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Speakers' contributions

ACCESS TO JUSTICE FOR PERSONS WITH
DISABILITIES
Civil and Labour Context

SEMINAR FOR MEMBERS OF THE JUDICIARY

Trier, 7-9 November 2018



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ERA training
November 2018, Trier

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

Victoria Lee, OHCHR



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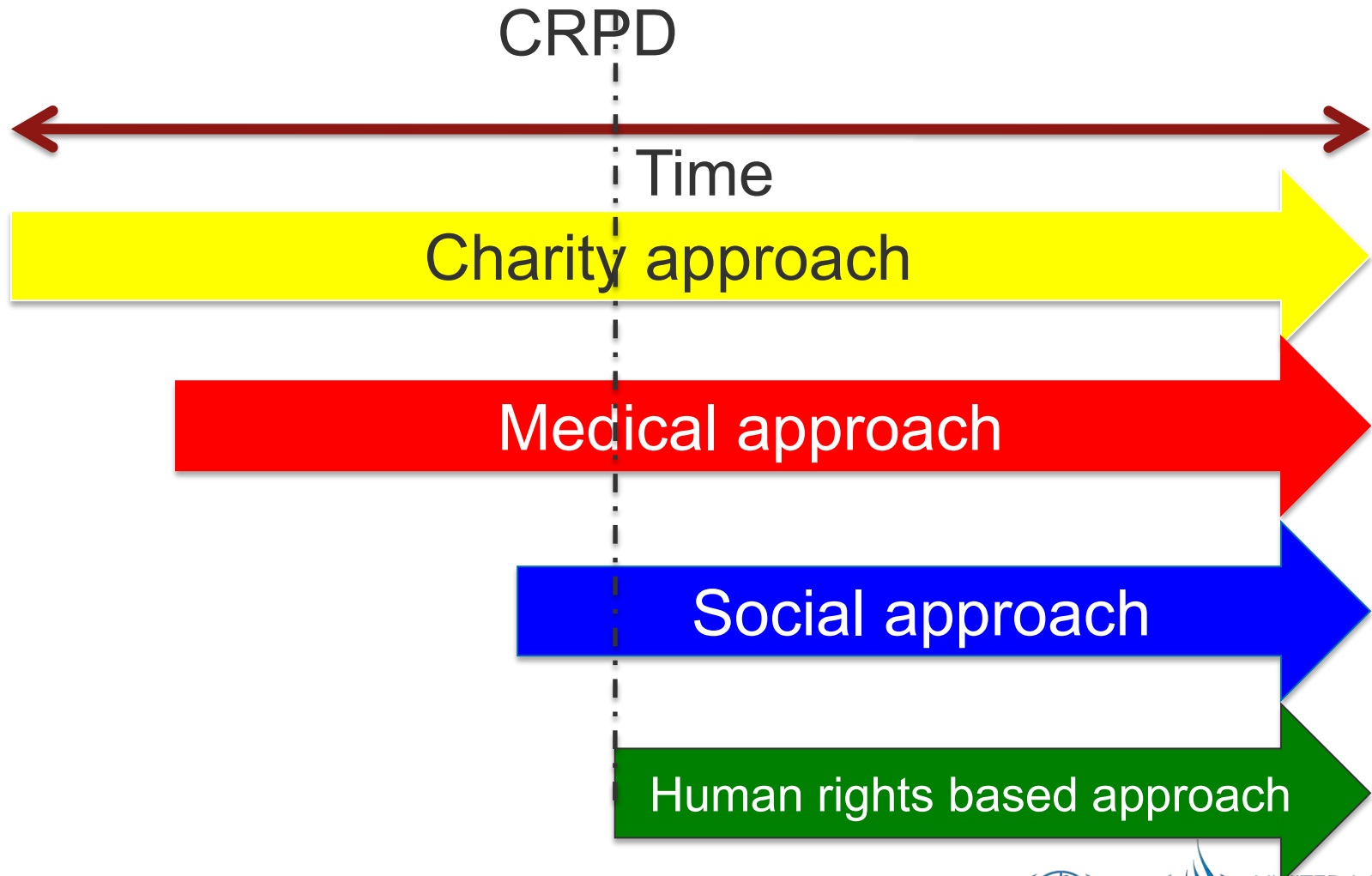
Outline

- HRBA to disability
- CRPD
- Article 13 of the CRPD



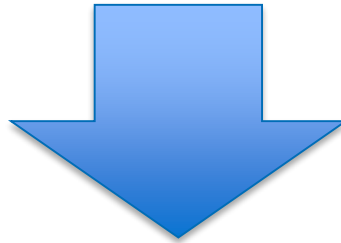
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How have we approached persons with disabilities over the years?



Medical model:

Persons with disabilities as **objects of treatment**
Need to be cured, corrected, “normalized”

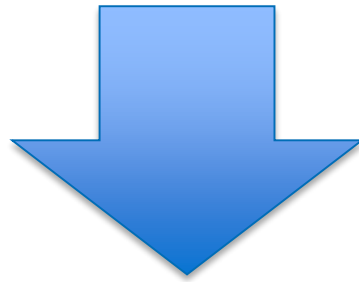


- Doctor knows best
- Segregation
- No voice / No choice

Charity model:

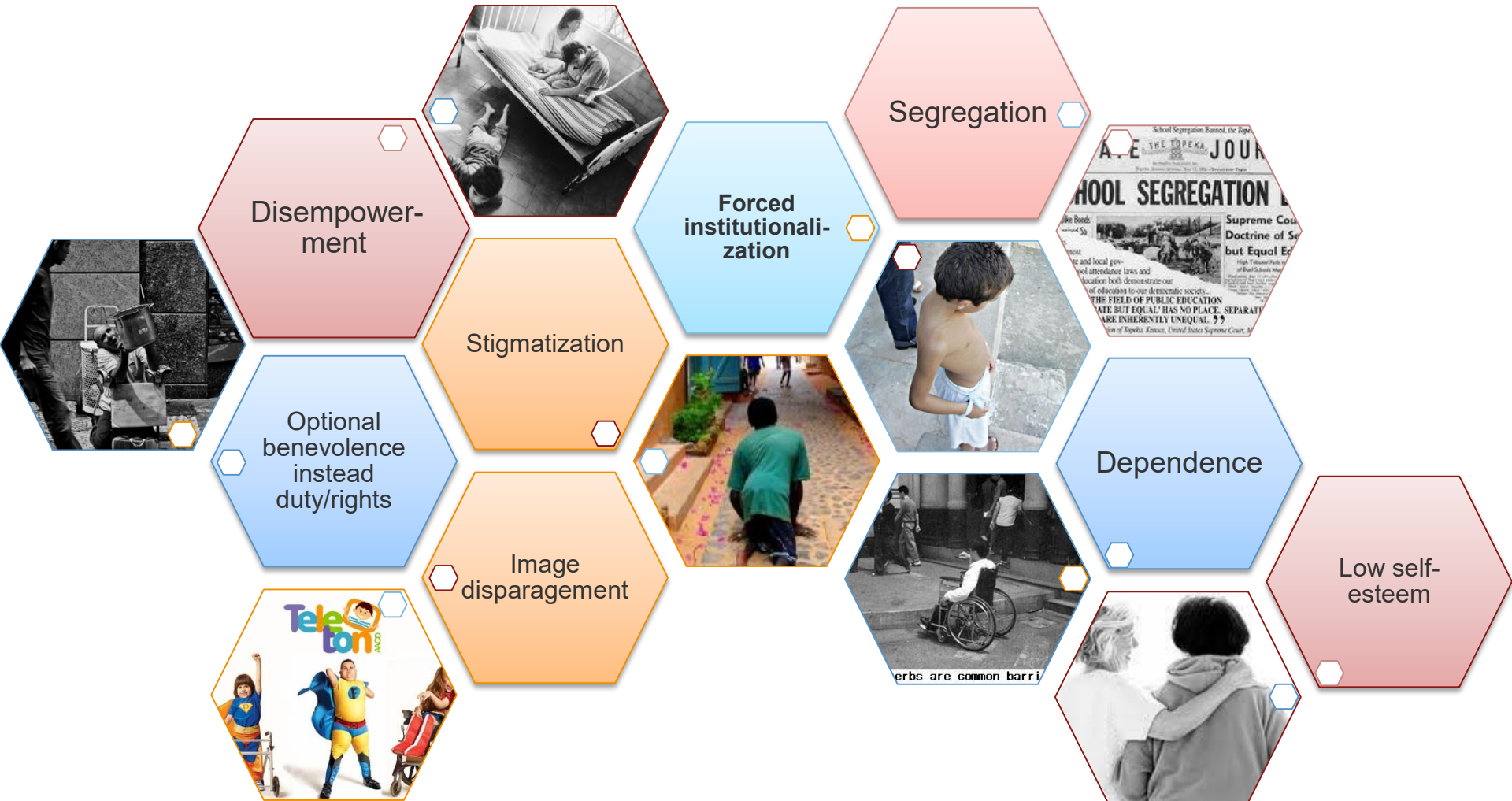
Persons with disabilities are **objects of charity/welfare:**

They need help, compassion, benevolence



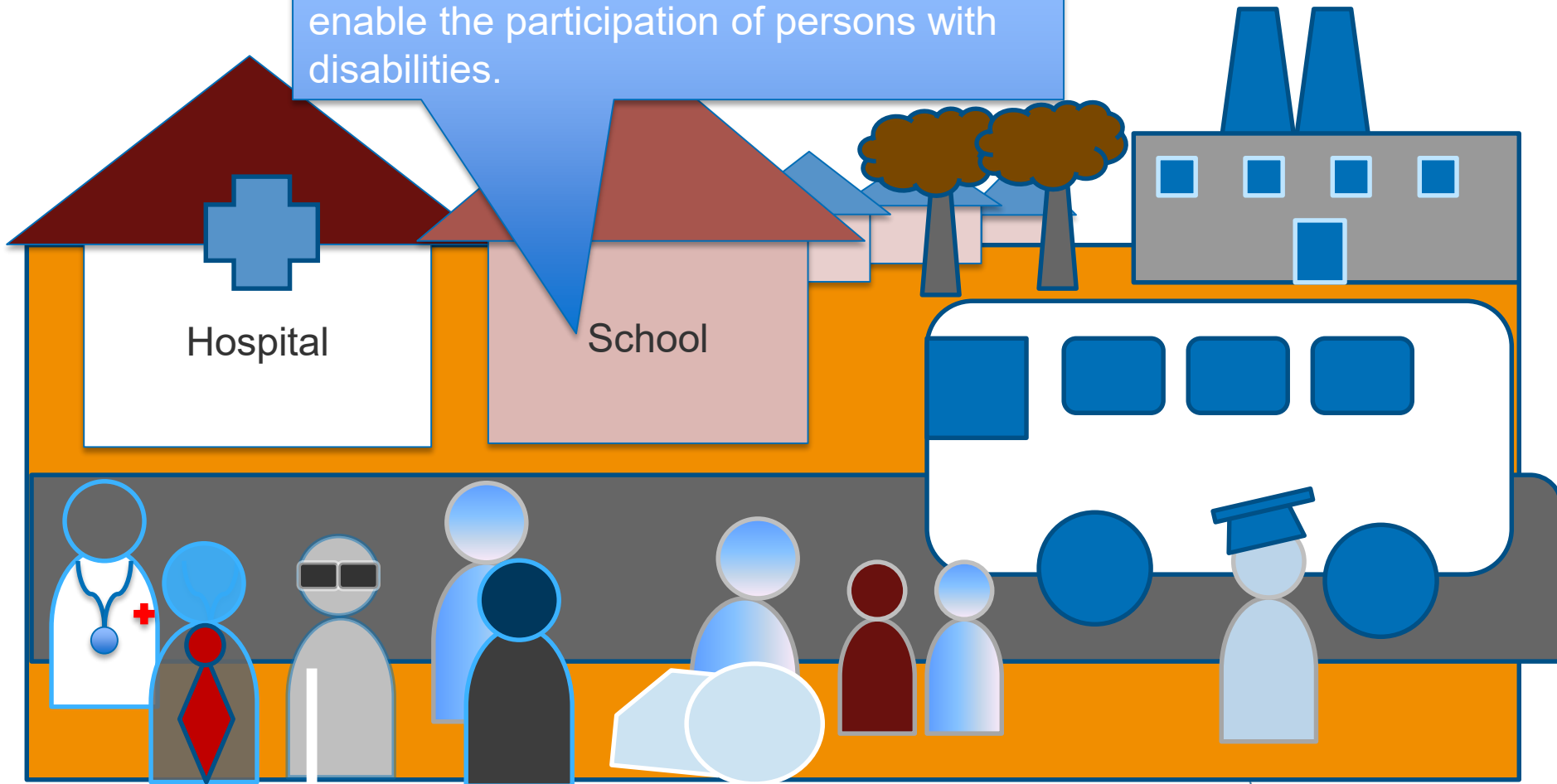
- Caregiver knows best
- Segregation
- No voice / No choice

Consequences of charity/medical approaches



Social approach

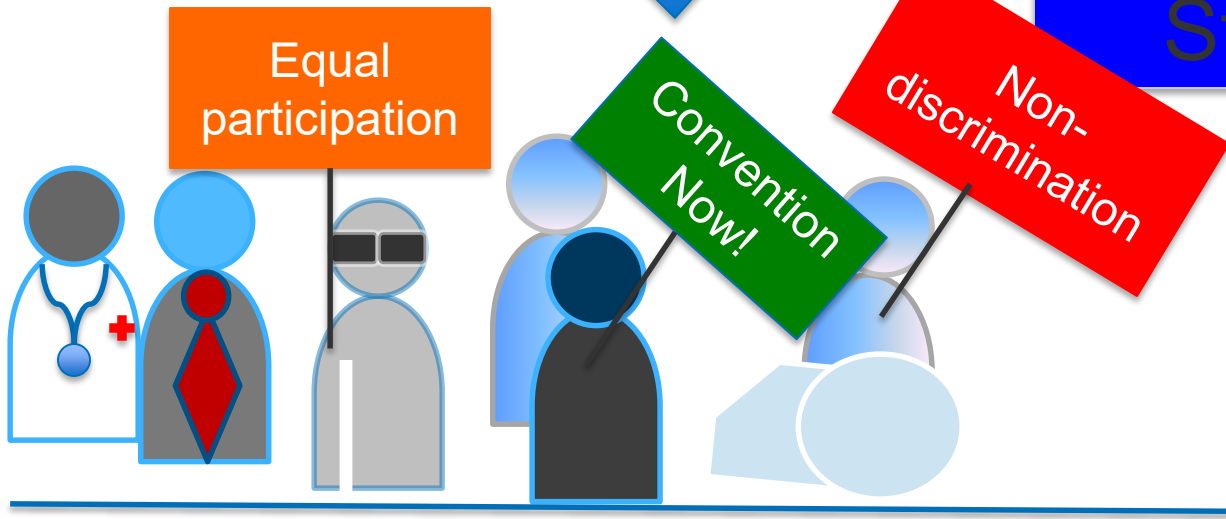
We need to eliminate the barriers to enable the participation of persons with disabilities.



Human rights based approach



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



Needs or rights?

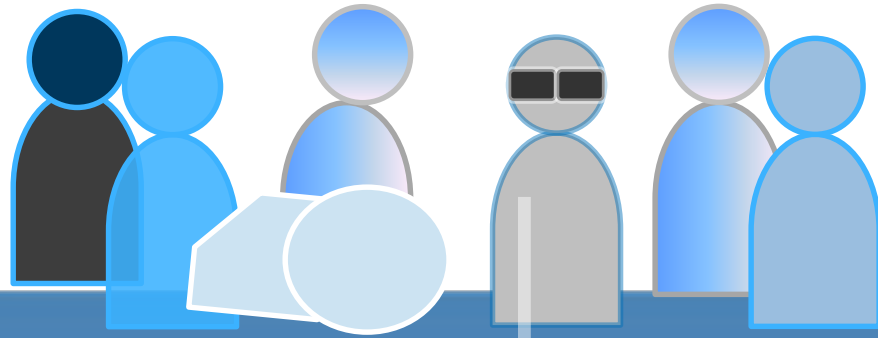
“Needs Based”

- Action is **voluntary**/optional
- ‘Needs’ are **contextual** and open-ended
- **People deserve help**
- **Passive** beneficiaries - can be invited to participate
- **Pragmatic** ways to work with structures
- Given scarce resources some people may have to be left out
- Hierarchy of needs

“Human Rights Based”

- Action is **mandatory**
- Universal and **legally established** claims and entitlements
- **People are entitled to enforceable rights**
- **Active** participants by right
- Power structures **must be** effectively changed
- All people have **the same rights** to fulfill their potential
- Rights are **indivisible** and interdependent though in any situation practical prioritisation may be required

Persons with disabilities are part of human diversity



Being human has a broad spectrum of possibilities

MANY WAYS OF
WALKING

MANY WAYS OF
SEEING

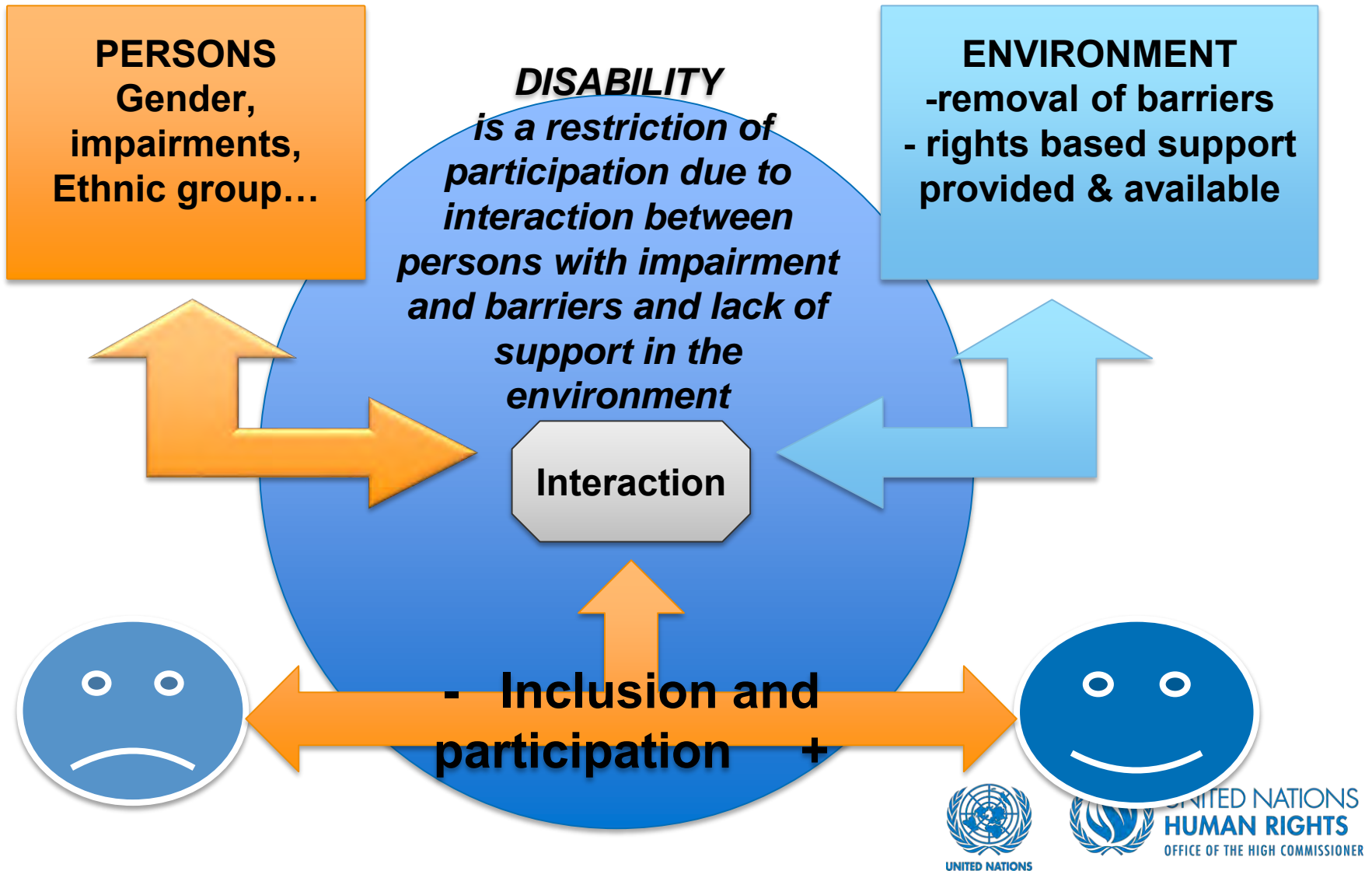
MANY WAYS OF
THINKING

MANY WAYS OF
COMMUNICATING

MANY WAYS OF
INTERACTING

Etc.

What is disability for the CRPD?



Human rights based approach

Convention on the Rights of Persons with Disabilities:

Persons with disabilities are subjects of their rights, they have the same rights as everyone else.

No double standards

No higher standards

Inclusion for ALL



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Human rights based approach

- Persons with disabilities enjoy and exercise their rights on an equal basis with others
- They have the right to receive support in the exercise of their rights- this includes the right to refuse support
- Justiciability and enforceability of rights



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Why is the Convention important?

- Clarifies the rights of persons with disabilities
- Sets out responsibilities to respect those rights
- Requires a rights-based approach to disability
- Promotes inclusive and accessible development
- Ensures national and international monitoring of rights



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Whom does the CRPD protect?

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others

Consider:

- Diversity of disabilities – physical, psychosocial, intellectual, sensory
- Women with disabilities
- Children with disabilities
- Older persons with disabilities
-



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Discrimination on the basis of disability

Any **distinction, exclusion or restriction** on the basis of disability which has the **purpose or effect** of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

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



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Reasonable accommodation



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Reasonable accommodation

Elements

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

Human rights based approach

CRPD positive measures:

- Universal design
- Accessibility
- Accommodations
 - Reasonable accommodation
 - Procedural accommodations*
- Support / supported decision-making
 - Rights based
 - Voluntary = right to refuse support
 - Informal/formal



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When in doubt... CRPD Article 3

General 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.



Persons with disabilities denied justice

- Laws to be applied are inherently discriminatory
 - Reinforce discrimination & exclusion
 - Denial of legal standing
 - Denial of right to complaint
- Justice system itself not inclusive
 - Inaccessible environments, information, communications
 - Lack of awareness by judicial actors

Article 13, CRPD: access to justice

Equal & effective participation by persons with disabilities :

I. Right to fair trial- at all stages:

- Investigations
- Proceedings
- Remedies

II. In every role within justice system

III. Training for those working in the field of administration of justice



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Article 13, CRPD: Right to access justice

I. Right to fair trial

- Equal access to and equality before the courts
- Procedural guarantees
- Seeking & obtaining just & timely remedies for rights violations



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Legal standing

Article 12, CRPD: Universal legal capacity

Equal recognition before the law of persons with disabilities.

Persons with disabilities enjoy and exercise legal capacity on an equal basis with others

- Right to bring a complaint, be a party to proceedings
- Right to participate as witness
- Right to participate as juror, judge



Accessibility

Removing barriers:

- Physical
- Communications
- Information



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Beyond accessibility:

procedural and age-appropriate accommodations

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including **through the provision of procedural and age-appropriate accommodations**

- Measures (not exhaustive):
 - Accessible formats
 - Provision of SL interpretation
 - Multiple means of communication (video link)
- Procedural flexibility to accommodate specific requirements
- Age-appropriate accommodations



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Procedural accommodations

- Not subjected to progressive realisation: its denial results in discrimination
- ≠ reasonable accommodation- not subject to a proportionality test



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Procedural accommodations

- Should be provided based on “free choice and preference” of person concerned
- Not necessarily based on medical information or conditioned by any disability assessment, possession of disability certificate/card
- Confidentiality- no obligation to openly disclose personal, health or rehabilitation information
- Can be modified or replaced, as appropriate



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Procedural accommodations

States should:

- Review of legislation, including administrative, civil and criminal legislation to explicitly include a duty to provide procedural accommodations
- Define entity responsible for providing procedural accommodations
- Provide information on where and how to request and access them
- Ensure that they are always available and free of charge
- Responsible entity should document – facilitate accountability & improve knowledge management



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Article 13, CRPD: access to justice

II. Equal & effective participation by persons with disabilities in **every role** within justice system: witnesses, lawyers, judges, jurors, experts

Component of active citizenship in order to shape the society in which we live

- Good governance- democracy, rule of law, accountability



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Article 13, CRPD: access to justice

III. Training of all actors in justice system to address attitudinal barriers & lack of knowledge on:

- CRPD: HRBA
- Provision of procedural accommodations
- Overcoming gender & disability based stereotypes



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Articles 13, 4(3), 29, 33

PARTICIPATION

In all steps:

Phases of administration of justice

Law/policy reform

Training

Awareness-raising

Research...



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Resources

- Convention on the Rights of Persons with Disabilities
- OHCHR report on access to justice (2018)
- CRPD Committee General Comment no 1 on equal recognition before the law (2014)
- CRPD Committee General Comment no 6 on equality & non-discrimination (2018)
- CRPD Committee General Comment no 7 on participation (2018)
- Special Rapporteur on the rights of persons with disabilities' report on legal capacity (2018)
- Special Rapporteur on the rights of persons with disabilities' report on access to rights-based support (2016)



Questions / comments?

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www.ohchr.org/en/issues/disability/pages/disabilityindex.aspx



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The right to access to justice of persons with disabilities in EU law

Dr. Angela Vernia

(Employment Judge – Tribunal of Bari)



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.

Summary

- **Introduction**
- **The role of the UNCRPD in EU Law**
- **The right to access to justice: *a comparative analysis of Article 47 of the EU Charter of Fundamental Rights and Article 13 of the UNCRPD***
- **Access to justice for persons with disabilities under EU secondary law**
- **Conclusions**

Introduction

The EU acceded to the Convention with the **Council Decision 2010/48/EC**

- **30 March 2007**: the former EC and its Member States signed the UNCRPD
- **28 August 2008**: Commission Proposal for a Concluding Decision of UNCRPD was adopted
- **26 November 2009**: **Council Decision 2010/48/EC**
- **22 January 2011**: the UNCRPD entered into force in the EU area

UNCRPD and "Regional Integration Organisations"

- The UNCRPD is the first human rights treaty that contemplates the possibility that not only the States but the "regional integration organisations" may become parties of the same(CRPD, Article 44)
- *"The Committee notes with appreciation that the European Union is the first regional organization to ratify a human rights treaty concluded under the auspices of the United Nations, thus setting a positive precedent in public international law"* (UNCRPD, Committee Cos, Para. 1)

The Role of the UNCRPD in EU Law

The Status of the UNCRPD

- The UNCRPD is a **mixed agreement**: that is, an international agreement that falls partly within the scope of the EU regulatory powers and partly within the scope of those of the Member States
- *“In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements insofar as the provisions fall within the scope of Community competence”*(Case C-239/03, *Etang de Berre*).
- *"Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States"* - Article 216 (2) TFEU

The UNCRPD and the EU Law Sources

- The UNCRPD has become a **part of EU law**.
- Under the EU legal order, the fundamental hierarchy of norms is as follows:
 - the **Treaties** – the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (including their Protocols) **and the Charter of Fundamental Rights** constitute ***EU primary law***
 - **directives, regulations and decisions** constitute ***EU secondary law***
- All the **international law sources** are inferior to the Treaties' provisions but superior to EU secondary law
- Therefore the **UNCRPD** – as an international mixed agreement - is **inferior to the Treaties' provisions** but is **superior to secondary EU law**

The UNCRPD's Legal Efficacy

- The UNCRPD, in the light of its spirit and objectives, could be *potentially* capable of attributing rights to individuals
- *However*, its provisions are addressed to the Parties and do not seem to be sufficiently clear, precise and unconditional up to the point of having **direct effect** in the EU legal order
- The European Court of Justice constantly affirms that the UNCRPD is “**programmatic**” and its provisions are **not “unconditional and sufficiently precise** ... they therefore do **not** have **direct effect** in European Union Law” (Case C-363/12 *Z. v. A Government Department*, Case C-356/12 *W. Glatzel v. Freistaat Bayern*)

The Interpretative Effect

- Although the UNCRPD is not directly applicable, it may have effect in the EU legal order on the basis of the **principle of consistent interpretation** (Joined Cases C-335/2011 and C-337/2011, *Ring and Werge*, Case C-312/2011, *Commission v. Italy*, Case C-363/2012, *Z. v. Government Department*), meaning that both EU law and national legislation must be **interpreted in a manner consistent with the UNCRPD**
- This also entails that if the wording of secondary EU Law is open to more than one explanation, the interpretation which could render the provision consistent with the Convention should be preferred as far as possible.
- However, “Case law leaves the door open to the review of EU measures in the light of the UNCRPD” (D. Ferri), regardless of whether the Convention has direct effect, in two situations: 1) when an EU act intends to implement a specific obligation arising from the UNCRPD, 2) when an EU act expressly refers to specific provisions of the UNCRPD (for these two famous exceptions, see C-69/89 *Nakajima*, and C-70/87 *Fediol*; moreover, “*The judgment of the Court in The Netherlands v. EP and Council provides good grounds to consider that the review of EU measures in the light of the UNCRPD may be possible regardless of whether the Convention has direct effect (ECJ 9 October 2001, C-377/98)*”).

The Interpretative Effect: the Notion of Disability

- The most notable example of the interpretative effect is related to the notion of **disability**
- The seminal case: the HK Denmark judgement (decision 11.4.2013), Joined Cases C-335/2011 and C-337/2011
- The CJEU preliminarily affirms that the Employment Equality Directive (2000/78) was mentioned in the Declaration of Competences annexed to the Decision 2010/48 and was defined as “one of the European Union acts which refers to matters governed by the UN Convention”.
- The Court then establishes that the Directive “***must, as far as possible, be interpreted in a manner consistent with that Convention***” and put this in practice regarding the definition of “disability”.
- According to the social model of disability which underlies the UNCRPD, the Court overrules the definition of disability given by the Chacòn Navas judgement (Case C-13/05, based instead on the medical model) and establishes that, in the light of the aforementioned interpretative duty, the concept of **disability** must be understood as “*a [long-term] limitation that results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers*” (see Para. 37).

The Right to Access to Justice

A Comparative Analysis – Article 47 CFR and Article 13 UNCRPD

- There is **no standardised concept of “access to justice” in EU Law.**
- The latter is generally understood as referred to the possibility of access to the legal system.
- The access to justice, in other words, enables the individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings: it thus cuts across civil, criminal and administrative law.

Access to Justice Scholarships

- The theory and methodology about the access to justice were cleared by Prof. Mauro Cappelletti in the 70's - 80's at the European Institute of Fiesole (see, M. Cappelletti and B. Garth, *Access to Justice*, Giuffrè 1978)
- More recently, it is worth mentioning a categorization that identifies three distinct but interlinked components of the access to justice – substantive, procedural and symbolic (see, R. Badhi, *Background Paper on Women's Access to Justice in the MENA Region*, Middle East and North African (MENA) Regional Consultation 2007)
- Namely, the **substantive component** is concerned with the substance or the content “*of the right claims that are available to those who seek a remedy*”, the **procedural component** must be understood as meaning the types of institutions where one might bring a claim and the rules which govern the complaint, and the **symbolic component** appears to consist in a society in which, due to its laws and justice system, disadvantaged groups (e.g., people with disabilities) are fully included as equal citizens.

The Right to Access to Justice under EU Law

- In order to identify the meaning and content of the right to access justice in EU law, we make reference to **Article 47 of the Charter of Fundamental Rights of the EU** (on the grounds of the rights set out in the ECHR – Articles 6 and 13) which provides **the right to a fair trial and an effective remedy**

Article 47 states that: "*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 insofar as such aid is necessary to ensure effective **access to justice**".*

The Rights under Article 47 CFR

- Article 47 CFR summarises all the particular rights covered by the concept of access to justice in EU Law:
 - 1) the right to a fair and public hearing before an independent and impartial tribunal previously established by the law;
 - 2) the right to timely resolution of disputes;
 - 3) the right to be advised, defended and represented;
 - 4) the right to an effective remedy before a tribunal;
 - 5) the right to legal aid.

1) The Right to a Fair Trial

This includes the right to access a court

- Accessibility involves availability of courts, availability of interpretation, access to information and to court judgements; it may also involve the geographical remoteness of a court that can prevent applicants from participating effectively in proceedings

The right to a fair hearing essentially covers:

- the right to equality of arms (each party has a reasonable opportunity to present its case in conditions that do not disadvantage either party);
- the right to adversarial proceedings that encompasses the right to have knowledge of all evidence filed to influence the court's decision, the right to have sufficient time to familiarise oneself with the evidence before the court, the right to produce evidence;
- the right to a reasoned decision (courts are not required to give detailed answers to every argument, but sufficient reasons to allow individuals to make effective applications for appeal).

1) The Right to a Fair trial

The right to a public hearing requires that an individual has the right to attend and hear evidence

Article 47 uses the term "tribunal", which means that a tribunal must possess judicial functions, be capable of issuing binding decisions, be established by law and apply rules of law;

- Moreover, a tribunal must be "**independent**" - to act as a third-party decision-maker, independent of the administrative authorities (free from external pressure-external independence) and the parties (internal independence);
- And "**impartial**". Impartiality consists of two elements: a subjective element relating to the individual judge's personal prejudices or bias, and an objective element relating to the appearance of bias.

2) The Right to Timely Resolution of Disputes

Article 47 also guarantees the right to a trial within a reasonable time.

EU law has not established specific definitions of what a "reasonable time" is, therefore, the reasonableness of the length of proceedings, in both criminal and non-criminal proceedings, according to the ECJ case law, ends up depending on the circumstances of the case, on the basis of the following **criteria**:

- the complexity of the case (relates both to the facts and to the law, e.g., high evidence, complex legal issues, the need to hear many witnesses);
- the complainant's conduct;
- the domestic authorities' conduct – states must organise their legal systems to enable their courts to guarantee the right to obtain a final decision within a reasonable time. However, the key responsibility for preparing a case and for the speedy conduct of a trial lies with the judge. Repeated changes of judge or a structural overload of cases does not justify excessively lengthy proceedings; the state is responsible for all state authorities, not just the court;
- the importance of what is at stake for the complainant (e.g., cases concerning children require a faster resolution).

3) The Right to be Advised, Defended and Represented

- This right is set out by Article 47 of the CFR, as specifically regards the non-criminal proceedings (while criminal cases are disciplined by Article 48)
- It entails the right to **practical and effective legal assistance**
- The ECJ established that the right to legal representation and the privileged nature of correspondence between lawyers and clients are fundamental part of the EU's legal order

4) The right to an Effective Remedy before a Tribunal

- This right allows individuals to seek a **redress** for violations of their rights
- Different types of remedies (e.g., compensation, specific performance, injunctions) may redress different types of violation
- Under EU law, Member States are legally bound to establish systems of legal remedies and procedures to ensure the effective judicial protection of rights in the fields covered by EU law, on the basis of the principles of **effectiveness** and **equivalence**
- **Effectiveness** requires that domestic law does not make it impossible or excessively difficult to enforce rights under EU Law
- **Equivalence** requires that the conditions relating to claims arising from EU law are not less favourable than those relating to similar actions of a domestic nature

5) The right to legal aid

- This right is guaranteed by Article 47 in non-criminal proceedings, and Article 48 in criminal proceedings.
- As the right to legal assistance, according to article 47, should be effective for all individuals, regardless of their financial means, a further **right to legal aid to those who lack sufficient resources** is provided, as far as this is necessary to ensure effective access to justice (it applies to proceedings relating to all rights and freedoms arising from EU law)
- Legal aid is generally subject to **financial means** and **merit tests**: States can decide whether it is in the interest of justice to provide legal aid, taking into account the importance of the case for the individual, the complexity of the case and the individual's capacity to protect himself/herself (e.g., vulnerable persons).

TFEU, Article 67(4)

"The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters"

UNRPD, Article 13

- *"States Parties shall ensure effective **access to justice for persons with disabilities on an equal basis with others**, including through the provision of **procedural and age-appropriate accommodations**, in order to facilitate their effective role as **direct and indirect participants**, including as witnesses, in **all legal proceedings**, including at investigative and other preliminary stages.*
- *In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote **appropriate training** for those working in the field of administration of justice, including police and prison staff".*

Beyond the Classical Notion of Access to Justice

- The statement provided by Article 13, UNRPD, is the first to enshrine an **explicit** right to access to justice in international law
- The latter is both a **fundamental right in itself** and an essential **prerequisite** for the protection and promotion of all other human rights
- **Persons with disabilities** face significant **obstacles in access to justice** that include denial of their legal standing and due process guarantees and the inaccessibility of the physical and communication environments during proceedings.
- The UNCRPD calls for the **elimination of obstacles and barriers** faced by persons with disabilities in accessing justice on an equal basis with others, and **innovates** on **previous standards** developed under international law.
- The convention not only clarifies **what access to justice means for persons with disabilities**, but also upholds **equal and effective participation at all stages and in every role within the judicial system** as a core element of the right to access to justice.

Report of the Office of the UN High Commissioner for Human Rights (2018)

- ***“It underscores the fact that access to justice for persons with disabilities entails not only the removal of barriers to ensure access to legal proceedings to seek and obtain appropriate remedies on an equal basis with others, but also the promotion of the active involvement of persons with disabilities in the administration of justice”*** (Par C, 12.).

A new aspect of the Right under exam: Participation

- The **scope** of the right is broader compared with the right to a fair trial and an effective remedy under Article 47, CFR, which is only concerned with the right of the main parties of a dispute
- Article 13 (1) refers to the right to participate in legal proceedings as a "**direct or indirect**" **participant**, that is, to take part in the justice process in capacities other than those of claimant or defendant, including crime victims, suspects, witnesses
- Art. 29, UNCRPD (promoting the participation in public affairs), supplements Article 13: in combination the two articles suggest that disabled people have the right to participate, on an equal basis with others, in the justice system as a whole
- The latter entails the right to **participate in justice system in a broad sense**: access to the profession of lawyer or judge; participation in jury service; procedural accommodations for witnesses
- An innovative and explicit requirement of the right to access is that it is specifically extended to non-judicial mechanisms - "all legal proceedings" (equality bodies, Ombudsman etc.); Article 47 is mainly limited to judicial procedures
- Article 13 goes beyond the right to a fair hearing and to an effective remedy (Article 47 CFR) by explicitly requiring disability **training** to be provided to the judiciary, police and other staff; the training requirement is expressly extended to prison staff

Article 13: to be read in conjunction with...

- The **content** of Article 13 goes beyond the right to a fair trial and an effective remedy (article 47, CFR)
- Article 13 and **Article 5, UNCRPD ("non discrimination")**
- Although the obligation to prohibit discrimination is not explicitly mentioned by article 13, it is clearly implicit in the phrase "**on an equal basis**"
- An action which is discriminatory in purpose or effect must be prohibited (thus embracing something akin to the notion of indirect as well as direct discrimination in EU Law).
- Failure to provide procedural accommodations will also amount to discrimination and therefore falls within the scope of what must be prohibited.

Reasonable/Procedural Accommodations

- Article 13 does not explicitly mention reasonable accommodation, but "**procedural and age appropriate accommodation**"
- Procedural accommodations are not limited by the concept of "disproportionate or undue burden"
- Procedural and age-appropriate accommodations are **all the possible accommodations** needed to exercise the right to access to justice on an equal basis with others
- Adjustments to standard practice or procedure in order to remove a particular disadvantage in access to justice
 - a different timetabling of a case (by avoiding an early morning start for a person taking certain types of medication)
 - more frequent breaks for a person with a physical impairment which requires this
 - a sign language interpreter or reader to accompany a person with sensory impairments, or communicating with a deaf person in writing rather than orally
 - display of text, Braille, tactile communication, large print, audio, plain-language

And also with...

- **Article 21** - **accessibility** of information and communication
- **Article 9** - to ensure the physical accessibility of buildings and spaces open to the public; the provision of live assistance and intermediaries such as sign language interpreters; accessible signage, including Braille and easy-to-read formats; accessible information and **communication** technologies
- **Article 12** - **legal capacity** - without the recognition of legal personality, there can be no recourse to justice and, without access to justice, the right to be recognised as equal before the law is meaningless since it cannot be asserted, applied to a specific context, or enforced.
- **Article 8 and 16** - to promote **awareness** amongst disabled people, their families and society of the rights of disabled people and how they might be enforced.

The Access to Justice for Persons with Disabilities in Secondary EU Law

The Non-Discrimination Context

- **Directive 2000/78 EC** - general framework for equal treatment in employment and occupation - requires Member States to prohibit disability discrimination in employment and occupation
- **No directive** has been issued which prohibits disability discrimination in the provision of services available to the public that include **access to justice**
- European Commission, **Proposal** for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008)
- **No explicit requirement** for Member States is provided **to prohibit disability discrimination in access to justice**

Article 21, CFR

- Article 21 (1), CFR: any "*discrimination based on any ground such as ... disability ... shall be prohibited*" = to prohibit disability discrimination in connection with entitlements deriving from EU Law
- Where EU Law requires Member States to establish procedures or mechanisms for the enforcement of specific rights, those procedures or mechanisms must be free from disability discrimination and reasonable accommodation for disabled people must be assured
- Where **EU Law explicitly** requires the provision of at least **some aspects of access to justice, the requirement that they must be free from discrimination is implicit**
- "*Judicial and/or administrative procedures*" are to be established for the enforcement of obligations to prohibit discrimination on the grounds of:
 - race - Article 7, Directive 2000/43/EC
 - gender - Article 8(1), Directive 2004/113 EC and Article 17(1), Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
 - sexual orientation, age, religion or belief and disability - Article 9(1), Directive 2000/78/EC

The Access to Justice in Secondary EU Law for Persons with Disabilities

Beyond the Non-Discrimination Context

- The **Free Movement Directive** requires **mechanisms for judicial redress** to be available to EU citizens refused entry into another Member State
- **Article 31 Directive 2004/38/EC** of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
- "*Procedural safeguards*":
 1. The persons concerned shall have access to judicial and, where appropriate, administrative **redress procedures** in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
 2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
 - where the expulsion decision is based on a previous judicial decision; or
 - where the persons concerned have had previous access to judicial review; or
 - where the expulsion decision is based on imperative grounds of public security under Article 28(3).
 3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 ...

Criminal Justice

- Criminal justice provides a focus for analysis of the extent to which disability considerations are being factored into emerging EU access to justice standards
- **Directive 2010/64 on the right to interpretation and translation in criminal proceedings**
- **Directive 2012/29 on minimum standards on the rights, support and protection of victims of crime**
- **Directive 2013/48 on the right to a lawyer in criminal proceedings**
- **Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings**

Directive 2010/64 on the Right to Interpretation and Translation in Criminal Proceedings

- This Directive should ensure that there is free and adequate linguistic assistance, allowing **suspected or accused persons who do not speak or understand the language of the criminal proceedings** fully to exercise their right of defence, and safeguarding the fairness of the proceedings (R17)
- Suspected or accused persons who are "**unable to speak or understand the language of the proceedings** are provided with **an interpreter and with translation of the essential documents**"
- People with disabilities or people who are "**in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively**"
- Member States have to **take into account "any potential vulnerability** that affects one's ability to follow the proceedings and to make themselves understood".

Some Criticism to Directive 2010/64

- **NO** specific **mention** is made of **reasonable accommodations**. However, Article 3 (2) states "appropriate assistance for persons with hearing or speech impediments"; recital 27 requires to **take into account** "**any potential vulnerability** that affects one's ability to follow the proceedings and to make themselves understood"
- Duties to ensure reasonable accommodations emerge obliquely as duties to make relevant information accessible to disabled people
- **People with disabilities** are characterised as being made "weak" or "**vulnerable**" by their physical or sensorial impairments; the CRPD, by contrast, stresses the significance of social and external factors in creating barriers for disabled people
- These **measures** are **limited** to those who are "**unable to speak or understand the language of the proceedings**": but what about suspected or accused disabled people who are capable to speak or understand the proceedings, but have visual impairments?

Directive 2012/29 on Minimum Standards on the Rights, Support and Protection of Victims of Crime

- Recital (9) - **no discrimination** based on disability and **recognition**
 - No discrimination of any kind based on any ground such as ..., disability,
 - In all contacts with a competent authority ... the personal situation and immediate needs, ..disability .. of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity
- Recital (15) - **accessibility** to premises and access to information
 - In applying this Directive, Member States should ensure that victims with disabilities are able to benefit fully from the rights set out in this Directive, on an equal basis with others, including the facilitating of the accessibility to premises where criminal proceedings are conducted and access to information
- Recital (21) – the **right to understand and to be understood**, provision of information and advice taking into account a person’s intellectual capacity, hearing or speech impediments
 - It should also be ensured that the victim can be understood during proceedings. In this respect, the victim's knowledge of the language used to provide information, age, maturity, intellectual and emotional capacity, literacy and any mental or physical impairment should be taken into account. Particular account should be taken of difficulties in understanding or communicating which may be due to a disability of some kind, such as hearing or speech impediments. Equally, limitations on a victim's ability to communicate information should be taken into account during criminal proceedings (see Chapter 3)

Directive 2012/29 on Minimum Standards on the Rights, Support and Protection of Victims of Crime

- Article 3(2): **communications in simple and accessible language**
 - Member States must ensure that **communications with victims** are **given in simple and accessible language, orally or in writing**. Such communications should take into account the personal characteristics of the victim, **including any disability** which may affect the ability to understand or to be understood (see Directive, Chapter 3)
- Article 22: **individual assessment of victims to identify specific protection needs – also victims with disabilities**
 - 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 crimes, and victims with disabilities, shall be duly considered (see Directive, Chapter 4)

Some Criticism to Directive 2012/29

- This directive appears to adopt the uncomfortable approach of categorizing people with disabilities as “vulnerable” and in need of protection

Directive 2013/48 on the Right to a Lawyer in Criminal Proceedings

- ...and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
- Article 13 **Vulnerable persons**: "Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive"
- Access to a lawyer/confidentiality
- Right to have a third party informed of the deprivation of liberty
- Right to communicate with third persons while deprived of liberty
- Right to communicate with consular authorities while deprived of liberty
- Waiver-limitations

Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings

- Article 9: **Vulnerable persons:** "Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive"
- Recital 27
 - Non discrimination on grounds of disability
 - Respect and implementation in the light of the Charter, including integration of people with disabilities
- Recital 18
 - practical arrangements: legal aid should be granted following a request by a suspect, an accused person or a requested person.
 - such a request should not be a substantive condition for granting legal aid, considering the needs of vulnerable persons

Conclusions

- EU secondary law demonstrates the European Union's increasing interest in the right to access to justice for persons with disabilities
- ...but disabled people are often considered as "vulnerable"
- 'Ensuring equal access to justice is not an issue of protecting people who are inherently "vulnerable"; it is a matter of equality and human rights'
- The translation into legislation and practices of UNCRPD ideals and the new right to justice designed by article 13 is still a challenge

Thank you for your attention!



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CASE STUDY

Steven was hired to work for Getrag Ltd., a company that produces bolts, in 1998.

He was initially employed as an “incoming inspector” and worked inside the main Getrag manufacturing site.

During the employment relationship he contracted multiple sclerosis, but his condition was well controlled by medication, and he has not had a seizure in over eight years.

In 2006, his condition deteriorated and his employer decided to assign him to administrative work (invoice control).

In 2016, his employer repeatedly required that he undergo medical examinations with a doctor appointed by Getrag to evaluate his fitness for work. Steven attended all the medical examinations.

Finally, the employer asked the Local Medical Commission to evaluate Steven’s health condition. The Commission wrote a report according to which Steven was considered permanently unsuited to the job of “incoming inspector”, and in fact was not fit to operate heavy machinery. Nevertheless the Commission evaluated Steven as suited to “sedentary activities”.

His employer immediately put him on paid leave.

Steven decided to sue Getrag Ltd. claiming that he had been discriminated against on the grounds of a disability.

He contested the medical examinations and also claiming that even if he was declared unfit to operate machinery, Getrag Ltd. should have offered him a different position in the company, such as administrative control, and he requested this measure from the Employment Tribunal.

In his complaint he referred to the national anti-discrimination law, but also claimed there was a general violation of the UNCRPD.

The defendant claims that Steven is not a person with a disability, and as a result, no discrimination on the grounds of disability was committed, stating that the UNCRPD is immaterial in the case at stake.

In addition, Getrag Ltd. claims that even if Steven were to be considered a person with a disability, still no discrimination occurred and the paid leave was justified as a result of observing the minimum safety standards.

1. Is Steven a person with a disability?

- In the affirmative, why?
- In the negative, Why not?

2. What rights guaranteed by the UNCRPD are affected in the circumstances described above?

Bear in mind that Steven uses a wheelchair.

- 3. Is Stevens' complaint well founded in your opinion?**
- 4. In short, what would your decision be in this case if you interpreted the relevant national law in compliance with the UNCRPD?**

FALLSTUDIE

Steven wurde im Jahr 1998 von der Getrag Ltd. eingestellt, einem Schraubenhersteller.

Er war anfänglich als „Eingangskontrolleur“ beschäftigt und arbeitete am Hauptfertigungsstandort der Getrag.

Während des Beschäftigungsverhältnisses brach bei ihm Multiple Sklerose aus, die jedoch durch Medikamente gut unter Kontrolle war; er hatte in mehr als acht Jahren nicht einen einzigen Schub.

Im Jahr 2006 verschlechterte sich sein Zustand, und sein Arbeitgeber beschloss, ihn in die Verwaltung zu versetzen (Rechnungskontrolle).

Im Jahr 2016 verlangte sein Arbeitgeber wiederholt, dass er sich ärztlichen Untersuchungen durch einen von der Getrag benannten Arzt unterziehen sollte, um seine Arbeitsfähigkeit beurteilen zu lassen. Steven unterzog sich sämtlichen ärztlichen Untersuchungen.

Schließlich ersuchte der Arbeitgeber die lokale medizinische Kommission, Stevens Gesundheitszustand zu beurteilen. Die Kommission verfasste einen Bericht, der besagte, dass Steven für die Tätigkeit des „Eingangskontrolleurs“ dauerhaft arbeitsunfähig und faktisch nicht fähig sei, schwere Maschinen zu bedienen. Die Kommission befand Steven jedoch für fähig, „sitzende Tätigkeiten“ auszuführen.

Sein Arbeitgeber stellte ihn unter Fortzahlung seiner Bezüge unverzüglich von der Arbeit frei.

Steven beschloss, ein Verfahren wegen Diskriminierung aufgrund einer Behinderung gegen die Getrag Ltd. anzustrengen.

Er focht die Ergebnisse der ärztlichen Untersuchungen an und machte ferner geltend, dass er zwar für unfähig befunden worden sei, Maschinen zu bedienen, dass ihm die Getrag Ltd. jedoch einen anderen Posten in dem Unternehmen hätte anbieten müssen, beispielsweise eine administrative Kontrolltätigkeit; diese Maßnahme beantragte er beim Arbeitsgericht.

In seiner Beschwerde stützte er sich auf das nationale Antidiskriminierungsrecht, machte aber auch einen allgemeinen Verstoß gegen die UN-BRK geltend.

Die Beklagte argumentiert, dass Steven kein Mensch mit einer Behinderung sei und dass infolgedessen keine Diskriminierung aufgrund einer Behinderung begangen worden sei; sie erklärte, dass die UN-BRK im vorliegenden Fall keine Rolle spiele.

Ferner macht die Getrag Ltd. geltend, dass auch dann keine Diskriminierung vorläge, wenn Steven als Mensch mit einer Behinderung zu betrachten sei, weil die bezahlte Freistellung dann als Ergebnis der Beachtung der Mindestsicherheitsstandards gerechtfertigt sei.

1. Ist Steven eine Person mit einer Behinderung?

- Falls ja, warum?
- Falls nein, warum nicht?

2. Welche durch die UN-BRK garantierten Rechte werden unter den oben beschriebenen Umständen berührt?

Berücksichtigen Sie, dass Steven einen Rollstuhl benutzt.

3. Ist Stevens Beschwerde Ihrer Meinung nach begründet?

4. Führen Sie kurz aus, wie Ihre Entscheidung in dieser Sache ausfallen würde, wenn Sie das einschlägige nationale Recht in Übereinstimmung mit der UN-BRK auslegen würden.



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The right to equal recognition before the law

Constantin Cojocariu

Human rights lawyer and consultant

Key concepts

Convention on the Human Rights of Persons with Disabilities

European Convention on Human Rights

Stereotyping

- A stereotype is a widely held and oversimplified image or idea of a particular type of person or thing, it is misleading and may distort our judgment.
- Examples of stereotypes:
 - Having a mental disability means you cannot make decisions
 - Decisions have to be made for you by family, friends, doctors or other professionals in your “best interest”
 - People with mental disabilities should be placed in institutions, where they can be properly cared for

Stereotyping

Alajos Kiss v. Hungary (European Court of Human Rights, 2010) involved a man placed under partial guardianship who complained about not being able to vote.

- Persons with disabilities are a particularly vulnerable social group, who had historically been subjected to discrimination. This status gave rise to stereotypical assessments, without consideration of individual “capacities and needs.”
- “The treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny.”

Legal capacity

- a legal construct enabling individuals to make different decisions, both large (buying a house or getting married) and small (deciding what to wear or what to do every day)

...and protecting them from any unwanted interferences with their personhood, for example by refusing a medical intervention.

- Legal capacity is an inherent and inalienable right, closely related to personal freedom, a gateway to other rights and a marker of full citizenship.

Mental capacity

- Mental capacity refers to a person's decision-making skills
- Evaluating mental capacity usually involves asking questions about one's ability to understand the information necessary to make a decision, to understand the potential consequences of the decision and to communicate their decision.

Guardianship

- Guardianship (partial or plenary) is a mechanism that deprives persons with intellectual and psychosocial disabilities of their legal capacity; the right to take decisions on their behalf is transferred to a third party, variously known as a guardian or a trustee.
- Experience shows that guardianship often facilitates abuse

Guardianship

- The European Court of Human Rights has described the pernicious consequences of guardianship as follows:

Divesting someone of legal capacity entails serious consequences. The person concerned is not able to take any legal action and is thus deprived of his or her independence in all legal spheres. Such persons are put in a situation where they depend on others to take decisions concerning various aspects of their private life, such as, for example, where to live or how to dispose of their assets and all income. Numerous rights of such persons are extinguished or restricted. For example, such person is not able to make a will, cannot be employed, and cannot marry or form any other relationship creating consequences for their legal status, etc. (X. and Y. v. Croatia, 2011)

Substituted v. supported decision-making

Substituted decision-making designates a mechanism by which the ability of an individual to be an actor under the law in some or all areas of their life is removed by the State and the decision is made for them by others.

A supported decision-making regime comprises various support options which give primacy to a person's will and preferences and respect human rights norms.

Determining legal capacity

Status approach

- the very existence of a particular diagnosis or impairment is considered sufficient grounds for incapacitation, regardless of the individual's actual capacities.

Outcome approach

- focuses on the “reasonableness” of a given decision and determines capacity on that basis.

Functional approach

- concentrates on the individual's ability to understand the nature and consequences of a certain decision, such as the decision to choose where to live, or the decision to undergo a medical procedure, or to vote.

Convention on the Human Rights of Persons with Disabilities

Article 12: the right to equal recognition before the law

- Para. 1: persons with disabilities are subjects of law with rights and obligations like anyone else.
- Para 2: persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life.
- Para. 3: persons with disabilities have the right to receive support with making decisions.
- Para. 4: Safeguards must be in place to protect persons with disabilities receiving support from abuse.
- Para. 5: Persons with disabilities have the right to control their finances on an equal basis with others.

The relationship between mental capacity and legal capacity

- The conflation of mental capacity and legal capacity has led to the denial of the right to equal recognition before the law, “since a person’s disability and/or decision-making skills are taken as legitimate ground for denying his or her legal capacity and lowering his or her status as a person before the law.”
- Mental capacity varies from one person to another depending on many factors, including environmental and social factors. In that sense, mental capacity is not an “objective, scientific and naturally occurring phenomenon.”
- All persons, including those with disabilities, rely on support to make decisions. They often makes decisions that are not entirely rational and which may be shaped by a variety of external influences. In that sense, it is often said that everybody should be allowed to make and learn from their mistakes, including persons with disabilities.

Universal legal capacity

- Legal capacity is “an inherent right accorded to all people, including persons with disabilities.”
- Article 12 calls for replacing outdated substitute decision-making with supported decision-making systems.
- Accordingly, the outcome, status and functional approaches to removing legal capacity are inherently flawed.

Supported-decision making

- Support arrangements are diverse, may be formal or informal and include trusted persons, peer support, advocacy, or assistance with communication, advance planning mechanisms
- Support must respect the rights, will and preferences of the person concerned. Supporters should not make decisions on behalf of the person, or try to unduly influence the decision-making process
- Support is complemented by reasonable accommodation in line with the prohibition of non-discrimination

Safeguards

- Supported decision-making systems must also include safeguards aimed at ensuring the respect of person's rights, will and preferences, including the right to take risks and make mistakes,
- ...and at protecting against undue influence by the persons providing support or other persons,
- ...as well as against conflicts of interest and other abuse.
- Guardianship is not an adequate safeguard in the sense of Art. 12(4)
- Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations.

European Convention on Human Rights

General approach

- *A.-M.V. v. Finland* (2017): in the area of legal capacity, the Court will have regard to the CRPD and the General Comment no. 1 on Article 12.
- *Guberina v. Croatia* (2016): “by adhering to the requirements set out in the CRPD the respondent State undertook an obligation to take into consideration its relevant principles, such as reasonable accommodation, accessibility and non-discrimination against persons with disabilities with regard to their full and equal participation in all aspects of social life”

General approach

- cases concerning interferences with legal capacity are generally examined from the standpoint of the right to respect for private life under Article 8.
- The ramifications of any incapacitation decision may however engage other Articles, such as:
 - the right to liberty under Article 5, in case incapacitation results in involuntary detention or institutionalisation
 - The right to free elections under Article 3 of Protocol 1, in case incapacitation results in a deprivation of the right to vote
 - The right to respect for family life under Article 8, in case incapacitation results in a loss of parental rights

General approach

- Placement under guardianship represents a severe interference with the rights of the person in question, particularly when it applies for an indefinite period and cannot be challenged (*Shtukaturv v. Russia*, 2008)
- Initiating incapacitation proceedings without good reason is a serious interference with private life, since the person in question is subject to various intrusive assessments and a powerful guardian *ad litem* may be appointed to represent them (*X. and Y. v. Croatia*, 2011)
- ...consequently, strict scrutiny applies to justifications provided for guardianship orders (*Alajos Kiss v. Hungary*, 2010)
- ...but States have a positive obligation to take measures “to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves” (*Winterwerp v. Austria*, 1979)

General approach

- The Court permits substitute-decision making, in “exceptional circumstances” and subject to appropriate safeguards (*D.D. v. Lithuania*, 2012)
- ...but has not made any references to supported-decision making
- ...nonetheless, guardianship should be a measure of last resort, applicable after careful consideration of possible alternatives. (*Ivinović v. Croatia*, 2014) --> Q: are there any alternatives under national law?
- Guardianship has to be tailored to individual circumstances; regimes that “distinguish only between full capacity and full incapacity, [without providing] for any “borderline” situation” are likely to be in breach of the Convention (*A. N. v. Lithuania*, 2016)

General approach

Status approach
impermissible

- “the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation” (*A.N. v. Lithuania*, 2016)

Outcome approach
considered on a case
by case basis as part of
proportionality analysis

- “a circular argument, according to which a person reluctant to undergo psychiatric hospitalisation would thereby demonstrate his inability to appreciate his own condition and the risk of its potential worsening – which would yield yet another reason for his involuntary treatment” (*Pleso v. Hungary*, 2012)

Functional approach
endorsed

- courts should investigate what kind of actions [the applicant] was unable of understanding and controlling”, including with respect to “the incidence of [his] illness” and “the possible consequences of [his] illness for his social life, health, pecuniary interests, etc.” (*Shtukaturov v. Russia*, 2008)

Evidence

- The broad powers vested in medical professionals have to be counterbalanced by robust procedures preventing indiscriminate restrictions on fundamental rights (*D.R. v. Lithuania*, 2018)
- *Ivinović v. Croatia* (2014): the applicant, a 68-year old wheelchair user with cerebral palsy, complained about her placement under partial guardianship under the pretext that she mismanaged her personal finances.
- The Court criticised the national authorities for their overreliance on medical evidence, emphasizing the judges' role as the final decision-makers and the importance of weighing all relevant circumstances.
- The impugned decision was based on insufficient evidence, in the absence of any indication proving that the applicant had not been looking after her health.
- The authorities failed to clarify how precisely the applicant incurred her debts and if she was responsible for those debts.
- Even if the applicant had indeed experienced difficulties managing her finances, incapacitation, even partial, could only be a measure of last resort, after other less restrictive alternatives were tried and failed.

Procedural safeguards

- *A.-M.V. v. Finland* (2017): the applicant complained about the Finnish authorities' decision to appoint a mentor entitled to decide on his behalf where and with whom he should live.
- There was no violation of Art. 8, seeing that the institutional arrangement in question was closely tailored to the applicant's circumstances
- ...the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation
- ...a determination was made in relation to the applicant's ability to understand the implications of a specific decision
- ...effective safeguards were in place to prevent abuse and ensuring that the applicant's rights, will and preferences were taken into account.

Access and representation

- Direct access to court to claim enumerated rights, without the need to secure the consent of a guardian, including in order to seek a court review of any deprivation of liberty, to seek restoration of their legal capacity, in case of a conflict with their guardian or to challenge non-consensual medical treatment'
- There has to be regular review
- Courts should be alert to the possibility and implications of a conflict of interest between the person in question and their guardian
- *Zagidulina v Russia* (2013): the stronger a person's views about the outcome of a decision, the stronger this right of personal presence
- Good quality legal representation should be provided (*Ivinović v. Croatia*, 2014)

CRPD Committee,
*Budjosó and others. v.
Hungary* (2013)

Disability-based
restrictions on legal
capacity impermissible

Support and reasonable
accommodation should
be provided


ECtHR, *Alajos Kiss v.
Hungary* (2010)

Restrictions on legal
capacity based on
individualized
assessment permissible

No mention of support
or reasonable
accommodation

Legislative trends toward compliance with Article 12 CRPD

Default position: all or nothing guardianship regime




Abolishing plenary guardianship



Multiple substitute decision-making options responding better to individual circumstances



Substitute decision-making mixed with some supported decision-making



Peru legal capacity law reform (2018)

Thank you!

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Case study on supported decision-making

Toni was born in 1966 and lives in the capital of Zelda. He suffered since his early childhood from cerebral palsy and uses a wheel chair. He lived in an apartment that is part of a house that he shared with his brother and brother's wife. Toni's adoptive father is alive, but their relationship is very strained due to disagreements around Toni's "lifestyle." Toni went into early retirement in 2005. He had worked as an electrician for a telephone company. His only income is his retirement pension. He had had a bank account that he managed for many years without generating a negative balance. He had had not taken out any loans and did not use a credit card. Toni writes poetry and had one volume published. He cooks for himself. In 1997, he had been deprived of his legal capacity on account of "his physical illness and intellectual underdevelopment". On 10 July 2000 his legal capacity had been fully restored by a ruling of a local court.

On 12 November 2009, Toni's father asked the local court to partially deprive Toni of his legal capacity. He relied on the previous ruling of 1997 by the same court by which Toni had been deprived of his legal capacity. He further asserted that Toni had been suffering from "grave bodily damage" since early childhood, as he had been diagnosed with cerebral palsy and various chronic illnesses such as diabetes, high blood pressure and defective eyesight. Toni's father offered to act as guardian.

The incapacitation request was based on two reasons. First, it claimed that Toni lived in conditions of neglect. His attire was ill suited for the weather and his nails were long. He was missing a number of teeth and had severe tooth decay. His house had mould and mildew, and his bed had no bedding. In Toni's father's view, it was necessary to place him in a social care institution, where he could be properly looked after. Second, the deprivation of legal capacity was necessary in order to prevent Toni, who was "naïve and amiable," from disposing of his assets or becoming the victim of exploitation by others.

On 19 November 2009, the court ordered the appointment of Ms. Anon as Toni's litigation guardian, from the local Legal Aid Office. The first hearing took place on 21 January 2010. At the hearing, Toni appeared clean and organized. He claimed that he took care of his own household and would like to keep matters as they were without outside interference. He expressed concerns about the appointment of a guardian, in terms of harm to his financial freedom. Under questioning from the court, Toni was able to provide coherent replies regarding his financial affairs. He had solid knowledge about the amounts he received every month, the balance in his account and his monthly expenses. However, during the proceedings Toni had repeatedly given and then withdrawn his consent to the appointment of a guardian. Toni also asked to have one of his friends act as witness, but that request was denied after his father claimed that the friend was a "bad influence."

The court heard from a social worker who visited Toni and assessed his situation. The social worker argued that Toni should be placed under plenary guardianship, an even stricter form of guardianship than that suggested by Toni's father. He confirmed Toni's father's account regarding the lack of hygiene in Toni's flat and

the need to protect him from financial exploitation. He mentioned that Toni had lent money to a number of people, although admittedly they mostly repaid the loans. He argued that a guardian would care for Toni's physical and medical needs, financial and property matters, as well as assist him in obtaining some benefits that were owed to him by virtue of his disability.

The court also heard one of Toni's neighbors, acting as witness. He mentioned that Toni had three or four friends in the community who had helped him for many years with shopping, cared for him when he was ill and who went to church with him regularly. The prosecutor asked the court to investigate if it would be possible to place a restriction on the amount of money Toni could withdraw from the bank to cover his basic needs, so as to avoid placing him under guardianship.

A psychiatrist who evaluated Toni's health state gave evidence in court, stating that his "physical afflictions" left him with a "mild mental retardation" and that he "lacked insight into his condition". Thus, Toni lacked "sufficient intellectual capacity to adequately protect his own rights and interests, and because of his lack of insight he might also jeopardise the rights and interests of others."

The litigation guardian argued that Toni was able to manage his financial affairs and that he just needed minimal guidance and explanations from a trusted person without the need for a guardian. The litigation guardian mentioned that he arrived at this conclusion after spending a long time getting to know Toni and that he would be able to continue providing Toni with support should the court give him permission to do so.

Zeldan law provides that a guardian may be appointed "for any other person who, permanently or temporarily, is unable to look after all or any of his affairs, there being no person authorized and willing to do so on his behalf." Furthermore, guardianship had to be a measure of last resort, and courts had to investigate alternatives that were less restrictive and explain the reasons for discarding them and choosing guardianship. Zeldan ratified the CRPD, which, under national law, had priority over any contrary legislation.

Toni's litigation guardian submitted to the court a recent decision from another court in Zeldan introducing an arrangement that is an alternative to guardianship in the form of a decision-making supporter. However, that decision was isolated and its legal basis was quite controversial. He also submitted a report by a well-regarded Zeldan NGO that documented numerous abuses committed by guardians.

On 10 June 2010, the court partially deprived Toni of his legal capacity, thereby stopping him from disposing of her money and other assets. The ruling relied exclusively on the opinion given by the psychiatrist.

Please assess the course of action taken by the national court from the point of view of Article 12 of the CRPD and national Zeldan law.

Fallstudie zu unterstützter Entscheidungsfindung

Toni wurde 1966 geboren und lebt in der Hauptstadt von Zelda. Er leidet seit frühester Kindheit unter Zerebralparese und benutzt einen Rollstuhl. Er lebt in einer Wohnung in einem Haus, das er sich mit seinem Bruder und dessen Ehefrau teilt. Tonis Adoptivvater lebt, aber ihre Beziehung ist wegen Auseinandersetzungen über Tonis „Lebensstil“ sehr angespannt. Toni ging im Jahr 2005 in Frührente. Er hatte als Elektriker für eine Telefongesellschaft gearbeitet. Sein einziges Einkommen ist seine Altersrente. Er hatte ein Bankkonto, das er seit vielen Jahren führte, ohne ins Minus zu geraten. Er hatte keine Kredite aufgenommen und benutzte keine Kreditkarte. Toni schreibt Gedichte, und ein Band mit seinen Gedichten wurde veröffentlicht. Er kocht für sich selbst. Im Jahr 1997 wurde ihm aufgrund „seiner körperlichen Erkrankung und seines geistigen Entwicklungsrückstands“ die Rechts- und Handlungsfähigkeit entzogen. Am 10. Juli 2000 wurde ihm durch die Entscheidung eines Amtsgerichts die Rechts- und Handlungsfähigkeit vollständig wieder zuerkannt.

Am 12. November 2009 beantragte Tonis Vater beim Amtsgericht, Toni die Rechts- und Handlungsfähigkeit teilweise zu entziehen. Er stützte sich auf die frühere Entscheidung von 1997 des gleichen Gerichts, mit der Toni die Rechts- und Handlungsfähigkeit entzogen worden war. Er versicherte ferner, dass Toni seit frühester Kindheit unter „schwerwiegenden Körperschäden“ gelitten habe, da bei ihm Zerebralparese sowie diverse chronische Erkrankungen wie Diabetes, Bluthochdruck und eine Sehschwäche diagnostiziert worden waren. Tonis Vater bot an, die Aufgabe des Betreuers zu übernehmen.

Der Antrag auf Entziehung der Rechts- und Handlungsfähigkeit stützte sich auf zwei Gründe. Zunächst wurde argumentiert, dass Toni in Verwahrlosung lebte. Seine Kleidung war nicht auf das Wetter abgestimmt, und seine Nägel waren lang. Ihm fehlten mehrere Zähne und er litt stark unter Karies. Sein Haus war von Schimmelpilz befallen, und er schlief in einem Bett ohne Bettzeug. Nach Ansicht von Tonis Vater musste er in einer Sozialfürsorgeeinrichtung untergebracht werden, in der er ordnungsgemäß betreut werden konnte. Dann wurde ausgeführt, dass die Entziehung der Rechts- und Handlungsfähigkeit nötig sei, um zu verhindern, dass Toni, der „naiv und liebenswert“ sei, frei über sein Vermögen verfügt oder von anderen ausgenutzt wird.

Am 19. November 2009 bestellte das Gericht Frau Anon von der örtlichen Rechtsberatungsstelle zu Tonis Rechtspflegerin. Die erste Anhörung fand am 21. Januar 2010 statt. Zu der Anhörung erschien Toni sauber und ordentlich. Er führte aus, dass er seinen Haushalt selbst führe und alles unverändert lassen wolle, ohne Eingriff von außen. Hinsichtlich der Bestellung eines Betreuers äußerte er Bedenken im Zusammenhang mit der Einschränkung seiner finanziellen Unabhängigkeit. Während der Befragung durch das Gericht konnte Toni Fragen zu seinen finanziellen Angelegenheiten schlüssig beantworten. Er hatte fundiertes Wissen über seine monatlichen Geldeingänge, den Saldo seines Kontos und seine monatlichen Ausgaben. Während des Verfahrens hatte Toni jedoch wiederholt seine Zustimmung zur Bestellung eines Betreuers erteilt und

dann wieder zurückgezogen. Toni beantragte auch, einen seiner Freunde als Zeugen zuzulassen, dieser Antrag wurde jedoch abgelehnt, nachdem sein Vater argumentierte, dass dieser Freund „schlechten Einfluss“ auf ihn habe.

Das Gericht hörte einen Sozialarbeiter an, der Toni besucht und seine Situation beurteilt hatte. Der Sozialarbeiter argumentierte, dass Toni unter vollständige Betreuung gestellt werden sollte, eine noch strengere Form der Betreuung, als von Tonis Vater vorgeschlagen wurde. Er bestätigte die Darstellung von Tonis Vater bezüglich der mangelnden Hygiene in Tonis Wohnung und die Notwendigkeit, ihn vor finanzieller Ausbeutung zu schützen. Er erwähnte, dass Toni mehreren Leuten Geld geliehen habe, obgleich diese die Kredite zugegebenermaßen zum überwiegenden Teil zurückzahlten. Er argumentierte, dass sich ein Betreuer um Tonis körperliche und medizinische Erfordernisse sowie seine finanziellen und vermögensrechtlichen Angelegenheiten kümmern und ihn bei der Erlangung gewisser Leistungen, die ihm aufgrund seiner Behinderung zustehen, unterstützen würde.

Das Gericht hörte auch einen von Tonis Nachbarn, der als Zeuge auftrat. Er führte aus, dass Toni in der Gemeinde drei oder vier Freunde habe, die ihm seit vielen Jahren beim Einkaufen halfen, ihn pflegten, wenn er krank war, und regelmäßig mit ihm in die Kirche gingen. Der Staatsanwalt ersuchte das Gericht, zu prüfen, ob es möglich sei, die Geldsummen zu beschränken, die Toni zur Deckung seiner Grundbedürfnisse von der Bank abholen kann, um zu vermeiden, dass er unter Betreuung gestellt wird.

Ein Psychiater, der Tonis Gesundheitszustand beurteilt hatte, sagte vor Gericht aus und erklärte, dass Tonis „körperliche Gebrechen“ bei ihm zu einer „leichten mentalen Retardierung“ geführt hätten und dass es ihm an „Einsicht in seinen Zustand fehle“. Somit fehle es Toni an „ausreichenden geistigen Fähigkeiten, seine eigenen Rechte und Interessen angemessen zu schützen, und wegen seiner fehlenden Einsicht könnte er auch die Rechte und Interessen anderer gefährden“.

Die Rechtspflegerin argumentierte, dass Toni in der Lage sei, seine finanziellen Angelegenheiten zu regeln, und dass er nur minimale Anleitung und Erläuterungen von einer Vertrauensperson benötige, ohne dass ein Betreuer erforderlich sei. Die Rechtspflegerin führte aus, dass sie zu dieser Schlussfolgerung gelangt sei, nachdem sie viel Zeit mit Toni verbracht habe, um ihn kennenzulernen, und dass sie Toni auch weiter unterstützen könnte, falls das Gericht ihr die Genehmigung dazu erteilen sollte.

Das Recht von Zelda besagt, dass ein Betreuer bestellt werden kann „für jede andere Person, die dauerhaft oder vorübergehend nicht in der Lage ist, alle oder einige ihrer Angelegenheiten zu regeln, wenn es keine Person gibt, die ermächtigt und bereit ist, dies in ihrem Namen zu tun“. Zudem müsse die Betreuung das letzte Mittel sein, und die Gerichte müssten weniger einschneidende Alternativen prüfen und die Gründe für das Verwerfen dieser Alternativen und die Entscheidung für die Betreuung erläutern. Zelda ratifizierte

die UN-BRK, die – nach nationalem Recht – Vorrang vor anderslautenden Rechtsvorschriften hat.

Tonis Rechtspflegerin legte dem Gericht eine jüngst ergangene Entscheidung eines anderen Gerichts in Zelda vor, durch die eine Regelung eingeführt wurde, bei der es sich um eine Alternative zur Betreuung handelte – in Form eines Betreuers bei Entscheidungsprozessen. Diese Entscheidung war jedoch isoliert, und ihre Rechtsgrundlage war recht umstritten. Sie legte ferner einen Bericht einer renommierten NRO Zeldas vor, der zahlreiche, von Betreuern begangene Missbräuche dokumentierte.

Am 10. Juni 2010 entzog das Gericht Toni teilweise seine Rechts- und Handlungsfähigkeit, wodurch er nicht mehr über sein Geld und sein sonstiges Vermögen verfügen konnte. Das Urteil stützte sich ausschließlich auf das Gutachten des Psychiaters.

Bitte beurteilen Sie die Handlungsweise des nationalen Gerichts unter dem Gesichtspunkt von Artikel 12 der UN-BRK und des nationalen Rechts von Zelda.



The concept of "disability" in EU law

Seminar for members of the judiciary

Trier, 8 November 2018

Ioanna Dervisopoulos

Judge, Darmstadt Administrative Court,

2006-2014 Référendaire in the private office of Advocate General

Prof. Dr. Dr. Juliane Kokott at the CJEU

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Overview



- Equal treatment in EU law
- Charter of Fundamental Rights
- ECHR
- Agreements under international law
- Directive 2000/78 and ban on discrimination on the grounds of a disability

Historical development



- Beginnings: Prohibition of discrimination on the basis of nationality
- Prohibition of discrimination on the basis of gender
- CJEU judgments on fundamental rights
- Amsterdam Treaty sets broader jurisdiction: new directives
- Charter of Fundamental Rights

Broadening the scope of EU legislation



- Article 13 TEC (introduced 1999 in the Amsterdam Treaty, now Article 19 TFEU)
- Introduction of competence for measures aiming to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Broadening the scope of EU legislation



Directive 2000/78 establishing a general framework for equal treatment in employment and occupation

"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 as regards employment and occupation, with a view to putting into effect in the Member States the **principle of equal treatment.**"

CJEU judgments on fundamental rights



- Originally no guarantee of fundamental rights set out in writing
- **Only in 1969 did the court mention “fundamental rights of the individual” while considering general legal principles (*Stauder* C-29/69)**
- In the protection of fundamental rights the court was guided by the common constitutional conditions of the Member States and the ECHR (*Nold* C-4/73)

Charter of Fundamental Rights



Development

- Following a special procedure, a convention was convened to draw up a draft.

(The convention was composed of government representatives, representatives of national parliaments, the European Parliament and the Commission)

- Nice Treaty: Proclamation of the Charter
- Legally binding since the Lisbon Treaty (1 December 2009):

Charter of Fundamental Rights



- Prohibition of discrimination in the Charter:

provisions on equality in Chapter III

Article 21 Non-discrimination

1: “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”

Charter of Fundamental Rights



- Scope Article 51 (1) CFR
- **“ The provisions of this 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 ...”.**
- Implementing EU law = national legislation within the scope of the law of the European Union, confirmed so far in CJEU case law; cf. judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, point 19

Agreements under international law



- United Nations Convention on the Rights of Persons with Disabilities
 - approved by EU, provisions of the convention thus **“integral part of EU law”**
 - **thus directive 2000/78 “must as far as possible be interpreted in a manner that is consistent with those agreements”.**

Agreements under international law



- Article 267 (1) b) TFEU - checks on the validity of EU acts in the light of agreements under international law?
 - Only if the content of the provisions in question is unconditional and sufficiently precise; CJEU with regard to UNCPD: no (Judgment in *Z*, C-363/12, points 87ff.
 - Test of whether nature and structure of the agreement under international law allow a check on the validity of EU acts on the basis of international law is thus not required

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- Judgment of 11 July 2006, *Chacon Navaz*, C-13/05:
 - disability not defined by the directive, but to be interpreted independently and uniformly
 - Definition of "disability" = "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional **life**" to be distinguished from "sickness", "it must also be probable that [the limitation] will last for a long time".
 - "Sickness" no further unwritten prohibition on discrimination

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- Judgment of 11 April 2013, *Ring*, C-335/11:
 - UNCPD 2009 approved by EU; directive is to be interpreted in the light of the convention
 - Thus: Change to the definition of disability
 - **“a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.”**
 - Thus: not only congenital disability or those arising from injuries, but also disabilities caused by sickness

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- judgments of 18 March 2014, *Z* and *CD*, C-363/12 and C-167/12:
 - Clarification of the definition in *Ring*: **“not only ... the impossibility of exercising a professional activity, but also ... a hindrance to the exercise of such an activity”**
 - Lack of a womb = disability?
 - *Ring*: “full and effective participation ... in professional life **on an equal basis with other workers”**
 - **UNCPD: “full and effective participation in society”**
 - No check on validity using the UNCPD

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- judgment of 18 December 2014, *FOA*, C-354/13:
- Discrimination on grounds of obesity?
- Directive is not to be extended to unspecified forms of discrimination; no general prohibition of discrimination on grounds of obesity under EU law, so EU fundamental rights not applicable
- but: discrimination on grounds of obesity may be discrimination based on disability, contrary to AG no specific BMI; not just impossibility of working activity, but also hindrance to working activity

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- Obesity is thus a disability if on the grounds of his or her obesity the worker is hindered in full and effective participation in working life, and indeed on the basis of limited mobility or the emergence of pathologies which are a hindrance to the performance of his or her work or lead to restrictions to his or her working life

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- judgment of 17 July 2008, *Coleman*, C-303/06: discrimination by association, see also judgment of 16 July 2015, *CEZ Razpredelenie*, C-83/17

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- judgment of 01 December 2016, *Daouidi*, C-395/15: Long-term nature of illness

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- judgment of 09 March 2017, *Milkova*, C-406/15: protection of officials with disabilities

CJEU case law on discrimination on the basis of disability – Directive 2000/78



- judgment of 18 January 2018, *Ruiz Conejero*, C-270/16: repeated absence related to sickness



Thank you for your attention!



Der Begriff der "Behinderung" im Unionsrecht

Seminar für Angehörige der Justiz
Trier, 08. November 2018

Ioanna Dervisopoulos
Richterin, Verwaltungsgericht Darmstadt,
von 2006-2014 Référendaire im Kabinett der Generalanwältin
Prof. Dr. Dr. Juliane Kokott am EuGH



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Überblick

- Gleichbehandlung im Unionsrecht
- Charta der Grundrechte
- EMRK
- Völkerrechtliche Verträge
- Richtlinie 2000/78 und Verbot der Diskriminierung aufgrund einer Behinderung

Historische Entwicklung



- Anfang: Verbot der Diskriminierung aufgrund der Staatsangehörigkeit
- Verbot der Diskriminierung aufgrund des Geschlechts
- EuGH-Grundrechtsurteile
- Vertrag von Amsterdam schafft breitere Zuständigkeiten: neue Richtlinien
- Charta der Grundrechte

3

Erweiterung des Geltungsbereichs der EU-Gesetzgebung



- Art. 13 EG-Vertrag (eingeführt 1999 durch den Vertrag von Amsterdam, jetzt Art. 19 AEUV)
- Einführung einer Zuständigkeit für angemessene Maßnahmen zur Bekämpfung von Diskriminierung aufgrund des Geschlechts, der Rasse oder ethnischen Herkunft, der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung

4

Erweiterung des Geltungsbereichs der EU-Gesetzgebung



Richtlinie 2000/78 zur Schaffung eines allgemeinen Rahmens für die Gleichbehandlung in den Bereichen Arbeit und Beschäftigung

„Artikel 1

Zweck dieser Richtlinie ist die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten.“

5

EuGH-Grundrechtsurteile



- Anfänglich keine schriftlich fixierte Grundrechtsgewährleistung
- Gerichtshof erwähnt erstmals 1969 die in den allgemeinen Rechtsgrundsätzen enthaltenen „Grundrechte der Person“ (Rs. Stauder C-29/69)
- Beim Schutz der Grundrechte ließ sich der Gerichtshof von den den gemeinsamen Verfassungsüberlieferungen der Mitgliedsstaaten und der EMRK leiten (Rs. Nold 4/73)

6

Charta der Grundrechte



Entwicklung

- Ergebnis eines speziellen Verfahrens, ein Konvent wurde mit der Ausarbeitung eines Entwurfs beauftragt
(Konvent setzte sich zusammen aus Regierungsvertretern, Vertretern der nationalen Parlamente, des europäischen Parlaments und der Kommission)
- Vertrag von Nizza: Verkündung der Charta
- Seit dem Vertrag von Lissabon (1. Dezember 2009): rechtsverbindlich

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Charta der Grundrechte



- Diskriminierungsverbot in der Charta:

Bestimmungen zur Gleichheit in Kapitel III

Artikel 21 Nichtdiskriminierung

Abs. 1: „Diskriminierungen, insbesondere wegen des Geschlechts, der Rasse, der Hautfarbe, der ethnischen oder sozialen Herkunft, der genetischen Merkmale, der Sprache, der Religion oder der Weltanschauung, der politischen oder sonstigen Anschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, **einer Behinderung**, des Alters oder der sexuellen Ausrichtung, sind verboten.“

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Charta der Grundrechte



- Geltungsbereich: Artikel 51 Abs. 1 GR-Charta
- „Diese Charta gilt für die Organe und Einrichtungen der Union unter Einhaltung des Subsidiaritätsprinzips und für die Mitgliedstaaten ausschließlich bei der Durchführung des Rechts der Union. Dementsprechend achten sie die Rechte, halten sie sich an die Grundsätze und fördern sie deren Anwendung gemäß ihren jeweiligen Zuständigkeiten.“
- Durchführung des Unionsrechts = einzelstaatliche Gesetzgebung im Geltungsbereich des Rechts der Europäischen Union, Bestätigung der bisherigen Rspr. Des EuGH; vgl. Urteil vom 26. Februar 2013, Åkerberg Fransson, C-617/10,

Rn. 19

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Völkerrechtliche Verträge



- Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen
 - von EU genehmigt, Bestimmungen des Abkommens daher "integrierender Bestandteil der Unionsrechtsordnung"
 - daher ist die Richtlinie 2000/78 „nach Möglichkeit in Übereinstimmung mit diesem Übereinkommen auszulegen“.

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Völkerrechtliche Verträge



- Art 267 Abs. 1 b) AEUV Gültigkeitskontrolle von Rechtsakten der Union am Maßstab völkerrechtlicher Verträge?
 - Nur, wenn die betreffenden Bestimmungen inhaltlich unbedingt und hinreichend genau ist; EuGH im Hinblick auf UNCPD: nein (Urteil Z, C-363/12, Rn. 87ff.
 - Prüfung, ob Art und Struktur des völkerrechtlichen Vertrages eine Kontrolle der Gültigkeit von Unionsrechtsakten anhand des Völkerrechts zulassen, daher nicht erforderlich

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Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteil vom 11. Juli 2006, Chacon Navaz, C-13/05:
 - Behinderung in Richtlinie nicht definiert, aber autonom und einheitlich auszulegen
 - Definition "Behinderung" = "eine Einschränkung, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betreffenden am Berufsleben bildet" und, in Abgrenzung zu "Krankheit", "muss es wahrscheinlich sein, dass die Einschränkung von langer Dauer ist".
 - "Krankheit" kein weiteres, ungeschriebenes Diskriminierungsverbot

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Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteil vom 11. April 2013, Ring, C-335/11:
 - UNCPD 2009 von EU genehmigt, RL ist im Lichte des Abkommens auszulegen
 - Daher: Modifikation der Definition von Behinderung
 - „Einschränkung, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können, und wenn diese Einschränkung von langer Dauer ist.“
 - Daher nicht nur angeborene Behinderungen oder solche, die von Unfällen herrühren, sondern auch von Krankheit verursachte Behinderungen

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Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteile vom 18. März 2014, Z und CD, C-363/12 und C-167/12:
 - Klarstellung der Definition in Rs. Ring: „nicht nur Unmöglichkeit, eine berufliche Tätigkeit auszuüben, sondern auch eine Beeinträchtigung der Ausübung einer solchen Tätigkeit“
 - Fehlende Gebärmutter = Behinderung?
 - Ring: „volle und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern“
 - UNCPD: „volle, wirksame und gleichberechtigte Teilhabe an der Gesellschaft“
- Keine Gültigkeitskontrolle am Maßstab der UNCPD

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Rechtsprechung des EuGH zur
Diskriminierung aufgrund
von Behinderung – RL 2000/78



- Urteil vom 18. Dezember 2014, FOA, C-354/13:
- Diskriminierung wegen Adipositas?
- RL nicht auf ungeschriebene Diskriminierungsverbote auszudehnen, im Unionsrecht kein allgemeines Verbot der Diskriminierung wegen Adipositas, daher auch Unionsgrundrechte nicht anwendbar
- Aber: Diskriminierung wegen Adipositas kann Diskriminierung wegen Behinderung sein, anders als GA kein konkreter BMI; nicht nur Unmöglichkeit der Berufstätigkeit, sondern auch Beeinträchtigung der Berufstätigkeit

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Rechtsprechung des EuGH zur
Diskriminierung aufgrund
von Behinderung – RL 2000/78



- Adipositas dann Behinderung, wenn der AN aufgrund seiner Adipositas an der vollen und wirksamen Teilhabe am Berufsleben gehindert wäre, und zwar aufgrund eingeschränkter Mobilität oder dem Auftreten von Krankheitsbildern, die ihn an der Verrichtung seiner Arbeit hindern oder zu einer Beeinträchtigung seiner Berufstätigkeit führen

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Rechtsprechung des EuGH zur
Diskriminierung aufgrund
von Behinderung – RL 2000/78



- Urteil vom 17. Juli 2008, Coleman, C-303/06: Diskriminierung durch Assoziierung, siehe auch Urteil vom 16. Juli 2015, CEZ Razpredelenie, C-83/17

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Rechtsprechung des EuGH zur
Diskriminierung aufgrund
von Behinderung – RL 2000/78



- Urteil vom 01. Dezember 2016, Daouidi, C-395/15: Langfristigkeit der Erkrankung

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Rechtsprechung des EuGH zur
Diskriminierung aufgrund
von Behinderung – RL 2000/78



- Urteil vom 09. März 2017, Milkova, C-406/15: Schutz von Beamten mit Behinderung

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Rechtsprechung des EuGH zur
Diskriminierung aufgrund
von Behinderung – RL 2000/78



- Urteil vom 18. Januar 2018, Ruiz Conejero, C-270/16: wiederholte, krankheitsbedingte Fehlzeiten

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Vielen Dank für Ihre Aufmerksamkeit!

Case Study III

Ms Z. is a teacher. She suffers from a rare condition where although she has healthy ovaries and is fertile, she has no uterus and cannot therefore become pregnant. Ms Z. and her husband decide to have a child with the help of a surrogate mother. Surrogacy is not prohibited under national law.

Under Ms Z.'s terms of employment there is provision for paid maternity and adoption leave. Since Ms Z. has not been pregnant and has not given birth to a child, she does not meet the conditions set out in national law to be granted maternity leave. Since she has also not adopted the child born through surrogacy, she is also not eligible for adoption leave under the provisions of national law.

Ms Z. applies to the competent government department grant for leave equivalent to adoption leave. The government department rejects this application on the grounds that Ms Z. does not meet any of the conditions set out in the existing rules for maternity and adoption leave.

Ms Z. therefore brings a case against the government department before the competent equality tribunal. She asserts that she has been discriminated against on the grounds of a disability, that the government department has failed to make adequate provision for her as a person with a disability, and that the government department has refused to grant her paid leave equivalent to maternity or adoption leave.

You are the competent national judge of the equality tribunal to hear the case. Ms Z. applies to you for a referral to the CJEU. Please consider your answers to the following questions:

- 1) Are you empowered or even required to make such a referral?
- 2) What do you need to take into account for the referral? What form and what content should the reference for a preliminary ruling have?
- 3) What question or questions will you put to the CJEU?
- 4) What answers are the CJEU likely to give to your question(s)?

Case Study III

Frau Z. ist Lehrerin. Sie leidet an einer seltenen Fehlbildung, infolge derer sie, obwohl sie über gesunde Eierstöcke verfügt und fruchtbar ist, keine Gebärmutter hat und deshalb nicht schwanger werden kann. Frau Z. und ihr Ehemann entschieden sich dazu, ein Kind mit Hilfe einer Leihmutter zu bekommen. Leihmutterschaft ist nach nationalem Recht nicht verboten.

Die Arbeits- und Beschäftigungsbedingungen von Frau Z. sehen einen Anspruch auf bezahlten Mutterschafts- und Adoptionsurlaub vor. Da Frau Z. nicht schwanger war und kein Kind geboren hat, erfüllt sie aber nicht die im nationalen Recht festgelegten Voraussetzungen für die Gewährung eines Mutterschaftsurlaubs. Da sie das aus der Ersatzmutterschaft hervorgegangene Kind nicht adoptiert hat, kann sie auch keinen Adoptionsurlaub nach den Voraussetzungen des nationalen Rechts in Anspruch nehmen.

Frau Z. beantragte bei dem zuständigen Government Department die Gewährung eines dem Adoptionsurlaub entsprechenden Urlaubs. Das Government Department lehnte diesen Antrag mit der Begründung ab, Frau Z. erfülle nicht die in den bestehenden Regelungen zum Mutterschafts- und Adoptionsurlaub vorgesehenen Voraussetzungen.

Daher erhob Frau Z. vor dem zuständigen Equality Tribunal Klage gegen das Government Department. Sie macht geltend, dass sie wegen einer Behinderung diskriminiert worden sei, dass das Government Department es unterlassen habe, angemessene Vorkehrungen für sie als Person mit Behinderung zu treffen, und dass das Government Department es abgelehnt habe, ihr einen dem Mutterschafts- oder Adoptionsurlaub entsprechenden bezahlten Urlaub zu gewähren.

Sie sind der für den Rechtsstreit zuständige nationale Richter des Equality Tribunal. Frau Z. beantragt bei Ihnen eine Vorlage an den EuGH. Bitte überlegen Sie sich Antworten auf die folgenden Fragen:

- 1) Sind sie zu einer Vorlage berechtigt oder sogar verpflichtet?
- 2) Was müssen Sie bei der Vorlage beachten? Welche Form und welchen Inhalt sollte das Vorabentscheidungsersuchen haben?
- 3) Welche Frage(n) würden Sie dem EuGH stellen?
- 4) Welche Antworten wird der EuGH voraussichtlich auf Ihre Frage(n) geben?

The Concept of Reasonable Accommodation

EJ Philip Rostant



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Funded by the European Union's REC Programme (2014-2020)

Reasonable Accommodation and the UNCRPD

- 2. 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.
- 3. **In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.**
- Article 5.

The Framework Directive

“The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.”

Recital 16.

Article 5 - The Framework Directive

- Measure to ensure **compliance with the principle of equal treatment**
- Requires employers to take **appropriate measures**, where **needed in a particular case**, to enable a person with a disability to have **access to, participate in, or advance in employment**, or to undergo **training**.
- **Unless** such measures would impose a **disproportionate burden** on the employer.

Key Concepts

- “a person with a disability”
- “in a particular case”
- “access” “participate” “advance”
- “needed” and “appropriate”
- “disproportionate burden”

“a person with a disability”

- No duty owed to persons “perceived” to have a disability or “associated” with some one with a disability.
- Without a clear understanding of the nature of the disability
 - The court cannot assess whether the duty arises at all,
 - Or, if it does, what accommodation is needed

“in a particular case”

- The duty is owed to an individual (with a disability) by the employer
- It will be difficult to discharge the duty without a proper dialogue between the employer and the employee

“access” “participate” “advance”

- “This Directive **does not require the recruitment, promotion, maintenance in employment or training** of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, **without prejudice to the obligation to provide reasonable accommodation for people with disabilities**”
- *Recital 17*

“appropriate”

- “appropriate measures should be provided, ie effective and practical measures to adapt the workplace for the disability, for example **adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources**”
- *Recital 20*

“needed”

- Article 2 of the convention uses the word “necessary” and the two concepts are the same.
- The duty is discharged by the provision of an accommodation that addresses the barrier. The accommodation can be the least expensive, least disruptive, or most easily provided, provided it is effective.

Effective



Ineffective



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Unnecessary



“disproportionate burden”

- “To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other **cost entailed**, the scale and financial **resources of the organisation** or undertaking and the possibility of obtaining **public funding**”
- Recital 21

THANK YOU

The Burden of Proof in Disability Discrimination Cases

EJ Philip Rostant



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Funded by the European Union's REC Programme (2014-2020)

Directive 2000/78 (the Framework Directive)

Article 10

Member States shall take such measures as are necessary, in accordance with their national judicial systems, 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.

Burden of proof-Disability

“The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

However, it is not for the respondent to prove that the plaintiff... has a particular disability...”

(Recital 31 Framework Directive-quoted in *Daouidi v Bootes Plus SL and others* ([Case C-395/15](#))

The Protected Characteristic of Disability

- A person with a disability.
- A person associated with a person with a disability. (Coleman C-303/06)
- A person perceived to be disabled?

Proving
Disability

Impairment / Limitation

Long term

Functional deficit

Barriers hindering full and
effective participation

In the workplace

Disability
Discrimination

Direct Discrimination

Indirect Discrimination

Harassment

Reasonable Accommodation

Victimisation

Proving Discrimination

“The directive(s) opted for a mechanism making it possible to lighten, though not remove, the burden on the victim”

AG Mengozzi C-415/10
Meister (p 22)

A Two Stage Test

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, (1) **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.

A Two Stage Test

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, (1) 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, (2) **it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.**

| The Role of
the Court

“ verify that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.”

Firma Feryn NV. Case C-54/07

Direct Discrimination and Victimisation
The First Stage (1)

Find primary facts.

The First Stage (2)

Draw Inferences

Has the burden shifted?

Negative treatment + Difference of characteristics \neq Shift

But

Negative Treatment + Difference of Characteristic + “Something more” = A “non-conclusive presumption”* = Shift

*Asociatia ACCEPT v Consiliul National pentru Combaterea Discriminarii [2013] EUECJ C-81/12 para 54

Something More? Access to information

Kelly and Meister

Where rules of procedure operate in such a way as to risk the achievement of the objectives of the directive (97/80) it is for the national court to

“take all appropriate measures to ensure that that did not occur”.

Chez

“Matters that may be taken into consideration include the fact that, notwithstanding requests to this effect from the referring judge..., CHEZ RB failed to adduce evidence”

Stage 2- The Employer's Explanation

“it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”

(Article 10)

This may be done by any “legally permissible means”

(Asociatia ACCEPT para 56)

Indirect Discrimination (1)

First stage

Has the claimant established a **prima facie case** that there is a provision, criteria or practice which puts persons with a disability at a particular disadvantage and which causes her detriment?

Yes? Second Stage.

No? Claim fails.

Indirect Discrimination (Stage 2)

Second stage

Has the employer shown **cogent evidence which disproves the existence of any of the elements** of the complaint?

Yes? Claim fails.

No? Justification.

Justification (3)

Justification

Can the employer **justify** the provision, practice or criteria (PCP) by showing that it has a legitimate aim and that the means chosen to meet that aim, the PCP, is appropriate and necessary ?

No? Claim succeeds.

Yes? Claim fails.

Harassment

The burden rests upon the claimant to show that unwanted conduct took place and that it had the **purpose or effect proscribed by Article 2(3)**.

The claimant would then need to show facts from which it could be presumed that the **conduct related to disability**.

If the burden shifts then the employer would be required to show that the conduct was **not related to disability**.

Reasonable accommodation

The claimant must show the existence of some aspect of their work (a PCP, the nature of the work itself or some feature of the work place) that prevents (or hinders) their access to, participation in, or advancement in, employment; or to undergo training because of their disability.

If so

The employer must prove that any measure to combat this would be disproportionate.

THANK YOU

Beweislast in behindertenrechtlichen Verfahren

Philip Rostant, Arbeitsrichter



JUDICIAL
COLLEGE



Gefördert durch das Programm „Rechte, Gleichstellung und Unionsbürgerschaft“ (2014-2020) der Europäischen Union

Richtlinie 2000/78 (Rahmenrichtlinie)

Artikel 10

Die Mitgliedstaaten ergreifen im Einklang mit dem System ihrer nationalen Gerichtsbarkeit die erforderlichen Maßnahmen, nach denen dann, wenn Personen, die sich durch die Verletzung des Gleichbehandlungsgrundsatzes für beschwert halten und bei einem Gericht bzw. einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.

Beweislast – Behinderung

„Eine Änderung der Regeln für die Beweislast ist geboten, wenn ein glaubhafter Anschein einer Diskriminierung besteht. Zur wirksamen Anwendung des Gleichbehandlungsgrundsatzes ist eine Verlagerung der Beweislast auf die beklagte Partei erforderlich, wenn eine solche Diskriminierung nachgewiesen ist.

Allerdings obliegt es dem Beklagten nicht, nachzuweisen, dass der Kläger... eine bestimmte Behinderung aufweist...“

(Erwägungsgrund 31 der Rahmenrichtlinie – zitiert in Daouidi gegen Bootes Plus SL u. a. ([Rechtssache C-395/15](#)))

Das geschützte Merkmal „Behinderung“

- Eine Person mit einer Behinderung.
- Eine Person, die mit einem behinderten Menschen eng verbunden ist.
(Coleman C-303/06)
- Eine als behindert wahrgenommene Person?

Behinderung
beweisen

Beeinträchtigung / Einschränkung

Langfristig

Funktionelles Defizit

Barrieren, die die volle und
wirksame Teilhabe verhindern

Am Arbeitsplatz

Diskriminierung
wegen einer
Behinderung

Unmittelbare Diskriminierung

Mittelbare Diskriminierung

Belästigung

Angemessene Vorkehrungen

Viktimisierung

Diskriminierung
beweisen

„Die Richtlinien haben sich in Bezug auf die Beweislast für ein Verfahren entschieden, das die Beweislast des Opfers erleichtern kann, ohne diese zu beseitigen“

GA Mengozzi C-415/10
Meister (Erwägungsgrund 22)

Zweistufige Prüfung

Die Mitgliedstaaten ergreifen im Einklang mit dem System ihrer nationalen Gerichtsbarkeit die erforderlichen Maßnahmen, nach denen dann, (1) **wenn Personen, die sich** durch die Verletzung des Gleichbehandlungsgrundsatzes **für beschwert halten** und bei einem Gericht bzw. einer anderen zuständigen Stelle Tatsachen **glaubhaft machen**, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.

Zweistufige Prüfung

Die Mitgliedstaaten ergreifen im Einklang mit dem System ihrer nationalen Gerichtsbarkeit die erforderlichen Maßnahmen, nach denen dann, (1) wenn Personen, die sich durch die Verletzung des Gleichbehandlungsgrundsatzes für beschwert halten und bei einem Gericht bzw. einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, (2) **es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.**

Die Rolle des
Gerichts

„zu prüfen, ob die diesem Arbeitgeber vorgeworfenen Tatsachen glaubhaft sind, und zu beurteilen, ob die Beweise zur Stützung des Vorbringens des Arbeitgebers, dass er den Gleichbehandlungsgrundsatz nicht verletzt habe, ausreichend sind.“

Firma Feryn NV. Rechtssache C-54/07

Unmittelbare Diskriminierung und Viktimisierung
Erste Stufe (1)

**Primäre Tatsachen
finden**

Erste Stufe (2)

Folgerungen ziehen

Hat sich die Beweislast verlagert?

Negative Behandlung + unterschiedliche
Merkmale \neq Verlagerung

Aber

Negative Behandlung + unterschiedliche
Merkmale + „etwas mehr“ = eine „widerlegbare
Vermutung“* = Verlagerung

*Asociația ACCEPT gegen Consiliul Național pentru Combaterea Discriminării [2013] EuGH C-81/12
Randnr. 54

Etwas mehr? Zugang zu Informationen

Kelly und Meister

Wenn Verfahrensvorschriften bewirken, dass die Erreichung der Ziele der Richtlinie (97/80) gefährdet wird, muss das nationale Gericht „alle geeigneten Maßnahmen ergreifen um zu gewährleisten, dass dies nicht geschieht“.

Chez

„Zu den Gesichtspunkten, die Berücksichtigung finden können, zählt auch der vom vorlegenden Gericht erwähnte Umstand, dass CHEZ RB trotz entsprechender Aufforderungen dieses Gerichts (...) davon abgesehen hat, (...) Beweise beizubringen (...)“

Stufe 2 – Erklärung des Arbeitgebers

„es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat“

(Artikel 10)

Dies kann „mit allen rechtlich vorgesehenen Mitteln“ geschehen

(Asociatia ACCEPT Randnr. 56)

Mittelbare Diskriminierung (1)

Erste Stufe

Hat der Kläger **einen ersten Anschein** von Vorschriften, Kriterien oder Verfahren glaubhaft gemacht, die Personen mit einer Behinderung in besonderer Weise benachteiligen und ihnen schaden?

Ja? Zweite Stufe.

Nein? Klage scheitert.

Mittelbare Diskriminierung (Stufe 2)

Zweite Stufe

Hat der Arbeitgeber **stichhaltige Beweise vorgelegt, die das Vorliegen eines der Beschwerdegründe widerlegen?**

Ja? Klage scheidet.

Nein? Rechtfertigung.

Rechtfertigung (3)

Rechtfertigung

Kann der Arbeitgeber die Vorschriften, Kriterien oder Verfahren **rechtfertigen**, indem er nachweist, dass sie ein legitimes Ziel verfolgen und dass die Mittel zur Erreichung dieses Ziels – die Vorschriften, Kriterien oder Verfahren – angemessen und erforderlich sind?

Nein? Klage hat Erfolg.

Ja? Klage scheidet.

Belästigung

Es obliegt dem Kläger, nachzuweisen, dass die unerwünschten Verhaltensweisen stattgefunden haben und dass sie **die Folgen nach Artikel 2 Absatz 3 bezweckt oder bewirkt haben**.

Der Kläger müsste dann Tatsachen nachweisen, die vermuten lassen, dass die **Verhaltensweisen im Zusammenhang mit der Behinderung standen**.

Verlagert sich die Beweislast, müsste der Arbeitgeber nachweisen, dass die Verhaltensweisen **nicht im Zusammenhang mit der Behinderung standen**.

Angemessene Vorkehrungen

Der Kläger muss nachweisen, dass es Aspekte seiner Arbeit (Vorschriften, Kriterien oder Verfahren, der Charakter der Arbeit selbst oder ein Merkmal des Arbeitsplatzes) gibt, die aufgrund seiner Behinderung seinen Zugang zur Beschäftigung, seine Ausübung des Berufes oder seinen beruflichen Aufstieg bzw. seine Teilnahme an Aus- und Weiterbildungsmaßnahmen verhindern (oder behindern).

Ist dies der Fall

muss der Arbeitgeber nachweisen, dass Maßnahmen zur Bekämpfung dieser Auswirkungen unverhältnismäßig wären.

VIELEN DANK

Data Protection in employment and beyond for persons with disabilities

Catherine Casserley



This presentation

- Scope of the GDPR
- Importance for PWD
- Discrimination/harassment and data protection

GDPR - definitions

- **applies in relation to “personal data”**
- any information relating to an identified or identifiable **natural person** (**‘data subject’**); **an identifiable natural person** is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; (Art 4(1))

scope

- Applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system (Art 2)

Definitions

- **“processing”** – any operation performed on personal data, including collection recording, storage, disclosure by transmission dissemination or otherwise making available (Art 4)
- **“controller”** – natural or legal person public authority or other body which determines the means of the processing
- **“processor” means person public authority** etc which process personal data on behalf of a controller

Data protection principles – Article 5

- Lawful, fair, transparent
- Collected for specified explicit and legitimate purposes – purpose limitation
- Adequate relevant and limited to what is necessary – data minimalisation
- Accurate and kept up to date
- Kept in a form which permits identification for no longer than is necessary – storage limitation
- Processed in a manner which ensures appropriate security - integrity

Lawfulness of processing (art 6)

Lawful only if:

- Data subject given consent
- Related to contract DS party to
- Necessary for legal obligation
- To protect vital interests of DS or another
- Necessary for perf of task in public interest or official authority
- Necessary for purposes of legitimate interest pursued by controller or third party unless ints overridden by ints or fundamental rights of

Article 9 – processing of special categories

- Processing of data *inter alia* concerning health prohibited unless falls within paragraph ((2) as follows:
 - (a) DS given explicit consent
 - Necessary for purposes of carrying out obligations and exercising rights of controller or DS in field of employment and social security
 - Necessary to protect the vital interest of DS or another where DS is physically or legally incapable of giving consent
 - Processing carried out by not for profit bodies

Article 9

- Relates to personal data made public by DS
- Necessary for legal claims
- Necessary for substantial public interest
- Necessary for preventative or occupational medicine
- Necessary for public interest in public health
- Necessary for public interest in scientific or history research, with sufficient safeguards

Remedy

- DS have right to object to processing, erasure and to claim compensation for breach of data processing provisions

Relevance for disabled people

- Likely to fall within “special category” of data
- **“disclosure”**, for those with non visible disabilities, a significant issue, often because of concerns of confidentiality
- Interaction between maintaining confidentiality and discrimination/harassment

Employment

- Pre-employment questions about health?
- Requiring disclosure – s.60 Equality Act 2010
- Direct discrimination? Article 2(2) Directive 2000/78 EC
- Also harassment Article 2(3)
- UNCRPD 22 (2) – right to privacy

Employment

- Reasonable accommodation – Article 5
- **“where needed in a particular case”** – may be disclosure of information, will need to ensure compliance with GDPR
- Otherwise not only breach, may amount to harassment
- **e.g. telephoning an employee’s parent to tell them of concern about their health**

Beyond employment

- Education and occupation
- Use of disclosure of medical information to inform how tutors interact with disabled students – ensure consent obtained

Services

- Common cases of discrimination and breach of GDPR arise in healthcare/dentistry settings e.g. HIV
- Lack of understanding of what **“processing” involves** – and the sensitivity of personal data

Thank you for listening!
Any questions?

- Catherine Casserley
 - Cloisters
 - cc@cloisters.com
 - 02078274026

CASE STUDIES TRIER NOVEMBER 2018

Rajesh Mistry sends you the following statement. He would like your advice on what he should do

STATEMENT OF RAJESH MISTRY

- 1) I am Rajesh Mistry of 79 Astor Close, Ealing, London. I am 55 years old. I have had a visual impairment since birth and am registered blind although I can see shadows. I prefer to read in braille. I am fully mobile, walking with the aid of a long cane.
- 2) I have a degree in music and a certificate in Education. I have been a fully qualified teacher for 21 years and have taught in a variety of primary schools in and around Liverpool. For the last 6 ½ years I was a music teacher at a school in Liverpool.
- 3) At the beginning of this year, the school made a number of cuts in various teaching budgets and I was made redundant. I looked for similar employment in the Liverpool area. The post of Music Co-ordinator for which I applied was advertised in the Times Educational Supplement in February. I get this and other newspapers on tape. I requested an application form which I received together with a job description and a person specification. The job was paying £30,000 per year. I believed that I had all the qualifications and experience requested for the post and so I completed the application form on my word processor. I, however, deleted the part of the form which asked if I had any disabilities. I did not believe it to be necessary to answer this question because I did not need any adjustments to be made for me at the interview.
- 4) I was shortlisted for the post and was invited for interview on 12th March. I travelled to the interview alone. I was shown into the interview room and to a chair by the receptionist. The Head Teacher of the school, Andrew Holden who was chairing the interview, greeted me but he did not introduce me to any of the other panel members. I was aware that there were other people in the room so I asked Mr Holden politely if I could know who else was in the room. Mr Holden started to give me the names of the other three panel members so I asked if they would introduce themselves to me so that I could get a better impression of who they were and where they were sitting. Mr Holden agreed to my request but I thought from the tone of his voice that he was irritated.
- 5) During the interview the panel members acknowledged that I was extremely well qualified for the post. One of the panel members, Mrs

Alison Martin, asked how I would deal with the level of paperwork involved with the post of Music Co-ordinator. She remarked that unlike a Music Teacher, as the Music Co-ordinator my job would involve planning the music curriculum for the whole year and preparing and checking lesson plans. I would also be expected to prepare reports about the provision of music teaching within the school on a regular basis. I started to explain that I used a personal computer with specialist software for music and a braille embosser as well as a personal assistant/reader but Mr Holden interrupted me by saying that the school's resources would not stretch to the cost of such equipment. I went onto explain that I personally owned some of the necessary equipment and that the Access To Work Scheme part fund the rest and the personal assistant/reader.

- 6) Mrs Martin then commented that she didn't understand how someone like me would be able to cope with the demands of the job. I felt quite affronted by her comments, given my long history in teaching and the fact that I can cope perfectly well.
- 7) At the end of the interview Mr Holden told me that they would be writing to all the candidates being interviewed within the next 2 weeks. I asked if I could be informed by telephone or tape. I was not telephoned but 2 weeks later received a letter from Mr Holden informing me that I had been unsuccessful for the post. I telephoned the school and was put through to Mr Holden's secretary. She was a little impatient with me and said that Mr Holden was a difficult man to get hold of and then she said he was just a difficult man generally. I left a message asking him to call me but when he did not do so I wrote to ask him why I had been unsuccessful. I received a letter from his secretary a week later saying that Mr Holden would be out of the country during the Easter break.
- 8) I believe that the reasons why I was unsuccessful for the post were all related to my disability. I believe that the panel members were surprised when they realised that I had a visual impairment and that the Chair of the interview panel, Mr Holden, was irritated by my request that the other panel members introduce themselves to me. This influenced the way in which he conducted the interview. I also believe that Mr Holden thought that that I would be a financial burden on the school and would not be able to deal with all the paperwork involved with the job.

A. How would you advise Mr Mistry?

2. Ms Brown

Summary of Mrs Brown's situation

Ms Brown has been employed by Tin Borough Council for 6 years as a revenue collections officer (dealing with the collection of council tax). During that time she has carried out her duties well and she enjoys her job. She has had depression in the past but it has never led to her having more than a week or two off work and it is controlled by medication. She has never told her employers of her depression as she does not see the need to do so and would prefer to keep her private life to herself.

Her mother is taken ill and subsequently dies. Ms Brown has some time off to deal with her mother's death and illness and then returns to work. She has a new manager when she returns, as her previous manager has left. In addition, one of her closest colleagues has also left and is replaced by someone that she finds she does not get on with very well. Her new manager starts to question the way in which she writes her responses to queries that she receives from council tax payers and asks her to re-write her responses on a number of occasions. Mrs Brown begins to find the situation very stressful and feels that she is being picked on by this manager. She also feels that he is ganging up on her with the new member of staff and that he wants her to leave.

She visits her doctor as a result of the stress that she feels under and her doctor increases her medication: he also gives her a note which says that she cannot go to work as a result of her depression. She sends this note to her employer.

Her manager contacts her when he receives the note and asks her if her depression is new or whether she had it previously. When she says that she has had it for some time, he is very angry and starts proceedings to dismiss her for withholding her medical condition from her employer.

Mrs Brown comes to you for advice. How would you advise her?

3. Mr Black

Mr Black works in a supervisory role as a staff nurse on a general hospital ward and has done so for the past 20 years. He has a very good work record and is liked and respected by his colleagues. He has had some ill health recently and receives a diagnosis of Parkinson's disease. His doctor says that he can continue to work but that his condition will be

kept under regular review. Mr Black tells his manager about his condition, and also tells two of his colleagues.

Mr Black's manager is concerned about the impact that his condition will have on patient safety. The two colleagues that Mr Black has told are also concerned and speak to his manager about the impact that his condition may have on his work. They also talk to other colleagues about this, who approach his manager to complain about the prospect of being managed by him.

Following a meeting with Mr Black his manager decides to remove him from his supervisory role as a staff nurse and to relegate him to a role as nursing assistant so that he no longer has responsibility for other staff and overall responsibility for patient care.

Mr Black approaches you for advice about his situation.

FALLSTUDIEN TRIER NOVEMBER 2018

Rajesh Mistry sendet Ihnen die folgende Aussage. Er bittet Sie um Ihren Rat dazu, wie er vorgehen sollte.

AUSSAGE VON RAJESH MISTRY

- 1) Ich bin Rajesh Mistry, wohnhaft 79 Astor Close, Ealing, London. Ich bin 55 Jahre alt. Ich bin seit Geburt sehbehindert und als blind registriert, obwohl ich Schatten erkennen kann. Beim Lesen bevorzuge ich Braille-Schrift. Ich bin vollständig mobil, wobei ich beim Gehen einen Langstock benutze.
- 2) Ich habe ein Musikstudium absolviert und habe einen pädagogischen Abschluss. Ich bin seit 21 Jahren vollqualifizierter Lehrer und habe an einer Vielzahl von Primarschulen in und um Liverpool unterrichtet. Während der letzten 6 ½ Jahre war ich Musiklehrer an einer Schule in Liverpool.
- 3) Anfang diesen Jahres kürzte die Schule diverse Budgets für den Lehrbetrieb, und ich wurde entlassen. Ich suchte eine ähnliche Beschäftigung im Raum Liverpool. Die Stelle des Musikkoordinators, um die ich mich bewarb, wurde im Februar im Bildungsanzeiger der Times veröffentlicht. Ich erhalte diese und andere Zeitungen auf Band. Ich forderte ein Bewerbungsformular an, das ich zusammen mit einer Stellenbeschreibung und einem Anforderungsprofil erhielt. Die Stelle war mit einem Jahresentgelt von 30 000 £ dotiert. Meiner Meinung nach verfügte ich über alle für die Stelle geforderten Qualifikationen und Erfahrungen, daher füllte ich das Bewerbungsformular an meinem Textverarbeitungssystem aus. Allerdings löschte ich den Teil des Formulars, in dem nach Behinderungen gefragt wurde. Ich hielt es nicht für nötig, diese Frage zu beantworten, weil für mich für das Bewerbungsgespräch keinerlei Vorkehrungen getroffen werden mussten.
- 4) Ich kam in die engere Wahl für die Stelle und wurde für den 12. März zum Bewerbungsgespräch eingeladen. Ich reiste alleine zu dem Bewerbungsgespräch an. Die Rezeptionistin führte mich in den Raum für das Bewerbungsgespräch und zu einem Stuhl. Der Schulleiter, Andrew Holden, der das Bewerbungsgespräch leitete, begrüßte mich, aber stellte mich keinem der anderen Mitglieder des Gremiums vor. Mir war bewusst, dass weitere Personen im Raum waren, daher fragte ich Herrn Holden höflich, ob ich erfahren dürfte, wer noch im Raum sei. Herr Holden begann, mir die Namen der drei anderen Gremiumsmitglieder zu nennen, also fragte ich, ob sie sich mir selbst

vorstellen würden, damit ich einen besseren Eindruck davon erlangen könnte, wer sie sind und wo sie sitzen. Herr Holden ging auf meine Bitte ein, aber der Ton seiner Stimme ließ mich erkennen, dass er irritiert war.

- 5) Während des Gesprächs erkannten die Gremiumsmitglieder an, dass ich für die Stelle extrem gut qualifiziert war. Eines der Gremiumsmitglieder, Frau Alison Martin, fragte, wie ich den mit der Stelle des Musikkoordinators verbundenen Verwaltungsaufwand bewältigen würde. Sie merkte an, dass – anders als bei einem Musiklehrer – meine Aufgabe als Musikkoordinator die Planung des Musiklehrplans für das ganze Jahr sowie die Planung und Kontrolle von Unterrichtsplänen umfassen würde. Erwartet würde von mir auch die regelmäßige Erstellung von Berichten über die Erbringung des Musikunterrichts innerhalb der Schule. Ich begann zu erklären, dass ich einen Personalcomputer mit spezieller Software für Musik und einen Brailledrucker sowie einen persönlichen Assistenten/Vorleser nutzte, aber Herr Holden unterbrach mich, indem er sagte, dass die Kosten derartiger Ausrüstung nicht aus den Mitteln der Schule bestritten werden könnten. Ich erläuterte weiter, dass ich persönlich einen Teil der nötigen Ausrüstung besäße und dass der Fonds des Programms „Zugang zu Beschäftigung“ den Rest und den persönlichen Assistenten/Vorleser teilfinanzieren würde.
- 6) Frau Martin merkte dann an, dass sie nicht verstehe, wie jemand wie ich den Anforderungen der Stelle gewachsen sein sollte. Angesichts meiner langen Lehrtätigkeit und der Tatsache, dass ich insgesamt perfekt zurechtkomme, fühlte ich mich von ihren Bemerkungen etwas vor den Kopf gestoßen.
- 7) Am Ende des Gesprächs sagte mir Herr Holden, dass sie sich innerhalb der nächsten zwei Wochen schriftlich bei allen Bewerbern melden würden. Ich bat darum, telefonisch oder auf Band informiert zu werden. Ich erhielt keinen Telefonanruf, aber zwei Wochen später erhielt ich ein Schreiben von Herrn Holden, in dem ich darüber in Kenntnis gesetzt wurde, dass meine Bewerbung um die Stelle nicht erfolgreich gewesen sei. Ich rief in der Schule an und wurde zur Sekretärin von Herrn Holden durchgestellt. Sie war etwas ungeduldig mit mir und sagte, dass Herr Holden schwer zu erreichen sei, und dann sagte sie, dass er allgemein ein schwieriger Mann sei. Ich hinterließ eine Nachricht und bat um seinen Rückruf, aber als dieser ausblieb, schrieb ich ihm und fragte, warum ich keine Erfolg gehabt hatte. Eine Woche später erhielt ich einen Brief von seiner Sekretärin, in dem sie mich wissen ließ, dass Herr Holden während der Osterferien außer Landes sein würde.

8) Meiner Meinung nach standen alle Gründe dafür, dass meine Bewerbung um die Stelle nicht erfolgreich war, mit meiner Behinderung in Zusammenhang. Ich denke, dass die Gremiumsmitglieder überrascht waren, als sie meine Sehbehinderung realisierten, und dass der Vorsitzende des Bewerbungsgremiums, Herr Holden, durch meine Bitte irritiert war, dass sich die anderen Gremiumsmitglieder selbst vorstellen mögen. Dies beeinflusste die Art und Weise, in der sie das Bewerbungsgespräch führten. Ich glaube ferner, dass ich nach Ansicht von Herrn Holden eine finanzielle Belastung für die Schule darstellen würde und nicht in der Lage wäre, den mit der Stelle verbundenen Verwaltungsaufwand zu bewältigen.

A. Wie würden Sie Herrn Mistry beraten?

2. Frau Brown

Zusammenfassung der Situation von Frau Brown

Frau Brown ist seit sechs Jahren beim Tin Borough Council als Steuerbeamtin (zuständig für die Erhebung von Gemeindesteuer) beschäftigt. In dieser Zeit hat sie ihre Aufgaben gut ausgeführt, und sie mag ihre Arbeit. Sie litt in der Vergangenheit unter Depressionen, aber sie musste der Arbeit nie mehr als ein oder zwei Wochen fernbleiben, und die Erkrankung wird medikamentös behandelt. Sie hat ihrem Arbeitgeber nie von ihrer Depression erzählt, da sie dafür keine Notwendigkeit sieht, und zieht es vor, ihr Privatleben für sich zu behalten.

Ihre Mutter wird krank und stirbt in der Folge. Frau Brown nimmt sich eine Auszeit, um mit dem Tod und der Erkrankung ihrer Mutter fertig zu werden, und kehrt dann an ihren Arbeitsplatz zurück.

Sie hat einen neuen Vorgesetzten, da ihr früherer Vorgesetzter nicht mehr da ist. Außerdem ist auch einer ihrer engsten Kollegen nicht mehr da, und wurde durch jemand ersetzt, mit dem sie nach eigener Auffassung nicht besonders gut klar kommt.

Ihr neuer Vorgesetzter beginnt, die Art und Weise, in der sie ihre Antworten auf Anfragen von Gemeindesteuerzahlern abfasst, zu hinterfragen, und fordert sie in mehreren Fällen auf, ihre Antworten neu zu formulieren. Frau Brown beginnt, ihre Situation als sehr stressig zu empfinden, und hat das Gefühl, dass dieser neue Vorgesetzte es auf sie abgesehen hat. Sie hat ferner das Gefühl, dass er sich mit dem neuen

Kollegen gegen sie verbündet, und dass er möchte, dass sie die Organisation verlässt.

Aufgrund der empfundenen Stressbelastung sucht sie ihren Arzt auf, der ihre Medikation erhöht. Ferner stellt er ihr ein Attest aus, das besagt, dass sie aufgrund ihrer Depression nicht arbeiten gehen könne. Sie sendet dieses Attest an ihren Arbeitgeber.

Als ihr Vorgesetzter das Attest erhält, kontaktiert er sie und fragt, ob ihre Depression neu sei, oder ob sie diese schon früher hatte. Als sie sagt, dass sie diese bereits seit einiger Zeit habe, ist er sehr aufgebracht und strengt ein Kündigungsverfahren an, weil sie ihren Arbeitgeber nicht über ihren Gesundheitszustand in Kenntnis gesetzt hat.

Frau Brown kommt zu Ihnen und sucht Ihren Rat. Wie würden Sie sie beraten?

3. Herr Black

Herr Black arbeitet in leitender Funktion als Stationspfleger in der allgemeinen Abteilung eines Krankenhauses, und zwar bereits seit 20 Jahren. Seine Leistungsbeurteilungen sind sehr gut, und seine Kollegen mögen und respektieren ihn. Es ging ihm in letzter Zeit gesundheitlich nicht gut, und schließlich wird bei ihm Parkinson diagnostiziert. Nach Aussage seines Arztes kann er weiterhin arbeiten, sein Zustand wird jedoch regelmäßig überprüft werden. Herr Black informiert seinen Vorgesetzten über seinen Zustand und erzählt auch zwei seiner Kollegen davon.

Der Vorgesetzte von Herrn Black macht sich Sorgen über die Auswirkungen, die sein Zustand auf die Patientensicherheit haben wird. Die zwei Kollegen, denen Herr Black davon erzählt hat, sind ebenfalls besorgt und sprechen seinen Vorgesetzten auf die Auswirkungen an, die sein Zustand auf seine Arbeit haben kann. Sie sprechen auch mit anderen Kollegen darüber, die seinen Vorgesetzten ansprechen, um wegen der Perspektive, Herrn Black künftig weiterhin als Vorgesetztem unterstellt zu sein, Beschwerde zu erheben.

Nach einem Gespräch mit Herrn Black entscheidet sein Vorgesetzter, ihn seiner leitenden Funktion als Stationspfleger zu entheben und zum Pflegehelfer herabzustufen, damit er nicht mehr die Verantwortung für andere Mitarbeiter und die allgemeine Verantwortung für die Patientenbetreuung trägt.

Herr Black kommt zu Ihnen und sucht Ihren Rat zu seiner Situation.