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Speakers' presentations

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

SEMINAR FOR LEGAL PRACTITIONERS, NGOs, EQUALITY BODIES AND
ACADEMICS

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The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features

Dr Damjan Tatic, Ph. D.



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The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features

Dr Damjan Tatic, Ph. D.

- Human rights are universal and indivisible
- They belong to all human beings, so naturally they also belong to persons with disabilities
- Convention on the Rights of Persons with Disabilities CRPD is the first human rights treaty adopted under the auspices of the United Nations in the new Millennium

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- United Nations' General Assembly unanimously adopted Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to it on December 13th 2006
- CRPD and the Optional Protocol to it entered in force on May 3rd 2008
- 174 ratifications of or accessions to CRPD until August 9th 2017
- 92 ratifications of or accessions to the Optional Protocol to CRPD until August 9th 2017

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- The Convention is based on the following principles:
- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Convention prescribes for measures for enjoyment of civil, political, economic, social, cultural rights by persons with disabilities on basis of equality with others
- Civil and political rights- immediate implementation
- Economic, social, cultural- progressively

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- The purpose of the Convention is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity” (article 1, clause 1).
- Articles 4 on general obligations of state parties to the Convention and 5 on equality and non- discrimination constitute the core of Convention on Rights of Persons with Disabilities.
- Convention prescribes that state parties “undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability” (article 4, clause 1).

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Persons with disabilities have to be consulted through their representative organizations in development of policies and legislation necessary for implementation of the Convention (article 4, clause 3).
- States Parties recognize that “all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law” (article 5, clause 1).

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
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- States Parties shall “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds” (article 5, clause 2).
- *Convention puts strong emphasis on provision of reasonable accommodation.*

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Convention pays special attention to situation and equality of women with disability (article 6) and children with disability (article 7)
- *Awareness- raising and accessibility are 2 powerful tools and preconditions for full and equal participation of persons with disabilities in society.*
- Convention prescribes measures for awareness- raising in article 8 in detail
- Convention prescribes measures for ensuring accessibility of physical environment, public transport, information and communication and services opened for public in article 9 in detail

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Convention prescribes for various measures that need to be implemented in order to enable persons with disabilities to fully and equally enjoy civil, political, economic, social and cultural rights
- Article 10: Right to life
- Article 12: Equal recognition before the law
- Article 13: Access to justice
- Article 14: Liberty and security of the person
- Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment
- Article 16: Freedom from exploitation, violence and abuse
- Article 17: Protecting the integrity of the person
- Article 18: Liberty of movement and nationality

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
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- Article 21: Freedom of expression and opinion, and access to information
- Article 22: Respect for privacy
- Article 23: Respect for home and the family
- Article 24: Education
- Article 25: Health
- Article 27: Work and employment
- Article 28: Adequate standard of living and social protection
- Article 29: Participation in political and public life
- Article 30: Participation in cultural life, recreation, leisure and sport

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Convention also regulates measures that will enable persons with disabilities to live independently and be included in their respective communities (article 19)
- It covers disability – specific issues such as:
 - personal mobility (article 20),
 - habilitation and rehabilitation (article 26).
- It also provides measures to ensure safety of persons with disabilities in situations of armed conflict and natural disasters (article 11).

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- *Articles 34 to 39 prescribe for setting up and functioning of Committee on the Rights of Persons with Disabilities. State parties shall elect independent experts to the Committee, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities (article 34).*

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- The Committee reviews reports of State parties on the implementation of CRPD and makes recommendations to the State parties
- It adopts general comments that interpret CRPD in more detail-so far it adopted 4 on
- Legal capacity
- Accessibility
- Women and girls with disabilities
- Inclusive education

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Committee reviewed 55 initial reports until April 2017 and 6 more in August 2017
- There are 43 pending Initial reports Committee still needs to review
- In April 2017 Committee begun the cycle of reviewing state parties second periodic reports by sending list of questions under simplified reporting procedure to Spain, Peru, Hungary and El Salvador

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Under the Optional Protocol to CRPD, Committee has capacity to review individual communications
- This is not a judicial review, its' decisions on such communications are not mandatory but states should implement Committee's recommendations in good faith in accordance with the principles of international public law

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
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- Under the Optional Protocol to CRPD, Committee has capacity to review individual communications
- This is not a judicial review, its' decisions on such communications are not mandatory but states should implement Committee's recommendations in good faith in accordance with the principles of international public law
- Until April 2017 it reviewed 18 communications

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
Dr Damjan Tatic, Ph. D.

- Among those, 5 communications were filed against Australia, 3 against Sweden, 2 against UK, 2 against Hungary, 1 against Argentina, 1 against Brazil, 1 against Austria, 1 against Germany, 1 against Spain and 1 against Italy
- Committee found 6 communications inadmissible, discontinued 1 and decided on alleged violations in 11 cases

The UN Convention on the Rights of Persons with Disabilities
(UNCRPD): key features
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- **Thank you kindly for
your time and
attention!**

Disability in European Union Law



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Overview of the presentation

1. Disability rights in Europe
2. The European Convention of Human rights (EHCR) and disability
3. The European Social Charter
4. Disability rights in the European Union treaties
5. The European Charter of Fundamental Rights
6. The United Convention on the Rights of Persons with Disabilities (UNCRPD) as part of the EU legal order
7. Secondary EU legislation protecting the rights of persons with disabilities
8. Issues of primacy, direct and indirect effect

1. Disability rights in Europe

- Over the last decade, the protection of the fundamental rights of persons with disabilities in Europe has evolved drastically. It is today ensured by a multilevel structure in which different overlapping legal orders intertwine.
- The rights of persons with disabilities are simultaneously protected by national, European Union and international (ECHR and UNCRPD) instruments and institutions. In addition, institutional remedies - most notably through judicial review exercised by the courts - are established at every level to ensure the protection of these rights.
- In recent years, the growth of the disability rights protection in Europe has been characterized by a continuous dynamic of mutual reinforcement between those different levels.

2. The European Convention of Human rights (EHCR) and disability

- The ECHR is acquiring a key significance as a constitutional source for the protection of basic civil and political rights of persons with disabilities throughout Europe.
- Since the enactment of the 11th Additional Protocol to the ECHR in 1998, the citizens of signatory states are able to commence legal proceedings before the European Court of Human Rights (ECtHR) when they believe that an individual right proclaimed in the ECHR has been unlawfully breached by their state, and they have unsuccessfully exhausted all national remedies. In addition, they can receive damages if the state is found guilty of the breach. The ECtHR, therefore, exercises an external and subsidiary review of the national systems of fundamental rights protection by remedying potential violations at the state level.
- Although not expressly listed among the protected grounds of discrimination, disability has been included by the ECtHR in its interpretation of 'other status' under Article 14 of the ECHR.
- In the case of *Glor v. Switzerland* (2009), the European Court of Human Rights - for the first time :
 - found a violation of the right to non-discrimination on the basis of the applicant's disability;
 - referred to the UNCRPD;
 - and used the concept of reasonable accommodation.

- Since then, the ECHR has delivered some landmark judgements in relation to disability rights. The Court's disability jurisprudence generally concerns the management of compulsion in institutional settings, including with respect to detention/institutionalisation, forced medical treatment or restraint or incapacitation.
- For example, in *Alajos Kiss v Hungary* (2010), the Court concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship cannot be considered compatible with the legitimate grounds for restricting the right to vote.
- In *Stanev v. Bulgaria* (2012), the ECHR issued a ground breaking judgement with significant implications for people with mental disabilities who have been institutionalized in Europe and beyond. The case represented the first time that the Court found that the placement of a person with a psycho-social disability in a social care institution may amount to detention under the Convention and that poor conditions in such homes may violate the right to be free from degrading treatment.
- In *Çam v. Turkey* (2016), the Court delivered a significant judgment on the inclusion of students with disabilities in the field of education by ruling that the state's refusal to enrol a blind student into a music academy violated the right to education and from non discrimination, and that the state's refusal to make reasonable accommodation to facilitate access to school facilities also constituted a discrimination.

3. The European Social Charter

- Another legal instrument constituting the general human rights framework of the Council of Europe is the European Social Charter (ESC), which was first adopted in 1961 and then substantially revised in 1996. It was the first human rights treaty to explicitly mention disability. It includes a right to equal opportunities and equal treatment in matters of employment and occupation and a protection against discrimination, inter alia, on the grounds of "other status", which also includes disability as a protected ground.
- The main article in the European Social Charter relating to the disability rights is article 15 concerning the right of persons with disabilities to independence, social integration and participation in the life of the community. Articles 9, 10 and 17 are also relevant, since all provisions of the Charter are applicable to persons with disabilities.
- This is in particular reflected in the decision adopted in 2014 by the body monitoring the implementation of the ESC – the European Committee of Social Rights (ECSR) – in *Autism-Europe v. France* - where it was found that France failed to comply with :
 - article 15.1 the ESC with regard to the right of children and adolescents with autism to be educated primarily in mainstream schools;
 - article E taken in conjunction with Article 15 because families have no other choice than to leave the national territory in order to educate their children with autism in a specialized school, which constitutes a direct discrimination against them;
 - article E taken in conjunction with Article 15. because the limited funds in the State's social budget for the education of children and adolescents with autism indirectly disadvantages these persons with disabilities.

4. Disability rights in the European Union treaties

- The European Union legal system is structured and hierarchical. Therefore, the starting point for considering the legal framework protecting disability rights within the European Union are the two core functional treaties, namely the Treaty on European Union (TEU), originally signed in Maastricht in 1992, and the Treaty on the Functioning of the European Union (TFEU), originally signed in Rome in 1957.
- The protection of human rights is firmly embedded in the TEU :
 - Article 2 TEU, states that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.
 - Article 3 TEU pledges the Union to “combat social exclusion and discrimination” and to “promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child”.
 - Article 6(1) TEU states that : “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”.

- Article 6(2) TEU states that: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms...”
- Article 6(3) TEU states that: “Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.
- Article 7 sets out procedure for dealing with a “clear risk of a serious breach” by a Member State of the values referred to in Article 2.
- Article 9 TEU mandates the EU institutions to afford all citizens equal attention, and Article 21 TEU sets forth the requirement that the EU be guided by the principle of equality in EU external action.
- Although these articles do not create any rights, their prominent position in the TEU shows that the EU is committed to human rights and allows for more substantive forms of protection to be developed in the future.
- The TFEU contains a horizontal clause on non-discrimination provides the EU with a legal basis for the EU non-discrimination legislation.
 - Article 10 TFEU specifies that “in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation”.
 - Article 19 TFEU (former Article 13 EC) allows the EU to take action to combat discrimination on the named grounds his provides: “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation.”

5. The European Charter of Fundamental Rights

- Since the entry into force of the Lisbon Treaty in December 2009, the Charter has acquired the same legal value as the EU Treaties and binds the EU institutions and member states when their action falls under the scope of application of EU law.
- The Charter incorporates a binding set of principles bringing together in one place all of the personal, civic, political, economic and social rights enjoyed by people within the European Union. The Charter includes the social and economic rights recognised as general principles of EU law, but also the fundamental rights adopted by the EU from the European Convention on Human Rights (ECHR) and the constitutional traditions common to the member states.
- Article 21(1) of the Charter provides for an all-embracing prohibition on discrimination states that: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.
- Article 26 of the Charter states that 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”. These measures may concern education, vocational training, ergonomics, accessibility, mobility, means of transport and housing as well as access to cultural and leisure activities.

- Article 51 sets out the **scope of application** of the Charter:
 - Article 51(1) states that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. Thus the Charter binds also Member states whenever they act within the scope of EU law.
 - Article 51(2) reiterates the article 6(1) provision of the TEU: “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. This means that the Charter cannot enter new policy domain and only attaches to EU law which is the expression of agreement between Member states that the EU has competence in conformity with the subsidiarity principle.
- Since its adoption, the ECJ mainly relied on the on the Charter :
 - to give broad interpretation to human rights: Case C-391/09 Runevi-Vardyn v. Vilnius and Case C- 159/10 Fuchs and Köhler v Land Hessen.
 - to invalidate EU secondary legislation which breaches a Charter principle: Case C-92/09 Volker v Land Hessen, and Case C-236/09 Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres,.

- In the case **C356/12** Glatzel v Freistaat Bayern, the ECJ for the first time had to assess the compatibility of EU provisions with the disability provisions of the Charter. The ECJ had to assess whether physical conditions for drivers settled in the Directive 2006/16 constitute discrimination on the grounds of disability and, hence, violate the principle of equal treatment (Article 20 of the Charter), and more specifically, the principle of non-discrimination on the grounds of discrimination (Article 21(1)) as well as the principle of integrating of integrating persons with disabilities (Article 26).
- The ECJ eventually concluded that it did not have sufficient information to conclude that the Directive should be invalidated but there are several interesting elements to notice in its judgment :
 - a) the EC considered that Article 26 of the Charter “does not require the EU legislature to adopt any specific measure” for persons with disabilities and that “in order for that article to be fully effective, it must be given more specific expression in EU law or national law”.
 - b) the reference to the UN Convention on the Rights of Persons with Disabilities as an integral part of the European Union legal order and the Directive 2006/126 as regard personal mobility considered as one of the legal acts of the European Union which refer to matters governed the UNCRPD.
 - c) the way in which the ECJ carefully examined whether there is an objective justification for different treatment of some disabled drivers (suitability , necessity and proportionality)
 - d) the lack of necessity to determine whether a diminished visual acuity should be considered to amount to a disability within the meaning of the Charter since a difference in treatment consisting in not issuing a driving licence for vehicles on the ground of insufficient visual acuity may be objectively justified in the light of overriding considerations of road safety.

6. The United Convention on the Rights of Persons with Disabilities (UNCRPD) as part of the EU legal order

- The European Union has acceded to the UNCRPD with Council Decision 2010/48/EC. The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council. The Council Decision has 2 substantive legal bases, namely Article. 19 TFEU (non discrimination) and article 114 TFEU (measures aiming to improve the conditions for the establishment and functioning of the internal market) , in conjunction with the procedural provision of article 218 TFEU (agreements between the Union and third countries or international organisations).
- It was the first time ever that the EU becomes a party to an international human rights treaty and it was also the first time that an intergovernmental organization join a United Nations human rights treaty.
- The UNCRPD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a Declaration of competence specifying which areas of the agreement fall within the competence of the Regional organization and which within that of its Member States. This Declaration is intended to specify to third Countries the distribution of competences between the European Union and the Member States and is also is relevant to determine the ultimate international responsibility for the implementation of the UNCRPD.

- The UNCRPD is a **mixed agreement**. Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand. The mixed nature is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States.
- An international agreement has legal effect in the EU legal order and does not require further acts of implementation at EU level such as a regulation or a directive. Moreover, in the hierarchy of sources of EU law, international agreements concluded between the EU and third countries or international organisations are situated below primary sources and general principles of EU law, but above secondary sources. The ECJ held that international agreements and all acts of the EU institutions adopted in relation to their conclusion prevail over secondary sources of EU law.
- As a result, all EU unilateral measures such as regulations, directives and decisions must be in conformity with international agreements in so far as their provisions fall within the scope of Community competence. Any conflicting secondary legislation may be annulled by the ECJ by virtue of Article 263 TFEU.
- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (ECJ Case C-61/94). The accession to the UNCRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention (Ring vs Dansk almennyttigt Boligselskab DAB – ECJ Case C2335/11).

- Under certain conditions (see *infra*), international agreements can be invoked before the court by an individual; there is direct effect (Demirel - Case 12/86).
- In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Case C-239/03, Etang de Berre). Therefore, the Commission might bring an infringement case against Member State not properly implementing the UNCRPD insofar as its provisions are within the scope of the EU competence.

7. Secondary EU legislation protecting the rights of persons with disabilities

- There is a very broad and diverse legislation at the European level dealing with disability related issues. Disability is part of the non-discrimination EU policy together with gender, ethnic origin, religion or belief, age and sexual orientation. Disability related issues are also covered by EU legislation and programmes in the field of education, employment and training, health and safety at work, social protection, social inclusion, public procurement, state aids, transport, telecommunications, consumer protection, health services and bioethics, assistive technologies etc.
- Article 19 TFEU has been the legal basis for the Council Directive 2000/78/EC of 27 November 2000, known as the Employment Equality Directive. As provided for in Article 1, the purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation a regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
- This directive bans both direct discrimination (differential treatment based on a specific characteristic) and indirect discrimination (any provision, criterion or practice which is apparently neutral, but is liable to adversely affect one or more specific individuals or incite discrimination). Harassment, which creates a hostile environment, is also deemed to be a form of discrimination.
- Among the substantive provisions of the Directive figures an article on reasonable accommodation. As defined by Article 2 of the UNCRPD, reasonable accommodation means that the employer has a legal duty to take measures to adapt to working place to an employee with disabilities, such as removing physical barriers by installing ramps, facilitating access of visually impaired employees to information technologies, or altering working times to accommodate the needs of workers with disabilities. Failure to provide reasonable accommodation constitutes discrimination for the purpose of the Directive.

- The Employment Equality Directive requires Member States to provide for effective judicial remedies, embed legal rules on shifting the burden of proof to the respondent where a prima facie case of discrimination is established, and provide for sanctions. Notably, the Employment Equality Directive imposes only minimum requirements, and allows Member States to apply provisions which are more favourable to the protection of equal treatment than those laid down in the Directive.
- In 2008, the Commission presented a Proposal for a new Equal Treatment Directive aiming at extending the EU's non-discrimination legislation beyond the sphere of employment and occupation, addressing discrimination in the fields of social protection, social advantages, education, and access to and supply of public goods and services. However, this proposed Directive is still subject to an ongoing discussion and negotiation in Council. As yet, it has not been possible to achieve the unanimous agreement of all Member States that is required for the adoption of directives based on Article 19 TFEU, meaning the directive is far from being approved.
- On 2 December 2015, the European Commission also adopted a proposal for a European Accessibility Act, namely a directive aiming at prescribing common accessibility requirements covering products and services across the EU. Discussions among the Member states in the European Council and in the Parliament are still underway and it is too early to say when the final adoption of the proposal could be expected.

- Article 153 of the Treaty on the Functioning of the European Union gives the EU the authority to adopt directives in the field of safety and health at work. Reference is made in the Framework Directive and individual directives to the protection of the health and safety of workers with disabilities – for instance through the provision in Directive 89/654/EEC on the minimum safety and health requirements for the workplace stipulating that employers are required to organise workplaces “to take account of handicapped workers, if necessary”. In 2015, the ECJ concluded the Fenoll case (C-316/13) that the concept of “worker” as stipulated in of Directive 2003/88 on working time and Article 31 of the Charter of Fundamental Rights must be interpreted in such a way that a person in a sheltered workplace, performing work which was not entirely marginal, should be covered by the definition of worker.
- Disability is also addressed to some extent in EU consumer law, most notably in the Unfair Commercial Practices Directive (2005/29), the Product Safety Directive (2001/95) and the Consumer Rights Directive ((2011/83). However, the conceptualisation of vulnerability under EU consumer law remains inadequate to provide the adequate protection for persons who are disadvantaged on grounds of their disability.

- Disabled passengers rights are protected at European level by a set of comprehensive regulations which covers all means of transportation: planes, trains, ships and buses or coaches.
- The Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air establishes a set of specific rights for passengers with disabilities. The basic principles of this regulation are:
 - persons with disabilities should not be discriminated against when booking a ticket or boarding an airplane;
 - persons with disabilities have the right to receive assistance at the airport at no additional charge;
 - all staff dealing directly with the traveling public must receive relevant training, including disability awareness training.
- Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, establishes rules for compensation but also regarding the liability of airlines for damaged, lost, or destroyed mobility equipment.
- Similar to the air- passengers’ rights regulations, disabled passenger’s rights are addressed in :
 - the Regulation 1371/2007 when travelling by train;
 - the Regulation 1177/2010 when travelling by sea and inland waterway;
 - the Regulation 181/2011 when traveling in bus and coach transport.
- Since the EU law on passengers rights is framed in regulations, it is **directly applicable**. They do not need any other acts of parliament in the member state to make them into law. These regulations are also **vertically and horizontally directly effective** : they can be used as a piece of law in a member state court against the state or another individual.

8. Issues of primacy, direct and indirect effect

- The primacy of European Union law (sometimes referred to as supremacy) is an EU law principle that when there is conflict between European law and the law of Member States, European law prevails; the norms of national law have to be set aside. This principle was developed by the European Court of Justice, and, as interpreted by that court, it means that any norms of European law always take precedence over any norms of national law, including the constitutions of Member states.
- Direct effect is another principle of the EU law developed by the ECJ. It enables individuals to immediately invoke a European provision before a national or European court. This is significant because of the consequences both within the legal order of the European Union and for its member states.
- For example, if the provisions of the UNCRPD would be directly effective in the EU legal order, they will also have direct effect within the legal orders of all member states and, as EU law, enjoy supremacy over national law. EU law thus could act as a door opener for the UNCRPD in the member states' legal orders and provides an enforcement mechanism and potentially also an hierarchical boost : the UNCRP provisions could be enforced by all mechanisms used to enforce EU law, in particular by national courts, and it will benefit from the doctrine of supremacy of EU law according to which it enjoys a higher rank than member states' legislation.

- The term 'direct effect' was first used by the Court of Justice of the European Union (CJEU) in a judgement on 5 February 1963 when it attributed, to specific treaty articles, the legal quality of direct effect in the case of NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen (Case 26/62). In this case, the CJEU identified three situations necessary to establish the direct effect of primary EU law. These are that:
 - the provision must be sufficiently clear and precisely stated
 - it must be unconditional and not dependent on any other legal provision;
 - it must confer a specific right upon which a citizen can base a claim.
- Taken together, the principles of direct effect and primacy mean that treaty provisions may be used to make claims before domestic courts and override domestic law. Probably the best-known example is Defrenne v. Sabena (Case 43/75), where the CJEU decided that the principle that women and men should receive equal pay, which is laid down by Article [141 EC now 157 TFEU], may be relied on before the national courts. These courts have a duty to ensure the protection of the rights, which that provision vests in individuals.
- "Vertical" effect applies when provisions have direct effect between citizen and public bodies. "Horizontal" effect' applies when the provisions have direct effect between citizen and citizen.
- The principle of direct effect also applies to the EU secondary legislation :
 - decisions are binding in their entirety upon those to whom it is addressed (not general, but specific)
 - regulations are directly applicable in all member states. They are self-executing.
 - directives are not directly applicable-no self-executing character. Their Transposition in domestic law is in principle required but they are exceptions (non implementation by the member States, precise and clear provisions).

- The principles of direct effect also applies to mixed agreements s (Case 12/86 Demirel) insofar as the provisions of the agreement at stake:
 - address areas already largely covered by Community law (Case C-239/03 Commission v France -Etang de Berre)
 - are sufficiently clear, precise and unconditional (Case C-192/89 Sevince)
- In the case Z v The Board of management of a community school (C-363/12), the ECJ held that the provisions of the UNCRPD are not, as regards their content, provisions that are unconditional and sufficiently precise and therefore **do not have direct effect** in European Union.

Case study : the role of the UNCRPD and its role as interpretative tool – the definition of disability



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Definition of disability in the UNCRPD

- Although the UNCRD does not give a precise definition of "disability" or "persons with disabilities", its Preamble and Article 1 include principles which are meant to clarify the application of the Convention. While the Preamble establishes a conceptual definition of disability, the objective of Article 1 is to define the group of persons to be covered by the Convention.
- Paragraph (e) of the Preamble stipulates 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".
- Article 1 provides that "persons with disabilities include those persons who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

Definition of disability in EU law

- There is no definition of disability in EU primary or secondary legislation.
- This is in particular the case for the Equal treatment directive 2000/78. As with other grounds specified in the framework directive, no definition is provided of the term disability.
- There were several reasons for this :
 - Community legislation generally did not define protected grounds;
 - the political difficulty of seeking to overcome differences in the definition of disability among the Member States;
 - the belief that a definition of disability was less important under an equality approach, as compared to a social protection approach.
- As the UK House of Lords Select Committee predicted in 2000, *“EU-wide definitions will evolve as cases reach the Court of Justice. This will be a long process, and there will inevitably be a period of uncertainty as cases are taken through the courts”*.

The jurisprudence of the ECJ on the definition of disability

From 2006, the ECJ has wrestled with the definition of disability in EU law in seven judgments :

- **Chacón Navas** v Eurest Colectividades SA (2006) - Case C-13/05.
- **Coleman** v Attridge Law (2008) - Case C-303/06.
- **Ring** v Dansk almennyttigt Boligselskab DAB (2013) – Case C-335/11 en **Werge** v Pro Display A/S- Case C-337/11.
- **Glatzel** v Freistaat Bayern (2014) – Case C-356/12.
- **Z v A Government Department and the Board of Management of a Community School** (2014) - Case C-363/12.
- **Kaltoft** v Kommunernes Landsforening (2015) – Case C-354/13
- **Daouidi** v Bootes Plus SL and Others (2016) – Case C-395/15

Chacon Navas (Case C13/05). Background.

- Sonia Chacón Navas had been ill at home for several months when she received notification from her employer, Eurest Colectividades, that her contract will be terminated. The notification letter acknowledged that her dismissal was unlawful and it included the employer's offer to pay financial compensation. Spanish law distinguishes between unlawful and void dismissals. Dismissals are void when they fail some of legal requirements, for instance, the prohibition to discrimination on grounds such as gender or disability. Differences in the available remedies explain the importance of the distinction between unlawful and void dismissals. In the case of unlawful dismissals, the employer has the obligation to pay the former employee a financial compensation. If the dismissal is deemed void, the employee has the right to be reinstated in the position from which he was wrongfully dismissed, as well as the right to any unpaid remuneration. This the reason why Mrs Chacon Navas took a legal claim against Eurest on the basis that her dismissal amounted to disability discrimination.
- The Spanish court, to which the claim was taken, took the view that a dismissal on the grounds of sickness could amount to a form of disability discrimination. However, in the absence of a definition of disability under Spanish law, the court referred the case to the ECJ.

ECJ Ruling on Chacon Navas (2006)

- The Court ruled that :
 - the concept of "disability" for the purpose of Directive 2000/78 must, be given an autonomous and uniform interpretation throughout the Community;
 - someone dismissed solely on account of sickness could not fall within the general framework laid down in the directive for combating discrimination on grounds of disability;
 - 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*";
 - in order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will *last for a long time*.

Comments on Chacon Navas

- The definition adopted by the Court assumed that medical impairments themselves, not the work environment, hinder professional life.
- This definition was surprising because the Court's reasoning seemed markedly uninformed by the historical, political, and normative debate regarding the meaning of disability in Europe and abroad. Not once in the entire judgment hints the Court at the evolution of the disability policy or refers to the scientific conceptual framework provided by the International Classification of Functioning, Disability and Health (ICF) adopted by the WHO in 2001.
- The judgment also departed from the traditional teleological interpretation approach of the ECJ, namely to interpret legislative provisions in the light of the purpose, values, legal, social and economical goals these provisions aim to achieve.
- The expected approach of the ECJ would have been to interpret the concept of disability broadly and to shift the bulk of the analysis to the question of discrimination. Instead, the court focused its attention towards the definitional question from a medical perspective. It looked specifically at the medical impairment and turned to issues such as the nature and severity of the impairment or the duration or expected duration of the impairment.
- The ECJ ruling was made before the adoption of the UNCRPD by the United Nations General Assembly (December 2006).

Coleman (Case C303/06). Background.

- Mrs Coleman had a disabled son, Oliver, with bronchomalacia and congenital laryngomalacia. She worked as a secretary for a London law firm called Attridge Law. They accused her of using her child as a way to manipulate requests for working time
- Mrs Coleman lodged a claim with the Employment Tribunal, London South, alleging that she had been subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child.
- However, under the UK Disability Discrimination Act 1995, it states that one may consider oneself discriminated against (leading to unfair dismissal compensation) only if the treatment is "against a disabled person". Because Mrs Coleman was not herself disabled, the question was whether the 1995 Act had properly implemented the Directive 2000/78/EC on the matter.
- The Employment Tribunal referred the matter to the Court of Justice, asking whether the directive on equal treatment in employment and occupation must be interpreted as prohibiting direct discrimination on grounds of disability and harassment related to disability only in respect of an employee who is himself disabled, or whether the directive applies equally to an employee who is treated less favourably by reason of the disability of his child.

ECJ Ruling on Coleman (2008)

- The directive, the purpose of which is to combat all forms of discrimination, applies not to a particular category of person but by reference to the nature of the discrimination.
- An interpretation limiting its application only to people who are themselves disabled is liable to deprive the directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

Remarks on Coleman

- In Coleman, the Court's approach explicitly rejected the calls for a narrow interpretation of the principle of equal treatment on the ground that such an interpretation would hamper the social and economic integration of persons with disabilities. The ECJ used a teleological interpretation seeking to achieve the objectives of the legislation.
- The Advocate general pointed out that the denial of protection against discrimination by association would harm persons with disabilities by limiting the protection of their caregivers.
- The Court more or less ignored the Chacon Navas decision, or at least the textual perspective adopted in that case. The Court's judgment mentions that its judgement on Chacon Navas did not hold that the principle of equal treatment should be interpreted strictly within the scope of the Directive.
- The ECJ ruling was made after the adoption of the UNCRPD by the United Nations General Assembly (December 2006) but before the ratification of the Convention by the European Union (December 2010).

Jette Ring (Case C-335/11) Background

- Mrs Ring and Mrs Werger were dismissed by their respective employers with a one month notice using a special rule in Danish labour law that makes it possible to dismiss on such short notice an employee who during a 12 months period has had 120 days of paid sickness leave.
- Mrs Ring and Werger claimed that they could have continued working if they would have been accommodated with some special office furniture and a reduction in working time.
- The women, with the help of their trade union (HK Danmark), issued proceedings at the national court, stating that their dismissal and the special one month notice rule amounted to discrimination on the ground of disability, as prohibited under Danish equal treatment law.
- Since the Danish law in fact implements the Equality Directive 2000/78, the national court and asked preliminary questions to the CJEU in order to clarify the obligations under this Directive.

Jette Ring (Case C-335/11) Background – cont.

- Three key legal questions as regards disability discrimination were referred to the ECJ :
 - the definition of a disability : is any person who, because of physical, mental or psychological injuries, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in Navas case covered by the concept of disability within the meaning of the directive?
 - the question what can count as a reasonable accommodation : is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78/EC?
 - the question whether national legislation under which it is possible to dismiss employees who have used their right for paid sickness leave on a shorter notice than other employees is in compliance with EU law.

ECJ Ruling on Jette Ring (2013)

- Disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from mental, physical 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, and the limitation is a long-term one.
- A reduction in working hours may constitute one of the accommodation measures.
- The Danish legislation may not be applied in a case where it concerns a disabled person and where in fact the disablement is partly due to the fact that the employer has not taken appropriate measures. The law could also be invalid since it may be presumed that disabled persons will more easily meet the 120 days criterion than non-disabled persons who are merely sick. It is for the national court to decide whether the Danish Government has an objective justification for having this legislation in place and applying it also to disabled persons.

Remarks on Jette Ring

- The ECJ recalled that the primacy of international agreements concluded by the European Union over instruments of secondary law and made it clear that the EU concept of 'disability' must be interpreted in a manner consistent with the UNCRPD.
- In order to be consistent with the Convention, the ECJ adopted a new definition of disability. Disability must be understood as referring to limitations which result from :
 - (i) **long-term...**
 - (ii) **physical, mental or psychological** impairments
 - (iii) which in **interaction with various barriers**
 - (iv) **may hinder** the full and effective participation of the person in professional life
 - (v) on an **equal basis** with other workers
- This definition covers not only disabilities that are congenital or result from accidents, but also those caused by illness. The ECJ also stated that there was nothing in the wording of Directive 2000/78 to indicate that its scope of application is limited to a certain degree of severity of disability.

Z (Case C363/16). Background

- Ms Z., a teacher working in Ireland, has a rare condition which has the effect that, she has no uterus and therefore cannot support a pregnancy. Ms Z. and her husband had a child as a result of an agreement with a surrogate mother in California. Genetically, the child is the couple's son and there is no reference to the surrogate mother's identity on the child's US birth certificate. Under Californian law, Ms Z. and her husband are considered the baby's parents.
- Ms Z. applied for paid leave equivalent to maternity leave or adoption leave. The application was refused on the grounds that Ms Z. had never been pregnant and the child not be adopted by the parents.
- The national tribunal before which the Ms Z. brought actions had asked whether such a refusal is contrary to the Pregnant Workers Directive or whether it constitutes discrimination on grounds of sex or of disability (both types of discrimination being prohibited under the Equal Treatment Directive and Employment Equality Framework Directive respectively).

ECJ Ruling on Z. (2014)

- As regards the Employment Equality Framework Directive, the Court considers that it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her. However, the concept of 'disability' within the meaning of that directive presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers.
- In principle, the inability to have a child by conventional means does not, in itself, prevent the commissioning mother from having access to, participating in or advancing in employment.
- That being the case, the Court finds that the inability to have a child does not constitute a 'disability' within the meaning of the Employment Equality Framework Directive and, therefore, that that directive is not applicable in a situation such as that at issue here.

Comments on Z.

- The Court referred to Article 1 UNCRPD and again firmly stated that the Equal treatment directive must, as far as possible, be interpreted in a manner that is consistent with the UNCRPD.
- The ECJ accepted that Mrs Z may have a disability within the meaning of the UNCRPD. However, the Court relied on the limited scope of the directive *ratione materiae*, as the directive only targets disabilities that make a worker's involvement in professional life more burdensome, which is not the case for medical conditions that prevent women from getting pregnant.

Glatzel (Case C356/12). Background

- Mr Glatzel was denied a driving licence for heavy goods vehicles by the Bavarian Authorities because the visual acuity in his worse eye did not reach the minimum level of acuity required in the Annex III to the Directive of the European Parliament and of the Council of 20 December 2006 on driving licences.
- The National referring court essentially asked the ECJ to determine the validity of the visual acuity requirement of the Annex III to the Directive in the light of Articles 20, 21(1) and 26 of the European Charter of Fundamental Rights concerning equality before the law, non-discrimination on grounds of disability, and the integration of persons with disabilities.

ECJ Ruling on Glatzel (2014)

- It is not necessary for the purpose of determining the validity of Directive 2006/126, in the light of Article 21(1) of the Charter, to determine definitively whether Mr Glatzel is considered to have a disability within the meaning of that provision. Even if the impairment of Mr Glatzel could be considered as falling within the definition of disability within the meaning of the Charter, the difference in treatment consisting in not issuing him with a driving licence for heavy good vehicles on the ground that his visual acuity is insufficient may be objectively justified in the light of overriding considerations of road safety.
- The principle of proportionality requires, in particular, the principle of equal treatment, to be reconciled as far as possible with the requirements of road safety which determine the conditions for driving motor vehicles.
- Although Article 26 of the Charter requires the European Union to respect and recognize the right of persons with disabilities to benefit from integration measures, this principle does not require the EU to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right.

Kaltoft (Case C356/12). Background

- Mr Karsten Kaltoft worked for 15 years for the Municipality of Billund (Denmark) as a childminder. On 22 November 2010, the municipality terminated his employment contract. Throughout the duration of his employment contract, Mr Kaltoft was considered obese under the definition of the World Health Organization (WHO). Taking the view that the dismissal resulted from unlawful discrimination on grounds of obesity, the Fag og Arbejde (FOA), a workers' union acting on behalf of Mr Kaltoft, brought proceedings before a Danish court seeking a declaration of that discrimination as well as compensation.
- In the context of assessing that request, the District Court of Kolding, Denmark asked the ECJ to specify whether EU law itself prohibits discrimination on grounds of obesity. It is also asking whether obesity can constitute a disability and therefore falls within the scope of the above directive.

ECJ Ruling on Kaltoft (2015)

- The ECJ recalls that no provision of the Treaties or of secondary EU legislation prohibits discrimination on grounds of obesity as such.
- As far as whether obesity can constitute a disability, the Court finds that if, under given circumstances, the obesity of the worker entails 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 that person in professional life
 - on an equal basis with other workers,
 - and the limitation is a long-term oneThen such obesity can fall within the concept of 'disability' within the meaning of the directive.
- Such would be the case, in particular, if the obesity of the worker hindered that participation on account of reduced mobility or the onset of medical conditions preventing that person from carrying out work or causing discomfort when exercising professional activity.

Remarks on Kaltoft.

- The Court simply restates its definition of disability settled in judgment **Jette Ring (Case C-335/11)**. However, the judgment is interesting because it deals with obesity.
- Obesity cases are emblematic of legal definitions of disability that exclude individuals whose impairments are voluntarily induced. In holding that disability does not depend on the extent to which the person may or may not have contributed to the onset of his disability, the ECJ rejects the underlying motivations of moralism of such approaches.
- Kaltoft is also a further step towards an approach which would shift the judicial analysis away from the nature of the medical impairment and towards its discriminatory social effects. In Kaltoft, neither the Court or the advocate questioned whether obesity qualifies as an impairment.
- Although the Advocate general touched upon the issue, the ECJ did not elaborate on the notion of "perceived" impairment to address the case. In 2000, the Supreme Court of Canada made it clear that the definition of a human rights disability could go beyond a condition showing real and actual limitations to encompass the perception of the employer that the applicant was suffering from a disability.

Daouidi (Case C356/12). Background

- On 26 November 2014, while he was still temporarily unable to work, because of a dislocated shoulder, Mr Daouidi received a notice of disciplinary dismissal from his employer Bootes Plus.
- The Spanish court pointed out that there was sufficient evidence to assume that the true reason for the dismissal was not a disciplinary issue but his temporary inability to work for an indeterminate period of time as a result of his accident.
- The Spanish Court referred the case to the ECJ to ascertain whether he could be considered disabled for the purposes of European anti-discrimination legislation, given the uncertain duration of his incapacity.

ECJ Ruling on Daouidi (2016)

- The fact that a person is in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of disability laid down by that directive, read in the light of the UNCRPD.
- The evidence which makes it possible to find that such a limitation is "long-term" includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and
- In the context of the verification of that 'long-term' nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data.

Remarks on Daouidi

- Although the judgment does not provide particularly helpful guidance on it, the “long term” nature of the impairment requirement characterizing the EU definition underlines the persistence of a focus on the nature, rather than the social effect, of medical impairments.
- By insisting that impairment must be “long term”, the EU definition excludes from the protection against discrimination a vast array of workers with short-term, fluctuating, or episodic impairments.
- It should be recalled that the definition of disability in the UNCRPD is an inclusive rather than an exclusive definition. While article 1 UNCRPD refers to “long-term” impairments, this provision is not exhaustive of other impairments. In that regard, the UN Committee on the Rights of Persons with Disability, in *Ms. S.C v Brazil* (2014), specified that under Article 1 of the Convention, “persons with disabilities include, **but are not limited** to those who have long-term impairments.

Conclusion

- Using the UNCRPD as an interpretative tool for assessing the EU legislation, the European Court of Justice has progressively taken a positive and expanding approach to disability rights.
- With regard to the definition of disability, the case law of the ECJ underlines steps in the right direction : when assessing the rights of persons with disabilities to be protected against discrimination, the legal analysis should be shifted away from the nature of the medical impairments of the person and towards the discriminatory social effects of such impairments.
- However, the case law reveals that there is still a widespread legal confusion on the different meanings of disability and the reference to the UNCRPD might be not enough to resolve the issue.
- This is partly due to the fact that simply classifying disability definitions as conforming to a medical or a social model of disability fails to acknowledge that disability policy (including the UNCRPD) is part of public policies promoting different and competing dimensions of equality. Because of that, the “definition” of disability cannot be the same across those different dimensions but the adopted definition should be at least consistent with the dimension of equality at stake.

Étude de cas : la CDPH des Nations unies et son rôle d'aide à l'interprétation – La définition du handicap



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Définition du handicap dans la CDPH

- Bien que la CDPH n'énonce aucune définition précise du « handicap » ou des « personnes handicapées », son préambule et son article premier établissent des principes qui encadrent son champ d'application. Le préambule contient une définition conceptuelle du handicap, tandis que l'article premier vise à définir la catégorie de personnes couvertes par la Convention.
- Le paragraphe e) du préambule affirme que « la notion de handicap évolue et que le handicap résulte de l'interaction entre des personnes présentant des incapacités et les barrières comportementales et environnementales qui font obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres ».
- L'article premier dispose que « Par personnes handicapées on entend des personnes qui présentent des incapacités physiques, mentales, intellectuelles ou sensorielles durables dont l'interaction avec diverses barrières peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres. »

Définition du handicap dans le droit de l'Union

- Il n'existe aucune définition du handicap dans le droit primaire ou le droit dérivé de l'UE.
- C'est notamment le cas dans la directive 2000/78 relative à l'égalité de traitement. Pas plus que pour les autres motifs prévus dans cette directive-cadre, aucune définition n'est donnée pour le terme « handicap ».
- Plusieurs raisons expliquent cet état de fait :
 - L'absence de définition des motifs de protection d'une manière générale dans le droit communautaire
 - La difficulté politique à tenter de surmonter les disparités entre les États membres dans la définition du handicap
 - L'idée selon laquelle une définition du handicap est moins importante dans une approche fondée sur l'égalité par rapport à une approche fondée sur la protection sociale
- Ainsi que le Comité spécial de la Chambre des Lords du Royaume-Uni l'avait anticipé en 2000, *« les définitions édictées à l'échelle européenne sont appelées à évoluer à mesure que la Cour de justice sera saisie d'affaires. Le processus sera long et on traversera inéluctablement une période d'incertitude le temps que les dossiers suivent le cours des procédures judiciaires. »*

Jurisprudence de la CJE sur la définition du handicap

Depuis 2006, la CJE a traité de la définition du handicap dans le droit européen dans plusieurs arrêts :

- Affaire C-13/05, **Chacón Navas** / Eurest Colectividades SA (2006)
- Affaire C-303/06, **Coleman** / Attridge Law (2008)
- Affaire C-335/11, **Ring** / Dansk almennyttigt Boligselskab DAB (2013), et affaire C-337/11, **Werge** / Pro Display A/S
- Affaire C-356/12, **Glatzel** / Freistaat Bayern (2014)
- Affaire C-363/12, **Z** / A Government Department and the Board of management of a community school (2014)
- Affaire C-354/13, **Kaltoft** / Kommunernes Landsforening (2015)
- Affaire C-395/15, **Daouidi** / Bootes Plus SL et autres (2016)

Affaire Chacón Navas (C-13/05) – Contexte

- Sonia Chacón Navas était en arrêt de travail pour cause de maladie depuis plusieurs mois lorsque son employeur, Eurest Colectividades, lui a notifié la résiliation de son contrat. La lettre de notification reconnaissait que son licenciement était irrégulier et comprenait une offre de l'employeur de lui verser une indemnisation financière. Le droit espagnol opère une distinction entre le licenciement irrégulier et le licenciement nul. Un licenciement est nul s'il viole une exigence légale, comme l'interdiction de la discrimination fondée sur le sexe ou sur le handicap, par exemple. L'importance de cette distinction est liée aux recours disponibles dans les deux situations. En cas de licenciement irrégulier, l'employeur est tenu de verser une indemnité financière au travailleur licencié. Si le licenciement est réputé nul, le travailleur a par contre le droit d'être réintégré au poste dont il a été indument licencié, ainsi que d'obtenir le versement de toute rémunération non perçue. C'est pourquoi M^{me} Chacón Navas a intenté une action en justice contre Eurest au motif que son licenciement constituait une discrimination fondée sur le handicap.
- Le tribunal espagnol saisi de cette action a estimé qu'un licenciement pour cause de maladie pouvait constituer une forme de discrimination fondée sur le handicap. En l'absence de définition du handicap dans le droit espagnol, il a toutefois adressé une question préjudicielle à la CJEU à ce sujet.

Arrêt de la CJE dans l'affaire Chacón Navas (2006)

- La Cour a statué ce qui suit :
 - la notion de « handicap » au sens de la directive 2000/78 doit faire l'objet d'une interprétation autonome et uniforme dans toute la Communauté ;
 - une personne qui a été licenciée exclusivement pour cause de maladie ne peut relever du cadre général établi par la directive en vue de lutter contre la discrimination fondée sur le handicap ;
 - la notion de « handicap » doit être entendue comme visant « *une limitation, résultant notamment d'atteintes physiques, mentales ou psychiques et entravant la participation de la personne concernée à la vie professionnelle* » ;
 - pour que la limitation relève de la notion de « handicap », il doit donc être probable qu'elle soit de *longue durée*.

Commentaires sur l'arrêt Chacón Navas

- La Cour sous-entend dans la définition adoptée que ce sont les atteintes médicales elles-mêmes, et non le milieu de travail, qui entravent la vie professionnelle.
- Cette définition a créé la surprise car il semble que la Cour a largement ignoré dans son raisonnement le débat historique, politique et normatif prévalant en Europe et au-delà sur la signification d'un handicap. La Cour ne fait référence nulle part dans l'arrêt à l'évolution de la politique en matière de handicap ou au cadre conceptuel scientifique établi par la classification internationale du fonctionnement, du handicap et de la santé (CIF) adoptée par l'OMS en 2001.
- L'arrêt s'écarte en outre de l'approche habituelle d'interprétation téléologique de la CJE, qui consiste à interpréter les dispositions législatives à la lumière de la finalité, des valeurs et des objectifs juridiques, sociaux et économiques que ces dispositions visent à réaliser.
- Il était escompté que la CJE donne une interprétation large à la notion de handicap et qu'elle place la question de la discrimination au cœur de son analyse. Au lieu de cela, la Cour a mis l'accent sur la question de la définition d'un point de vue médical. Elle a spécialement examiné l'atteinte médicale et s'est intéressée à des aspects tels que la nature, la gravité et la durée ou la durée probable de cette atteinte.
- La CJE a prononcé cet arrêt avant l'adoption de la CDPH par l'Assemblée générale des Nations unies (décembre 2006).

Affaire Coleman (C-303/06) – Contexte

- M^{me} Coleman avait un fils handicapé, Oliver, qui souffrait de bronchomalacie et de laryngomalacie congénitales. Elle était secrétaire dans un cabinet d'avocats de Londres appelé Attridge Law. Son employeur l'avait accusée d'utiliser son fils comme prétexte pour exiger l'aménagement de ses horaires de travail.
- M^{me} Coleman a saisi l'Employment Tribunal, London South, d'un recours dans lequel elle soutenait qu'elle avait été victime d'un licenciement implicite (« unfair constructive dismissal ») et d'un traitement moins favorable que celui réservé aux autres employés, en raison du fait qu'elle avait la charge principale d'un enfant handicapé.
- Aux termes de la loi britannique de 1995 relative à la discrimination fondée sur le handicap, une personne ne peut toutefois prétendre qu'elle a été victime d'une discrimination (ce qui lui donnerait droit à une indemnité pour licenciement abusif) que si le traitement en cause est pratiqué « à l'encontre d'une personne handicapée ». Étant donné que M^{me} Coleman n'était pas elle-même handicapée, il s'agissait de savoir si cette loi avait correctement transposé la directive 2000/78/CE à cet égard.
- L'Employment Tribunal a renvoyé la question à la Cour de justice en lui demandant si la directive relative à l'égalité de traitement en matière d'emploi et de travail devait être interprétée en ce qu'elle interdit une discrimination directe fondée sur le handicap et le harcèlement lié au handicap uniquement à l'encontre d'un employé qui est lui-même handicapé ou si la directive s'applique également à un employé qui est victime d'un traitement défavorable en raison du handicap dont est atteint son enfant.

Arrêt de la CJE dans l'affaire Coleman (2008)

- La directive, qui vise à lutter contre toutes les formes de discrimination, ne s'applique pas à une catégorie de personnes déterminée, mais en fonction de la nature de la discrimination.
- Une interprétation limitant l'application de la directive aux seules personnes qui sont elles-mêmes handicapées serait susceptible de priver cette directive d'une partie importante de son effet utile et de réduire la protection qu'elle est censée garantir.

Commentaires sur l'arrêt Coleman

- Dans l'arrêt Coleman, la Cour a expressément rejeté les appels à une interprétation élargie du principe de l'égalité de traitement au motif qu'une telle interprétation nuirait à l'intégration économique et sociale des personnes handicapées. Elle a mis en œuvre une interprétation téléologique visant à atteindre les objectifs de la législation.
- L'avocat général avait souligné que la négation d'une protection contre la discrimination par association porterait préjudice aux personnes handicapées car elle limiterait la protection dont peuvent bénéficier les personnes qui les prennent en charge.
- La Cour a en quelque sorte ignoré l'arrêt Chacón Navas, ou à tout le moins la perspective textuelle adoptée dans cette affaire. Elle a précisé dans ce second arrêt qu'elle n'avait pas jugé, dans l'affaire Chacón Navas, que le principe de l'égalité de traitement devait être interprété de manière restrictive à l'intérieur du champ d'application de la directive.
- La CJE a prononcé cet arrêt après l'adoption de la CDPH par l'Assemblée générale des Nations unies (décembre 2006), mais avant la ratification de la Convention par l'Union européenne (décembre 2010).

Affaire Jette Ring (C-335/11) – Contexte

- M^{me} Ring et M^{me} Werger ont été licenciées par leurs employeurs respectifs avec un préavis d'un mois sur la base d'une disposition spéciale du droit du travail danois, qui autorisait le licenciement avec un préavis réduit à cette durée si le travailleur a été en arrêt maladie avec maintien du salaire pendant 120 jours au cours des douze mois précédents.
- M^{me} Ring et M^{me} Werger prétendaient qu'elles auraient pu continuer à travailler si on leur avait accordé un équipement de bureau spécifique et une diminution de leur temps de travail.
- Avec l'aide de leur syndicat (HK Danmark), les plaignantes ont intenté une action devant un tribunal national en affirmant que leur licenciement et la disposition spéciale établissant un préavis d'un mois constituaient une discrimination fondée sur le handicap, ce qui est interdit en vertu de la loi danoise sur l'égalité de traitement.
- Étant donné que la loi danoise en cause est en réalité la transposition de la directive 2000/78 sur l'égalité, le tribunal national a adressé certaines questions préjudicielles à la CJE afin que les obligations imposées par cette directive soient précisées.

Affaire Jette Ring (C-335/11) – Contexte (suite)

- La CJE a été amenée à examiner trois questions juridiques fondamentales sur la discrimination fondée sur le handicap :
 - La définition d'un handicap : La notion de « handicap », au sens de la directive, est-elle applicable à toute personne qui, en raison d'atteintes physiques, mentales ou psychiques, ne peut accomplir son travail pendant une période satisfaisant à la condition de durée visée dans l'arrêt Chacón Navas, ou ne peut le faire que de façon limitée ?
 - Les aménagements raisonnables possibles : La réduction du temps de travail peut-elle constituer l'une des mesures visées par l'article 5 de la directive 2000/78 ?
 - Une législation nationale qui autorise un employeur à licencier un travailleur qui a utilisé son droit à un congé de maladie rémunéré avec une durée de préavis réduite est-elle conforme au droit de l'Union européenne ?

Arrêt de la CJE dans l'affaire Jette Ring (2013)

- La notion de « handicap » doit être interprétée en ce sens qu'elle inclut un état pathologique causé par une maladie médicalement constatée comme curable ou incurable dès lors que cette maladie entraîne une limitation, résultant notamment d'atteintes physiques, mentales ou psychiques, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs, et que cette limitation est de longue durée.
- La réduction du temps de travail peut constituer l'une des mesures d'aménagement.
- La législation danoise ne peut être appliquée dans un cas où elle concerne une personne handicapée et le handicap est en réalité partiellement dû au fait que l'employeur n'a pas pris les mesures appropriées. La loi en cause pourrait également être nulle puisqu'il peut être supposé qu'une personne handicapée atteindra plus facilement le seuil des 120 jours qu'une personne non handicapée qui est simplement malade. Il incombe à la juridiction nationale de déterminer si le gouvernement danois a une justification objective pour l'adoption de cette loi et son application aux personnes handicapées.

Commentaires sur l'arrêt Jette Ring

- La CJE a rappelé que les accords internationaux conclus par l'Union européenne priment les instruments de son droit dérivé et établi clairement que la notion européenne de « handicap » doit recevoir une interprétation conforme à la CDPH.
- Afin de respecter la Convention, la CJE a élaboré une nouvelle définition du handicap. Cette notion doit être entendue comme visant une limitation résultant :
 - i) d'atteintes **physiques, mentales ou psychiques**
 - ii) **durables**
 - iii) dont l'**interaction avec diverses autres barrières**
 - iv) **peut faire obstacle** à la pleine et effective participation de la personne concernée à la vie professionnelle
 - v) sur la **base de l'égalité** avec les autres travailleurs.
- Cette définition ne couvre pas seulement les handicaps de naissance ou d'origine accidentelle, mais également ceux causés par une maladie. La CJE a également souligné qu'aucun élément dans la formulation de la directive 2000/78 ne laissait entendre que son champ d'application était limité à un certain degré de gravité du handicap.

Affaire Z (C-363/12) – Contexte

- M^{me} Z., une enseignante travaillant en Irlande, souffre d'une affection rare qui a pour conséquence qu'elle n'a pas d'utérus et ne peut se trouver enceinte. M^{me} Z. et son mari ont conclu un accord avec une mère porteuse installée en Californie pour avoir un enfant. Cet enfant est le fils génétique du couple et son certificat de naissance américain ne mentionne pas l'identité de la mère porteuse. En vertu du droit californien, M^{me} Z. et son mari sont considérés comme les parents de cet enfant.
- M^{me} Z. a demandé un congé payé équivalent à un congé de maternité ou d'adoption. Elle s'est vu opposer un refus au motif qu'elle n'avait pas été enceinte et que l'enfant n'était pas adopté par les parents.
- Le tribunal national devant lequel M^{me} Z. a introduit un recours a demandé à la Cour si ce refus était contraire à la directive sur les travailleuses enceintes ou s'il constituait une discrimination fondée sur le sexe ou sur le handicap (ces deux types de discrimination étant interdits, respectivement, par la directive sur l'égalité de traitement et la directive sur l'égalité en matière d'emploi et de travail).

Arrêt de la CJE dans l'affaire Z. (2014)

- Au sujet de la directive sur l'égalité en matière d'emploi et de travail, la Cour estime incontestable que l'impossibilité pour une femme de porter son enfant puisse être la source d'une grande souffrance pour celle-ci. Cependant, la notion de « handicap » au sens de cette directive suppose que la limitation dont souffre la personne, en interaction avec diverses barrières, puisse faire obstacle à sa pleine et effective participation à la vie professionnelle sur la base de l'égalité avec les autres travailleurs.
- En principe, l'incapacité d'avoir un enfant par des moyens conventionnels, en elle-même, ne constitue pas un empêchement pour la mère commanditaire d'accéder à un emploi, de l'exercer ou d'y progresser.
- La Cour considère donc que l'incapacité d'avoir un enfant ne constitue pas un « handicap » au sens de la directive sur l'égalité en matière d'emploi et de travail et que, en conséquence, cette directive n'est pas applicable dans une situation telle que celle de l'espèce.

Commentaires sur l'arrêt Z.

- La Cour a fait référence à l'article premier de la CDPH et elle a répété avec fermeté que la directive sur l'égalité de traitement doit faire l'objet, dans la mesure du possible, d'une interprétation conforme à cette convention.
- La Cour a admis que M^{me} Z. avait peut-être un handicap au sens de la CDPH. Elle s'est toutefois appuyée sur le champ d'application matériel limité de la directive, qui vise uniquement les handicaps qui compliquent la participation des travailleurs à la vie professionnelle, ce qui n'est pas le cas d'une pathologie à cause de laquelle une femme ne peut pas être enceinte.

Affaire Glatzel (C-356/12) – Contexte

- Les autorités bavaroises ont refusé de délivrer un permis de conduire pour les véhicules poids lourds à M. Glatzel parce que l'acuité visuelle dont celui-ci dispose à son œil le moins bon n'atteint pas le niveau minimal exigé à l'annexe III de la directive du Parlement européen et du Conseil du 20 décembre 2006 relative au permis de conduire.
- La juridiction nationale de renvoi a demandé, en substance, à la Cour d'apprécier la validité de l'exigence en matière d'acuité visuelle établie à l'annexe III de la directive au regard des articles 20, 21, paragraphe 1, et 26 de la Charte européenne des droits fondamentaux portant, respectivement, sur l'égalité en droit, la non-discrimination en raison d'un handicap et l'intégration des personnes handicapées.

Arrêt de la CJE dans l'affaire Glatzel (2014)

- Il n'est pas nécessaire, aux fins de l'appréciation de la validité de la directive 2006/126 au regard de l'article 21, paragraphe 1, de la Charte, de déterminer de manière définitive si M. Glatzel est considéré comme étant ou non handicapé au sens de cette dernière disposition. En effet, à supposer même que l'atteinte d'une personne comme M. Glatzel soit considérée comme relevant de la notion de « handicap », au sens de la Charte, la différence de traitement consistant à ne pas lui délivrer un permis de conduire pour les véhicules poids lourds au motif que son acuité visuelle serait insuffisante est susceptible d'être objectivement justifiée au regard des considérations impératives relatives à la sécurité routière.
- Le principe de proportionnalité exige notamment de concilier, dans toute la mesure du possible, le principe d'égalité de traitement avec les exigences de la sécurité routière qui sont déterminantes pour les conditions de la conduite des véhicules à moteur.
- L'article 26 de la Charte prescrit que l'Union européenne doit reconnaître et respecter le droit des personnes handicapées à bénéficier de mesures d'intégration, mais ce principe n'exige pas qu'elle adopte une quelconque mesure spécifique. Pour que cet article soit pleinement effectif, le droit européen ou national doit lui donner corps plus précisément. En conséquence, il ne saurait en soi conférer un droit subjectif à une personne.

Affaire Kaltoft (C-354/13) – Contexte

- M. Karsten Kaltoft a travaillé pour la municipalité de Billund (Danemark) en qualité d'assistant maternel pendant 15 ans. Le 22 novembre 2010, la municipalité a mis fin à son contrat. Pendant toute la durée de son emploi, M. Kaltoft a été obèse au sens de la définition fournie par l'Organisation mondiale de la santé (OMS). Estimant que M. Kaltoft avait été licencié à la suite d'une discrimination illicite fondée sur son obésité, le Fag og Arbejde (FOA), un syndicat de travailleurs agissant pour celui-ci, a introduit un recours devant un tribunal danois pour obtenir une reconnaissance de cette discrimination ainsi que des dommages et intérêts.
- Dans le cadre de l'appréciation de ce recours, le tribunal de Kolding, au Danemark, a demandé à la CJE de préciser si le droit européen en tant que tel interdisait la discrimination fondée sur l'obésité. Il lui a également demandé si l'obésité pouvait constituer un handicap et, par conséquent, entrer dans le champ d'application de la directive pertinente.

Arrêt de la CJE dans l'affaire Kaltoft (2015)

- La Cour a rappelé qu'aucune disposition des traités ou du droit dérivé de l'Union ne contient une interdiction de la discrimination fondée sur l'obésité en tant que telle.
- S'agissant d'établir si l'obésité peut constituer un handicap, la Cour a affirmé que si, dans des circonstances données, l'état d'obésité du travailleur entraîne une limitation :
 - résultant notamment d'atteintes physiques, mentales ou psychiques,
 - dont l'interaction avec diverses barrières
 - peut faire obstacle à la pleine et effective participation de cette personne à la vie professionnelle
 - sur la base de l'égalité avec les autres travailleurs
 - et si cette limitation est de longue durée,
un tel état relève de la notion de « handicap » au sens de la directive.
- Tel serait le cas, notamment, si l'obésité du travailleur fait obstacle à sa participation du fait d'une mobilité réduite ou de la survenance de pathologies qui empêchent cette personne d'accomplir son travail ou qui entraînent une gêne dans l'exercice de son activité professionnelle.

Commentaires sur l'arrêt Kaltoft

- La Cour a simplement répété la définition du handicap formulée dans l'arrêt **Jette Ring (affaire C/335/11)**. Cet arrêt est toutefois intéressant en ce qu'il aborde la question de l'obésité.
- Les cas d'obésité sont emblématiques des définitions légales du handicap qui excluent les personnes dont l'atteinte résulte d'une cause volontaire. En soutenant que la notion de « handicap » ne dépend pas de la question de savoir dans quelle mesure la personne a pu contribuer ou non à la survenance de son handicap, la CJE a rejeté les motivations de moralisme sous-jacentes à cette approche.
- L'arrêt Kaltoft franchit également un pas supplémentaire vers une approche dans laquelle l'analyse judiciaire ne porterait plus sur la nature de l'atteinte médicale, mais sur ses effets sociaux discriminatoires. En l'espèce, ni la Cour ni l'avocat général n'ont cherché à déterminer si l'obésité est assimilable à une telle atteinte.
- Bien que l'avocat général ait abordé la question, la CJE n'a pas étudié en profondeur la notion de handicap « perçu » pour traiter l'affaire. En 2000, la Cour suprême du Canada a affirmé clairement que la définition d'un handicap au sens des droits de l'homme pouvait s'étendre au-delà d'un état assorti de limitations réelles et effectives et englober la perception d'un employeur selon laquelle le candidat à un poste souffrait d'un handicap.

Affaire Daouidi (C-395/15) – Contexte

- Le 26 novembre 2014, alors qu'il était encore en situation d'incapacité temporaire de travail à cause d'une luxation du coude, M. Daouidi a reçu de son employeur, Bootes Plus, un avis de licenciement disciplinaire.
- Le tribunal espagnol a indiqué qu'il existait des faits suffisants pour considérer que le motif réel du licenciement n'était pas un problème disciplinaire, mais l'incapacité de travail à durée indéterminée résultant de l'accident du travail dont M. Daouidi a été victime.
- Le tribunal espagnol a adressé l'affaire à la CJE afin qu'il soit établi si M. Daouidi pouvait être considéré comme handicapé au sens de la législation européenne contre la discrimination du fait de la durée indéterminée de son incapacité de travail.

Arrêt de la CJE dans l'affaire Daouidi (2016)

- Le fait qu'une personne se trouve en situation d'incapacité temporaire de travail, au sens du droit national, pour une durée indéterminée, en raison d'un accident du travail, ne signifie pas, par lui-même, que la limitation que cette personne subit peut être qualifiée de « durable », au sens de la définition du « handicap » établie par la directive lue à la lumière de la CDPH.
- Parmi les indices permettant de considérer qu'une telle limitation est « durable », figurent notamment le fait que, à la date du fait prétendument discriminatoire, l'incapacité de la personne concernée ne présente pas une perspective bien délimitée quant à son achèvement à court terme ou le fait que cette incapacité est susceptible de se prolonger significativement avant le rétablissement de ladite personne.
- Dans le cadre de la vérification de ce caractère « durable », la juridiction de renvoi doit se fonder sur l'ensemble des éléments objectifs dont elle dispose, en particulier sur des documents et des certificats relatifs à l'état de ladite personne, établis sur la base des connaissances et des données médicales et scientifiques actuelles.

Commentaires sur l'arrêt Daouidi

- Bien que l'arrêt ne procure pas d'orientation particulièrement utile à ce sujet, l'exigence de « durabilité » de l'atteinte qui caractérise la définition européenne souligne que l'accent continue d'être mis sur la nature de l'atteinte médicale plutôt que sur son effet social.
- En imposant que l'atteinte soit « durable », la définition européenne prive d'une protection contre la discrimination toute une série de travailleurs victimes d'atteintes de courte durée, fluctuantes ou épisodiques.
- Il convient de rappeler que la définition du handicap utilisée dans la CDPH est davantage inclusive qu'exclusive. Même si l'article premier de cette convention mentionne des incapacités « durables », d'autres incapacités ne sont pas incompatibles avec cette disposition. Ainsi, le Comité des droits des personnes handicapées des Nations unies a déclaré, dans sa décision dans l'affaire S.C. contre Brésil (2014), qu'en vertu de l'article premier de la Convention, « par personnes handicapées, on entend notamment, **mais pas seulement**, des personnes qui présentent des incapacités (...) durables ».

Conclusions

- En recourant à la CDPH pour interpréter et, partant, apprécier les actes législatifs de l'Union européenne, la Cour de justice européenne a progressivement adopté une approche positive des droits en matière de handicap, dans un champ de vision de plus en plus large.
- En ce qui concerne la définition du handicap, la jurisprudence de la CJE affiche un progrès : dans l'examen des droits des personnes handicapées qui doivent être protégés contre la discrimination, l'analyse juridique doit s'écarter de la nature des atteintes médicales et s'orienter vers les effets sociaux discriminatoires de ces atteintes.
- La jurisprudence révèle toutefois qu'il subsiste une confusion juridique répandue sur les différentes significations du handicap et la référence à la CDPH n'est peut-être pas suffisante pour y voir clair.
- Cette difficulté s'explique, entre autres, en ce qu'en classant simplement les définitions du handicap dans la logique d'un modèle médical ou social du handicap, on perd de vue que la politique relative au handicap (y compris la CDPH) fait partie de politiques publiques qui ciblent des dimensions différentes et antagonistes de l'égalité. La « définition » du handicap ne saurait donc être la même pour toutes ces dimensions, mais la définition retenue doit à tout le moins correspondre à la dimension de l'égalité qui est en jeu.

EU Disability Law and the UN Convention on the Rights of Persons with Disabilities

The European Ombudsman

Apostolidou Elpida
ERA seminar, 25/9/2017



European Ombudsman



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Emily O'Reilly, European Ombudsman

- **Complaint-driven institution**
 - Complaints from citizens, companies, NGOs, business associations
 - Concerning maladministration in the EU institutions, bodies, offices and agencies
- **Own-initiative power**
 - Examples of cases: transparency of TTIP negotiations, ECB and the Group of 30, post-mandate activities of former Commissioners/Ad Hoc Ethical Committee
 - EO powers → inspection of EU documents, calling officials to testify
 - Network of Ombudsmen



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The European Ombudsman as a member of the EU CRPD monitoring Framework

- Framework members: European Parliament, European Ombudsman, Fundamental Rights Agency, European Disability Forum
- As a member of the Framework, the European Ombudsman:
 - **"protects"** by encouraging and dealing with disability-related complaints
 - **"monitors"** by launching inquiries on her own initiative
 - **"promotes"** awareness of the UNCRPD



European Ombudsman

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I. Complaint-based work on disabilities

Examples of issues:

- **Accessibility of EU buildings**
- **Accessibility of material on EU institutions' websites**
- **Sign-language interpretation at EU events**
- **Participation in EU recruitment competitions**
- **Health insurance claims by EU staff**



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I. Complaint-based work on disabilities

➤ Accessibility of EU buildings

- **Access to the workplace:** An employee using a wheelchair complained that the institution failed to provide him proper access to his workplace.
 - The institution apologised and agreed to take appropriate corrective measures.
- **Parking spaces:** Complainants alleged a lack of sufficient parking places for people with disabilities near EU buildings.
 - The institutions contacted the local authorities to ensure additional parking spaces.



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I. Complaint-based work on disabilities

➤ Sign-language interpretation at events

- Complaints from citizens alleging lack of sign-language interpretation at EU funded events
 - In one case the institution agreed to reimburse the complainant.
 - In another case the institution agreed to provide sign-language interpretation at future events.



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I. Complaint-based work on disabilities

- **Participation in recruitment competitions**
 - UNCRPD Committee: *“the EU should act as a role model and increase employment of persons with disabilities across all EU institutions”*
 - Complaint from a candidate with a hearing disability against EPSO
 - Ombudsman’s stakeholder consultation → a number of Member States give additional time to applicants with hearing impairments when they sit written tests
 - EPSO should consider allowing extra time for candidates with a hearing impairment where this is requested in the case of computer based and written tests.



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I. Complaint-based work on disabilities

- **Implementation of UNCRPD at national level**
 - Complaint on the Commission’s handling of an infringement complaint about the application of the UNCRPD in the Czech Republic
 - Commission’s explanations: UNCRPD forms integral part of EU law but is “programmatic” in nature. Implementation is the responsibility of the signatories in accordance with their respective competences.
 - Member States are primarily responsible for housing and social protection.
 - The explanations make clear the Commission’s position in terms of when it can intervene with a Member State in its role as Guardian of the Treaties concerning the implementation of the UNCRPD.



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I. Complaint-based work on disabilities

- **Picture warning on tobacco products**
 - Picture showing a person in a wheelchair alongside a text stating “*smoking causes strokes and disability*”
 - The library of picture warnings to be used is provided by the Commission.
 - The complainant considered that persons with disabilities are being stigmatised by the use of this picture warning.
 - For the future, it would be helpful for the Commission to consult appropriate civil society groups regarding the choice of sensitive images before they become publicly available.



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II. Own-initiative work on disabilities

- **EU cohesion policy (1)**
 - Strategic inquiry concerning compliance with fundamental rights in the implementation of EU cohesion policy
 - *“If, for example, there are complaints that EU money is used to “institutionalise” persons with disabilities instead of helping to integrate them, the Commission clearly needs to ensure the matter is investigated and corrective action taken if needed”*

Emily O’Reilly, European Ombudsman, May 2014
 - Ombudsman’s decision published in May 2015 → taking account of responses to the Ombudsman’s consultation, including from the European Disability Forum, ENIL-ECCL, etc.



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II. Own-initiative work on disabilities

➤ EU cohesion policy (2)

- 8 proposals to the Commission: to raise awareness and provide guidance at national level; to verify the adequacy and efficacy of complaint-handling arrangements; to consider applying sanctions and initiating infringement proceedings, where appropriate.
 - Commission's reply to the Ombudsman's proposals (Nov 2015):
 - Two separate guidance notes to Member States
 - If a Member State does not comply with fundamental rights, consequences range from suspension of payments to possible infringement proceedings.



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II. Own-initiative work on disabilities

➤ Education

- January 2016: Strategic initiative on the integration of children with disabilities in the European Schools
- Although the European schools fall outside the Ombudsman's mandate, she has tried to engage in a constructive dialogue.
- Questions to the Commission: general policy, assessing needs, training, means of redress, etc.
 - The Commission noted that it is already reflecting, in contact with stakeholders, on ways to implement the UN recommendations and that the annual budget for the integration of pupils with disabilities has been increased in recent years.



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II. Own-initiative work on disabilities

➤ Health

- May 2016: Strategic inquiry on whether the treatment of persons with disabilities under the Commission's Joint Sickness Insurance Scheme complies with the UNCRPD
- Full reimbursement of medical costs in case of a "serious illness" → Four criteria including the criterion of shortened life expectancy
- The Ombudsman asked whether the Commission would consider introducing separate criteria for the reimbursement of medical costs for persons with disabilities.
 - The inquiry is ongoing: Meeting between Ombudsman and Commission staff (June 2017)



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II. Own-initiative work on disabilities

➤ Website accessibility – making the Ombudsman's website more accessible (1)

- Easy-to-read explanation of our work and of how to lodge a complaint available online in 24 languages
- Training for the Ombudsman's staff working on websites
- Assessment of the accessibility of the Ombudsman's website by an external service provider → Validation of conformance with WCAG 2.0, level AA (April 2017)
- Accessibility page – Feedback mechanism for users



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II. Own-initiative work on disabilities

- **Website accessibility – Ombudsman’s strategic inquiry (2)**
 - July 2017: Letter to President Juncker opening strategic inquiry on the accessibility of Commission’s websites and online tools
 - *“I still need to be convinced that the Commission is doing enough to follow-up on the recommendation of the UNCRPD Committee”*
Emily O’Reilly, European Ombudsman, July 2017
 - Questions to the Commission: assessment of web accessibility, staff training, provision of an accessibility statement (including a feedback mechanism for users), accessibility of Intranets
- The inquiry is ongoing. The Commission is to send its reply by 31 October 2017.



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Thank you!



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Litigation on behalf of people with disabilities at the European Court of Human Rights

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Strategic litigation

Strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court.

The clients involved in strategic litigation have been victims of human rights abuses that are suffered by many other people.

(www.mdac.org/en/what-we-do/strategic_litigation)

What can it achieve?

1. Document abuses
2. Enforce laws
3. Progressive interpretation of laws
4. Empower “victims”
5. Reverse historic injustices
6. Media attention
7. Funding opportunities
8. Spark law reform, but...

Risks

Technical
Drawn-out
Stress – on family (and lawyers)
Negative landmarks
Empty victories
Collateral damage

Toolbox

Strategic litigation only one tool...

Non-violent actions

Demonstration projects

Media

Political advocacy

International advocacy

Commissioning research

Collecting stories

Educating families about rights

Seek out new allies



ECHR litigation: scope

- the right to life
- The right to be free from torture, inhuman and degrading treatment or punishment
- The right to respect for private and family life, home and correspondence
- The right to a fair trial
- The right to an effective remedy
- The right to vote and to stand for election

ECHR application checklist

Violation happened in one of the 47 States?

Applicant is a person or a legal entity?

Victim status?

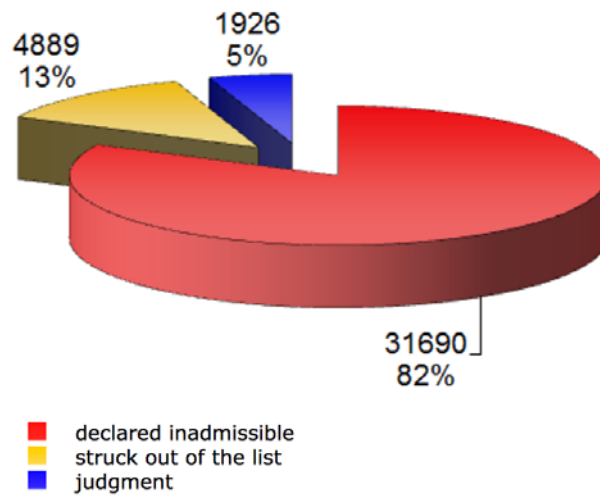
Exhaustion of domestic remedies?

Six months from the date of the final decision at domestic level?

<http://app.echr.coe.int/CheckList>

Warning!

Applications disposed of in 2016



Securing access to justice for persons with disabilities

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Outline

1. Legal capacity?
 - a) Rusi Stanev
 - b) What is required by human rights law?
 - c) What are substituted and supported decision-making?
2. Access to justice
 - a) Art. 13 CRPD
 - b) Art. 6 and 13 ECHR
 - c) Art. 47 EU Charter





What is legal capacity?

A construct that enables law to recognise and validate the decisions and transactions that a person makes

Domestic law

Variety of provisions and sources

- Autonomous decision-making (+ informal supports)
- Substituted/proxy decision-making (guardianship) – treats adults like children
- Supported decision-making



International law

In particular the UN Convention on the
Rights of Persons with Disabilities
(CRPD)

4 important elements

1 We have the **right to make
our own decisions**
(autonomous decision-making)

– Article 12(2)

2

States have an **obligation to provide supports** (where needed) to help someone exercise legal capacity.

- Article 12(3)

3

States must provide safeguards -Article 12(4)

States must protect against **exploitation, violence and abuse** - Article 16

4

States must ensure accommodations are provided – Articles 5 and 2

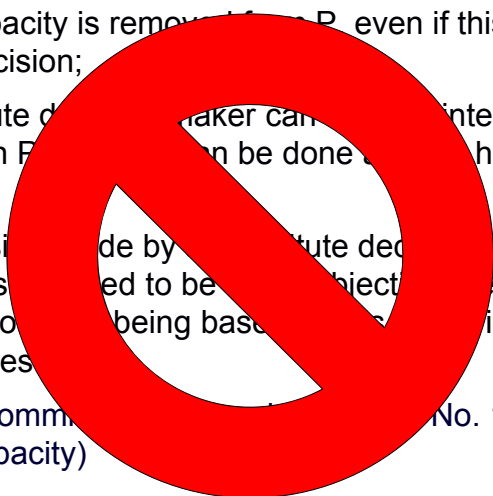
Substitute decision-making

Legal capacity is removed from P, even if this is in respect of single decision;

A substitute decision maker can be appointed by someone other than P, and decisions can be done on behalf of P, in his or her will; and

Any decision made by a substitute decision maker is based on what is considered to be the "best interests" of P, as opposed to being based on P's will and preferences

(CRPD Committee General Comment No. 1 (2014) on Legal Capacity)



Critique

1. How to protect against exploitation and abuse of people whose will and preference are not known or knowable?
2. Is substituted decision-making always morally unjustifiable?
3. Contains few policy guidance several States find feasible
4. Process ignored submissions on the draft

European Court of Human Rights

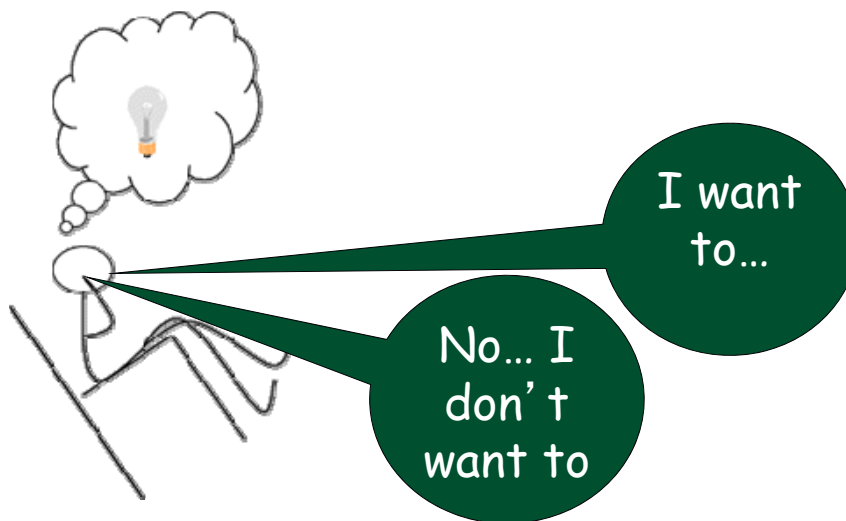
Psychiatry: *Shtukaturov v. Russia* (2008)

Social care institutionalisation: *Stanev v. Bulgaria* (2012), *DD v. Lithuania* (2012), *Kedzior v. Poland* (2012), *Stankov v. Bulgaria* (2015)

Marrying, parenting: *Lashin v. Russia* (2013), *Kocherov and Sergeeva v. Russia* (2016)

Access to justice: *Shtukaturov v Russia* (2008), *Salontaji-Drobnjak v Serbia* (2009), *X and Y v Croatia* (2011), *Sýkora v the Czech Republic* (2012), *Mikhaylenko v Ukraine* (2013), *Ivinovic v. Croatia* (2014)

Expressing will and preferences to others

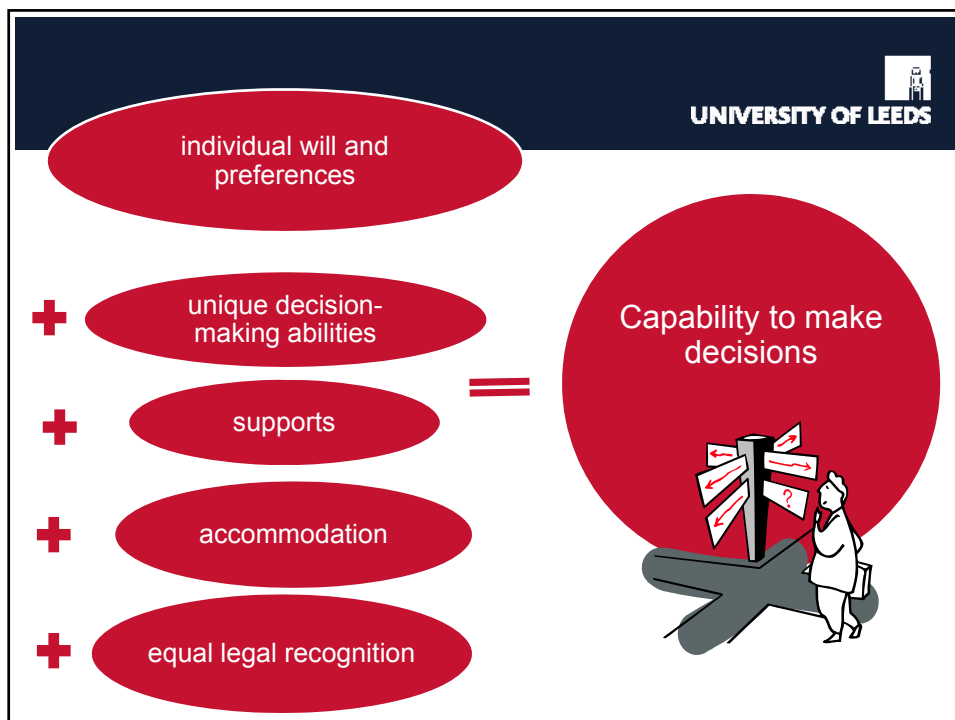


Being known by others as a full person



People you trust and who are committed to you





UNIVERSITY OF LEEDS

What's in the formula?

Legal capacity is NOT 'mental capacity'

What P wants is at the centre

Focus is on supports and accommodation

When people have different ideas about what P may want, they talk to figure out the 'best interpretation of P's will and preference', not 'best interests'



Types of accommodation

- More time (by a doctor or financial institution) with P and supporters
- More time to make a decision
- Providing more information, different formats, plain language
- Including P's supporters in the decision-making process

A new way

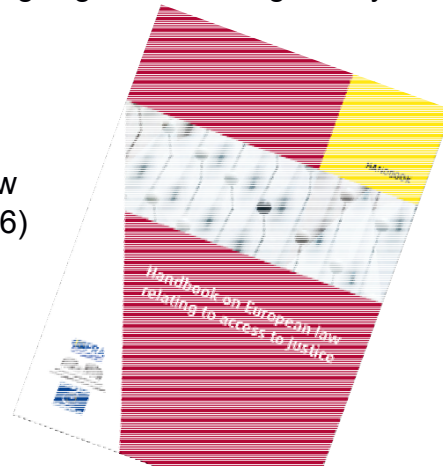
From	To
A 'presumption of capacity'	A presumption to act independently
Capacity assessment	Assessing need for supports and 'alternative course of action'
Detention	Exploration of alternatives
Finding of incapacity	Finding of need for support
Substitute decision making	Supported decision making and power to appoint
Best interest test	Best interpretation of will and preference

What is civil society calling for?

1. Legislate for the right to supports in decision making and government duty to establish
2. Prohibit on findings of incapacity, substitute decision making and detention where alternatives exist
3. Legal obligation to explore alternatives
4. Duty of 'third parties' (doctors, banks etc) to accommodate
5. Rights advisors in mental health system
6. Government to engage disability community in developing and delivering supports

From an access to justice perspective, a lack of capacity may prevent a person from commencing litigation or hiring a lawyer in order to access justice.

FRA, “Handbook on European law related to access to Justice” (2016)
p. 155



“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by [a] tribunal...”

- Dispute...
- must be related to rights and obligations
- E.g. *Stanev v. Bulgaria*

Art 13 ECHR

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

- Increases judicial protection to people who want to complain about an alleged rights violation
- Essential element of rights protection
- Brings rights home

Art 47 EU Charter of Fundamental Rights

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 26 of the Charter

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.

Article 13 of the CRPD

Goal To “facilitate [person’s] effective role” in legal proceedings

Duty To “ensure effective access to justice”

How Innovations such as

- procedural and age-appropriate accommodations
- training for justice professionals, incl police and prison staff

Questions:

- 1.What sort of role can people with disabilities play in legal proceedings?
- 2.What are examples of accommodations in legal proceedings?

Connecting CRPD rights

Prohibition of discrimination – Art. 5

Legal capacity – Art. 12

Evolving capacity of children – Principles in Art. 3

Reasonable accommodation in detention – Art. 14(2)

([N]ecessary 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.

– Art. 2)

([N]ecessary 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.

Article 2, CRPD

CRPD Committee on the EU
(Oct 2015)

Access to justice (art. 13)

38. The Committee is concerned about **discrimination** faced by persons with disabilities in accessing justice, owing to the **lack of procedural accommodation** in European Union member States.

39. The Committee recommends that the European Union take appropriate action to combat discrimination faced by persons with disabilities in accessing justice by ensuring that **full procedural accommodation** and **funding for training justice personnel** on the Convention are provided in its member States.



**“I’m not an object,
I’m a person.
I need my freedom.”**

Rusi Stanev, at the
European Court of
Human Rights,
November 2010

EU law relating to victims with disabilities

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Introduction

1. The Victims' Directive
2. Who is a victim of crime?
3. Rights under the Victims' Directive
4. Challenges for victims with disabilities
5. Enforcement mechanisms at a domestic level
6. Case Studies

A stylized illustration of a balance scale, symbolizing justice or law. The scale is positioned on the right side of the slide, with its pans hanging from a horizontal beam. The background is a dark purple gradient.

1. The Victims' Directive

A stylized illustration of a balance scale, symbolizing justice or law. The scale is positioned on the right side of the slide, with its pans hanging from a horizontal beam. The background is a dark purple gradient.

The Victims' Directive

- *The Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [hereafter the Victims' Directive]*
- Transposition date: 16th of November 2015
- The Victims' Directive provides for minimum rights, supports and protection for victims of crime regardless of where the crime was committed in the European Union. The rights under the Directive are not conditional upon the residential status of the victim or the victims' citizenship or nationality.



2. Who is a victim of crime?

Definition of a Victim of Crime

The first question to ask is does the individual fall within the definition of a victim of crime?

A victim is defined by the Victims Directive as a:-

- (i) a *natural person* who has suffered *harm*, including *physical, mental or emotional harm or economic loss* which was directly caused by *a criminal offence*;
- (ii) *family members* of a person whose *death was directly caused by a criminal offence* and who have suffered harm as a result of that person's death;

Indirect Victims of Crime

- The Recital to the Victims Directive goes further in defining a victim by making reference to indirect victims of crime. An indirect victim would be for example a child who witnesses domestic abuse. The Recital states:-
- *“Family members, who are indirect victims of the crime, should therefore also benefit from protection under this Directive. However, Member States should be able to establish procedures to limit the number of family members who can benefit from the rights set out in this Directive”*

3. Rights under the Victims’ Directive

Rights under the Victims' Directive

A stylized illustration of a balance scale, symbolizing justice and equality. The scale is positioned on the right side of the slide, with its pans hanging from a central beam. The background is a dark purple gradient.

- The right to information
- The right to understand and be understood
- Right to interpretation and translation
- The right to access victim support services
- The right to an individual assessment
- The right to protection
- The right to compensation
- The right to be heard
- The right to legal aid
- Rights of victims resident in another Member State

Considering the needs of victims with disabilities

A stylized illustration of a balance scale, symbolizing justice and equality. The scale is positioned on the right side of the slide, with its pans hanging from a central beam. The background is a dark purple gradient.

- Intellectual disability
 - Emotional, psychological or mental health issues
 - Sensory disability (sensory disability refers to a disability of the senses for example sight, hearing, smell, touch, taste and spatial awareness)
 - Mild learning disability (dyslexia)
 - Developmental disability (for example, autism)
 - Physical disability
 - Long term physical illness
 - Sensory impairment (one of the senses: sight, hearing, smell, touch, taste and spatial awareness, is no longer normal)
- Other:
- Disability as a result of a criminal offence i.e. PTSD, mental health issues and amputees as a result of terrorism

Right to understand and to be understood

"Article 3

- 1. Member States shall take **appropriate measures to assist victims to understand and to be understood from the first contact** and during any further necessary interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority.*
- 2. Member States shall ensure that **communications with victims are given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood.***
- 3. Unless contrary to the interests of the victim or ~~unless the course of proceedings would be prejudiced,~~ Member States shall allow victims to be accompanied by a person of their choice in the first contact with a competent authority where, due to the impact of the crime, the victim requires assistance to understand or to be understood."*

Right to interpretation and translation

"Article 7

- 1. Member States shall ensure that victims **who do not understand** or speak the language of the criminal proceedings concerned are **provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal proceedings, free of charge, at least during any interviews or questioning** of the victim during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings."*

Individual assessment of victims to identify specific protection needs

Article 22

"2. The individual assessment shall, in particular, take into account:

- (a) the **personal characteristics of the victim**;
- (b) the type or nature of the crime; and
- (c) the circumstances of the crime.

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a **bias or discriminatory motive** which could, in particular, **be related to their personal characteristics**; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, **victims of terrorism**, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or **hate crime**, and **victims with disabilities** shall be duly considered"

Right to protection of victims with specific protection needs during criminal proceedings

Article 23

"2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

- (a) interviews with the victim being **carried out in premises designed or adapted for that purpose**;
- (b) interviews with the victim being carried out by or **through professionals trained** for that purpose;
- (c) all **interviews** with the victim being **conducted by the same persons** unless this is contrary to the good administration of justice;
- (d) all interviews with victims of sexual violence, gender based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a **person of the same sex** as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced."

Right to protection of victims with specific protection needs during criminal proceedings

Article 23

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

- (a) measures to **avoid visual contact between victims and offenders including during the giving of evidence**, by appropriate means including the use of communication technology;
- (b) measures to ensure that the **victim may be heard in the courtroom without being present**, in particular through the use of appropriate communication technology;
- (c) measures to **avoid unnecessary questioning concerning the victim's private life not related to the criminal offence**; and
- (d) measures allowing **a hearing to take place without the presence of the public**.

Other legislation

- Directive on combating terrorism (2017/541/EU)
- Istanbul Convention (Council of Europe Convention on preventing and combating violence against women and domestic violence. signed by the EU 13th June 2017)
- Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters
- EU Charter of Fundamental Rights of the European Union (EU Charter). Article 47 of the EU Charter provides that victims of crime have the right to an effective remedy and a fair trial which ensures victims 'effective access to court proceedings'
- Compensation Directive (2004/80/EC)
- The Trafficking Directive (2011/36/EU)
- The Directive on Child Exploitation (2011/92/EU)

A silhouette of a balance scale against a dark purple background. The scale is slightly tilted, with the right pan lower than the left. The text is overlaid on the left side of the scale.

4. Challenges for victims with disabilities

A silhouette of a balance scale against a dark purple background, identical to the one in the first slide. The text is overlaid on the left side of the scale.

Challenges

- Accessing information and support under the Victims' Directive where a crime is not formally reported
- Making a Statement
- Understanding the information received
- Referral to victim support services
- Protection measures incl. screens, tv link et al.
- Making a complaint about access to rights

A silhouette of a balance scale against a dark purple background. The scale is slightly tilted to the right, with the right pan being lower than the left pan.

5. Enforcement mechanisms at a domestic level

Enforcing the Victims Directive

Victims can access their rights in domestic courts. However, the success or failure of the implementation of the Victims Directive in each jurisdiction will depend on training & the implementation of a;

- a. transparent,
- b. clear and;
- c. Easy and timely complaints procedure

which would enable victims to make a complaint about a breach of their rights under the Directive. It would particularly assist victims with disabilities, special needs and victims who are at risk of secondary and repeat victimisation.

Complaints Procedure

- Article 4 (1) (h) of the Victims' Directive provides that victims should be informed by the Gardaí of *'the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings'*.

Complaints Procedure A Victims of Crime Ombudsman?

- The foreword to the Directive recommends that *"Member States should consider developing 'sole points of access' or 'one-stop shops', that address victims' multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation"*. A Victim of Crimes Ombudsman offers such a solution.

Going to court: Access to legal aid?

- Article 47 of the EU Charter has two parts, the right to a fair trial and a right to an effective remedy. It accords both a victim and the accused these rights. A victim is entitled to legal aid for the purposes of a fair trial, if they are a participant in criminal proceedings. This is in keeping with the right to legal aid under Article 13 of the Victims' Directive.
- A victim may be entitled to legal aid where they are not a party to proceedings on the basis of their right to an effective remedy. Legal aid should be afforded to victims who cannot afford it '*to ensure effective access to justice*'. This may afford victims, who are not participants to criminal proceedings, a right to legal aid where they are trying to get access to justice.

6. Case Studies

Case Study 1

Hugo is 23 years old and has a sensory impairment. He has sight loss and at times has difficulty hearing. One day when Hugo was outside the local market he felt someone hit him over the head and someone reached into his jacket and took his wallet. Hugo, with great difficulty, made it to the local police station. He told the police officer at the desk what had happened. The police officer asked Hugo whether he could identify the offender and if there were any witnesses. Hugo had difficulty understanding him and asked him to repeat the question. The police officer asked Hugo the question again and Hugo told him that he had difficulty with his sight and didn't see the offender. Hugo added that he thought that there might have been CCTV. The police officer said that as Hugo was not able to identify the offender and there were no witnesses that there was nothing that the police could do. The police man told Hugo to forget about it and go home. All of Hugo's money was in the wallet and he did not have enough money to get a bus or taxi home. His head was also sore. Hugo is very upset and he wants to make a formal statement to the police. He wants your advice on whether his rights were respected?

Case Study 2

Marie is 25 years old and has downsyndrom. One day when she was out for a walk in the park she got separated from her mother. A man approached Marie and asked if she would like to go back to his house for a cup of tea. Marie went back to his house and was subsequently subjected to horrific rapes and sexual abuse. Marie was falsely imprisoned in the house for three days until she managed to escape and call for help. Marie was very traumatised after the event but she knew what happened was wrong. She told the police that the bad man had put his pinkie in her pocket and she pointed to her private areas. She was interviewed by different people over three weeks and was examined by a doctor 3 times. No one explained to Marie what was happening over this time and she found it hard to understand the police man. She did not get any support services and she wasn't allowed to bring her mammy or her friend in the room when she spoke to the police. Marie has now been told that her case is going to go to court. Marie is very scared about going to court and seeing the offender again. She has been told that she will be protected and that she won't have to see the offender but she doesn't know what this means. Please advise Marie on what rights she has and whether her rights were respected during the interview process?

Case Study 3

Angelo and Frank are resident in Ireland. Angelo is Italian and Frank is English. Both were on holidays in Italy visiting Angelo's mother. They went into Rome for the day, with Angelo's mother, when suddenly and without warning a car came towards them. Angelo was hit by the car and the car just missed Frank. A bomb subsequently went off near Angelo's mum. Many people died. Angelo had to have his leg amputated. Frank was unhurt but is having flashbacks and panic attacks and is now unable to leave his house. Since the attack Angelo's mum is having ringing in her ears and is at times having difficulty hearing. Angelo and Frank have returned to Ireland. They have been looking for support services for victims of terrorism in Ireland but there are none. They also want to attend the forthcoming trial of the bomber and the driver of the car and they are wondering whether they are entitled to legal aid and whether their expenses will be covered? They also want to know whether all three of them can claim compensation and how they can get help doing this. Please advise all three on what rights they have?

YOUR QUESTIONS & COMMENTS



Le droit de l'UE relatif aux victimes handicapées

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Cette publication a été produite avec le soutien financier du programme « Droits, égalité et citoyenneté » 2014-2020 de l'Union européenne. Son contenu n'engage que l'auteur et ne peut en aucun cas être réputé refléter la position de la Commission européenne.

Introduction

1. Directive sur les victimes
2. Qui est une victime de la criminalité ?
3. Droits au titre de la directive sur les victimes
4. Difficultés pour les victimes handicapées
5. Mécanismes d'exécution au niveau national
6. Études de cas



1. Directive sur les victimes



Directive sur les victimes



- *Directive du Parlement européen et du Conseil établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité et remplaçant la décision-cadre 2001/220/JAI du Conseil (ci-après, la « directive sur les victimes »)*
- Délai de transposition : 16 novembre 2015
- La directive sur les victimes établit des droits, un soutien et une protection minimum pour les victimes de la criminalité quel que soit l'endroit où le crime en cause a été commis dans l'Union européenne. Les droits qu'elle leur confère ne sont pas subordonnés au statut de résident, à la citoyenneté ou à la nationalité des victimes.



2. Qui est une victime de la criminalité ?

Définition d'une victime de la criminalité

La première question à se poser consiste à déterminer si le cas examiné correspond à la définition d'une victime de la criminalité.

Aux termes de la directive sur les victimes, une victime désigne :

i) toute *personne physique* ayant subi un *préjudice*, y compris une *atteinte à son intégrité physique, mentale, ou émotionnelle* ou une *perte matérielle*, qui a été directement causé par une *infraction pénale* ;

ii) les *membres de la famille* d'une personne dont le *décès résulte directement d'une infraction pénale* et qui ont subi un *préjudice* du fait du décès de cette personne.

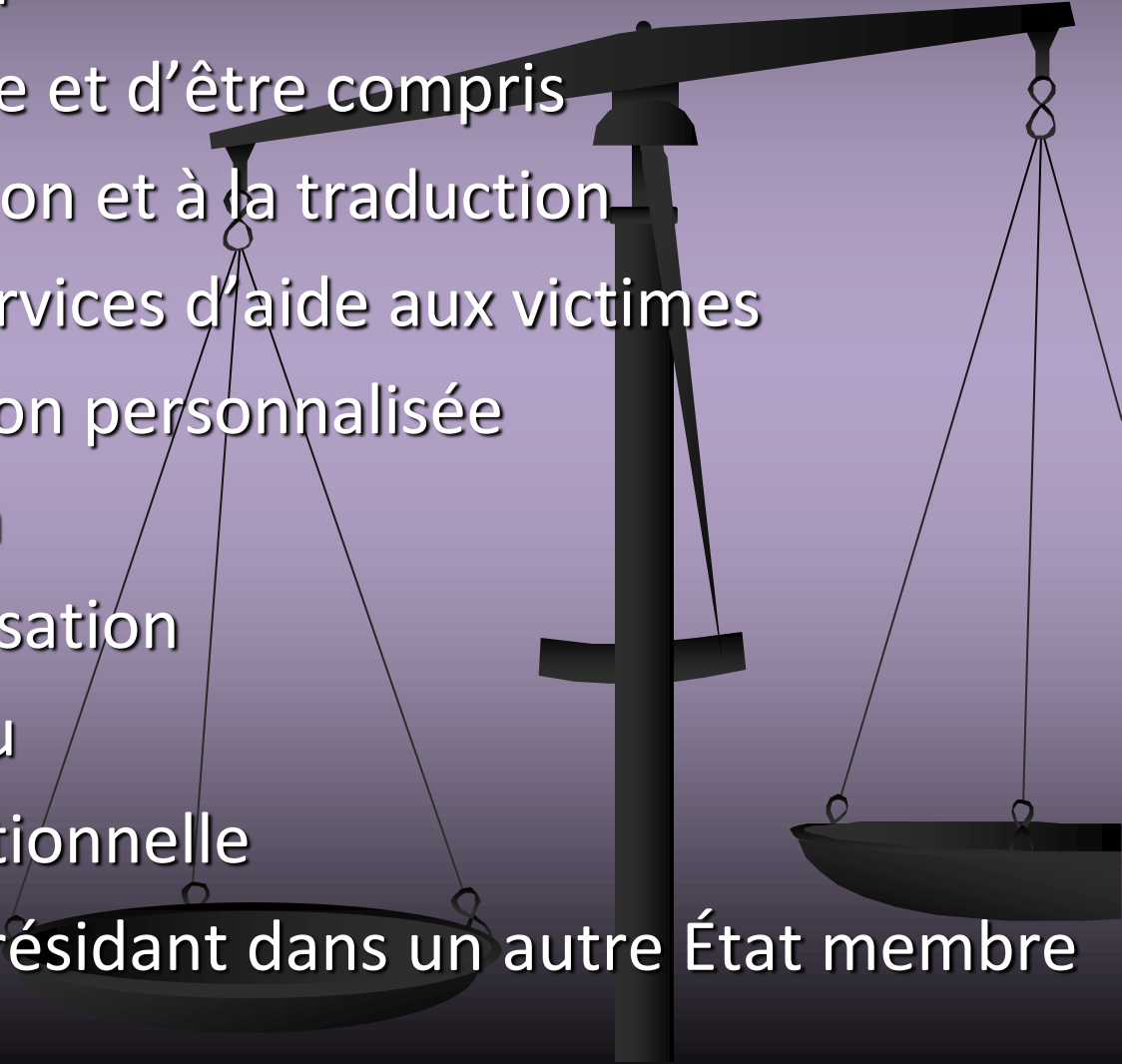
Victimes indirectes de la criminalité

- Le préambule de la directive sur les victimes pousse la définition d'une victime encore plus loin en faisant référence aux victimes indirectes de la criminalité. Une victime indirecte serait par exemple un enfant témoin d'actes de violence domestique. Aux termes de ce considérant :
- *« [L]es membres de la famille, qui sont des victimes indirectes de l'infraction, devraient également bénéficier d'une protection en application de la présente directive. Les États membres devraient cependant pouvoir établir des procédures afin de limiter le nombre des membres de la famille pouvant bénéficier des droits énoncés dans la présente directive. »*



3. Droits au titre de la directive sur les
victimes

Droits au titre de la directive sur les victimes

- Droit à l'information
 - Droit de comprendre et d'être compris
 - Droit à l'interprétation et à la traduction
 - Droit d'accès aux services d'aide aux victimes
 - Droit à une évaluation personnalisée
 - Droit à la protection
 - Droit à une indemnisation
 - Droit d'être entendu
 - Droit à l'aide juridictionnelle
 - Droits des victimes résidant dans un autre État membre
- 

Examiner les besoins des victimes handicapées

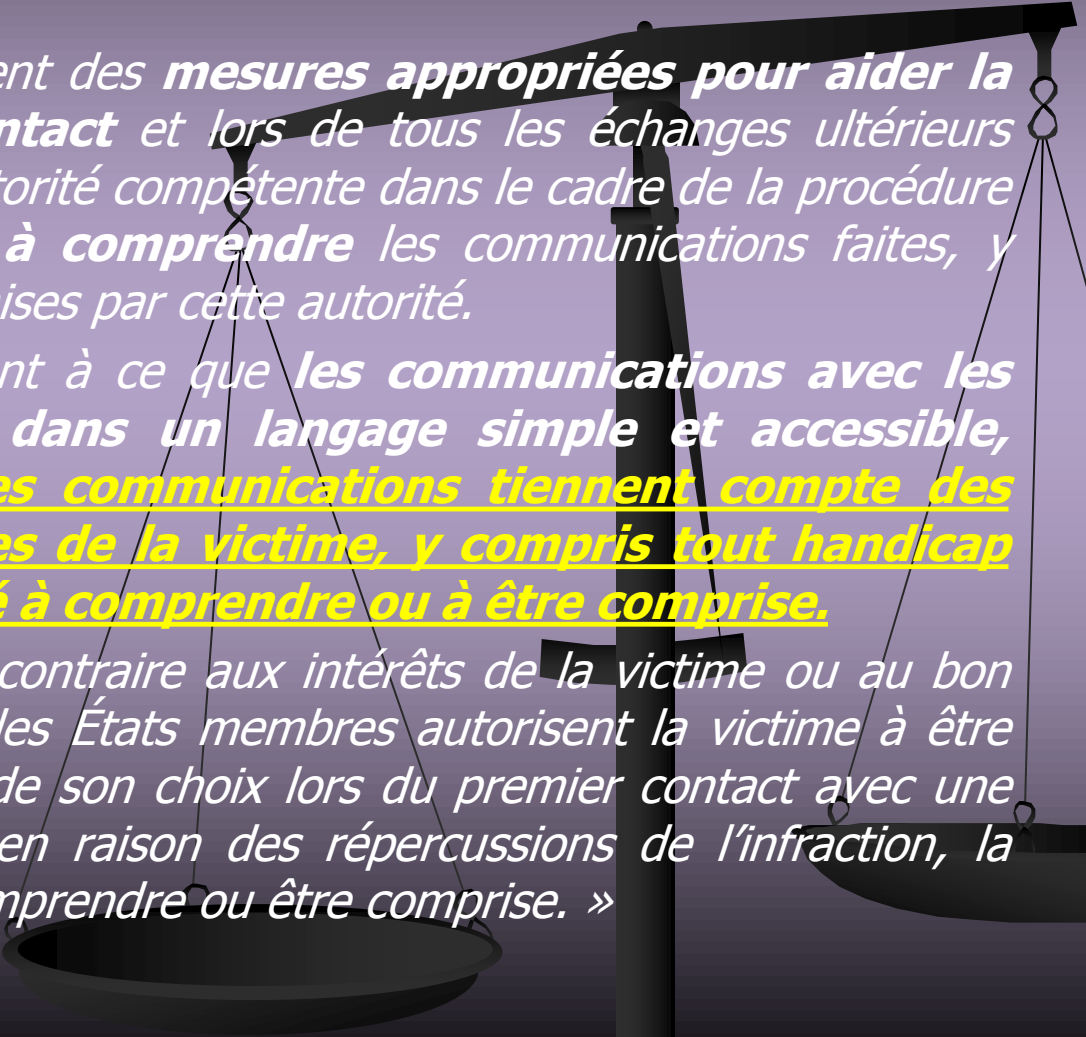
- Handicap intellectuel
- Problèmes de santé morale, psychologique ou mentale
- Handicap sensoriel (ce type de handicap désigne un handicap affectant les sens, par exemple, la vue, l'ouïe, l'odorat, le toucher, le goût et la relation spatiale)
- Trouble de l'apprentissage léger (dyslexie)
- Trouble du développement intellectuel (par exemple, autisme)
- Handicap physique
- Maladie physique de longue durée
- Déficience sensorielle (l'un des sens, à savoir la vue, l'ouïe, l'odorat, le toucher, le goût ou la relation spatiale, n'est plus normal)

Autres :

- Handicap résultant d'une infraction pénale, à savoir stress post-traumatique, troubles de la santé mentale et amputations à la suite d'actes de terrorisme



Droit de comprendre et d'être compris



« Article 3

1. Les États membres prennent des **mesures appropriées pour aider la victime, dès le premier contact** et lors de tous les échanges ultérieurs qu'elle devra avoir avec une autorité compétente dans le cadre de la procédure pénale, **à être comprise et à comprendre** les communications faites, y compris les informations transmises par cette autorité.

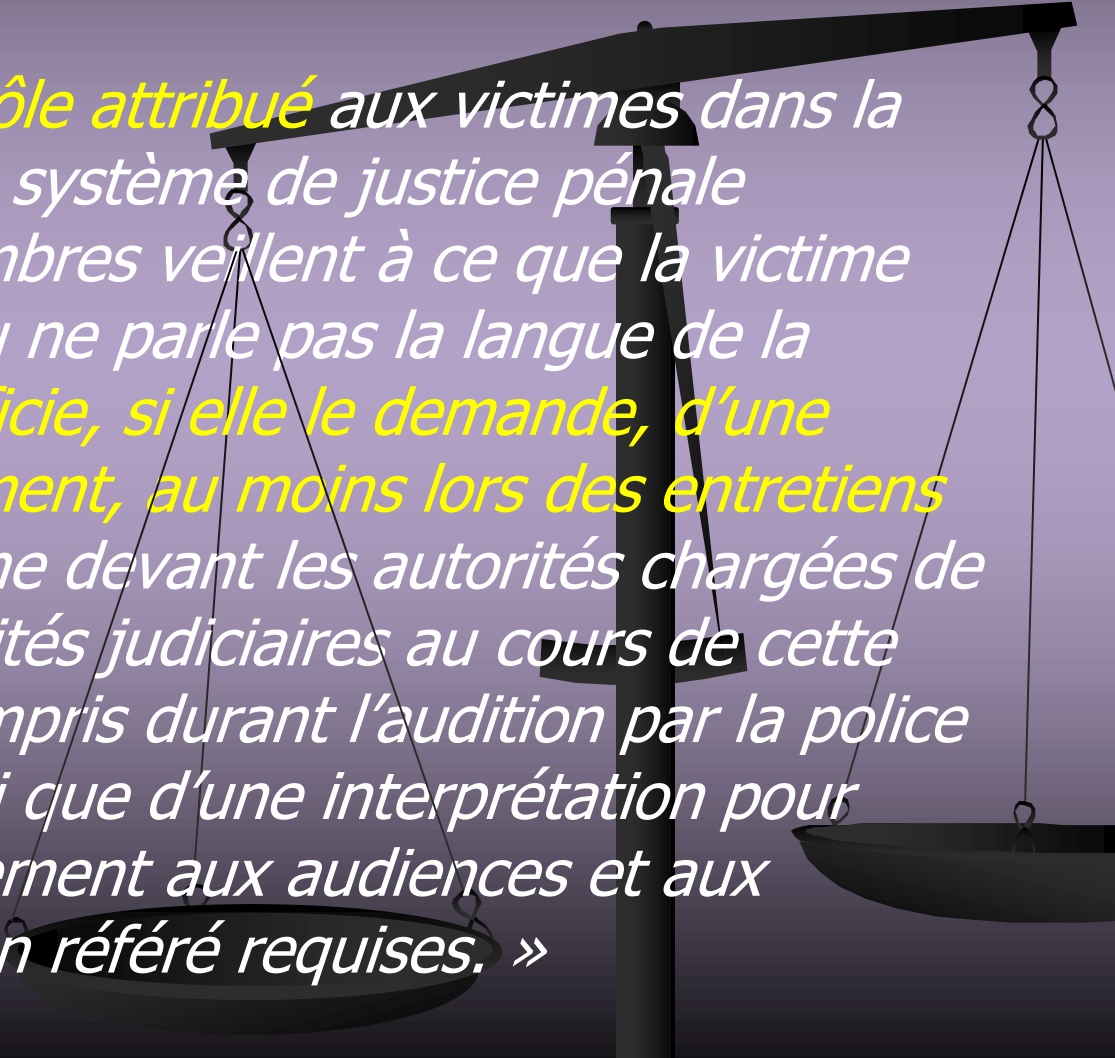
2. Les États membres veillent à ce que **les communications avec les victimes soient formulées dans un langage simple et accessible, oralement ou par écrit. Ces communications tiennent compte des caractéristiques personnelles de la victime, y compris tout handicap qui peut affecter sa capacité à comprendre ou à être comprise.**

3. À moins que cela ne soit contraire aux intérêts de la victime ou au bon déroulement de la procédure, les États membres autorisent la victime à être accompagnée d'une personne de son choix lors du premier contact avec une autorité compétente, lorsque, en raison des répercussions de l'infraction, la victime a besoin d'aide pour comprendre ou être comprise. »

Droit à l'interprétation et à la traduction

« Article 7

1. *Conformément au rôle attribué aux victimes dans la procédure pénale par le système de justice pénale concerné, les États membres veillent à ce que la victime qui ne comprend pas ou ne parle pas la langue de la procédure pénale bénéficie, si elle le demande, d'une interprétation, gratuitement, au moins lors des entretiens ou auditions de la victime devant les autorités chargées de l'instruction et les autorités judiciaires au cours de cette procédure pénale, y compris durant l'audition par la police ou la gendarmerie, ainsi que d'une interprétation pour pouvoir participer activement aux audiences et aux éventuelles audiences en référé requises. »*



Évaluation personnalisée des victimes afin d'identifier les besoins spécifiques en matière de protection

Article 22

« 2. L'évaluation personnalisée prend particulièrement en compte :

- a) les **caractéristiques personnelles de la victime** ;
- b) le type ou la nature de l'infraction ; et
- c) les circonstances de l'infraction.

3. Dans le cadre de l'évaluation personnalisée, une attention particulière est accordée aux victimes qui ont subi un préjudice considérable en raison de la gravité de l'infraction, à celles qui ont subi une infraction **fondée sur un préjugé ou un motif discriminatoire**, qui pourrait notamment être **lié à leurs caractéristiques personnelles**, à celles que leur relation ou leur dépendance à l'égard de l'auteur de l'infraction rend particulièrement vulnérables. À cet égard, les **victimes du terrorisme**, de la criminalité organisée, de la traite des êtres humains, de violences fondées sur le genre, de violences domestiques, de violences ou d'exploitation sexuelles, ou d'**infractions inspirées par la haine**, ainsi que les **victimes handicapées** sont dûment prises en considération. »

Droit à une protection des victimes ayant des besoins spécifiques en matière de protection au cours de la procédure pénale

Article 23

« 2. Pendant l'enquête pénale, les mesures ci-après sont mises à la disposition des victimes ayant des besoins spécifiques de protection identifiés conformément à l'article 22, paragraphe 1 :

- a) la victime est auditionnée dans des **locaux conçus ou adaptés à cet effet** ;
- b) la victime est **auditionnée** par des **professionnels formés** à cet effet ou avec l'aide de ceux-ci ;
- c) la victime est toujours **auditionnée par les mêmes personnes**, sauf si cela est contraire à la bonne administration de la justice ;
- d) à moins que l'audition ne soit menée par un procureur ou par un juge, les victimes de violences sexuelles, de violences fondées sur le genre ou de violences domestiques sont toujours auditionnées par une **personne du même sexe** que la victime, si la victime le souhaite, pour autant que cela ne nuise pas à la procédure pénale. »

Droit à une protection des victimes ayant des besoins spécifiques en matière de protection au cours de la procédure pénale

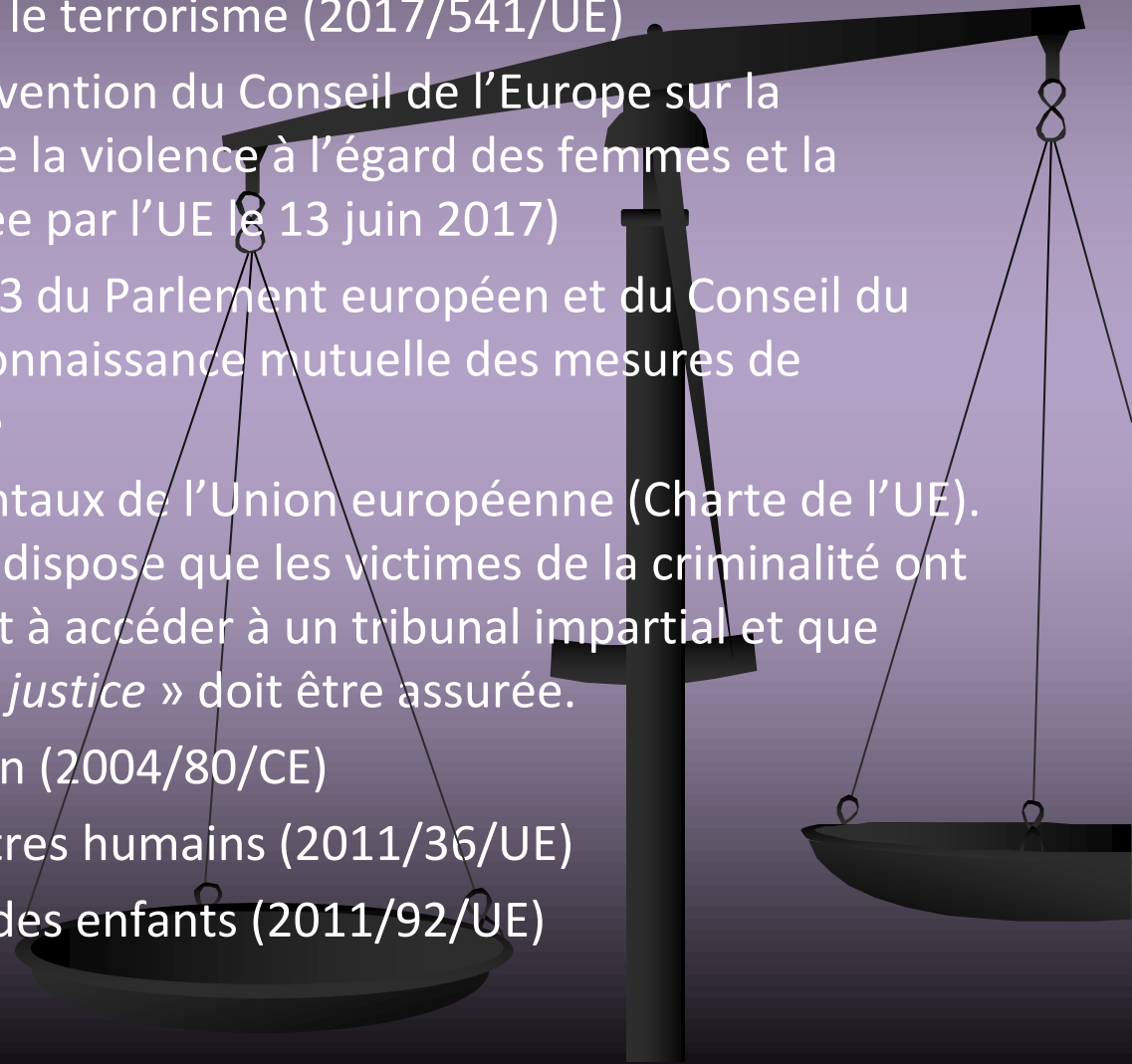
Article 23

3. Pendant la procédure juridictionnelle, les mesures ci-après sont mises à la disposition des victimes ayant des besoins spécifiques de protection identifiés conformément à l'article 22, paragraphe 1 :

- a) des mesures permettant d'éviter tout contact visuel entre la victime et l'auteur de l'infraction, y compris pendant la déposition, par le recours à des moyens adéquats, notamment des technologies de communication ;
- b) des mesures permettant à la victime d'être entendue à l'audience sans y être présente, notamment par le recours à des technologies de communication appropriées ;
- c) des mesures permettant d'éviter toute audition inutile concernant la vie privée de la victime sans rapport avec l'infraction pénale ; et
- d) des mesures permettant de tenir des audiences à huis clos.

Autres actes législatifs

- Directive sur la lutte contre le terrorisme (2017/541/UE)
- Convention d'Istanbul (Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, signée par l'UE le 13 juin 2017)
- Règlement (UE) n° 606/2013 du Parlement européen et du Conseil du 12 juin 2013 relatif à la reconnaissance mutuelle des mesures de protection en matière civile
- Charte des droits fondamentaux de l'Union européenne (Charte de l'UE). L'article 47 de cette Charte dispose que les victimes de la criminalité ont droit à un recours effectif et à accéder à un tribunal impartial et que « *l'effectivité de l'accès à la justice* » doit être assurée.
- Directive sur l'indemnisation (2004/80/CE)
- Directive sur la traite des êtres humains (2011/36/UE)
- Directive sur l'exploitation des enfants (2011/92/UE)



4. Difficultés pour les victimes handicapées



Difficultés



- Accéder à une information et à un soutien au titre de la directive sur les victimes lorsqu'un acte de criminalité n'a pas été dénoncé officiellement
- Faire une déposition
- Comprendre les informations reçues
- Renvoi vers les services d'aide aux victimes
- Mesures de protection, y compris écrans, liaison TV, etc.
- Déposer une plainte au sujet de l'accès à des droits

5. Mécanismes d'exécution au niveau national

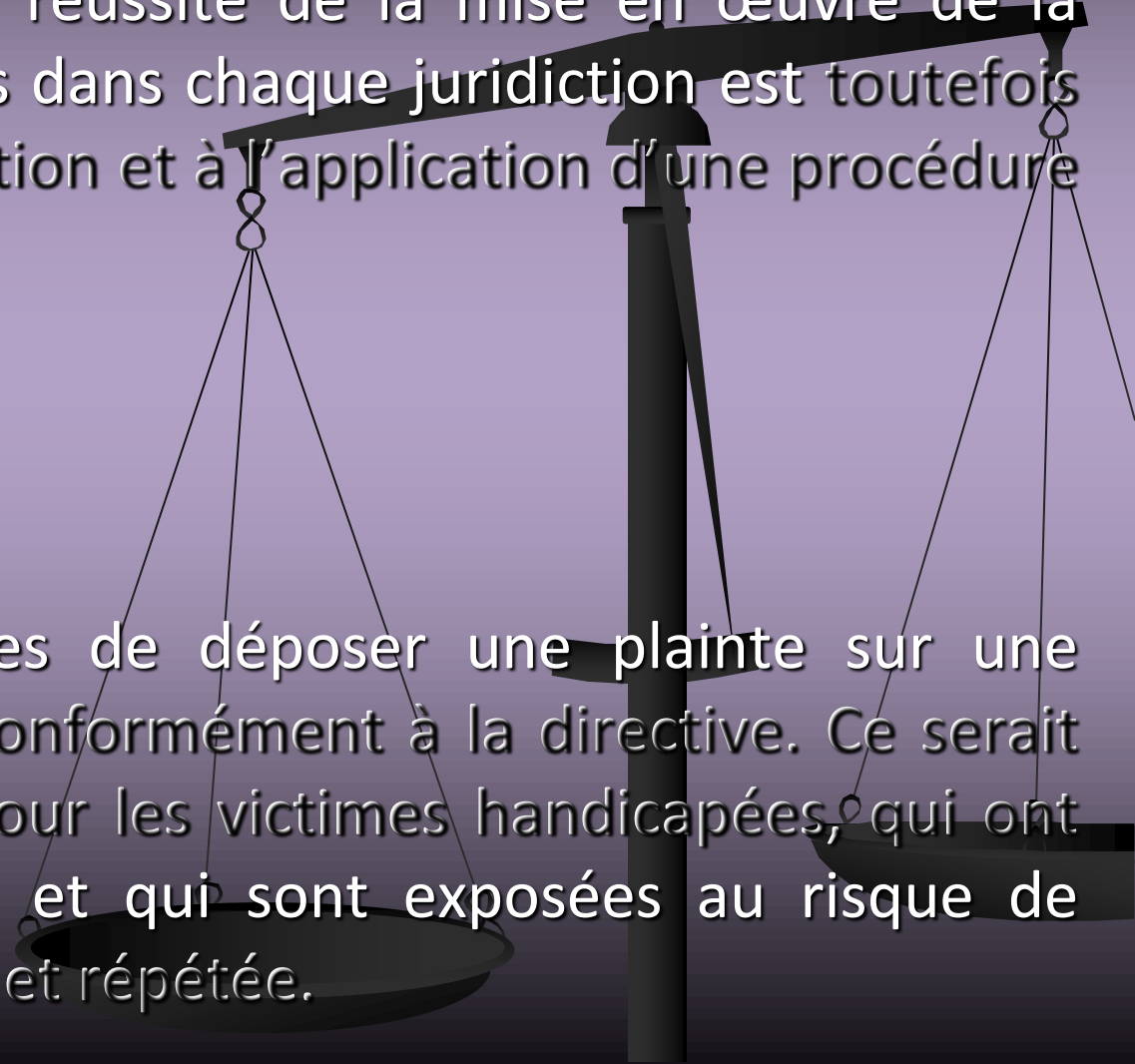


Exécuter la directive sur les victimes

Les victimes peuvent faire valoir leurs droits devant les tribunaux nationaux. La réussite de la mise en œuvre de la directive sur les victimes dans chaque juridiction est toutefois subordonnée à la formation et à l'application d'une procédure de plainte :

- a. transparente,
- b. claire et
- c. simple et rapide,

qui permet aux victimes de déposer une plainte sur une atteinte à leurs droits conformément à la directive. Ce serait particulièrement utile pour les victimes handicapées, qui ont des besoins spécifiques et qui sont exposées au risque de victimisation secondaire et répétée.



Procédure de plainte

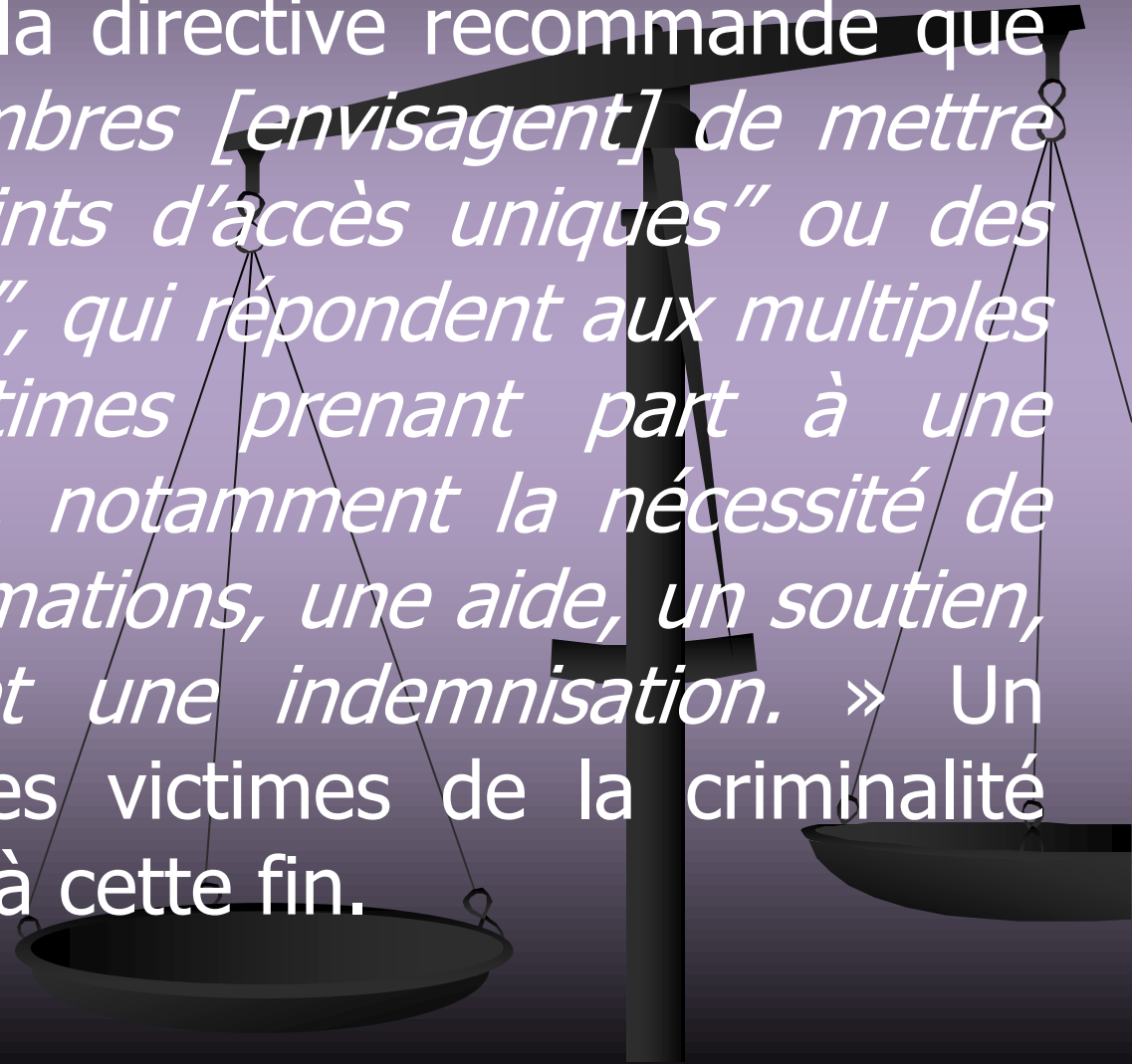


- L'article 4, paragraphe 1, point h), de la directive sur les victimes dispose que l'autorité compétente doit informer la victime sur « *les procédures disponibles pour faire une réclamation au cas où ses droits ne seraient pas respectés par l'autorité compétente agissant dans le cadre d'une procédure pénale* ».

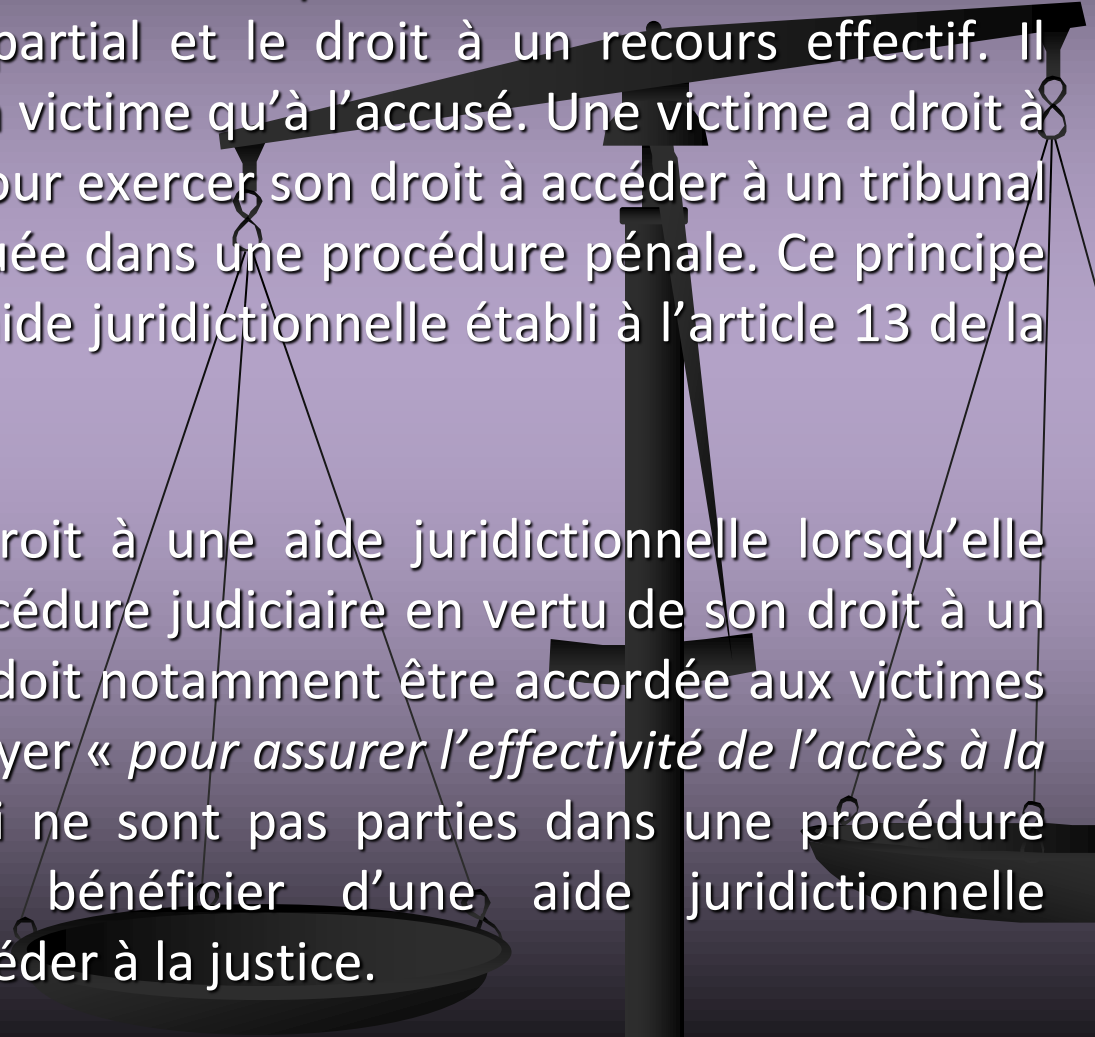
Procédure de plainte

Un médiateur pour les victimes de la criminalité ?

- Le préambule de la directive recommande que « *[l]es États membres [envisagent] de mettre sur pied des "points d'accès uniques" ou des "guichets uniques", qui répondent aux multiples besoins des victimes prenant part à une procédure pénale, notamment la nécessité de recevoir des informations, une aide, un soutien, une protection et une indemnisation.* » Un médiateur pour les victimes de la criminalité offre une solution à cette fin.

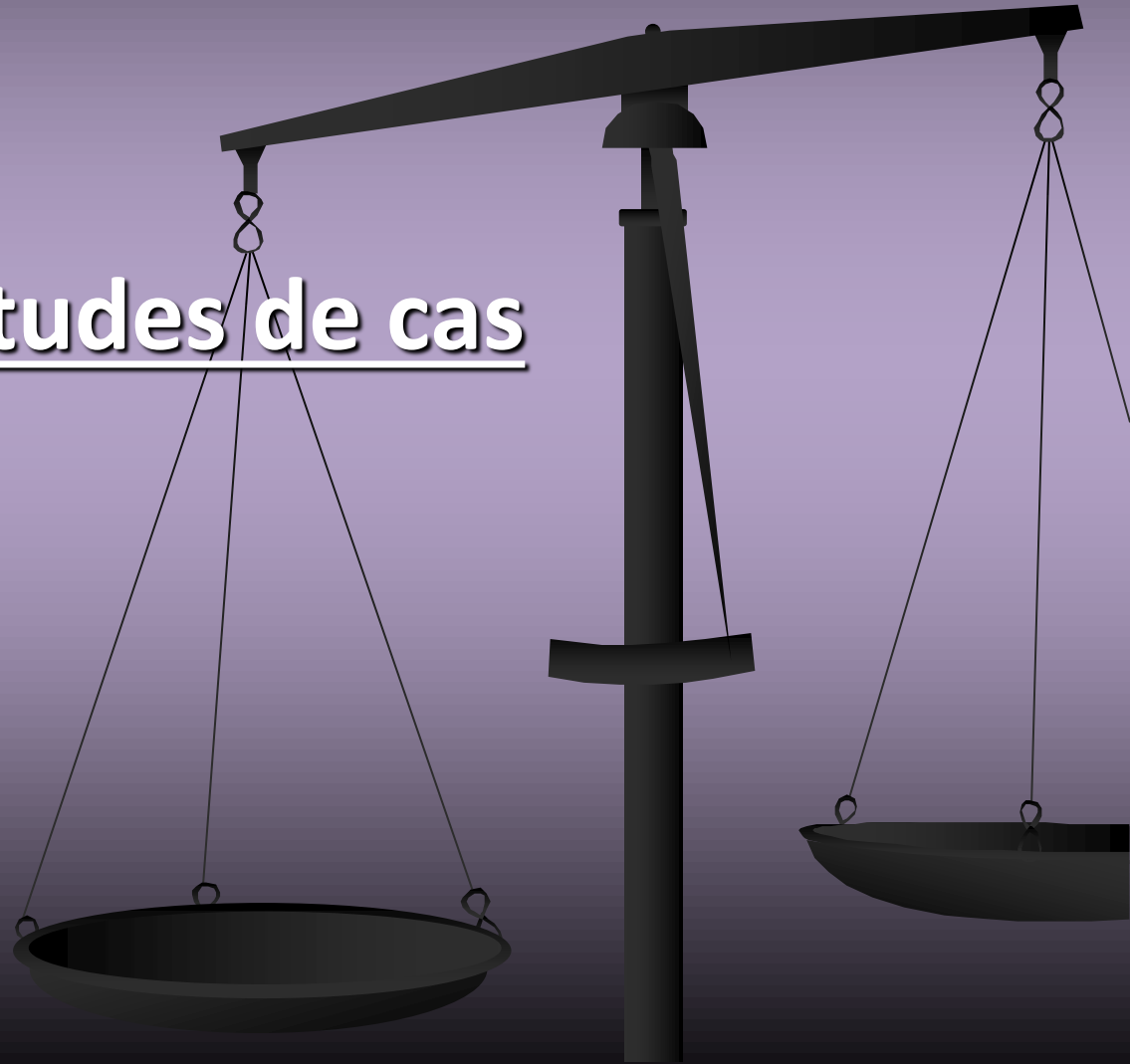


Saisir la justice : accès à une aide juridictionnelle ?



- L'article 47 de la Charte de l'UE comprend deux volets : le droit à accéder à un tribunal impartial et le droit à un recours effectif. Il accorde ces droits tant à la victime qu'à l'accusé. Une victime a droit à une aide juridictionnelle pour exercer son droit à accéder à un tribunal impartial si elle est impliquée dans une procédure pénale. Ce principe est conforme au droit à l'aide juridictionnelle établi à l'article 13 de la directive sur les victimes.
- Une victime peut avoir droit à une aide juridictionnelle lorsqu'elle n'est pas partie à une procédure judiciaire en vertu de son droit à un recours effectif. Une aide doit notamment être accordée aux victimes qui ne pourraient pas la payer « *pour assurer l'effectivité de l'accès à la justice* ». Les victimes qui ne sont pas parties dans une procédure pénale pourraient ainsi bénéficier d'une aide juridictionnelle lorsqu'elles souhaitent accéder à la justice.

6. Études de cas



Étude de cas n° 1

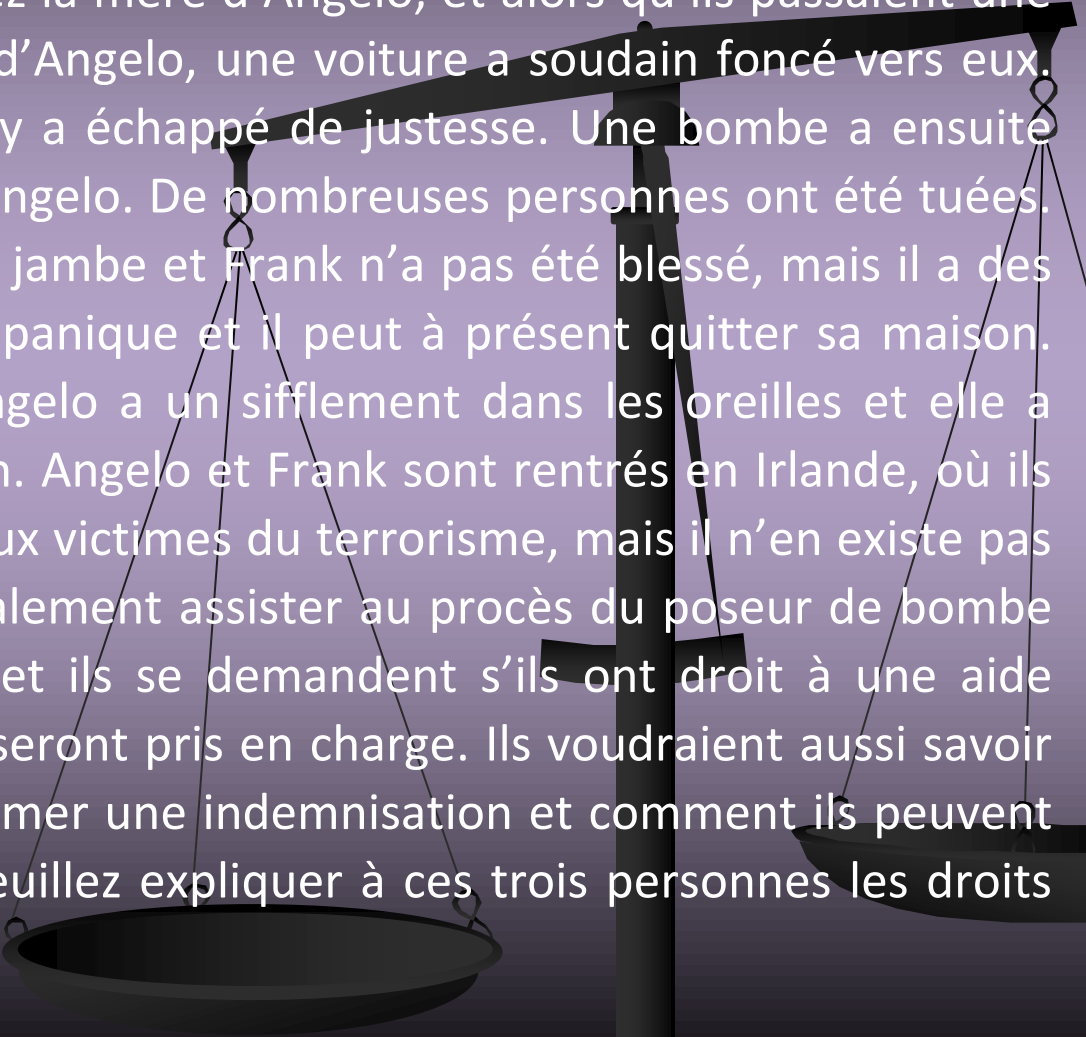
Hugo, 23 ans, est atteint d'une déficience sensorielle. Il a perdu la vue et il éprouve parfois des difficultés d'audition. Un jour, alors que Hugo était devant le supermarché du quartier, il a senti que quelqu'un le frappait à la tête et quelqu'un fouillait dans sa veste pour prendre son portefeuille. Hugo s'est rendu à grand peine au poste de police le plus proche, où il a raconté à l'agent de permanence ce qu'il s'était passé. L'agent de police a demandé à Hugo s'il pourrait identifier le coupable et s'il y avait des témoins. Hugo pouvait difficilement le comprendre et l'a prié de répéter la question. L'agent a posé une nouvelle fois ses questions à Hugo, qui lui a répondu qu'il souffrait de problèmes de vue et qu'il n'avait pas vu le coupable. Hugo a ajouté qu'il pensait que la scène pouvait avoir été filmée par des caméras de surveillance. L'agent de police a affirmé qu'étant donné que Hugo ne pouvait pas identifier le coupable et qu'il n'y avait pas de témoins, la police ne pouvait rien faire. Il a dit à Hugo d'oublier l'incident et de rentrer chez lui. Tout l'argent de Hugo se trouvait dans son portefeuille et il n'avait plus d'argent pour prendre un bus ou un taxi pour rentrer chez lui. De plus, sa tête lui faisait mal. Hugo est profondément bouleversé et il veut faire une déposition officielle à la police. Il vous demande conseil pour savoir si ses droits ont été respectés.

Étude de cas n° 2

Marie, 25 ans, est atteinte du syndrome de Down. Un jour, alors qu'elle se promenait au parc, elle s'est éloignée de sa mère. Un homme a abordé Marie et lui a proposé d'aller prendre une tasse de thé chez lui. Marie l'a suivi et elle a été l'objet de viols et de terribles sévices sexuels. Elle est restée enfermée trois jours chez cet homme avant de réussir à s'enfuir et à appeler à l'aide. Après ces événements, Marie était extrêmement traumatisée, mais elle savait que ce qui lui était arrivé était mal. Elle a dit à la police que le méchant homme avait mis son petit doigt dans sa poche en montrant ses parties intimes. Elle a été interrogée par plusieurs personnes et elle a été examinée par un médecin à trois reprises en l'espace de trois semaines. Durant tout ce temps, personne n'a expliqué à Marie ce qu'il se passait et il était difficile pour elle de comprendre le policier. Elle n'a obtenu aucun service d'aide et elle n'a pas été autorisée à se faire accompagner par sa mère ou son amie lorsqu'elle parlait à la police. Aujourd'hui, Marie a appris que son affaire va aller au tribunal. Elle a très peur de se rendre au tribunal et de revoir son agresseur. On lui a dit qu'elle serait protégée et qu'elle ne devrait pas voir l'accusé, mais elle ne sait pas ce que cela signifie. Veuillez expliquer à Marie les droits dont elle dispose et lui indiquer si ses droits ont été respectés au cours des auditions.

Étude de cas n° 3

Angelo, qui est italien, et Frank, qui est anglais, résident en Irlande. Ils sont partis en vacances en Italie, chez la mère d'Angelo, et alors qu'ils passaient une journée à Rome, avec la mère d'Angelo, une voiture a soudain foncé vers eux. Angelo a été percuté et Frank y a échappé de justesse. Une bombe a ensuite explosé non loin de la mère d'Angelo. De nombreuses personnes ont été tuées. Angelo a dû être amputé d'une jambe et Frank n'a pas été blessé, mais il a des réminiscences et des crises de panique et il peut à présent quitter sa maison. Depuis l'attentat, la mère d'Angelo a un sifflement dans les oreilles et elle a parfois des difficultés d'audition. Angelo et Frank sont rentrés en Irlande, où ils ont cherché un service d'aide aux victimes du terrorisme, mais il n'en existe pas dans ce pays. Ils souhaitent également assister au procès du poseur de bombe et du chauffeur de la voiture et ils se demandent s'ils ont droit à une aide juridictionnelle et si leurs frais seront pris en charge. Ils voudraient aussi savoir s'ils peuvent tous les trois réclamer une indemnisation et comment ils peuvent obtenir une aide à cette fin. Veuillez expliquer à ces trois personnes les droits dont elles disposent.



VOS QUESTIONS ET COMMENTAIRES





FIN

Disclaimer

This publication has been produced with the financial support of the European Union's REC Programme 2014-2020. The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

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Detention of persons with disabilities

No laws, conventions

Instead:

1. Basis of conventions - their background, why they came to be.
2. The actual situation of those on whom the conventions focus,
3. How to ensure implementation.

By preventive monitoring

But:

Persistence of ill-treatment

In the opposite sequence:

3. Implementation
2. Situation
1. Basis

How to ensure / enforce implementation of human rights conventions?

a) Punitive measures?

b) National adoption of international law? (different policies, some states do not adopt conventions that will not be implemented from day one. Others adopt but are in violation of every paragraph, and then struggle.

c) General agreement? (everyone agrees how things should be, but...)

d) Publicity, media, general indignation? (powerful effect, including financially, but then ... silence?)

e) Political effect (elections) (advocating prisoners rights and promising improvements of prisons are not appealing to the electorate)

f) By preventive monitoring!

CPT

cpt.ceo.int

CPT
Findings
Reports
Recommendations repeated in reports
Standards
Case law
Conventions
National law

Facts and findings: the reality of the persons concerned:

Coercion

Deprivation of liberty / detention

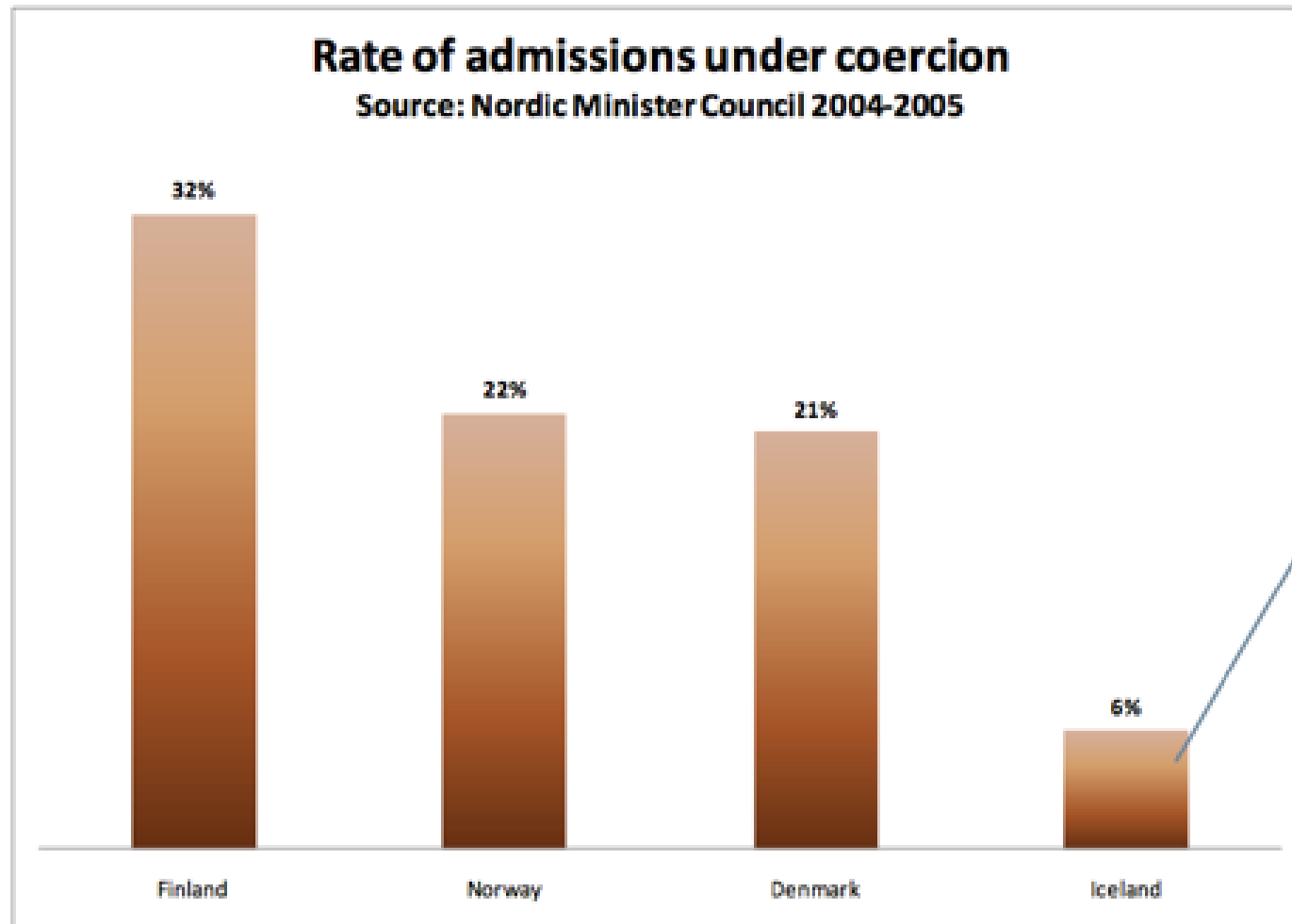
Involuntary hospitalisation

De facto involuntary hospitalisation and treatment

Restraint

Inhuman or degrading treatment or punishment. Torture.

Differences between states in frequency of involuntary hospitalisation.



Graph showing great differences in proportion of admissions to psychiatric establishments that are involutnary in Nordic countries, from 6% in Iceland, to 32% in Finland.

Differences between states in use of coercion of involuntary patients.

“The alternatives are worse.”

Table 3

Coercive measures used among 770 involuntary admitted patients in ten European countries

Country	Seclusion		Restraint		Forced medication		p ^a	Number of coercive measures applied	Number of coercive measures applied per patient
	N	%	N	%	N	%			
Germany	0	—	51	55	42	45	<.001	93	1.50
Bulgaria	4	4	17	15	90	81	<.001	111	1.13
Czech Republic	9	6	50	33	94	61	ns	153	1.66
Greece	0	—	131	69	59	31	<.001	190	1.64
Italy	19	19	24	24	59	58	<.001	102	1.36
Lithuania	0	—	9	27	24	73	ns	33	1.32
Poland	0	—	83	32	174	68	<.001	257	2.86
Spain	10	5	82	37	129	58	ns	221	2.51
United Kingdom	79	30	68	26	113	43	<.001	260	2.74
Sweden	1	2	7	17	34	81	.004	42	1.45
Total	122	8	522	36	818	56		1,462	1.90

^a For the difference (Pearson chi square) in the pattern of applied coercive measures compared with other countries investigated

Number of coercive measures used among 770 involuntary admitted patients in ten European countries. Raboch J et al.

Perceived coercion among involuntary patients

49% in Norway

100% in Iceland

Different legal concept of coercion, wide to low.

Can use of coercion be reduced?

Difficult (Denmark)

Parliament's efforts, funding,
legislation, demands.

3,116 individuals restrained in 2002,
New Mental Health Act 2007.

Main aim: reduce coercion.

3,119 individuals restrained in 2010.

Use of mechanical restraints at Lincoln Asylum, England 1830-38

Year	N patients	N restrained	Episodes of restraints	Hours in restraints
1830	92	54	2,364	27,113 ³ / ₄
1840	109	45	647	6,397
1838	148	0	0	0
From Georg Hoyer				

Preventive monitoring

How to monitor.
How to decrease degrading
treatment.

Forget about Conventions, Protocols and Check Lists

Instead, try to figure out whether
this is degrading

Crowded living room example

What is the definition of degrading?

Please, let me know if you find it

Can we find it in Conventions,
Protocols or Check lists?

How do you feel when you are there?

Reliance on gut feeling even more important in psychiatric monitoring

What is behind that door?

- the most important question in monitoring

Follow up on hints and hunches

- more likely to produce interesting findings than sticking to the programme

Big bath example

Its normal to blunder
- to a certain limit

Respect mistakes and your limitations

You will miss something.
- live with it

Possible pitfalls exist for most
issues,
especially psychiatry.

Possible pitfalls exist for most issues,
especially psychiatry.
Now, why is that?

**We're making a fuss about police
detention conditions, prison
cells...**

Why do we keep silent about...

...why do we keep silent about...

Psychiatric patients

Forensic patients

Asylum residents

Why?

Mental disorders are common,
they increase vulnerability,
sufferers are not different,
but do have extra needs,
effective treatments exist,
of various types

C. Meux

Pitfall: Project too big, practice too widespread, authorities too stubborn

- Restraints in Denmark. *Failure.*
- Conditions of forensic patients in Bosnia. *Success, eventually*
- ECT without anaesthesia or muscle relaxants in Turkey. *Success* (but what about India, China....)

Strange things carry on, considered normal by all locally, should not be accepted just because no one complains. Examples:

excessive use of restraints

ECT without anaesthesia

isolation

denial of discharge of voluntary patients

escaped voluntary patients brought back by police

Voluntary patients restrained

crowded living areas

huge dormitories

Guidelines, standards and checklists:

- CPT Standards
- Mental Health in Detention
- Istanbul Protocol
- The ITHACA Toolkit (www.ithacastudy.eu)
- Checklist by AL and PH

But much of this is not limited to
psychiatric monitoring.

Shoe print on back case

Legal capacity: CRPD

Supported decision making and reasonable
accommodation in place of substituted decision making

Deprivation of liberty:

Situations where the person is placed in custodial settings “which that person is not permitted to leave at will by order of any judicial, administrative or any other authority” (HL vs UK)

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“Individuals may be deprived of their liberty even if they do not resist their placement” (De Wilde v Belgium 1971) or “are permitted to leave the facility on frequent occasions” (Ashingdane v UK 1985)

Pitfall:

Challenge the courts

Court decision to place a person in a psychiatric facility

3,000 cases per year

Legal representation?

Check legal representation. Was it real?

The court-appointed lawyer never met the client before or after the hearing. ...The lawyer did not know the content of psychiatric reports. Although on paper it may be claimed that the patient's rights are respected by the appointment and appearance or a legal representative, in reality the lawyer was purely cosmetic and added nothing to the court procedure. This situation is replicated across central and eastern Europe: States leaving themselves wide open to challenge at Strasbourg.

Oliver Lewis. Protecting the Rights of People with Disabilities: the European Convention of Human Rights. European Journal of Health Law 9: 293-320, 2002

Sore spots:

Improvements?

“Some things are so bad that they can improve for a long time without becoming good” - old lady

Detention of persons with disabilities

Is this a violation of a convention
or law?

Instead, try to figure out whether
this is degrading

Crowded living room example

What is the definition of degrading?

Please, let me know if you find it

How do you feel when you are there?

Reliance on gut feeling even more important in psychiatric
monitoring

Try to find the worst.
Ask,
“where are the most challenging patients kept?”
Forensic patients

Ask patients, which units are the worst,
where are staff most difficult,
where are the beatings/use of restraints/forced
medication/punishment

What is behind that door?

- the most important question in monitoring

Mental disorders are common,
they increase vulnerability,
sufferers are not different,
but do have extra needs,
effective treatments exist,
of various types

C. Meux

Effectiveness entails necessity
and acceptance.
If it works, use it!

So, is ECT necessary?
Restraints?

Effectiveness leads to perceived necessity,
which excuses coercion

For many doctors, not providing treatment,
known to be effective, is inhuman.

Health care is a human right
But: is unmodified ECT necessary?
Surgical castration of sex offenders?

Strange things carry on, considered normal by all locally, should not be accepted just because no one complains. Examples:

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Judge: 3,000 cases per year

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*Persistence
of
ill-treatment*

Ill-treatment in mental health and social care establishments persists in most of the 47 Council of Europe member states, if not all.

Reasons
Exceptions
Eradication

*Reluctance to implement
recommendations is even more
stubborn in psychiatric
establishments and social care
homes than police, prisons.*

CPT report 2011:

The male forensic psychiatric ward in [...] Hospital in [...] had 12 single rooms that were described as being “of an antediluvian design” by the CPT in 1995, measuring less than 8 sq m each and containing only a bed bolted to the floor. The ward was found to be dilapidated.

CPT report 2011:

Very high priority should be given...

Authorities characterised the hospital environment as a whole as "dehumanising, impersonal and degrading"

CPT 1995: "...serious risk of institutionalisation for both patients and staff."

CPT report 2011:

16 years later, the CPT found the rooms still in use,
with the same antediluvian design.

Institutionalisation
Well documented in 1950s
Asylums persist
and their effects
With limited attention

CPT report 2011

*The Committee is somewhat puzzled by the fact that available resources are directed at maintaining in-patient establishments, rather than developing alternatives to hospitalisation in line with Article 19 of the UN Convention on the Rights of Persons with Disabilities (to which [...] became a party in 2010). **The CPT would welcome the remarks of the [...] authorities on this issue.***

*“Voluntary”
In spite of opposition*

Guardianship system Malfunctioning

*The alternative to consent
Longer detention
Informed?*

Anosognosia
Lack of insight
“I disagree with my doctor”
Doctor empowered

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and acceptance.
If it works, use it!

So, is ECT necessary?
Restraints?

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For many doctors, not providing treatment,
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Health care is a human right
But: is unmodified ECT necessary?
Surgical castration of sex offenders?

Extralegal detention
De facto deprivation of liberty
Not de jure → no safeguards

*Lack of community support,
appropriate dwelling*

*Long term
Life-long
ill-treatment*

Thank you



Disability in employment and beyond

Catherine Casserley
Barrister-at-law
Cloisters
cc@cloisters.com



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Presentation

- Council Directive 2000/78/EC of 27 November 2000
- A claim of disability discrimination and the burden of proof
- Reasonable accommodation



Directive 78/2000

Scope – Article 3

- Access to employment and occupation, including employment working conditions, dismissals and pay
- Vocational guidance and training, including work experience, advanced vocational training
- Membership of and involvement in organization of workers or particular profession including benefits



Directive 78/2000

Vocational training

- *Blaizot v University of Liege EU: Case 24/86*, ECJ broadened the definition of vocational studies considerably to in effect cover all university studies, holding that University studies constitute vocational training not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills needed by the student for the pursuit of a profession, trade or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose

Recital 19

- in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

No direct or indirect discrimination on grounds referred to in Article 1 (inc disability)

Direct discrimination: where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

- Indirect discrimination: indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
 - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

- Harassment is a form of discrimination within the meaning of paragraph 1 - unwanted conduct related to [any of the grounds] 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. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
- An instruction to discriminate against persons [on any of the grounds] shall be deemed to be discrimination

- No discrimination where it is a genuine and determining occupational qualification

- Reasonable Accommodation – how should it be conceptualized?
- Sui generis
- Part of spectrum of legal mechanisms
- Means of implementing the principle of equal treatment – not “special treatment”
- Strong overlap in target with indirect discrimination
- Different approach



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Article 5

- Article 5: in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that 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 provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the member state, it should not be considered disproportionate



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Recital 20/1

- Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.
- To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.



Interaction with indirect discrimination

- Article 2(2)(b)(ii): indirect discrimination shall be taken to occur 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 or as regards persons with a particular disability, the employer or any person or organisation to whom this directive is applied is obliged under national legislation to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision criterion or practice



Compared to indirect discrimination

- **Disadvantages**
- Individualised
- Knowledge required
- **Advantages**
- Simpler mechanism to apply
- Positive rather than negative

- Victimisation
- Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

- Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended (article 9)
- Sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive (Article 17)



Burden of Proof

- Member States must take necessary measures to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
- This doesn't prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
- It does not apply to criminal procedures.
- Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).
- Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.



Burden of Proof

- *Meister v Speech Carrier Systems GmbH* Case C-415/10
- Recruitment case – no interview offered though candidate met the requirements
- Employer refused to provide information
- Claim of sex age and ethnic origin discrimination
- Questions referred as to whether there was a requirement to provide information to comply with the provisions of the Directives (re: burden of proof)



Burden of Proof

- Answer no, but:
- *it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.*



Other EU Caselaw

- Direct discrimination:
- *Coleman v Attridge Law* ECJ Case C-303/06
- Less favourable treatment "on grounds of" not confined to those who have the protected characteristic (applies also to harassment)
- Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV – ECJ
- Fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of the EC Race directives as will dissuade candidates from applying existence not dependent on the identification of a complainant who claims to be the victim...
- ? Advertisement indicating unwillingness to make reasonable adjustments?

- Reasonable Accommodation
- *HK Danmark acting on behalf of ing v Dansk almennyttigt Boligselska* 571 CJEU/528 CJEU
 - reduction in working hours may constitute one of the accommodation measures which an employer is required to take
- Indirect discrimination
- *HK Danmark*: rule relating to absences on grounds of illness that applies equally to disabled and non disabled persons may result in indirect discrimination against disabled workers. Worker with disability has additional risk of illness compared to non disabled worker; greater risk of absence days such a rule may be indirect discrimination
- -

- Indirect discrimination
- *Oder v Baxter Deutschland GmbH* 167 CJEU
- German redundancy pay agreement which provided that workers older than 54 who were made redundant were entitled to compensation on the basis of earliest possible date on which pension would begin was precluded by Article 2(2) because it entailed unjustifiable indirect discrimination on grounds of disability. The calculation method took account of the possibility of receiving an early retirement pension on grounds of disability which was subject to a different minimum age requirement for severely disabled people. As a result the first component for the calculation would always be lower for a severely disabled worker than for a non disabled worker of the same age. The lower amount of compensation paid to disabled workers was not justified by the advantage that disabled workers had in being entitled to claim a retirement pension earlier than non disabled workers.



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enforceability

- *R (on the application of Unison) v Lord Chancellor* Supreme Court [2017] UKSC 51
- Challenge to fees in the employment tribunal
- Given the conclusion that the fees imposed by the Fees Order are in practice unaffordable by some people, and that they are so high as in practice to prevent even people who can afford them from pursuing claims for small amounts and non-monetary claims, it follows that the Fees Order imposes limitations on the exercise of EU rights which are disproportionate, and that it is therefore unlawful under EU law.
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UK claims

- 2016 – over 90,000 employment tribunal claims (half the number pre-introduction of fees)
- Significant percentage will be disability related
- Average award of £21,000
- Fees now removed.....



And now...

Thank you for listening!
Any questions/contributions....

Case study

Katherine applies to study biology at the Excellence University and is admitted there. In her last year at school, she found that, though she has a very high IQ, she was having difficulty in understanding some of the questions asked of her in one of her assignments. As a result her parents took her for an assessment to find out if she was dyslexic. She has been diagnosed as having mild to medium dyslexia, having difficulties in processing written information, understanding what is being asked of her in writing and in putting her thoughts into writing within the time allotted. This was something that she had managed to cope with on her own up until her last year at school. It has been advised that as a result she will not perform as quickly as others in examinations and assessments. Her school allowed her extra time in her examinations and she performed much better in them than she had done previously.

Katherine has to undertake a number of practical assignments in her first year as a student at the University. She asks for extra time in which to do these as a result of her dyslexia but is told that there is a need to complete them within the time allotted and that this cannot be changed as it is a competence standard. She fails both of her practical assessments. She asks for extra time in her examination – 15% as she was given at school – but is given only 10%. She fails her examination and is asked to leave the course.

Katherine comes to you for advice.

Can you advise her:

- Whether she has a disability for the purposes of the directive?
- Whether she has a potential claim under the directive
- In particular : what type of discrimination might there be?
- Could the university justify its conduct?
- If there has been discrimination, what remedy should be available to her?
- What practical steps would you suggest that the university should take when faced with a student in Katherine's position?

Étude de cas

Katherine souhaite étudier la biologie à l'Université Excellence et elle y est admise. Au cours de sa dernière année d'école, elle a remarqué que bien qu'elle avait un QI très élevé, elle éprouvait des difficultés à comprendre certaines des questions qui lui étaient posées dans l'un de ses devoirs. Ses parents ont donc demandé à ce qu'elle soit examinée afin de déterminer si elle était dyslexique. D'après le diagnostic posé, elle souffre d'une dyslexie légère à modérée et elle a des difficultés à traiter les informations écrites, à comprendre ce qui lui est demandé par écrit et à exprimer ses pensées par écrit dans les délais impartis. Elle avait réussi à gérer ces problèmes sans aide extérieure jusqu'à sa dernière année d'école. Il a été signalé qu'à cause de ces troubles, elle ne pourrait pas travailler aussi vite que les autres élèves lors des examens et des évaluations. Son école lui a accordé davantage de temps et elle a obtenu des résultats nettement meilleurs qu'auparavant.

Katherine doit effectuer un certain nombre d'exercices pratique durant sa première année d'études à l'Université. Elle demande plus de temps pour les réaliser à cause de sa dyslexie, mais on lui répond qu'il est obligatoire de les achever dans les délais impartis et que ces délais ne peuvent pas être modifiés car ils font partie d'une norme de compétence. Elle échoue à ses deux évaluations pratiques. Elle demande plus de temps pour l'examen – 15 %, comme la marge que l'école lui accordait – mais elle n'obtient que 10 %. Elle rate son examen et elle est priée de quitter le cours.

Katherine vous demande votre avis.

Veillez répondre à ces questions :

- A-t-elle un handicap au sens de la directive ?
- Peut-elle faire valoir un droit au titre de la directive ?
- En particulier, de quel type de discrimination pourrait-il s'agir ?
- L'université pourrait-elle justifier ses pratiques ?
- Si une discrimination a été commise, de quels recours devrait-elle disposer ?
- À votre avis, quelles mesures concrètes l'université devrait-elle prendre lorsqu'elle est confrontée à un étudiant dans la situation de Katherine ?