



*Specific Substantive Obligations under the UNCRPD:  
Education, Health, Participation, Work and Employment,  
Standard of living, Social protection (Focus on Participation  
Issues)*

**Andrea Broderick**  
**Marie Curie Research Fellow**  
**Maastricht University**

---

ERA Training Seminar: EU Disability Law and the UN  
Convention on the Rights of Persons with Disabilities

Trier, 11-12 April 2013

Discriminatory barriers (physical,  
legislative, attitudinal)

**Denial of access to substantive  
rights**

Denial of right to participate in  
society

# Structure of the Presentation

- Importance of participation issues in the EU context
- Importance of participation issues in the overall scheme of the UNCRPD
- Relevance of the social model of disability and the cross-cutting articles on equality/reasonable accommodation and accessibility
- Traditional divide between civil and political rights and economic, social and cultural rights
- Specific substantive rights with a focus on participation issues

# Participation Issues in the EU

- **European Disability Strategy 2010-2020:** A Renewed Commitment to a Barrier-Free Europe:
  - **Eight main areas for action:** Accessibility, Participation, Equality, Employment, Education and training, Social protection, Health, and External Action.
- **EU Lisbon Strategy for Growth and Jobs:** aims to improve the comparatively low work participation rates of disabled people in Europe.
- **European Accessibility Act:** legislative initiative to improve accessibility of goods and services in the Internal Market
- **Proposed Equal Treatment Directive:** to cover disability, among other grounds, and addressing areas such as healthcare, education, social protection, social security, access to and supply of goods and services.
- **Council of Europe Action Plan (2006 – 2015)** to promote the Rights and Full Participation of Persons with Disabilities

# Participation Issues in the CRPD

- **Article 3 of the CRPD** – participation as a general principle
- **Article 4(3) of the CRPD** – States should ensure consultation with and active involvement of persons with disabilities in the development of legislation and policy to implement the Convention
- **Article 33(3) of the CRPD** – persons with disabilities shall be involved and fully participate in the process of monitoring the CRPD
- **Article 34(4) of the CRPD** – experts with disabilities on the Committee on the Rights of Persons with Disabilities

# Social Model of Disability

- Paragraph (e) of the Preamble of the CRPD
- Article 1 of the CRPD
- Focus is not on individual impairments but rather on barriers to participation.
- The social model requires the removal of barriers and underpins the substantive rights of the Convention – compare to medical model
- *Chacón Navas v Eurest Colectividades SA* (2006): Medical model of disability
- Opinion of Advocate General Jääskinen delivered on 25 October 2012: *European Commission v Kingdom of Spain* (Case C-360/11): Social model of disability, in accordance with the CRPD

## Reasonable Accommodation

- Article 2 of the CRPD – a denial of reasonable accommodation is a distinct form of discrimination
- Article 5(3) of the CRPD – States must ensure that reasonable accommodation is provided
- Aim of the requirement is to ensure the removal of barriers
- Individualized duty
- Immediate obligation (but subject to the caveat that it is not a “disproportionate or undue burden”)
- Features prominently in the substantive articles of the CRPD

## Accessibility

- Article 9 of the CRPD
- Aim of the accessibility requirement is specifically stated as being ‘to enable persons with disabilities to live independently and to participate fully in all aspects of life’
- Generalized duty
- Subject to progressive realization
- Features prominently in the substantive articles of the CRPD

## **“On an Equal Basis with Others”**

- A core part of the equality and non-discrimination norms in the CRPD
- This phrase is embedded in the substantive articles of the Convention
- It essentially obliges states to guarantee to persons with disabilities that they will be accorded rights of participation in society in line with the rights of participation which their non-disabled counterparts already enjoy.



## Civil and Political Rights

- These rights are traditionally viewed as rights that protect an individual from unwarranted State infringement
- They are often described as “negative” state obligations
- They are associated with minimal cost implications and are, therefore, deemed capable of immediate enforcement

## Economic, Social and Cultural Rights

- These rights are deemed to be “positive” rights which are subject to the concept of progressive realization.
- They are deemed to require state action and are often associated with having significant cost implications.
- Article 4(2) of the CRPD: progressive realization

# Civil and Political Rights v Economic, Social and Cultural Rights

## General Comment 3: CESCR

- The full realization of economic, social and cultural rights may be achieved progressively

### HOWEVER

- “Steps towards that goal 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.”

# Specific Substantive Rights of the CRPD



## Examples of Civil and Political Rights

- Participation in Political and Public Life (Article 29 CRPD)
- Participation in Cultural Life, Recreation, Leisure and Sport (Article 30 CRPD)

## Examples of Economic, Social and Cultural Rights

- Right to Education (Article 24 CRPD)
- Right to Health (Article 25 CRPD)
- Right to Work and Employment (Article 27 CRPD)
- Right to Adequate Standard of Living and Social Protection (Article 28 CRPD)

# Civil and Political Rights v Economic, Social and Cultural Rights

# **Participation in Political and Public Life (Article 29 CRPD)**

- **Ensure the right to participate in political and public life, including the right to vote and be elected, by:**
  - Ensuring accessible voting procedures, facilities and materials
  - Protecting the right to vote by secret ballot and the right to stand for elections and effectively hold office (assistive and new technologies)
  - Allowing assistance in voting by a person of choice
  
- **Encourage participation in public affairs and actively promote an environment where disabled people can participate in public affairs without discrimination, including:**
  - Joining non-governmental organizations and organizations of persons with disabilities

# Obligation to take Positive Measures to Ensure Participation in Public Affairs

- **Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2011)14:**
  - “The governments of member states should facilitate the development of the **proper support services** providing the needed assistance and conduct other **positive actions** likely to encourage women and men with disabilities, as well as children and young people with disabilities, to participate in political and public life as citizens holding equal political rights and obligations”

# Participation in Political and Public Life (continued)

- **Right to vote linked to the right to legal capacity (Article 12 CRPD):**
  - “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”
  - “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. CRPD, Article 12(3)”
- **Recent Report:** European Union Agency for Fundamental Rights, *The Right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities* (October 2010) 15/16
- **Recent Case:** *Alajos Kiss v Hungary* (2010)

# Standard of Scrutiny in ECtHR – link to Participation

## ➤ *Alajos Kiss v Hungary* (2010)

- 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**.

## ➤ *Kiyutin v Russia* (2011)

- If a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the **State's margin of appreciation is substantially narrower** and it must have **very weighty reasons** for the restrictions in question
- **The reason for this approach**, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their **social exclusion.**'



# Participation in Cultural Life, Recreation, Leisure and Sport: Article 30 CRPD

- Central focus of this right is on the elimination of barriers to communication and other barriers to participation
  
- **States must ensure accessibility:**
  - Access to cultural materials in **accessible formats**
  - Ensure that intellectual property rights do not constitute a discriminatory **barrier to access**
  - **Access** to media in accessible formats
  - **Physical accessibility** of cultural venues
  
- **States must also ensure:**
  - Opportunity to develop creative and intellectual potential
  - Recognition of cultural and linguistic identity, including sign language/deaf culture

# Participation in Cultural Life (continued)

- **With a view to ensuring participation on an equal basis, states must:**
  - Promote mainstream sporting activities
  - Disability-specific sporting activities
  - Physical access to sporting, recreational venues
  - Children with disabilities have equal access and participation rights
  - Access to services

# Right to Education: Article 24 CRPD

- Persons with disabilities **not excluded** from general education system and children with disabilities **not excluded from free and compulsory primary education** or secondary education, on the basis of disability
- **Access to inclusive education** on an equal basis with others;
- **Access to vocational training without discrimination**, lifelong learning through provision of reasonable accommodation
- **Reasonable accommodation** of the individual's requirements
- Provision of support required to facilitate **effective education**;
- Effective individualized **support measures**

## **Right to Education (continued)**

- **States must enable persons with disabilities to learn life and social development skills to facilitate participation in society by:**
  - Facilitating the learning of Braille, alternative methods of communication, sign language
  - Providing education in the most appropriate setting for blind, deaf and deafblind
  - Employing teachers, including teachers with disabilities, who are qualified in the use of sign language
  - Providing training to teachers on disability awareness and the use of appropriate forms of communication

# Recent Case-Law of ECtHR on Segregated Education

## ➤ *D.H. v Czech Republic* (2007)

- ECtHR found a violation of Article 14 of the ECHR, taken in conjunction with Article 2 of Protocol No. 1.
- The applicants had been quasi-automatically segregated from mainstream schools on the basis of the results of psychological tests which were conceived for the majority population
- Recognition by the Court that the cultural and linguistic disadvantages which Roma children face should have been taken into account by the state in devising the relevant tests

# Recent Case-Law of ECtHR on Segregated Education (continued)

## ➤ *Horváth and Kiss v Hungary* (2013)

- ECtHR found a violation of Article 14 of the ECHR, taken in conjunction with Article 2 of Protocol No. 1.
- **Novel feature of Horváth case** lies in its analysis of State's positive obligations in addressing long-standing discrimination with regard to the rights of Roma children to mainstream education.
- The Court held that the applicants had 'received an education which did not offer the necessary guarantees stemming from the **positive obligations of the State to undo a history of racial segregation in special schools.**'
- The Court noted that in light of the "recognised bias in past placement procedures," the state had '**specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.**'

# Progressive Realization of the Right to Education

- This aspect of the right to education stirred contention during the negotiations of the CRPD
  
- **Relevant cases:**
  - *Autism France v Europe (2003)*
  
  - *MDAC v Bulgaria (2008)*
  
- Right to education is subject to progressive realization but certain elements of the right are immediately realizable (as with other economic, social and cultural rights in the CRPD)

# Right to Health: Article 25 CRPD

- **States Parties recognize the right to the highest attainable standard of health without discrimination:**
  - Same range, quality and standard of free or affordable health care
  - Provide disability-specific services such as early intervention
  - Provide services as close as possible to peoples' communities
  - Requirement on health professionals to provide same quality of care to persons with disabilities as they provide to others
  - Prohibit discrimination in health insurance and life insurance
  - Prevent discriminatory denial of health care or health services on the basis of disability



# Four Essential Elements of the Right to Health

- **Committee on Economic, Social and Cultural Rights: General Comment 14 on the Right to Health:**
  - Availability
  - **Accessibility** (non-discrimination, physical accessibility, economic accessibility, information accessibility)
  - Acceptability
  - Quality

# Recent ECtHR case

## ➤ *Kiyutin v Russia* (2011)

- The ECtHR referred to the CRPD, among other international instruments, in its ruling that a distinction made on account of one's health status, including such conditions as HIV infection, should be covered – either as a form of disability or alongside with it – by the term “other status” in the text of Article 14 of the ECHR.

# Right to Work/Employment: Article 27 CRPD

- **Open labour market inclusion** in an accessible environment
- **Prohibit discrimination** on the basis of disability – recruitment/conditions of employment/promotion
- **Reasonable accommodation duties** (e.g. flexible work arrangements, adapting equipment, specialized training)
- **Just and favourable working conditions** on an equal basis
- **Accessibility requirements** – access to training and employment but also accessible workplaces, housing and transportation
- **Equal opportunities** (private, public, self-employment)
- **Promote employment in private sector** - Affirmative action and disability awareness training

# **Right to an Adequate Standard of Living and Social Protection: Article 28 CRPD**

- **Right to an adequate standard of living without discrimination on basis of disability:**
  - Food
  - Clothing
  - Housing
  - Continuous improvement of living conditions
  
- **Right to social protection without discrimination on basis of disability:**
  - **Access** to appropriate and affordable services, devices and other assistance for disability related needs
  - **Access** to social protection programmes and poverty reduction programmes
  - **Access** to persons with disabilities living in poverty to assistance from the State with disability-related expenses
  - **Access** to public housing programmes and retirement benefits

*“If we are to achieve a richer culture, we must weave one in which each diverse human gift will find a fitting place”*

~ Margaret Mead ~



## CONCLUSION

THANK YOU FOR YOUR ATTENTION

Contact: [andrea.broderick@maastrichtuniversity.nl](mailto:andrea.broderick@maastrichtuniversity.nl)