

UNDERSTANDING UNCRPD – SUBSTANTIVE ARTICLES

NEIL CROWTHER,
INDEPENDENT CONSULTANT

www.neilcrowtherconsulting.com

What I will address

- The purpose and structure of the Convention
- Its approach to the traditional division of civil and political rights from economic, social and cultural rights
- Articles focusing on participation and with particular salience & topicality in the EU context
- Relevant legislative, policy or legal issues and developments

Purpose of the Convention

- Re-affirms the human rights of persons with disabilities as set out in ICCPR, ICESCR and other UN Treaties (e.g. UNCRC, UNCEDAW)
- Situates these human rights in the context of disability e.g. right to live independently and to be included in the community
- (officially) does not introduce new rights
- Sets out the steps States must take to protect, promote and ensure the human rights of persons with disabilities

Structure of the Convention

- Articles 1-9 are considered to be 'cross-cutting' Articles of general application e.g. Purpose, general principles, general obligations, equality and non-discrimination, awareness raising, accessibility
- Articles 10-30 are 'substantive' Articles e.g. Legal Capacity, Access to Justice, Education, Health, Political Participation
- Articles 31-50 concern implementation and monitoring e.g. data collection, international cooperation, role of the CRPD Committee, national implementation and monitoring

Civil and political rights

- Traditionally viewed as rights that protect the individual's freedom from unwarranted State infringement
- Often described as
 - ▣ Negative State obligations
 - ▣ Minimal Cost implications
 - ▣ Capable of immediate enforcement
- For example:
 - ▣ Liberty and security of the person
 - ▣ Political participation
 - ▣ Private and family life

Economic, social and cultural rights

- These rights are described as positive rights that require State action, thought to have significant cost implications. As a result the legal obligations is often of a different nature, States have a duty to:
 - ▣ Respect, protect and fulfill
 - ▣ Non-discrimination
 - ▣ Progressive realization
- For example:
 - ▣ Right to health
 - ▣ Right to education
 - ▣ Right to an adequate standard of living

Economic, social and cultural rights continued

- “Steps towards that goal (of progressive realisation) must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”

UNCRPD blurs the boundaries

- UNCRPD blurs the distinction between civil and political rights and economic and social rights
- “Not enough just to open the door. Many disabled people require the material support to pass through it” Prof. Gerard Quinn
- Articles co-mingle different classes of rights: Positive obligations underpinning civil and political rights, reasonable accommodation, civil and political rights contingent on economic and social rights e.g. Article 19
- ‘Substantive freedom’ – Amartya Sen
- Officially no ‘new rights’, but.....?

Article 5 – equality and non-discrimination

- 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- 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.
- 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities **shall not be considered discrimination** under the terms of the present Convention.

Discrimination on the basis of disability

- "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the **purpose or effect** of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, **including denial of reasonable accommodation;**

Reasonable accommodation

- "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;
- In UK 'reasonable adjustments' duty on providers of goods, facilities and services is an 'anticipatory duty' owed to disabled people as a group

More favourable treatment

- "Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention".
- But risk of separate and segregated provision being justified on these grounds e.g. special schools, sheltered employment and institutional models of care

Article 5 – issues and developments

- The Framework Directive for equal treatment in employment and occupation
- A Directive regarding non-discrimination in the field of goods, facilities and services?

‘Intersectionality’

- Article 6 – Women with disabilities
- Article 7 – Children with disabilities

Article 9 - Accessibility

- 1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

Article 9 continued

- Identification and elimination of obstacles and barriers to accessibility, shall apply to Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; Information, communications and other services, including electronic services and emergency services.
- Development and promotion of minimum standards
- Ensuring private sector facilities are accessible
- Training on accessibility issues
- Accessible information

Article 9 – issues and developments

- Various existing EU legislation and standards relating to accessibility, 'design for all' and assistive technology across transport, infrastructure, products and ICT
- European Commission presently consulting on an EU Accessibility Act
- Discrimination and reasonable accommodation in the context of goods; facilities and services?

Article 18 - Liberty of movement and nationality

- 1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities

Article 18 – important issues and developments

- Barriers to free mobility within the EU experienced by persons with disabilities e.g. disabled car parking, social security benefits, travel concessions
- An EU Mobility Card?

Article 19 - Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 19 - Living independently and being included in the community

- Situates right to liberty and right to a private and family life in the context of disabled people's living arrangements
- De-institutionalisation and non-segregation
- Self-determination, participation and non discrimination – civil and political rights
- Contingent upon the availability of living and support options which prevent segregation and isolation and allow for meaningful choices – economic and social rights and access to mainstream community facilities – reasonable accommodation, accessibility

Article 19 – issues and developments

- Stanev v Bulgaria – detention was incompatible with Article 5(1) ECHR because it was grounded not in his alleged mental disorder (which there had been no real attempt to assess or treat) but in a lack of available alternatives
- EU Agency on Fundamental Rights study into the social situation of people with learning disabilities or mental health problems
- Impact of austerity measures on enjoyment of the right to live independently and to be included in the community
- EU structural funds – supporting independent living?

Article 24 - Education

States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an **inclusive education system** at all levels and lifelong learning ensuring that:

- No **exclusion from the general education** system on the basis of disability, including from free and compulsory primary education, or from secondary education,
- Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others **in the communities in which they live;**
- Reasonable accommodation is provided;
- Support is provided, within the general education system, to facilitate effective education;
- Individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

Article 24 continued

- Persons with disabilities shall be enabled to learn life and social development skills to facilitate their full and equal participation in education and as members of the community including Braille, sign language and promoting the 'linguistic identity of the deaf community' .
- Teacher training and the employment of specialist teachers

Article 24 – issues and developments

- Are special schools in contravention of Article 24?

Article 27 - Work and employment

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by **work freely chosen or accepted** in a labour market and work environment that is **open, inclusive and accessible** to persons with disabilities

- Prohibiting discrimination in relation to getting employment, getting on in employment and staying in employment, including reasonable accommodation
- Protecting the rights of persons with disabilities to just and favourable conditions of work – equal pay, health and safety, protection from harassment, redress
- Protecting labour and trade union rights
- Providing opportunities for vocational training and career development
- Providing assistance in finding, obtaining, maintaining and returning to employment

Article 27 continued

- Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- Employ persons with disabilities in the public sector;
- Promote the employment of persons with disabilities in the private sector including through affirmative action and incentives
- Promote the acquisition by persons with disabilities of work experience in the **open labour market**;
- Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
- Ensure that persons with disabilities are not held in slavery or in servitude, and are protected, from forced or compulsory labour.

Article 27 – issues and developments

- Are EU procurement rules which allow member states to reserve participation in certain public contracts to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are 'handicapped persons' consistent with the Convention?
- Persons with disabilities under full or partial guardianship unable to enter into employment contracts in some EU countries

Adequate standard of living and social protection

States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, and to **the continuous improvement** of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

- Ensure equal access to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
- Ensure access to social protection programmes and poverty reduction programmes;
- Ensure assistance from the State with disability-related expenses,
- Ensure access to public housing programmes; (e)
- To ensure equal access to retirement benefits and programmes

Article 28 – issues and developments

- Many EU States instituting social security reforms in as austerity measures & persons with disabilities disproportionately affected
- “There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.”
- 42 General Comment No 19, The Right to Social Security, (2008), paragraph

Article 29 - Participation in political and public life

- State parties shall guarantee ...
 - ▣ Right to vote and be elected
 - ▣ Voting procedures are accessible
 - ▣ Protect secret ballot
 - ▣ Voting assistance
- Actively promote participation
 - ▣ Non-governmental organizations
 - ▣ Forming and joining organizations of persons with disabilities

Article 29 issues and developments

- Legal capacity and the right to vote - EU Agency on Fundamental Rights 2010 study found EU countries automatically excluded people under guardianship or placed limitations on their participation. Only a minority support full political participation
- Recommendation CM/Rec(2011)14 of the Committee of Ministers (2011) to member states on the participation of persons with disabilities in political and public life

In conclusion

- UNCRPD a comprehensive and ambitious 'plan of action' aimed at transforming society
- Takes a distinctive approach to this task, based on the idea of 'substantive freedom'
- To be more than just words, requires a strong 'dynamic of change' involving governments, civil society, human rights bodies and other actors