

European Disability Law.

Outline.

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1. Executive Summary.

European law and policy has undergone major changes in the last two decades and especially in the last six years.

Legal Competence on the disability issue is shared between the nation states of Europe, the Council of Europe (which works through freely negotiated treaties) and the European Union whose law is directly binding but in narrow fields. These fields have been expanding rapidly to cover most areas of importance to persons with disabilities.

European States used to differ widely in how they dealt with disability. This is no longer true. These days European States differ in **how** they apply European law. So the variations tend to be between different ways of achieving legal results required by European level law.

The USA and many common law countries have moved dramatically towards civil rights and non-discrimination law as the dominant framework of reference in their disability laws and policies in the past 30 years. The civil rights perspective places a sharp focus on the person – rather than on social systems. That is its strength. It is not designed primary to bring about programmatic changes –such changes are generally an agreeable by-product of civil rights law.

The European heritage is slightly different. Disability was traditionally dealt with through a strong social state (European ‘social model’) and not through civil rights or non-discrimination. That is, Europe had a strong programmatic approach to disability. The strength of the approach was that it brought about broad social change. The weakness of this approach is that it tended to perpetuate stereotypes (the disabled are helpless and objects of pity) and it did not respond directly to the persons affected. It did not give them individual standing to challenge how they were treated by others.

The European ‘social model’ is now being refreshed – in the disability context as well as generally. This is partly due to the fact that it is unsustainable in terms of cost. It is also due to the fact that Europe needs more active citizens and workers in its labour markets who can pay taxes. And it is partly due to the rise of civil rights thinking even in a field (disability) dominated by social policy for so long. So Europe is now experimenting by combining a changed ‘social model’ (supporting people actively and not passively through welfare) with the civil rights approach (giving people legal remedies to challenge discriminatory behaviour).

These changes are reflected in law. Most of the social supports that assist persons with disabilities have been given a clear legislative basis. A Good Example is the Irish Disability Act of 2005 which requires programmatic Government action in seven different sectors. A multi-billion Euro investment programme is earmarked for this sectoral approach. This is in addition to the layer of non-discrimination law in the field.

And the EU has a very strong legal basis for action in the anti-discrimination field – Article 13 of the Treaty of Amsterdam (1997). It was under Article 13 that a landmark EU Directive combating discrimination was adopted: the [EU Framework Employment Directive](#) 2000. This Directive borrows from the Americans with

Disabilities Act but then adds a distinctive European social flavour. It is the single most important European instrument driving disability law and policy forward in European nation states at the moment. A new [Anti-Discrimination Unit](#) was formed within the European Commission on Non-Discrimination after the Treaty of Amsterdam. This takes the lead with respect to legislation.

So strong is Article 13 that the EU as such (i.e., separately from its Member States) probably has sufficient legal basis to sign and ratify the new [UN Convention on the Rights of Persons with Disabilities](#). Indeed, the EU States negotiated the UN convention on the basis of what is contained in the Framework Directive.

Presently, the EU Directive only applies in the context of employment. But the EU does have a clear legal basis to extend it to other fields (such as housing and education). An omnibus anti-discrimination Directive (similar to the Americans with Disabilities Act) should be in place within the next 2-3 years.

2. European Institutional Architecture – the Council of Europe and the European Union

Most of the law reform initiatives are now being driven at European level (as distinct from Rome, London or Paris).

This paper will focus on European level responses since this will increasingly direct the law reform efforts of the Member States. But variations in national laws will continue especially where European level institutions have no clear competence (a diminishing field).

(a) Council of Europe – a Classic Intergovernmental Organisation specialising in Human Rights.

The [Council of Europe](#) was founded in 1949 and is headquartered in Strasbourg (France). It has 46 Member States with over 800 million persons including Russia. By way of contrast, the EU has 25 Member States with 450 million citizens.

The Council of Europe is a classic Inter-Governmental organisation that works through a [Committee of Ministers](#) which is a purely political body (normally meeting at ambassadorial level). It also has a [Parliamentary Assembly](#) which is not directly elected but is instead composed of members seconded from national parliaments. There is a [Council of Europe Commissioner for Human Rights](#) (Tomas Hammerberg of Sweden) whose task it is to promote rights and to provide an early warning system. The Commissioner travels extensively and comments on the status of persons with disabilities in the Member States he visits. He makes sure disability has a high profile within the Council.

The tools of the Council of Europe are those one might expect from an Intergovernmental body. It adopts legally binding [treaties](#) which now number 200. These treaties often have independent ‘treaty monitoring bodies’ attached (such as a high level Committee or Court) to issue authoritative interpretations of the treaty.

About 15 of these treaties concern human rights – the most famous of which is the [European Convention on Human Rights](#) which has a [European Court of Human Rights](#). Ratification of this core convention is essentially a pre-condition for membership of the Council of Europe.

Contrary to popular opinion. The judgments' of this Court are **not** directly binding on States. They are enforced' politically by the Committee of Ministers. Most judgments of the Court are quickly given effect in the State concerned.

The Committee of Ministers can also adopt [Recommendations](#) or [Resolutions](#) which are basically Policy Guidelines that the Member States are expected to follow when crafting their laws and policies. Recommendations are issued to ensure that divergences between European laws and policies in important areas are kept to a minimum. There are a number of very important Recommendations and Resolutions on disability law and policy in the disability field (see below).

Importantly, when an 'activity' does not fall squarely within the remit of the Council of Europe (as determined by the Statute of the Council of Europe) any Member State may nevertheless propose that the machinery of the Council be used to enable like-interested States to work on projects of joint interest (through a 'Partial Agreement' mechanism). Disability was one of these '[Partial Agreements](#)' and the relevant 'activities' have indeed produced a wealth of Studies and other research on disability. There is dedicated Unit dealing with the [Integration of Persons with Disabilities](#) in the Council of Europe.

(b) The EU - a Supra-National Organisation with a Core Focus on Economic Integration.

The European Union is, to say the least, quite different to the Council of Europe. It was founded later in 1957. It took national sovereignty to be 'the problem' of Europe and so seeks ways to break down sovereign barriers between its Member States. This was to be done by integrating or pooling national sovereignty in narrow economic fields. The fields initially chosen had to do with the instruments of war (coal, steel, nuclear energy) on a belief that if control over these resources were merged then conflict would be less likely. Building on this, the eventual merger of the national economies was foreseen through the free movement of labour, capital, services and goods.

The original Treaty of Rome (1957) has been amended many times by a succession of treaties to essentially expand the competencies of the EU (Single European Act (1986), Maastricht Treaty establishing the European Union (1992), The Treaty of Amsterdam (1997), and the Treaty of Nice, (2001)).

In order to ensure that the regulation of the 'common market' could not be controlled by a dominant State a new institution was created at supra-national lever to identify the collective European public interest (the [European Commission](#)) and to propose legislation for it. EU legislation is proposed by the Commission (which has a monopoly over such proposals) and adopted by the [Council of Ministers](#) which represents the States. An [EU Parliament](#) is directly elected by the citizens of the Member States and sometimes has important co-decision powers with the Council.

This pan-European Legislation can be in the shape of a **Regulation** which leaves no choice to Member States as to how the law is to be applied. Or it can be in the shape of a **Directive** – which states the ends to be achieved but leaves discretion to Member States as to be the means to be used to give it domestic effect. States must adopt their own legislation ‘transposing’ a Directive within set timeframes. Individuals can sometimes sue in the courts of their own State on the basis of EU Directives – even in the absence of implementing legislation. And, they can challenge their own State’s implementing legislation if it does not sufficiently follow a Directive. Domestic courts can refer a case to the European Court of Justice for an interpretation of EU law.

The Commission can challenge Member States for non-compliance with these laws before the [European Court of Justice](#) whose rulings have direct effect in the Member States (even to the extent of overriding national constitutions!). The supremacy of EU law over national law was seen as essential to building a ‘common market’.

From the beginning, however, the framers of this mechanism foresaw a ‘spill-over’ of economic integration into ‘political’ integration. That is, the more economic fields were integrated, the greater the need for a pooling of political sovereignty to regulate the new ‘common market’.

In sum, the EU treaties focused on economic integration and on the pooling of sovereignty at European level to enable this to happen and to regulate it. The **end** was ‘humanitarian’ (stop war by merging economies) – the **means** were ‘economic’. This meant that the EU lacked a ‘human face’ for a long time. The treaties did not have ‘human rights’ or a Bill of Rights unlike national constitutions and unlike the Council of Europe. This had to change because of the success of the project of economic integration (calling for a more ‘political’ Union) as well as an ongoing problem of legitimacy in pushing economic growth without a social face.

By the mid-1990s the search was on to create a more ‘People’s Europe’ in the EU. And this was to be done by adding new competencies to the Treaties dealing with human rights and social policy. Disability was one of the main beneficiaries of this trend.

The most important of these treaty changes was Article 13 of the [Treaty of Amsterdam](#) that enabled the EU to adopt Directives combating discrimination on the ground of disability (among other grounds). An [EU Charter of Fundamental Rights](#) was politically proclaimed in 2000 with interesting disability provisions. The Charter does not yet have the status of a legally binding instrument.

The most ‘logical’ outcome of this trend is to enact a ‘[Constitution](#)’ (or ‘constitutional treaty’) for the EU which has so far not been attained. That ‘Constitution’ (rejected about two years ago) would have made the EU Charter of Fundamental Rights enforceable directly by the European Court of Justice.

3. Council of Europe Instruments & Policies - Disability.

Progress on disability has tended to come more from the 'soft' law instruments of the Council of Europe than from its 'hard' law treaties.

Treaty Law & Disability.

(a) European Convention on Human Rights & Disability.

This is by far the most important treaty of the Council of Europe. A number of its provisions such as the right to life (Article 2), the right to liberty and due process (Article 3), freedom from torture, inhuman and degrading treatment (Article 3), fair trial (Article 6), right to privacy (Article 8) and non-discrimination (Article 14), are relevant in the disability context.

In *Price v UK* (2002) the UK Government was found in breach of Article 3 because a female prisoner with a disability was not allowed use her battery powered wheelchair, needed assistance with toileting but only a male officer was allowed help and could not use her inaccessible bed. In *Botta v Italy* (1998) the Court accepted that the notion of private life (in Article 8) entailed a right to physical and psychological integrity.

Article 3 figured prominently in the British case of **R (A & B) v East Sussex CC (2003)**. A local health authority was found in breach of Article 3 because it instructed its employees never to lift persons with disabilities. Two sisters had to spend about 3 days and nights in their wheelchairs. The local authority was motivated for health and safety reasons. The British courts found a violation of Article because the ban on lifting was too absolute and failed to take due account of the rights of persons with disabilities.

Unfortunately, Article 14 has not proven very powerful in combating discrimination. A new Protocol expanding Article 14 has now come into effect. So far, it had yielded no results in the disability context. For example, the case of *D.H. v Czech Republic* (2006) involved a claim by Roma that most of their children were placed in segregated schools for the intellectually disabled. The Court found no discrimination. Worse, it went on to say that whether such schools existed was entirely a matter for the States concerned. That is, segregated education was not seen as an equality issue by the European Court of Human Rights. This case has now been referred to the full Court.

(d) European Social Charter & Disability.

Despite its title, this is a legally binding treaty in the field of economic social and cultural rights. It is actually a web of complicated treaties. It contains a large number of 'obligations of conduct' (to be achieved over a period of time) rather than 'obligations of result' (immediately achievable). It has its own 'treaty monitoring body' (*European Committee of Social Rights*) which interprets the treaty. States Parties submit periodic reports to this Committee for evaluation. In addition, States may opt in to a '*Collective Complaints*' mechanism whereby groups can lodge complaints against their own States for non-compliance.

The original [Charter](#) itself dates back to 1961. The original provisions on disability reflected the social welfare and rehabilitation model. The Charter was updated in 1996 ([Revised European Social Charter](#)) and has an excellent Article (15) on disability which fully accords with the modern notion of independence and choice. The Revised text also contains a very powerful non-discrimination provision (Article E: which was not in the 1961 version and which creates an ‘obligation of result’). The mix of the new Article 15 with Article E is very powerful.

The most famous Collective Complaint concerned the allegedly slow rate of integrating autistic children into the French educational system ([Autisme Europe v France](#)). The Committee decided against France in 2003. Essentially the Committee held that when the treaty creates an obligation of conduct that States must make progress that is tangible, measurable and takes due account of those who will be adversely affected if no progress is made (i.e., families).

(c) [European Convention for the Prevention of Torture & Disability](#).

The interesting thing about this treaty is that it is preventative in nature. It sets up a Committee (treaty monitoring body) that routinely travels to –and inspects – facilities in Member States. It puts forward a Report to the States which must then respond with the measures they intend to take to rectify problem issues. This Report – and the Government response – eventually becomes public knowledge.

Importantly, the Committee now routinely inspects mental health facilities and other residential facilities and often makes very trenchant criticism. States normally react constructively to this by putting reforms in place.

Policy Instruments & Disability.

An Integration of Persons with Disabilities Unit exists in the Council of Europe which is responsible for coordinating much of the policy work and research.

(d) *Recommendations of the Committee of Ministers.*

A series of important policy Recommendations and Resolutions from the Council of Europe cover the disability field.

These include [Recommendation R \(92\) on a Coherent Policy for Persons with Disabilities](#). This is a very impressive policy document that deals with equality of opportunities in a variety of fields (employment, education, housing, law). [Recommendation R \(83\) Concerning the Legal protection of Persons Suffering from Mental Disorder Placed as Involuntary Patients](#) set out a number of principles dealing with the lawful involuntary confinement of the mentally ill. The [European Charter on Sport for All: Disabled Persons](#) (1996) sets out a number of principles dealing with the inclusion of persons with disabilities in sport. [Recommendation R \(98\) 3 on Access to Higher Education](#) deals in part with higher education for students with disabilities. [Resolution AP \(2001\)](#) deals with the issue of eAccessibility for persons with disabilities: full citizenship for persons with disabilities through new inclusive technologies.

A hugely important Recommendation deals with the vexed issue of capacity: [Recommendation R \(99\) 4 Concerning the Legal protection of Incapacitated Adults](#). It creates a strong presumption in favour of capacity and maintaining capacity. It encourages assisted-decision making (as against substitute decision-making). The notion of proportionality governs all State interventions. EU Member States were certainly aware of this when negotiating Article 12 of the recent UN treaty.

(e) Influential Studies & Publications.

The Integration Unit within the Council of Europe publishes many comparative law and other thematic studies on disability. These include **Legislation to Counter Discrimination against Persons with Disabilities** (2nd Ed., 2003), **Safeguarding Adults and Children with Disabilities against Abuse** (2003), **Rehabilitation and Integration of People with Disabilities: Policy and Legislation** (useful compendium of legislation, 7th Edition, 2003), **The Status of Sign Language in Europe** (2005). These Studies are not available on line but can be purchased [here](#).

(c) Ten Year Council of Europe Action Plan on Disability: 2006-2015.

In 2006 – and following a High Level Ministerial meeting in Malaga (2003) the Council of Europe adopted a Ten Year Action Plan on Disability: [Recommendation R \(2006\) Action Plan to promote the rights and full participation of Persons with Disabilities in Society](#). It contains 15 Action lines including community living, legal protection, social protection. Six cross-cutting spheres are identified including women and girls, ageing, high support needs and minorities and migrants. Implementation is a matter for the Member States

4. The European Union and Disability.

The EU did not have clear legal competence in the disability field until recently. That did not stop it from setting up a dedicated [Unit on the Integration of Persons with Disabilities](#) in the early 1980s (its contribution to the UN World Decade of Persons with Disabilities). It funded a programme (HELIOS) that brought disabilities NGOs from all over Europe together in dialogue with each other and with EU Institutions. It also had a since the early 1980s which has published a lot of very influential studies (e.g., on the [Definition of Disability](#)).

The Commission also provided support for a recent and highly important study on community-based alternatives to institutionalisation for persons with disabilities: [Included in Society](#). It is perhaps fair to say that the need for deinstitutionalisation and the related need for greater community based care has yet to be faced throughout Europe. Indeed, a group of European NGOs have come together to “promote the provision of comprehensive, quality and community-based services as an alternative to institutionalisation” (European Coalition for Community Living).

The Helios funding programme had amazing if unforeseen consequences. It made groups realise they had much in common and it gave them courage to assert a rights-based perspective on disability – at home in their own States as well as European level. The most important European level disability NGO (which is a combination of many European disability NGOs) is the [European Disability Forum](#) (EDF) in

Brussels. The thinking behind a lot of EU disability law and policy proposals has emanated from the EDF.

EU policy changed in 1996 with the adoption of a famous Communication (policy statement) by the Commission on [Equality of Opportunity for Persons with Disabilities](#) which was endorsed by the Council.

In the early to mid 1990s it was clear that the treaties needed to be given a human face. The EDF put together a cogent set of arguments for treaty changes that would enable the EU to adopt Directives combating disability discrimination. The result was the new Article 13 on the Treaty of Amsterdam. It was this that enabled the famous Framework Employment Directive to be adopted. Mention should be made of Article 21.1 of the [EU Charter of Fundamental Rights](#) which also prohibits disability discrimination. This just reinforces Article 13.

Core EU Legal Instruments & Disability.

(a) [Framework Directive on Employment Discrimination.](#)

This is without doubt the most important of all the European legal instruments on disability. Its legal basis is Article 13 of the Treaty of Amsterdam. It was accompanied by a separate Directive combating [Race discrimination](#). The Race Directive called for the creation of independent Equality Agencies to champion race equality in all Member States. Although the Framework Directive does not call for such Agencies, most Member States have included disability within the remit of the relevant Equality Agencies. The most famous of these in the disability context is the British [Disability Rights Commission](#).

Article 2 of the Framework Directive prohibits both direct and indirect discrimination based on disability (as well as a number of other grounds) in the employment context.

No definition of disability is given. The British definition - which follows the US ADA – has proven very problematic in blocking cases before the courts.

The recent decision of the European Court of Justice in [Chacon Navos](#) (Case C-13/05. C 69/8, O.J. 19.3.2005) indicates that the definition is a question for EU law (i.e., States do not have complete discretion as to the definition) and that sickness is not (without more) a disability.

Discrimination ‘on the ground of disability’ is prohibited. That has led one litigant to claim that ‘association with a person with a disability’ should be covered. The case involves a lady dismissed from her job because she has a son with a disability. This is now pending before the European Court of Justice.

Article 5 creates an obligation to provide ‘reasonable accommodation’ on the ground of disability. It reads:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that 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 undergo training,

unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State.

While failure to provide ‘reasonable accommodation’ is deemed to be discrimination under most comparative case law this question has yet to be firmly decided by the European Court of Justice.

A defence of ‘disproportionate burden’ is allowed. But note the last sentence in Article 5. This effectively means that employers cannot evade their obligations by refusing to take advantage of State grants and aids. Such grants may make the difference to enabling an employer to provide ‘reasonable accommodation’. This is a big difference between Europe and the US. The achievement of civil rights is tied to the provision of social support.

Article 7 of the Directive creates space for States to continue to provide ‘positive action measures’ without violating the non-discrimination norm. Since hiring quotas were in place at the time of the adoption of the Directive it seems clear that they will be accepted. But it is unclear if other ‘preferences’ will be acceptable – e.g., preferences that ‘set-aside’ certain low status jobs for persons with particular disabilities. An interesting case is pending before the ECJ from Greece. A job applicant for a bank job was turned away on the basis that the bank’s quota (2%) was already full. It raises the question whether the quota merely complements non-discrimination or whether it supplants the non-discrimination norm.

This Directive has led to an unprecedented amount of disability law reform and case law all across Europe (including many non-EU States). Typical is [Archibald v Fife Council](#) [House of Lords, 2004]. Here ‘reasonable adjustment’ was interpreted to mean that a worker re-assigned to a job with a slightly higher salary did not have to sit an examination required for ‘promotion’ to that job. In an Irish case in 2003 a railway company was fined for dismissing an employee with depression since it made no effort to identify a ‘reasonable accommodation’.

The European Commission supports an independent Network to keep track of the case law and to study thematic issues. The extensive publications of this Network are placed on the [Commission’s website](#).

The Commission has promised to produce a new legislative proposal that builds on this Directive and applies the non-discrimination norm in other fields such as education, housing, social advantages, etc.

(b) Public Procurement Law.

One tool used by the US to leverage private actors to meet social goals is to force private actors who deal with the Government to reach a higher standard of employment or accessibility with respect to the goods and services they supply. This was resisted in Europe for a long time on the basis that such ‘social conditionality’ distorted market forces. The pursuit of free competition was deemed more important than achieving the social goal of equality.

This is changing. The new [EU Public Procurement Directive 2004](#) *enables* member States in their legislation to add such ‘social conditionality’. But it does not require them to do so.

(c) Transport Law & Disability.

A 2002 Directive on Bus and Coach Design requires the construction of all new buses and coaches to be accessible. A [draft Regulation](#) has been proposed by the Commission in 2005 dealing with accessibility in air transport which would prohibit a refusal to carry a person with a disability on account of their disability and also provide for a right to assistance.

Policy Co-Ordination & Disability.

(a). Other Policy Instruments & Disability.

Where the EU lacks ‘hard’ legal competence to force action through legislation it can usually assist the Member States to co-ordinate their separate actions (so-called Open method of Coordination, OMC). Nearly all the OMCs include a disability perspective. The [EU Employment Strategy](#) which has a peer review mechanism includes the achievement of greater levels of employment for persons with disabilities as one of its goals. The same is true for the EU [Social Inclusion Strategy](#).

There is an extensive EU programme on eAccessibility which is unfortunately not driven by ‘hard’ legal obligations.

It is increasingly likely that EU Development Aid will be proofed from a disability perspective. This is important since The EU development aid budget is the single largest in the world.

(b) New EU Disability Action Plan.

The Commission issued a new action plan to maintain momentum: [Equal Opportunities for People with Disabilities: a European Action Plan](#). The plan proposes to intensify efforts at coordinating the rights-based approach to disability across an impressively broad range of competencies. It will begin with employment since economic independence is so foundational in providing the means for self-determination in so many spheres of life. The Commission will henceforth issue a biennial report on the overall situation of people with disabilities in the enlarged EU. The [first was published in 2005](#). Such reports will be used as the basis for identified new or emerging priorities in the years up to 2010. This coincides nicely with a parallel Action Plan by the Council of Europe.

5. Assessment.

Twenty years ago it would have been impossible to talk of European disability law and policy. National law was supreme and had great variations. Now European States compete among themselves to be the best in implementing European disability

law and policy. And there are now fewer gaps in European law that allow for wide variations between the States.

Both the Council of Europe and the EU now have forward looking action plans in the disability context. These action plans are increasingly setting the domestic agenda for law reform.

The big problems in Europe have to do with community living and institutional care as well as education. The non-discrimination norm – especially within the Council of Europe core legal instruments – remain considerably underdeveloped relative to the US. The most important engine of change engine is the EU and especially Article 13 of the Treaty of Amsterdam.

The EU sees equality of opportunities as a ‘productive factor’ in the marketplace. It sees equality as underpinning economic efficiency and not undermining it. This works well for those who have a tangible ‘use value’ in the marketplace. But it does not directly assist those who live in institutions. The challenge in Europe is to tie its strength (the social safety net) to the goals of civil rights law (protecting individuals).