

THE IMPLICATIONS OF THE UNCRPD FOR EU DISABILITY LAW: IS THERE ROOM FOR DIRECT EFFECT?

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Is there room for direct effect ?



Since its ratification by the EU, the UNCPRD has become an integral part of the EU law. Therefore, the question must be considered:

Can individuals make claims to individual rights based on the UNCPRD which their national courts must directly apply as part of the EU law?

Overview



- Direct effect
 - In the international legal order
 - In the EU legal order
 - Primary law
 - Secondary law
- Mixity, ie. the position of international agreements in EU law
 - Crucial issue is that of the division of competences between the Member States and the EU
- Other relevant aspects (UNCRPD as an interpretation tool, the Charter of Fundamental Rights of the EU)
- Case study (MX v HSE)

What would be the effect of UNCPRD provisions having direct effect?



- The UNCPRD provisions create rights which individuals may rely on before domestic courts
- The domestic courts must apply them
- They are supreme to any conflicting national provisions (hierarchy of norms)

Direct effect in the international legal order



A matter of national legal tradition

- “Dualist” tradition: international laws does not exist for citizens as laws. International law has to be integrated into national law otherwise it is not valid law at all. If a State accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law but citizens cannot rely on it and judges cannot apply it.
- “Monist” tradition: a citizen who is being prosecuted by his state for violating a national law, can invoke the human rights treaty in a domestic court and can ask the judge to apply this treaty and to decide that the national law is invalid. He or she does not have to wait for national law that transposes international law.

Direct effect in European Union law



- In the *Van Gend and Loos* Case (C-26/62), the CJEU held that the Community legal order constitutes a “ new legal order of international law” in which the EC Treaty imposes legal obligations and confers legal rights on individuals and these obligations/rights are enforceable in the national courts.

About *Van Gend and Loos*



- Art. 30 TFEU (ex Art. 12 TEC) of the Treaty: “Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States”
- Mr Van Gend was charged an 8% import tariff on goods imported from Germany into the Netherlands based on a Dutch regulation in force since 1960. The EC Treaty had come into force in 1958. Mr Van Gend challenged the tariff as unlawful.
- A preliminary ruling from the ECJ was sought by the Dutch Court under Art. 234 TFEU (ex Art.177 TEC): “Does Article 30 (ex 12) have direct application in national law in the sense that nationals of Member states may, on the basis of this Article, lay claim to rights which the national court must protect?”

The Van Gend and Loos ruling



- The Treaty does not have a provision on direct effect.
- For the ECJ, it is necessary to consider the “spirit, the general scheme and the wording” of these provisions.
- Objective of the Treaty is to create a common market-of direct concern to interested parties. This implies the Treaty is more than just an agreement between States
- The Community constitutes a new legal order for the benefit of which States have limited their sovereign rights, the subjects of which comprise the Member States and their nationals. Independently of national legislation, Community (ie Union) law therefore imposes obligations on individuals and also confers individual rights.

But they are restrictive conditions for direct effect!



The provision in the Treaty :

- must be clear, unconditional, negative
- must require no legislative intervention by states
- must be capable of same interpretation in all Member States

Some provisions have also a “horizontal direct effect”



Defrenne v Sabena (C-43/75) :

- Art. 157 TFEU (ex Art. 119 TEC) states that Member States “shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”
- Art. 157 TFEU (ex Art. 119 TEC) confers individual rights which must be protected. The fact that the Article is addressed to Member States does not prevent such rights being conferred on individuals
- Art. 157 TFEU (ex Art. 119 TEC), being mandatory, extends to all agreements intended to regulate paid labour collectively.

Direct effect of EU Secondary legislation



- **Decisions**

Binding in their entirety upon those to whom it is addressed (not general, but specific)

- **Regulations**

Directly applicable in all member states. They are self-executing

- **Directives**

Not directly applicable, no self-executing character. Transposition is, in principle, required but they are exceptions (non-implementation, precise and clear etc)

About the status of international agreements in the EU legal order



- Art. 216 TFEU: the international agreements concluded by the Union are binding for both the EU institutions and the Member States
- As a general rule, international agreements properly concluded by the EU prevail over EU secondary law and national provisions
- Once included in the EU legal order, international agreements are subject to the judicial control of the CJEU

Status of the UNCPRD in the EU legal order



- The European Union acceded to UN Convention on the Rights of Persons with Disabilities, with the Council Decision 2010/48/EC, formally adopted on 26 November 2009 (p.20 in background documentation)
- The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council.

The UNCPRD ratification as a first time in history



- It is the first time ever that the EU becomes a party to an international human rights treaty.
- It is also the first time that an intergovernmental organization join a United Nations human rights treaty.
- The EU competence to conclude the UNCPRD derives from **Art. 19 TFEU** which addresses disability discrimination and **Art. 114 TFEU** which addresses the internal market.

The UNCPRD as a mixed agreement



- Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand
- Mixity is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States
- The UNCPRD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a Declaration of competence by the regional organisation, specifying which areas of the agreement fall within the competence of the Regional organisation and which within that of its Member States

The EU competences with regard to matters governed by the CPRD



- **Exclusive competence of the EU:** the compatibility of State aid with the common market, the Common Customs Tariff, and obligations with respect to the EC/EU's own public administration
- **Shared competence:** combating discrimination on the grounds of disability; free movement of goods, persons, services and capital; agriculture; transport; taxation; internal market; equal pay for men and women; trans-European network policy; and statistics.
- **Supporting or coordinating competence:** employment; education; vocational training policy; actions strengthening economic and social cohesion; and cooperation with third countries

Scope of the control of the CJEU on mixed agreements



- The CJEU has no right to rule on them:

If there is truly no Union law on the matter (C-431/05, *Merck Genericos*)

If the case deals with an area largely covered by Union law, but not the precise subject matter (C-239/03, *Commission v France -Etang de Berre*)

Effects of international agreements concluded by the Community in the EU's legal order



- The CJEU has adopted a “monist” approach for evaluating the legal effects of international agreements.
- This has the consequence that an international agreement has legal effect in the EU legal order and does not require further acts of implementation, such as a regulation or directive (C-81/73, *Haegeman/ État Belge*)
- AND FURTHERMORE, under certain conditions international agreements be invoked before the court by an individual;
- There can be direct effect (*Demirel*, C-12/86)

Background to *Demirel*



- The Agreement Establishing an Association between the European Economic Community and Turkey contains some key provisions regarding the free movement of workers (admission and residence, right to equal treatment etc.)
- The ECJ stated that many provisions of the agreement are programmatic in nature and “are not sufficiently precise and unconditional to be capable of governing directly movement of workers” (C-12/86 *Demirel*)
- However, some provisions are sufficiently precise and can thus be relied upon directly by workers (C-192/89 *Sevince*)

Precision and unconditionality



- Example of provision not having direct effect: Art. 12 AA: The Contracting Parties agree to be guided by Articles 48, 49 and 50 the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.”
- Example of provision with direct effect: Art. 37 AA: “As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community”.

In a nutshell



- Direct effect is potentially possible in respect of those provisions of the CRPD which:
 - address areas already (largely) covered by Union law
 - Fulfil the *van Gend en Loos* test:
 - are sufficiently clear, precise and unconditional so as to have direct effect under the standard established by the CJEU

- Are there any ?
 - Compare Arts. 5, 9, 19, 20, 27, 31, 32 UNCRPD
 - All provisions of the UNCRPD are directed to States Parties and none seems to be sufficiently clear and unconditional or self-executing in nature.

Other useful functions?

The UNCPRD as an interpretation tool of European Union law



- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (*Commission v Germany*, C-61/94)
- The accession to the UNCRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention

The UNCPRD as an interpretation tool of European Union law (contd.)



- The ECJ/CJEU case law leaves the door open to the review of EU measures in light of the UNCPRD, in particular when interpreting EU and national anti-discrimination laws in respect to disability as it was introduced in the European Union through the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

The role of the Charter of Fundamental Rights of the EU



- Article 6 (1) EU Treaty:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties”.

Disability in the Charter



- The Charter includes two explicit references to disability and contains other provisions which are of interest for persons with disabilities
 - Art. 21 of the Charter lists disability as one of the grounds on which discrimination must be prohibited
 - Art. 26 deals with the “Integration of persons with disabilities” and states: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”.

Scope of application of the Charter



- Art. 51: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”
- “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”

The role of CRPD in national courts: MX v HSE, High Court of Ireland, [2012] IEHC 491



- Challenge to the procedures adopted in the institutional regime being applied to a person diagnosed with paranoid schizophrenia (administering medication, taking blood etc)
 - No due regard for applicant' s equal rights before the law
 - Claimed right to “assisted decision-making”: essentially wanted a review of decision that applicant lacked capacity by an independent review body, ideally a court or tribunal
 - s. 57 of Mental Health Act repugnant to Constitution, incompatible with ECHR and fails to have due regard for UNCPRD
- Irish law requires that questions of constitutionality should only be entered into if it is necessary for the determination of the case at bar
 - ie: resolve issue by means other than constitutional reference first

MX v HSE (contd.)



- But, the Court looked at whether the UNCRPD is directly applicable (para. 29 *et seq.*)
- Ireland is a signatory but has not ratified. So how could the CRPD apply?
 - Art 216 TFEU: international agreements binding in areas of EU competence
 - CJEU: monist approach - legal effect with no need for further implementation
 - Direct effect under Demirel
 - Applicant submitted that Irish law must give effect to Art. 12 UNCRPD as part of its obligation under EU law
 - So, does Art. 12 CRPD fall under Demirel?
 - Art. 12 CRPD is not within EU competence
 - No direct effect, insufficient precision (*obiter*)

MX v HSE (contd.)



- Right to equal treatment is not part of the EU's legal order such that Art. 12 CRPD creates directly enforceable rights or obligations (para. 46)
- UNCRPD with a functioning of informing national Constitutional systems as well as the principles contained in ECHR (para. 72)
- Issue still in a state of flux; situation might be reached where sufficient EU Member States bring their legal system into line with the CRPD such that it might be considered to be a European consensus

Thank you for your attention!



Questions? Comments?
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