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Speakers' presentations

EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

SEMINAR FOR MEMBERS OF THE JUDICIARY

Prague, 9-10 October 2017



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http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm

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The concept of disability and disability- based
discrimination under CRPD
Dr Damjan Tatic, vice-chair of CRPD Committee

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The concept of disability and disability- based
discrimination under CRPD
Dr Damjan Tatic, vice-chair of CRPD Committee

- Human rights are universal and indivisible
- They belong to all human beings, so naturally they also belong to persons with disabilities
- Convention on the Rights of Persons with Disabilities CRPD is the first human rights treaty adopted under the auspices of the United Nations in the new Millennium

The concept of disability and disability- based
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- United Nations' General Assembly unanimously adopted Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to it on December 13th 2006
- CRPD and the Optional Protocol to it entered in force on May 3rd 2008
- 174 ratifications of or accessions to CRPD until August 9th 2017
- 92 ratifications of or accessions to the Optional Protocol to CRPD until August 9th 2017

The concept of disability and disability- based
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- The Convention is based on the following 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.

The concept of disability and disability- based
discrimination under CRPD

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- The purpose of the Convention is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity” (article 1, clause 1).
- 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” (article 5, clause 2).
- *Convention puts strong emphasis on provision of reasonable accommodation.*

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- In section (e) of Preamble, the Convention recognizes that that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.
- It moves from medical to human rights approach to disability but does not provide specific definition

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- In article 1 Convention gives a wide definition of persons with disabilities as “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”
- In its’ jurisprudence Committee referred to persons with “mental disabilities” as persons with psycho- social disabilities

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- Convention gives the following definitions of discrimination on the basis of disability and reasonable accommodation in article 2:
- “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;

The concept of disability and disability- based
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- “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 its’ review of more than 60 state party reports and individual communications, Committee on the rights of persons with disabilities developed a rich jurisprudence on disability- based discrimination

The concept of disability and disability- based
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- In a large number of States parties, it is encouraging to see that the broadening of anti-discrimination laws and human rights frameworks has led to extended protection to persons with disabilities of their rights.
- The Committee also welcomes that in many cases, disability has been explicitly included as prohibited grounds for discrimination.
- Nevertheless, the Committee observes that anti-discrimination laws and regulatory frameworks remain imperfect and incomplete or ineffective. In this regard, they very often lack a recognition of multiple and intersectional discrimination, fail to acknowledge that the denial of reasonable accommodation constitutes discrimination, and lack effective mechanisms of legal redress and reparation, effective compensations included.
- Persons with disabilities are faced with discrimination leading to continued exclusion, segregation and lack of redress, particularly women, children and older persons with disabilities, persons with psychosocial and intellectual disabilities and those with high support requirements and those whose disabilities are not visible.

The concept of disability and disability- based discrimination under CRPD

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- The Committee notes that much of this disability-based differential treatment of persons with disabilities with humiliating consequences in terms of legal recognition of disabilities continues with the acquiescence of public authorities.
- The Committee has observed that often disability-based discrimination, such as inaccessibility, institutionalization or segregation are incorrectly not regarded as discrimination and are wrongly justified as being carried out among others in order to allegedly protect or care for the person with a disability in question, in his or her best interests, or in the interest of public order. Such practices are in direct contravention of the Convention and its principles, including the respect for the inherent dignity, autonomy, and freedom to make one's choices.

The concept of disability and disability- based discrimination under CRPD

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- While formal equality seeks to combat direct discrimination by treating persons in a similar situation similarly and persons in different situations differently, substantive equality seeks to address structural and indirect discrimination and takes into account power relations.
- Formal equality helps to combat negative stereotyping and prejudices, but it cannot offer solutions for the "dilemma of difference."
- Substantive equality acknowledges that the "dilemma of difference" requires both, ignoring and acknowledging differences among human beings in order to achieve *de facto* equality.
- However, in order to overcome deeply entrenched disability-based discrimination, States and local authorities, devolved governments need to do more than combat discriminatory behaviour, structures and systems. In order to change discriminatory structures and systems, positive measures are necessary.
- The Convention is based on this new model of equality, which is also known as transformative or inclusive equality. Inclusive equality is not to be misunderstood as being a model specifically related to disability, but rather a model that acknowledges that individuals, on a general basis, experience discrimination as members of a (or several) social group(s) and that these groups are not homogeneous. Hence, non-discrimination measures need to target individuals as well as groups. Furthermore, the Convention is the first human rights treaty to acknowledge explicitly intersectional discrimination

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- 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” (article 5, clause 1).
- 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” (article 5, clause 2).

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- *Convention puts strong emphasis on provision of reasonable accommodation.*
- 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.
- The duty to prohibit “all discrimination” includes all forms of discrimination. In international human rights practise five main forms of discrimination are identified:
-

**The concept of disability and disability- based
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- “Direct discrimination”, which occurs when persons with disabilities are treated less favorably than another person in a similar situation for a reason related to a prohibited ground. It also includes detrimental acts or omissions based on prohibited grounds where there is no comparable similar situation. A public school that refuses to admit a child just because of his or her disability is an example of direct discrimination.
- “Indirect discrimination”, which means that laws, policies or practices appear neutral at face value, but have a disproportionate negative impact on a person having a status or a characteristic associated with one or more prohibited grounds compared with other persons, unless such laws, policies or practices is objectively justified by a legitimate aim, and the means achieving that aim are appropriate and necessary. For example, government information that is not available in Easy Read would indirectly discriminate against persons with intellectual disabilities.
- “Denial of reasonable accommodation”, which according to article 2 of the Convention constitutes discrimination if the necessary and appropriate modification and adjustments (that do not impose a disproportionate or undue burden) are denied and are needed to ensure the equal enjoyment or exercise of a human right or fundamental freedom. For instance, denying access to a public theater to a person with a disability just because he or she is accompanied by a guide dog constitutes denial of reasonable accommodation. Denial of reasonable accommodation does not refer to groups but always to an individual in a given particular situation.

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- “Harassment”, which shall be deemed a form of discrimination when unwanted conduct related to disability or other prohibited grounds, takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- Intersectional discrimination when a person having a status or a characteristic associated with one or more prohibited grounds is discriminated on several prohibited grounds or statuses.

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- “On the basis of disability” includes not only persons who presently have an impairment, but also who have had an impairment in the past, have a disposition to an impairment which lies in the future, and persons who are presumed to have an impairment or those who are associated with a persons with disabilities

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- Examples of reasonable accommodations include making existing facilities and information accessible to the individual person with a disability; modifying equipment; reorganizing activities; rescheduling work; adapting curricula and learning materials; adjusting medical procedures; implementing specific medication modalities; or enabling access to support personnel
- Other examples may be: giving the person with a disability training, modifying procedures for testing or assessment providing supervision, modifying instructions or reference manuals.

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- Reasonable accommodation duties are different from accessibility duties. Accessibility is related to groups, whereas reasonable accommodation is related to individuals. The duty to provide accessibility is an *ex ante* duty, which means that it has to be provided before a person with a disability wants to use exercise his or her right, for example to enjoy access to a building, service or product, on an equal basis with others.
- In contrast, the duty to provide reasonable accommodation is an *ex nunc* duty. It applies in a particular situation and in a particular context, often, but not necessarily, upon request by the person with a disability. Reasonable accommodation needs to be negotiated with the individual person with a disability concerned. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination is ensured, taking the human dignity, autonomy, and choices of the individual into account

**The concept of disability and disability- based
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- “Disproportionate or undue burden” should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. Both terms should be considered synonyms insofar as they refer to the same idea: that the request for reasonable accommodation needs to be bound by a possible excessive burden on the accommodating party.
- “Reasonable accommodation” is a single term and “reasonable” should not be misunderstood as another exception clause referring to the costs of accommodation, but rather to its effectiveness.
- “Reasonable accommodation” should also not be confused with “specific measures”, including “affirmative action measures” or similar positive duties. While both concepts aim at achieving *de facto* equality, reasonable accommodation is a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others. Examples of specific measures include: temporary measures for countering the low numbers of women with disabilities employed in the private sector, and support programmes to increase the number of students with disabilities in tertiary education. Similarly, reasonable accommodation should not be confused with the provision of support such as personal assistants under the right to live independently and being included in the community, or support to exercise legal capacity.
- “procedural accommodations” in the context of access to justice should not be confused with reasonable accommodation.

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- **Thank you kindly for
your time and
attention!**



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Disability in EU Law

Dr. Delia Ferri

Maynooth University Department of Law

*“EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH
DISABILITIES “ SEMINAR FOR MEMBERS OF THE JUDICIARY*

Prague, 9 10 October 2017



Introductory Remarks

The UNCRPD in the EU Legal Order

The CJEU and the Definition of Disability

Concluding Remarks



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Introductory Remarks

The original involvement of the former European Community in the area of disability was limited. This is due to the fact that none of the 'pre-Amsterdam' Treaties contained a reference to disability.

The EC initiatives targeted to disabled people took the form of **action programmes intended to exchange information**, or were **soft law documents**.

The Legal Breakthrough

The Treaty of Amsterdam introduced **Art. 13 EC** (now **Art. 19 TFEU**) which enabled the Council to take appropriate action to **combat discrimination** based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation.

Council Directive 2000/78/EC

Council Directive 2000/78/EC

implements the principle of equal treatment in the field of employment

prohibits discrimination on various ground, including disability

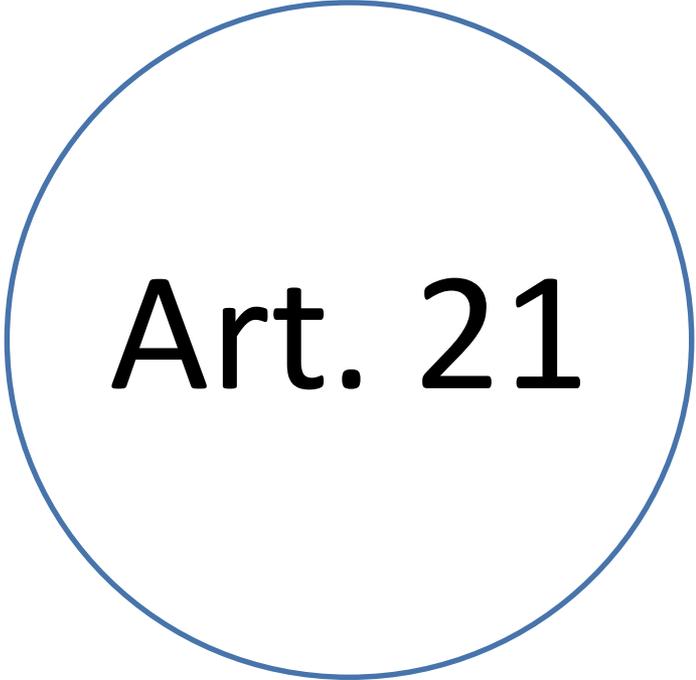
Duty to provide RA

Positive Actions

EU Charter of Fundamental Rights

Art. 26

Article 26 of the Charter states that '[t]he 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**'



Art. 21

Since 2000...

- ❖ ...the EU has been relatively successful in **mainstreaming** disability into its general legislation (e.g. in the area of transport)
- ❖ ...the EU signed and **concluded the UNCRPD**
- ❖ ...the EU has adopted **disability action plans**

The European Disability Strategy 2010-2020

The EDS 2010-2020

Supports the EU's
implementation
of the UNCRPD

Proposes
comprehensive
and mainstream
policy action

Cements the
paradigm shift
towards a human
rights approach
of disability
policies

Subject to a
revision process
(public
consultation –
progress report
launched on 2
February 2017)

The European Disability Strategy 2010-2020

The Strategy identifies eight main areas of action:

- ❖ Accessibility
- ❖ Participation
- ❖ Equality
- ❖ Employment
- ❖ Education and Training
- ❖ Social Protection
- ❖ Health
- ❖ External Action

The European Disability Strategy 2010-2020

“The objectives of the 10-year Strategy remain fully relevant and the European Commission is committed to continue its action using the competences and instruments at its disposal to raise awareness at EU-level”



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The UNCRPD in the EU legal order

Ratification, Status and Legal effects

The Conclusion of the UN CRPD by the EC/EU

30 March 2007: the former EC and its MS signed the UNCRPD

26 November 2009: Council Decision 2010/48/EC on the Conclusion of the UNCRPD

28 August 2008: Commission Proposal for a Concluding Decision of UNCRPD

The Conclusion of the UN CRPD by the EC/EU

The instrument of ratification was deposited in December **2010**, after the adoption of a **Code of Conduct** by the Council

On **23 January 2011** the UNCRPD entered into force for the EU

The Conclusion of the UN CRPD by the EC/EU

- The UNCRPD, as other multilateral agreements that make provision for participation by regional economic integration organisations (REIOs) such as the EU alongside its Member States, provides for a Declaration of competence by the REIO, specifying which areas of the agreement fall within the competence of the REIO and which within that of its Member States.
- In compliance with Art. 44 UNCRPD, a **declaration of competence** has been annexed to the Decision on the Conclusion of the UNCRPD

“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”
(CRPD Committee COs Para 1)

The UNCRPD in the EU legal Order

- ❖ The UNCRPD is a mixed agreement
- ❖ A **mixed agreement** is an international agreement which **falls partly within the competence of the EU and partly within the competence of the Member States**, and therefore includes among its parties the EU and (all or some of) the Member States

The Status of the UNCRPD

Art. 216(2) TFEU

*“Agreements concluded by the Union are **binding** upon the institutions of the Union and on its Member States”*



The Status of the UNCRPD

Mixed agreements “have the same status of purely [EU] agreements, in so far as the provisions fall within the scope of [EU] competence”
(Case C-239/03 Commission v France)

The UNCRPD in the EU Legal Order

The UNCRPD forms integral part of EU law, and in hierarchical terms, it is

- inferior to the provisions of the Treaties
- but superior to secondary EU law



Secondary EU law must be interpreted in a manner consistent with the UNCRPD

The UNCRPD in the EU Legal Order

The principle of consistent interpretation does not apply to the EU treaties (i.e. to primary law) [Case T-201/04, *Microsoft Corp. v. Commission*]

The CJEU Jurisdiction

The CJEU has the jurisdiction to interpret mixed agreements (and so the UNCRPD) under Art. 267 TFEU (*inter alia* Case C-53/96, *Hermes*; Joined Cases C-300/98 and 392/98 *Parfums Christian Dior*).

- “... the Court has **jurisdiction** to define the obligations which the [EU] has assumed and those which remain the sole responsibility of the Member States” (Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*)

The CJEU Jurisdiction

The Court has jurisdiction to rule on the validity of EU measures under Art. 267 TFEU *vis a vis* an international agreement, but the legality of a EU measure can be called in question on grounds of breach of international agreements to which the EU is a party only if the provisions of those agreements have direct effect.

The CJEU and Consistent Interpretation



Joined cases C- 335/11 and C-337/11, *Ring and Werge*

Case C-312/11, *Commission v. Italy*

Case C-363/12, *Z. v A Government Department*

Case C-354/13, *Kaltoft*

Case C-395/15, *Daouidi v Bootes*

Case C-406/15, *Milkova*

(Lack of) Direct Effect

“.... it must be held that the **provisions of [the UNCRPD] are not, as regards their content, provisions that are unconditional and sufficiently precise [...], and that they therefore do not have direct effect in European Union law.** It follows from this that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention” (Case C-363/12, *Z. v A Government Department*)



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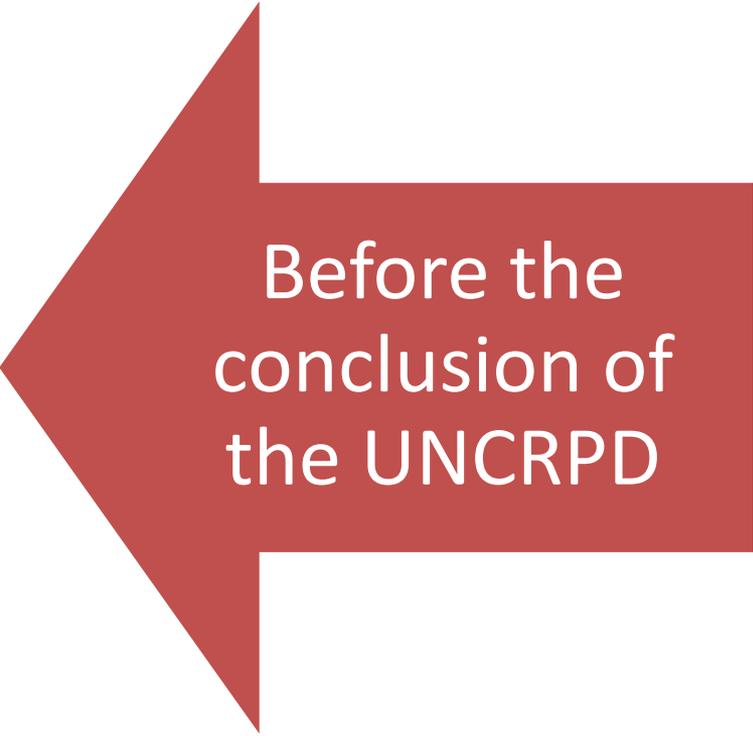
The CJEU and the definition of Disability

From the medical model to the social model

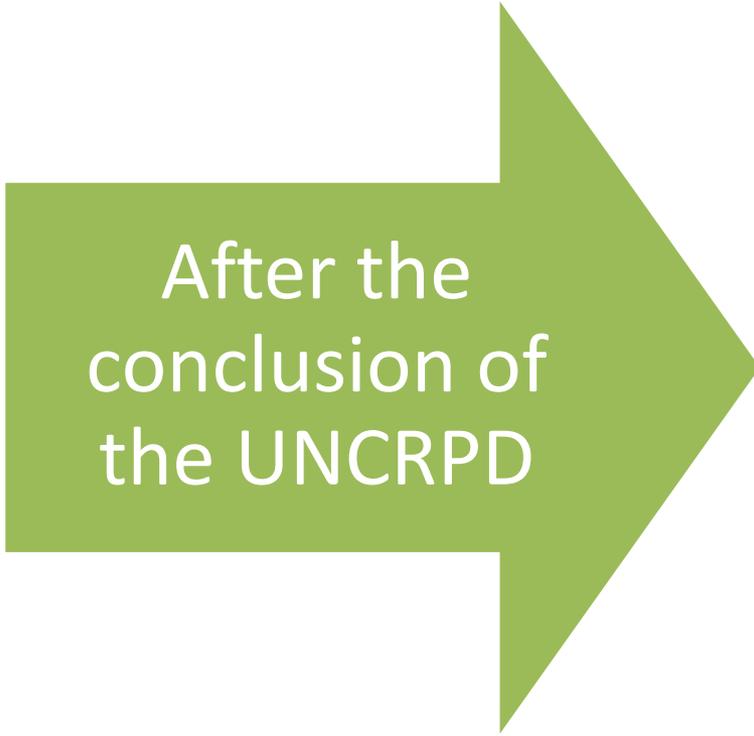
Definition of Disability in EU law

- ❖ EU legislation, to date, does not include a definition of disability. In State aid law, namely in the 2014 General Block Exemption Regulation (GBER), a definition of ‘workers with disabilities’ has been included. While this definition is inspired to the social model, it still refers to national legislation
- ❖ In the non-discrimination field, the absence of a definition of disability as a ground of discrimination has proven problematic because a uniform definition of disability across the EU is of paramount importance in determining the actual scope *ratione personae* of Directive 2000/78/EC of 27 November 2000

Definition of Disability in EU law



Before the
conclusion of
the UNCRPD



After the
conclusion of
the UNCRPD

Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades*

“The concept of ‘disability’ is not defined by Directive 2000/78 itself. Nor does the directive refer to the laws of the Member States for the definition of that concept.

*It follows from the need for **uniform application of Community law** and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question”*

Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades*

*“...the concept of ‘disability’ must be understood as referring to a **limitation** which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”*



Ring and Werge: the Paradigm Shift

Ring and Werge
**'arguably marks a
paradigm shift in the
Court's case-law.** In that
case, the EU concept of
disability was explicitly
aligned with that of the
UN Convention' (Para
88, Case C-363/12 Z)

Ring and Werge: the Paradigm Shift

*“...the concept of ‘disability’ must be understood as referring to 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....*

*...it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness. **It would run counter to the very aim of the directive**, which is to implement equal treatment, **to define its scope by reference to the origin of the disability”***

Case C-363/12

Z. v A Government Department

*'[w]hereas the UN Convention refers broadly to participation in society, **the Court's definition covers only participation in professional life**'.*

Case C-354/13, *Kaltoft*

- Mr Karsten Kaltoft worked for 15 years for the Municipality of Billund (Denmark) as a childminder
- During his employment, consequent to his recognised obesity, Kaltoft was provided financial assistance to fund fitness and physical training sessions
- Mr Kaltoft was dismissed in November 2010, and decided to bring an action for unlawful discrimination. He alleged that he was dismissed on account of his obesity

Case C-354/13, *Kaltoft*

Can obesity
discrimination fall
within the scope of
the EU concept of
disability
discrimination under
Directive
2000/78/EC?

Case C-354/13, *Kaltoft*

*“...It should be noted that obesity does not in itself constitute a ‘disability’ within the meaning of Directive 2000/78....However, in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that **in interaction with various barriers may hinder the full and effective participation of that person in professional life** on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78”*

C 395/15, *Mohamed Daouidi*

- The CJEU further considered the concept of disability, and discussed the assessment of such a “long-term limitation”



C 395/15, *Mohamed Daouidi*

- The referring court asks, in essence, whether Directive 2000/78 must be interpreted as meaning that the fact that a person finds himself or herself **temporarily unable to work**, as defined in national law, for an **indeterminate** period of time by reason of an accident at work implies, by itself, that the limitation of that person's capacity can be defined as **'long-term'**, within the meaning of 'disability' under that directive.

C 395/15, Mohamed Daouidi

*“...the evidence which makes it possible to find that such a limitation is ‘long-term’ includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned **does not display a clearly defined prognosis as regards short-term progress** or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and in the context of the verification of that ‘long-term’ nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person’s condition, established on the basis of current **medical and scientific knowledge** and data”*



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Concluding Remarks

The EU and Disability

Disability has become a prominent and cross-cutting field of the EU law.

The EU action revolves around the implementation of the UNCRPD

Dialogue between Courts

Ring and Werge has opened a “Pandora’s box”. A series of preliminary references from national judges about the meaning of disability have in fact been raised since then, which the decision in *Daouidi* is not likely to end.

Reference to
the UNCRPD

Ambiguities

Thank you for your attention!



Case Study
**The Legal Status of the UNCRPD and Its Role as
Interpretative Tool**

Dr. Delia Ferri
Maynooth University Department of Law

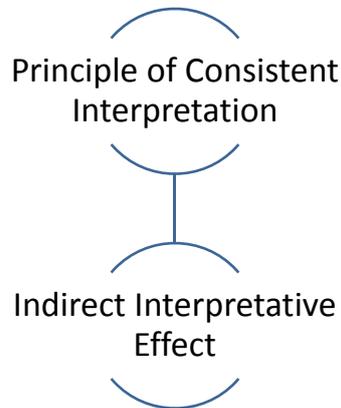
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National Courts and the UNCRPD

Following their ratification of the UNCRPD, States Parties are obliged to ensure full compliance with the Convention within their domestic legal order. This obligation extends to all domestic institutions, including courts

The ways in which national courts can engage with the UNCRPD varies according to the “type” of domestic system (e.g. monist or dualist)

National Courts and the UNCRPD



National Courts and the UNCRPD

Lisa Waddington and
Anna Lawson (eds.), *The
UN Convention on the
Rights of Persons with
Disabilities in Practice: A
Comparative Analysis of
the Role of Courts*, OUP,
2018

National Courts and the UNCRPD

UNCRPD as a catalyst for the emergence of disability rights and policies, as a benchmark against which to measure the appropriateness of disability policies (Lawson, 2017) but rarely a judicial parameter *per se* (Waddington & Lawson, forthcoming)



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National Courts and the UNCRPD

- Advance the rights of persons with disabilities, support the reasoning alongside other domestic provisions
- Radically re-interpret domestic law
- Fill the gaps in domestic law (this is very evident e.g. in the Italian legal system - D. Ferri, *Italy*, in Lisa Waddington and Anna Lawson (eds.), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, OUP, 2018)



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Filling the Gaps

“It is a form of usage which ...can be characterised as an addition of some form of new doctrine or approach which builds on existing law rather than reversing or reinterpreting it. What distinguishes it from the resolving ambiguity usage is primarily a matter of scale – both usages rely on the absence of clear law, but the gap filling method operates at a larger scale to populate domestic law with some doctrine or norm present in the CRPD but previously missing from or underdeveloped in domestic law” (A. Lawson, forthcoming)



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Case Studies

**Group Discussion: 12.15 -12.55
(approx. 20 min for each case)**

**Plenary Discussion: 12.55-
13.15**



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Plenary Discussion

Case Studies

What would be your decision in this case if you interpret your relevant national law in compliance with the UNCRPD?

General Remarks

How would you use the UNCRPD in similar cases pending in your court?



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Thank you for your attention!



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**Maynooth
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National University
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“EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES “
SEMINAR FOR MEMBERS OF THE JUDICIARY
Prague, 9-10 October 2017

Case Study

The legal status of the UNCRPD and its role as interpretative tool

The legal status and effects of international treaties in the domestic legal order is a domestic constitutional question. It depends on how domestic constitutions (and constitutional courts) spell out the relationship between national law and international law. In some countries, the constitution explicitly establishes that human rights treaties have a constitutional status. By contrast, in most cases, constitutions make it clear that international treaties, regardless of their content, have a “sub-constitutional” status and in case of a conflict between a provision of domestic law and international treaty norm, the latter should prevail. Regardless notable constitutional differences, in general, domestic law must be interpreted as far as possible, in light of and in compliance with international agreements (principle/doctrine of consistent interpretation). Scholars such as Falk, Schermers, Francioni and Conforti have recognized the pivotal role that national courts could play in international law's enforcement even indirectly through consistent interpretation. Sometimes national courts have acted as ‘guardians’ or ‘agents’ of the international legal order, enforcing international law without regard for national interests.

On the other hand, the UNCRPD itself requires States Parties to ensure full compliance with the Convention within their domestic legal order. This obligation extends to courts.

A recent research project led by Lawson and Waddington (Lisa Waddington and Anna Lawson (eds.), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, OUP, 2018) analysed how the UNCRPD has been used by national judges across different jurisdictions. The jurisdictions considered were Argentina, Australia, the Council of Europe, the European Union, Germany, India, Ireland, Italy, Kenya, Mexico, Russia, Spain and the United Kingdom. In most of these jurisdictions, courts have given the UNCRPD indirect interpretative effect.

Against this background and considering this pivotal role and the principle of consistent interpretation, this workshop is designed for to help judges/legal practitioners integrating the UNCRPD principles into their reasoning. Participants are confronted with practical cases in different fields and must attempt solve the case in a manner consistent to the UNCRPD.

Methodology

Participants are divided into small groups and examine/discuss the following case-studies on the basis of the UNCRPD principles and provisions.

- **Introduction (12.00- 12.15)**
- **Group Discussion: 12.15 -12.55 (20 min for each case)**
- **Plenary Discussion: 12.55-13.15**

CASE STUDY 1

In January 2015, Mr. Francis started to work for Maynooth Ltd, a computer manufacturing company. His work consisted in assembling computer processors. He had been recruited by an employment agency as and was initially employed on a six-month contract. Mr. Francis has epilepsy, but his condition is well controlled by medication. At the time of his employment, he informed the employment agency of his medical condition.

Mr. Francis worked for Maynooth Ltd for four months without any difficulty. In April 2015, his supervisor informed him that Maynooth Ltd would like him to apply for a permanent position. Mr. Francis completed an application form, where he declared his epilepsy. After submitting his application form, he was told that he would not be required to attend an interview, but would be required to undergo a medical examination by a doctor nominated by Maynooth Ltd. Immediately, following the medical examination, Maynooth Ltd decided not to offer Mr. Francis a permanent post and to terminate her temporary contract with immediate effect, on the basis that he was not fit to operate the machinery in use at Maynooth Ltd.

Mr. Francis decided to sue Maynooth Ltd complaining that he had been discriminated against on the grounds of disability. He contested the medical examination. However, he also complained that even if he was declared unfit to operate with machinery, Maynooth Ltd should offer him a different position in the company and not dismissing him. In his complaint he refers to national anti-discrimination law, but he also claims a generic violation of the UNCRPD.

The defendant claims that Mr Francis is not a person with a disability, and as a consequence, no discrimination on the grounds of disability occurred. It submits that the UNCRPD is immaterial to the case at stake. In addition, Maynooth Ltd submits that, should Mr Francis be considered a person with a disability, still no discrimination occurred and that the termination of the agreement was justified by the respect of minimum safety standards.

- 1. Is Mr Francis a person with a disability?**
- 2. What rights guaranteed by the UNCRPD are affected in the circumstances described above?**
- 3. Is Mr Francis' complaint well founded in your opinion?**
- 4. In sum, what would be your decision in this case if you interpret your relevant national law in compliance with the UNCRPD?**

CASE STUDY 2

Since the age of 14, Mr Red was diagnosed a form of bipolar disorder, associated to occasional symptoms such as sudden dizziness, anger, reckless behaviour, claustrophobia, and insomnia. He also suffers from congenital Cone monochromacy (i.e. a visual impairment which prevents him from recognizing colours).

Mr Red is currently 22 years old. After undertaking a vocational training programme, he found a job as a janitor in a local office building, where he has been working for 4 years since the age of 18. In general, he is well able to take care of himself and he is undertaking adequate therapies for bipolar disorder. However, Mr Red has a tendency to be irresponsible with money and to buy expensive goods and luxury accessories.

In December 2016, Mr Red decided to purchase a BMW car and used all his savings to pay the deposit. When his parents came to know about the purchase, without telling anything to Mr Red, they decided that he should be placed under guardianship. They applied to court to be nominated guardians.

- 1. What rights guaranteed by the UNCRPD are affected in the circumstances described above?**
- 2. Could Mr Red be placed under guardianship under your domestic legislation?**
- 3. Is there any other support measure you could/would adopt in this case?**
- 4. In sum, what would be your decision in this case if you interpret your relevant national law in compliance with the UNCRPD?**



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Access to justice for persons with disabilities

Milan Šveřepa, director



- legal capacity Art 12 UN CRPD
- EU legal acts victims' and procedural rights
- relevant international case law

Inclusion Europe is the association of people with intellectual disabilities and their families in Europe.

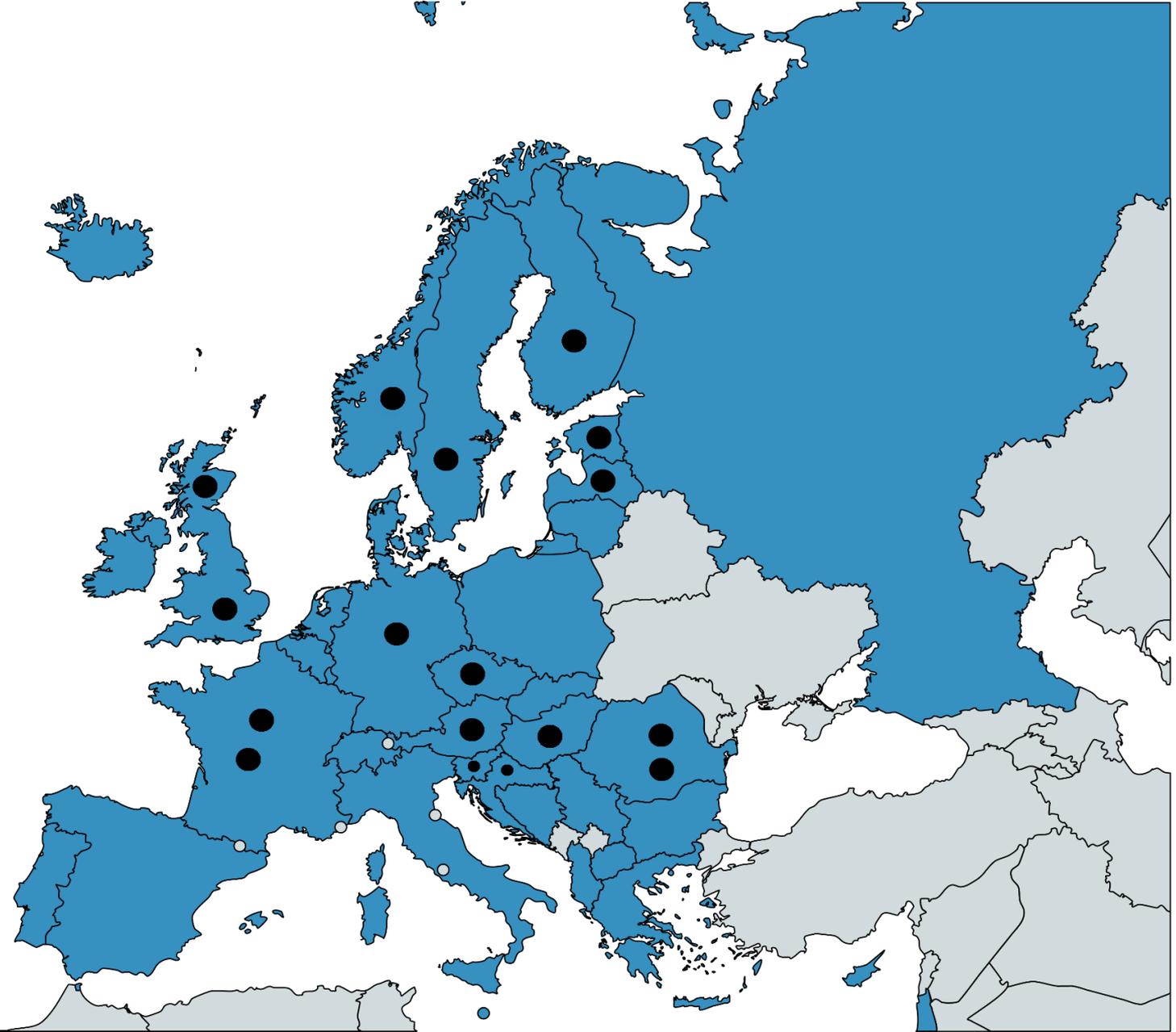
We want a European society where people with intellectual disabilities enjoy equal rights and fully participate in all aspects of life.

- they have legal capacity to make decisions about their lives; they can vote in elections
- they live in a community, making choices about their lives; no longer segregated in institutions.
- they go to mainstream schools or they can find suitable work
- they work together to fight for their rights

Inclusion Europe has **73** members in **38** countries.

Inclusion Europe members

- Members
- European platform of self-advocates



Decisions, decisions, decisions



Inclusion Europe

RESPECT, SOLIDARITY
AND INCLUSION

for people with
Intellectual Disabilities
and their families



**When was the last time you
made a decision later
regretted?**

Honest!

Does this apply to your decision-making?

Does it apply to other people?

Most decisions we make are not „rational“.

Decisions are subject to many influences: culture, preferences, social norms and relations.

We often need and seek advice to make a decision.

Decisions may not be in our „best interests“.

We like to have that we have the right to make mistakes, and to learn from them.

Why deny this any particular group of people?

Article 12 - Equal recognition before the law



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This UNCRPD article challenges the concept of rational personhood.

It supports equal opportunities, independence, autonomy and inclusion in society.

It is essential for the realisation of other rights.

Full legal capacity means being in a position to make **decisions about one's life in big things and small.**

It affects the ability to find employment, the right to vote, the right to work, the right to marry and to hold parental rights, the right to free movement or the right to seek legal protection before courts.

It also affects how people spend their money and what they do in their leisure time.

It can prevent individuals to request their legal capacity to be restored. *Catch XII* style.

A lot of State parties interpreted article 12 as allowing substituted decision making.

General comment:

- development of supported decision-making systems in parallel with the retention of substitute decision-making regimes does not comply
 - **Article 12 is not subject to progressive realisation!**
- Supported decision-making must be available to all. A level of support needs should not be a barrier to obtaining support in decision-making;
 - **„the existence of an impairment can never be the basis for a denial of legal capacity or of any of the rights in Article 12.“**

The provision is clear in guaranteeing to people with disabilities **the right to enjoy full legal capacity on an equal basis with others**, while also imposing an **obligation on the states to provide them with support in exercising legal capacity**.

However, for people with intellectual disabilities, access to these rights remains particularly difficult because of the still **broadly accepted substitute decision-making and the absence of proper arrangements to support people to take their own decisions**.

Choices. A platform for supported decision-making

www.right-to-decide.eu

Over 100 examples of supported decision-making organised by:

- Types of support
- Areas of life

Safeguards in supported decision-making



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One reason for the resistance against full legal capacity has been **the concern for the safety and security of the person.**

The argument goes: People with intellectual disabilities can be vulnerable against abuse and manipulation. They could take decisions against their own best interest.

In many respects valid concern.

But! The requirements for people with intellectual disabilities should not be higher than for everybody else – they should also have the opportunity to make mistakes and to learn from them.

There is also another risk, recognised by the UNCRPD Article 12: **individuals who are in need of support for making their decisions may be at increased risk of abuse.**

Paragraph 4 of Article 12 requires **safeguards** to be put in place as safety measures to prevent it.

Support for decision-making and safeguards must be developed hand in hand.

Safeguards must be understood within the context of the idea of the “Dignity of risk”.

The issue of risk-taking is very important for people with intellectual disabilities, who may have been denied the process of choice and decision-making skills.

Risk-taking means adequate assistance and information must have been offered to the individual and that the individual was assisted to become aware of their responsibilities and of the implications of the choices.

Risk taking must therefore be mitigated by safeguards against abuse.

Main requirements for safeguards, taking into account General comment interpretation:

1. Appropriate and effective to prevent abuse
2. Respectful of the rights of the person
3. Respectful of the will and preferences of the person
4. Free of conflict of interest and undue influence
5. Proportional and tailored to the person's circumstances.
6. In place for the shortest time possible
7. Subject to regular review by a competent, independent and impartial authority or judicial body
8. Proportional to the degree to which such measures affect the person's rights and interests

EU legal acts: victims' and procedural rights



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Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime

Ensures that persons who have fallen victim of crime are **recognised, treated with respect and receive proper protection, support and access to justice.**

The Directive replaces the 2001 Framework Decision on the standing of victims in criminal proceedings and considerably strengthens the rights of victims and their family members to information, support and protection and victims' procedural rights in criminal proceedings.

The Directive requires that the Member States ensure appropriate **training on victims' needs for officials** who are likely to come into contact with victims and **encourage cooperation between Member States and coordination of national services** of their actions on victims' rights.

- 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 by **facilitating the accessibility to premises where criminal proceedings are conducted and access to information.**
-
- **(21) Information and advice provided by competent authorities, victim support services and restorative justice services** should, as far as possible, be given by means of a range of media and in a **manner which can be understood by the**

- **(21) Information and advice provided by competent authorities, victim support services and restorative justice services** should, as far as possible, be given by means of a range of media and in a **manner which can be understood by the victim (...)** 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 www.easy-to-read.eu and others

Article 3.2: Right to understand and to be understood

- Member States shall ensure that communications with victims are given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood.

Article 22: Individual assessment of victims to identify specific protection needs

- particular attention shall be paid to victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics;

Example: research – The Netherlands

Violence can be reported with local anti-discrimination offices.

It is rare that women with an intellectual disability report violence here.

Only an estimated 12% of cases is reported.

Most studies focus primarily on sexual abuse.

Women are far more likely to be sexually abused (61% for women against 23% for men).

www.life-after-violence.eu

"Violence against women with intellectual disabilities often goes unreported. They fear retaliation if they speak out,,

„I was sexually abused in the institution when was a teen. It was done by a young boy, but then later also by a therapist. The boy did not really know what he was doing and I was too scared to shout. The therapist touched me whenever we were alone. He said: “Don’t talk, nobody will believe you”. I have never told this to anyone before. He was right, they will not believe me anyway. The only thing they would do is send me back to the institution.“

Case law examples



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- ECHR:
- [Stanev v Bulgaria](#)
- In 2000, following a request from his stepmother and half-sister, a court declared him partially legally incapacitated without notifying him
- Without informing Stanev, the guardian requested that he be placed in a social care home for 'people with mental disorders
- Stanev was taken to an isolated home about 400 kilometers from his hometown and 80 per cent of his pension was transferred there as payment.

- Stanev v Bulgaria

- Stanev expressed the desire to leave the home permanently and asked the prosecutor and the mayor to bring actions to restore his legal capacity
- both refused based on medical assessments indicating that Stanev had schizophrenia and that the home was the most suitable place for him.
- Stanev was examined by independent psychiatrist and psychologist who found that his schizophrenia diagnosis was inaccurate, his residence in the home was damaging his mental health, and he should be reintegrated into society.
- Court found a violation of article 6(1) (access to court) because Stanev lacked standing to directly apply for judicial restoration of his legal capacity (amongst other things but this is our focus)

- **Kiss v Hungary :**

- breach of Article 3 of Protocol 1 to the European Convention of Human Rights, which provides for free elections and includes the right to vote.
- Judgment:
- "The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing.... In addition, 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 (cf. also the example of those suffering different treatment on the ground of their gender...). The reason for this approach, which questions certain classifications per

CRPD Committee jurisprudence:

[Marlon James Noble v Australia](#), communication 007/2012, Sept 2016

- About a person with intellectual disabilities, deemed unfit to stand trial but was nevertheless detained in prison for more than 10 years, thereby “converting his disability into the core cause of his detention,” UN experts have found. charged in 2001 with child sex abuse
- Australia’s Criminal Law (Mentally Impaired Defendants) Act of 1996, once a person is found unfit to plead, he or she can be held in custody for an unlimited period. They have no possibility to go before the courts unless or until they are deemed able to understand the notion of criminal responsibility
- CRPD Committee said about Mr. Noble’s detention: “the whole judicial procedure focused on his mental capacity to stand trial without giving him any possibility to plead not guilty and test the evidence submitted against him.”

- The United Nations Committee on the Rights of Persons with Disabilities ([CRPD](#)) recently found that Australia violated the rights of two deaf people who were called up for jury service but told that they could not participate because sign language or real-time steno-captioning could not be provided. See CRPD, [*Gemma Beasley v. Australia*](#),

- Communication No. 11/2013, Views of 25 April 2016; CRPD, [*Michael Lockrey v. Australia*](#), Communication No. 13/2013, Views of 25 April 2016. In two separate opinions, the CRPD found that Australia violated both individuals' rights to equality and non-discrimination, accessibility, access to justice, and freedom of expression and access to information as guaranteed under the Convention on the Rights of Persons with Disabilities ([ICRPD](#)). See CRPD, *Gemma Beasley v. Australia*; CRPD, *Michael Lockrey v. Australia*.

Comment – Ask - Engage

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Twitter – Facebook – Newsletters – Youtube

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Right to Live Independently Story of Barbora

EU DISABILITY LAW AND THE UN CRPD

Seminar for Members of the Judiciary

Prague, 9-10 October 2017



Bára's Journey to Independent Life



Journey to Independent Life

- 1. Childhood and youth in the family and in institutions**
- 2. Adult life in institutions for people with disabilities**
- 3. The plan and the journey to freedom (2013 – 2016)**
- 4. Precious „ordinary“ life**

1. Childhood in Family and Institutions

- New-born Bara was left in infant institutional care
- Couple of times Bara and her siblings returned to the family – not successful
- State and institutions did not offer Bara other horizons than institutionalized life
 - Just elementary education x **no** final school report, vocational training, no support in future planning and managing life, no freedom, no options for decisions. **Full restriction of legal capacity.**

2. Adult life in institutions for people with disabilities

- In the insitution
 - Worked as cleaning woman in the institutin for „pocket money“ wage (10-15 EUR per month)
 - Assested staff with laundry, any kind of care of clients, namely Slavka (girl with high support needs)
- New experience
 - open work place for half a year in a project, commuted on her own – happy for the freedom, started to go out as much as possible

Ratification of CRPD in 2009

Czech Republic has ratified the CRPD in 2009 and it is part of the national law system since February 2010 when it was published in the Collection of International Treaties.

(incl. Art. 12 and 19)

Situation of Barbora in 2012

- She was 44, still lived and worked in the institution as a cleaning woman, helping staff with their work for free
- Had public guardian (municipality)
 - She did not have elementary information on her savings, payments to institution for social service and living, school reports, etc.
- Also was in contact with former employee
 - walked her dog, visited her relatives, touch of normal life...

Turning point in Bara's life – meeting people from the community

- Volunteers from the community started to visit people living in the institution in their town and going out with them
- Volunteers together with some former and current employees of the institution started to cooperate as a team

**Sunday
afternoon
in cafe**



3. The plan and the journey to freedom (2013 – 2016)

Bara and her supporters

- Bara expressed her wish to live a normal life (2012)
 - on her own, have a dog, normal job (preferably to work with children)
- Supporters and friends
 - help Bara to find job out of the institution, accomplish certificate for work with laundry
 - provide natural support in all areas of life where needed – not much, Bara learns quickly
 - Research on housing – municipal and private apartments are available

Bara in the institution

- The social services are aimed at social inclusion and „regular“ life (provided by the law)
- Bara
 - is ready to move and live on her own with natural support, does not need social care system any more.
 - stays in the institution only for nights
 - has no support neither cooperation of the institution in her activities aimed at social inclusion x **on the contrary institution increases pressure and manipulation both towards Bara and volunteers**

Institution

Institution forces Bara

- to move far from the town (too much information is getting out of the institution with Bara?), to her problematic family, Bara refuses.
- to undergo strange „psychiatric“ examinations, diagnosed treatment is: she needs institutional care

Disputes with management and staff are promoting

Public guardian

- No cooperation with Bara, refuses to act to protect and fulfill her rights. Cooperates with the institution.
- **Bara** with supporters applied to rent a municipal apartment
- **Guardian** said no - municipality was in conflict of interests: it is public guardian and owner of apartments at the same time.
- **Bára** had 3 more opportunities to rent other apartments. Last one was finally rented by Jan to keep it for **Bára**. She had it but was not allowed to use it.

I want to move - I am not allowed

- Supporters founded **guardianship council** to strengthen their position in promoting Bára's rights
- Jan P. asked Quip and SPMP for support (social work, legal support, parental organization of people with intellectual disability)
- **Supporters, Quip, SPMP**: worked on support system – assess and cover support needs (SIS)
- **Quip** prepared claim to court to restore Bara's legal capacity and approve agreement on support in decision-making (SDM) (2015)

Bára's circle of support

(this slide contains photographs of people in Barbora's circle of support)



Vlasta



Farnie



Boss
from her
work



Legal capacity proceedings

Argumentation for court:

- reliable support system
- no threat of serious harm
- SDM agreement with 3 supporters (former guardianship council) for legal acts, to be used if needed

Argumentation overcame psychiatric expert opinion that was traditional, very negative, not corresponding to the reality

4. Precious „ordinary“ life

We won! (January 2016)

- Bara has full legal capacity
- Lives on her own (officially since Apr. 2016)
- With natural support in the community
- Works in kindergarden
- Has normal free time activities
- Visits Slávka and others in the insitution
- Shares her experience, participates in projects



Lessons learned with Bára

- Obstacle was not on the side of the person but of the system
- Much more support was needed to overcome barriers of the system than to support Bara in everyday life
- Natural support was crucial to help Bara get a normal life (get out of the system)
- Legal capacity was a key to take over the control of Bara's own life

Our experience from strategic litigation

- Courts are not obstacle to restore LC if
 - There is a good support system
 - Well prepared claim, argumentation
 - Support in the process – natural, legal
 - People don't give up and appeal if necessary
- Legal capacity is a key to control one's life **X** without opportunities (income, housing, support) and respect to will it is not enough to have real control

Art. 12 and 19 are mutually conditional



Thank you for your attention

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The CRPD and its implementation for women

Professor Dr. Jenny E. Goldschmidt



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Women and the CRPD: Concepts and developments

- The position of women with disabilities demands specific attention because of interaction between characteristics of individuals → CEDAW also relevant
- Closely related to development of several legal concepts:
 - Equality
 - Vulnerability
 - Stereotyping
 - Intersectionality
- Special attention to General Comment No. 3 (2016): article 6: Women and Girls with Disabilities

Vulnerable groups: concept and risks

- CRPD contains no new rights
- Need to elaborate obligations more precisely
- Why? Some are less equal than others
- Concept of vulnerable groups emerging in ECHR and EU too
- Risks: reaffirmation of vulnerability: however, see par. 7 GC: goes beyond non discrimination → empowerment → interpretation tool

See:

- Lourdes Peroni and Alexandra Timmer, Vulnerable Groups: The Promise of an Emerging Concept in European Convention Human Rights Law, *International Journal of Constitutional Law* (2013), p. 1056-1085

Equality

- See par. 8, 9, 14, 15, 16 and 17 of GC 3
- Substantive equality approach in EU
- Towards 'transformative equality' → need to change dominant rules that reaffirm exclusion goes beyond the equal-different approach → see par. 8 of GC No. 3

European case law follows this development and CRPD provides not only independent normative structure but also interpretative framework for national judges.

Intersectionality

→ Par 3. of CRPD GC no.3:

Uses term Multiple discrimination:
discrimination is compounded or
aggravated.

- Concept: multiple and intersetional discrimination (par. 10)
- Different manifestations
- Legal recognition

→ Related to stereotyping see par. 8 GC

Stereotyping

- Developed under equality law
 - Link between vulnerability and stereotyping
- Need for empowering approach instead of victimizing approach

See: - Alexandra Timmer, Gender Stereotyping in the case law of the EU Court of Justice, *European Equality Law Review*, Issue 1/2016, 37-46

- Illustrative case: ECtHR 25 July 2017, *Carvalho de Pinto Sousa Morais v. Portugal*, Application no. 17484/15, see also the separate opinions.

Women and children with disabilities

- Preamble: p, q, r, s,
- Art. 4 under 3
- Art. 5 under 2
- Art. 6
- Art. 7
- Art. 16 under 1, 2, 4
- Art. 18 under 2
- Art 23 under 1 (c), 3, 4 and 5
- Art 25
- Art 28 under 2 (b)

General Comment no 3 (2016)

- Focus on State obligations but also part of prohibition of discrimination→
- Needs to be applied in accordance with CRPD
- See: barriers caused by disbelief when reporting sexual violence (par 17 under e)
- Training of professionals in justice sector (par. 26)

Violence against women → see Section IV A GC 3

- Specific situation e.g Institutions
 - Sexual harassment
 - Burden of Proof
 - Obligations
-
- **See also CEDAW General Recommendation No. 35 on Gender based violence, uodatig GR no 19, 26 July 2017**

Health Care: Section IV under B

- Relation to legal capacity
- See case law ECtHR → no stereotyping!

Family planning and birth control

- Relation to agency and legal capacity → GC 3 under 45: Forced contraception and sterilization can result in sexual violence.
- Par 18 CEDAW GC 28: Violations of sexual and reproductive rights may amount to torture or inhuman treatment.
- Supported decision making → idem: right to be provided with assistance to raise children

EMPLOYMENT

- See art 27 CRPD and par 58 GC no 3: relevant in combination with EU law
- Social Protection see Case of Bélané Nagy v. Hungary ECtHR 13-12-2016

Role of National Judge

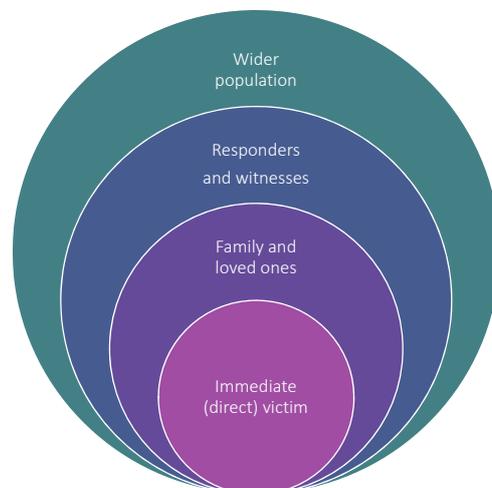
- Awareness
- Identification
- Knowledge and awareness of broader context
- Application

THANK YOU!



How to safeguard the rights of victims with disabilities in court proceedings

Who can be a victim?



Victims' needs



Victims' rights in the EU

Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (Victims' Rights Directive)

- o Disability recognised as defining needs of victims
- o Victim status guaranteed, regardless of criminal proceedings
- o Recognition of the need to accommodate for difficulties in communication due to disability
- o Support needs to be available before, during and after criminal proceedings
- o Specialist support and legal protection to vulnerable victims
- o Prevention of secondary victimisation
- o Training of professionals

Victims' needs in proceedings

“Personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity”

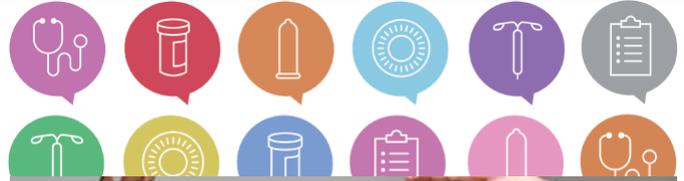
Victimisation of persons with disabilities



- o 2 to 7 times more likely to become victims
- o Persons with intellectual disabilities are most likely to become victims

Specific forms of victimisation

- o Institutionalisation
- o Sexual and reproductive health
- o Parental rights
- o Hate crimes



Guardianship as a barrier



Needs of victims' with disabilities

- o Accessibility
- o Reasonable accommodations

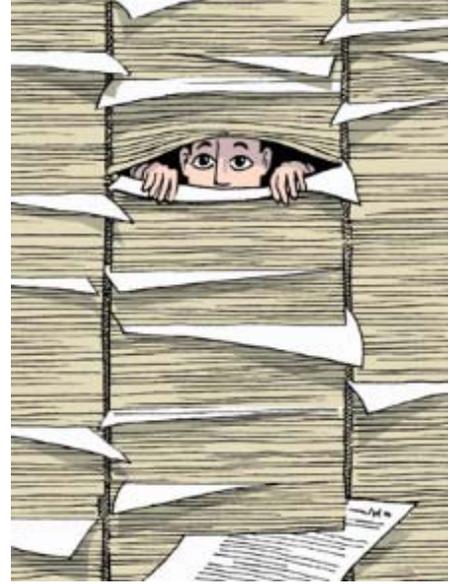


Identifying the victim



Commencing and running the proceedings

- Power of Attorney and legal capacity
- Financial issues
- Statutes of limitations



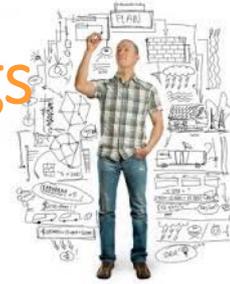
Rights in criminal proceedings

- *Right to be heard*
- *Right to question decision not to prosecute*
- *Right to safeguards in the context of restorative justice*
- *Right to legal aid*
- *Right to reimbursement of expenses*
- *Right to return of property*
- *Right to decision on compensation*



After the proceedings

- o Individual care plan
- o Compensation
- o Secondary victimisation



Case-law of the ECtHR

- o Center for Legal Resources on behalf of Valentin Campeanu v. Romania
- o Đorđević v. Croatia
- o Gauer and others v. France
- o Stanev v. Bulgaria
- o Kocherov and Sergeyeva v. Russia



Thank you!

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Universiteit Leiden
The Netherlands

DETENTION OF PERSONS WITH DISABILITIES

Prof.dr. Aart (A.C.) Hendriks
Prague, 10 October 2017

Universiteit Leiden. University to discover.

Conflict of interests

Professor in health law, surrogate judge (including mental health/involuntary detention), member of Board of Supervisors University Medical Hospital and member of scientific committees

No conflict of interest

Aims of presentation

Discuss types of detention (penal and health/social related)

Standards and other guarantees > focus ECHR and CPT

Legal and practical problems

> Focus on persons with mental impairments

Art. 14 CRPD

Liberty and Security of the Person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and **that the existence of a disability shall in no case justify a deprivation of liberty.**

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, **entitled to guarantees** in accordance with international human rights law and shall be treated in compliance with the **objectives and principles of this Convention, including by provision of reasonable accommodation.**

Standards

ECHR and case-law ECtHR

Notably: Art. 3, 5, 6, 8 (and 14)

- *Musial v. Poland (2009)*, no. 28300/06

CPT

- CPT's annual general reports and country specific reports

- <http://www.coe.int/en/web/cpt/standards>

CRPD

- Access to Justice (Art. 13)

- Freedom from torture (Art. 15)

- Personal integrity (Art. 17)

- General Comment No. 1 (2014) Equal recognition before the law (Legal Capacity)

Police arrest and procedural safeguards

ECHR

M.S. v. the UK (2012), no. 24527/08 (police cell and acute mental suffering)

Jasinskis v. Latvia (2010), no. 45744/08 (medical examination)

CPT

Medical examination

CRPD

• Access to justice (Art. 13)

• Freedom from torture (Art. 15)

• Personal integrity (Art. 17)

In penal detention

ECHR

Emphasis: human dignity and human conditions

- *Price v. the UK (2001)*, no. 33394/96 (degrading treatment)
- *Aerts v. Belgium (1998)*, no. 25357/94 (deterioration of health status?)
- *Kucheruk v. Ukraine (2007)*, no. 2570/04 (handcuffing and solitary confinement)
- *Hüseyin Yıldırım v. Turkey (2007)*, no. 2778/02 (human dignity)
- *Z.H. v. Hungary (2012)*, no. 28973/11 (deaf and mute)

CPT

- Prison conditions
- Medical examination
- Prison health services

CRPD

- Access to Justice (Art. 13)
- Freedom from torture (Art. 15)
- Personal integrity (Art. 17)

Involuntary detention psychiatric hospitals / social care institutions

ECHR

Art. 5 ECHR

- *Winterwerp v. Netherlands (1979)*, no. 6301/73 (criteria)
- *Poirot v. France (2011)*, no. 29938/07 (proof)
- *Nencheva et al. v. Bulgaria (2013)*, no. 48609/06 (lack of resources)
- *M.H. v. the UK (2013)*, no. 11577/06 (review)
- *Yaikov v. Russia (2015)*, no. 39317/05 (review)

CPT

Checklist - for visits to social care institutions where persons may be deprived of their liberty

CRPD

- Access to Justice (Art. 13)
- Freedom from torture (Art. 15)
- Personal integrity (Art. 17)

Problems

Combination of criminal behaviour and health/social impairments requiring detention/care > autonomy or protection

Combination of protected grounds > notably disabilities and age

Lack of knowledge / how to establish what constitutes a reasonable accommodation?

Unwillingness or unableness?

Conclusions

- Art. 14 CRPD guarantees the right to liberty and security;
- Penal detention and deprivation of liberty because of mental health disorder / lack of self supporting skills are fundamentally different, but overlap
- Good detention facilities require fin resources;
- Reasonable accommodation requires fin resources;
- Everything starts with good communication.

Questions or Comments????





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Universiteit Leiden
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CASE STUDY DETENTION

Prof.dr. Aart (A.C.) Hendriks
Prague, 10 October 2017

Universiteit Leiden. University to discover.

What should State do?

Boy of Roma origin, 5 years old, abandoned at birth, placed in an orphanage, turns out to be HIV-positive and suffering from a severe mental disability. Orphanage can not offer good care.

What should State do according to CRPD?

- Placement of boy in an institution? If so, what kind?
- Who can / should represent the boy?
- Voluntary or mandatory care?
- Other points to be considered?

Conclusions

- Art. 13 reflects need for comprehensive accessibility to justice;
- Positive obligations > individuals rights?
 - Not all barriers disability specific;
- Awareness is needed, not only pwd (their rights) but notably from law enforcement personnel etc.
 - Remaining problems.

Questions or Comments????



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Disability in Employment

Philip Rostant

Employment Judge

Employment Tribunals England and Wales



2

UNCRPD and Employment-Article 27

Appropriate steps, including through legislation to...

- **Prohibit discrimination** on the basis of disability;
- **Protect the rights** of persons with disabilities;
- Ensure that **reasonable accommodation** is provided to persons with disabilities in the workplace;
- Promote access to training, vocational guidance, work experience and other **measures designed to improve access by people with disabilities to the job market.**

Ending Discrimination-Promoting Participation

UNCRPD-Art 27



Council Directive 2000/78/EC of 27
November 2000

Council Directive 2000/78/EC of 27 November 2000 (the Framework Directive)

- Article 1
- The purpose of this Directive is to lay down a general framework for **combating discrimination** on the grounds of, ...**disability**, ...as regards employment and occupation, with a view to putting into effect in the Member States the **principle of equal treatment**.

The Framework Directive

Article 2

Concept of discrimination

For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no **direct** or **indirect discrimination** whatsoever on any of the grounds referred to in Article 1.

+

harassment (Article 2(3))

victimisation (Article 11).

reasonable accommodation (Article 5)

A claim of disability discrimination

Preliminary considerations

- Disability
- Nature of claim
- Nature of the disability
- Knowledge of disability

The Concept of Disability

A medical model



The Concept of Disability

A social model



The Concept of Disability



Proving disability

- Impairment
- Long-term
- Functional deficit and/or
- Barriers hindering full and effective participation {in society}
- In the workplace

Proving discrimination

Framework Directive-Art 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.

Knowledge of disability?

- Direct discrimination
- Indirect discrimination
- Harassment
- Reasonable accommodation

Reasonable accommodation(1)

Recital 16

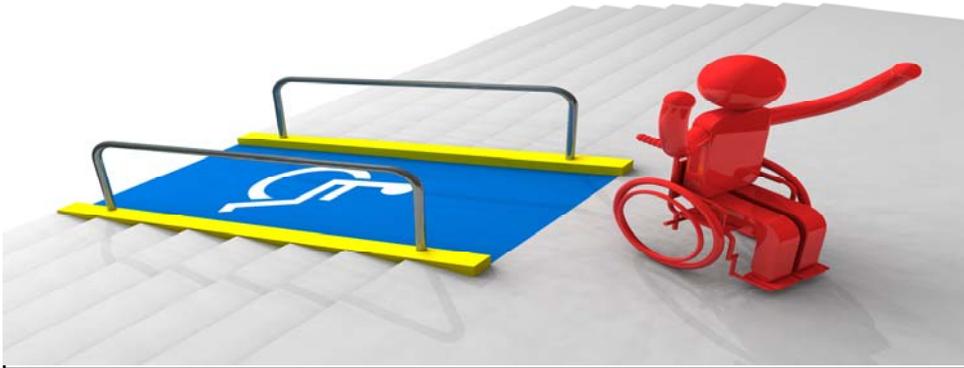
The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

Reasonable accommodation(2)

- **Article 5**
- Measure to ensure **compliance with the principle of equal treatment**
- Requires employers to take **appropriate measures**, where **necessary**, 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.

Appropriate and necessary

- Measure must address the barrier or difficulty.
- Without the measure, the person with the disability is prevented or hindered from participation.



Disproportionate burden

- The duty is only to provide *reasonable* accommodation



Structured approach



Direct Discrimination

Article 2(2)

“2. For the purposes of paragraph 1:

direct discrimination shall be taken to occur where one person is treated **less favourably** than another is, has been or would be treated in a **comparable situation**, on **any of the grounds** referred to in Article 1;”

Direct Discrimination

Comparable situation



10 years relevant experience
University degree
Further professional qualifications



10 years relevant experience
University degree
Further professional qualifications
History of depression

Direct Discrimination

Treated less favourably



Direct Discrimination

On any of the grounds



Depression?

Indirect Discrimination

Article 2(2)

(b) **indirect discrimination** shall be taken to occur where an **apparently neutral provision, criterion or practice** would put persons having... a **particular disability**,... at a **particular disadvantage** compared with other persons unless:

- (i) that provision, criterion or practice is **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate and necessary**,

Discrimination by association (1)

- “Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled.”

Case C-303/06 *Coleman*.

Discrimination by association (2)

- “the concept of ‘discrimination on the grounds of ethnic origin’,... must be interpreted as being intended to apply in circumstances such as those at issue before the referring court —irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure”.

C-83/14 *CHEZ Razpredelenie Bulgaria AD*

Harassment

Article 2(3)

- Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment...

Harassment

Unwanted conduct



Harassment

Related to any of the grounds



Harassment

Purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment



Victimisation

Article 11

“Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”

Victimisation

Dismissal or other adverse treatment



Positive action

- Article 7
- 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
- 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

The End

Thank You

Case Study

Introduction

You have just finished hearing a case of discrimination brought by Klaus. The case was against his former employer Sadistisch Fitness-Studios GmbH (SFS) which owned the gymnasium in Trier where he worked until he was dismissed.

Klaus gave evidence at the hearing as did Philipp the regional manager, and Klaus's immediate line manager Magda, the head of administration at the gymnasium. Ursula, the manager of the gymnasium at the relevant time did not attend the hearing. By the time the case came to court, she had left the employment of SFS to work as the private fitness coach for a billionaire based in Bermuda.

The following facts have been established.

- 1 Ursula is a former professional athlete and remains very fit. Klaus was employed in administration.
2. The gymnasium has a modern open plan reception area. Klaus's office was on the first floor and to reach it from the main administration office on the ground floor he had to cross reception and go up an open flight of stairs. Klaus regularly had to go between the two offices several times a day and when he did so it was in full view of the customers of the gymnasium who were arriving and leaving. The alternative to the open plan stairs was to take the lift.
3. Klaus is HIV positive and is significantly overweight although not clinically obese. He told the Court that he found using the stairs, particularly if he had to do so several times in a short space of time, very tiring and he sometimes got out of breath. This was made even worse if he had to carry anything of any weight, such as paper files or packets of bottled water. For this reason, he almost always used the lift, even though it was often slower than taking the stairs due to the fact that was the only lift and it served several floors.
4. SFS was concerned about the financial performance of this particular gymnasium, which is in competition with two others in Trier. When she was appointed, Ursula set about improving the image of the gymnasium. She directed that all staff, even those working in reception and in administration must wear SFS tracksuits at work. Klaus hated this. He thought he looked ridiculous in a track suit because of his weight. His colleagues, who had never mentioned it before, now started making comments about his clothing. The comments were, prima facie, sympathetic. For instance, he was encouraged to take off the tracksuit top when he was in the main administration office, out of sight to gymnasium users, because he must "find it very hot". He was also asked by the person in charge of ordering tracksuits for the staff whether she should look for a larger size because the one she had ordered for him "looks a bit uncomfortable". On another occasion, in his hearing, two of his younger colleagues discussed the requirement to wear tracksuits and one of them said that she did not mind but that she thought that other people

might mind because “tracksuits do not look good on everybody”. Klaus found these comments insensitive and upsetting.

5. At a staff meeting, Ursula announced that the use of the lift by staff only going as far as the first floor was inefficient and presented a bad image for the gymnasium users. She directed that all staff only going to the first floor must use the stairs, unless they were carrying anything heavy. One afternoon, she saw Klaus walk across reception and stand waiting for the lift. She called across to him, in the hearing of several customers, to remind him that she expected him to take the stairs if he was only going up one floor. Reluctantly Klaus took the stairs. Later that day he complained to Ursula that it was unreasonable to require him to use the stairs every time and that an exception should be made for him. Ursula did not agree and said that if she saw Klaus using the lift again he would be disciplined.

6. A few weeks later, at the end of a long hot afternoon, Ursula spotted Klaus, carrying a packet of six 33cl bottles of mineral water, coming out of the lift on the first floor. She immediately called him in to her office. Klaus explained that he thought that he was not breaking the rule about using the lift because he was carrying a heavy object. He also pointed out that his colleague, Karin, was permitted to use the lift when she was carrying water bottles. Ursula was not impressed. She did not agree that the water bottles were heavy. She told Klaus that a “real man” would stop complaining and sulking and get fit. She warned Klaus that if she saw him using the lift again, against the rule, he would be dismissed.

7. Klaus appealed this warning to the Regional Manager Philipp. In his appeal he said that he believed that Ursula had discriminated against him because of his weight and that he believed that that was discrimination because of disability. His appeal was dismissed.

8. A few months later, there was a redundancy exercise. Ursula announced that the gymnasium was not performing well enough and that to save money some staff would have to be dismissed. The gymnasium employs fitness instructors, as well as administration staff. She decided that the fitness instructors must remain but that she could make savings in administration.

9. Klaus was one of three administration staff selected for redundancy by Magda the head of administration. At the time of his selection, the gymnasium had a vacancy for a trainee fitness instructor, which was first offered to the three redundant administration staff. All three applied. Ursula was on the selection panel. Klaus was not selected. When he asked why, he was told that his image was wrong for the job and also that it was not clear that he had the necessary levels of personal fitness. The person selected was 27 and, although slim, is a heavy smoker.

10. There was also a vacancy for a manager for the restaurant in the gymnasium. Klaus has previous experience in catering and applied for the vacancy. He was the only person to do so. Ursula was also responsible for appointing to this post. She refused to appoint Klaus. She failed to give a reason and Klaus suspects that it is because she is concerned about his HIV positive status, which he had declared when first appointed to his administrative post.

Questions

1. Do you think that Klaus is a person with a disability? If so, what is the impairment that results in his disability?

For the remaining questions, assume that Klaus meets the definition of disability.

2. Applying the appropriate burden of proof, assess the chances of any of Klaus's following claims succeeding.

2.1 Direct Discrimination because of disability, because of sexual orientation and because of sex.

2.2 Harassment related to disability

2.3 Breach of the duty to make a reasonable accommodation

2.4 Indirect Discrimination because of disability

2.5 Victimization

Does your approach change to any of your findings, including your decision on disability, if the following facts are also established?

1. Klaus is a very keen swimmer and swims a kilometer every day before work although he did not mention that when he was interviewed for the trainee fitness coach job.

2. You conclude that Magda was not being truthful when she said in court that the selection decision for the redundant administration staff was made by her alone and that Ursula was not involved at all.

3. SFS produces evidence that if administrative staff used the lift every time they needed to go upstairs they would, on average spend 30 minutes a day waiting for it to come.

Philip Rostant