

*Discrimination on the Grounds of Disability
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*Professor Dr. Andrea Broderick
Full Professor, UNESCO Chair in Human Rights and
Peace, Maastricht University*



*EU disability law & the legal status of
the CRPD in EU law*

*The CRPD's conceptualisation
of disability and key reasonable
accommodation provisions*

*EU Law: The concepts
of 'disability' and
'reasonable
accommodation'*

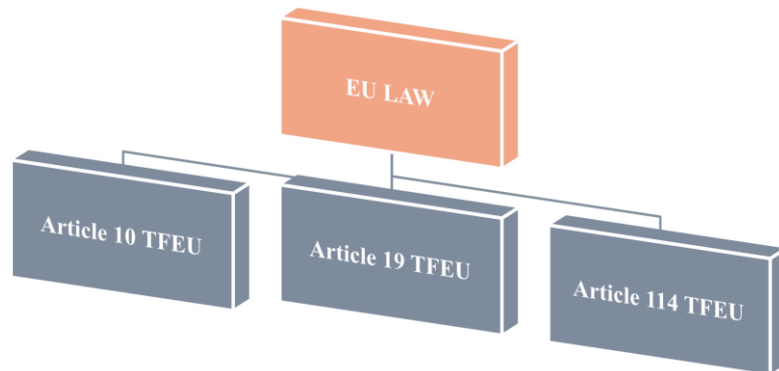
*Key comparative
observations on the
concepts of 'disability'
and 'reasonable
accommodation'*

Concluding remarks

SECTION I:

*EU Disability Law and the Legal Status of
the CRPD in EU Law*

***The Constitutional Provisions that Empower the EU to
Combat Discrimination***



Secondary Legislation on Disability: Directive 2000/78

- The TFEU provisions prompted the adoption of, among other things, **two-non discrimination directives** in 2000
- The most relevant directive for the purposes of disability is **Council Directive 2000/78/EC**
- Directive 2000/78 establishes a general framework for equal treatment in the area of employment and vocational training
- It **prohibits discrimination on various grounds, including disability**, and also on grounds of religion or belief, sexual orientation and age

The Charter of Fundamental Rights of the EU

- The EU Charter of Fundamental Rights (CFR) **became binding in December 2009**, when the Lisbon Treaty came into force
- The CFR has **the same legal value as the EU Treaties** but it does not expand the existing competences of the EU that are laid down in the Treaties (including to protect the rights of people with disabilities): See Article 51 CFR and Case C-354/13, *Kaltoft*, paras. 36-39)

➤ Article 21 of the CFR enshrines the right to non-discrimination, including on the grounds of disability

➤ Article 26 of the CFR contains the right of persons with disabilities to benefit from measures for their independence, social and occupational integration and participation in the community (See *Wolfgang Glatzel v Freistaat Bayern*, C-356/12)

The Conclusion of the CRPD: A Mixed Agreement



Status of the CRPD in EU Law

According to **Article 216(2) TFEU**, international agreements concluded by the EU are binding for the EU institutions as well as for EU Member States

International agreements prevail over EC secondary law and national provisions

The CRPD ‘enjoys a quasi-constitutional status in EU law, beneath the Treaties but above secondary law’ (*Favalli and Ferri, 2016*). The CJEU must take the CRPD into account when interpreting EU secondary legislation

The CJEU has held that the CRPD forms an ‘integral part’ of EU Law (*HK Danmark, Cases C-335/11 & C-337/11, para. 30*)

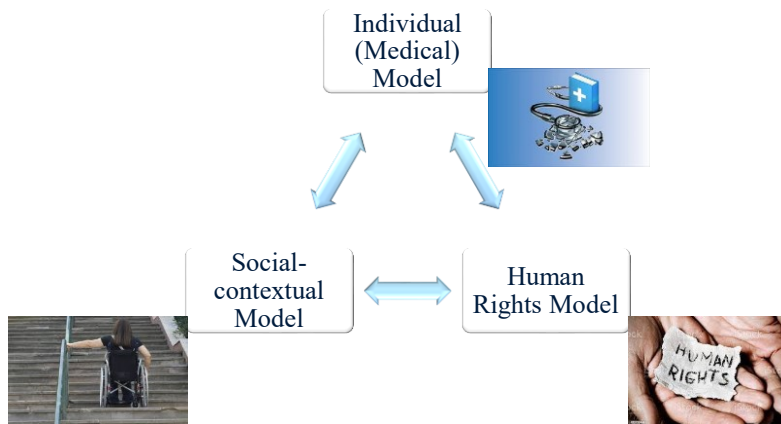
SECTION 2

The CRPD's Conceptualisation of Disability and Key Reasonable Accommodation Provisions

The UN Convention on the Rights of People with Disabilities (UNCRPD)



Models of Disability: The 'Paradigm Shift'



The Individual (Medical) Model to the Social-contextual Model

- The medical model focuses on the **impairment/functional limitation** and attempts to 'cure' the person so that he/she can fit in with the 'norm'
- The social-contextual model recognises that disability stems from **interactions** between people with **impairments and societal barriers**

The Human Rights Model

- The human rights model recognises that disability is a 'social construct'
- Persons with disabilities are recognised as **equal holders of rights** and not objects of charity, so **stereotypes must be countered**
- It recognises that 'disability is one of several layers of identity' (*General Comment No. 6; Degener, 2017*)

Recital (e) of the CRPD Preamble:

- Disability is an evolving concept that 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



Article 1 of the CRPD:

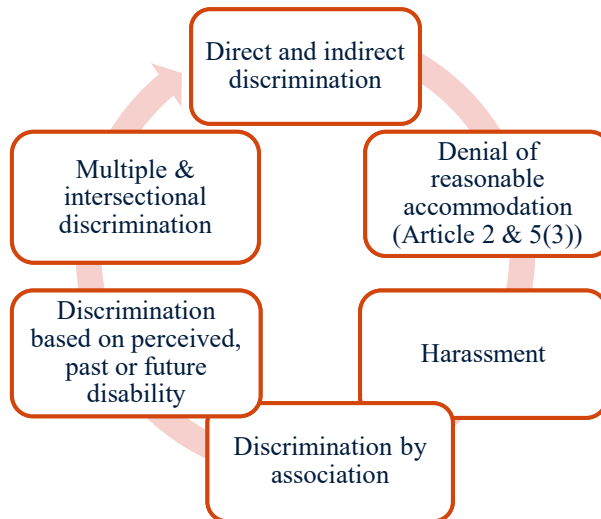
- Persons with disabilities include those who have **long-term** physical, mental, intellectual or sensory **impairments**, which in **interaction with various barriers** may hinder their full and effective **participation in society** on an equal basis with others

The Prohibition of Disability-Based Discrimination in the CRPD: Article 2 CRPD

➤ Article 2 CRPD: "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 Prohibition of Discrimination: Article 5 CRPD



The Duty of Reasonable Accommodation

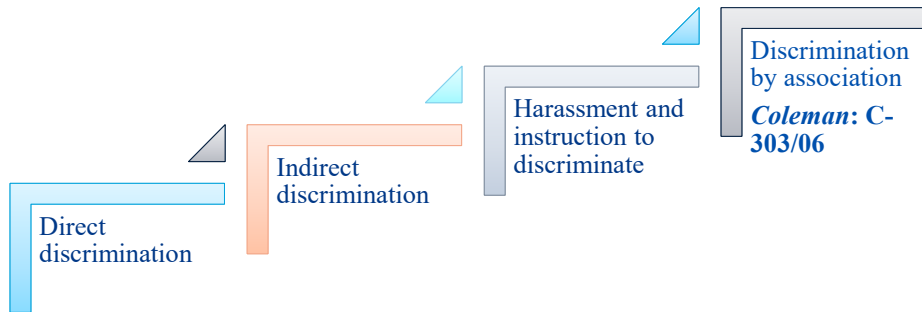
- Article 4 CRPD: sets out the general obligation of States Parties to ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’
- Article 5(3) CRPD: States Parties to the CRPD must ensure that reasonable accommodation is provided (by private and public entities)
- Article 2 CRPD defines ‘reasonable accommodation’ as entailing:

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

SECTION 3:

EU Law: The Concepts of ‘Disability’ and ‘Reasonable Accommodation’

Scope of the Prohibition of Discrimination in the Employment Equality Directive and Case Law



The Concept/Definition of ‘Disability’ under EU Law

- The concept or definition of disability is important as it determines who is deemed to be ‘disabled’ in order to claim protection under Directive 2000/78
- Directive 2000/78 prohibits discrimination on the ground of disability, but it does not define the concept of ‘disability’
- This has led to a number of preliminary references to the CJEU seeking guidance on how to interpret the concept of ‘disability’
- The question arises whether the CJEU’s definition of ‘disability’ is compatible with the CRPD’s human rights model (*Waddington, 2015, 2016 and 2017; Lourenço/Pohjankoski, 2018; Waddington & Broderick, 2018*)

The Duty of Reasonable Accommodation under EU Law

Article 5
Employment
Equality
Directive

Article 5 Directive 2000/78: Employers shall take **appropriate measures**, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training, **unless such measures would impose a disproportionate burden** on the employer....(account should be taken of the financial and other costs entailed, the scale and financial resources of the organization and the possibility of obtaining public funding (**recital 21**))

Recital 20: Outlines appropriate measures

Recital 17: The Directive does not require the employment of an individual who **is not competent, capable and available to perform the essential functions** of the post, without prejudice to the reasonable accommodation duty

The Link between Reasonable Accommodation and Indirect Discrimination

Indirect Discrimination:
Article 2(2)(b)(ii) Directive
2000/78

No indirect discrimination if the employer is obliged, under national legislation, to take appropriate measures (*i.e.* reasonable accommodation) to eliminate the disadvantages caused by the provision, criterion or practice that would otherwise be discriminatory

Main CJEU Case Law on Disability

Chacón Navas v Eurest Colectividades SA: C-13/05

Coleman v Attridge Law (2008): C-303/06



HK Danmark (Ring and Skouboe Werge): C-335/11 and C-337/11.

Glatzel v Freistaat Bayern: C-356/12



Z v A Government Department and the Board of Management of a Community School: C-363/12

Kaltoft v. Kommunernes Landsforening: C-354/13

Main CJEU Case Law on Disability

Daouidi v Bootes Plus SL and Others: C-395/15

Milkova: C-406/15



DW/Nobel Plastiques Ibérica SA: C-397/18

XX v Tartu Vangla: C-795/19



VL v Szpital Kliniczny: C-16/19

TC, UB v Komisia za zashtita ot diskriminatsia, VA: C-824/19

XXX v HR Rail SA: C-485/20

SECTION 4:

Key Comparative Observations on the Concepts of 'Disability' and 'Reasonable Accommodation' in EU Law



The Shift from the Individual to the Social Model of Disability

- In *Chacón Navas*, C-13/05, the CJEU defined disability as: a **limitation** which results in particular from physical, mental or psychological **impairments** and which hinders the participation of the person concerned in professional life
- According to this **medicalised definition**, the cause of the disadvantage was the ‘impairment’, which hindered participation in professional life
- In *HK Danmark (Ring and Skouboe Werge)*, C-335/11 and C-337/11, ‘disability’ was defined as: 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
- The CJEU moved away from the individual model, but it is debatable whether the Court embraced the **social-contextual model** even though it cited Article 1 CRPD (*Waddington, 2015; Waddington and Broderick, 2018*)
- Disability does not have to entail complete exclusion (see *HK Danmark*)

Distinction between Illness and Disability

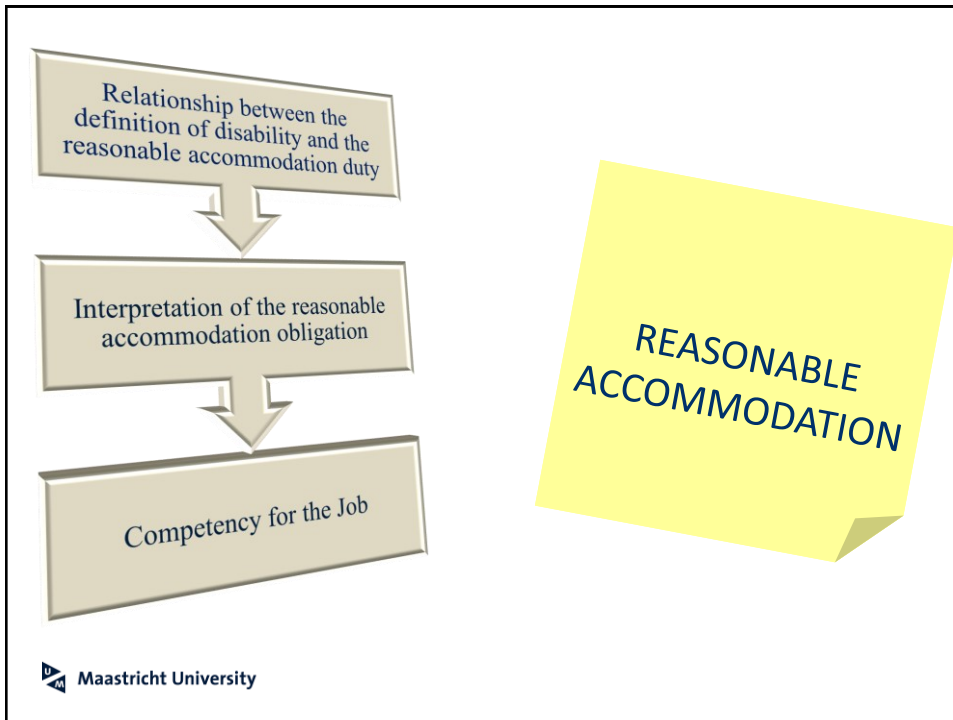
- The CJEU has consistently held that **sickness and disability are different** (for example, see C-13/05 *Chacón Navas*, para. 46).
- The CJEU’s definition of ‘disability’ requires that the impairment be ‘long-term’, so **permanent and long-lasting conditions** are covered
- A curable or incurable disease amounts to a disability if it leads to the required degree of limitation
- In *Mohamed Daouidi v Bootes Plus SL*, C-395/15, the CJEU stated that a limitation may be **long term** if the incapacity of the person does not display a ‘clearly defined prognosis as regards short-term progress or is likely to be significantly prolonged before that person has recovered’ (paras. 56/57)
- The CJEU placed emphasis on **‘objective evidence’**: ‘documents and certificates relating to that person’s condition, established on the basis of current medical and scientific knowledge and data’ (para. 57)

Difficulties with Applying the CJEU Definition of Disability

- The CJEU has ruled that several impairments can come within the definition (for example, occupational illness, *DW Nobel Plastiques* C-397/18) and that a trainee is covered by the personal scope of the Directive (*HR Rail* C-485/20)
- In *Kaltoft* C-354/13, the CJEU held that obesity constitutes a disability within the context of the Directive, but only where it satisfies the definition laid out in *HK Danmark*: **a limitation resulting from an impairment which, in interaction with other barriers, hinders participation in professional life**
- The CJEU gave some examples of relevant limitations: if the obesity of the worker hindered that participation on account of reduced mobility or onset of medical conditions preventing that person from carrying out work (para. 60)
- However, this represents a move away from the human rights model as requiring that a person must experience a limitation resulting from impairment may serve to exclude discriminatory practices, such as, stereotypes, prejudicial attitudes (*Schiek, 2015; Waddington, 2015; Waddington and Broderick, 2018*)

Difficulties with Applying the CJEU Definition of Disability

- In *Z v. A Government department*, C-363/12, the CJEU affirmed the importance of an interpretation of the Directive compatible with the CRPD
- However, it ruled that although Ms. Z had a recognised limitation resulting from her impairment (inability to conceive naturally), this did not amount to disability under the Directive, because it did not impact on her ability to work.
- The CJEU's definition of disability is narrower than that in the CRPD. The CRPD refers to impairments, which in interaction with barriers may hinder full and effective participation **in society** rather than only in professional life
- The CJEU's narrow approach led to an individual being denied employment benefits that would normally be covered by the Directive on the ground that the individual did not meet the definition of disability (*Waddington, 2015*)
- National legislation and the judiciary can follow the approach in the CRPD



Relationship between the Definition of Disability and the Reasonable Accommodation Duty

- ❖ The definition of disability determines **who is protected** under the Directive
- ❖ However, in *HK Danmark (Ring and Skouboe Werge)* the Court outlined that it is not necessary for a claimant to require a reasonable accommodation in order to be considered a person with a disability under the Employment Equality Directive
- ❖ The definition of disability under Article 1 of Directive 2000/78 comes first, before the **determination and assessment of the appropriate accommodation measures** (*HK Danmark, Ring and Skouboe Werge*, para. 45)

Interpretation of the Reasonable Accommodation Duty

Reduction in working hours: *HK Danmark (Ring and Skouboe Werge)*



❖ **Organisational measures:**
DW/Nobel Plastiques

Reassignment to another job:
may constitute an appropriate measure in the context of reasonable accommodation under Directive 2000/78: *HR Rail*

Reallocation of tasks: *TC, UB v Komisia za zashtita ot diskriminatsia, VA*

Interpretation of the Reasonable Accommodation Duty: EU law and the CRPD

CRPD:
The CRPD and the CRPD Committee clearly define an unjustified failure to provide a reasonable accommodation as a form of discrimination (*sui-generis*)

EU law:
Article 5 of the Directive 2000/78 simply sets out an obligation to provide reasonable accommodation (although see the 2008 proposal for a new non-discrimination directive)

The CJEU has not commented on the classification of the reasonable accommodation duty (although see the opinion of Advocate General Rantos in *HR Rail*)

Competency for the Job

DW/Nobel Plastiques: dismissal of a worker with a disability for 'objective reasons' related to low productivity

Tartu Vangla: an absolute bar on the continued employment of a prison officer whose auditory acuity did not meet minimum standards

HR Rail: an employee who became no longer 'competent, capable and available' to perform the essential functions of the post concerned.

When assessing whether a worker with a disability is 'competent, capable and available to perform the essential functions of the post concerned', the reasonable accommodation duty is relevant: see CRPD Committee, Individual Communication 34/2015

CONCLUDING REMARKS



➤ The CRPD has had quite a considerable impact on the interpretation by the CJEU of the EU law definitions of disability and the reasonable accommodation duty

➤ There is some evidence of a social model approach in the case law



➤ However, there are concerns regarding the application in practice of the CJEU's definition of disability

➤ The interpretation of the reasonable accommodation obligation by the CJEU is also partly compliant with the CRPD, but not fully

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THANK YOU FOR YOUR ATTENTION

Contact: andrea.broderick@maastrichtuniversity.nl

