

*Non-discrimination, direct  
and indirect discrimination,  
reasonable accommodation  
and the burden of proof in  
disability proceedings in EU law*

*Dieter Schindlauer  
December 2013*

## Before I begin: the relevance of the CRPD

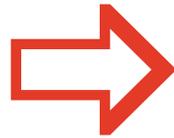


“Demonstration of cripples and idiots”, 1981 “Cripples tribunal in Dortmund”

<http://www.freitag.de/2006/50/06500601.php>

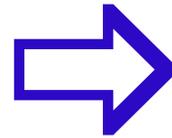
# Change in attitude

invisible  
embarrassing  
locked away



looked  
after

care



goal:

diversity  
inclusion

special  
treatment  
segregated

change  
systems -  
not people,  
inclusion  
right in the  
middle

# Human rights approach CRPD

## Art. 1(1): Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal employment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect of their inherent dignity.



We had no idea that women would also attend this event. We have no toilets for women.

Quelle: <http://www.flickr.com/photos/homeofhostians/2222201044/>



Under the general transport conditions, we cannot carry more than three homosexuals per flight.

Quelle: <http://www.flickr.com/photos/homeofhostians/2222201044/>



Good news: people from Lower Austria can already use 40% of the trams in Vienna.

Quelle: <http://www.flickr.com/photos/nestels/27859401/>



Your child has blond hair. Attending a normal school is out of the question.

Quelle: BilderBox.com

*Still plays a key role for enforcement.*

*Council Directive 2000/78/EC*

*“Framework Directive”*

- *direct and indirect discrimination*
- *harassment*
- *instruction to discriminate*
- *victimisation*

# Direct discrimination “based on disability”

- treated “less favourably”  
in a comparable situation
- association (CJEU Coleman)
- attributed/presumed disability

Test: just on grounds of disability ...

*Only justification:*

*“genuine and determining  
occupational requirement”*

*or*

*“positive action”*

# INDIRECT DISCRIMINATION

“where an apparently neutral provision, criterion or practice would put persons having ... a particular disability ... at a particular disadvantage ... unless ...”

## Justification:

- justified by a legitimate aim
- means of achieving that aim are appropriate and necessary

REASONABLE

ACCOMMODATION

# REASONABLE ACCOMMODATION



Quelle: BIZEPS <http://www.bizeps.or.at/woche/index.php?anderes=0839>



Quelle: <http://failblog.org/2010/06/01/epic-fail-photos-access-ramp-fail/>

# Obligation of the employer

- take appropriate measures, where needed in a particular case
- objective: have access to, participate in, or advance in employment, or undergo training

Justification: disproportionate burden

(governmental measures/funding taken into consideration)

## Recital 20 of Directive 2000/78/EC

effective and practical measures

for example:

- adapting premises
- adapting equipment
- adapting patterns of working time
- adapting the distribution of tasks
- adapting the provision of training or integration measures

# disproportionate burden ?

recital  
21

- financial and other cost ?
- scale, financial resources, total turnover of the organisation ?
- possibility of obtaining public funding or any other assistance ?

Judgment C-335/11, C-337/11 (HK Danmark)

UNCRPD has already had an impact

• concept of disability:

impairment can also be caused by illness

• reasonable accommodation.

can also be a reduction of working time

• existence of disability does **not** depend on the type of accommodation to be provided

# The burden of proof

in general:

## Claimant:

has to establish facts from which it may be presumed that there has been discrimination

## Respondent:

has to prove that there has been no breach of the principle of equal treatment

# Entitlement to information

Judgments Kelly (C-104/10) and Meister (C-415/10)

---

- An applicant who meets the requirements listed in a job advertisement is **not entitled to have access to information** indicating whether the employer engaged another applicant.
- **Nevertheless**, the refusal to grant access to information **may be taken into account** in the context of establishing facts from which it may be presumed that there has been discrimination.  
(Meister)