

The UN Disability Convention and its Impact on European Equality Law

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Introduction

On 23 December 2010, the European Union (EU) ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). It is the first time in its history that the EU has become a party to an international human rights treaty.² The CRPD was ratified just weeks after the European Commission published the European Disability Strategy 2010-2020 which sets out a detailed programme of action to empower people with disabilities so that they can enjoy their rights, and benefit fully from participating in society and in the European economy.³

Ratification means that the EU is now bound to ensure that the rights of persons with disabilities are respected, protected and fulfilled. It also mirrors the obligations of the 16 member states of the European Union that have ratified the CRPD and the remaining 11 that have signed it.⁴ Since 2000, the EU has taken on an important role in setting down minimum standards with respect to disability discrimination law within member states. Alongside this, the European Court of Human Rights (ECtHR) has very recently handed down decisions which have broadened the scope of protection for persons with disabilities within the Council of Europe's borders. Yet, there are many issues relating to disability discrimination which are under-developed in comparison to other grounds of discrimination. This article, therefore, aims to examine some of the recent developments in relation to disability discrimination law

in Europe and explore the potential of the CRPD to improve equality outcomes for persons with disabilities.

Although some progress has been made to introduce legal safeguards to overcome discrimination against disabled people, part one of this article indicates that discrimination and intolerance are still widespread. Part two looks at the CRPD and highlights some of the key provisions for overcoming disabled persons' inequality. Finally, part three discusses the recent developments in European (both the EU and the Council of Europe) law and policy, and appraises the (potential) influence of the CRPD on regional mechanisms.

1. Discrimination and Intolerance against Persons with Disabilities in Europe

In the EU, one in six people - around 80 million - has a disability that ranges from mild to severe.⁵ According to the Council of Europe Commissioner for Human Rights, this figure within the Council of Europe member states is between 10 and 15 percent of the population, i.e. between 80 and 120 million people.⁶ The wide range of impairments that fall within the term "disability" make the definition far broader than that applying to any other vulnerable group. Persons with disabilities include persons with physical, mental,⁷ intellectual⁸ and sensory impairments. It is noteworthy that protection from discrimination

on grounds of disability is also often extended to persons living with medical conditions such as HIV/AIDS or diabetes on the basis of the discrimination which such persons are likely to experience following their diagnosis.⁹

While many disabled people may experience similar discriminatory treatment, the causes of disadvantage differ and depend on their individual impairment. For example, issues affecting the equality outcomes for a person who has schizophrenia may differ entirely to the issues that affect the equality outcomes for persons living with HIV/AIDS or those who have lost a limb or a sensory function. In light of this, the human rights definition of persons with disabilities contained in Article 1 of the CRPD offers a holistic approach to defining disability. Article 1 provides that:

“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 definition in Article 1 moves away from the historically dominant medical model of disability and towards the social model understanding of disability. In this understanding, “disabled people experience disability as a social restriction, whether those restrictions occur as a consequence of inaccessibly built environments, questionable notions of intelligence and social competence, the inability of the general population to use sign language, the lack of reading material in Braille or hostile public attitudes to people with non-visual disabilities”.¹⁰

A definition which is based on the individual experience is more capable of accurately framing discussions which are relevant to

disabled people, identifying hidden sources of discrimination and improving our understanding of human rights.¹¹ As a result of defining disability in a way that takes into consideration the impairment of the individual *and* the barriers that hinder their social participation (for example, environmental, built or human barriers), Article 1 of CRPD entitles a broad range of people who are vulnerable to discrimination on grounds of disability to protection.

Disability discrimination is a historical legacy which is ingrained in the fabric of all societies.¹² In Europe, this legacy is reflected in the continued acceptance of many practices that acutely discriminate against persons with disabilities. Persons with disabilities are often assumed to be incapable of undertaking productive work, attending schools on a level playing field with children without disabilities, or make active contributions to their communities, and often discussions on developing equalising measures for persons with disabilities are underpinned by such assumptions. According to the International Labour Organisation, in Europe, a person with a disability aged between 16 and 64 has a 66% chance of finding a job; this rate falls to 47% for a moderately disabled person and 25% for a person with a severe disability.¹³ Further, inequality is not restricted to sectors such as employment. The European Union Fundamental Rights Agency has recently concluded that in 17 out of 27 EU member states, persons with mental health problems and persons with intellectual disabilities are excluded from political participation or are only permitted limited political participation.¹⁴

Another significant problem is the failure of persons without disabilities to consult or involve persons with disabilities in making decisions that have far-reaching consequences

for the latter. Since 2008, Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, has voiced concerns about the treatment of persons with disabilities on three separate occasions.¹⁵ In 2009, he identified the need for greater action:

“During missions to Council of Europe member states I have had to conclude that persons with intellectual disabilities are still stigmatised and marginalised; that they are rarely consulted or even listened to; that a great number of them continue to be kept in old-style, inhuman institutions; and that moves to provide housing and other services in community-based settings have met obstacles and been delayed.”¹⁶

Yet symptoms of disability discrimination such as stigma, stereotyping and prejudice are still common and corrosive influences which marginalise persons with disabilities. These symptoms stifle clear and constructive thought about how processes and procedures could be made more accessible and inclusive for disabled people. For example, in many European countries disabled persons are marginalised from political and legal decision-making processes because of the historical perception that they do not have the capacity to be involved and actively participate.¹⁷

Of deeper concern is the stigma and prejudice which is frequently formalised in policy, resulting in egregious human rights violations against persons with disabilities in some countries. In the recent past, the European Committee on Social Rights has condemned the practice of segregating children with intellectual disabilities in educational institutions in France¹⁸ and Bulgaria.¹⁹ There has also been widespread media attention in the United Kingdom in respect to violent attacks on persons with learning disabili-

ties. In one widely reported case, a 64 year old man suffering from mental and learning difficulties died of a heart attack after being harassed and verbally abused by two youths in Manchester.²⁰ This case is not an isolated event. Instead, it represents a trend which demonstrates that intolerance toward disabled persons is growing and becoming more visible. One reason for this trend may be that violence against persons with disabilities is ignored, underestimated or misunderstood. The latest hate crimes report by the Organisation for Security and Cooperation in Europe (OSCE), which states that only nine European countries reported to the OSCE that they recorded any data on crimes against persons with disabilities, suggests that underreporting is a significant barrier too.²¹ Consequently, the contention that ignorance or misunderstanding of the issue is a dominant factor which causes widespread discrimination must be matched with the fact that there is also a lack of effective monitoring and reporting of attacks.

2. The Unique Challenge of Disability and the UN Convention on the Rights of Persons with Disabilities

The CRPD was adopted in 2006 and entered into force in 2008. Its purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.²² It was the most rapidly negotiated human rights treaty to date²³ and, since its adoption, it has received impressive support globally.²⁴ Disabled people and disability organisations were key participants in influencing and drafting the CRPD.²⁵ This influence is visible not merely through the broad range of substantive rights the CRPD guarantees, including both civil and political rights²⁶ and socio-economic rights,²⁷ but also through the procedures it puts in place for mechanisms such

as monitoring.²⁸ Taking into consideration the scope of discrimination against persons with disabilities, we should highlight some of the CRPD's key provisions that will be important for combating disability discrimination throughout Europe.

2.1 Consultation and Involvement

As discussed above, ignorance and misperceptions about the capabilities of persons with disabilities have propagated their exclusion from many areas of life in European societies. Lacking effective avenues of consultation or involvement, persons with disabilities are often denied the opportunity of participating in public decision-making processes and shaping key policy issues. The CRPD requires consultation and involvement through Article 4(3):

“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.”

Article 4(3) of the CRPD provides that meaningful consultation with and involvement of people with disabilities needs to be the starting point to developing legislation and policy to implement the Convention. Such consultation and involvement are crucial for creating laws and policies relating to disability issues. Indeed, even in respect to laws or policies that do not relate to disability issues, consultation mechanisms should aim to capture and reflect disabled peoples' views. Without effective consultation and involvement, persons with disabilities will inevitably be burdened with laws and procedures that do not

account for their individual experiences and that reproduce the paternalistic approach that has sustained historic disadvantage. For many law and policy makers, the principle of consultation and inclusion raises concerns about communication and sensitivity (not to mention funding); however, unless serious consultation and involvement procedures are ingrained into law and policy development processes, either through the direct participation of persons with disabilities or indirectly through representative organisations, effective equality will never be achieved.

2.2 Reasonable Accommodation

Article 5(3) of the CRPD requires State Parties to take all appropriate steps to ensure that reasonable accommodation is provided for persons with disabilities in order to promote equality and eliminate discrimination. The CRPD also specifically requires that State Parties provide reasonable accommodation in respect to the right to liberty and security of the person,²⁹ the right to education³⁰ and the right to work and employment.³¹ Reasonable accommodation is defined in Article 2 of the CRPD as follows:

“‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

This definition is similar to but stronger and more far-reaching than the definition contained in Article 5 of the Council Directive 2000/78/EC of 27 November 2000, which, within the context of employment and occupation, requires that:

“[E]mployers 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”.³²

Although many states within the EU will have in place provisions to provide reasonable accommodation in employment and occupation, Article 5(3) of the CRPD creates a stronger and broader requirement. States Parties must take all appropriate reasonable accommodation steps to promote equality in the enjoyment and exercise by persons with disabilities of all human rights. In order to comply with the CRPD, States Parties bound by the Council Directive will now have to expand their legal provisions relating to reasonable accommodation for people with disabilities to cover areas outside employment and occupation.³³

2.3 Legal Capacity

Article 12 is one of the most difficult but interesting and innovative aspects of the CRPD. Article 12 provides that:

“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.”

Article 12 of the CRPD has a great potential to create positive change. The fact that many states continue to deny or restrict the legal capacity of persons with intellectual difficulties through court action is very problematic.³⁴ It has led to the restriction of basic rights without justification or review. For example, as the European Union Fundamental Rights Agency has reported, the majority of European Union Member States link the right to political participation to the legal capacity of the individual.³⁵ In view of the impact that the restriction of legal capacity can have on a person's exercise of their human rights, two questions are of central importance to understanding the scope of Article 12:

(1) Does Article 12 require States Parties to grant all persons with disabilities the legal capacity to act even where they are considered to lack capacity?

(2) If so, would this increase the risk of some persons with disabilities being vulnerable to people who would take advantage of their lack of capacity?

Paragraphs 3 and 4 of Article 12 provide guidance on these questions. Article 12(3) requires that states must put in place appropriate measures which support persons with disabilities in exercising their legal capacity; thus it is plain that Article 12 applies to all persons with disabilities regardless of the form of disability.³⁶ In cases of severe mental or intellectual impairment, appropriate measures may include electing a personal representative to support the person in taking decisions and exercising their legal capacity. Further, Article 12(4) provides that in such cases safeguards must be put in place to prevent abuse occurring within the exercise of legal capacity. So Article 12 requires State Parties to engage with the legal capacity issue positively by leaning toward supportive inclusion rather than automatic exclusion. As Gerard Quinn has commented:

“[I]ncapacity is not really a black and white issue, it is very much an individualised process. The first thing that a political authority should look to do is to put in the supports to enable individuals to make decisions, rather than take away this opportunity and do the easier thing of letting another person make the decision for them.”³⁷

Therefore, Article 12 confronts the perception that persons with incapacity should not have a right to take decisions that may have a substantial effect on their lives. This, according to Gabor Gambos:

“[G]oes against a 2000 year old deep-rooted prejudice-based paradigm which says that there are people who are so disabled in their cognitive decision-making functions that they cannot exercise their autonomy, or their right to make their own choices, and that this right should be delegated to another person who will make decisions on their behalf.”³⁸

The right to recognition everywhere as persons before the law required by Article 12(1) challenges the historical legacy of pervasive stereotyping, prejudice and stigma which has caused discrimination against disabled people. What is more, acting in combination with other provisions of the CRPD, for example Article 29,³⁹ Article 12 has the potential to play an instructive role in guiding legal reform and policy development. Article 12 offers a concrete set of standards which remoulds the relationship that persons with disabilities have with society by sending a clear message that persons with disabilities “enjoy legal capacity on an equal basis with others in all aspects of life”.

2.4 Violence and Abuse

Violence against persons with disabilities is an often overlooked issue when developing legal and policy measures to promote full and effective equality. Article 16 of the CRPD requires states to:

“[T]ake all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects;⁴⁰ (...) take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, *inter alia*, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers;⁴¹ (...) put in place effective legislation and policies (...) to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and (...) prosecuted⁴².”

The need for strong legal provisions, including a severe judicial response and enhanced penalties for hate crimes on a range of grounds including disability, has been identified by the Council of Europe's Commissioner for Human Rights.⁴³ Without effective provisions which require state authorities to prevent, prioritise and prosecute the violence and abuse targeted at persons with disabilities, efforts to document and report hate crimes are likely to fail. In several European countries, there are no laws in place which deal with aggravated offences on the grounds of disability and it appears that relatively few countries keep records of such crimes. In countries that have adopted such laws, for example the United Kingdom, it appears that both the reporting of these crimes and the rate of prosecution for reported crimes have been low.⁴⁴ Article 16 of the CRPD strengthens this area of disability equality law by placing strong obligations on States Parties to adopt law and policy measures aimed at protecting the safety of persons with disabilities. While adoption of legislation is an important first step, such laws require targeted awareness-raising campaigns to ensure that victims know their rights, understand the procedures for reporting abuse and violence and are comfortable in coming forward to report when they have been a victim of a crime. Alongside this, training and awareness-raising within the judiciary and law enforcement authorities would benefit victims with disabilities who report crimes in getting a fair shake within the criminal justice system. Part of the reason for the underreporting of violent attacks against persons with disabilities may be because there is an uncertainty among law enforcement authorities about how to deal with victims who have disabilities and are unable to express their experiences in a similar way to victims without disabilities. Consequently, when implementing

measures to protect persons with disabilities from violence and abuse, it is extremely important that training and awareness-raising measures among law enforcement officials are also put in place so that persons with disabilities can report crimes in a comfortable and sensitive environment which enables them to communicate their experiences effectively.

Law and policy development for some problematic issues, for example consultation or violence/hate crimes, can benefit from the lessons learnt during the successful implementation of mechanisms and safeguards in relation to discrimination on grounds of race or sex. Communication with some persons with disabilities remains a key issue in some areas. Therefore, it is important that processes are created which provide effective communication pathways for persons with disabilities. Other issues, for example, legal capacity and reasonable accommodation, are either unique to disability or have been traditionally perceived as disability issues. As such, they present greater practical and conceptual difficulties to law and policy makers. However, the CRPD sets clear and instructive standards which bind State Parties to adopt measures that improve the equality outcomes for persons with disabilities.

3. The Potential Impact of the CRPD on European Law and Policy

3.1 The European Union

Anti-discrimination law in respect to disability was introduced in the European Union through the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.⁴⁵ This Directive prohibited the direct and indirect discrimina-

tion, harassment and instruction to discriminate against disabled persons in the field of employment and occupation. In its early jurisprudence, the Court of Justice of the European Communities (ECJ) lent towards a medical definition of disability. Disability, the ECJ explained:

“[M]ust be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. (...) However, by using the concept of ‘disability’ in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts cannot therefore simply be treated as being the same.”⁴⁶

Later jurisprudence has interpreted protection from discrimination on the ground of disability to include protection from discrimination by association on the ground of disability.⁴⁷ The practical implication of this decision is that now if persons without disabilities are discriminated against because of an association with a person with a disability - for example, a mother with caring responsibilities for her child who has a disability - they will be protected from discrimination under Article 2(a) of the Council Directive. The justification for this interpretation was made in the opinion of Advocate General Poiares Maduro:

“As stated, the effect of the Directive is that it is impermissible for an employer to rely on religion, age, disability and sexual orientation in order to treat some employees less well than others. To do so would amount to subjecting these individuals to unjust treatment and failing to respect their dignity and autonomy. This fact does not change in

cases where the employee who is the object of discrimination is not disabled herself. The ground which serves as the basis of the discrimination she suffers continues to be disability. **The Directive operates at the level of grounds of discrimination. The wrong that it was intended to remedy is the use of certain characteristics as grounds to treat some employees less well than others; what it does is to remove religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well.** Put differently, the Directive does not allow the hostility an employer may have against people belonging to the enumerated suspect classifications to function as the basis for any kind of less favourable treatment in the context of employment and occupation.”⁴⁸ (Emphasis added.)

Although the ECJ’s early interpretation of disability received some criticism for being overly medial, recent jurisprudence has grappled with key concepts and concerns for persons with disabilities in a progressive and welcome manner.

But what impact could the EU’s ratification of the CRPD have on the jurisprudence of the ECJ? In *Mangold v Helm* the ECJ referred to:

“[T]he source of the actual principle underlying the prohibition of those forms of discrimination [on the grounds of religion or belief, disability, age or sexual orientation] being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.”⁴⁹

Recital 4 of the Council Directive provides that the right of all persons to equality be-

fore the law and protection against discrimination:

“[C]onstitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories”.

The implication of ratifying the CRPD is that it must be read into Recital 4 of the Council Directive by the EU organs, including the ECJ. Therefore, the CRPD will form part of the foundation of the universal right to equality before the law and protection against discrimination. On this basis, the ECJ must seek consistency with the CRPD. In addition, with the entry into force of the Charter of Fundamental Rights of the European Union, the ECJ may be aided by the provisions of the CRPD in interpreting the scope of Article 21⁵⁰ and Article 26⁵¹ of the Charter.

In relation to EU policy, the CRPD has had a major influence on the content of the European Disability Strategy 2010-2020.⁵² The European Commission justified much of the strategy as necessary to effectively implement the CRPD in Europe and create consistency in EU disability policy. The strategy includes eight action points where EU level policy harmonisation is necessary.⁵³ Guided by the CRPD, the EU has undertaken to support and supplement national initiatives to implement the requirements of the CRPD through strategic action, including:

- Supporting and supplementing national policies and programmes to promote equality, for instance by promoting the conformity of Member State legislation on legal capacity with the CRPD; and
- Working where appropriate within a broader framework of non-discrimination to highlight disability as a human rights issue in the EU’s external action; raising awareness of the CRPD and the needs of people with disabilities, including accessibility, in the area of emergency and humanitarian aid; consolidating the network of disability correspondents; increasing awareness of disability issues in EU delegations; ensuring that candidate and potential candidate countries make progress in promoting the rights of people with disabilities.

In order to fully comply with the requirements of the CRPD, the EU will have to pass additional legislation to support Council Directive 2000/78/EC. Therefore, it is likely that the CRPD will provide the needed momentum for adopting a new anti-discrimination directive that would harmonise protection from discrimination on grounds of disability (and age, religion, sex, and sexual orientation) to the standards afforded to race. Given the commitment in Article 6(1) of the CRPD to combating multiple discrimination, the adoption of a new anti-discrimination directive seems to be the necessary starting point.

3.2 The Council of Europe

The European Court of Human Rights (ECtHR) has set an example which the ECJ should look to follow in respect to the CRPD. Benefitting from the standards contained in the CRPD, the ECtHR has pushed the issue of discrimination and intolerance against per-

sons with disabilities into focus in Strasbourg in two recent cases. In *Glor v Switzerland*,⁵⁴ the applicant, Swiss national Sven Glor, was deemed medically unfit to perform military service due to his diabetes. According to the Swiss authorities, his condition posed a problem on account of the particular restrictions related to military service including the limited access to medical care and medication, the significant physical efforts required and the psychological pressure exerted on military personnel. However, the authorities decided that Mr Glor's diabetes was not severe enough to relieve him from paying a non-negligible military service exemption tax on his annual earnings for several years. As a result, Mr Glor argued that he had been subjected to discrimination on the basis of his disability, contrary to Article 14 together with Article 8 of the European Convention on Human Rights (ECHR), because he had been prohibited from carrying out his military service, and was obliged to pay the exemption tax as his disability was judged not to be severe enough for him to forgo the tax.

While Article 14 of the ECHR contains an "other status" clause whereby a non-listed ground could be read into the right to non-discrimination, prior to *Glor v Switzerland* the ECtHR had never before found a violation of the right to non-discrimination on the basis of disability. It is also significant that the ECtHR concluded that diabetes constituted a disability. In handing down its decision, the ECtHR condemned disability discrimination committed by the Swiss authorities through failing to provide reasonable accommodation to Mr Glor by finding a solution which responded to his individual circumstances. The judgment is also praiseworthy for noting that the CRPD signalled the existence of a European and universal consensus on the need to protect persons with disabilities from dis-

crimatory treatment. This note was made in spite of the fact that Switzerland had not signed the CRPD.

The ECtHR built on the *Glor* decision in its 2010 judgment of *Alajos Kiss v Hungary*.⁵⁵ The applicant in this case suffered from manic depression and had for that reason been placed under partial guardianship. The Hungarian Constitution contained an absolute voting ban for people put under guardianship. Consequently, the applicant could not vote in the 2006 parliamentary elections. The ECtHR held unanimously that such an absolute ban violated the right to free elections of Article 3 of Protocol 1 ECHR. In reaching its decision the court stated:

"The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification and **the curtailment of their rights must be subject to strict scrutiny**. This approach is reflected in other instruments of international law (...). The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote."⁵⁶ (Emphasis added.)

By stating that the curtailment of the rights of persons with intellectual or mental disabilities must be subject to strict scrutiny, the ECtHR indicated that a very high threshold must be met in order for it to be justified. Past decisions of the ECtHR have used this level of scrutiny in limited circumstances which apply to distinctions made on grounds such as race or sex.⁵⁷ The CRPD was a cornerstone of the ECtHR's finding that the same

level of scrutiny should be used to assess distinctions made on the ground of disability.⁵⁸

The strength of the ECtHR's case law on discrimination and intolerance against persons with disabilities will surely be tested in the near future. For example, the record of interpreting the ECHR consistently with the standards contained in the CRPD is likely to be tested in the forthcoming case of *Kiyutin v Russia*.⁵⁹ In this case, the applicant is a national of Uzbekistan who lives in the Oryol region of Russia. He is married to a Russian national with whom he has a young child. Mr Kiyutin's application for a residence permit was however rejected by the Russian authorities on account of his HIV-positive status. According to Russia's Law on the Legal Status of Foreign Nationals, foreigners wishing to stay in the country long-term must demonstrate that they are HIV-negative. In his application to the ECtHR, Mr Kiyutin has argued that the rejection of his application for a residency permit violates his right to respect for his family life as well as his right to non-discrimination on the basis of HIV status (Article 14 of the ECHR in conjunction with Article 8). NGOs intervening in the case have argued that the right to equality and non-discrimination, set out in Article 5 of the CRPD, protects persons living with HIV/AIDS.⁶⁰ If the ECtHR accepts the applicant's position, it will represent not only a forceful use of the CRPD to interpret the ECHR but it will also open up an added dimension by protecting persons living with HIV/AIDS through the right to non-discrimination on grounds of disability.

It is unsurprising that the recent strengthening of ECHR jurisprudence in respect to disability has occurred shortly after the entry into force of the CRPD. A significant number of the countries which are bound by the ECHR are also parties to the CRPD and there ap-

pears to be an overarching consensus among these countries that disability rights must be promoted, protected and fulfilled. Admittedly, at times the ECtHR plays the role of a consensus-builder in reaching its decisions.⁶¹ Hopefully, now that a consensus already exists around the CRPD, the ECtHR will be in a better position when calling to order states that discriminate against persons with disability and violate their basic human rights.

In its short lifetime, the CRPD has already added an extremely important new dimension to the fight against discrimination on grounds of disability in Europe. It has consolidated legal concepts such as reasonable accommodation, guided the jurisprudence of the ECtHR and energised European countries to develop new safeguards and measures to entrench disability rights and promote effective equality for persons with disabilities. Whether the ECJ will follow the example of the ECtHR and take into consideration the CRPD when handing down decisions on disability-related issues is yet to be tested. However, in light of the increased protection from discrimination and the promotion of equality on the ground of disability required by the Charter of Fundamental Rights of the European Union, one would expect that the CRPD would be a natural source of guidance.

Conclusion

The CRPD has been described as "a paradigm shift" in relation to how human rights are to be understood in the 21st century.⁶² This would be a significant burden to bear for any piece of international law, let alone a law which protects the rights of individuals who have for so long been overlooked in society. Yet in the short period since its entry into force, the impact of the CRPD offers much promise.

In Europe, it has been accepted almost universally that there is a need for strong human rights protection for persons with disabilities. The CRPD has already begun to shape EU policy and ECtHR jurisprudence and in many areas it is proving to be a key instrument for promoting law reform and requiring states to re-examine how persons with disabilities are perceived. Often it has asked fundamental questions of the paternalistic welfare policy adopted by most European countries towards disabled persons. Nonetheless, in Europe paternalistic rhetoric still underpins disability law, policy and practice. Consequently, these strategic developments will only lead to effective equality for persons with disabilities in key areas such as education, healthcare, criminal justice and political participation once the initial enthusiasm and goodwill shown to the CRPD is transformed through the difficult task of putting in place practical solutions for the challenges encountered by persons with disabilities.

Undoubtedly, a global convention on disability was needed due to the large gaps that existed in national, regional and international human rights and non-discrimination protection. This article has argued that the CRPD has started to influence the European Union and the Council of Europe mechanisms and institutions. But such mechanisms should have an impact on law and policy development at local levels. At these local levels it is clear that discrimination and intolerance against persons with disabilities is still pervasive throughout Europe. Whether the CRPD will be able to fulfil its promise will depend on how national authorities grapple with complex issues such as legal capacity during implementation. In any case, the energy and vision that the CRPD has imparted on the struggle for equality for persons with disabilities should not be underestimated.

¹Jarlath Clifford is a consultant for The Equal Rights Trust. This article is based on a presentation given at a conference on "Legal Problems of the Prohibition and Prevention of Xenophobia and Other Forms of Intolerance" held at the University of Vilnius, Lithuania, on 19 November 2010. The author thanks Amal de Chickera for comments on an earlier draft of this article.

²European Commission, *EU ratifies UN Convention on disability rights*, Press Release, Brussels, 5 January 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4&format=HTML&aged=0&language=EN&guiLanguage=en>.

³European Commission, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, SEC(2010) 1324 final, Brussels, 15 November 2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1324:FIN:EN:PDF>.

⁴Similarly, in the Council of Europe, 26 Member States have ratified the CRPD, 19 have signed it and only two states have neither signed nor ratified it.

⁵See above, note 3.

⁶Council of Europe Commissioner for Human Rights, *Human Rights and Disability: Equal Rights for All*, ComDH/IssuePaper (2008)2, Strasbourg, 20 October 2008, available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1355349&Site=CM>.

⁷ For example, schizophrenia or bipolar disorder.

⁸ For example, learning limitations caused by Down's Syndrome.

⁹ In Britain, HIV infection constitutes a disability under Schedule 1, Part 1, Para 6 of the Equality Act 2010. Further, the European Court of Human Rights has held that discrimination against a person living with diabetes constituted discrimination on the ground of disability in the case of *Glor v Switzerland*, Application No. 13444/04, 30 April 2009.

¹⁰ Scotch, R. K., "Models of Disability and the Americans with Disabilities Act", *Berkeley Journal of Employment and Labor Law*, Vol. 21(1), 2000, p. 215.

¹¹ Many questions remain unresolved in relation to the nature and scope of state obligations for protecting the human rights of persons with disabilities. For example, on 11 December 2007, the Office of the High Commissioner for Human Rights convened an expert seminar, in collaboration with the Special Rapporteur on Torture, and the Committee against Torture, entitled "Freedom from torture and other cruel, inhuman and degrading treatment and punishment and persons with disabilities", which tried to clarify issues of discriminatory ill-treatment of persons with disability. The final report of the seminar is available at: <http://www2.ohchr.org/english/issues/disability/torture.htm>.

¹² Colin Barnes, for example, argues that institutional discrimination is embedded in the excessive paternalism of contemporary welfare systems which systematically ignore or inadequately meet the needs of disabled people. See Barnes, C., *Institutional Discrimination Against Disabled People: A Case for Legislation*, British Council of Organisations of Disabled People, London, 1991.

¹³ International Labour Organisation, *Factsheet: Discrimination at Work in Europe*, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_90_en.pdf.

¹⁴ European Union Agency for Fundamental Rights, *The Right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities*, October 2010, available at: http://www.fra.europa.eu/fraWebsite/attachments/Report-vote-disability_EN.pdf.

¹⁵ See Council of Europe Commissioner for Human Rights, "Persons with mental disabilities should be assisted but not deprived of their individual human rights", *Viewpoints*, 21 September 2009, available at: http://www.coe.int/t/commissioner/Viewpoints/090921_en.asp; *idem*, "A neglected human rights crisis: persons with intellectual disabilities are still stigmatised and excluded", *Viewpoints*, 14 September 2009, available at: http://www.coe.int/t/commissioner/Viewpoints/090914_en.asp; *idem*, "Respect and rights-based action instead of charity for people with disabilities", *Viewpoints*, 20 October 2010, available at: http://www.coe.int/t/commissioner/Viewpoints/081020_en.asp.

¹⁶ Council of Europe Commissioner for Human Rights, "A neglected human rights crisis: persons with intellectual disabilities are still stigmatised and excluded", note 15 above.

¹⁷ For example, Belgium, Czech Republic, Germany, Ireland, Poland and Portugal exclude persons with mental health problems and persons with disabilities from the right to political participation. See above, note 14.

¹⁸ See European Committee on Social Rights, *International Association Autism Europe v France*, Complaint No. 13/2002, 4 November 2003.

¹⁹ European Committee on Social Rights, *Mental Disability Advocacy Centre (MDAC) v Bulgaria*, Complaint No. 41/2007, 3 June 2008. In this case the European Committee on Social Rights handed down the opinion that a failure to take appropriate measures to take account of existing differences may amount to discrimination. Consequently, the Committee found a violation of Article 17 (2) of the Revised European Social Charter read in conjunction with Article E because of the discrimination against children with moderate, severe or profound intellectual disabilities residing in homes for mentally disabled children as a result of the low number of such children receiving any type of education when compared to other children.

²⁰ See Shakespeare, T., "The Cruel Toll of Disability Hate Crime", Comment is Free, Guardian Newspaper (Online Edition), 12 March 2010, available at: <http://www.guardian.co.uk/commentisfree/2010/mar/12/disability-hate-crime-david-askew>.

²¹ The nine countries are Belgium, Cyprus, Finland, France, Georgia, Germany, Moldova, the Netherlands, and the United Kingdom. See Organisation for Security and Cooperation in Europe, *Hate Crimes in the OSCE Region - Incidents and Responses: Annual Report for 2009*, Office for Democratic Institutions and Human Rights, October 2010, available at: <http://www.osce.org/odihr/documents/73636>.

²² CRPD, Article 1.

²³ United Nations, *Convention on the Rights of Persons with Disabilities: Advocacy Toolkit*, 1 July 2008, available at: http://www2.ohchr.org/english/issues/disability/docs/CRPD_Advocacy_Tool.pdf.

²⁴ A list of the states that have signed and ratified the CRPD is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en.

²⁵ De Burca states that the drafting process of the CRPD, both substantively and procedurally, was driven by factors such as the central role of NGOs and other non-state actors in the negotiation process. See De Burca, G., "The EU in the negotiation of the UN Disability Convention", *Fordham Law Legal Studies Research Paper No. 1525611*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525611. See also Stein, M., "Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities", *Texas Journal on Civil Liberties & Civil Rights*, 2008, Vol. 13, p.167 (William & Mary Law School Research Paper No. 9-36).

²⁶ See, for example, CRPD, Article 14 (Liberty and Security of the Person).

²⁷ See, for example, CRPD, Article 24 (Education). An overarching challenge to fulfilling the human rights of persons with disabilities, regardless of whether they are civil, political, social or economic is that it often requires states to take steps which result in significant public expenditure. But it should be emphasised that the social and economic rights of persons with disabilities are indivisible from all other human rights and are necessary in order to overcome the historical disadvantage of persons with disabilities. Consequently, the public expenditure argument must not be allowed to justify the failure to promote, protect and fulfil these rights.

²⁸ See CRPD, Article 33 (National implementation and monitoring), and note that Article 33(3) provides that civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.

²⁹ CRPD, Article 14(2).

³⁰ CRPD, Article 24(2)(c) and Article 24(5).

³¹ CRPD, Article 27(i).

³² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 5.

³³ For example, in the British Equality Act 2010, there is a duty to make reasonable adjustments (reasonable accommodation) for persons with disabilities in areas outside employment, including housing and education. However, this is hardly sufficient to ensure equal rights in all areas of life, including civil, political, economic, social and cultural.

³⁴ For an example on how legal capacity is denied or restricted is the Czech Republic, see Inclusion Europe, *Legal capacity and guardianship procedures, Czech Republic: Summary*, available at: http://www.inclusion-europe.org/Justice/CZ/EN_NC_CZ.pdf.

³⁵ See above, note 14.

³⁶ See *Legal Opinion on Article 12 of the CRPD*, 21 June 2008, available at: http://www.leeds.ac.uk/disability-studies/archiveuk/legal%20opinion/LegalOpinion_Art12_FINAL.pdf.

³⁷ The Equal Rights Trust, "Interview: Promoting a Paradigm Shift: ERT talks with Gabor Gombos and Gerard Quinn about the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol", *The Equal Rights Review*, Vol. 2, 2008, p. 90, available at: http://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf.

³⁸ *Ibid.*

³⁹ CRPD, Article 29 (Participation in political and public life) requires states to: "[e]nsure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others"; ensure "that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use"; protect "the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government"; and "[p]romote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs".

⁴⁰ CRPD, Article 16(1).

⁴¹ CRPD, Article 16(2)

⁴² CRPD, Article 16(5).

⁴³ See Council of Europe Commissioner for Human Rights, "Hate crimes – the ugly face of racism, anti-Semitism, anti-Gypsyism, Islamophobia and homophobia", *Viewpoints*, 21 July 2008, available at: http://www.coe.int/t/commissioner/Viewpoints/080721_en.asp.

⁴⁴ See Disability Now, *The Hate Crime Dossier*, available at: <http://www.disabilitynow.org.uk/the-hate-crime-dossier>.

⁴⁵ See above, note 33.

⁴⁶ *Sonia Chacón Navas v Euresst Colectividades SA*, Case C-13/05, 11 July 2006, Paras 43 – 44. See also Bell, M., "Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive", *The Equal Rights Review*, Vol. 3, 2009, pp. 7 – 18.

⁴⁷ *Coleman v Attridge Law and Steve Law*, Case C-303/06, 17 July 2008.

⁴⁸ Opinion of Advocate General Poiares Maduro, delivered on 31 January 2008, in *Coleman v Attridge Law and Steve Law*, Case C-303/06, Para 22.

⁴⁹ *Mangold v Helm*, Case C-144/04, 22 November 2002, Para 74.

⁵⁰ Article 21 of the Charter of Fundamental Rights of the European Union states: "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited." See *Official Journal of the European Communities*, 18 December 2000, C 364/13.

⁵¹ Article 26 of the Charter of Fundamental Rights of the European Union states: "The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community." See *Official Journal of the European Communities*, 18 December 2000, C 364/14.

⁵² Furthermore, within the Council of Europe, clear parallels exist between the CRPD and the Committee of Ministers *Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015*, 5 April 2006.

⁵³ The eight main areas for action are: accessibility, participation, equality, employment, education and training, social protection, health, and external action.

⁵⁴ See above, note 9.

⁵⁵ *Alajos Kiss v Hungary*, Application no. 38832/06, 20 May 2010.

⁵⁶ *Ibid.*, Para 44.

⁵⁷ See, for example, *Abdulaziz, Cabales, and Balkandali v UK*, Application nos. 9214/80, 9473/81, and 9474/81, 28 May 1985, in relation to sex; and *Nachova and Others v Bulgaria*, Application nos. 43577/98 and 43579/98, 6 July 2005, in relation to race.

⁵⁸ See above, note 55, Para 44 in conjunction with Para 14.

⁵⁹ *Kiyutin v Russia*, Application no. 2700/10. See third party legal submission by Interights, available at: <http://www.interights.org/documentbank/index.htm?id=588>. 60 *Ibid.*

⁶¹ See Letsas, G., "The Truth in Autonomous Concepts: How to Interpret the ECtHR", *European Journal of International Law*, Vol. 15, 2004, pp. 279–305; see also Wintemute, R., "Consensus is the right approach for the European Court of Human Rights", Comment is Free, Guardian Newspaper (Online Edition), 12 August 2010, available at: <http://www.guardian.co.uk/law/2010/aug/12/european-court-human-rights-consensus>.

⁶² See above, note 23.