# The Impact of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law

Jean Monnet-Symposium “The European Union as protector and promotor of equality” European Academy of Otzenhausen, Germany, 28-30 March 2019

Presenter: Theresia Degener

# Intro

When the Convention on the Rights of Persons with Disabilities was adopted by the United Nations in 2006 it was the first international Human Rights treaty adopted in the new millennium which was composed of many innovations, which and why it is usually called the treaty of many firsts. It is the first international binding treaty addressing the rights of persons with disabilities from a Human Rights based approach, it is the first international Human Rights treaty demanding a comprehensive national monitoring mechanism to be implemented by members, it is the first Human Rights treaty addressing the issue of intersectionality, and the topic of development from the Human Rights based angle and -most importantly for this meeting-it is the first international Human Rights treaty providing membership for regional integration organizations such as the European Communities which have now become the EU. The latter acceded the CRPD in 2010 which made the treaty part of European Union law starting from 2011. The monitoring mechanism under the CRPD requires that member states submit an initial report within 2 years of ratification and thereafter submit periodic reports. State party reports are then reviewed by the CRPD Committee and a constructive dialogue with members is held in Geneva. The EU’s first report was reviewed in 2015 which resulted in Concluding Observations adopted by the Committee in the same year. Together with its views on individual communications, it’s reports on inquiry procedures, and its General Comments, the concluding observations of the CRPD Committee are part of what is usually called the jurisprudence of the Human Rights treaty bodies. Within its first decade the CRPD committee has adopted about 70 concluding observations, approximately 25 individual communications were considered, 3 reports on inquiry procedures and 7 general comments were adopted. Nondiscrimination was a topic in all these procedures, of particular importance is Gen. Comment number 6 on article 5 CRPD dealing with equality and nondiscrimination.

The CRPD is rightly called the treaty of paradigm change from the medical model to the human rights model of disability. This paradigm change did not start with the CRPD, in fact EU disability law had initiated that paradigm change at least a decade earlier by adopting the social model approach to disability in various programs and legislations. The turning point was 1997, when disabled people became visible citizens of the European Community with the adoption of the Amsterdam Treaty and its article 13 on antidiscrimination measures covering disability as one of several categories. Adopting a social model approach to disability meant, that European disability law and policy was based on the understanding that disability is not only a medical issue to be dealt with by rehabilitation, therapies and other individualized fixing measures. The social model of disability meant to see it as a socially constructed category, caused by barriers, discrimination, stigmatization and exclusion. Instead of welfare measures modern European disability law started to be rights based and equality oriented. Disability law and policy based on a social model of disability prioritized antidiscrimination measures. The first European legislation taking such an approach was the Employment Equality Directive of 2000 prohibiting discrimination inter alia on the ground of disability in the field of employment and vocational training.

The European Union’s predecessor, the European Community signed the treaty in 2007 together with more than 80 member states of the UN at the earliest possibility when the Secretary-General opened for signature in March 2007. The legal effect is that the EU has become a party to the CRPD to the extent of its competences. According to article 44 CRPD the EC/EU had to declare the extent of its competences with regard to the fields covered by the convention when concluding that treaty. Thus, the signature was supplemented with annexes on these competences and a code of conduct between the Council, the EU member states and the Commission in relation to the implementation by and representation of the EU relating to the CRPD. The CRPD is a mixed agreement since it involves exclusive and shared competence and supportive competence to act. With respect to disability equality and antidiscrimination, the EU shares competence with its members all of whom have by now ratified the convention.

# Non-Discrimination in the CRPD

## Non-discrimination as a principle and a right

Nondiscrimination runs like a “golden thread” throughout the CRPD. In fact, when the treaty was negotiated between 2002 and 2006 in New York, a substantial part of the initial negotiations related to its legal character as a pure antidiscrimination treaty, or a development treaty or a more holistic treaty. The European Commission took part in these negotiations and vigorously lobbied for a pure antidiscrimination instrument, however, without success. The finally adopted CRPD is a holistic Human Rights treaty, similar to the CRC. Antidiscrimination as a principle and as a right has a prominent role in it. It appears in several of the 8 general principles of the convention in article 3, which includes inter alia, the principle of nondiscrimination, equality of opportunity, or equality between men and women. In article 4 on general obligations, State parties are asked to take all appropriate measures, to modify or abolish existing laws, customs and practice which constitute discrimination against persons with disabilities. State parties are further obliged, to protect disabled people against discrimination by private actors and to combat discrimination with immediate, effective and appropriate measures of awareness raising against stereotypes, prejudices, harmful practices and other forms of discriminatory attitudes against disabled persons.

The main antidiscrimination provision, article 5, demands that State Parties prohibit all forms of disability-based discrimination and clarifies that specific measures for the purpose of achieving de facto equality of disabled persons shall not be considered discrimination. The right to be protected against discrimination as enshrined in article 5, includes the right to be provided with reasonable accommodation. It is important to note, that reasonable accommodation duties under the CRPD are not to be considered proactive equality measures, also called positive discrimination or special or specific measures. The denial of reasonable accommodation is defined as a form of discrimination in the definition part of the Convention. Thus, as one of its innovations, the CRPD enlarges the definition of discrimination in international Human Rights law. It is further important, to distinguish reasonable accommodation duties from accessibility duties under article 9 CRPD. Accessibility of the built environment, of public transportation and of information and communication systems are of paramount importance for achieving equality of disabled persons. As the Committee has elaborated in its Gen. Comment No 2, accessibility is a precondition for equality and nondiscrimination. But legally, both measures need to be distinguished to which I will return to later.

The CRPD is also the first binding international Human Rights treaty acknowledging multiple discrimination in article 6 on disabled women. In the preamble multidimensional discrimination in relation to other categories than gender or disability are mentioned.

All substantive rights within the CRPD contain the clause “on an equal basis with others”, which confers an equality dimension to all rights within the CRPD. For example, article 12 on equal recognition before the law provides that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and have a right to access to the support they may require in exercising their legal capacity. Supported decision-making is the new term in this regard, challenging systems of substitute decision-making such as guardianship laws or mental health laws. The Committee has interpreted article 12 as prohibiting all forms of substitute decision-making. In fact, article 12 is the strongest manifestation of what has been called the human rights model of disability as the basis of the CRPD and an improvement of the social model of disability. The human rights model of disability clarifies that Human Rights may not be denied or restricted on the basis of impairment and the enjoyment of all Human Rights cannot be preconditioned on a certain health status. The human rights model of disability goes beyond the antidiscrimination agenda in that it demands equal freedom and free equality for all persons with disabilities.

## Reasonable Accommodation as a new concept

Denial of reasonable accommodation as a new form of discrimination in international law has its roots in US antidiscrimination law where it was first used in the context of religion. In 1973 it was extended to disability antidiscrimination law, where it has since then remained and developed into one of the key concepts of disability antidiscrimination law worldwide. During the 1990s a number of countries, such as Canada, Australia or the UK followed the US and adopted similar disability discrimination laws. But the real boost came in the new millennium. With the incorporation of the term “reasonable accommodation” into the European Employment Equality Directive, it became legally mandatory for EU Member States to adopt or amend employment discrimination legislation which provides for reasonable accommodations to persons with disabilities. In the first decade many European countries enacted such legislation, albeit struggling with the legal implications of reasonable accommodation as 2016 report of Delia Ferri and Anna Lawson on this matter reveals. While the CRPD did not give birth to the terminology, it provides a clear definition of reasonable accommodation as “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”. Thus, reasonable accommodation is about making space for differences in human beings and it resonates neatly with the concept of substantive or material equality as developed in antidiscrimination theory as a step beyond formal equality.

In its 2018 General Comment No 6 the Committee has further elaborated on the normative content of article 5 and the legal character of reasonable accommodation duties. They need to be distinguished from accessibility duties according to article 9. Whereas accessibility measures address groups of disabled persons reasonable accommodations according to article 5 address individual circumstances. In GC No 6 the Committee explained these differences:

“Reasonable accommodation duties are different from accessibility duties. Both aim to guarantee accessibility, but the duty to provide accessibility through universal design or assistive technologies is an ex ante duty, whereas the duty to provide reasonable accommodation is an *ex nunc* duty:

(a) As an ex ante duty, accessibility must be built into systems and processes without regard to the need of a particular person with a disability, for example, to have access to a building, a service or a product, on an equal basis with others. States parties must set accessibility standards that are developed and adopted in consultation with organizations of persons with disabilities, consistent with article 4 (3) of the Convention. The duty of accessibility is a proactive, systemic duty;

(b) As an *ex nunc* duty, reasonable accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights. Reasonable accommodation is often but not necessarily requested by the person who requires access, or by relevant representatives of a person or a group of people. Reasonable accommodation must be negotiated with the applicant(s). In certain circumstances, the reasonable accommodation provided becomes a collective or public good. In other cases, the reasonable accommodations provided only benefit the applicant(s). The duty to provide reasonable accommodation is an individualized reactive duty that is applicable from the moment a request for accommodation is received. Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability.”

Reasonable accommodation duties also need to be distinguished from positive discrimination measures called specific measures in article 5 (4) CRPD While specific measures imply a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights, reasonable accommodation is a non-discrimination duty.

The Committee defines denial of reasonable accommodation as one form of discrimination, next to direct and indirect discrimination as well as harassment. It is to be hoped that this clarification puts an end to uncertainties regarding the legal nature of reasonable accommodation. There has been quite some debate on whether denial of reasonable accommodation is a form of direct or in direct discrimination or whether it is a sui generis discrimination. Member States have legislated on this in different manners.

Two more clarifications in GC No 6 may have an impact on EU law in the future. The duty to provide reasonable accommodation is limited by the disproportionate or undue burden test. Often, the proportionality test is mixed with the reasonable test, which in itself does not put a financial ceiling to the duty. A measure is reasonable if it is effective for the purpose it aims to achieve (promote equality and eliminate discrimination). Financial burdens associated with the duty have to be assessed at a later step, not under the reasonable test.

The other conceptual clarification GC No 6 offers relates to the procedure of negotiating reasonable accommodation. It involves several steps such as: identifying barriers, assessing feasibility and relevance of the modification to be made, assessing the limits of the duty and making sure that the modification achieves its objectives.

## Inclusive Equality as a new model of equality

Modern antidiscrimination law has moved from formal equality concepts to substantive equality. Where formal equality is based on the idea of sameness in treatment, substantive equality takes into account de facto equality and the result of equality measures. In order to tackle indirect discrimination and denial of reasonable accommodation antidiscrimination law needs to take into account different needs of social groups as well as acknowledge that social groups are not homogeneous. One could argue that the CRPD follows the substantive equality model, however, the Committee in GC No 6, declared that the CRPD is based on an equality concept, which goes further than the substantive equality model. The CRPD equality model is called inclusive equality model and is based on what Sandra Fredman has developed as the transformative equality model. “It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.“ Inclusive equality resonates with the human rights model which improves the social model of disability. The human rights model of disability “recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible.”

# Impact of CRPD on EU jurisprudence

In its first decade the CRPD had a clear impact on EU jurisprudence as developed by the Court of Justice. A thorough review of the use of CRPD by the Court of Justice of the European Union has been undertaken by Lisa Waddington recently. Her finding is that – so far- the major influence of the CRPD can be seen in the definition of disability interpreted by the Court of Justice. The CRPD as an international treaty concluded by the EU has its place in the hierarchy of the EU norms. According to established jurisprudence, international agreements are inferior to primary law but superior to secondary law. Thus, the Court is bound to interpret secondary EU law relating to the scope of the CRPD in a manner which is consistent with the CRPD as far as possible. In exceptional circumstances the Court may also find that secondary law, conflicting with the CRPD, is invalid.

Before concluding the CRPD, the Court in 2006 held in *Chacon Navas* that for the purpose of the Employment Equality Directive, disability is to be defined as “a limitation which result in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned and professional life.” The limitation, the Court held, can only be regarded as disability” if it will last for a long time”. As Waddington criticized soon after the publication of the judgment, this definition was based on the medical model of disability. According to this model, the disadvantage of person with disabilities experiences is rooted in the impairment and not caused by the reaction of society to this impairment. In *HK Danmark (Ring and Skoube Werge)* the Court has redefined disability as “a limitation which results in particular from physical, mental or psychological impairments which an interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with others workers.” This definition is based on article 1 CRPD which does not contain a definition of disability but describes the group of persons with disabilities as including:” 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.” One can debate whether this new definition is fully in line with the CRPD, i.e. with the human rights model of disability. Lisa Waddington who proposed a social contextual definition of disability on the basis of the CRPD, argues, that the Court in *HK Danmark* still held onto the medical model of disability despite referring to article 1 CRPD. However, she agrees that *HK Danmark* can be regarded as the leading case which brought EU definition of disability into line with the CRPD. The human rights model of disability has so far not been referred to by the Court, but it has been used by other EU institutions such as the European Parliament. The human rights model of disability contains no definition of disability but an understanding of disability as a socially constructed phenomenon which needs to be contextualized in human rights law and policy.

In *HK Danmark* as well as in other cases the Court referred to the CRPD concerning reasonable accommodation, but the references usually go to the text of the Convention rather than to the jurisprudence of the CRPD Committee. As regards reasonable accommodation, the clearest impact of the CRPD can be seen in the clarification that denial of reasonable accommodation is a form of discrimination and not merely a measure to promote antidiscrimination. The Equal Employment Directive uses the phrase “reasonable accommodation” in a different paragraph than the definition of discrimination. This has led to irritations as to whether denial of reasonable accommodation is a form of discrimination. The text of the Convention is very clear in this regard, as article 2 defines discrimination as “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”.

# Impact of CRPD on EU legislation

Certainly, the CRPD also had an impact on EU legislation. While the European Commission until today did not undertake a full review of EU law to determine compliance with the Convention, in many of its secondary legislative instruments (regulations directives or decisions) the EU has since its conclusion of the Convention referred to the CRPD and thus indicated that these instruments are designed to implement the treaty in some way. Examples are the 2012 Regulation (1025/ 2012) on European Standardization, or the 2014 Regulation on electronic transactions in the internal market.

With respect to CRPD impact on EU antidiscrimination three areas should be mentioned: The Disability Strategy 2010 - 2020, the Structural and Investment Funds Regulations, and the European Accessibility Act of 2019.

The European Disability Strategy 2010 – 2020 - a Renewed Commitment to a Barrier Free Europe, is not a formal EU legislation because it is programmatic and rather a form of “soft law”. But it is the main basis for EU disability law and policy. The Treaty on the Functioning of the EU (TFEU) requires the Union to combat discrimination based on disability when defining and implementing its policies and activities (Article 10) and gives it the power to adopt legislation to address such discrimination (Article 19).The strategy identifies 8 areas of action to be taken by the EU and its member states, equality being among them. The European Disability Strategy 2010 to 2020 has clearly been impacted by the CRPD. The whole purpose of that strategy is to implement the CRPD within the European Union.

By far the strongest impact of the CRPD on EU legislation can be found in the 2013 General Regulation on the European Structural and Investment Funds. The ESIF funds are a series of financial support mechanisms for EU members particularly those economically disadvantaged. Financial support is given to projects in areas such as infrastructure training and employment. The General Regulations of 2013 include so-called “ex- ante conditionalities” for the receipt of funding. Among them are the existence of administrative capacity for the implementation and application of the CRPD and, more importantly, reassurance that these funds are used for anti- discrimination measures in line with the CRPD, and particularly for deinstitutionalization instead of refurbishing or building new institutions contrary to article 19 CRPD. These regulations go back to a legal opinion of 2012 written by Gerard Quinn and Suzanne Doyle on the use and future potential of the EU structural funds to contribute to the implementation of the CRPD. The legal opinion clarified that the use of ESI funds must be redirected from financing institutional settings for persons with disabilities to deinstitutionalization and provision of independent living services. Civil society had criticized for a long time the use of European structural and investment funds for this matter. During the review of the first European Union “State” Party report to the CRPD Committee in 2015 this issue played a major role in the dialogue. In its Concluding Observations, the Committee recommended “that the European Union develop an approach to guide and foster deinstitutionalization and to strengthen the monitoring of the use of the European Structural and Investment Funds so as to ensure that they are used strictly for the development of support services for persons with disabilities in local communities and not for the redevelopment or expansion of institutions.” These measures are important in order to achieve equal opportunity for persons with disabilities. They enable persons with disabilities to equally choose where, with whom and how they want to live in the community as enshrined in article 19 CRPD.

The third major impact of CRPD on EU anti-discrimination is visible in the recently adopted European Accessibility Act. This act is not an antidiscrimination legislation since its purpose is to improve accessibility of goods and services and thus improve the functioning of the internal market. Article 114 not Art. 10 TFEU is the legal basis for this legislation which will help to improve accessibility standards in the digital area. However, given that article 9 CRPD and its interpretation by the Committee in its GC No 2 describe accessibility as a precondition for equality, the EAA can be characterized as an antidiscrimination legislation in a wider sense. Even though it precludes important areas of daily life. However, the directive, will help to improve the accessibility of a set of important products and services for persons with disabilities, such as computers, smartphones, tablets, TV sets, banking ATM and services, payment terminals, e-books and e-readers, e-commerce websites and mobile apps and ticketing machines.

During the review of the first “State” party report of the EU the lack of a comprehensive antidiscrimination legislation for persons with disabilities in the EU was also discussed. Unlike other categories, disability is only covered by the Equal Employment Directive. In order to ameliorate this, a horizontal equal treatment directive has been on the table of the European Council since 2008. However, due to the resistance by some EU members-unfortunately Germany taking the lead in this matter-this proposal has never been adopted. When the EU concluded the CRPD, there was much hope that this would lead to the eventual adoption of that directive. In fact, the Committee included such a recommendation in its concluding observations. Unfortunately, this recommendation has not been fulfilled so far.

# Conclusions

To conclude, it may be said that the main impact of the CRPD on EU antidiscrimination law can be seen in new legal concepts, such as the human rights model of disability and the inclusive equality model. These new concepts have not so far been materialized in EU jurisprudence of the CJEU or in EU legislation.

However, there has been some tangible impact. This can be seen in the definition of disability as redefined by the Court in a social-contextual manner. As regards legislation, the impact can be seen in the Disability Strategy 2010–2020, the Structural and Investment Funds Regulations of 2013, and the European Accessibility Act of 2019.

The CRPD’s human rights model of disability as well as the inclusive equality model of GC No 6 offer the legal concepts for a more comprehensive and coherent antidiscrimination theory. It is my hope that in particularly, the inclusive equality model becomes widely accepted across all categories and fields of discrimination law.