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***The Importance of Talking While Walking:
A Reflection Paper.***

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Equal Rights in an Enlarged Union**

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Or

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A Reflection Paper.***

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“...we can perhaps remember –even if only for a time – that those who live with us are our brothers and sisters; that they share with us the same short moment of life; that they seek – as we do – nothing but the chance to live their lives in purpose and happiness, winning what satisfaction and fulfilment they can”.

1. Introduction.

I did not write these lines – but I wish I had. They were not even written by a European. In fact they were written by Senator Edward Kennedy in 1968 to eulogise his slain brother - Robert Kennedy. Though written against the backdrop of a personal tragedy, they nonetheless contain the seeds of hope. For they pronounce a certain moral vision of the political community – one that happens to nicely express the essential moral and political mission of our European Union. For the very legitimacy and political potency of our Union rests on our collective commitment to respect diversity. Human diversity constitutes the very bedrock of our unity, a celebration of what it means to be European and not, as too often in the past, an occasion for exclusion and discrimination – whether overt or covert.

We are gathered here in Prague because of that political vision and because of the potentially central role that the two Anti-Discrimination Directives can play in helping to make it a reality. It is incumbent on us to maximise that potential and – through it – to ensure that the values that these Directives are given real meaning in the lives of so many of our citizens. The impact should be personal. The Directives should lead to tangible improvements in the lives of millions. But the impact should also be political by helping to ensure that respect for diversity becomes a natural reflex and not merely something to be done simply to avoid entanglement with the law.

It is fitting to hold this conference in Prague at this moment in time. Franz Kafka wrote chillingly of the absence of legality – or of the existence of a warped notion of legality. His writing serves to remind us that legality has been as much an engine of oppression in the past as it can be the source of justice. It is important to recall that our Union is built on the rule of law – not a spurious rule of law that is disconnected with justice – but one

that is intimately tied to democracy and human rights. That is why we pin so much faith in the possibility of achieving justice through law and that is why these Directives are so important.

I want to reflect on the European project if only momentarily and because it gives context to these Directives. Although crafted by lawyers they do not belong to the technicians and theoreticians of the law – they belong to the People and to their longing for a more open and inclusive Europe. It is important to share this moral vision - or to work towards a common ethical vantage point - for it alone provides the clarity needed to chart a path through some of the more obscure interpretive choices that will confront us soon within the Directives.

By way of charting that moral path, I want to bring the non-discrimination idea back into alignment with the diversity idea – by exploring the ends and values of diversity and the utility of non-discrimination as a tool for its achievement. I believe it is this alignment that gives purpose and direction to the Directives. I believe that it is necessary to create an epistemic community around this alignment so that the ends of the Directives can be achieved.

In doing so, I will share with you our experiences in the Disability Expert Network. In our Network we travelled our own path to come to terms with the values and key concepts of the Framework Directive. Hopefully, our long road of reflection has ripened into understanding – an understanding of what, ideally the Directive, requires and how a country's performance should be judged. As such it is a microcosm of a process of that we all need to go through on other grounds. It is the story of our epistemic community.

We will never reach a final destination. But the journey will be meaningful if we share the same common framework of reference and sense of ultimate destination. Thankfully, we will be able to go through it together in the expanded and integrated Expert Network. But of course, such Networks need to exist as much (if not more) in the life of the mind as well as within technocratic arrangements.

2. Moral Vision – Using Anti-Discrimination Law to Leverage Diversity

Let me tentatively unpack the linkage between non-discrimination and diversity.

(a) Diversity as an End.

I think we can all share the view that diversity is both valuable in itself and also serves other instrumental ends. However, the case for diversity is not always self-evident and needs to be constantly reinforced with arguments that do not simply assume its legitimacy.

History, especially European history, teaches us many lessons in this regard. In a famous exchange in the late nineteenth century John Stuart Mill debated Lord Acton on the value of diversity within society. Mill took the view that homogeneity was crucial for the viability of a sustainable political order. Acton took exactly the opposite view. History has borne Acton out. Both were right, however, to insist that the question of how we handle the ‘other’ goes to the heart of our moral and political vision of the political community.

Perhaps the best way to appreciate the moral attractiveness and political and economic benefits of diversity is to reflect on its absence. The sad reality is that, through time, our societies have not responded well to difference – and almost regardless of the difference in question. It is as if the terms of entry, belonging and participating depended on conformity with some dominant trait or ideal.

(b) The Value(s) of Diversity.

Practical Value – Allowing Identity to Evolve.

Homogeneity is ultimately counter-productive. For it through interaction with difference that identity develops and flourishes. So the more homogenous a society is the less

capable it is of evolving through time to meet fresh challenges. So one case for diversity is precisely that helps to replenish and sharpen one's sense of identity.

Ethical Base – Ethics, Public Reason and Not Ethnicity as the Glue of Democracy..

From a purely ethical perspective, it is surely more laudable to build a political community on a common bedrock of ethics that all can subscribe to regardless of their other differences instead of building a political community on the basis of ethnic similarity.

Economic Rationale: Diversity as a Productive Factor.

From an economic perspective diversity is a productive factor. We all intuit a strong connection between diversity and productivity in part because of the almost uniformly high motivation of those who can now enter the workplace who may have not been able to do so in the past. I applaud the Commission's recent study on the benefits of diversity within the workplace. Much more needs to be done and can be done to make the 'business case' for diversity.

Political Rationale – Diversity as a Civilising Factor.

And diversity is also a civilising factor. We value – or should value – human beings not merely because of their 'use value' within the economy but simply because they are human beings. A lower 'use value' should never equate with a lower value as a human being. Markets ultimately serve people. The social dimension to the market cushions people against markets when markets work against them. Also, and again from a political perspective, a rich infusion of difference helps refresh the polity which might otherwise degenerate towards decay. Nothing helps the political marketplace so much as competition within the marketplace.

(c) Core Antinomy: Group Characteristics – Individual Dignity.

Diversity does not just refer to the diversity of individuals. It refers to the clustering of individuals within categories or other loose associations or groupings. While the group has a tenuous recognition in classic legal thinking, the person who belongs to the group and who is adversely affected because of his association with the group is properly the subject of anti-discrimination law.

Our liberal-democratic order is predicated on a certain moral vision of the human being. Our legal order is committed to a transcendent view of the person as morally free and even prior to the group or community. We view individuals as capable of choosing their own good as against having them imposed. We abhor ascribing responsibility –much less blame – in circumstances where individuals bear no personal responsibility. People are penalised only for their morally free acts - for what they do (murder) - and not for who they are (black, Irish, Jewish). Crimes of condition (being Irish or Jewish) are prohibited. Our legal orders create space for the morally free person by checking public power and by facilitating free and private interaction in civil society and in the market economy. The image at play is that of the ‘unencumbered self’.

Yet the reality is that the stuff of the human personality is moulded at least in part by group affiliation and community. Our affiliations are partly constitutive of who we are as individuals. And our societies do not react equally positively toward all such affiliations. That is, we are discriminated against **because of, or on the ground of**, age or disability - **characteristics that make sense when aggregated or shared collectively among others**. While the ground is collective – the effect is always personal.

I leave to one side the academic debate about the ‘social construct’ of difference. There is much to the view that persons are often ‘marked apart’ by group affiliations in order to be ‘kept apart’. That is to say, difference is imagined or created in order to set the terms of entry and participation so as to exclude those deemed different. However, our primary focus is not on the origin of the difference but on how those who are different – or who are labelled as different - are treated.

I also leave to one side the question of whether the relevant difference is inherited, acquired through personal choice or simply (and sometimes wrongly) ascribed by others. Again our core focus is on the negative use of difference and the possible uses of anti-discrimination law to undo its effects.

It often appears unclear whether the purpose of anti-discrimination law is to valorise the group or to disaggregate the individual from the group and so honour the individual despite the group. To put the matter another way, it is often unclear whether individuals are being protected through anti-discrimination law *because* of their identify with the group or *despite* their association with the group.

Often we are proud of our affiliation – whether inherited (e.g., colour) or acquired (e.g., choice of religion). It can give shape and meaning to our personal destinies. Often we want our affiliation valorised by law and policy. We want to combat prejudice in society about the group – against individuals who share core traits of the group. We want legal protection *because* we associate with the group trait or characteristic. Take an extreme example. In the context of the drafting of the treaty on disability rights, some NGOs argued that there should be a right to be disabled and be proud of it! That is to say, disability pride is equated with black pride in belonging to the relevant group in question.

On still other occasions one seeks legal protection because of the way in which collective traits are automatically ascribed to the individual. These traits may stem from stereotypes or prejudice. This attribution may discount the extent to which there may be variations within the group or trait. Most importantly, it leads to a form of social determinism – one that is blind to the individual realities behind the affiliation or trait. And liberal legality is the sworn enemy of social determinism in as much as it forecloses human possibilities for fulfilment. So although the group affiliation may be constitutive of who we are as persons, it does not eviscerate our individual humanity which is always transcendent. Perhaps this gives us a clue to the underlying moral purpose of the Directives.

3. Legal Vision – Anti-Discrimination as a Tool.

How should a democratic society interested in the flourishing of its citizens and the diversity of its various group affiliations respond to human difference?

Before unpacking the various layers at play, let me first distinguish between several axes on which to assess the issue.

(a) Deontological vs Comparative Justice: Respecting/Accommodating Difference.

First, one might have a developed theory about how to respond appropriately to particular differences in democratic society. That is to say, one might have a developed theory about the place of that difference in society and the about just claims of those who are members of the affiliation. There is a substantive underlay to this vision of justice. Call it a deontological approach.

Secondly, one might adopt the view that those who share the trait or characteristic in question must at least be treated equally with others who are similarly situated; call it a comparative approach. This approach does not necessarily pivot on any substantive theory of justice or of the just claims of the group when considered in isolation from other groups. It assesses the justice of their treatment *relative* to the treatment of other groups. So its underlying theory of justice is relative rather than substantive.

Obviously the second of these approaches is the one that predominates in equality theory. And yet it is hard to imagine a purely comparative theory of justice in complete isolation from substance. Substance creeps back into the equation when considering, for example, whether individuals are indeed ‘similarly situated’. If individuals are not in fact held to be similarly situated then the difference may be ignored or some positive account might be taken to accommodate it.

This latter view of non-discrimination has been endorsed by the European Court of Human Rights (Thlemminos) and by the European Committee on Social Rights (Collective Complaint 13). So the non-discrimination ideal – properly parsed – is quite

capable of stretching to this agenda of accommodating difference and the Framework Directive remains one of the pre-eminent tools in the world for achieving this.

(b) Formal vs Redistributive Theories of Justice.

I leave to one side the distinction between formal and substantive or redistributive justice for the purpose of today's proceedings. It is clear, however, that formal justice alone is not enough to secure justice in the round.

It is plain that formal protections secure the personal element by protecting people against the abuse of power – whether public or private. And in this sense it is immediate and visibly valuable. And while protecting people against power is indispensable it must surely be accompanied by restoring to people power over their own lives. This is where economic, social and cultural rights are important in rounding out the non-discrimination agenda. Indeed this is why a consideration of the synergies that can and should be developed between the European social model and anti-discrimination law is so important.

(c) Promoting Difference – Compatibility with Anti-Discrimination Law.

Promoting difference is another matter. It could be said that a democratic society has a responsibility to foster group affiliation since it is a precondition for individual identity – or at least provides the backdrop to the formation of individual identity. And indeed, to a certain extent society does foster a plurality of groups at least in the context of religion by exempting religious bodies from some aspects of the laws. Yet the conscious promotion of group difference remains the exception rather than the rule.

And so it is that positive action measures – whether responding to past injustices or compensating for a legacy of disadvantage or whether intended to valorise group identity – tend to find authoritative support outside the non-discrimination ideal and from more general public policy goals including the goal of advancing diversity in society. And yet there is congruence between the ends (if not always the means) of positive action and non-discrimination and it is this congruence that allows both to co-exist. It is precisely

because non-discrimination is a tool for the achievement of diversity that it can sit well with such positive action measures. That is why many non-discrimination provisions in Constitutions and in legislation create explicit ‘savers’ for positive action measures.

However, and this is a big caveat, this does not alter the fundamental commitment of our legal orders to the human element. There may well come a point where certain positive action measures so eviscerate the human element that they can no longer be accommodated within liberal legal theory and might be found to violate the non-discrimination norm. It is debatable, for example, whether some positive action measures in the context of disability so debase the human personality as to be incompatible with the non-discrimination ideal. To reserve certain low skilled jobs for certain categories of disabled workers may be a step too far.

(e) The ‘Difference’ of the ‘Different’ Grounds.

I think it is important to remember that although direct discrimination is usually intentional, it need not be. Conversely, indirect discrimination may sometimes in fact be quite intentional in order to screen people out from consideration. More usually, indirect discrimination will arise because of the unreflective adherence to a pattern of behaviour that excludes in fact or by adopting policies and practices that did not consciously consider their impact on categories of persons and which may impact adversely.

Sometimes to discriminate on the basis of a ground it is prohibited because the ground (or group trait) is itself worth valorising. Sometimes it is because the ground is proxy in the minds’ eye for certain traits, which even if accurate, should never be used against individuals (age). And sometimes it is because the automatic attribution of the core traits of a ground or affiliation impermissibly eliminates the individual element – or merit or inherent worth – that should shine out despite membership of the ground in question (disability). It is worthwhile pausing on the various grounds in this light at least momentarily.

Take age. This is a human trait acquired naturally through the efflux of time. There is some truth to the common perception that age impacts on capacity. That is, there is a natural rate of decline of personal 'use value'. It is this kernel of truth that makes it hard to challenge the misperceptions. Leave aside the rhetorical question whether 'use value' should determine legal status. The implicit lesson of history was 'accept your exclusion – you're getting old'. However, this truth – or partial truth – has always masked the large degree of individual variations. Indeed, it is no longer as true as it once might have been because of more healthy lifestyles and advances in prophylactic medicine. In other words, biological fact gave rise to an odious form of social determinism which must now be reversed to valorise the diversity of ages in our societies. Both the direct and indirect discrimination norms are of use in rolling back practices that unduly foreclose opportunities on the ground of age.

Take disability. Here the reduction of 'use value' is implicit in the very word 'disability'. So the resulting exclusion (which is extremely pronounced in the employment sphere) appears even more 'natural'. The countervailing ethic of integration is automatically on the defensive as cost-ineffective since it is presumed that persons with disabilities are less productive. Here the doctrine of 'separate but equal' - long and rightly rejected in the area of race – still finds an echo in the field of disability. Not only is the exclusion 'natural' and one must reconcile oneself to it but one must also be thankful for State support and largesse! Social determinism again grossly exaggerates the reduced - or allegedly reduced - capacity of persons with disabilities. To a large extent the non-discrimination norm (both direct and indirect) helps to reverse the presumptions accreted through the centuries about persons with disabilities. Furthermore, to respect the difference of disability will entail accommodating the difference in order to make space for the presence of the individual so that they can function to the optimum of their true capacity. Hence the significance of the concept of 'reasonable accommodation' as a way of moving beyond respecting difference to accommodating it. The real challenge is to ensure that such accommodation remains within the non-discrimination idea.

Note that with age and disability the would-be discriminator is less likely to be motivated by personal animus and more likely to unthinkingly repeat a pattern or practice once considered 'normal'. Hence the importance of the indirect discrimination norm on these grounds.

Take sexual orientation. Why does sexual orientation attract discriminatory behaviour? Note, age and disability tend to mask an underlying reality of personal capacity. So the key task with respect to those grounds is to create space for a more rational appreciation of individual worth behind the mask. Sexual orientation is not a mask for anything else. It is what it is. And yet it is reacted to negatively for a variety of complex reasons including irrational fear. No wonder that many persons of a difference sexual orientation fear going public. And so the key task of non-discrimination law is to protect sexual orientation for what it is. There is a higher likelihood on this ground that the would-be discriminator would be motivated by personal animus but here too indirect discrimination can prove a useful weapon since many would-be discriminators will likely try to hide their animus.

Take race – the emblematic ground of discrimination. Such differences are generally visible. They imply – but not invariably – differences in culture and religion and political belief. They challenge the ethic of toleration and diversity. The motivation to prohibition discrimination on the ground of race is twofold; it is to honour and valorise the difference of race and race as such and it is (1) to protect individuals because of negative reactions against race and it (2) to reverse irrational presumptions about those who belong to certain racial categories (i.e., disaggregating and honouring the personal element). The first goes to the reality that our polities are now built on common public ethics to which all may subscribe rather than on ethnicity which by definition excludes. The second protects individuals against stereotyping.

And take religion and belief. Religion used to form a core unifying element of our political communities. By the Treaty of Augsburg (1555) a country was to have the same religion as its ruler. So religious affiliation was closely tied to political loyalty. That

link has thankfully passed so that a diversity of faith-based value systems is not only possible but also desirable. Yet prejudice remains against particular religions or belief systems. A plurality of faith-based ethical systems is important in democratic culture.

3. Case Study in Practical Wisdom – The Ripening of Reflection into Understanding in the Disability Network.

The Expert Network in Disability Discrimination started from a very low knowledge base. A number of us had worked together since the early 1990s on various aspects of EU law and policy in the field of disability. Tellingly, we were all working alone and separately until a European-level project brought us together.

(a) The Emergence of a Community of Disability Discrimination Scholars in the 1990s.

The famous European Day Report of 1995, which was aptly entitled, ‘Invisible Citizens’ involved a number of members of the future Network and initiated a process of collaborative legal research at European level. The European Day project is supported by the European Commission and Parliament. It is fair to say that the 1995 Report was the genesis of much European level legal research into disability discrimination law. It clearly exposed the true degree of discrimination against people with disabilities throughout Europe and provided cogent arguments for further European level action to combat this discrimination.

The European Day Report of 1996 developed the arguments for amendment to the treaties in order to provide a clear legal basis to enable effective European level action to be taken. After Westendorp Reflection Report endorsed the arguments emanating from the European Day analysis it was clear that some treaty changes were on the way and that they would include disability. So the arguments played a pivotal role in ensuring that any treaty developments in the field of discrimination would include disability. This was a giant leap forward.

Part of the momentum for continued collaboration at European level came from unexpected quarters. A number of those involved in the European Day Report of 1995 as well as other European country experts were present at a special conference to mark the 10th anniversary of the enactment of the Americans with Disabilities Act in 2000 in Washington DC. We vowed not to meet again so far away from home and to initiate joint research projects in Europe. It is fair to say that without the European Day projects and without the added stimulus of the Washington conference there simply would not have been a critical mass of scholars available to bid for the Article 13 Disability Network.

(b) The Establishment of the Disability Network – Building the Knowledge Base.

The main task of the Network, which was set up in the Spring of 2002, was to provide a Baseline Study on disability discrimination law in the existing 15 Member States. All members of the Network were lawyers (mainly academic). Two judges were also members (Denmark and Spain).

We knew we were starting from a low knowledge base compared, for example, to race. A detailed Template for Reporting by the national experts was drawn up with the expert assistance of Dr Aart Hendricks. We prioritised information concerning those aspects of the Directive that were either peculiar to disability or were particularly important in their application to disability. Unsurprisingly, the most important of these had to do with the status of ‘reasonable accommodation’ under national law (Art 5). We also asked experts to report on issues such as the reach of the relevant non-discrimination norms (both direct and indirect) to disability, whether individuals who are associated with persons with disabilities (e.g., mothers in the home seeking access to the labour market) are brought within the protective reach of the laws. We also asked experts to compile a Bibliography on disability discrimination in their countries.

The first set of Reports laid the groundwork for a draft Synthesis Report. In the subsequent year (2003) we asked the experts to update their reports and then commissioned a number of reports on thematic issues such as definitions (of disability),

the status of 'reasonable accommodation' under comparative law, the interaction of health & safety law with disability discrimination law and medical testing.

National reporting and work on thematic studies continued through 2004. Although the Network was due to be wound down by June 2004 we asked the experts to submit their Final Reports together with 5 page summaries. We specifically commissioned three eminent members of the Network (Professor Degener, Professor Deschutter and Dr Lisa Waddington) to complete their thematic work on definitions, medical testing and 'reasonable accommodation'.

Separate from the Commission, the Network itself convened a major international conference on disability discrimination in the Catholic University of Louvain in April 2004. This was easily the best attended conference on European disability discrimination law to have ever taken place. Over 19 nationalities were represented. The object of the exercise was to explore the relationship between the non-discrimination idea in the Framework Directive as it applies to disability to positive trends within general and regional human rights law. To that end we invited eminent speakers to address whether and how the Framework Directive could be understood against the backdrop of international law (professor McCrudden), the status of the non-discrimination idea under the International Covenants on Civil and Political Rights as well Economic, Social and Cultural Rights (Professor Bossuyt), the European Convention on Human Rights (Dr De Silvia) and the Revised European Social Charter (Claire Hamed). We moved logically from what 'ought to be' under international law to explore what 'can be' by looking at comparative law – especially that of the US (Professors Burgdorf and Blanck), Canada (Dr Patricia Bregman) and Australia (Dr Gaeme Innes). We were particularly mindful of the pitfalls in litigation that occurred elsewhere and determined to learn from them. We then looked carefully at developments within the Member States. We did so thematically by taking the key issues of relevance to the disabled under the Framework Directive; namely Definitions, the status of 'reasonable accommodation' and Medical testing.

(c) Outputs and Achievements – A Sustainable Community of Scholarship.

The result has been a richness of research and ideas that would not otherwise have been possible to generate. A Baseline now exists with which to properly analyse domestic law. Our Synthesis Report will hopefully be published soon by the Commission and will clearly set out our vision of what the Directive requires and current state of the art in the Member States. In doing so it will help to clarify key concepts in the disability context.

The thematic research address key inhibiting factors that may hold back the effectiveness of the Framework Directive in the Disability context. That is why we looked at the necessity of bringing the relevant norms of the Framework Directive into alignment with existing health & safety law.

While all of the experts were well grounded in anti-discrimination law, a few of them had little direct exposure to non-discrimination on the ground of disability. Now all of them are and this has paid handsome dividends. Our Greek member for example, arranged a hearing in the Greek Parliament on the transposition of the Framework Directive on the disability ground.

The Commission should be in a position to publish at least some of the output of the Network soon. And we will separately public the outcome of the Leuven conference which will be the leading textbook on the subject in Europe.

Most importantly we have formed a genuine epistemic community. Our questions persist. But now we are asking better questions. And we approach them from the same value base.

5. Our Common Journey – Challenges in the Road Ahead.

I believe that the journey ahead should be shared. The creation of a merged Expert Network provides us with an opportunity to create synergies between the various grounds.

