismissal of workers absent from work because of lumbar pain and whiplash injury from a road accident
- Definition of “disability” 2.0 (taking into account the “evolving nature” of disability in the UN Convention)
- “[...] 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.” (paragraph 38 of the judgment)

Definition of disability – evolution

- First definition:
 - “limitation ... from impairments ... which hinders participation ... in professional life”
- Current definition:
 - “Limitation ... from ... impairments which in interaction with various barriers may hinder the full and effective participation on an equal basis with other workers.”

Case C-354/13, *Kaltoft*

- Context: dismissal of childminder suffering from obesity
- No general principle prohibiting discrimination on grounds of obesity
- “obesity does not in itself constitute a ‘disability’ within the meaning of Directive 2000/78 ” (para 58)
- However, obesity may constitute a disability within Dir. 2000/78 “...in particular, if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.” (para 60)

Illness / disability

- “a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78” (*Chacon Navás*, para 52)
- “In order for the limitation to fall within the concept of ‘disability’, it must ... be probable that it will last for a long time.” (*Chacon Navás*, para 45)
- “it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those cause by illness” (*Ring and ors*, para 40)
- Obesity (and presumably all other long-term illnesses which fit the definition) may constitute a disability (*Kaltoft*, para 60)

Reasonable accommodation / definition of disability

- Relation to the definition of disability: “the definition of the concept of ‘disability’ within the meaning of Article 1 of Directive 2000/78 comes before the determination and assessment of the appropriate accommodation measures referred to in Article 5 of the same directive.” (Case C-354/13, *Kaltoft*, para 57)
- Cf. US Supreme Court in *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999) (myopic twin sisters applying for commercial air line pilot post; not considered disabled because vision can be corrected)

Reasonable accommodation: Substance

- UNCRPD art 2: “‘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.”
- In employment: Art. 5 of Directive 2000/78 “... 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. ...”
- “[...] a reduction in working hours may constitute one of the accommodation measures [...]” (*Ring and ors*, paragraph 64)

What is “reasonable”?

- Recital 17 : “The directive [2000/78] does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”
- Limit: no obligation for reasonable accommodation if burden on the employer is disproportionate
- What is “disproportionate”? – not the case when burden is “sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.” (Art. 5 *in fine*)

Validity review of acts of the EU legislature in the domain of disability

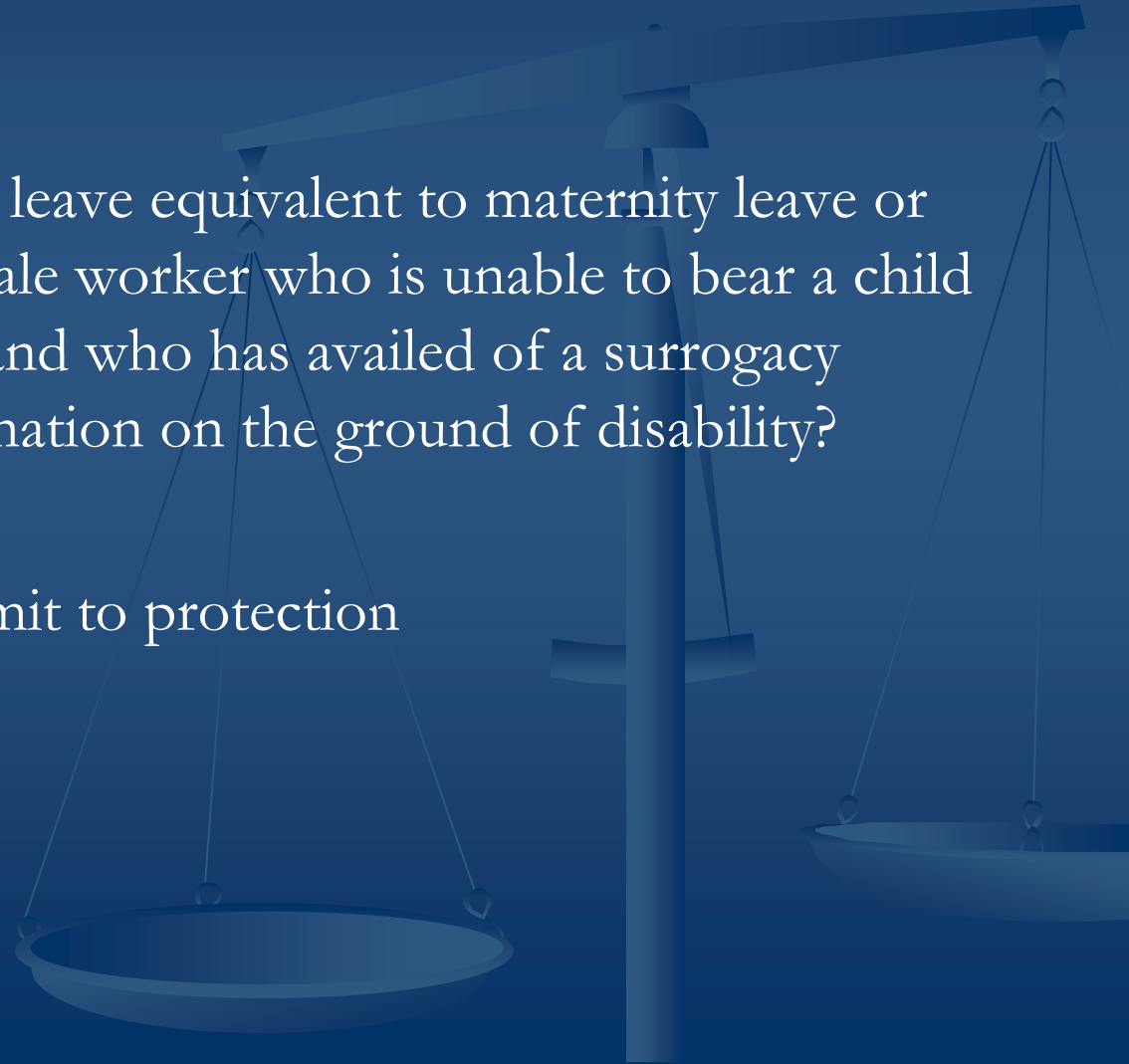
- Judgment of the Court (Fifth Chamber) of 22 May 2014 in Case C-356/12, *Glatzel*
- Validity review of the Driving Licence Directive 2006/126 esp. with regard to Articles 21 & 26 of the Charter
- EU legislator had respected proportionality in striking the balance between road safety and rights of persons with visual impairments
- Article 26 is to be respected; does not require that a specific measure be adopted

Case C-363/12, *Z.*

- Context:

Refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child (due to lack of uterus) and who has availed of a surrogacy arrangement – discrimination on the ground of disability?

- Scope of EU law as a limit to protection



(Case C-363/12, *Z.*)

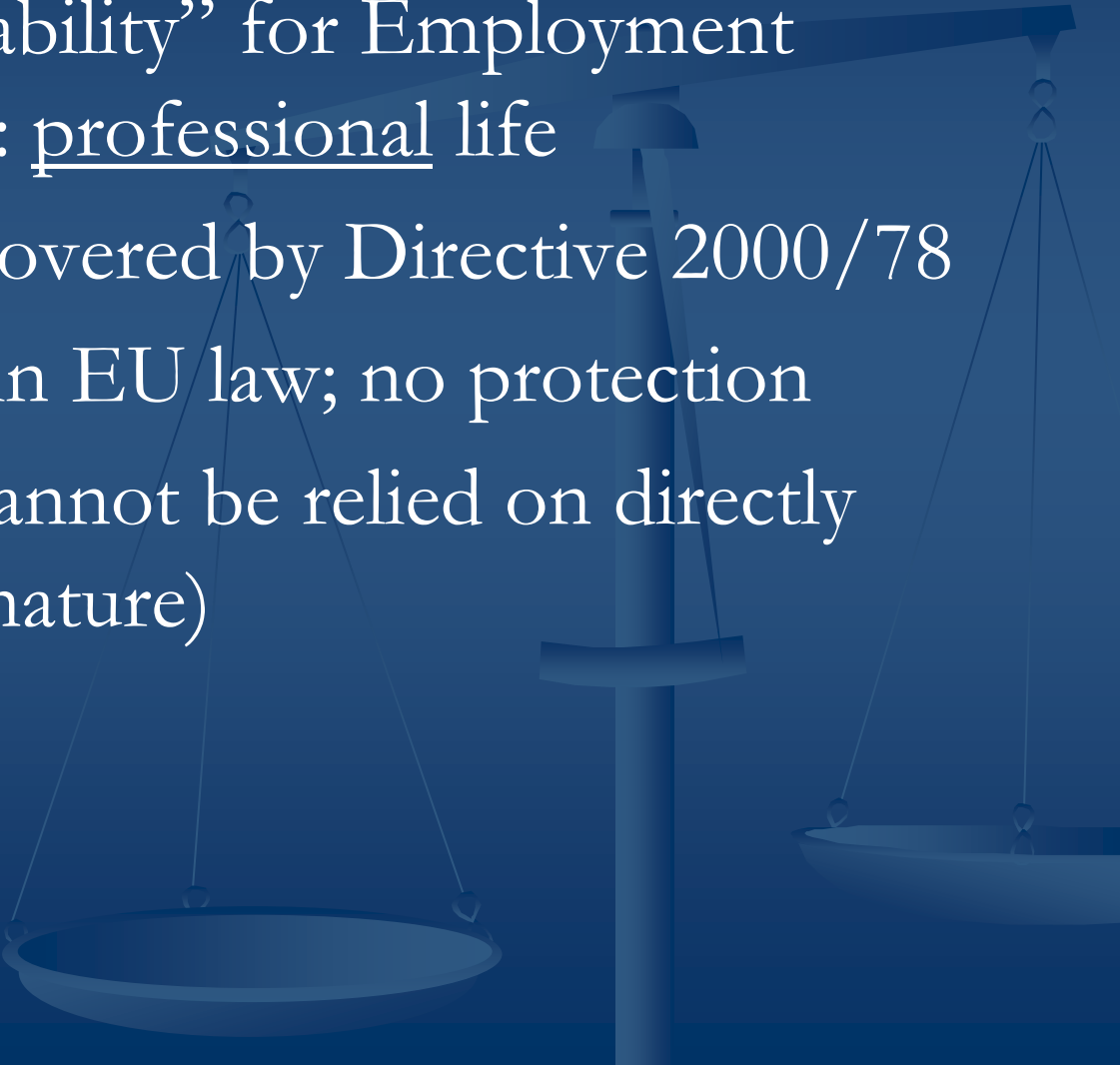
EU Court of Justice:

■ Not having a uterus is not a disability for the purposes of the Employment Equality Directive:

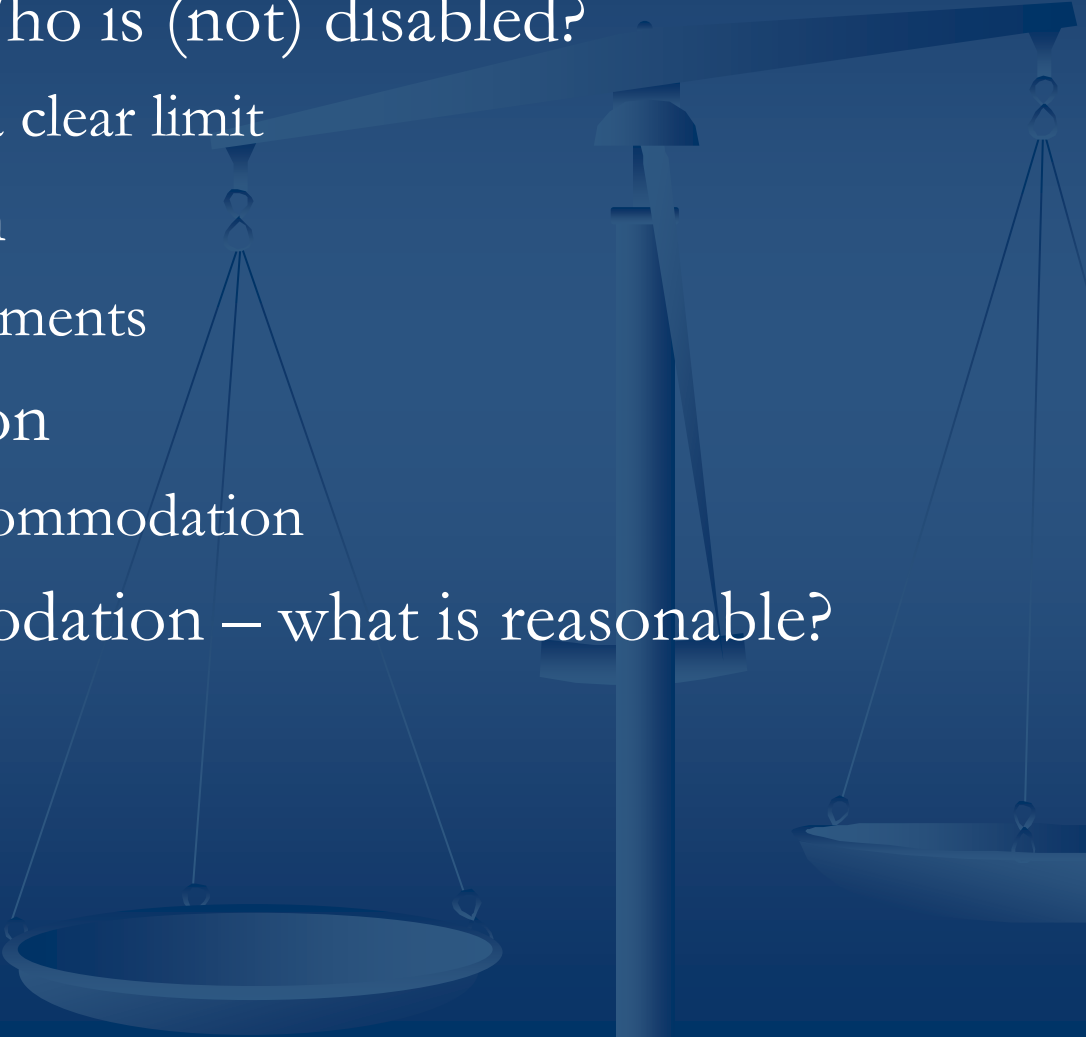
■ “the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. [It does not appear that] Ms *Z.*’s condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.”
(paragraph 81)

■ UN Convention on the Rights of Persons with Disabilities is “programmatic” and its provisions are not unconditional and sufficiently precise and do not, therefore, have direct effect in EU law. (paragraph 90)


Scope of EU law as a limit to protection

- Definition of “disability” for Employment Equality Directive: professional life
 - Z: surrogacy not covered by Directive 2000/78
 - Situation not within EU law; no protection
 - UN Convention cannot be relied on directly (“programmatic” nature)
- 

Questions

- Broad definition – Who is (not) disabled?
 - Scope of EU law as a clear limit
 - Direct discrimination
 - Occupational requirements
 - Indirect discrimination
 - Accessibility and accommodation
 - Reasonable accommodation – what is reasonable?
- 

Thank you for your attention!



Pekka Pohjankoski
Legal Secretary (*Référéndaire*)
Chambers of Judge A. Rosas
Court of Justice

National Judges and Preliminary References before the Court of Justice



Pekka Pohjankoski
Legal Secretary (*référéndaire*)
Chambers of Judge A. Rosas
Court of Justice of the European Union

Structure



- ❧ Why a preliminary reference procedure?
- ❧ Who, when, what? Article 267 TFUE, RoP, Guidance Note
- ❧ Limits to obligation to refer – “CILFIT” criteria
- ❧ Urgency
- ❧ Decisions not to refer and the ECHR
- ❧ Incorrect decisions not to refer and state liability

Why a preliminary reference procedure?



- ❧ Function of the preliminary reference procedure
- ❧ Goal: uniform interpretation and application of EU law
- ❧ Validity review of EU acts
 - ❧ Court of Justice has exclusive jurisdiction to declare EU acts invalid
 - ❧ National courts may reject pleas challenging validity (uphold validity)

What, who, when?

Article 267 TFUE



The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Limits to the obligation to refer – “CILFIT” criteria (Case 283/81)



☞ *Acte éclairé:*

- ☞ Court has interpreted under Art. 267 TFEU a materially identical question in a similar case
- ☞ Previous decision by the Court on the point of law in question, although in a different type of proceeding and the questions at issue are not strictly identical

☞ *Acte clair:*

- ☞ Correct application of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved
- ☞ National court must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.
- ☞ See also, Joined Cases C-72/14 and C-197/14, *X and ors*, para 60 (pending reference by lower court on same question does not preclude last-instance court from considering question *acte clair*).

Art. 94 Rules of Procedure



- ❧ Content of the request for a preliminary ruling
 - ❧ Facts
 - ❧ Relevant provisions of national law and EU law
 - ❧ Reasons for request
 - ❧ Questions

Advice to Member State courts



- ❧ Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJEU 2012, C 338, p. 1)
- ❧ Practical information as to how to make a reference
 - ❧ E.g. length of request: ~10 pages, numbered paragraphs
- ❧ Available on the EU Courts' website curia.europa.eu
 - ❧ “Court of Justice” → “Procedure” → “Texts governing procedure”

Urgency



- ❧ Expedited procedure (all areas of EU law)
 - ❧ Art. 23a of Statute, Art. 105 RoP

- ❧ Urgent preliminary reference procedure (PPU)
 - ❧ Art. 23a of Statute, Arts. 107-114 RoP
 - ❧ Areas covered by Title V of Part Three of the TFUE
 - ❧ “Area of Freedom Security and Justice”
 - ❧ European Arrest Warrant, parental authority or custody of children, child abductions

Decisions not to refer and the ECHR



☞ The decision not to refer should provide reasons

☞ Judgment of 20 septembre 2011 in Case *Ullens de Schooten and Rezabek v. Belgium*, §60 (“Article 6 § 1 [ECHR] ... imposes ... an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis.”)

☞ ECtHR does not look into correctness of reasoning, but its existence


- ☞ Judgment of 10 April 2012 in Case *Vergauven and ors v. Belgium* §§34-35, 91 (no violation of Art. 6 § 1 ECHR when reasons given indicating that provisions of EU law cited not relevant for resolving dispute)
- ☞ Judgment of 8 April 2014 in Case *Dhahbi v. Italy*, esp. §33 (violation of Art. 6 § 1 ECHR when decision of supreme court contained no reference to applicant’s request to make reference)
- ☞ Judgment of 21 July 2015 in Case *Schipani and ors v. Italy*, §§71-72 (violation of Art. 6 § 1 ECHR since not clear from partial reasoning whether question was considered not to be relevant or to be clear or to have already been interpreted by CJEU, or whether it was simply ignored)

Incorrect decisions not to refer and state liability



- ∞ Member State liability under EU law
- ∞ Acts of the judiciary
 - ∞ C-224/01, *Köbler v Republik Österreich* (principle of Member State liability applies also to damage caused by last-instance court decisions)
 - ∞ C-173/03, *Traghetti del Mediterraneo v Repubblica italiana*,
 - ∞ Paras 42-43: "... State liability ... could be incurred in the exceptional case where that court manifestly infringed the applicable law. Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article [267 TFEU]; it is in any event presumed where the decision involved is made in manifest disregard of the case-law of the Court on the subject.")
 - ∞ C-160/14, *Ferreira da Silva e Brito and ors v Estado português*, para 44 ("[last instance court must refer in circumstances] characterised both by conflicting lines of case-law at national level regarding the concept of a 'transfer of a business' within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States")

Thank you for your attention!



Pekka Pohjankoski
Legal Secretary (*Référéndaire*)
Chambers of Judge A. Rosas
Court of Justice of the European Union

Workshop exercise

Alfonso works as a junior designer in a boutique architect firm. Although he is deaf since his birth, he is very gifted visually and his auditory impairment has not prevented him from becoming successful in his job. For some months now, he has suffered from intense lower back pain. According to his doctor, the back problem is serious and may never heal. Upon receiving this information, Alfonso becomes depressed since his work is everything for him. He takes medication for his depression. The back pain is particularly intense when Alfonso works sitting, so he suggests to his employer that a powered height-adjustable desk be installed in his office. The employer informs him that he cannot have the desk. The reasons provided are that if the employer gives one to Alfonso, he will have to give one to everyone, in order for there to be equal treatment. In any event, the desks are pricey, the cheapest model starting from 300 euros. According to the employer, Alfonso is only disabled because of his hearing impairment, but not because of his back pain.

Besides his work as a designer, Alfonso is a promising young painter. He wants to become a professional artist and applies to the national Academy of Visual Arts in his country, a EU Member State. The jury of the Academy is thrilled with his portfolio and recommends him for the program. However, Alfonso is refused admission. In the refusal letter, the director of the Academy explains that, notwithstanding Alfonso's excellent scores in the admission examination, following the degree program in painting requires participation in class activities, which in turn necessitates the ability to hear. According to the letter, the government's recent austerity measures have imposed cuts in the Academy's budget and, therefore, it no longer has the resources to cater for people with special needs. At the end of the letter, the Academy regrets the situation and wishes Alfonso all the best in his future.

Alfonso sues both his employer and the Academy of Visual Arts in the appropriate first-level general court of his country having jurisdiction over both disputes, claiming discrimination on grounds of disability. Among other pleas, Alfonso alleges a breach of EU law, in particular, the Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (OJEU 2000, L 303, p. 16) and the Charter of Fundamental Rights.

The first-level court is wondering to what extent Alfonso is disabled, whether he is directly or indirectly discriminated on grounds of a possible disability, and whether the claimant may avail himself of protection granted by EU law. In view of these circumstances, should the court make a reference for a preliminary ruling to the EU Court of Justice? If so, should the reference concern both the claim against the employer and the Academy?

Equal recognition before the law under the CRPD

24-26 October 2016
ERA seminar, Trier

Presentation of Facundo Chavez Penillas, Human Rights and Disability Advisor
Office of the High Commissioner for Human Rights

Dear colleagues,

In this opportunity I was requested to present on the standards developed so far on the right to equal recognition before the law, particularly regarding the exercise of legal capacity. I will divide this presentation in three parts: (i) the non-discriminatory approach to persons with disabilities; (ii) the standards; (iii) some practical examples.

Before presenting the standards, I would like to briefly focus on a critical aspect of this right and its consideration under the Convention on the Rights of Persons with Disabilities: the non-discriminatory approach to persons with disabilities.

The Convention, as presented yesterday, defines the group of persons with disabilities as that which is restricted on its participation in society as consequence of the social barriers that affect persons with impairments. Consequently, a first distinction to be made is in the terminology of "impairment", on the one hand, and "disability", on the other hand. "Impairment" is an individual characteristic and "disability" is the social effect that results from the barriers that affect them.

I will ask you to keep this differentiation in mind along our conversations today in order to better address the non-discriminatory approach to persons with disabilities.

The Convention defines discrimination on the basis of disability from the starting point of considering persons with disabilities as part of human diversity, as other human rights treaties focus on children, women, ethnic origin, race, among others.

Historically, persons with disabilities have not been equally considered part of human diversity and the non-discrimination approach to them was subject to conditions. That is, while persons with disabilities have been recognized in law as having the unconditional right not to be discriminated against, this non-discrimination perspective was not fully reflected in law and, if in conflict with paternalistic perspectives on them, the ground for discrimination has been diluted in practice. This is particularly true when it comes to the exercise of their legal capacity and to make decisions on their own.

Nowadays, most legal systems in the world do not apply conditions to exercise legal capacity. Under Human Rights Law, women are not conditioned to make decisions on their assets or their medical treatment on the basis of their sex. People of African-descent are not restricted on their right to get married or to enter into contracts on the

basis of their race. Even children had been recognized the right to make decisions concerning their lives according to their evolving capacities.

While the Convention and other international human rights law recognizes equal status to persons with disabilities to other populations, this has not been reflected on an equal basis with others to persons with disabilities in national law. The Convention comes to break this disparity and eliminates conditions to upholding the non-discriminatory approach to persons with disabilities, including those that historically had been considered to lack the capacity to make decisions like persons with intellectual and psychosocial disabilities. The Convention approaches the right to equal recognition before as an enabling right to exercise other rights as, without it, personhood is abolished and equal exercise of rights is a legal fiction.

Many legal systems had advanced in this sense. Absolute deprivation of legal capacity is being challenged all over the world. Many countries left behind this approach to move into partial deprivation of legal capacity and this has to be acknowledged as an advance. Nevertheless, this is not yet up to the standards in the Convention.

But, what does the standard say?

I would like to start first saying why is it important to revert practices on the exercise of legal capacity. During the negotiations of the Convention it was made evident that depriving the exercise of legal capacity had a number of negative effects that lead to human rights violations, some of the extremely harmful and irreversible. For example, without legal capacity persons with disabilities, mainly women and girls, are subject to forced sterilization and abortion; people are deprived of their liberty because of forced institutionalization; people could not enter into employment contracts or exercise their right to vote; among others.

These practices are widespread among persons with disabilities and go to the core of human dignity, and affect those who face them in irreversible manners, undermining their self-confidence and their personal integrity in ways similar to torture and degrading treatment, as it was recognized by different human rights bodies.

It was also identified that most of the people under guardianship or similar measures were deprived of their legal capacity on grounds that were disproportional to the measure, like as a mean to access to social protection schemes, health insurance, support in school, among others. After the diagnosis of an impairment – usually by a forensic team –, particularly an intellectual or psychosocial impairment, the person and their context disappear and the diagnosis takes over telling the full story of the person to the legal system.

After identifying this widespread malpractice, the obvious response was to eliminate substituted decision-making and reframe the approach to a person-centered approach where the person concerned regains control over their decision. This, of course, raise the question of what should be done in hard cases when the person cannot express their will and preference.

The Committee on the Rights of Persons with Disabilities developed in its General Comment No. 1 an approach that is in line with the non-discriminatory approach to disability.

The Committee says in that document that “mental capacity”, that is, “the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors;” should not be an obstacle to exercise legal capacity both in the dimensions of legal standing and legal agency.

This approach is the corner stone of the non-discrimination approach to persons with disabilities and should not be conditioned. This moves away the focus from the impairment to the environment and implies the recognition of persons with disabilities as subjects of rights.

The Committee in its country reviews called on States to do mainly three things: (i) eliminate substituted decision-making systems and replace them by supported decision-making systems; and (ii) provide the necessary support to make decisions when requested by the person; and (ii) provide safeguards to avoid abuse from the people providing support.

A number of countries started to move forward on this path. For example Peru was one of the first countries to adopt legislation on this sense and a bill eliminating deprivation of legal capacity, regulating support and establishing safeguards is expected to pass this year.

Costa Rica recently adopted legislation that eliminates guardianship and provides for supported-decision making. The language in this legislation is vague and further jurisprudence should be examined to see if support will be transformed into guardianship in practice.

Argentina did not eliminate guardianship altogether but included support for decision making in its legislation and the Supreme Court, deciding on the right to vote, is evaluating a case where the general prosecutor requests to the court that in order to deprive legal capacity the judges must provide arguments on why it was not possible to provide support.

I will further explore on these practices later.

Support is openly defined by the Committee as any form of human or technical support that enables the person concerned to determine and/or communicate their will and preference. Most of us rely on our networks to make decisions that we may feel go beyond our understanding, most commonly we rely on conversations with friends and family before making important financial decisions, or getting married, or choosing what to study. The idea of support does not fall far from these common practices and imply recognizing these networks as a valid way of ensuring that the person with disability concerned is making a decision that is informed and that has a substantive process behind it. The support does not substitute the will and preference of the person concerned, and the decision ultimately lies on the person.

The Convention, recognizing that certain persons with disabilities are at higher risk of abuse from the support person, also includes the need for safeguards. These safeguards could be administrative or judicial mechanisms monitoring the role of the

support person, e.g. request them to report periodically, keep record of activities, monitor assets of the support person, among others.

Maybe the most important challenge that the Convention's approach brings to the table, is that related to persons with disabilities who cannot express themselves either momentarily or permanently.

Before entering in the standards developed by the Committee, I would like to highlight that statistics show that such cases do not represent the bulk of cases among persons with disabilities and that from a public policy perspective is reasonable to allocate the necessary resources to those cases that may need a higher scrutiny of the situation. I will exemplify with practices on this later.

Advanced decisions or power-of-attorney indicating what would be the preference of the person in a given situation are a good solution to avoid substituted decision making. These practices could be encouraged by public policy or courts when a case is brought to them. Unfortunately, this is not a widespread practice.

The Committee included in its general comment the standard of the best interpretation of the will and preference of the person concerned for such cases. While it has not yet delivered detailed guidance on it, the discussions around this legal provision aimed at creating an informed assumption on the will and preference of the person that can be analysed through objective interpretations. For example, a judge could infer from letters, witnesses close to the person like friends and family, colleagues, behaviour or other sources, what would the person want in a given case to be done.

If these standards were applied in all cases, the number of deprivations of legal capacity would be reduced to a minimum that, from a public policy perspective, would be irrelevant to keep guardianship in law. Most of this change depends of developing jurisprudence and practices that make the case evident as it was in the Latin American countries I mentioned before.

But, what is it that these countries did?

Judges had the most important role on this process together with public prosecutors. A few judges and public prosecutors understood the importance of ending substituted decision-making in the face of the human rights violations at stake and the abuse that persons with disabilities were (and continue to) face in those countries. In addition, jurists found the issue interesting both from an academic and political perspective and the mental health and disability movements worked together to advocate for change. Among them not only persons with disabilities, but psychiatrists, psychologists, health service providers, social-care service providers, among others.

In Argentina, far before any legal reform, two judges one in the most populated jurisdiction and another in a medium-size city started to apply in their decisions the standards of the Convention.

The first criterion applied by these judges was to avoid looking at the person through the diagnosis lens, and started to ask questions:

Why is this person deprived of legal capacity? If the answer was connected to, for example, sign a paper to access a benefit or health insurance, they conducted a contextual evaluation of the person. Does they have assets? Who manages them and for

what purpose? Does the person have social networks? Is the person making decisions in other issues? Is the measure proportional to the person's social context? An in dialogue with the person, the judges started to find solutions to all of the interests at stake.

By being consistent with the goal of not depriving legal capacity, judges and the people involved in the cases started to find support networks that could guide the persons with disabilities on managing their own lives. After that, judges started to rule against existing civil and procedural legislation finding them inapplicable in the particular case as there was the Convention and a solution that fits the Convention's standards.

These practices, motivated public prosecutors who usually are guardians of persons who lack social networks to support them to operate in the same line and started to challenge decisions that deprived their clients of legal capacity, and laws and procedures that required guardianship to access to benefits and services. These initiatives were receipted by the general prosecutor's office which created a pilot project to eliminate unnecessary guardianships. Over 4000 guardianships were considered unnecessary and ended in two years, which proved that the existing legislation was not providing for the protection it allegedly pursued. The civil code was being discussed at that moment and this approach was brought to the working group discussing capacity in the new civil code. The working group considered that a first step was to implement support and safeguards, and that judges with their practices were going to build the case by themselves against guardianship in most cases. Difficult cases were to be considered in a second stage. The new civil code entered into force in Argentina last year with this approach and practice continues to evolve.

In conjunction with this, the new mental health law included in 2010 a provision indicating that decisions depriving legal capacity should be revised every three years. This put the issue on the agenda of judges and public prosecutors that actively engaged on reverting decisions. The Ministry of Health created an interdisciplinary unit to support this process. This unit constituted by social workers, psychologists and psychiatrists and lawyers, all trained on the Convention, had two tasks: (i) monitor conditions, time and reasons of forced institutionalization in psychiatric institutions; and (ii) support courts in evaluation of deprivation of legal capacity.

In order to perform this second task, the unit developed a protocol to evaluating context based on the experiences developed by judges and prosecutors. Data collected includes: (i) basic information (address, family, etc.); (ii) how does the person concerned sees the legal process of deprivation of legal capacity (is they aware of the consequences, does it improve or restrict access to services, etc.); (iii) does the person have legal representation (if yes, was it appointed by themselves or by the State); (iv) is the person offering a support person for decision-making (friends, family, organizations, public prosecutor, etc.); (v) social resources, both personal and in the community; among others.

All of this information is made available to the judge and the public prosecutor involved in the process for they to make an informed assessment of the situation and to break the traditional approach of basing their decisions in purely medical assessments made by the forensic team. Judges realized that a diagnosis fails to describe the reality

of the person and this kind of assessment should not be the basis for depriving legal capacity.

This should be considered a good practice as it is moving in the right direction and is building capacity along the way. The Committee has recognized this effort although it needs to achieve the goal of ending guardianship.

In Peru the process was motorized by two pillars. In that country guardianship is not a widespread practice as in Argentina, consequently in practice it was already a residual measure. The second pillar was that it was legally and morally unnecessary, as in most cases was doing more harm than good. Here the most important role was on politicians, civil society and renowned jurists.

I left some of the decisions related to legal capacity that support these practices with the organizers. I apologize as we do not have them in other language but in Spanish.

To open our conversation, I would like to put forward the following questions:

1. Do you already undertake contextual analysis in your countries to challenge or decide on cases requesting deprivation of legal capacity?
2. Does your legal framework allow you to challenge national laws on legal capacity using the Convention? If so, have you already decided on such cases?
3. What are the challenges that you face to enforce the Convention?

Gracias.

Access to justice under the CRPD

24-26 October 2016
ERA seminar, Trier

Presentation of Facundo Chavez Penillas, Human Rights and Disability Advisor
Office of the High Commissioner for Human Rights

Dear colleagues,

I will build upon my previous presentation in this session.

In addition, I will assume your knowledge on the relevance and importance on the right of access to justice and the barriers that generally all people, particularly those that are poor, face in accessing the legal system.

Consequently, this time I will focus exclusively on the barriers and standards most applicable to persons with disabilities regarding this right.

Persons with disabilities face barriers on the following areas:

- (i) The right to be heard and to stand trial.
- (ii) The right to procedural accommodations.

While both areas are extremely intertwined, the first has the particularity of being connected to the right to equal recognition before the law.

Persons with disabilities are usually wrongfully perceived as unreliable to express on the facts connected to a case, perform as witnesses or instruct their lawyers. In addition, those deprived of their legal capacity are usually excluded from civil and criminal procedures based on their lack of capacity.

Practice across countries show that deaf persons and those with intellectual and psychosocial disabilities are disproportionately impacted by these preconceptions and that they experience higher rates of engagement with the judicial systems. Communication is a major barrier for them and the lack of procedural accommodations leads to a number of human rights violations.

Those deprived of their legal capacity or attributed with an intellectual or psychosocial impairment are excluded *de iure* from civil and criminal processes in most countries. Once a diagnosis is provided to a person with disability, the person is considered unfit to stand trial and is diverted from the process into a special process that usually violate the right to a fair trial by depriving the right to be heard in person. The International Criminal Court has said that in order to be fit to stand trial the person should be able : (i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement. The

CRPD Committee – in several concluding observations and in its Guidelines on Article 14 of the CRPD – has strongly rejected the concept of unfitness to stand trial and its discriminatory character and has consistently recommended that “all persons with disabilities accused of crimes and detained without trial in prisons and institutions, are allowed to defend themselves against criminal charges and provided with the required support and accommodation to facilitate their effective participation”, together with procedural accommodations to ensure fair trial and due process, all of them free of charge.

Importantly, Article 12 of the CRPD confirms that the concept of competence to stand trial must not exclude persons with disabilities from regular procedures. The CRPD Committee has emphasized that the recognition of the right to legal capacity is essential for exercising the right of access to justice on an equal basis with others, and that persons with disabilities must therefore be recognized as persons before the law with equal standing in courts and tribunals. The support in the exercise of legal capacity provided for in Article 12 covers the capacity to participate in judicial, administrative and other legal proceedings, and may take various forms, such as the recognition of diverse communication methods, procedural accommodation, professional sign language interpretation and other assistive methods. Furthermore, full compliance with Article 12 forbids any impairment-based restriction in the exercise of self-representation before courts, such as the one proposed by the Human Rights Committee, “in the interest of justice”, on those who cannot “act in their own interest.”¹ The CRPD criteria call for the development of adequate policy guidelines to ensure better access to justice, including self-representation and the instruction of counsel.

I will not go on the consequences of diverting persons with disabilities, as I know that tomorrow you will have a workshop on deprivation of liberty. Nevertheless, let me say that studies in Australia show that people deprived of their legal capacity are underrepresented among those benefitting from diversion mechanisms, given the fact that they cannot plead guilty, although it has been extensively proven that persons with psychosocial and intellectual disabilities that accessed diversion mechanisms have less rates of recidivism.

With regard to procedural accommodation, let me start by saying that there is an increasing interest in developing guidelines on access to justice that consider the issue of procedural accommodations. In a quick review of these guidelines across countries for this seminar, I noticed that many of them confuse “reasonable accommodation” with “procedural accommodation”.

Reasonable accommodation does not apply in the context of access to justice as the term “reasonable” was intentionally left aside during the Convention’s negotiations. Instead, article 13 requires “procedural accommodations”, which are not limited by the concept of “disproportionate or undue burden.” This differentiation is fundamental because the right of access to justice operates as the last resort to ensure the exercise of human rights. Consequently, failure to provide procedural accommodation constitutes a form of discrimination on the basis of disability in connection to the right of access to justice.

¹ Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

Procedural and age-appropriate accommodations, as Stated in the Convention, are all the possible accommodations needed to exercise the right to fair trial, including those necessary to stand trial on an equal basis with others.

Procedural accommodation should start with an interactive dialogue with the person concerned in order to identify what are their accommodation needs and how to address them as people with disabilities are experts on their own needs and most of the time already know what fits best for communication purposes. Procedural accommodation should be evaluated on the basis of its outcome. Where a procedural accommodation is denied, remedies should be provided. The duty to provide procedural accommodation must be explicitly included in legal instruments in order to avoid overlooking them. Nevertheless, the mandate to provide procedural accommodation already exists in the Convention and should be applied by courts.

People with disabilities have different accommodation needs, some may need communication accommodation. The Convention establishes that "Communication" includes languages, including sign language, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.

Practice shows that certain people need other means of accommodation, for example, it might be necessary to take breaks along an oral proceeding for the person to rest or reduce their anxiety. Certain people may not be in a position to face their perpetrators or counterparts in a trial, and may need to be present at the proceeding via videoconference.

The Committee has made recommendations on procedural accommodation to all countries reviewed under article 13 of the Convention. This makes evident that almost no country in the world has a systemic approach to this element of the right of access to justice.

The provision of accommodations should be documented and shared by courts in order to produce a repository of good practices, facilitating information sharing among judicial actors. Most commonly, judges and other members of the judiciary do not know what the available resources are, what has happened in other cases or how accommodation was solved in those cases. Having procedural accommodation focal points in courts can help to avoid creating new practice every time and improving knowledge management.

Some accommodations could require financial resources. Creating a centralised fund to rapidly react to requests of accommodation can also contribute to be ready to provide for this right.

In 2015 we organized an expert meeting on deprivation of liberty to explore the challenges, also, connected to the exercise of the right of access to justice. Some of the action recommendations coming out of that meeting were the following:

a) Increase trainings on the CRPD for lawyers, judges and other personnel in the justice and prison system.

b) Promote strengthened collaboration between lawyers and other professionals, such as social workers, in order to support lawyers work as counsels. Such collaboration should not entail abdication or limitation of professional responsibility of the lawyer, which should be clearly regulated.

c) Support the adoption of protocols and guidelines to ensure and enhance the provision of procedural accommodation. On this regard, applied research with a CRPD perspective in the area of procedural law should be promoted.

d) Promote debate on access to justice of persons with disabilities and the provision of procedural accommodation among bar associations, criminal law associations and research institutes, academia, among other relevant bodies with civil and criminal law expertise.

In order to open the conversation, I suggest the following questions:

- (i) Have you faced challenges similar to these? Have you found effective solutions?
- (ii) Have you faced other challenges?
- (iii) What kind of tools would be useful for your everyday function?

Reasonable Accommodation : What does it entail ?

Presentation Overview

- ▣ Origins and foundations of the concept of reasonable accommodation
- ▣ Reasonable accommodation as a cornerstone of the human rights approach to disability
- ▣ Key elements of the concept
- ▣ Selected case-law on reasonable accommodation

1. Origins and foundations of the concept of reasonable accommodation

- The concept of reasonable accommodation did not originate in the context of disability but in reference to discrimination on the grounds of religious practice (United States Civil Right Act 1964). Reasonable accommodation was an exception to be granted to a person upon whom a working time rule would have a discriminatory effect on grounds of their religion.
- The concept was subsequently expanded to disability in the domestic disability law of the United States (ADA -1991) and appeared at the international level in General Comment 5 of the Committee on Economic, Social and Cultural Rights (CESCR -1994).
- Article 5 of the Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation required Member States to introduce reasonable accommodation duties for persons with disabilities in the employment context.

- The UNCRPD introduces a general duty of “Reasonable Accommodation” and applies it in several contexts including education and work. Reasonable accommodation is defined in Article 2 as :

“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”

- As Article 5(2) of the UNCRPD imposes to States Parties to “prohibit all discrimination on the basis of disability”, this would include an obligation to provide reasonable accommodation to persons with disabilities. The obligation under Article 5(3) to “take all appropriate steps to ensure that reasonable accommodation is provided” would include an obligation on the States Parties to impose the duty to provide reasonable accommodation on different sectors of society such as transportation providers, employers, and schools etc..

2.

A cornerstone of the human rights approach to disability

“

“Everybody is a genius. But if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid.”

Typology of approaches towards disability

(Marcia Rioux)

Disability as an individual pathology

Locating the problem inside the person.

- The “medical” approach
- The “functional” approach

Disability as a social pathology

Locating the problem outside the person.

- The “environmental” approach
- The “human rights” approach

- If disability is mainly viewed as a problem of the person, directly caused by disease, trauma or other health condition, medical and social care is viewed as the main issue, and at the political level the principal response is that of modifying or reforming health and social care policy
- On the other hand, if the issue is mainly seen as a socially created problem, disability is not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment. Hence the response to the problem requires social action, and it is the collective responsibility of society at large to make the environmental modifications necessary for the full participation of people with disabilities. The issue is therefore an attitudinal or ideological one requiring social change, which at the political level becomes a question of human rights.

- This model emphasizes the role that social attitudes and systems that appear neutral on their face play in creating and perpetuating disadvantage. Under this approach, impairment is recognized to the extent necessary to design accommodations to permit persons with disabilities to achieve substantive equality.

- This conception of disability is included in the United Nations Convention on the Rights of Persons with Disabilities its Preamble, the UNCRPD states:

“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.”

3. Key elements of the concept of reasonable accommodation

Classification of the duty

▣ According to Article 2 of the UNCRPD, “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”.

▣ The right to be free from discrimination is a civil and political right and thus implementation of reasonable accommodation duties is required with immediate effect.

Content of the duty

Necessity and effectiveness

The duty is solution-oriented : its fulfilling must enable the person to enjoy her or his rights on an equal basis. An informal process is de facto required to clarify what the person needs and identify the appropriate accommodation.

Individualization

The duty to provide reasonable accommodation is an “ex nunc duty”, which means that it is enforceable from the moment a person needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context.

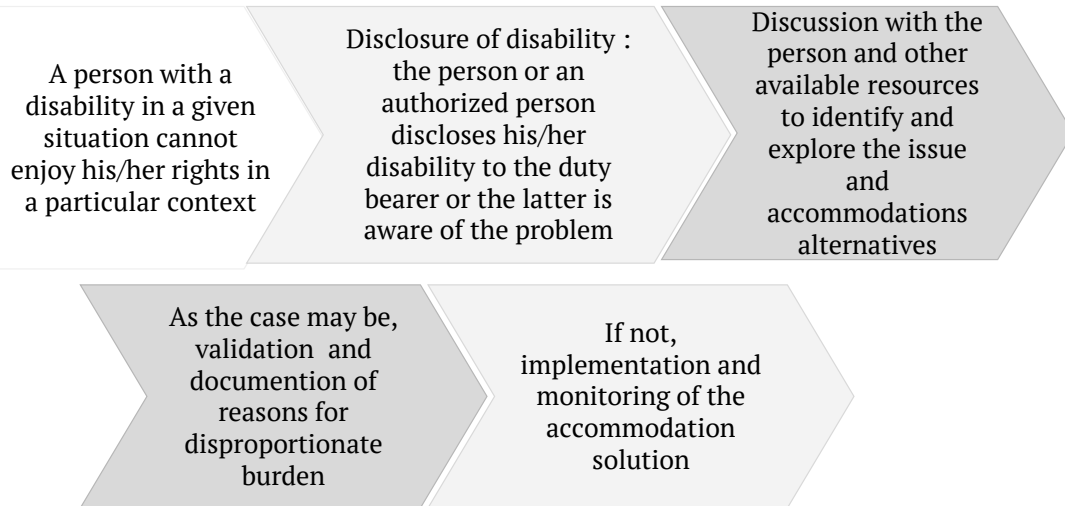
Disproportionate or undue burden

The duty requires assessments of the level of any potential burden to be conducted in a manner that is sensitive to the circumstances of the particular duty-bearer.

Material scope of the duty

- In addition to article 5 and 2, the UNCPRD makes explicit references to the obligation on States to introduce reasonable accommodation duties in a number of areas, including liberty and security of the person (article 14), education (article 24) and employment (article 27).
- Even had such explicit references not been made, articles 5 and 2 of the UNCPRD necessarily imply the imposition of reasonable accommodation duties across all human rights and fundamental freedoms.

How it works in practice



4. Selected case-law on reasonable accommodation

Committee on the Rights of Persons with Disabilities

- ▣ H.M. v Sweden – Communication No. 3/2011
Refusal to grant building permission for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability on grounds of incompatibility of the extension in question with the city development plan
- ▣ Jungelin v Sweden – Communication No. 5/2011
Recruitment process, reasonable accommodation in the workplace

European Court of Human Rights

- ▣ Glor v. Switzerland (2009)
Reasonable accommodation of a physical disability for a mandatory military service or an alternative civil service.
- ▣ Semikhvostov v. Russia (2014)
Failure to provide reasonable accommodation in a detention facility resulting in inhuman and degrading conditions.
- ▣ Cam v. Turkey (2016)
Refusal of the enrolment of a student at a Music Academy because of her blindness.

Court of justice of the European Union

- ▣ HK Danmark, acting on behalf of Jette Ring v Dansk Almenyttigt Boligselskab DAB and HK Danmark, acting on behalf of Lone Skoube Werge v Pro Display A/S in liquidation - Joined Cases C-335/11 and C-337/11 11 April 2013
An employer may be obliged to offer part-time work as a reasonable accommodation in order for a disabled worker to be able to continue being active on the labour market.

National case-law

- ▣ France, Court of Appeal, Poitiers, September 2005.
The refusal to sell tickets cinema to wheelchairs users - unless the defendant could demonstrate the technical impossibility of providing access to the cinema, or its disproportionate cost - constitutes a discrimination based on disability.
- ▣ Spain, Audiencia Nacional, November 2009.
The rules of the Ministry of Education governing scholarships must be subject to the provision of reasonable accommodations.
- ▣ Germany. Federal Labour Court (Decision of 19.12.2013)
The employer has the duty to assess reasonable accommodation options for an employee with a HIV disease.

Workshop approach

The purpose of this workshop is to examine what the role of judges (and other legal operators) to ensuring the rights of persons with disabilities.

The starting point for this review is the Convention on the Rights of Persons with Disabilities.

For this we have the presence of a person with disability as an experience expert will tell us what happened when you had to face legal proceedings.

We have little time so we will center on answering to the question if the legal operators ensured the rights of Dolores regarding article 12 and 13 CRPD.

Some details about Dolores



Dolores Torrents is a person with Disability. She born in Barcelona, Spain.

She went to school until age of 15 when she finished compulsory schooling.

As she had remarkable aptitude for drawing and painting, she studied for five years a design module. It allowed her to work as an illustrator in a graphic design company.

Later, she got an educational scholarship for 6 months in Italy. During that period, she also travelled to Rumania. She speaks Italian and Romanian.

Nowadays, Dolores lives independently with a roommate and some supports and she is a trainer on the rights of people with intellectual disability and belongs to the Rights Observatory of a Plena inclusión Catalanian Federation.

Facts that led to her incapacitation:

Her parents decided ask for her incapacitation because she was victim of a fraud in an English Academy (as well as thousands of individuals) and she lost the money of her bank account because her credit card had been stolen and cloned.

The judicial processes:

Dolores has been involved in two different processes related to her legal capacity. Her family wanted support for economic affairs but the judge decided a partial guardianship. She also lost her right to vote.

Two years ago, Dolors decided to initiate by herself a new judicial procedure to vindicate her rights. The judge refused to admit her own behalf, so she reported it to the High Court. They admitted her complaint so the judge was changed.



Who are we?



Dolors Torrents



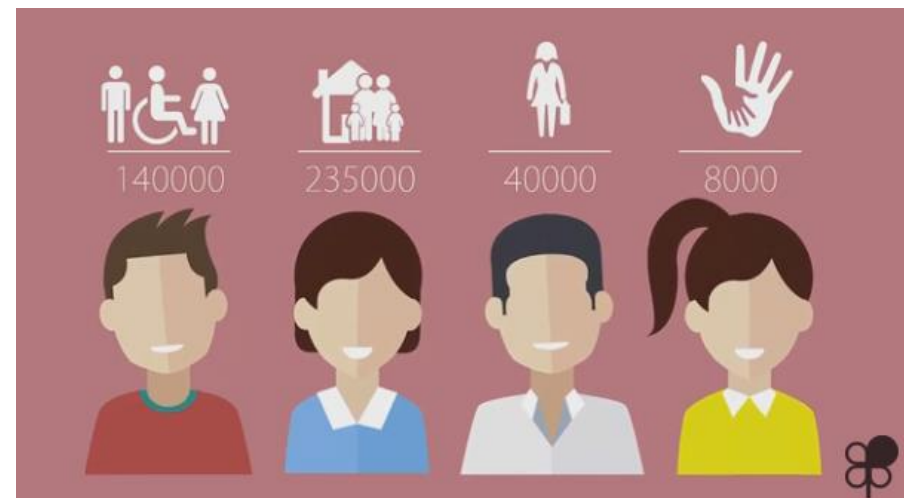
Inés de Araoz

Plena inclusión

Plena inclusión is a Spanish umbrella organization for persons with intellectual or developmental disabilities and their families.



<https://www.youtube.com/watch?v=wBYDzx12f-Y>



Approach to Spanish situation

- Substituted decision-making model.
- 95% of the cases are plenary guardianship.
- 60% increase of the incapacitation cases between 2010 – 2015 in the Court of Zaragoza (Spanish Region).
- Legislative reform pendant. In preparation.
- Jurisprudential development of article 12.



Article 13 CRPD

States Parties shall ensure **effective access** to justice for persons with disabilities on an equal basis with others.

... facilitate their **effective role** as direct and indirect participants [...] in all legal proceedings.

...through the provision of **procedural** and age-appropriate **accommodations**.

**RIGHT TO DUE PROCESS OF PEOPLE
WITH INTELLECTUAL DISABILITY**



Imagine your life without legal capacity... maybe...

You can't control your financial affairs

You can't vote

You can be held in an involuntary confinement

You can be substituted in your decision making...

Interview with Dolors...

Summary of the first Dolors's process

Her family told her that they are going to initiate the process.

... But they didn't explain anything about the process and its consequences.

The **lawyer** didn't interview her: he didn't know anything about her will and preferences or about her needs of support.

The **judge** interview her. He didn't know anything about her will and preferences or about her needs of support. He think that she is a person with disability so she is unable.

He didn't have enough information to give a correct judgement.

And... what can I say about the forensic?



Summary of the first Dolors's process

In our experience, processes related to the legal capacity of persons with intellectual or developmental disability are characterized by **legal defenselessness**.

Influence of the predominant social and cultural model on the judges, lawyers and forensic doctors:

Intellectual disability = inability to take decisions



Train of trainers course on CRPD



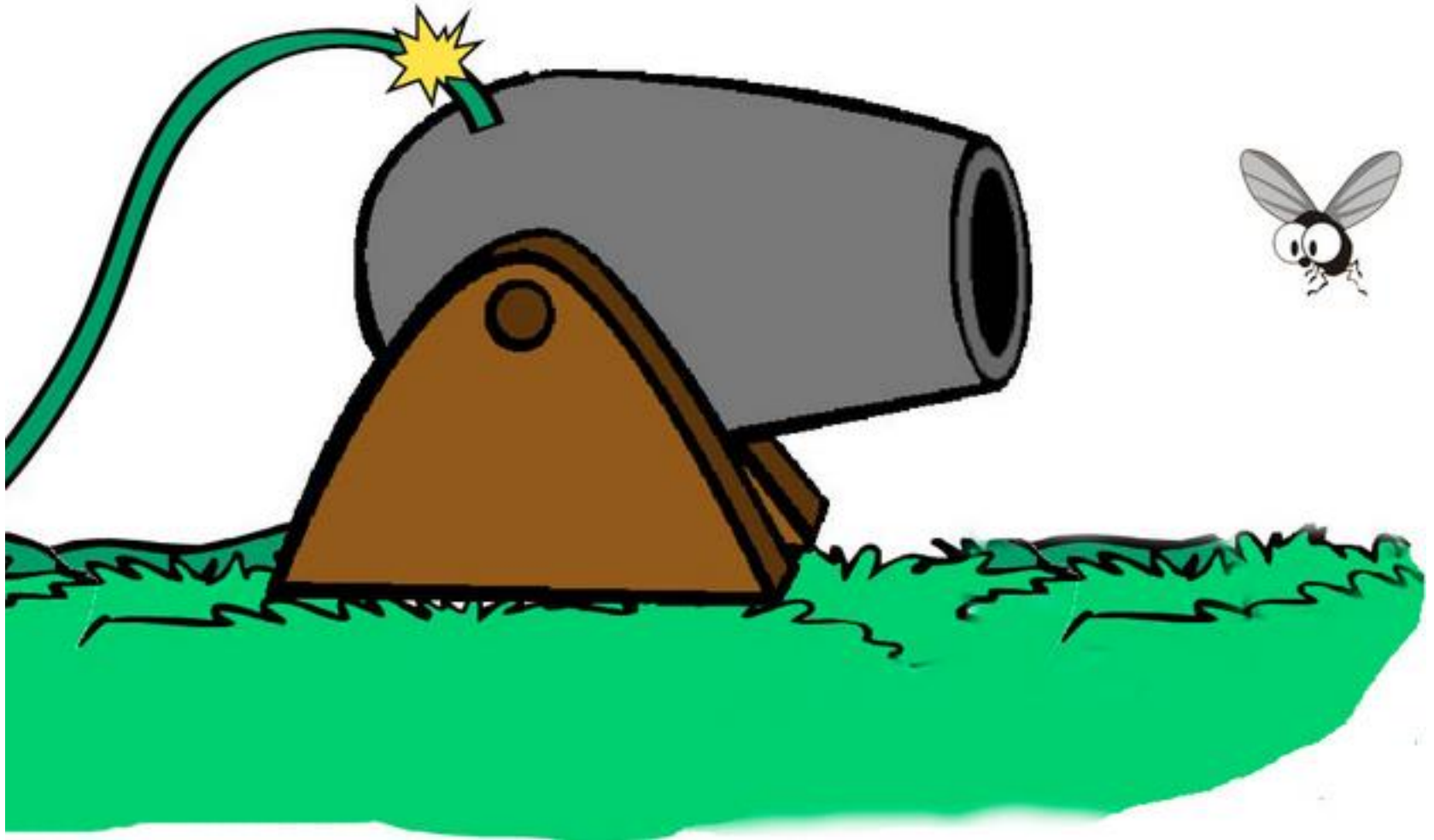
The opinion of the people with intellectual disability...

They feel that their judgment is not sufficiently reasoned, believing that the judge does not know them enough to establish on what aspects of their life they need or not support.



Key findings

We are using a sledgehammer to crack a nut...



About the processes...

- Decision on establishment of support must be taken with the person.
- Pre-trial information: accesible and sufficient.
- The trial must be centered on the person.
- The judge must ensure the real participation of the person.
- We need to have enough information of the needs of the person before to decide about the support that they need.

About the legal capacity...

At all times [...] the individual autonomy and capacity of persons with disabilities to make decisions must be respected.

(GC Equal Recognition before the law)

It means that:

- **We need to have enough information of the needs of the person before to decide about the support that they need.**
- **We never can't eliminate the ability to make decisions of people.**
- **No more support than the necessary.**
- **Capacity to make decisions perceived as something dynamic.**



With support...



“It’s very important to know that we have the same rights than the other people.

But sometimes we need support to exercise them.”



"La mirada de la esperanza". VIII Concurso Fotografía INICO



CONTACT INFORMATION

Inés de Araoz Sánchez-Dopico
asesoriajuridica@plenainclusion.org

Detention of persons with disabilities: EU Law and the UN CRPD

Trier, October 2016
Jean-Sébastien Blanc



Structure

- A few words about the APT
- Disability, mental health and deprivation of liberty: some data
- Arrest by the police and procedural safeguards
- Detention in penal establishments
- Administrative detention
- Involuntary placement in psychiatric hospitals



A few words about the APT

- NGO founded in 1997, based in Geneva
- Idea of the founder Jean-Jacques Gautier: «open-up places of detention to outside scrutiny»
- Prevention of torture and other ill-treatment achieved through a combination of 3 strategies
 - Reinforcement of legal and policy framework
 - Improvement of practices
 - Strengthening of public oversight
- European Convention for the Prevention of Torture and Optional Protocol to the UN Convention against Torture (OPCAT)



Some data...

- Population EU (2011):
 - 26% of persons older than 16 y.o. experience «limitations of their activities» (out of them: 28% women and 23% men)
- Mental health in prison (WHO/UE):
 - Out of 2 millions detainees, at least 400'000 have a serious mental health problem (WHO)
 - 80% of detainees have a mental health problem
 - Main causes: overcrowding, violence, marginalisation, detention conditions, quality of care, discrimination
 - Frequent comorbidity: personality disorder and addictions



Prevalence of main mental health problems

	% prison population	% general population
Psychotic disorders	10-20%	0,5-1%
Schizophrenia	1-4%	0,5-1%
Personnality disorder	40-65%	6-9%
Anti-social disorder	31-65%	2-3%
Severe depression	10-14%	2-10%
Anxiety disorders	33%	2-10%
Post-traumatic stress disorder	4-25%	1-3%
Addictions (general)	22-65%	2-18%



Key articles on disability and deprivation of liberty

CRPD	EU Charter of Fundamental Rights
<ul style="list-style-type: none">• Art. 12 - Equal recognition before the law• Art. 13 Access to justice• Art. 14 Liberty and security of the person• Art. 15 Freedom from torture or cruel, inhuman or degrading treatment or punishment• Art. 19 Living independently and being included in the community• Art. 25 Health• Art. 33 National implementation and monitoring	<ul style="list-style-type: none">• Art. 1 (Human dignity)• Art. 4 (Prohibition of torture)• Art. 6 (Right to liberty and security)• Art. 21 (Non-discrimination)• Art. 26 (Integration of persons with disabilities: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”)



Statements: agree or disagree?

- «The mere existence of an impairment can never justify a deprivation of liberty»
- «Isolation and restraints applied onto persons with disabilities must be eliminated as practices violating the prohibition of torture and other ill-treatment»
- «All treatments must be based on the informed consent of the person»
- «Detention on the basis of a disability must always be a last resort and must include safeguards and the right to appeal»



Disabilities and detention: two perspectives

CRPD, WGAD

- The mere existence of a disability can never justify the **deprivation of liberty** of a person
- Involuntary placement is tantamount to a form of **arbitrary detention**
- All treatments must be based on the **informed consent** of the person
- **Isolation** and **restraints** applied onto persons with disabilities must be **eliminated** as practices violating the prohibition of torture and other ill-treatment
- **Detention condition**: right to be treated in accordance with the CRPD principles, including accessibility and reasonable accommodation
- Aims at **deinstitutionalisation**

«Traditionnal» Standards CPT/SPT

- Detention on the basis of a disability must always be a **last resort** and must be accompanied by safeguards and the possibility to **appeal decisions**
- Involuntary detention does not allow for forced treatment (**opportunity to refuse**)
- **Restraints** and **isolation** must be avoided to the extent possible (use of de-escalation techniques); must never be used as a punishment (some forms are prohibited); training of staff
- **Deinstitutionalisation** and support in the community as end goal

Persons with disabilities and the police: arrests and procedural safeguards



Main risks

- Arbitrary detention
- Potential state of vulnerability and weakness
- Reasons of the arrest are not clear, the language is not adapted
- Rights are not explained in a clear manner
- Legal council and responsible adult?
- In case of detention: reasonable accomodation?



EU Directives on procedural safeguards

- **Directive (2010/64/EU) on the right to interpretation and translation in criminal proceedings :**
 - → duty of care towards persons who are in a potentially weak position (any physical impairments which affect their ability to communicate effectively), and appropriate assistance for persons with hearing or speech impediments
- **Directive (2012/13/EU) on the right to information in criminal proceedings**
 - → information about their rights in simple and accessible language, taking into account any particular needs of persons
- **Directive (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime**
 - → Communication with the victims take into account any disability that may hinder the capacity to understand or to be understood
- **Directive (2013/48/EU) on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings**
 - → take into account any vulnerability that may hinder the capacity to access a lawyer and inform a third party from the outset of the deprivation of liberty



Key recommendations

- **Recommendations of the EUROPEAN COMMISSION on procedural safeguards**
 - (7). foresee a **presumption of vulnerability**: obstacles to understand and effectively participate in the proceeding
 - Right to information (8). Persons with disability should receive upon request information concerning their procedural rights **in a format accessible to them**
 - (10). legal representative or an **appropriate adult** should be present at the police station and **during court hearings**
 - (12). **If deprived of their liberty**, vulnerable persons should have **access to systematic and regular medical assistance throughout criminal proceedings**.
 - 13. **Any questioning** of vulnerable persons during the pre-trial investigation phase **should be audio-visually recorded**.
 - 14. **deprivation of liberty** of vulnerable persons should be a **measure of last resort**, proportionate and taking place under conditions suited to the needs of the vulnerable person+ **reasonable accommodation**
- **UN SPECIAL RAPPORTEUR ON TORTURE (Report to the UN GA, Ausut, 2016)**
 - Identify vulnerability promptly in view of conducting interrogations and **implementation of additional safeguards**
 - Persons with **sensory impairment** also have the **right to an interpreter**

Persons with disabilities and detention in penal establishments



Main risks

- Rights and obligations are not explained in a clear manner (procedural safeguards)
- Inappropriate conditions of detention
- Inappropriate behaviour of the staff
- Punitive approach: isolation, etc.
- Violence from fellow inmates
- Perspective of reinsertion
- «Preventive detention» of undefined duration



European Court of Human Rights

- **W.D. v. Belgique:** Plaintiff kept for a long period of time in a prison environment without a therapy adapted to his mental health needs and without perspective of reinsertion amounts to a degrading treatment (*viol. Art. 3*)
- **Semikhvostov v. Russie:** Conditions of detention of a detainee with disabilities (wheel-chair user) amount to a violation of art. 3; his right to effective appeal was also violated (*viol. Art. 3 et Art. 13*)



UN Standard Minimum Rules for the Treatment of Prisoners

- Rule 109.1. Persons who are found to be **not criminally responsible**, or who are **later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons**, and arrangements shall be made to **transfer them to mental health facilities as soon as possible**.
- 109.2. If necessary, **other prisoners with mental disabilities and/or health conditions** can be observed and **treated in specialized facilities** under the supervision of qualified health-care professionals.
- 109.3. The health-care service shall **provide for the psychiatric treatment of all other prisoners who are in need** of such treatment.
- Règle 110. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to **ensure if necessary the continuation of psychiatric treatment after release** and the provision of social-psychiatric aftercare.



European Prison Rules

- 12.1 Persons who are **suffering from mental illness and whose state of mental health is incompatible** with detention in a prison should be detained in an establishment specially designed for the purpose..
- 40.4 Medical services in prison shall seek to **detect and treat physical or mental illnesses or defects** from which prisoners may suffer.
- 40.5 All necessary medical, surgical and psychiatric services **including those available in the community** shall be provided to the prisoner for that purpose.
- 47.1 **Specialised prisons or sections** under medical control shall be available for the observation and treatment of **prisoners suffering from mental disorder or abnormality** [...]
- 47.2 The **prison medical service shall provide for the psychiatric treatment** of all prisoners who are in need of such treatment and pay special attention to suicide prevention.

Persons with disabilities and administrative detention





Main risks

- Potential vulnerability and weakness
- Reasons of the arrest are not clear for the detained person, the language is not adapted and rights are not explained in a clear manner
- Possibility to appel
- Violence
- In case of detention: reasonable accommodation?
- Transfers, deportations
- Multiple vulnerabilities: language, disability, etc.



Administrative detention

- **Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, UNHCR, 2012:**
 - [...] States [should make] “**reasonable accommodations**” or changes to detention policy and practices to **match their specific requirements** and needs. A **swift and systematic identification and registration** of such persons is needed **to avoid arbitrary** detention; and any alternative arrangements may need to be tailored to their specific needs [...]. As a general rule, asylum-seekers with long-term physical, mental, intellectual and sensory impairments **should not be detained**. In addition, **immigration proceedings need to be accessible to persons with disabilities**, including where this is needed to facilitate their rights to freedom of movement.
- **Directive (2013/33/UE) on the reception of applicants for international protection :**
 - (11) The health, **including mental health**, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities
 - (21) Member States shall **take into account the specific situation** of vulnerable persons such as disabled people, elderly people and persons with mental disorders
 - (22) Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs **throughout the duration of the asylum** procedure and shall provide for appropriate monitoring of their situation.

Persons with disabilities placed involuntarily in psychiatric hospitals and social care establishments



Main risks

- Involuntary placement
- Involuntary treatment
- Restraints and seclusion
- Lack of information
- Lack of staff, or staff poorly trained
- Right to privacy
- Lack of meaningful activities



European Court of Human Rights

- **Stanev v. Bulgarie** (2006): Groundbreaking case:
 - **Indefinite and involuntary placement by State authorities in a home amounted to deprivation of liberty under** (art. 5.1)
 - **Conditions of detention** constitute a **degrading treatment** (art. 3);
 - The plaintiff did not have the possibility to **contest his detention before a court** (5.4)
 - The plaintiff could not **obtain reparation** before a Court (5.5)
 - The plaintiff had no right to a **fair trial** (6.1)



CRPD – Guidelines on article 14 (Liberty and security of the person)

- Art. 14: A **non-discrimination provision**
- **Absolute prohibition of detention based on a disability/impairment**
- **Deprivation of legal capacity** (art. 12) may be both a cause and an effect of the deprivation of liberty
- Involuntary comital of persons with disabilities on health-care grounds **contravenes the principle of free and informed consent** for health care (art. 25)
- The right to live independently and to be fully included in the community (art. 19) **prohibits forced institutionalization** (persons usually face institutionalization as a consequence of lack of support for living in their community)
- Art. 15: The right to live free from torture
- Access to justice (art. 13) requires “**procedural accommodations**”



Principles on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Working Group on Arbitrary Detention

- **Principle 20. Specific measures for persons with disabilities**
- Courts, while reviewing the arbitrariness and lawfulness of the deprivation of liberty of persons with disabilities, shall **comply with the State's obligation to prohibit involuntary committal or internment on the ground of the existence of an impairment** or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as their **obligation to design and implement deinstitutionalization strategies** based on the human rights model of disability. The review **must include the possibility of appeal**.
- The deprivation of liberty of a person with disability [...] is **required to be in conformity with the law, including international law**, offering the same substantive and procedural guarantees available to others and consistent with the right to humane treatment and the inherent dignity of the person.
- Persons with disabilities are entitled to **request individualized and appropriate accommodations** and support, if needed, to **exercise the right to challenge the arbitrariness and lawfulness of their detention** in accessible ways.



Detention Focus Database

Combined search: Detention issues and Groups at risk. Find: By alphabetical order.

Treatment

Safeguards

Safety, order and discipline

Contacts with the outside world

Material conditions of detention

Life in prison (Regime and activities)

Health care

Personnel

DATABASE ON DETENTION ISSUES

DETENTION FOCUS is a database grouping the most relevant issues related to prison worldwide. Conceived from a detention monitoring and a human rights perspective, it offers users an in-depth analysis on key issues such as solitary confinement, body searches, family visits, staff working conditions or access to a lawyer.

[Read more](#)

GROUPS IN SITUATIONS OF VULNERABILITY

Any detained person, whatever the reasons that led to their deprivation of liberty, is in a situation of vulnerability. The following are factors that place people in situations of vulnerability: a power imbalance between detainees and those in charge of them, an almost complete dependency upon the institution which has deprived them of their freedom or limits their movements, weakened social ties and stigmatization related to detention.

[Read more](#)

- Children
- Foreigners
- LGBTI persons
- Minorities and Indigenous people
- Persons with disabilities
- Women

- Thank you!

jsblanc@apt.ch

www.apt.ch

www.apt.ch/detention-focus

Disability and Employment

Presentation Overview

- ▣ The employment rights of persons with disabilities under the UNCRPD
- ▣ The situation of persons with disabilities in the labour market
- ▣ Addressing the barriers to participation in employment
- ▣ Discrimination in the workplace and impact of the UNCRPD on the European Union legal framework
- ▣ Cases studies

1.

The employment rights of persons with disabilities under the UNCRPD

- At the heart of the UNCRPD is the reaffirmation of the universality, indivisibility, interdependence and interrelatedness of all human rights, and the open acknowledgement that civil and political rights alone cannot fully protect the inherent dignity and worth of persons with disabilities. Accordingly, the aims of the UNCRPD cannot be realised unless the socio-economic rights of persons with disabilities are rigorously enforced.
- The economic and social rights of persons with disabilities within the UNCRPD are derived from already existing international covenants such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) from 1966 and the Convention concerning the Vocational Rehabilitation and Employment of Disabled Persons No. 159 from 1983 but the UNCRPD frames some specific applications of these rights (e.g. reasonable accommodation or the inclusiveness of the work settings).

- Article 27 of the UNCRPD recognizes the right of persons with disabilities to work on an equal basis with others. This recognition includes the right for persons with disabilities to earn a living through work that is freely chosen or accepted in a labour market and in a work environment that is open, inclusive and accessible.
- The protection includes all issues related to the conditions of employment such as: recruitment; hiring; employment; continuance of employment; access to all types of training; access to vocational rehabilitation; career advancement; equal pay for equal work; labour and trade union rights; protection from harassment; redress of grievances; and safe and healthy working conditions.

- As is the case for each specific obligation of the UNCRPD, cross-cutting obligations must also be taken into account in the interpretation and the implementation of article 27. Of particular significance in that context are :
 - Article 4: General obligations
 - Article 5: Equality & non-discrimination
 - Article 6 :Women with Disabilities
 - Article 7: Children with Disabilities
 - Article 8: Awareness raising
 - Article 9: Accessibility
 - Article 31: Statistics & data collection
 - Article 33: National implementation & monitoring

Typology of the duties imposed by article 27 of the States Parties

To respect

States must not interfere in the enjoyment of human rights : e.g. refrain to put obstacles for persons disabilities to earn a living through work that is freely chosen in an open and inclusive work environment

To protect

States must take steps to ensure that third parties do not interfere in the enjoyment of human rights : e.g. prohibit employers to discriminate persons on basis of disability

To fulfill

States must take measures to facilitate and to provide equal employment opportunities : e.g. organize comprehensive rehabilitation services in the areas of employment services

2.

The situation of persons with disabilities in the labour market

- The employment rate of persons with disabilities in the European Union in 2011 was 47.3 %, almost 20 percentage points below that of persons without a disability.
- Persons with disabilities have a greater risk of living in or near income poverty. In 2013, about 30 % of the population aged 16 or more in the European Union and having a disability was at risk of poverty or social exclusion, compared with 22 % of those with no disability.
- Persons with disabilities are a high share of people on social benefits/assistance programmes. In 2013, 68 % of the European population aged 16 or more and having some activity limitation would have been at risk of poverty if social transfers (social benefits, allowances and pensions) had not taken place.

- If persons with disabilities are employed, they commonly earn less than their counterparts without disabilities; women with disabilities commonly earn less than men with disabilities.
- If persons with disabilities are to enjoy effective social and economic rights and overcome social exclusion, they must have access to work, breaking some of the circular links between disability and poverty.
- A sizable part of employers continue to fear that persons with disabilities are unqualified and not productive despite widespread evidence that they often have appropriate skills, strong loyalty and low rates of absenteeism.
- Although attitudes at the workplace is plainly a major problem for persons with disabilities, many individuals face significant employment barriers that operate well before they are ever in a position to be discriminated against by an employer (education, accessibility, social protection etc.).

- ▣ Equal employment right outcomes for persons with disabilities would mean that :
 - their rates of labour force participation, employment, and unemployment would be equivalent to that of the general population industry or sector standards;
 - they would be benefiting the same employment protections and worker's rights as other workers;
 - they would enjoy comparable employment income for comparable work at similar levels of education and skills;
 - they would work in employment settings that are inclusive, open, and integrated.

3. Addressing the barriers to participation in employment

- A variety of policy measures are implemented around the European Union to address the specific barriers facing persons with disabilities to the labour market such as :
 - antidiscrimination laws;
 - affirmative actions and quotas;
 - subsidies and tax incentives;
 - sheltered and supported employment;
 - vocational rehabilitation and training;
 - awareness programmes.

- There is mixed evidence on the success of relying on only one type of measure preferably than on other one in bringing persons with disabilities into the workforce. Persons with disabilities are not a homogeneous group, and some subgroups require different and tailored approaches. For example, on the whole, antidiscrimination laws are mainly effective in preventing discrimination among skilled workers with a disabilities who are already employed.

- In many cases, the social protection systems act as a strong work disincentive for persons with disabilities. They commonly require for an eligible person to be out of the workforce and entirely and to be incapable of performing any work that would provide sufficient income for basic support. In practice, they force people to make a choice : either seeking benefits and give up economic independence, either support themselves through work, despite significant risks.

- To overcome this major obstacle, disability should be recognized - as advocated under the UNCPRD - as a health condition, interacting with contextual factors, and should be distinct from eligibility for and receipt of benefits, just as it should not automatically be treated as an obstacle to work. Assessments should focus on the capacity for work, not disability.

4. Discrimination in the workplace and impact of the UNCRPD on the European legal framework

- Article 2 of the UNCRPD defines discrimination on the basis of disability” very broadly to mean:

“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 political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation” .

- The EU Employment Equality Directive defines four forms of action as a discrimination :
 - direct discrimination
 - indirect discrimination
 - harassment
 - instruction to discriminate against another person.

- **Direct discrimination** : 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.
- **Indirect discrimination** : where an apparently neutral provision, criterion or practice would put persons having a particular disability at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.
- **Harassment** : where unwanted conduct related to the ground of disability takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- **Instruction to discriminate** : is defined as a form of discrimination.

- The UNCRPD specifically defines a failure to make a **reasonable accommodation** as a form of discrimination. The EU directive is not specific on this point. However Article 5 of the directive is clearly framed in such perspective.
- The ratification of the UNCRPD by the European Union means that EU directive should be interpreted in such a way that a failure to provide a reasonable accommodation should be regarded as a form of discrimination.
- Various approaches in the Member States :
 - France : reasonable accommodation treated as a discrimination with no specification
 - Sweden: treated as direct discrimination
 - Austria : treated as an indirect discrimination
 - Netherlands : treated as a specific form of discrimination

5. Case studies



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

Ingewahrsamnahme von Menschen mit Behinderungen: Unionsrecht und die BRK

Trier, Oktober 2016
Jean-Sébastien Blanc



Gliederung

- Einige Worte zur APT
- Behinderung, psychische Gesundheit und Freiheitsentziehung: einige Daten
- Festnahme durch die Polizei und Verfahrensgarantien
- Ingewahrsamnahme in Strafanstalten
- Verwaltungshaft
- Unfreiwillige Unterbringung in psychiatrischen Kliniken



Einige Worte zur APT

- Im Jahr 1997 gegründete NRO mit Sitz in Genf
- Idee des Gründers Jean-Jacques Gautier: „Öffnung von Haftorten für die Kontrolle von außen“
- Die Verhütung von Folter und Misshandlung wird durch eine Kombination von 3 Strategien erreicht
 - Stärkung des rechtlichen und polizeilichen Rahmens
 - Verbesserung der Praktiken
 - Stärkung der öffentlichen Aufsicht
- Europäisches Übereinkommen zur Verhütung von Folter und Fakultativprotokoll zum UN-Übereinkommen gegen Folter (OPCAT)



Einige Daten...

- Bevölkerung der EU (2011):
 - 26 % der Personen über 16 Jahre erfahren „Einschränkungen ihrer Aktivitäten“ (davon: 28 % Frauen und 23 % Männer)
- Psychische Gesundheit in Haftanstalten (WHO/EU):
 - Von 2 Millionen Inhaftierten haben mindestens 400 000 ein schwerwiegendes psychisches Problem (WHO)
 - 80 % der Inhaftierten haben ein psychisches Problem
 - Hauptursachen: Überbelegung, Gewalt, Marginalisierung, Haftbedingungen, Betreuungsqualität, Diskriminierung
 - Häufig besteht Komorbidität: Persönlichkeitsstörung und Suchterkrankungen



Prävalenz der wichtigsten psychischen Probleme

	% Gefangenens- population	% Allgemein- bevölkerung
Psychotische Störungen	10 - 20 %	0,5 - 1 %
Schizophrenie	1 - 4 %	0,5 - 1 %
Persönlichkeitsstörung	40 - 65 %	6 - 9 %
Antisoziale Störung	31 - 65 %	2 - 3 %
Schwere Depression	10 - 14 %	2 - 10 %
Angststörungen	33 %	2 - 10 %
Posttraumatische Belastungsstörung	4 - 25 %	1 - 3 %
Suchterkrankungen (allgemein)	22 - 65 %	2 - 18 %



Die wichtigsten Bestimmungen zu Behinderung und Freiheitsentziehung

BRK	EU-Charta der Grundrechte
<ul style="list-style-type: none">• Art. 12 – Gleiche Anerkennung vor dem Recht• Art. 13 – Zugang zur Justiz• Art. 14 – Freiheit und Sicherheit der Person• Art. 15 – Freiheit von Folter oder grausamer, unmenschlicher oder erniedrigender Behandlung oder Strafe• Art. 19 – Unabhängige Lebensführung und Einbeziehung in die Gemeinschaft• Art. 25 – Gesundheit• Art. 33 – Innerstaatliche Durchführung und Überwachung	<ul style="list-style-type: none">• Art. 1 (Würde des Menschen)• Art. 4 (Verbot der Folter)• Art. 6 (Recht auf Freiheit und Sicherheit)• Art. 21 (Nichtdiskriminierung)• Art. 26 (Integration von Menschen mit Behinderung: „Die Union anerkennt und achtet den Anspruch von Menschen mit Behinderung auf Maßnahmen zur Gewährleistung ihrer Eigenständigkeit, ihrer sozialen und beruflichen Eingliederung und ihrer Teilnahme am Leben der Gemeinschaft.“)



Aussagen: Einverstanden oder nicht einverstanden?

- „Das bloße Vorliegen einer Beeinträchtigung kann niemals eine Entziehung der Freiheit rechtfertigen“
- „Isolierung und Beschränkung von Menschen mit Behinderungen müssen als Praktiken, die einen Verstoß gegen das Verbot von Folter und Misshandlung darstellen, beseitigt werden“
- „Alle Behandlungen müssen auf der in Kenntnis der Sachlage gegebenen Einwilligung des Betroffenen basieren“
- „Die Ingewahrsamnahme aufgrund einer Behinderung muss stets als letztes Mittel erfolgen und Verfahrensgarantien sowie ein Beschwerderecht umfassen“



Behinderungen und Ingewahrsamnahme: zwei Perspektiven

BRK, WGAD

- Das bloße Vorliegen einer Behinderung kann niemals eine **Entziehung der Freiheit** rechtfertigen
- Die unfreiwillige Unterbringung ist gleichbedeutend mit einer **willkürlichen Ingewahrsamnahme**
- Alle Behandlungen müssen auf der **in Kenntnis der Sachlage gegebenen Einwilligung** des Betroffenen basieren
- **Isolierung** und **Beschränkung** von Menschen mit Behinderungen müssen als Praktiken, die einen Verstoß gegen das Verbot von Folter und Misshandlung darstellen, **beseitigt** werden“
- **Haftbedingungen**: Recht auf Behandlung entsprechend den Grundsätzen der BRK, einschließlich Barrierefreiheit und angemessene Vorkehrungen
- Zielt auf die **Deinstitutionalisierung** ab

„Traditionelle“ Standards von CPT/SPT

- Die Ingewahrsamnahme aufgrund einer Behinderung muss stets als **letztes Mittel** erfolgen und Verfahrensgarantien sowie ein **Beschwerderecht gegen Entscheidungen** umfassen
- Unfreiwillige Ingewahrsamnahme gestattet keine Zwangsbehandlung (**Möglichkeit, die Behandlung abzulehnen**)
- **Beschränkungen** und **Isolierung** müssen nach Möglichkeit vermieden werden (Anwendung von Deeskalationstechniken); dürfen niemals als Bestrafung angewandt werden (einige Formen sind verboten); Mitarbeiterschulung
- **Deinstitutionalisierung** und Unterstützung in der Gemeinschaft als Endziel



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

Menschen mit Behinderungen und die Polizei: Festnahmen und Verfahrensgarantien





Hauptrisiken

- Willkürliche Ingewahrsamnahme
- Potenzieller Zustand von Schutzbedürftigkeit und Schwäche
- Gründe für die Festnahme sind nicht klar, die Sprache ist nicht angepasst
- Rechte werden nicht eindeutig erklärt
- Rechtsbeistand und verantwortlicher Erwachsener?
- Im Falle einer Ingewahrsamnahme: angemessene Unterbringung?



EU-Richtlinien zu Verfahrensgarantien

- **Richtlinie (2010/64/EU) über das Recht auf Dolmetschleistungen und Übersetzungen in Strafverfahren:**
 - → Fürsorgepflicht gegenüber Menschen in einer potenziell schwachen Position (eventuelle körperliche Gebrechen, die ihre Fähigkeit beeinträchtigen, sich effektiv verständlich zu machen) und angemessene Unterstützung für hör- und sprachgeschädigte Personen
- **Richtlinie (2012/13/EU) über das Recht auf Belehrung und Unterrichtung in Strafverfahren:**
 - → Belehrung über ihre Rechte in einfacher und leicht verständlicher Sprache, wobei etwaige besondere Bedürfnisse berücksichtigt werden
- **Richtlinie (2012/29/EU) über Mindeststandards für die Rechte, die Unterstützung und den Schutz von Opfern von Straftaten**
 - → Bei der Kommunikation mit Opfern wird eventuellen Behinderungen, die ihre Fähigkeit, zu verstehen oder verstanden zu werden, beeinträchtigen können, Rechnung getragen
- **Richtlinie (2013/48/EU) über das Recht auf Zugang zu einem Rechtsbeistand in Strafverfahren und in Verfahren zur Vollstreckung des Europäischen Haftbefehls**
 - → Berücksichtigung einer eventuellen Schutzbedürftigkeit, die die Fähigkeit zum Zugang zu einem Rechtsbeistand und zur umgehenden Benachrichtigung eines Dritten von dem Freiheitsentzug beeinträchtigen kann



Wichtige Empfehlungen

- **Empfehlungen der EUROPÄISCHEN KOMMISSION über Verfahrensgarantien**
 - (7). eine **Vermutung der Schutzbedürftigkeit** vorsehen: Hindernisse, die sie daran hindern, das Verfahren zu verstehen und tatsächlich daran teilzunehmen
 - Recht auf Belehrung (8). Menschen mit Behinderung sollten auf Antrag **in einer für sie verständlichen Form** über ihre Verfahrensrechte belehrt werden
 - (10). der gesetzliche Vertreter oder ein **geeigneter Erwachsener** sollte auf der Polizeiwache und **während der Gerichtsverhandlungen** anwesend sein
 - **(12)**. Schutzbedürftige Personen, **denen die Freiheit entzogen ist**, sollten **während eines Strafverfahrens Zugang zu systematischer und regelmäßiger medizinischer Unterstützung haben**
 - **13. Jede Befragung** einer schutzbedürftigen Person in der vorgerichtlichen Ermittlungsphase **sollte audiovisuell aufgezeichnet werden.**
 - **14. der Freiheitsentzug** schutzbedürftiger Personen sollte das **letzte Mittel** darstellen, verhältnismäßig sein und unter Bedingungen erfolgen, die den Bedürfnissen der schutzbedürftigen Person angemessen sind + **angemessene Unterbringung**
- **UN-SONDERBERICHTERSTATTER ÜBER FOLTER (Bericht an die Generalversammlung der Vereinten Nationen, August 2016)**
 - Zügige Feststellung der Schutzbedürftigkeit im Hinblick auf die Durchführung von Befragungen und **Implementierung zusätzlicher Verfahrensgarantien**
 - Menschen mit einer **Sinnesbeeinträchtigung** haben ebenfalls das **Recht auf einen Dolmetscher**



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

Menschen mit Behinderungen und Gewahrsam in Strafanstalten





Hauptrisiken

- Rechte und Pflichten werden nicht in verständlicher Weise erklärt (Verfahrensgarantien)
- Unangemessene Haftbedingungen
- Unangemessenes Verhalten der Mitarbeiter
- Repressiver Ansatz: Isolierung usw.
- Gewalt durch Mithäftlinge
- Aussicht auf Wiedereingliederung
- „Sicherungsverwahrung“ von unbestimmter Dauer



Europäischer Gerichtshof für Menschenrechte

- **W. D. gegen Belgien:** Die langfristige Unterbringung des Beschwerdeführers im Strafvollzug ohne auf seine psychischen Erfordernisse abgestimmte Therapie und ohne Aussicht auf Wiedereingliederung stellt eine erniedrigende Behandlung dar (*Verstoß gegen Art. 3*)
- **Semikhvostov gegen Russland:** Haftbedingungen eines Inhaftierten mit Behinderungen (Rollstuhlfahrer) stellen einen Verstoß gegen Art. 3 dar; auch sein Recht auf einen wirksamen Rechtsbehelf wurde verletzt (*Verstoß gegen Art. 3 und Art. 13*)





Mindestgrundsätze der Vereinten Nationen für die Behandlung der Gefangenen

- Regel 109.1. Personen, die für **schuldunfähig** befunden werden oder bei denen **später schwere psychische Behinderungen und/oder Erkrankungen diagnostiziert wurden und deren Zustand durch einen Verbleib in der Vollzugsanstalt verschlimmert würde, dürfen nicht in Vollzugsanstalten untergebracht werden.** Es sind Vorkehrungen für **ihre möglichst rasche Verlegung in psychiatrische Einrichtungen** zu treffen.
- 109.2. **Andere Gefangene mit psychischen Behinderungen und/oder Erkrankungen** können erforderlichenfalls **in spezialisierten Einrichtungen** unter der Aufsicht anerkannter Gesundheitsfachkräfte beobachtet und **behandelt** werden.
- 109.3. Der Gesundheitsdienst hat **für die psychiatrische Behandlung aller anderen Gefangenen**, die einer solchen Behandlung bedürfen, zu **sorgen**.
- Regel 110. Durch Vereinbarung mit den zuständigen Stellen **sollte sichergestellt werden, dass erforderlichenfalls die psychiatrische Behandlung nach der Entlassung fortgeführt** und eine sozialpsychiatrische Nachbetreuung bereitgestellt **wird**.



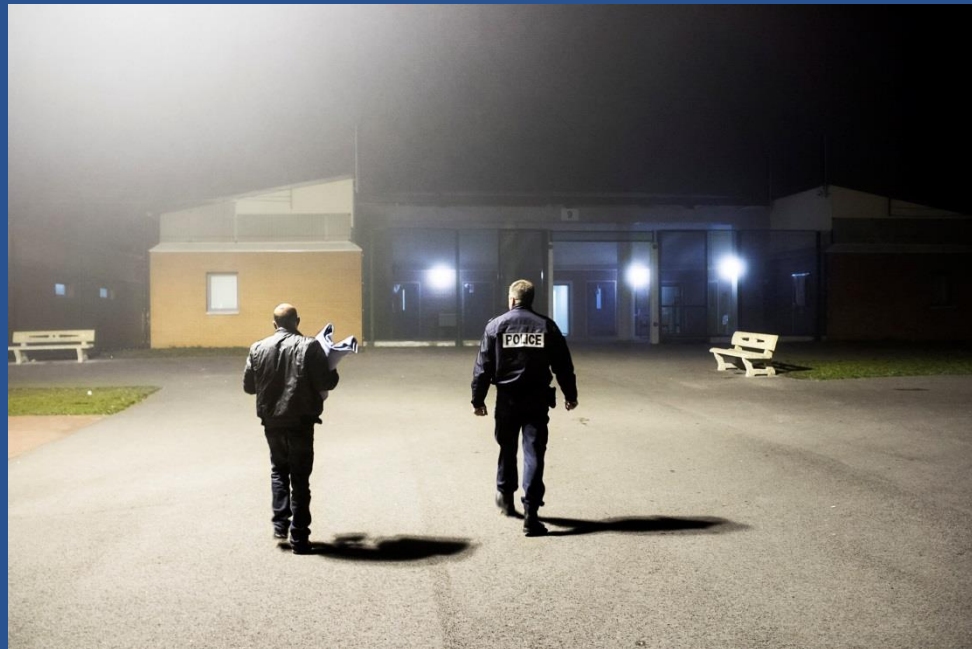
Europäische Strafvollzugsgrundsätze

- 12.1 Personen, die **psychisch erkrankt sind und deren psychischer Gesundheitszustand** die Freiheitsentziehung in einer Justizvollzugsanstalt **nicht zulässt**, sollen in einer eigens hierfür geschaffenen Einrichtung inhaftiert werden.
- 40.4 Der anstaltsärztliche Dienst soll **körperliche oder geistige Krankheiten oder Beschwerden**, an denen Gefangene möglicherweise leiden, **aufdecken und behandeln**.
- 40.5 Zu diesem Zweck müssen den Gefangenen alle erforderlichen ärztlichen, chirurgischen und psychiatrischen Einrichtungen **auch außerhalb der Anstalt** zur Verfügung gestellt werden.
- 47.1 Für die Beobachtung und Behandlung von **Gefangenen, die unter psychischen Störungen oder Anomalien leiden** [...], müssen unter ärztlicher Leitung stehende **spezialisierte Anstalten oder Abteilungen** verfügbar sein.
- 47.2 Der **anstaltsärztliche Dienst hat für die psychiatrische Behandlung** aller Gefangenen, die einer solchen Behandlung bedürfen, **zu sorgen** und besonderes Augenmerk auf die Verhütung von Selbstmord zu richten.



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

Menschen mit Behinderungen und Verwaltungshaft





Hauptrisiken

- Potenzielle Schutzbedürftigkeit und Schwäche
- Die Gründe für die Festnahme sind der in Gewahrsam genommenen Person nicht klar, die Sprache ist nicht angepasst, und die Rechte werden nicht in verständlicher Weise erklärt
- Möglichkeit eines Rechtsbehelfs
- Gewalt
- Im Falle einer Ingewahrsamnahme: angemessene Unterbringung?
- Verlegungen, Ausweisungen
- Mehrfache Schutzbedürftigkeit: Sprache, Behinderung usw.



Verwaltungshaft

- **Richtlinien über anwendbare Kriterien und Standards betreffend die Haft von Asylsuchenden und Alternativen zur Haft, UNHCR, 2012:**
 - [...] Staaten [sollten] ihre Politik und Praxis (...) an die besonderen Erfordernisse und Bedürfnisse „**in geeigneter Weise**“ anpassen und gegebenenfalls entsprechend ändern. Diese Personen müssen **rasch und systematisch identifiziert und registriert** werden, um ihre **willkürliche Inhaftnahme zu verhindern**; alternative Lösungen müssen gegebenenfalls auf ihre speziellen Bedürfnisse abgestimmt werden [...]. Grundsätzlich sollten Asylsuchende mit langfristigen körperlichen, seelischen, geistigen oder die Sinneswahrnehmung betreffenden Beeinträchtigungen **nicht in Haft genommen werden**. Außerdem **müssen Einwanderungsverfahren für Personen mit Behinderungen zugänglich sein**, einschließlich wenn dies erforderlich ist, um die Ausübung ihres Rechts auf Bewegungsfreiheit zu erleichtern.
- **Richtlinie (2013/33/EU) über die Aufnahme von Personen, die internationalen Schutz beantragen:**
 - (11) Die Gesundheit, **auch die psychische Gesundheit**, der in Haft genommenen schutzbedürftigen Antragsteller ist ein vorrangiges Anliegen der nationalen Behörden
 - (21) Die Mitgliedstaaten **berücksichtigen die spezielle Situation** von schutzbedürftigen Personen wie (...) Behinderten, älteren Menschen, (...) Personen mit psychischen Störungen
 - (22) Die Mitgliedstaaten tragen dafür Sorge, dass die Unterstützung, die Personen mit besonderen Bedürfnissen bei der Aufnahme nach dieser Richtlinie gewährt wird, ihren Bedürfnissen **während der gesamten Dauer des Asylverfahrens** Rechnung trägt und ihre Situation in geeigneter Weise verfolgt wird.



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

Unfreiwillig in psychiatrischen Kliniken und Sozialfürsorgeeinrichtungen untergebrachte Menschen mit Behinderungen





Hauptrisiken

- Unfreiwillige Unterbringung
- Unfreiwillige Behandlung
- Beschränkungen und Isolierung
- Mangel an Informationen
- Personalmangel oder schlecht ausgebildetes Personal
- Recht auf Schutz der Privatsphäre
- Mangel an sinnvoller Beschäftigung



Europäischer Gerichtshof für Menschenrechte

- **Stanev gegen Bulgarien** (2006): Wegweisende Rechtssache:
 - **Die unbefristete und unfreiwillige Heimunterbringung durch Staatsbehörden stellte eine Entziehung der Freiheit nach** (Art. 5 Abs. 1) **dar**
 - Die **Haftbedingungen** stellen eine **erniedrigende Behandlung** dar (Art. 3)
 - Der Beschwerdeführer hatte nicht die Möglichkeit, **seine Zwangsunterbringung vor einem Gericht anzufechten** (Art. 5 Abs. 4)
 - Der Beschwerdeführer konnte keinen **Schadensersatz** vor einem Gericht **erwirken** (Art. 5 Abs. 5)
 - Der Beschwerdeführer hatte kein Recht auf ein **faies Verfahren** (Art. 6 Abs. 1)



BRK – Leitlinien zu Artikel 14 (Freiheit und Sicherheit der Person)

- Art. 14: Eine **Nichtdiskriminierungsbestimmung**
- **Absolutes Verbot der Ingewahrsamnahme aufgrund einer Behinderung/Beeinträchtigung**
- Die **Entziehung der Rechts- und Handlungsfähigkeit** (Art. 12) kann sowohl Ursache als auch Wirkung der Entziehung der Freiheit sein
- Die unfreiwillige Einweisung von Menschen mit Behinderungen aus Gründen der Gesundheitsversorgung **widerspricht dem Grundsatz der freien Einwilligung nach vorheriger Aufklärung** im Bereich der Gesundheitsversorgung (Art. 25)
- Das Recht auf selbstbestimmtes Leben und umfassende Einbeziehung in die Gemeinschaft (Art. 19) **untersagt die Zwangsunterbringung in Einrichtungen** (Menschen werden in der Regel infolge mangelnder Unterstützung für ein Leben in ihrer Gemeinschaft mit der Institutionalisierung konfrontiert)
- Art. 15: Das Recht auf Freiheit von Folter
- Der Zugang zur Justiz (Art. 13) erfordert „**verfahrensbezogene Vorkehrungen**“



Grundsätze für Rechtsbehelfe und Verfahren im Zusammenhang mit dem Recht jeder Person, der die Freiheit entzogen wurde, bei einem Gericht Klage zu erheben, UN-Arbeitsgruppe für willkürliche Inhaftierungen

- **Grundsatz 20. Besondere Maßnahmen für Menschen mit Behinderungen**
- Bei der Überprüfung der Willkürlichkeit und Rechtmäßigkeit der Freiheitsentziehung bei Menschen mit Behinderungen haben Gerichte **der Verpflichtung des Staates gerecht zu werden, unfreiwillige Unterbringung oder Einweisung aufgrund des Vorliegens einer Beeinträchtigung** oder wahrgenommenen Beeinträchtigung, insbesondere auf der Grundlage einer psychosozialen oder geistigen Behinderung bzw. einer wahrgenommenen psychosozialen oder geistigen Behinderung zu untersagen, sowie seiner **Verpflichtung zur Ausarbeitung und Umsetzung von** auf dem menschenrechtsbezogenen Modell von Behinderung basierenden **Deinstitutionalisierungsstrategien** nachzukommen. Die Überprüfung **muss die Möglichkeit beinhalten, Rechtsmittel einzulegen**.
- Die Freiheitsentziehung bei einer Person mit einer Behinderung [...] **muss gesetzeskonform sein und auch internationalem Recht entsprechen**; sie muss dieselben inhaltlichen und verfahrensbezogenen Garantien bieten, die anderen Menschen zur Verfügung stehen, und sie muss mit dem Recht auf menschenwürdige Behandlung und dem Anspruch auf Achtung der dem Menschen innewohnenden Würde im Einklang stehen.
- Menschen mit Behinderungen sind berechtigt, **individuell abgestimmte und geeignete Vorkehrungen** und, bei Bedarf, Unterstützung bei der barrierefreien **Ausübung ihres Rechts auf Anfechtung der Willkürlichkeit und Rechtmäßigkeit ihrer Ingewahrsamnahme zu verlangen**.



Datenbank zu Gewahrsamsfragen

Home

Combined search

Detention issues and Groups at risk OK

Find

By alphabetical order

Treatment

Safeguards

Safety, order and discipline

Contacts with the outside world

Material conditions of detention

Life in prison (Regime and activities)

Health care

Personnel

DATABASE ON DETENTION ISSUES

DETENTION FOCUS is a database grouping the most relevant issues related to prison worldwide. Conceived from a detention monitoring and a human rights perspective, it offers users an in-depth analysis on key issues such as solitary confinement, body searches, family visits, staff working conditions or access to a lawyer.

[Read more](#)

Photo: CGLPL

GROUPS IN SITUATIONS OF VULNERABILITY

Any detained person, whatever the reasons that led to their deprivation of liberty, is in a situation of vulnerability. The following are factors that place people in situations of vulnerability: a power imbalance between detainees and those in charge of them, an almost complete dependency upon the institution which has deprived them of their freedom or limits their movements, weakened social ties and stigmatization related to detention.

[Read more](#)



Children



Foreigners



LGBTI persons



Minorities and indigenous people



Persons with disabilities



Women



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

- Vielen Dank!

jsblanc@apt.ch

www.apt.ch

[www.apt.ch/detention-
focus](http://www.apt.ch/detention-focus)

Détention des personnes handicapées: droit européen et convention de l'ONU

Trèves, Octobre 2016
Jean-Sébastien Blanc



Structure

- Quelques mots sur l'APT
- Handicap, santé mentale et privation de liberté: quelques chiffres
- Arrestation par la police et garanties procédurales
- Détention en établissement pénal
- Rétention administrative
- Placement involontaire en hôpital psychiatrique



Quelques mots sur l'APT

- ONG fondée en 1997, basée à Genève
- L'idée du fondateur Jean-Jacques Gautier: «ouvrir les lieux de détention aux regards extérieurs»
- Prévention de la torture et autres mauvais traitements par le biais de trois stratégies combinées
 - Renforcement du cadre juridique et politique
 - Amélioration des pratiques
 - Renforcement du contrôle public
- Convention européenne pour la prévention de la torture et Protocole facultatif à la Convention de l'ONU contre la torture



Quelques chiffres...

- Population UE (2011):
 - 26% des personnes âgées de plus de 16 ans vivent une «limitation de leurs activités», dont 28% de femmes et 23% d'hommes
- Santé mentale en prison (OMS/EU):
 - Des 2 millions de détenus, au moins 400'000 ont un problème de santé mentale sérieux (OMS)
 - 80% des détenues ont un problème de santé mentale
 - Principales causes: surpopulation, violence, marginalisation, conditions de détention, qualité des soins, discrimination
 - Comorbidité fréquente: trouble de la personnalité et dépendances



Prévalence des principaux problèmes de santé mentale

	% population carcérale	% population générale
Trouble psychotique	10-20%	0,5-1%
Schizophrénie	1-4%	0,5-1%
Trouble de la personnalité	40-65%	6-9%
Personnalité anti-sociale	31-65%	2-3%
Dépression majeure	10-14%	2-10%
Troubles anxieux	33%	2-10%
Stress post-traumatique	4-25%	1-3%
Addictions (en général)	22-65%	2-18%



Articles clés concernant handicap et privation de liberté

Convention relative aux droits des personnes handicapées

- Art. 12 Reconnaissance de la personnalité juridique dans des conditions d'égalité
- Art. 13 Accès à la justice
- Art. 14 Liberté et sécurité de la personne
- Art. 15 Droit de ne pas être soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants
- Art. 19 Autonomie de vie et inclusion dans la société
- Art. 25 Santé
- Art. 33 Application et suivi au niveau national

Charte des Droits Fondamentaux de l'Union Européenne

- Art. 1 (Dignité humaine)
- Art. 4 (Interdiction de la torture)
- Art. 6 (Droit à la liberté et à la sûreté)
- Art. 21 (Non-discrimination)
- Art. 26 (**Intégration des personnes handicapées** : « L'Union reconnaît et respecte le droit des personnes handicapées à bénéficier de mesures visant à assurer leur autonomie, leur intégration sociale et professionnelle et leur participation à la vie de la communauté»)



Quelques affirmations: d'accord ou pas d'accord?

- «La seule existence d'un handicap ne peut jamais justifier la privation de liberté»
- «L'isolement et la contention des personnes handicapées doivent être éliminés en tant que pratiques contrevenant à la prohibition de la torture et autres mauvais traitements»
- «Tout traitement doit être basé sur le consentement éclairé de la personne»
- «La détention sur la base d'un handicap doit toujours être un dernier recours et inclure des garanties et des voies recours»



Handicap et détention: deux perspectives

CDPH, GTDA

- La seule existence d'un handicap ne peut jamais justifier la **privation de liberté**
- Un placement involontaire équivaut à une forme de **détention arbitraire**
- Tout **traitement** doit être basé sur le **consentement éclairé** de la personne
- L'**isolement** et la **contention** doivent être **éliminés** en tant que pratiques contrevenant à la prohibition de la torture et autres mauvais traitements
- **Conditions de détention**: droit d'être traité en accord avec les principes de la CDPH, y compris l'accessibilité et les aménagements raisonnables
- Vise à la **désinstitutionalisation**

Standards «traditionnels» (CPT/SPT)

- La détention sur la base d'un handicap doit toujours être un **dernier recours** et inclure des garanties et des **voies recours**
- La détention involontaire n'autorise pas le traitement forcé (**opportunité de refuser**)
- La contention et l'isolement doivent être évités dans la mesure du possible (usage de techniques de désescalade); de doit jamais être utilisée comme punition (certaines formes de contention interdites); formation du personnel
- Désinstitutionalisation comme finalité et soins dans la communauté

Les personnes handicapées et la police: arrestation et garanties procédurales



Risques principaux

- Arrestation arbitraire
- Etat de vulnérabilité et faiblesse potentielles
- Raisons de l'arrestation ne sont pas claires pour la personne détenue, le langage n'est pas adapté
- Droits ne sont pas expliqués dans un langage clair
- Défense juridique et adulte de confiance?
- En cas de détention: aménagements raisonnables?



Directives européennes sur les garanties procédurales

- **Directive (2010/64/UE): droit à l'interprétation et à la traduction dans le cadre des procédures pénales:**
 - → attention particulière aux personnes en situation de faiblesse potentielle (tout trouble physique affectant leur capacité à communiquer effectivement) et assistance appropriée apportée aux personnes présentant des troubles de l'audition ou de la parole
- **Directive (2012/13/EU): droit à l'information dans le cadre des procédures pénales**
 - → informations fournies dans un langage simple et accessible, en tenant compte des éventuels besoins particuliers des personnes
- **Directive (2012/29/UE): droit, soutien et protection des victimes de la criminalité**
 - → Communication avec les victimes tiennent compte de tout handicap pouvant affecter la capacité de comprendre ou être compris
- **Directive (2013/48/UE): droit à un avocat et procédures relatives au mandat d'arrêt européen**
 - → tenir compte de toute vulnérabilité affectant la capacité d'exercer le droit d'accès à un avocat et d'informer un tiers dès leur privation de liberté



Recommandations clés

- **Recommandation de la COMMISSION EUROPÉENNE sur les garanties procédurales**
 - (7). prévoir une «**présomption de vulnérabilité**» : obstacles pour comprendre et participer effectivement à la procédure
 - Droit à l'information (8). personnes handicapées devraient recevoir, **dans un format qui leur est accessible**, des informations concernant leurs droits procéduraux
 - (10). Le représentant légal ou un **adulte approprié** devrait être **présent dans les locaux de la police** et aux **audiences du procès**
 - (12). **Si elles sont privées de liberté**, les personnes vulnérables devraient pouvoir bénéficier d'une **assistance médicale systématique et régulière tout au long de la procédure pénale**.
 - 13. Tout **interrogatoire** de personnes vulnérables au cours de l'enquête préliminaire devrait faire l'objet d'un **enregistrement audiovisuel**.
 - 14. la **privation de liberté** infligée aux personnes vulnérables avant leur condamnation constitue une **mesure de dernier ressort**, proportionnée et se déroulant selon des conditions adaptées aux besoins de ces personnes + **aménagements raisonnables**
- **RAPPORTEUR SPÉCIAL DE L'ONU SUR LA TORTURE (Rapport AG ONU août 2016)**
 - Identifier vulnérabilité rapidement en vue de la conduite des interrogatoires et **déclenchement de la mise en œuvre de garanties supplémentaires**
 - les personnes souffrant de **déficience sensorielle** ont également le **droit à un interprète**

Les personnes handicapées et la détention en établissements pénitentiaires



Risques principaux

- Droits et devoirs ne sont pas expliqués dans un langage clair (garanties procédurales)
- Conditions de détention inadaptées
- Comportement inapproprié du personnel
- Approche punitive du handicap: isolement, etc.
- Violence de codétenus
- Accès à des thérapies
- Perspective de réinsertion
- Détention «préventive» de durée indéterminée



Cour Européenne des Droits de l'Homme

- **W.D. c. Belgique:** Maintien en détention du requérant sur une longue durée dans un environnement carcéral sans thérapie adaptée à son état de santé mentale et sans perspective de réinsertion correspond à un traitement dégradant (*viol. Art. 3*)
- **Semikhvostov c. Russie:** Conditions de détention inadaptées à un détenu handicapé (en chaise roulante) constituent une violation de l'article 3; droit à un recours effectif n'a pas été respecté (*viol. Art. 3 et Art. 13*)



Ensemble de règles minima des Nations Unies pour le traitement des détenus

- Règle 109. 1. Les **personnes qui ne sont pas tenues pénalement responsables**, ou chez lesquelles un **handicap mental ou une autre affection grave est détectée ultérieurement**, et dont l'état serait aggravé par le séjour en prison, **ne doivent pas être détenues dans une prison** et des dispositions doivent être prises pour les **transférer aussitôt que possible dans un service de santé mentale**.
- 109.2. Si nécessaire, d'autres **détenus souffrant d'un handicap mental ou d'une autre affection peuvent être mis en observation et traités dans un service spécialisé**, sous la supervision de professionnels de la santé ayant les **qualifications requises**.
- 109.3. Le service de santé doit **assurer le traitement psychiatrique de tous les autres détenus** qui en ont besoin.
- Règle 110. Il est souhaitable que des dispositions soient prises, en accord avec les organismes compétents, pour **assurer si nécessaire la poursuite du traitement psychiatrique après la libération**, ainsi qu'une assistance post-pénitentiaire sociopsychiatrique.



Règles pénitentiaires européennes

- 12.1 Les personnes souffrant de maladies mentales et dont **l'état de santé mentale est incompatible avec la détention** en prison devraient être détenues dans un **établissement spécialement conçu à cet effet**.
- 40.4 Les services médicaux de la prison doivent s'efforcer de **dépister et de traiter les maladies physiques ou mentales, ainsi que les déficiences** dont souffrent éventuellement les détenus.
- 40.5 A cette fin, chaque détenu doit bénéficier des soins médicaux, chirurgicaux et psychiatriques requis, **y compris ceux disponibles en milieu libre**.
- 47.1 Des **institutions ou sections spécialisées** placées sous contrôle médical doivent être organisées pour l'observation et le **traitement de détenus atteints d'affections ou de troubles mentaux** [...]
- 47.2 Le **service médical en milieu pénitentiaire doit assurer le traitement psychiatrique** de tous les détenus requérant une telle thérapie et apporter une attention particulière à la prévention du suicide.

Les personnes handicapées et la rétention administrative





Risques principaux

- Etat de vulnérabilité et faiblesse potentielles
- Raisons de l'arrestation ne sont pas claires pour la personne détenue, le langage n'est pas adapté: Droits ne sont pas expliqués dans un langage clair
- Voie de recours
- Violence
- En cas de détention: aménagements raisonnables?
- Transferts, rapatriements
- Vulnérabilités multiples: langue, handicap, etc.



Rétention administrative

- **Principes directeurs relatifs aux critères et aux normes applicables à la détention des demandeurs d'asile et alternatives à la détention, HCR, 2012:**
 - [...] Les Etats [devraient] prévoir des infrastructures adaptées ou à **effectuer des changements** dans leurs politiques et leurs pratiques de détention afin de se **conformer à leurs besoins particuliers**. Une **identification et un enregistrement rapides et systématiques** de ces personnes sont nécessaires pour **éviter la détention arbitraire**; et tout dispositif de substitution devrait être adapté à leurs besoins spécifiques [...]. En règle générale, les demandeurs d'asile qui présentent des incapacités physiques, mentales, intellectuelles ou sensorielles durables **ne doivent pas être détenus**. En outre, les **procédures d'immigration doivent être accessibles aux personnes handicapées**, notamment celles qui s'avèrent nécessaires pour faciliter l'exercice du droit de circuler librement.
- **Directive (2013/33/UE) sur les personnes demandant la protection internationale:**
 - (11) L'état de santé, y compris **santé mentale**, des personnes vulnérables en rétention est pour les autorités nationales une préoccupation primordiale
 - (21) Les EM tiennent compte de la **situation particulière des personnes vulnérables**, telles que les handicapés et les personnes souffrant de troubles mentaux
 - (22) Les EM évaluent si le demandeur a des besoins particuliers en matière d'accueil, dans un délai raisonnable après la demande; ils veillent à ce que ces besoins soient également pris en compte s'ils deviennent **manifestes à une étape ultérieure** de la procédure d'asile.

Les personnes handicapées et le placement involontaire en hôpitaux psychiatriques et établissements sociaux



Principaux risques

- Placement involontaire
- Traitement involontaire
- Usage de la contention et de l'isolement
- Manque d'information
- Manque de spécialistes ou mal formés
- Droit à la vie privée
- Manque d'activités



Cour européenne des droits de l'homme

- **Stanev c. Bulgarie** (2006): Cas emblématique et pionnier:
 - **Placement involontaire et indéfini dans un établissement peut constituer une forme de privation de liberté** (art. 5.1)
 - Les **conditions de détention** en elles-mêmes constituent un **traitement dégradant** (art. 3);
 - Le plaignant n'a pas eu la possibilité de **contester sa détention** devant un tribunal (5.4)
 - Le plaignant n'a pas pu **obtenir réparation** devant un tribunal (5.5)
 - Le plaignant n'a pas eu droit à un **procès équitable** (6.1)



CDPH – lignes directrices sur l'article 14 (Liberté et sécurité de la personne)

- Art. 14: une disposition avant tout de **non-discrimination**
- **Interdiction absolue de la détention sur la base d'un handicap/d'une incapacité**
- Privation de la **capacité juridique** (art. 12): est souvent la cause et la conséquence de la privation de liberté
- Le placement involontaire contredit le principe du choix éclairé et du **consentement au traitement** (art. 25)
- Le droit à l'autonomie de vie et inclusion dans la société (art. 19) **interdit l'institutionnalisation** et la privation de liberté sur la base d'un handicap (personnes sont souvent institutionnalisées comme conséquence d'un manque de services dans la communauté)
- Art. 15 Droit de ne pas être soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants
- L'accès à la justice (art. 13) requiert des aménagements procéduraux



Principes sur les voies et procédures permettant aux personnes privées de liberté d'introduire un recours devant un tribunal, Groupe de travail sur la détention arbitraire

- **Principe 20. Mesures spécifiques au bénéfice des personnes handicapées**
- 38. Lorsqu'ils examinent le caractère légal ou arbitraire de la privation de liberté de personnes handicapées, **les tribunaux doivent respecter l'obligation qui incombe à l'État d'interdire le placement d'office ou l'internement au motif d'une incapacité réelle ou supposée**, en particulier d'un handicap psychosocial ou intellectuel réel ou supposé, ainsi que l'obligation qu'a l'État d'élaborer et de mettre en œuvre des stratégies de désinstitutionalisation fondées sur l'approche du handicap axée sur les droits de l'homme. L'examen doit prévoir la **possibilité de faire appel**.
- 39. La privation de liberté d'une personne qui présente un handicap, [...] doit être **conforme à la loi, y compris au droit international**, et être assortie des mêmes garanties de fond et de procédure que celles offertes aux autres personnes [...].
- 41. Les personnes handicapées ont le droit de **demander des aménagements** et une aide individualisés et appropriés, si nécessaire, pour **exercer de manière accessible le droit de dénoncer le caractère arbitraire de leur détention** ou d'en contester la légalité.



Detention Focus Database

Combined search

Detention issues and Groups at risk OK Find By alphabetical order

Treatment

Safeguards

Safety, order and discipline

Contacts with the outside world

Material conditions of detention

Life in prison (Regime and activities)

Health care

Personnel

DATABASE ON DETENTION ISSUES

DETENTION FOCUS is a database grouping the most relevant issues related to prison worldwide. Conceived from a detention monitoring and a human rights perspective, it offers users an in-depth analysis on key issues such as solitary confinement, body searches, family visits, staff working conditions or access to a lawyer.

Read more

GROUPS IN SITUATIONS OF VULNERABILITY

Any detained person, whatever the reasons that led to their deprivation of liberty, is in a situation of vulnerability. The following are factors that place people in situations of vulnerability: a power imbalance between detainees and those in charge of them, an almost complete dependency upon the institution which has deprived them of their freedom or limits their movements, weakened social ties and stigmatization related to detention.

Read more

- Children
- Foreigners
- LGBTI persons
- Minorities and Indigenous people
- Persons with disabilities
- Women

- Merci!

jsblanc@apt.ch

www.apt.ch

www.apt.ch/detention-focus