The European Disability Rights Revolution

Jeffrey Archer Miller

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 21 May 2020

European University Institute
Department of Law

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This thesis has not been corrected for linguistic and stylistic errors.

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9 May 2020 Jeffrey Archer Miller

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Abstract

Over the course of a decade, disability laws in Europe changed dramatically. Due to (1) the entry into force of the UN Convention on the Rights of Persons with Disabilities, (2) the transposition of EU Directive 2000/78 into national law, and (3) a new line of judgments handed down from the European Court of Human Rights, individuals with disabilities gained new rights—and new opportunities to enforce those rights in court. This *European Disability Rights Revolution* constitutes a double upheaval—one part conceptual, one part legal/hierarchical. This dissertation is an attempt to grapple with the complex confluence of events and ideas that created the European disability rights revolution and what drives it forward today. Does disability rights law develop mainly through European Union law, regional human rights law, international law, or domestic law? Who are the individuals and/or organizations that sustain the European disability rights revolution? Who breathes life into the statute books—and how do they do it?

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Preface: Some Brief Reflections on Motivation, Methodology, Trade-Offs, and Limitations

This PhD dissertation began with a simple observation: there appeared to be a lot happening in the field of European disability discrimination law: (1) EU Directive 2000/78 had been transposed into Member State law by the mid-2000s; (2) most of the Member States and the EU, in its capacity as a regional integration organization, had become signatories to the UN Convention on the Rights of Persons with Disabilities; and (3) in 2009, the European Court of Human Rights held for the first time in the court's history in *Glor v. Switzerland*,[1] that a government had violated Article 14 of the European Convention on Human Rights on the basis of disability discrimination.

So I asked: "What does all of this lawmaking really mean for individuals with disabilities in Europe?" Is it possible to say something meaningful, not just about doctrinal developments, but also about how the new legal landscape affects (or does not affect) people in their daily lives?

When I presented part of my research at a doctoral workshop, one reviewer made a comment that summed up the challenge I faced more clearly than I ever could, so I will unabashedly adopt it here: "It seems to me", said the reviewer, "that you are trying to figure out whether these laws actually work. And that's fine. But you have a problem. You can't get at your question directly. So what do you do? You have to use proxies, and you have to make inferences based on the available evidence".[2]

In his seminal work, political scientist Giovanni Sartori lamented the tendency of social scientists to oscillate between two "unsound extremes": the unconscious thinker and the over-conscious thinker. The unconscious thinker is unaware of the assumptions and implications of conceptual and methodological decisions. The over-conscious thinker is so consumed by method or theory that he or she cannot work at all. Sartori made a plea for the "conscious thinker", one who:

> realizes the limitations of not having a thermometer, and still manages to say a great deal simply by saying hot and cold, and warmer and cooler. Indeed, I call upon the conscious thinker to steer a middle course between crude logical mishandling on the one hand, and logical perfectionism (and paralysis) on the other hand.[3]

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[1] App. No. 13444/04 (Eur. Ct. H.R. Apr. 30, 2009).
[2] I am relying on my memory and paraphrasing, of course.
[3] Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 AM. POLITICAL SCIENCE REV. 1033, 1033 (1970).

This has been one of my guiding principles. I have tried to keep the potential pitfalls of my chosen methods and methodologies in mind without becoming overwhelmed by them. I have ventured to declare things cold when they appeared to me to be cold; hot when they appeared to me to be hot; and to openly confess when my research design did not allow me to measure the temperature at all.

In keeping with my effort to be a transparent "conscious thinker", it seems appropriate to make some disclosures from the outset. After several years immersed in questioning and debating how to do legal research, the only conclusion that I have reached with absolute certainty is that the fourteenth century monk and poet John Lydgate's observation that "you can't please all of the people all of the time" rings true in most aspects of life and that legal research is no exception. Legal scholars hold different opinions and preferences (sometimes very strongly) about how legal research should be conducted. Every methodological decision involves tradeoffs and limitations. All the more reason, then, to state first principles as clearly as possible. I know by now that I can't please all of the people all of the time, but I can at least try to explain where I am coming from.

First, this PhD is an attempt to understand how the law is used, rather than how the law ought to be used or how the law should be interpreted. In other words, it is not (intended to be) a normative project.

I recognize that this is a divisive statement in some circles. The question of what constitutes legal scholarship (or to be more precise, *good* legal scholarship) has received a great deal of attention of late. In a recent conference at Marquette University Law School, Robin West made the following observation, which colorfully encapsulates the current state of the debate:

> I started asking people unscientifically, randomly, "what do you think of normative legal scholarship?" That's the phrase that's often used to describe legal scholarship that more or less takes the form "the law is X and it ought to be Y." And I noticed right away one afternoon, in the same ten-minute period, colleagues telling me, "normative legal scholarship is just not legal scholarship" and "it's not legal scholarship because it's not scholarship. If it's normative, it's not scholarship. So, it's not legal scholarship if you're saying the law ought to be this. That's something else. It's advocacy or it's adversarialism or its op-ed writing in the guise of the Law Review, but anything that takes the form of the law is X, it ought to be Y isn't legal scholarship because it is not scholarship." This was stated most definitively and most emphatically by colleagues who are empiricists of various stripes, social scientists, and economists.
>
> At the same time, there were others telling me, including some extremely distinguished law faculty, that "legal scholarship that is not normative is not legal scholarship because it's not legal. If it's not normative, it's not legal. Legal

> scholarship has to be normative." This comes out in tenure debates. You will have colleagues saying, "we can't credit this as scholarship. This is normative." And then you'll have others saying, "we can't credit that as scholarship because it's not normative."[4]

If one cares to do some digging, it does not take long to find a venerable jurist supporting one side of the argument or the other. Oliver Wendell Holmes famously proclaimed that "[for] the rational study of law the black letter man may be the man of the present, but the man of the future is statistics . . ."[5]. Hans Kelsen took a decidedly dimmer view on the subject.[6] For good or ill, West is almost certainly correct that "academic legal writing is still, overwhelmingly, at least to some degree, 'normative.' It aims to improve the law; it aims to make the law better".[7]

I suspect that if we were to stick with West's description of normative scholarship as merely the "aim to make the law better", the debates would not be so fierce. Does anybody really oppose well-intentioned, careful scholarly efforts to make the law better? Surely, the real problem lies elsewhere.

Indeed, I think it does. It becomes evident in an editorial introduction to a recent special issue on empirical jurisprudence in the *European Journal of Legal Studies*. "Some might even fear," Šadl remarks, "that studying facts rather than principles is missing the most important element of law: its normative character".[8] Holtermann's contribution to the same special issue elaborates on this point:

> [E]mpirical researchers very often report being asked . . . what their empirical results have to do with the law . . . Starting from the assumption of a categorical difference between the empirical facts found and the law, the questioner rarely seems to expect that the empirical discovery does in fact have *any* significance for the study of law or for legal knowledge.[9]

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[4] *See Transcript—Conference on the Ethics of Legal Scholarship*, 101 MARQ.L.REV. 1083, 1092 (2018). *Compare* Robin West, *The Ethics of Normative Legal Scholarship*, 101 MARQ. L. REV. 981 (2017) (arguing in defense of the value of normative legal scholarship) *with* Stanley Fish, SAVE THE WORLD ON YOUR OWN TIME (2008) (arguing against normative scholarship). For a view from a distinctly European perspective on the value of "empirical jurisprudence", *see* Arthur Dyevre et al., *The Future of European Legal Scholarship: Empirical Jurisprudence*, 26 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 348 (2019).

[5] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 469 (1897).

[6] *See* Jakob Holtermann and Mikael Rask Madsen, *Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 1001, 1005-06 (2016) (discussing various positions on the value of empirical legal research vis-à-vis doctrinal studies).

[7] *See* Robin West, *The Ethics of Normative Legal Scholarship*, 101 MARQ. L. REV. 981, 988 (2017).

[8] *See* Urška Šadl, *A Method of (Free) Choice*, 12 EUROPEAN JOURNAL OF LEGAL STUDIES 1, 1 (2019).

[9] *See* Jakob Holtermann, *Philosophical Questions at the Empirical Turn*, 12 EUROPEAN JOURNAL OF LEGAL STUDIES 5, 7 (2019) (emphasis in original).

This goes hand-in-glove with the position that doctrinal studies is the only legitimate—or at the very least, the rightfully dominant—approach to legal research.[10] Note the marked shift from West's rather innocuous aim of "making the law better" to a much stricter position, something along the lines of: "There is only one way to make the law better, and that is through doctrinal studies".

For the normative legal scholar who takes the stricter position, I fear that very little of this dissertation will be deemed relevant or even sufficiently "legal" in nature. But for the normative legal scholar concerned with "making the law better", I hope to demonstrate that empirical legal scholarship has much to contribute. For in my view, in order to succeed in making the law better, one needs a firm grasp on how the law operates, not only in theory or doctrinally, but also in practice. The "venerable jurists" that I prefer to invoke are the participants in the pioneering Florence Access-to-Justice Project, who recognized decades ago that if we want to know if the "rights of ordinary people [are] real, and not merely symbolic", we must study "the actual workings of our legal systems . . . the system by which people may vindicate their rights". The formal law on the books may have little practical effect unless they are used and taken seriously by lawmakers, courts, and litigants.[11]

This leads me to a second decision to which I should confess sooner rather than later. The methods employed in the various chapters of this dissertation reflect my best effort to tailor my research designs to the questions at hand. And in all frankness, I have generated my research questions with little regard for larger philosophical questions about the true nature of legal science.[12] To enter into this debate, I am asked to think about "the law" in such narrow terms that I struggle to engage in it even as an abstract thought experiment. Perhaps I think too simplistically, but if the subject matter is—in a broad sense, legal, and it produces new knowledge—then I see no compelling reason to banish it from the realm of legal studies. To proceed otherwise—to set aside information as "not sufficiently legal"—is to forfeit a great deal of potentially useful information and insights. It is a counter-productive path that reinforces artificial disciplinary boundaries and stifles creativity.

My third methodological choice was to fully embrace multi-methods research. This was not interdisciplinary for the sake of interdisciplinarity, but rather an attempt to find the best ways to answer the questions that I was asking. At times, I found that traditional legal-

[10] *See id.* at 5.
[11] Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFFALO LAW REVIEW 181 (1977).
[12] Jakob Holtermann, *Philosophical Questions at the Empirical Turn*, 12 EUROPEAN JOURNAL OF LEGAL STUDIES 5, 8 (2019) (emphasis in original).

doctrinal analysis offered the most promising way forward.[13] On other occasions, I used methods that are more common to the social sciences or socio-legal studies, or a mixture of doctrinal and social-scientific methodologies. In other words, I have taken a deliberately agnostic view on which research method is superior *a priori*. Throughout this project, my primary concern has been to use the right tool for the job. In this dissertation, the "job" has always been—stated at a higher level of abstraction—to explain a relationship between law and society.

Fourth, I deliberately gave myself some leeway to explore the issues that seemed most salient for the country I was studying. Over the course of writing this dissertation, I learned that each Member State had a compelling story to tell about disability rights law. I made a conscious decision to investigate their uniqueness, even if this path did not always provide the best possible data for direct comparative purposes.

Fifth, I have made a concerted effort to allow my research questions to drive my case selection,[14] rather than the other way around. The dangers of selecting a case for pragmatic and/or logistical reasons is by now so commonly understood that one of the most widely-cited articles on case selection dispenses with it with biting terseness.[15] To select a case merely for pragmatic reasons "is not methodological in character",[16] the authors opine. And then add for good measure: "We suspect that there is not much that can be said about these issues that is not already self-evident to the researcher".[17] Perhaps that is true, but as the earlier passage from Sartori indicates, this is undoubtedly a principle that is easier to preach in sterile debates about methodology than to adhere to when one is immersed in the less-than-pristine world of empirical research.

At bottom, this dissertation is an exercise in data-driven inductive reasoning. My aim throughout has been to produce a piece of scholarship informed by method and theory, but

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[13] For example, Chapter 3, *infra*, is comprised almost entirely of doctrinal analysis.
[14] I use the term "case" here in the social science meaning of the word, and not as a synonym for a lawsuit.
[15] Jason Seawright and John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POLITICAL RESEARCH QUARTERLY 294, 296 (2008).
[16] *See id.*
[17] *See id.* Scientists often referred to this as the "streetlight effect", a parable recounted, among many other places, in David H. Freedman, "Why Scientific Studies Are So Often Wrong: The Streetlight Effect." *Discover Magazine* 26 (2010):

> Late at night, a police officer finds a drunk man crawling around on his hands and knees under a streetlight. The drunk man tells the officer he's looking for his wallet. When the officer asks if he's sure this is where he dropped the wallet, the man replies that he thinks he more likely dropped it across the street. Then why are you looking over here? the befuddled officer asks. Because the light's better here, explains the drunk man.

not held captive by them; conscious of research design trade-offs and limitations, but not paralyzed by them; mindful that human interactions are too complex to be reduced to Newtonian physics, but still willing to step into the laboratory to search for what is knowable.

Chapter 1: Introduction

In the mid-1990s, Lisa Waddington published an article on the state of disability law in Europe. She found that to the extent that programs to support individuals with disabilities existed in the workplace, almost all of them involved quota systems.[18] These policies had historical roots in government efforts to provide assistance to military veterans who had become disabled while serving their countries during the First World War. Over time, the eligibility criteria for the quota systems had been extended to cover the civilian disabled populations, and along the way became "part of an overall social-welfare policy".[19] Waddington explained:

> quotas are based on two related assumptions: (1) that employers will not hire large numbers of disabled people unless they are required to do so, and (2) that most disabled people are unable to compete for jobs with their non-disabled counterparts on an equal basis, and win them on their merits. In short, the assumption that disabled workers are less valuable and less productive, and that, if such workers are to be integrated in the open labour market, employers need to be obliged to hire them, and sometimes even financially compensated for doing so.[20]

Waddington went on to predict, with almost prophetic accuracy, that quota systems were on the way out and that new anti-discrimination laws were on the horizon. The United States and Canada had already adopted fully-fledged disability discrimination laws. Germany, the UK, Ireland, and France were taking cautious steps in the same direction.[21] Within a decade of Waddington's article, the landscape had changed completely. EU citizens had gained new formal rights—and new opportunities to enforce those rights:

First, in 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities ("CRPD").[22] The CRPD is the first comprehensive international treaty to affirm the rights of individuals with disabilities to "equality, dignity, and full participation and inclusion in society".[23] The EU joined the CRPD in 2011 in its capacity as a regional integration organization and the vast majority of Member States have also ratified the Convention. In doing so, they have committed themselves to abolishing laws and practices

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[18] *See* Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L. J. 62 (1996) ("With the exception of Scandinavia, the quota system has become the standard response of practically all European countries, in both western and eastern parts of the continent, to the employment *problems* which people with disabilities face.")
[19] *See id.* at 64.
[20] *See id.* at 71.
[21] *See id.* at 97.
[22] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007).
[23] Arlene S. Kanter, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (2014).

that discriminate against persons with disabilities[24] and to provide comprehensive reports to the United Nations on the measures that they have taken to meet their obligations under the Convention.[25]

Second, in 2009, the European Court of Human Rights ("ECtHR") held for the first time in the Court's history in *Glor v. Switzerland*,[26] that a government had violated Article 14 of the ECHR by engaging in disability discrimination. Until this landmark ruling, it was unclear whether Article 14, which prohibits "discrimination on any ground" included discrimination based on disability. The ECtHR has since reaffirmed its holding in *Glor* on several occasions.[27]

Third, drawing on new competences provided in Article 13 of the Treaty of Amsterdam, in 2000, the European Council approved the Employment Equality Directive ("Directive 2000/78"),[28] whose purpose is to combat discrimination and achieve equal treatment among EU citizens in the Member States.[29] To comply with Directive 2000/78, EU Member States were required to create national laws that set forth procedures whereby victims of disability discrimination can seek redress before national courts or administrative bodies.[30]

Waddington's anticipated European disability rights revolution has arrived. The "rights" paradigm is ascending in Europe. Quota systems, where they can still be found, are marching down the path of irrelevance. But the changes to disability law go beyond a tilt in favor of anti-discrimination principles. Once exclusively a matter of domestic law, disability law has become—almost simultaneously—also a matter of European Union law, regional human rights law, and international law.

In the midst of this double upheaval—one part conceptual, one part legal/hierarchical—what drives the European disability rights revolution forward today?

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[24] CRPD, Art. 4(b).
[25] CRPD, Art. 35-39.
[26] App. No. 13444/04 (Eur. Ct. H.R. Apr. 30, 2009).
[27] *See, e.g., Kiyutin v Russia*, App. No. 2700/10 (Eur. Ct. H.R. Mar. 10, 2011) (rejecting residence permit based on HIV-positive violates Article 14); *I.B. v. Greece*, App. No. 552/10 (Eur. Ct. H.R. Oct. 13, 2013) (dismissal of HIV-positive employee violates Article 14). For academic commentary, *see* Rory O'Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR* 29 LEGAL STUDIES 211 (2009); Jill Stavert, Glor v. Switzerland*: Article 14 ECHR, Disability and Non-Discrimination* 14 EDINBURGH L. REV. 141 (2010); Oddný Arnardóttir, *Cross-fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights–the Case of the Discrimination Grounds under Article 14 ECHR*, 33 NORDIC J. HUM. RTS. 220 (2015).
[28] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [hereinafter Council Directive 2000/78/EC].
[29] Council Directive 2000/78/EC, Art. 1.
[30] Council Directive 2000/78/EC, Art. 9(1).

Does disability rights law develop mainly through European Union law, regional human rights law, international law, or domestic law? Who are the individuals and/or organizations that sustain the European disability rights revolution? Who breathes life into the statute books—and how do they do it?

Some introductory remarks about how the term "disability rights revolution" is used in this dissertation are necessary. For the purposes of this thesis, it is an umbrella term that describes a multi-faceted process that can be approached from many different angles. I will make an attempt here to outline what, to my mind, are the different aspects of this revolution and how they could be studied:

1. *A Legal Revolution*.

One potential way to view the disability rights revolution—let us call this a minimalist approach—would be to examine it as a purely legal/doctrinal phenomenon. The revolution, one could argue, is simply the fact that at the international, regional, and domestic level, new laws exist that did not exist before. Through a close textual analysis of these new legal instruments and how they have been interpreted by courts, we can obtain a more fine-grained understanding of how the legal position of individuals with disabilities has changed over time. Through the standard tools of doctrinal analysis, we can seek to dissect the legal characteristics of the disability rights revolution. As a shorthand, we might call this a black-letter law or "law in the books" approach.

2. *A Social Revolution.*

Black-letter legal analysis is undoubtedly an essential pillar of any study of the disability rights revolution, but an exclusively doctrinal approach would, in my opinion, underemphasize a crucial aspect. These laws and legal instruments were created with specific policy objectives in mind. To put it colloquially, these laws are designed to change the way that society thinks about disability. The disability rights revolution rejects the notion that disability law is a domain that should be predominately about taking care of those "less fortunate" or "vulnerable" because, from a moral standpoint, it is the right thing to do. It is an emphatic challenge to the idea that individuals with disabilities are to be treated as object of

pity.[31] On the contrary, the revolution reinterprets disability as a condition that, in most cases, can be overcome through reasonable accommodations. It is society, rather than a person's physical or mental impairment, that is primarily responsible for creating the barriers that prevent a someone with a disability from participation in life on an equal footing with a non-disabled person. For example, from a disability rights perspective, a public building should not have an elevator because it is a kind thing to do for people with mobility impairments. Rather, it is the *right* of an individual with a disability to access to the building. It is *discriminatory* to deny this person access to the building. If necessary, that right should be enforceable in court against non-compliant actors.

The "social" aspect of disability rights law is widely recognized in legal scholarship. Particularly in Europe, the dominant approach to the study of disability rights law is to compare the jurisprudence of courts to an ideal-type "social" or "human rights" model of disability. The task is usually framed as an assessment of the extent to which the Court X or Court Y is living up to its obligation to interpret disability rights laws in a way that fully reflects a commitment to the principles expressed in the key legal texts that embody the disability rights revolution. As I argue in Chapter 3, *infra*, this approach has some glaring limitations. Foremost among them, the field is littered with idiosyncratic definitions of what the "social model" is, which then leads to an array of idiosyncratic opinions about what constitutes a derivation from the obligation to interpret disability rights texts in a way that conforms with the social model.

3. *An Exercise in Law Production.*

There is a third approach to studying the disability rights revolution—a path that is taken only rarely in legal scholarship. It involves an investigation not only of *outcomes*: i.e. the meaning of the legal text or how a court has interpreted a legal text, but also the *inputs*: i.e. why the legal text exists in the first place, or who uses litigation to enforce the rights of individuals with disabilities, or (an even more challenging task) who chooses *not* to use litigation to enforce their rights.

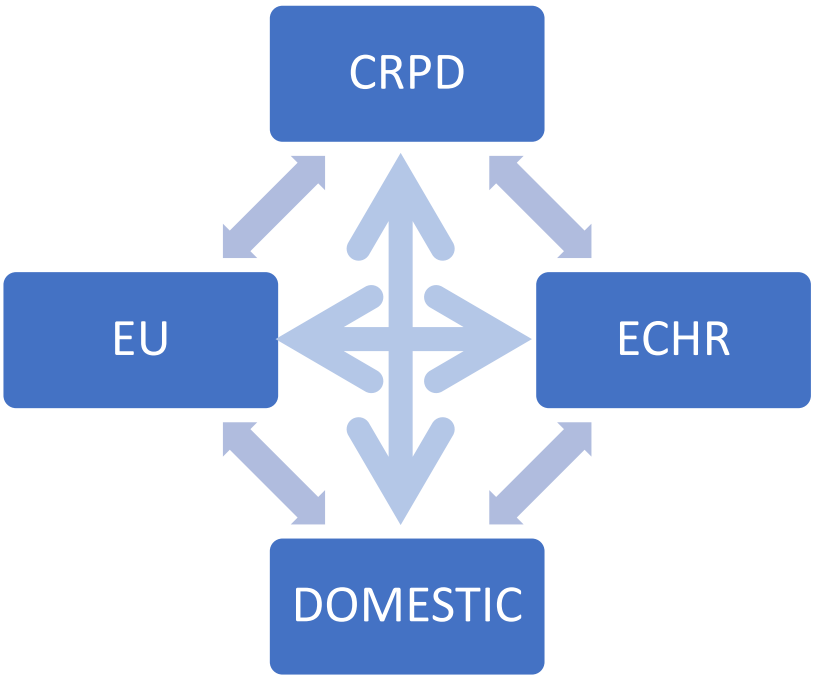
A study that that examines not just what the law is, but also who uses it and how they use it (or do not), takes on board a number of knotty issues. Perhaps most obviously, one

[31] *See* Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1994) (providing an historical account of the key actors and intellectual foundations of the disability rights revolution in the United States).

needs to take causality seriously, and in the case of the disability rights revolution, it is a very complex web of interactions. As will be discussed throughout this thesis, there are many instances where we can reasonably conclude that "top-down" causality has taken place. There are many examples in which international, regional and EU legal instruments are have been the principal drivers responsible for changing the legal position of individuals with disabilities in Europe. But we also know that much of the case-law develops through litigation that originates in domestic courts. Only a select few cases appear before a supra-national adjudicative body. These supra-national interpretations of "what the law is" are then applied in the domestic context. In other words, the production of law in the European disability rights revolution is not an exclusively top-down or bottom-up process. The causal arrows point in both directions.

The diagram below constitutes an attempt to reduce the components of the European disability rights revolution to its core: The CRPD, ECHR, EU, and the Member States, represented here by the term "Domestic". *At least in theory*, each of these entities has the ability to exert influence on the other. The full range of potential causal relationships are represented by the arrows in the diagram.

Map of the Components of the European Disability Rights Revolution



In this dissertation, the disability rights revolution is examined from a black-letter law perspective, as a tool of social change, and as a socio-legal phenomenon that develops

through feedback loops—a push-and-pull between different actors operating at different levels and in different institutions. But regardless of the vantage point, the core questions remain the same: I seek to understand what the legal position of individuals with disabilities in Europe is, the process by which these rights have been obtained, and which factors contribute to the further production and refinement of the law. A focus on the practical application of law means that the study is more attentive to hard law than soft law. The dissertation does not concern itself with legal mobilization per se, but rather with the narrower subset of legal practices from which one can observe a reasonably clear causal link between the activity and the strengthening or weakening of the rights of individuals with disabilities.

By deliberately narrowing the focus of this inquiry, I do not mean to minimize in any respect the importance of other forms of disability rights-related engagement that may, in the long run, prove more important to the lives of individuals with disabilities. At the end of the day, successful efforts to shape the attitudes and perceptions of society-at-large about the rights of individuals with disabilities to "live in the world"[32] as Jacobus TenBroek so eloquently described it, have far greater potential to have a positive impact on the lives of individuals with disabilities than even the most ambitious strategic litigation plan. The bias in favor of hard law and establishing clear causal relationships in this dissertation is mainly a result of the present author's background as a disability rights litigator. The knowledge that I have sought to acquire during the course of writing this dissertation is the kind of information that I suspect most practicing lawyers would find most relevant to their own work. Probably more than we care to admit, are we not all products of our accumulated personal experiences?

A Road Map

In the course of this dissertation, we will return to the diagram provided in the preceding sub-section several times. Specific elements of the diagram will be highlighted as we examine the relationships depicted in it from different vantage points. A series of descriptive/analytical studies does not lend itself to making generalizable statements about how European disability rights law operates in its entirety, but it does hold out the promise of building a more nuanced picture of how the European disability rights revolution is unfolding

[32] Jacobus TenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).

at the moment. It is a research design that aims to make the sum greater than its individual parts.

An outline of the plan for this dissertation is provided below:

Part I: Potential Drivers of Change: International, Regional, and European Law investigates the impact of international instrument on the development of disability rights law in Europe. By and large, Part I provides a view from the *top-down*.

Chapter 2 examines the impact of the CRPD and ECtHR on the European disability rights revolution through the lens of an analytical distinction between *diffuse* impact and *direct* impact. By *direct* impact, I mean a causal condition for which one can reasonably conclude that X caused Y. In this chapter "X" is the CRPD, and "Y" is a legal or policy outcome. By contrast, *diffuse* impact is defined as the power to shape cultural and social norms. Diffuse impact is often only indirectly discernable through court citations to the CRPD, references to the CRPD in government action programs, and other non-binding initiatives. Chapter 2's main conclusion is that, thus far, there is little evidence that the CRPD has had a clear direct impact on domestic laws and policies. In other words, the CRPD's influence is mainly *diffuse*. The strongest case for the direct effect of the CRPD appears to be through the case-law of the ECtHR. Whether the ECtHR's case-law will, in turn, shape domestic legal orders in a significant way remains an open question.

Chapter 3 provides an analysis of the case-law of the Court of Justice of the European Union ("CJEU") on disability discrimination. Most research on the CJEU's case-law has been highly critical of the Court. I present an alternative to the dominant social/medical models of disability framework, and instead engage in an EU-U.S. comparison. Contrary to the vast majority of academic commentary, I conclude that in most respects, the EU's case-law on disability discrimination is quite progressive. Most existing research casts the CJEU as a court that is unable or unwilling to understand how disability rights legislation should be interpreted. By contrast, my findings indicate that the CJEU is a competent and knowledgeable actor: one that has, more often than not, interpreted the disability-related provisions of Directive 2000/78 in an expansive manner.

In ***Part II: Law Production in the EU,*** the perspective shifts mainly to the view from the Member States. In contrast to Part I's *top-down* approach, in Part II, we approach the European disability rights revolution from the *bottom-up*. We do not abandon traditional doctrinal methods, but research questions designed to unpack the socio-legal context in which the European disability rights revolution is unfolding move to the forefront.

Chapter 4 examines a crucial period in the European disability rights revolution: the inclusion of Article 13 in the Treaty of Amsterdam (now codified as Article 19 of the Treaty on the Functioning of the European Union ("TFEU")) and the adoption of Directive 2000/78. While the factors that led to the creation of the CRPD and ECHR have been thoroughly researched,[33] we know far less about the circumstances that led to anti-disability EU anti-disability discrimination legislation.

Chapters 5-7 contain case studies on the UK, Germany, and Denmark. I dedicate a substantial portion of this dissertation to Member State case studies because I firmly believe that we cannot fully understand the legal impact of EU law if we focus exclusively on the small number of cases that come before the CJEU. As Lisa Conant et al. have recently observed:

> Much attention focuses on the few cases that reach European courts, but the bulk of relevant cases never make it this far. More emphasis needs to be placed on national courts, and national courts of first instance in particular. Very little data are currently available on how European law is used at these lower levels of national legal systems. Developing more systematic insights would highlight patterns against which individual case studies could be contrasted.[34]

Preliminary references and infringement proceedings help us to understand how EU law should be interpreted, but the full range of a directive's socio-legal impact begins to come into view only when we take a broader approach.

Case selection is a vast and complex area of research in the social sciences, much of which is dedicated to identifying the correct research design to properly test theories of causality.[35] Admittedly, this dissertation does not fit into a classic social science research design category. It does not present a general theory of behavior and proceed to test it empirically against a series of falsifiable hypotheses. On the other hand, the dissertation does not adopt a "free-form research where everything goes"[36] approach either. Situating the PhD's case studies within the social science literature on case selection—even if the project

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[33] On the CRPD, *see e.g.* Arlene S. Kanter, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (2014). On the ECHR, *see e.g.* Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 LAW & SOCIAL INQUIRY 137-159 (2007).

[34] *See* Lisa Conant et al., *Mobilizing European Law*, 25 JOURNAL OF EUROPEAN PUBLIC POLICY 9, 1376, 1384 (2017).

[35] *See* Jack S. Levy, *Case Studies: Types, Designs, and Logics of Inference,* 25 CONFLICT MANAGEMENT AND PEACE SCIENCE 1, 2 (2008).

[36] *See id.* at fn. 2 *quoting* Zeev Maoz, *Case Study Methodology in International Studies: From Storytelling to Hypothesis Testing*, in Michael Brecher and Frank P. Harvey (eds.) MILLENNIAL REFLECTIONS ON INTERNATIONAL STUDIES (2002).

does not make any strong generalizable[37] or theoretical claims—is still a useful heuristic exercise. It strengthens the clarity and rigor of the case selection process and makes the project more "methodologically self-conscious".[38]

The case studies have been selected because each in their own way, they demonstrated behavior that one may not have anticipated in advance. "Outlier" cases can provide a wealth of information and produce useful insights that help us to constructively re-examine the validity of prior assumptions.[39]

Chapter 5 is a case study based on the UK experience. It has a "least likely" case design. The UK had disability rights legislation in place long before Directive 2000/78 came into force. Therefore, the chapter's central research question is: Did the introduction of Directive 2000/78 make any difference in a Member States that already had a long history of disability rights litigation? The least likely case design is premised on what Levy calls the "'Sinatra inference'"—if I can make it there I can make it anywhere".[40] If there is any Member State where we would expect Directive 2000/78 to have little to no independent effect on national courts, surely it would be in a country that has had its own national disability discrimination laws, and a large body of case-law interpreting those provisions, for over two decades. And yet, we do discover Directive 2000/78 "making it", in the form of sophisticated public interest litigators seeking—successfully—to use Directive 2000/78 to expand the scope of disability rights protections under UK law.

Chapter 6 is a case study on the Danish experience. It uses a "deviant" case study design. A deviant case study focuses on "observed empirical anomalies" and aims to explain why the case deviates from the expected result.[41] Danish courts, which have a well-deserved reputation for infrequently referring cases to the CJEU, uncharacteristically referred several in the area of disability discrimination. What made Denmark behave against-type? I argue that Danish trade unions discovered the power of the preliminary reference procedure when they faced resistance from domestic courts on equal pay for equal work in the 1980s. When

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[37] The cases were not selected as stand-ins for representatives of a larger legal family. That is to say, the UK is not meant to be the "common law" example; nor Germany the "civil law" example; nor Denmark the "Scandinavian law" example.
[38] Jack S. Levy, *Case Studies: Types, Designs, and Logics of Inference,* 25 CONFLICT MANAGEMENT AND PEACE SCIENCE 1, 2 (2008).
[39] *Discussed in* John W. Creswell et al. *Advanced Mixed Methods Research Designs*, HANDBOOK OF MIXED METHODS IN SOCIAL AND BEHAVIORAL RESEARCH 240 (2003); Valerie J. Caracelli and Jennifer C. Greene. *Data Analysis Strategies for Mixed-Method Evaluation Designs*, 15 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 195-207 (1993).
[40] *See* Jack S. Levy, *Case Studies: Types, Designs, and Logics of Inference,* 25 CONFLICT MANAGEMENT AND PEACE SCIENCE 1, 12 (2008).
[41] *See id.*

EU law was expanded to include disability discrimination and they faced a similar problem, they resorted again to the CJEU to bypass unfavorable domestic court judgments.

Chapter 7 is a case study on the German experience. It too uses a deviant case design. The empirical anomaly that requires explanation is the inverse of the Danish story. German courts, which have a well-deserved reputation for frequently referring cases to the CJEU via the preliminary reference procedure, uncharacteristically referred only two in the field of Directive 2000/78 disability discrimination.[42] In this chapter, I argue that rather than fully embrace Directive 2000/78, German courts and other German legal actors have relied on pre-existing disability laws to circumvent difficult questions of legal interpretation. This work-around has reduced the pressure to seek guidance from the CJEU on disability rights-related questions.

The table below summarizes the research questions, research methods, and chapter conclusions.

[42] *Odar*, Case C-152/11 (6 December 2012) ECLI:EU:C:2012:772; *Bedi*, Case C-312/17 (19 September 2018) ECLI:EU:C:2018:734.

Chapter-by-Chapter Summary of Research Questions, Methods and Conclusions

Ch.	Research Question(s)	Research Method(s)	Research Conclusion
2	How does the CRPD drive the disability rights revolution forward in Europe?	Social science literature review; legal scholarship literature review; review of primary sources	The primary direct effect of the CRPD is on the case-law of the ECtHR. For the most part, the effects of the CRPD are "diffuse".
3	How has the CJEU interpreted the disability rights provisions of Directive 2000/78?	doctrinal analysis; comparative law	Compared to US case-law, the CJEU has embraced a broad interpretation of the scope of disability discrimination law.
4	Why did the Member States agree to shift competence for anti-disability discrimination legislation to the EU level?	qualitative social science research; review of primary sources	The political will to make a statement about racial discrimination was strong. NGOs provided technical expertise and support. Disability "rode in the wake" of this movement.
5	*UK*: In a Member State with a long history of disability discrimination legislation, is it still possible for Directive 2000/78 to have an effect on national law?	"least likely" case study; semi-structured interviews, doctrinal analysis	Even in a Member State with a long history of disability discrimination legislation, legal entrepreneurs have used Directive 2000/78 to broaden the scope of domestic disability discrimination laws.
6	*Denmark:* Why have Danish courts, which rarely drive EU case-law forward through the preliminary reference procedure, referred several in the area of disability discrimination? Can quantitative analysis shed light on the effects of the judicial dialogue between Danish courts and the CJEU on the evolution of Danish case-law?	"deviant" case study; semi-structured interviews, qualitative and quantitative social science methodologies; doctrinal analysis; review of primary sources	Danish trade unions first discovered the power of the preliminary reference procedure when they faced resistance from domestic courts on equal pay for equal work. When EU law was expanded to include disability discrimination, they enlisted again to the CJEU to bypass unfavorable domestic court judgments.
7	*Germany:* Why have German courts, which frequently drive EU case-law forward through the preliminary reference procedure, referred only two cases in the area of disability discrimination? Can quantitative case-law analysis shed light on this question?	"deviant" case study; qualitative and quantitative social science methodologies; review of primary sources	Rather than fully embrace Directive 2000/78 German courts and other legal actors have relied on pre-existing disability laws to circumvent difficult questions of legal interpretation.

Part I: Potential Drivers of Change: International, Regional, and European Law

Chapter 2: How does the CRPD drive the disability rights revolution forward in Europe?

As noted in Chapter 1, disability rights law in Europe is a matter of European Union law,[43] regional human rights law,[44] international law,[45] and domestic law. This chapter focuses mainly on the CRPD. In the chapters that follow, the perspective shifts to EU law. Regional human rights law, i.e. the case-law of the ECtHR on disability rights, will be treated as one of the effects of the CRPD. That is to say, for the purposes of this dissertation, regional human rights law is examined as a dependent variable rather than an independent variable.

Before delving into the analytical sections of this chapter, some introductory comments on methodology are in order. The phenomena discussed in this chapter present some thorny research design problems. In light of these challenges, it is necessary to explicitly state the advantages and disadvantages of various approaches, and to clarify and justify why certain decisions were made.

It is quite difficult to compare the extent to which European disability rights law reflect new developments at the EU, regional, or UN levels. Though they all address disability rights from a position other than domestic law, the instruments are dissimilar in a number of important ways. Perhaps most obviously, they have different material scopes. EU law covers only employment discrimination. The ECHR and CRPD touch on a much broader range of issues, including, but not limited to, guardianship, access to goods and services, and education. The instruments also vary in geographic scope. EU law is only directly applicable in the 28 (27?) EU Member States; the ECtHR has jurisdiction over 47 member countries; the CRPD has been ratified by 177 countries. They also have different standing rules and different enforcement mechanisms. Furthermore, one needs to keep in mind that all of these instruments are relatively new. EU disability discrimination law has been binding in most of the Member States for only about 15 years. The CRPD entered into force in 2008. The ECtHR's *Glor* decision was handed down in 2009.[46]

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[43] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [hereinafter Council Directive 2000/78/EC].
[44] Jill Stavert, Glor v. Switzerland*: Article 14 ECHR, Disability and Non-Discrimination* 14 EDINBURGH L. REV. 141 (2010).
[45] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007).
[46] App. No. 13444/04 (Eur. Ct. H.R. Apr. 30, 2009).

Comparison is difficult not only because the instruments are new and differ in legal and geographic scope, but also because research findings will invariably be heavily influenced by how the terms "influence" or "impact" are operationalized. For instance, a narrow definition might involve measuring the extent to which the instrument is used by domestic courts. An even narrower definition might lead us to investigate the extent to which, absent the presence of the legal instrument, the decision of the domestic court would have been different. In other words, one could try to establish that "but for" the new legal instrument, the outcome of the court case would have been different. A broader definition would take into account how an instrument has contributed a general shift in cultural and social norms, government action plans, soft-law, and other measures that do not have binding legal force.

In an earlier draft of this chapter, I sought to find a way to rank the CRPD, EU, and ECHR in terms of their impact on European law—an exercise that I have since abandoned. I have done so not only because it is a project fraught with potential pitfalls and invariably controversial, but even more importantly, because a research project designed to ferret out which instrument has had the greatest effect on the disability rights revolution has a high potential to distort how the instruments work in practice. Ranking implies that the instruments are somehow in competition with each other, which is not really the case here. The relationships are marked more by cross-fertilization, reinforcement, and cooperation than rivalry or strife. This is evident in the large number of cases in which the CJEU and ECtHR cite the CRPD.[47]

In light of the above, I have concluded that there is limited utility in trying to parse which legal instrument is driving the disability rights revolution forward. Too frequently, the outcome is the result of the combined effects of more than one instrument working in conjunction. With these concerns in mind, I propose an alternative research design for this chapter, one which puts the CRPD at the center of the analysis.

The first building block (or, in other words, assumption) is that the impact of the CRPD can be grouped into three broad categories:

1. The direct influence of the CRPD on European states;
2. The influence of the CRPD on the case-law of the ECtHR (and thereby, indirectly, the European states); and

[47] *See* discussion of CRPD's influence on ECtHR's case-law, *infra.*

3. The influence of the CRPD on the CJEU (and thereby, indirectly, the European states).

The second building block seeks to find a workable solution to the definitional problem of what constitutes "influence" or "impact". To address this methodological challenge, I propose a bifurcated definition with different thresholds to capture the many ways in which the CRPD operates, which I will call *diffuse* impact and *direct* impact:

Direct impact is the more demanding of the two types of influence. The threshold is a variant on the famous judgment of Judge Benjamin Cardozo in *Martin v. Herzog*:[48] "Proof of negligence in the air, so to speak, will not do", he instructed. There must be a causal connection between the negligent act and the injury. The analogous situation, which must be satisfied to fall within this category, is that "proof of impact in the air" will not suffice. We need at least *some* evidence from which a reasonable person could deduce that X caused Y. In other words, we must be fairly certain that the CRPD is the reason why a court's case-law changed, or a government passed new legislation, or a government revised a pre-existing law, etc.

Diffuse impact is a category intended to capture and acknowledge the power of shaping cultural and social norms, even if "winning hearts and minds" is often difficult to establish with mathematical certainty. Diffuse impact is often only indirectly discernable. It can be derived from court citations to the CRPD, references to the CRPD in government action programs, and other non-binding initiatives. The causality standard is lower. To fall into the diffuse impact category, we are simply acknowledging that an actor has taken notice of the CRPD, and we assume that references to the CRPD are indicia that attitudes are generally becoming more favorably disposed to the principles set forth in the CRPD. My conclusion, based on the information analyzed for this chapter, is that most of the CRPD's influence on the European disability rights revolution is of the *diffuse* variety.

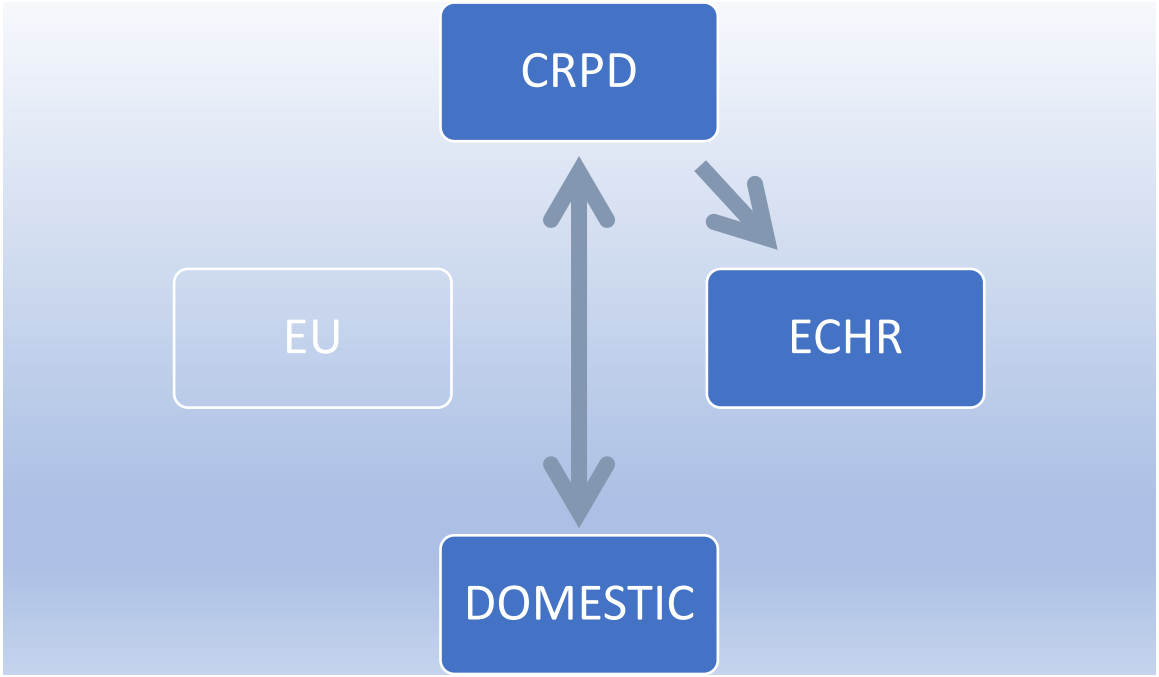
Research on the CRPD has exploded in recent years. In addition to a voluminous number of journal articles and books, in 2017, Springer published a 750-page commentary on the CRPD.[49] Not to be outdone, in 2018, Oxford University Press published a commentary that runs almost 1,400-pages.[50] It is beyond the scope of even a PhD-length thesis on

[48] *See Martin v. Herzog*, 126 N.E. 814, 176 App. Div. 614 (1920).
[49] *See* Valentina Della Fina et al. (eds), THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (2017).
[50] *See* Ilias Bantekas et al., (eds.) THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (2018).

disability rights law to do justice to the vast amount of literature that already exists on the CRPD.

Instead, this chapter addresses the narrower question of impact within the confines of the categories outlined earlier, specifically: The influence of the CRPD on European states (and vice-versa) and the influence of the CRPD on the case-law of the ECtHR. The third potential route to influence, the impact of the CRPD on the CJEU, is discussed in the chapters that follow.

Diagram of Relationships Examined in Chapter 2



The first section below draws on a widely-cited theory of how the CRPD operates in practice to examine the power and limitations of this instrument as a vehicle for directly influencing domestic law and policy. The second section evaluates the CRPD's role in the development of the case-law of the ECtHR. I conclude that the evidence that the CRPD has had a clear causal impact on domestic laws and policies is not strong. To the extent that the CRPD is pushing the European disability rights revolution forward, it is mainly doing so in an indirect or diffuse manner that is difficult to establish empirically. That said, there is a good case to be made that the CRPD is prodding the jurisprudence of the ECtHR in a more disability-friendly direction. Whether the ECtHR's case-law has, or will, shape domestic European legal orders remains an open question that is not addressed in this chapter and requires further research.

1. The UN Convention on the Rights of Persons with Disabilities: Experimentalist Governance or no governance at all?

In a series of influential articles, Gráinne de Búrca argues that the CRPD is an example of a new form of pluralist governance, which she calls "experimentalist".[51] She claims that the CRPD regime contains a number of clearly identifiable features—and that these feature are increasingly present across a wide range of international agreements.[52] In her most recent contribution, published in the *American Journal of International Law* in 2017, de Búrca extends her argument to include the assertion that experimentalist governance "can promote positive human rights reform."[53] In other words, experimentalist governance is not only a useful heuristic tool to understand recent trends in international relations, it is also a normatively appealing system of governance.[54]

De Búrca presents a thought-provoking rebuttal to four common criticisms of international human rights treaties: namely, that they (1) rarely change state behavior, (2) are too ambiguously worded, (3) lack effective enforcement mechanisms, and (4) impose the values of powerful states on weaker states under the guise of upholding "universal" human rights standards.[55] Re-examined through the lens of experimental governance, these attributes of the international human rights system become not weaknesses, but strengths. Legal ambiguity is normatively appealing if it provides space for "local discretion and flexibility in application and adaption to circumstances".[56] Similarly, the lack of an effective international enforcement mechanism may be a positive development if it creates room for solutions that

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[51] *See* Gráinne de Búrca, *The European Union in the Negotiation of the UN Disability Convention*, 35 EUROPEAN L. REV. 174 (2010); Gráinne de Búrca, et al., *New Modes of Pluralist Global Governance*, 45 NYU J. INT'L L. & POL. 723 (2013); Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277 (2017).

[52] Although the present article focuses mainly on the CRPD, it should be noted that de Búrca argues that several other international treaties exhibit experimentalist features. *See* Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277 (2017). (contending that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are also examples of experimentalist governance); *see also* Gráinne de Búrca et al, *New Modes of Pluralist Global Governance*, 45 NYU J. INT'L L. & POL. 723 (2013) (arguing that the Inter-American Tuna Commission and the Montreal Protocol on Substance Depleting the Ozone Layer can be understood as experimentalist governance regimes).

[53] *See Human Rights Experimentalism* at 279.

[54] *See id.* at 316 (arguing that "an experimentalist reading of the international human rights treaty system suggests lessons for the design and reform of these and other existing human rights treaty systems with a view to making them more effective in practice in advancing the goal of strengthening human rights standards across the globe").

[55] *See id.* at 278.

[56] *See id.* at 311.

are more sensitive to local conditions.[57] Experimentalist governance also provides a response to the criticism that international human rights treaties are elite, top-down projects. The open-endedness of international treaty obligations are recast in the experimentalist governance literature as an important design feature that encourages buy-in from domestic actors who are in the best position to adapt the norms asserted in the CRPD to circumstance on the ground.[58]

De Búrca presents her argument most clearly in her response to scholarship that questions how an international human rights system that lacks binding, hierarchical enforcement mechanisms can result in positive change:

> What is there, they reasonably ask, to constrain states from adopting whatever meaning they like, avoiding any real influence or impact of the obligations they have undertaken to protect and promote human rights, and choosing to interpret them in a self-serving way which avoids the need for any change? The answer of experimentalist governance theory is that it is the presence of an active, engaged array of stakeholders with a strong interest in shaping and enforcing the human rights norm, combined with the obligation of regular state reporting alongside stakeholder monitoring and reporting that provides a reasonably robust safeguard against self-interested interpretation of human rights norms by states that seek to avoid action and accountability. What prevents states from ignoring their commitments or hiding their noncompliance is the obligation of periodic and regular reporting, accompanied by NGO shadow-reporting to an external body that conducts a form of transparent, nonhierarchical review, and often in cooperation or engagement with other international bodies and peer review systems.[59]

De Búrca's contribution merits closer inspection. If the CRPD is producing the results that experimentalist governance promises, then it may represent a major innovation in the design of human rights treaties On the other hand, if we find that the CRPD does not operate as the proponents of experimentalist governance suggest it should or could, it is incumbent upon us to identify where the break-downs occur, and why.

More is at stake here than a semantic debate about how close an international regime comes to meeting the standards of a Weberian ideal-type. The CRPD is frequently hailed as an innovative improvement over earlier human rights treaties,[60] and de Búrca and others

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[57] *See id.* at 312.
[58] *See id.* at 313.
[59] *See id.* at 312-13.
[60] *See* Theresia Degener, *10 Years of Convention on the Rights of Persons with Disabilities*, 35 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 152, 152 (2017) (describing the CRPD as the "champion among United Nations' core human rights treaties); Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287, 289 (2007) ("The scope and coverage of the Convention is unprecedented."); Janet E. Lord and Michael Ashely Stein, *The Domestic Incorporation of Human Rights Law and The United Nations Convention on the Rights of Persons with Disabilities* 83 WASH. L. REV. 449,456 (2008) ("Moving beyond the traditional frameworks of human rights conventions, the CRPD lays out a template for comprehensive action, providing catalysts for socialization and outlining integrative mechanisms designed to address the cross-cutting nature of disability."); Gerard

explicitly hold it out as a potential model for future international agreements. It is an academic theory, but an academic theory with clear policy implications. If de Búrca is correct, then the most common criticisms that have been leveled against the international human rights treaty system in scholarly and policy circles are misplaced—or at the very least—greatly exaggerated.

Befitting a theory with high salience for policymaking, the fundamental distinction between a failed and successful experimental governance regime is essentially an empirical question. Successful regimes effectuate tangible change; they solve or greatly ameliorate the identified problem. This view is consistent with a large body of research that has taken as axiomatic that "[t]he success or failure of any international human rights system should be evaluated in accordance with its human rights practices on the domestic (country) level."[61]

There is much to be commended about de Búrca's work. It is a rare example of scholarship that bridges the cognate, but frequently stove-piped fields of International Relations and International Law.[62] Unusual among legal scholars, she presents her theory of experimentalist governance in the form of a causal and parsimonious model. The main criticism set forth in this chapter is that, despite the normative appeal and creativity of de Búrca's argument, there is simply very little evidence that the CRPD is fulfilling the experimentalist governance promise.

Given that it is a relatively new treaty, which opened for signature only in March 2007, perhaps it is too soon to draw definitive conclusions about its effects on domestic regimes. But at a minimum, the results presented in this chapter counsel for caution. We should not take for granted that the CRPD is currently delivering the legal and policy changes that experimentalist governance suggests it can.

Quinn and Eilionóir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AM. J. COMP. L. 23 (2012); Press Release, General Assembly, General Assembly Adopts Groundbreaking Convention, Optional Protocol on Rights of Person With Disabilities: Delegations, Civil Society Hail First Human Rights Treaty of Twenty-First Century, U.N. Doc. GA/10554 (Dec. 13, 2006), http://www.un.org/News/Press/docs/2006/gal0554.doc.htm

[61] *See* Christof Heyns and Frans Viljoen. *The Impact of the United Nations Human Rights Treaties on the Domestic Level,* 23 HUMAN RIGHTS QUARTERLY 483, 483 (2000); *see also* Emilie M. Hafner-Burton and Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises* 110 AM. J. SOCIOLOGY 1373, 1385-86 (2005) (observing that "world society approach" sociological literature has also concluded that "the act of treaty ratification is often loosely coupled with the relevant practice, especially when the treaty does not have an effective enforcement mechanism and national governments are left in charge of domestic implementation—as is the case with many international treaties").

[62] For a summary of works in this tradition, *see* Anne-Marie Slaughter et al., *International law and International Relations Theory*, 92 AM. J. INT'L L. 367 (1998); *see also* Michael Byers, *International Law*, in Christian Reus-Smit and Duncan Snidal (eds.) THE OXFORD HANDBOOK OF INTERNATIONAL IN RELATIONS (2008). ("International law has received relatively little attention from scholars of international relations. And, despite the intrinsic relationship between politics and law, scholars of international law have devoted relatively little attention to international politics").

The remainder of this section begins by describing how experimentalist governance is defined and whether the CRPD, in fact, operates in ways that the theory of experimentalist governance would lead us to expect. It then provides an in-depth analysis of the CRPD's effects on the UK, Denmark, and Germany. I find that for these countries, the effects have been modest. The case studies do not falsify the experimentalist governance thesis, but they do bring to light the extent to which practice can diverge from theory. The section concludes with some thoughts about why the results of the case studies do not match the expectations that the theory of experimentalist governance would predict.

In *New Modes of Pluralist Global Governance*, de Búrca et al. identify three modes of governance that reflect the fact that international law and world politics is less state-dominated than in the past. The first mode of governance "involves the creation of comprehensive and integrated international regimes".[63] Some attempts to create such regimes were made after World War I, but only succeeded after World War II. Examples of such regimes include the United Nations, the International Monetary Fund, and the World Bank. Mode One international regimes come close to fitting the ideal-type principal-agent model. "[T]he leading nation-states or coalitions of states can be considered as principals who create international regimes to act as their agents in addressing and solving what are considered to be well-defined governance problems arising from interdependence".[64] States believed that they understood their collective problems clearly and they delegated to their agents, i.e. the international organizations, responsibility for resolving problems according to clearly articulated rules. Mode One international regimes facilitate coordination by lowering the cost of making and enforcing rules.[65]

Mode Two international regimes became more prevalent starting in the mid-1990s. After the "stagnation or collapse of attempts to develop new comprehensive and integrated international regimes", a new form of governance marked by "networked information exchange" began to spread. Mode Two international regimes differ from Mode One international regimes in that the former is less hierarchical and recognizes the importance of relationships not just between states, but also sub-units of states and non-state actors.[66]

Mode Three is experimentalist governance, which de Búrca et al. describe as: "a set of practices involving open participation by a variety of entities (public or private), lack of

[63] *See* Gráinne de Búrca et al., *New Modes of Pluralist Global Governance*, 45 NYU J. INT'L L. & POL. 723, 729 (2013).
[64] *See id.* at 729-30.
[65] *See id.* at 730.
[66] *See id.* at 733.

formal hierarchy within governance arrangements, and extensive deliberation throughout the process of decision making and implementation".[67] An ideal-type experimentalist governance regime involves "initial reflection and discussion based on a broadly shared perception of a common problem, resulting in the articulation of a framework understanding with open-ended goals".[68] Implementation of these goals is delegated to lower-level actors who have local knowledge and discretion to adapt the framework to make it most effective for local conditions. There is continuous feedback from local actors, and outcomes are subject to peer review. Goals and practices are regularly evaluated and reconsidered in light of new data and the shared objectives. These regimes often contain a "penalty default", which serves as a punishment for non-compliance.[69]

In *New Modes of Pluralist Global Governance*, the authors apply this framework to several international agreements, including the CRPD. In the discussion below, we first examine, step-by-step, why the authors believe that the CRPD is a good example of experimentalist governance. Thereafter, we compare de Búrca et al.'s account of how the CRPD operates in practice to what we know about its impact in the countries that are the subject of in-depth analysis in forthcoming chapters of this PhD thesis.

The case for the CRPD as an experimentalist governance regime.

i. "Open Participation"

The first experimentalist governance factor is "openness to participation of relevant entities 'stakeholders' in a non-hierarchical process of decision making".[70] The authors argue that this factor is evident not only in the negotiation and drafting of the CRPD, but in many of its substantive provisions as well.[71] In fact, the authors present a somewhat mixed picture on the role of non-state actors in the CRPD machinery. On the one hand, they emphasize that NGOs played an important role in drafting the CRPD, and have continued to contribute to the maintenance of the regime as vocal critics of states that have not, in their view, fully implemented their obligations under the Convention. Many "play central roles in monitoring

[67] *See id.* at 738.
[68] *See id.* at 738-39.
[69] *See id.* at 739.
[70] *See id.* at 739.
[71] *See id.* at 751 and fn. 48, cataloging the relevant provisions in the CRPD that call for the participation of individuals with disabilities in in carrying out the obligations required under the Treaty).

and data-gathering".[72] Some submit expert information to their governments and provide shadow reports to the CRPD Committee. Civil society groups are also involved in regional and international capacity building exercises, for example, by providing training on how to prepare shadow reports to the CRPD Committee. On the other hand, "many governments are reluctant to seek or incorporate this feedback [from NGOs] into their periodic reports to the CRPD Committee".[73] In other words, it appears that NGOs are actively participating in the CRPD reporting process and are providing information that is relevant for the CRPD Committee when they assess the progress that the contracting parties have made in meeting their treaty commitments, but the NGOs mainly do so from the position of outsiders who attempt to apply pressure on their governments by influencing the findings of the CRPD Committee.

ii. "A Framework for Understanding and Open-Ended Goals"

The second key feature of experimentalist governance regimes is the "articulation of a broadly agreed common problem and the establishment of a framework understanding setting open-ended goals".[74] Here, the authors focus almost exclusively on the negotiations concerning the definition of disability in the UN Convention. They note that: "An Experimentalist approach to lawmaking emphasizes the importance of flexibility and revisability in the interest of adaptation to change and inclusiveness, which militates against the inclusion of a precise definition of disability.[75] The final draft of the CRPD does not provide a precise definition of disability, and the main provision on the meaning of disability is provided in the Convention's "purposes" section rather than the "definitions" section.[76]

While de Búrca et al. point to this as "adopting an inclusive and open-ended" approach that "fits with the premises of an Experimentalist Governance approach", the result is undoubtedly a compromise between two opposing camps. Many NGOs fought for a precise definition of disability, which they believed would provide the best hope of holding the contracting parties' feet to the fire.[77] This position was opposed by some government delegations precisely because they understood what was at stake, and preferred a watered-

[72] *See id.* at 753.
[73] *See id.* at 753.
[74] *See id.* at 739.
[75] *See id.* at 754.
[76] *See id.* at 755.
[77] *See id.* at 754.

down agreement that would make it more difficult for the CRPD Committee to find that states had committed clear-cut violations.[78]

Under these circumstances, it seems appropriate to question whether the CRPD has open-ended goals for normatively desirable reasons. The CRPD has an open-ended definition of disability not—as shall see below in other examples—because of a lack of technical or scientific knowledge about how solve the problem. Rather, it is open-ended because a diplomatic compromise was needed to bridge the diverging viewpoints held by NGOs and governments.

iii. and iv. "Implementation by Lower-Level Actors" with "Continuous Feedback, Reporting and Monitoring.

De Búrca et al. discusses the third and fourth experimentalist governance factors together. These are: "implementation by lower-level actors with local or contextualized knowledge" and "continuous feedback, reporting, and monitoring".[79] The CRPD establishes two monitoring mechanisms. Articles 34-39 of the CRPD creates an international human rights monitoring mechanism with a Committee of Experts. The CRPD Committee is tasked with "receiving, examining, and responding to state reports and reporting to the U.N. General Assembly and Economic and Social Committee".[80] There is also an Optional Protocol which allows individuals to lodge complaints for direct adjudication by the CPRD Committee.[81] Article 33 of the CRPD provides for independent *national* monitoring and implementation of the Treaty. The authors conclude that it is:

> clear that these novel provisions of the Convention have been brought to life in practice by the involvement of the various stakeholders. The combination of mandating focal points, recommending that state parties establish coordination mechanisms to facilitate action around the CRPD across government departments, and the requirement in Art. 33(2) for independent monitoring mechanisms, have, in conjunction with one another, had *significant effects*.[82]

In support of their position, de Búrca et al. point out that the independent agencies or "focal points" provide feedback to their governments when they draft their reports to the

[78] *See id.* at 754.
[79] *See id.* at 739.
[80] *See id.* at 756.
[81] *See id.* at 756.
[82] *See id.* at 760 (emphasis added).

CRPD Committee, draft parallel reports, and advise governments on compliance with the Convention and organize meetings.[83]

The other lower-level actors that the authors refer to are civil society organizations, which they describe as having "a robust relationship with the [CRPD] Committee and interact formally and informally with its members through a number of forums".[84] The International Disability Alliance (IDA) organizes side events during CRPD Committee sessions held in Geneva twice a year. NGOs can also provide feedback to the CRPD Committee before it publishes its "List of Issues" and before the State appears before the CRPD Committee for its official review.[85]

v. "Peer Review and Practices for Revising Existing Rules and Practices"

The fifth and final defining feature of experimentalist governance is the establishment of "practices, involving peer review, for revising rules and practices".[86] Here, de Búrca et al.'s focus almost exclusively on process rather than outcomes. Article 40 of the CRPD provides that "the States Parties shall meet regularly in a conference of States Parties in order to consider any matter with regard to the implementation of the present Convention".[87] Article 40 was "designed to allow States Parties to meet regularly to discuss best practices, difficulties, needs, and other matters regarding the implementation of the Convention".[88] What is conspicuously absent from this discussion are any examples in which these meetings resulted in concrete changes in existing rules and practices.

Is the CRPD Really an Experimentalist Governance Success Story?

While the CRPD contains features that would support experimentalist governance if it operated as (some of the) drafters intended, de Búrca et al.'s argument that it functions today as a true experimentalist governance international regime is debatable. The claim rests more on a formalist, check-the-box analysis than a results-based investigation. In the following section, we take a closer looker at the empirical evidence for the assertion that the CRPD is

[83] *See id.* at 761.
[84] *See id.* at 757.
[85] *See id.* at 757-58.
[86] *See id.* at 739.
[87] *See id.* at 761.
[88] *See id.* at 761-62 (quoting Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUMAN RIGHTS BRIEF 9 (2007)).

producing the "positive human rights reform" at the domestic level that de Búrca contends it is or should be delivering.

One way to analyze the impact of the CRPD on domestic regimes is to review the exchange of information between the State Party and the CRPD Committee to determine if the State Party has made any changes to its disability laws and/or policies as a result of ratifying the CRPD or in response to recommendations from the CRPD Committee. The exchanges take place through a standardized procedure of written submissions and a formal meeting of representatives of the State Parties and the CRPD Committee. The written correspondence is available on the UN's website.[89] First, the State Party submits an "Initial Report" to the CRPD Committee on its disability policies. Next, the CPRD Committee publishes a "List of Issues" (LOI) in response the initial report. Third, the State Party submits a "Reply" to the CRPD Committee's LOI. Fourth, the CRPD issues its Concluding Observations". And finally, the State Party has the opportunity, if it so chooses, to submit a "Follow Up" to the concluding observations. In addition, the CRPD Committee can carry out an "Inquiry" pursuant to Article 6 of the Optional Protocol to the Convention if the CRPD Committee has "reliable information indicating grave or systemic violations of the rights set forth in the convention." The CRPD exercised this power with respect to the UK, and in its October 2016 report, concluded that "there is reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been met".[90]

If the CRPD is functioning as an effective experimentalist governance regime, then we would expect to see a fruitful dialogue about, *inter alia*, best practices to reduce or eliminate discrimination against individuals with disabilities, the revision of the Convention's goals based on new information from lower-level actors, etc. Instead, we appear to be witnessing a process in which the CRPD Committee's recommendations are routinely ignored, and in the case of the UK, vehemently rejected. The following cases studies of the UK, Denmark, and Germany provide very little evidence of the virtuous cycle that is supposed to characterize experimentalist governance.

The UK is widely considered a front-runner in the disability rights movement. The rights of disabled people were first recognized in the 1978 Chronically Sick and Disabled

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[89] *See* https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en (providing database for most UN human rights committee-related documents); see also https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx, "Key Documents Related to Reporting Cycles" (providing documents specifically covering the work of the CRPD Committee).

[90] *See* Committee on the Rights of Persons with Disabilities, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention, Report of the Committee, CRPD/C/15/R.2/Rev.1 (6 October 2016) at ¶ 113.

Persons Act. The 1995 Disability Discrimination Act was one of the first examples of comprehensive disability rights legislation in the world. But the UK is also the first State Party to be condemned under Article 6 of the Optional Protocol to the Convention for engaging in "grave or systemic violations of the rights set forth in the convention."[91]

There is an usually large amount of publicly available information about the interactions between the CRPD Committee and the UK Government. In addition to responding to the CRPD Committee's allegations of committing grave or systematic violation of the Convention,[92] the UK has engaged in a full round of exchanges with the CRPD Committee about its disability law and policies: i.e., the Initial Report, the List of Issues, Reply, and Concluding Observations.[93] The UK independent monitoring mechanism[94] and UK- based NGOs[95] have also produced lengthy "parallel" and "shadow" reports that provide additional insight into the process.

The UK signed the CRPD on 30 March 2007 and ratified it on 8 June 2009. It ratified the CRPD Optional Protocol on 7 August 2009. The UK Government designated the Office for Disability Issues (ODI) as the focal point.[96] The UK Independent Mechanism (UKIM) has been designated as independent mechanisms under Article 33(2) of the Convention.

By now the UK Government, CRPD Commission, UKIM, and NGOs have produced thousands of pages debating whether the State Party complies with its treaty obligations under the CRPD. A familiar pattern emerges: In support of its view that it is in full

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[91] *See id.*

[92] *See* The United Kingdom Government Response to the Report by the United Nations Committee on the Rights of Persons with Disabilities under article 6 of the Optional Protocol to the Convention (November 2016).

[93] *See* Committee on the Rights of Persons with Disabilities Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties due in 2011, United Kingdom of Great Britain and Northern Ireland CRPD/C/GBR/1 (3 July 2013); Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of the United Kingdom of Great Britain and Northern Ireland CRPD/C/GBR/Q/1 (20 April 2017); Committee on the Rights of Persons with Disabilities, Replies of the United Kingdom of Great Britain and Northern Ireland to the list of issues, CRPD/C/GBR/Q/1/Add.1 (21 July 2017); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1 (3 October 2017).

[94] *See* Equality and Human Rights Commission, Monitoring the Implementation of the UN Convention on the Rights of Persons with Disabilities: The UK Independent mechanism list of issues interim report (December 2014); Equality and Human Rights Commission, UK Independent Mechanism Updated submission to the UN Committee on the Rights of Persons with Disabilities in advance of the public examination of the UK's implementation of the UN CRPD (July 2017); Equality and Human Rights Commission, UN CRPD disability report response (31 August 2017); Equality and Human Rights Commission, How is the UK Performing on Disability Rights? The UN's Recommendations for the UK (January 2018).

[95] *See* Disabled People Against Cuts (DPAC) and Inclusion London, Follow up Submission: Response to UNCRPD Inquiry (14 March 2017); Disability Rights UK, *A human catastrophe – New UN condemnation for UK human rights record* (31 August 2017).

[96] *See* Rachel Murray and Kelly Johnson, *Implementation of Article 33 CRPD in the United Kingdom: The Need to Consolidate Civil Society Engagement* in Gauthier De Beco (ed.) ARTICLE 33 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: NATIONAL STRUCTURES FOR THE IMPLEMENTATION AND MONITORING OF THE CONVENTION (2013) at 99.

compliance with the CRPD, the UK Government describes in detail the laws, policies and initiatives pertaining to individuals with disabilities. The UKIM, UK-based NGOs, and CRPD then point to shortcomings in the UK Government's submissions and call for changes to bring the UK into compliance with its treaty obligations. The UK Government responds with a vigorous denial that it has failed in to fulfill its duties under the Convention. The UKIM, UK-based NGOs, and CRPD Committee repeat their allegations, and the UK Government rejects them again.

A good example is the disagreement over whether it is necessary to incorporate the CRPD into UK legislation. In its Initial Report, the UK Government explained that while it was "committed to the principles of the Convention", the international agreement was "not legally binding in domestic law in the UK".[97] When the CRPD Committee pressed on this point in its LOI, the UK Government responded that the UK does not "as a general principle . . . incorporate international treaties into domestic law".[98] In response, UKIM expressed concerns that because the CRPD has not been directly incorporated into domestic law, "there is no explicit requirement for Ministers to consider their international obligations under the CRPD when developing new policy and law, or any domestic mechanism to hold them to account for failing to do so".[99] In its Concluding Observations, the CRPD Committee recommended that the UK "[i]ncorporate the Convention into its legislation, recognizing access to domestic remedies for breaches of the Convention, and adopt an appropriate and comprehensive response to the obligations enshrined in the Convention in its policies and programmes . . . ".[100] There is no indication that the repeated criticism of the CRPD Committee and the independent monitoring mechanism have had any effect on the UK Government's position.

Similarly, the UK Government rejected all 11 of the CRPD Committee's recommendations contained in an inquiry that concluded that the State Party had engaged in "grave or systemic violations" of its Convention obligations. The Secretary of State for Work

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[97] *See* Committee on the Rights of Persons with Disabilities Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties due in 2011, United Kingdom of Great Britain and Northern Ireland CRPD/C/GBR/1 (3 July 2013) at ¶ 44.

[98] *See* Committee on the Rights of Persons with Disabilities, Replies of the United Kingdom of Great Britain and Northern Ireland to the list of issues, CRPD/C/GBR/Q/1/Add.1 (21 July 2017) at ¶ A.6.(c).

[99] *See* Equality and Human Rights Commission, UK Independent Mechanism Updated submission to the UN Committee on the Rights of Persons with Disabilities in advance of the public examination of the UK's implementation of the UN CRPD (July 2017) at ¶ 1.1.

[100] *See* Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1 (3 October 2017) at ¶ III.A.7(a).)

and Pensions, Damian Green, publicly denounced the report as representing "an outdated view of disability which is patronising and offensive" and stood firm in his assertion that: "The UK is a recognised world leader in disabled rights and equality".[101]

It would be unrealistic to expect the UK Government and the CRPD Committee to reach an agreement on every point of contention, but in order for an experimentalist governance regime to produce positive outcomes, there must be at least *some* points of convergence between lower-level actors and the center. It is difficult to identify any concrete examples of this sort of behavior. On the contrary, the CRPD Committee has maintained that the UK has failed to meet its obligations under the Convention, and the UK has rejected that view. Once the positions of the interlocutors were established, neither side has budged. Finger pointing—rather than mutual learning, cooperation, and refinement of goals and objectives based on new information—has been the hallmark of this relationship thus far.

An examination of the other countries that are the subject of in-depth examination in this dissertation does not alter the picture very much. The Danish and German Governments have had less openly hostile relationships with the CRPD Committee and their respective domestic international monitoring mechanism and NGOs, but it is still difficult to point to many interactions that support the claim that experimentalist governance is driving on-the-ground change.

Germany ratified the CRPD on 24 February 2009 and the Convention has been binding on Germany since 26 March 2009. It has engaged in a full cycle of exchanges with the CRPD Committee about its disability law and policies.[102] It has designated the German Institute for Human Right (GIHR) as its independent mechanism[103] and the Federal Minister for Labour and Social Affairs as a focal point, as well as 16 focal points at the *Laender*

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[101] *See UN: 'Grave' disability rights violations under UK reforms*, BBC NEWS (7 November 2016). For a detailed discussion of the UK Government's response to the CRPD Committee Inquiry, *see* Disabled People Against Cuts (DPAC) and Inclusion London, Follow up Submission: Response to UNCRPD Inquiry (14 March 2017).

[102] *See* Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties Germany, CRPD/C/DEU/1 (7 May 2013); Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of Germany, CRPD /C/DEU/Q/1, (12 May 2014); Committee on the Rights of Persons with Disabilities, Replies of Germany to the list of issues, CRPD/C/DEU/Q/1/Add.1 (15 January 2015); Volume of Appendices, Responses to the questions from the List of Issues in connection with the first German country review (CRPD/C/DEU/Q/1/Add.1) (15 January 2015); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1 (13 May 2015); Committee on the Rights of Persons with Disabilities, Information received from Germany on follow-up to the concluding observations, CRPD/C/DEU/CO/1/Add.1 (27 November 2017).

[103] *See* German Institute for Human Rights, Submission of the National CRPD Monitoring Body of Germany to the CRPD Committee on the Rights of Persons with Disabilities on the occasion of the preparation of a list of issues by the Committee in the review of Germany's Initial Report in 2014 (2014); German Institute for Human Rights, Parallel Report to the UN Committee on the Rights of Persons with Disabilities (March 2015).

level.[104] GIHR has been an active monitoring body in all stages of the review process. Before the CRPD Committee's issued its List of Issues, GIHR produced a detailed report with numerous concrete recommendations for questions that the CRPD Committee should pose to the German Government.[105] The Institute published a similarly detailed report in advance of the CRPD Committee's issuance of its Concluding Observations for Germany.[106] The CRPD Committee meetings are confidential, so it is impossible to draw a direct causal link between the GIHR reports and the UN Committee's publications, but the overlap between the GIHR reports and the UN Committee's publications certainly allow one to draw a reasonable inference that the GIHR reports were closely examined by the CRPD Committee. Of the approximately 70 recommendations included in the CPRD Committee's Concluding Observations, more than half bear a strong resemblance to recommendations that the GIHR proposed in its 2015 report,[107] a striking finding particularly when one considers that the GIHR had deliberately limited its analysis to key issues and was "unable to comment on all the items" of potential relevance to the CRPD Committee.[108]

In some instances, the language used by the CRPD and GIHR is almost identical. To take just one example of many, in 2015 GIHR, proposed to the CRPD Committee that it include the recommendation that Germany: "introduce targeted measures to improve the physical and communicative accessibility of courts, judicial authorities and other bodies involved in administering the law . . ." In the CRPD Committee's 2015 Concluding Observation, it copied the GIHR's recommendation almost word-for-word, proposing that Germany "introduce targeted measures to improve the physical and communicative

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[104] *See* Gauthier De Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, United Nations Human Rights Office of the High Commissioner, Europe Regional Office (2014).

[105] *See* German Institute for Human Rights, SUBMISSION OF THE NATIONAL CRPD MONITORING BODY OF GERMANY TO THE CRPD COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES ON THE OCCASION OF THE PREPARATION OF A LIST OF ISSUES BY THE COMMITTEE IN THE REVIEW OF GERMANY'S INITIAL REPORT IN 2014 (2014).

[106] *See* German Institute for Human Rights, PARALLEL REPORT TO THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES IN THE CONTEXT OF THE EXAMINATION OF THE INITIAL REPORT OF GERMANY UNDER ARTICLE 35 OF THE UN CONVENTION OF THE RIGHTS OF PERSONS WITH DISABILITIES (March 2015).

[107] Counting the number of recommendations is not as simple one might initially expect. The CRPD Committee presents its recommendations in separately numbered paragraphs, many of which contain more than one recommendation. As the CRPD Committee rarely copies the recommendations of the national monitoring body word-for-word into its Concluding Observations, the researcher's determination that a CRPD Committee recommendation is sufficiently similar to a national monitoring body's recommendation requires some degree of subjective choice. The source materials for the figures provided in this section and in the appendix are the Concluding Observations of the CRPD Committee for Germany and Denmark and the parallel reports of the national monitoring bodies for Germany and Denmark. Full citations are provided in the footnotes, *supra*.

[108] *See* GIHR Parallel Report (2015) at "How to Read this Document".

accessibility of courts, judicial authorities and other bodies involved in administering the law."[109]

Denmark's experience with the CRPD has been broadly similar to Germany's. Denmark ratified the CRPD on 24 August 2009. It has also engaged in a full round of exchanges with the CRPD Committee about its disability law and policies.[110] Its focal point is the Ministry of Social Affairs and the Danish Institute for Human Rights (DIHR) is its independent mechanism. Before the UN Committee published its Concluding Observations for Denmark, DIHR published a parallel report that included numerous recommendations.[111] Of the approximately 55 recommendations included in the CPRD Committee's Concluding Observations, roughly half are substantially similar to those proposed by the DIHR. As in the case of the Germany, the Danish parallel report was not intended to be exhaustive, but rather "focus[ed] on selected issues on what needs to be done to strengthen the national human rights protection within the scope of the CRPD".[112]

The CRPD Committee's Concluding Observations occasionally demonstrate the same form of "mimicry" that we observed in the German case. For example, the DIHR's parallel report asks the CRPD Committee to recommend that Denmark: "Amend the legislation to ensure that all children with disabilities can complain to an independent authority if they do not receive adequate educational support".[113] The CRPD Committee, in almost identical language, recommended that Denmark "amend its legislation to ensure that all children with disabilities can submit a complaint to an independent authority if they do not receive adequate educational support".[114] The DIHR's parallel report calls for "initiatives to ensure that persons with disabilities have access to the highest attainable standards of health . . .

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[109] *Compare* GIHR Parallel Report (2015) at ¶ 91 with UN Concluding observations on the initial report of Germany at ¶ 28(a).

[110] *See* Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties
Denmark, CRPD/C/DNK/1 (7 May 2013); Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of Denmark, CRPD/C/DNK/Q/1 (12 May 2014);Committee on the Rights of Persons with Disabilities, Replies of Denmark to the list of issues, CRPD/C/DNK/Q/1/Add.1 (15 July 2014); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Denmark, CRPD/C/DNK/CO/1 (30 October 2014); Committee on the Rights of Persons with Disabilities, Information received from Denmark on follow-up to the concluding observations, CRPD/C/DNK/CO/1/Add.1 (23 November 2017).

[111] *See* Danish Institute for Human Rights, PARALLEL REPORT TO THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (2014).

[112] *See id.* at "Preface".

[113] *See id.* at 14.

[114] *See* Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Denmark, CRPD/C/DNK/CO/1 (30 October 2014).

.".[115] The CRPD Committee reformulated this recommendation only slightly to: "ensure that persons with disabilities, in particular persons with psychosocial disabilities, have equal access to the highest attainable standard of health . . .".[116]

While it seems reasonably clear that the CRPD Committee values the national monitoring mechanisms' expertise and input, and is willing to incorporate their views into their correspondence with the State Parties, it is difficult to find much evidence that the symbiotic relationship between the national monitoring bodies and the CRPD Committee has translated into positive legal or policy change. Admittedly, part of the challenge in evaluating the impact of Concluding Observations is that many of the recommendations are worded in ways that do not lend themselves to an objective means of determining whether a State Party is complying its treaty obligations or not. The CRPD Committee does not "instruct" or "order" State Parties to take specific actions. It is couched in much more diplomatic language. It "recommends", "urges", "requests" and in some cases, merely asks the State Party to "consider" certain measures. Recommendations can be quite specific. For example, the CRPD Committee recommended that Germany "[r]epeal section 1905 of the German Civil Code and explicitly prohibit in law sterilization without the full and informed consent of the individual concerned, eliminating all exceptions, including those based upon substituted consent or court approval".[117] These, however, are the exceptions. Most recommendations are sufficiently vague that the State Party would have little difficulty mounting a legal defense that complies with the letter of the recommendations, if not their spirit.[118]

The Role of Domestic Courts: Catalysts for Change?

According to de Búrca, "the function of a court within an experimentalist governance system can be understood as a catalyst for reform, or a destabilizer of dysfunctional

[115] *See* Danish Institute for Human Rights, PARALLEL REPORT TO THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES 15 (2014).
[116] *See* Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Denmark, CRPD/C/DNK/CO/1 (30 October 2014).
[117] *See* Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1 (13 May 2015) at ¶ 38(a).
[118] For example, the CRPD Committee recommends that Germany: "Encourage public and private broadcasting bodies to evaluate their work comprehensively regarding the implementation of the right to accessibility, especially with respect to the use of sign language." In the Danish case, the CRPD Committee "[r]equests that the Government of the Faroe Islands ensure access, both for people who are deaf and for those who are hard of hearing, to all the programmes broadcast by KVF." In situations such as these, from a legal perspective, the burden on the State Party to show that they are in compliance is very light.

arrangements. Hence the absence of an authoritative court or body, such as a treaty body, which could close off the possibility for differential interpretation and application in different local contexts of the meaning of a single human rights norm is quite compatible with and even required by the tenets of experimentalism."[119] Waddington, without referring to the experimentalist literature specifically, expresses a similar view when she writes that: "the main determinant of the impact which international treaties, such as the CRPD, have on the lives of individuals is the extent of their domestication within the legal order of States Parties. An essential element associated with the effectiveness of that domestication is the degree to which courts rely on, and make use of, the international treaty concerned."[120]

With few exceptions,[121] recently published research on how judges have used the CRPD in domestic court decisions provides limited support for the "courts as catalyst" experimentalist governance assertion. In the most comprehensive study to date, a 2018 book that evaluated how courts used the CRPD in 13 jurisdictions,[122] one of the concluding chapters notes that in most cases the CRPD was (1) cited, but not discussed, or (2) cited to "bolster an interpretation that the court was seemingly likely to reach anyway . . .".[123]

Explaining the gap between theoretical expectation and reality

So where did the experimentalist governance thesis go wrong? In *New Modes of Pluralist Global Governance*, de Búrca and her co-authors present three examples to

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[119] *See* Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277, 313 (2017). De Búrca cites Joanne Scott and Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007) and Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004). There is also a clear overlap here with the research agenda in the burgeoning field of Comparative International Law. *See* Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 57 (2011); Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467 (2015); Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties: A Comparative International Law Analysis of CEDAW*, 109 AM. J. INT'L L. 534 (2015); Anthea Roberts et al., COMPARATIVE INTERNATIONAL LAW (2018).

[120] *See* Lisa Waddington, *The Domestication of the Convention on the Rights of Persons with Disabilities: Domestic Legal Status of the CRPD and Relevance for Court Judgments* in Lisa Waddington and Anna Lawson (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS 538, 538 (2018).

[121] *See* Anna Lawson, *Uses of the Convention on the Rights of Persons with Disabilities in Domestic Courts* in Lisa Waddington and Anna Lawson (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS (2018) 556 (identifying some cases in which the CRPD has been used to overturn or significantly reinterpret domestic law).

[122] *See* Lisa Waddington and Anna Lawson, (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS (2018).

[123] *See* Christopher McCrudden, *Human Rights Theory and Comparative International Law Scholarship*, in Lisa Waddington and Anna Lawson, (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS 594, 598 (2018).

illustrate how experimentalist governance operates in practice: The Inter-American Tuna Commission (hereinafter, "Tuna Commission" or "IATTC"), the Montreal Protocol on Substance Depleting the Ozone Layer (hereinafter, "Montreal Protocol"), and the CRPD. In this section, I argue that the first two examples qualify as experimentalist governance regimes, but the CRPD does not. In the process of comparing how the Tuna Commission, Montreal Protocol and the CRPD function, we gain additional insight into which factors distinguish "unsuccessful" or "pseudo-experimental governance" from the genuine item.

Unlike the CRPD, the Tuna Commission and the Montreal Protocol are international regimes that came into existence to resolve narrow, clearly identified cross-border problems of a scientific nature that could not be effectively addressed by one state acting alone. The Tuna Commission's raison d'être was to prevent the death of dolphins that were caught in nets during tuna fishing. The Montreal Protocol was designed to prevent the depletion of the Earth's ozone layer. In both cases, in the early days, it was unclear what the best means of achieving the goal was, and input from lower-level actors provided valuable technical and scientific information that led to broad agreements about the best solutions. Furthermore, and of critical importance, unlike the CRPD, in these two cases, the regimes operated in the shadow of a "penalty default", mainly in the form of U.S. trade sanctions, which induced compliance from actors that would have otherwise shirked their responsibilities under the international agreements.

The CRPD is only superficially similar to these regimes. True, it is possible to make the argument that the CRPD contains de Búrca et al.'s five elements required to be classified as an experimentalist governance regime, but in practice, both the nature of the problem that it is intended to solve, and the way the CRPD operates in practice is quite different. With regard to the nature of the problem, the CRPD is a comprehensive human rights treaty designed to combat a social phenomenon, i.e. discrimination against an historically disadvantaged group. There may not be a consensus on how to achieve the objective of the Treaty, but it is safe to say that technical/natural scientific knowledge has a more modest role to play. The Tuna Commission discovered, based on local knowledge, that certain practices, such as providing nets with holes that allowed dolphins to escape, greatly reduced dolphin mortality. Similarly, the objective of preventing the depletion of the ozone layer relied heavily on natural science research. It is difficult to conceive of an analogous scientific breakthrough that would solve the problem of disability discrimination.

With regard to how the regimes operate in practice, there is very little evidence to suggest that the feedback from "lower level actors" to the center in the context of the CRPD

has resulted in a revision of rules and practices. Rather, what we appear to be seeing is an exchange of information about the disability policies of the contracting parties, but little willingness to change domestic policies based on the reports of the CRPD Committee. In contrast to the other two examples, there is no "penalty default" for parties that refuse to comply with the CRPD Committee's recommendations. No contracting party looms in the background, prepared to impose trade sanctions or some other coercive measure to ensure that reluctant parties follow the CRPD Committee's recommendations. Rather, more often than not, exchanges between the lower level and the center has resulted in standoffs and stalemates. The virtuous cycle of learning, revising objectives, and adaptation based on new information that characterize experimentalist governance does not appear to be happening.

The CRPD's lack of a credible penalty default is unsurprising in light of the fact that disability discrimination is rarely conceived of as a cross-border problem. The Tuna Commission was primarily driven by a U.S.-backed venture to prevent dolphin deaths, not just on U.S. vessels, but all vessels that fished in the Eastern Tropic Pacific. Ozone depletion clearly had potentially harmful implications for the whole world and could not be effectively remedied by a single state. The problem of disability discrimination does not fit this mold. Although one can argue that there are potentially disruptive economic effects if a state with high disability rights standards trades with a state with lower disability rights standards, the urgency of the problem from a cross-border perspective is clearly of a different magnitude, and the likelihood of creating an analogous penalty default in the context of non-compliance with CRPD treaty obligations seems extremely unlikely.

In short, while it is possible to fit the CRPD into the five-factor checkbox of experimentalist governance, the authors present very little evidence to suggest that the CRPD is also *effective* in solving the problems that it was created to address. The Tuna Commission significantly reduced dolphin deaths; the Montreal Protocol prevented the depletion of the Earth's ozone layer. What comparable statement could be made about the CRPD to substantiate the claim that it is effective? Obviously, it is a more straightforward process to collect data on dolphin mortality or the concentration of CFCs in the stratosphere than to study a social phenomenon. Nevertheless, there is real danger in assuming that an international regime is working because NGOs and national monitoring bodies are taking an interest in the project.

The CRPD's potential to effect change in the long-term should not be minimized. Attitudes and cultural norms are difficult to measure, slow to change, and at the end of the day immensely more important than revising statutes to comply with an international

agreement. From the perspective of the "long war" against disability discrimination, we may look back one day and see that the CRPD was an important catalyst that improved the lives of individuals with disabilities in a more direct way. But for the moment, most of what we currently know about the way the CRPD operates suggests that its influence has been mainly *diffuse*. Circumstances in which the chain of causality runs directly from the CRPD to a legal or policy outcome are difficult to find. The main exception to this rule is found in the case-law of the ECtHR, to which we now turn.

2. The European Court of Human Rights: an alternative venue for the CRPD's impact?

The ECHR does not contain any direct references to disability rights. The terms "disability" and "persons with disabilities" do not appear in the text.[124] The document was drafted in the 1950s. It would take several decades before disability rights reached legal recognition at the domestic level and even longer until it gained protection at the international level.[125]

Nonetheless, the ECtHR has not been inattentive or insensitive to the issues that individuals with disabilities face. Until recently, however, the ECtHR's disability case-law addressed almost exclusively the plight of complainants living outside of the community, i.e. in institutional setting such as prisons and mental institutions. Most of the ECtHR's case-law involves interpretations of Article 2 (the right to life and the prohibition on torture), Article 3 (inhumane and degrading treatment), Article 5 (the right to liberty and security), Article 6 (the right to a fair trial); Article 8 (the right to private and family life), and Article 13 (the right to an effective remedy).[126]

What is new (and comparatively underdeveloped) is the ECtHR's case-law on individuals living *in the community*,[127] which is the primary focus of this dissertation. The ECtHR's gateway to this new line of jurisprudence is Article 14, which prohibits "discrimination on any ground", but does not explicitly refer to disability. Article 14 is a rather cumbersome legal instrument. In the words of the Court: "It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded thereby".[128] This means that Article 14 is not a self-standing article. It can be triggered only in conjunction with a breach of one or more of the Convention's substantive articles. The procedure for obtaining a judgment before the ECtHR can also be difficult for complainants to navigate. Applications to the ECtHR are made by individuals against a country. Before the applicant can bring his or her claim, he or she must exhaust all domestic remedies. As the number of applications to the ECtHR has gone up over time, it has become

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[124] *See* Silvia Favalli, *The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: 'From Zero to Hero'*, 18 HUMAN RIGHTS LAW REVIEW 517, 522 (2018).
[125] See *id.* at 523.
[126] *See* Andrea Broderick and Delia Ferri, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY, Ch. 4 (2019) (reviewing the ECtHR's case-law on disability in institutionalized environments).
[127] *See* Constantin Cojocariu*, Guberina and Gherghina: The Two Sides of the Court's Disability Jurisprudence*, STRASBOURG OBSERVERS (17 May 2016) https://strasbourgobservers.com/2016/05/17/guberina-and-gherghina-the-two-sides-of-the-courts-disability-jurisprudence/
[128] *Guberina v. Croatia*, App. No. 23682/13 at ¶ 67 (Eur. Ct. H.R. 22 March 2016).

increasingly difficult for applicants to have their cases heard by the Court in a timely and efficient manner.[129]

Notwithstanding these hurdles, in 2009, the ECtHR held for the first time in the Court's history in Glor *v. Switzerland*,[130] that a government had violated Article 14 of the ECHR by discriminating against a complainant on the grounds of disability. The ECtHR has since reaffirmed its holding in *Glor* on several occasions.[131]

Favalli argues that it is "no coincidence" that *Glor* was decided shortly after the CRPD entered into force.[132] Indeed, she so goes so far as to conclude that:

> the entry into force of the UNCRPD drastically influenced the Strasbourg Court on disability equality. First, it determined the recognition of disability as a ground of discrimination under the ECHR, as the development of a rich ECtHR disability equality case law demonstrates. Furthermore, in the Court's reasoning the UNCRPD has become the starting point to provide a heightened standard of scrutiny of disability rights. In this light, starting from disability rights—as codified in the UNCRPD—the Strasburg Court provides protection for situations not covered by the ECHR (minor disabilities and seropositivity) or a basis from which to extensively interpret (and in light of international texts, such as the UNCRPD) the provisions of the ECHR.[133]

This presents the intriguing possibility that the most tangible power of the CRPD in Europe may be as an interpretive tool in conjunction with ECtHR case-law, rather than direct reliance on the CRPD before national courts. Indeed, the ECtHR has already cited the CRPD over 40 times. The vast majority of these cases involve allegations of mistreatment in prisons and mental institutions. Cases in which applicants challenge placement under guardianship, or excessively restrictive guardianship, also appear with regular frequency.[134]

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[129] *See* Andrew Tickell, *More "Efficient" Justice at the European Court of Human Rights: But at Whose Expense?* 2 PUBLIC LAW 206 (2015).

[130] App. No. 13444/04 (Eur. Ct. H.R. Apr. 30, 2009).

[131] *See, e.g., Kiyutin v Russia*, App. No. 2700/10 (Eur. Ct. H.R. 10 March 2011) (rejecting residence permit based on HIV-positive status violates Article 14); *I.B. v. Greece*, App. No. 552/10 (Eur. Ct. H.R. 13 October 2013) (dismissal of HIV-positive employee violates Article 14); *Çam v. Turkey*, App. No. 51500/08 (Eur. Ct. H.R. 23 February 2016); *Guberina v. Croatia*, App. No. 23682/13 (Eur. Ct. H.R. 22 March 2016). For academic commentary, *see* Rory O'Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR* 29 LEGAL STUDIES 211 (2009); Jill Stavert, Glor v. Switzerland*: Article 14 ECHR, Disability and Non-Discrimination* 14 EDINBURGH L. REV. 141 (2010); Oddný Arnardóttir, *Cross-fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights–the Case of the Discrimination Grounds under Article 14 ECHR*, 33 NORDIC J. HUM. RTS. 220 (2015).

[132] *See* Silvia Favalli, *The United Nations Convention on the Rights of Persons with Disabilities in the case law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023:'From Zero to Hero'*, 18 HUMAN RIGHTS LAW REVIEW 517, 524 (2018).

[133] *See id.* at 534 (but acknowledging that decisions on legal capacity under Article 8 of the ECHR do not seem to have changed as a result of the entry into force of the CRPD).

[134] ECtHR cases that cite the CRPD and not discussed elsewhere in this dissertation include: *A.-M.V. v. Finland*, App. No. 53251/13 (Eur. Ct. H.R. 23 March 2017) (holding that the government had not violated the ECHR in a case concerning the guardianship of an individual with an intellectual disability); *A.N. v. Lithuania*, App. No. 17280/08 (Eur. Ct. H.R. 31 May 2016) (holding that the government had violated Article 6 § 1 of the

Convention when it made a disproportionate finding that a disabled applicant was "fully incapacitated"); *Ābele v. Latvia*, App. Nos. 60429/12 and 72760/12 (Eur. Ct. H.R. 5 October 2017) (finding that government had violated Article 3 of the Convention, which prohibits "torture or .. inhuman or degrading treatment or punishment" in case of deaf prisoner); *Alajos Kiss v. Hungary*, App. No. 38832/06 (Eur. Ct. H.R. 20 May 2010) (holding that the government had violated Article 3 of Protocol No. 1 of the Convention when the applicant "lost his right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship"); *Béláné Nagy v. Hungary*, App. No. 53080/13 (Eur. Ct. H.R. 13 December 2016) (deciding, by nine votes to eight, that there has been a violation of Article 1 of Protocol No. 1 to the Convention when the applicant lost her disability allowance due to a legislative change): *Blokhin v. Russia*, App. No. 47152/06 (Eur. Ct. H.R. 23 March 2016). (holding that the government had violated Article 3, Article 5 § 1, Article 6 §§ 1 and 3 (c) and (d) of the Convention, inter alia, because the juvenile applicant was not afforded a fair trial); *Butrin v. Russia*, App. No. 16179/14 (Eur. Ct. H.R. 22 March 2016) (holding that the government had violated Article 13 of the Convention when it denied a blind prisoner "an effective domestic remedy with which to raise claims of inadequate conditions of detention" and a violation of Article 3 of the Convention owing to the "inhuman and degrading conditions of the applicant's detention"); *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, App. No. 47848/08 (Eur. Ct. H.R. 17 July 2014) (finding that the government had violated Article 2 and Article 13 of the Convention by, inter alia, placing an individual with HIV and an intellectual disability in an inappropriate setting); *Cînța v. Romania,* App. No. 3891/19 (Eur. Ct. H.R. 18 February 2020) (holding that the government had violated Article 8 "right to family life" and Article 14 "non-discrimination principle" in case of parent with mental illness denied contact to biological child); *D.R. v. Lithuania*, App. No. 691/15 (Eur. Ct. H.R. 26 June 2018). (holding that the government had Article 5 § 1 of the Convention due to "deprivation of the applicant's liberty for the purpose of conducting a psychiatric assessment" and "applicant's involuntary psychiatric hospitalization"); *Đorđević v. Croatia,* App. No. 41526/10 (Eur. Ct. H.R. 24 July 2012) (holding that the government had violated Article 3 with respect to the first applicant and Article 8 of the Convention with respect the second applicant, as we all as Article 13 of the convention, by, inter alia, failing to protect a disabled student from persistent harassment); *Fernandes de Oliveira v. Portugal*, App. No. 78103/14 (Eur. Ct. H.R. 28 March 2017). (holding that the government had violated both the substantive and procedural aspects of Article 2 of the Convention in a case in which a mother alleged that a psychiatric hospital had acted negligently in failing to prevent her son's suicide); *Grimailovs v. Latvia*, App. No. 6087/03 (Eur. Ct. H.R. 25 June 2013) (holding that the government had violated Article 3 of the Convention, inter alia, due to the inadequacy of the facilities where a disabled prisoner was confined); *Hadžimejlić and Others v. Bosnia and Herzegovina,* App. Nos. 3427/13, 74569/13 and 7157/14 (Eur. Ct. H.R. 3 November 2015). (holding that the government had violated Article 5 § 1 of the Convention when it placed an applicant diagnosed with paranoid schizophrenia in a social care home without following "a procedure prescribed by law"); *Ivinović v. Croatia*, App. No. 13006/13 (Eur. Ct. H.R. 18 September 2014). (finding "that the national courts, in depriving partially the applicant of her legal capacity, did not follow a procedure which could be said to be in conformity with the guarantees under Article 8 of the Convention"); *J.D. and A v. the United Kingdom*, App. Nos. 32949/17 and 34614/17 (Eur. Ct. H.R. 24 October 2019) (holding that the government did not violation of Article 14 in conjunction with Article 1 Protocol 1 of the Convention in a dispute over the housing benefits for a family with a disabled family member); *Jasinskis v. Latvia*, App. No. 45744/08 (Eur. Ct. H.R. 21 December 2010). (holding that the government had violated the substantive and procedural aspects of Article 2 § 1 of the Convention in a case in which an applicant alleged that that the police were responsible for his disabled son's death after he had been taken into police custody and that the subsequent investigation into his son's death was not effective); *Kiyutin v. Russia*, App. No. 2700/10 (Eur. Ct. H.R. 10 March 2011). (holding that the government had violated Article 14 of the Convention in conjunction with Article 8 when it discriminated against an HIV-positive applicant on the basis of health status); *Kocherov and Sergeyeva v. Russia*, App. No. 16899/13 (Eur. Ct. H.R. 29 March 2016). (holding that the government had violated Article 8 of the Convention in case concerning the right of an individual with a disability to parental custody); *Koroviny v. Russia***,** App. No. 31974/11 (Eur. Ct. H.R. 27 February 2014) (holding that the government had violated Article 3, Article 6 § 1, and Article 8 of the Convention based on the conditions of the first applicant's confinement in a specialist psychiatric hospital and attachment to his bed for 24 hours and censorship of the applicants' correspondence by the administration of the specialist psychiatric hospital); *L.R. v. North Macedonia*, App. No. 38067/15 (Eur. Ct. H.R. 23 January 2020) (holding that the government violated Article 3 when it placed a disabled child in an inappropriate institution where he suffered inhuman and degrading treatment); *Lashin v. Russia*, App. No. 33117/02 (Eur. Ct. H.R. 22 January 2013) (holding that the government had violated Article 8, Article 5 § 1, and Article 5 § 4 of the Convention in a case in which the applicant was unable to have his status as an "incapacitated person" reviewed in 2002 and 2003, his detention in a psychiatric hospital in 2002-2003, and his inability to obtain a review of the lawfulness of his detention); *M.H. v. the United Kingdom*, App. No. 11577/06 (Eur. Ct. H.R. 22 October 2013) (holding that the government had

violated Article 5 § 4 of the Convention during the first 27 days of the of the applicant's detention); *M.S. v. Croatia (No. 2*), App. No*. 75450/12* (Eur. Ct. H.R. 19 February 2015) (holding that the government violated the substantive and procedural aspects of Article 3 and Article 5 § 1 (e) of the Convention relating to the applicant's involuntary hospitalization; *McDonald v. the United Kingdom*, App. No. 4241/12 (Eur. Ct. H.R. 20 May 2014) (holding that the government had not violated the ECHR in reducing the applicant's disability-related support); *Mihailovs v. Latvia,* App. No. 35939/10 (Eur. Ct. H.R. 22 January 2013) (holding that the government had violated Article 5 § 4 and Article 5 § 1 when he was involuntary placed in a social and psychological research center that deprived him of liberty and hindered his ability to obtain an independent review of the lawfulness of his placement); *Mockutė v. Lithuania*, App. No. 66490/09 (Eur. Ct. H.R. 27 February 2018) (holding that the government violated Articles 8 and 9 when it illegally revealed information about the private life of a resident in a psychiatric hospital and prevented her from practicing her religion); *N. v. Romania*, App. No. 59152/08 (Eur. Ct. H.R. 28 November 2017) (holding that the government violated Article 5 § 1 and Article 5 § 4 "right to security of liberty" of the Convention in the case of involuntary commitment to psychiatric detention); *Nikolyan v. Armenia*, App. No. 74438/14 (Eur. Ct. H.R. 3 October 2019). (holding that the government had violated Article 6 § 1 and Article 8 of the Convention when it denied the applicant access to court to restore his legal capacity); *Plesó v. Hungary*, App. No. 41242/08 (Eur. Ct. H.R. 2 October 2012) (holding that the government had violated Article 5 § 1 (e) of the Convention when it placed an individual in compulsory confinement who did not have a mental disability of a kind or degree that warranted such action); *R.P. and Others v. the United Kingdom*, App. No. 38245/08 (Eur. Ct. H.R. 9 October 2012). (holding that the government had not violated Article 6 § 1 of the Convention because the disabled applicant's right to access to a court had not been sufficiently impaired to constitute a violation); *Rooman v. Belgium*, App. No.18052/11(Eur. Ct. H.R. 31 January 2019) (concluding that the government had violated Article 5 § 1 when it placed a mentally disabled applicant in an inappropriate institution without suitable treatment for his health condition); *S.H.H. v. the United Kingdom*, App. No. 60367/10 (Eur. Ct. H.R. 29 January 2013) (deciding, by four votes to three that there would be no violation of Article 3 of the Convention if the disabled applicant were removed to Afghanistan); *Seal v. the United Kingdom*, App. No. 50330/07 (Eur. Ct. H.R. 7 December 2010) (holding that the government had not violated Article 6 § 1 of the Convention because the applicant's right to access to a court had not been sufficiently impaired to constitute a violation); *Semikhvostov v. Russia*, App. No. 2689/12 (Eur. Ct. H.R. 6 February 2014) (holding that the government had violated Article 13 of the Convention when it denied a disabled prisoner "an effective domestic remedy with which to raise claims of inadequate conditions of detention" and a violation of Article 3 of the Convention owing to the "inhuman and degrading conditions of the applicant's detention"); *Stanev v. Bulgaria*, App. No. 36760/06 (Eur. Ct. H.R. 17 January 2012) (holding that the government did not violate the ECHR in a case in which the applicants alleged that a disabled student had been denied reasonable accommodation to the school environment and subjected to ill-treatment and lack of effective remedy); *Topekhin v. Russia*, App. No. 78774/13 (Eur. Ct. H.R. 10 May 2016). (holding that the government violated Article 3 of the Convention when it confined a disabled prisoner in unacceptable conditions); *Z.H. v. Hungary***,** App. No. 28973/11 (Eur. Ct. H.R. 8 November 2012) (holding that the government had violated Article 3 and Article 5 § 2 of the Convention when it exposed a deaf and intellectually disabled prisoner to inhuman and degrading treatment).

In the section below, I examine the narrower issue of the ECtHR's recent case-law on the rights of individuals with disabilities living in the community. I find that the ECtHR cites regularly to the CRPD, but that the Court's jurisprudence is inconsistent. In the past few years, the Court's judgements have oscillated between progressive and restrictive decisions. Some judgments have expanded the scope of the rights of persons with disabilities, while others have taken a much more cautious stance. Unlike Favalli, who depicts the twin motors of the CRPD and ECtHR as the drivers of a new dawn for disability rights in Europe, I suggest that the ECtHR's most recent jurisprudence is uneven and somewhat unpredictable.[135]

We must bear in mind that ECtHR's jurisprudence on disability rights in the community is still in its infancy. The body of case-law is small and evolving. It would be unwise to make any bold pronouncements about the CRPD's influence on the ECtHR. Nevertheless, I will advance the argument (tentatively) that two opposing trends are developing at more-or-less the same time. On the one hand, the ECtHR has used the CRPD to justify the expansion of the scope of Article 14 to include disability discrimination, and to gradually build a body of progressive case-law on the potentially adverse effects that general domestic laws can have on the specific needs of individuals with disabilities. Mainly through its case-law on the right to education, it has also developed a robust concept of the obligation to provide "reasonable accommodations" for individuals with disabilities under certain circumstances. On the other hand, the Court has been far more deferential to domestic authorities on questions involving access to goods and services.

Before turning to a closer examination of the forces at work in the disability rights jurisprudence of the ECtHR today, I pause to acknowledge that I have deliberately excluded from this analysis the small number of cases that the ECtHR has handed down on inclusive education for pupils with disabilities. In the present author's personal experience as a "special education" litigator, inclusive education involves a host of issues that make this sub-field particularly unique. To do justice to this topic would require a discussion that would go well beyond the scope of this chapter.[136] Another potential strand of research, which is not

[135] In fairness to Favalli, her article was published before some the cases analyzed in this chapter were handed down. Therefore, I have access to information that Favalli did not when she wrote her article.
[136] *See* ECtHR cases on inclusive education include the following: *Stoian v. Romania*, App. No. 289/14 (Eur. Ct. H.R. 25 June 2019); *Dupin v. France,* App. No. 2282/17 (Eur. Ct. H.R. 18 December 2018); *Sanlisoy v. Turkey*, App. No. 77023/12 (Eur. Ct. H.R. 8 November 2016). For recent commentary, *see* Constantin Cojocariu*, Stoian v. Romania: The Court's Drift on Disability Rights Intensifies*, STRASBOURG OBSERVERS (5 September 2019)

pursued here, would be to study whether the issues that arise most often in the ECtHR's disability jurisprudence—mistreatment in prisons and mental institutions foremost among them—has shifted in an appreciable way now that the ECtHR cites the CRPD on a regular basis when the applicant has a disability.

Glor v. Switzerland, App. No. 13444/04 (Eur. Ct. H.R. 30 April 2009) is the decisive point of departure for the ECtHR's jurisprudence on individuals with disabilities living in the community. The case involved Mr. Sven Glor, a Swiss national. Metaphorically speaking, Mr. Glor had fallen between two stools. A military doctor deemed him unfit for military service because he was a type 1 diabetic.[137] Nevertheless, he was ordered to pay a military-service exemption tax.[138] According to Swiss law, all men of a certain age were required to perform military service, civilian service, or pay a military-service exemption tax. Men with "major" disabilities were exempt from military service and not required to pay the tax. Civilian service was reserved for men eligible for military service but wished to express their right to be a conscientious objector. Mr. Glor did not fall into any of these categories. Although he was deemed unfit for military service, his disability was not considered to be "major" for the purposes of the law. Mr. Glor did not fit into the conscientious objector category either, as he maintained that he was willing to perform his military service at all times relevant to the litigation. By forcing him to pay the tax, Mr. Glor argued, the Swiss government sought to benefit from a medical condition over which Mr. Glor had no control.[139]

The ECtHR agreed with Mr. Glor. Citing the CRPD in support of its position, the Court ruled that the Swiss authorities had "failed to strike a fair balance between the protection of the interest of the community and respect for the Convention rights and freedoms of the applicant . . .".[140] In doing so, the domestic authorities had violated Mr. Glor's right to "private life", enshrined in Article 8 of the ECHR[141] and Article 14.[142]

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https://strasbourgobservers.com/2019/09/05/stoian-v-romania-the-courts-drift-on-disability-rights-intensifies; Johan Lievens and Marie Spinoy*, Dupin v. France: The ECtHR Going Old School in Its Appraisal of Inclusive Education?* STRASBOURG OBSERVERS (11 February 2019) https://strasbourgobservers.com/2019/02/11/dupin-v-france-the-ecthr-going-old-school-in-its-appraisal-of-inclusive-education

[137] *See Glor*, at ¶ 11.
[138] *See Glor*, at ¶ 14.
[139] *See Glor*, at ¶ 51.
[140] *See Glor*, at ¶ 96.
[141] *See Glor*, at ¶ 54.
[142] *See Glor*, at ¶ 98.

Guberina v. Croatia, App. No. 23682/13 (Eur. Ct. H.R. 22 March 2016) presented the Court with another opportunity to reinforce the concept that national laws should be interpreted in such a way that they take the specific problems of individuals with disabilities into account. This case involved an application for a tax exemption. According to Croatian law, citizens who were "buying their first real property by which they are solving their housing needs" were entitled to a tax exemption.[143] Mr. Guberina was a non-disabled man who lived with his wife and two children on the third floor of a residential building in Zagreb. Three years after he bought the apartment, his wife gave birth to a third child with severe disabilities.[144] Because the flat in which they resided did not have an elevator, and therefore did not meet his family's needs, Mr. Guberina purchased a new apartment in Samobor.[145] The Croatian authorities denied Mr. Guberina application for the tax exemption, arguing, essentially, that the law was intended to benefit citizens who were moving from living conditions that were sub-standard with respect to hygiene and/or basic infrastructure, such as access to electricity and water.[146] There was no indication that Mr. Guberina's Zagreb apartment was deficient for the purposes of the law, and therefore Mr. Guberina was not entitled to take advantage of the tax exemption. Mr. Guberina countered that the domestic authorities had failed to recognize that in his particular case, "the existence of a lift in the building was the same relevant infrastructural requirement as access to water and electricity in general".[147]

As in *Glor*, the Court, citing to the CRPD, found "that there was no doubt that the competent domestic authorities failed to recognize the factual specificity of the applicant's situation with regard to the question of basic infrastructure and technical accommodation requirements meeting the housing needs of his family",[148] and thereby violated Article 14. The Court also explicitly extended the scope of Article 14 to include associational discrimination. The fact that Mr. Guberina was not disabled himself, but rather discriminated against due to his relationship with his disabled son, did not exclude Mr. Guberina from protection under the law.[149]

In two complementary higher education cases, the ECtHR has ruled in favor of students whose needs were not sufficiently taken into account. The first, *Çam v. Turkey*,

[143] *See Guberina*, at ¶ 14.
[144] *See Guberina*, at ¶ 8.
[145] *See Guberina*, at ¶ 10.
[146] *See Guberina*, at ¶ 12.
[147] *See Guberina*, at ¶ 15.
[148] *See Guberina*, at ¶ 86.
[149] *See Guberina*, at ¶¶ 76-77.

App. No. 51500/08 (Eur. Ct. H.R. 23 February 2016), involved a music student who took part in the entrance competition for the Turkish National Music Academy. The Academy initially listed her name among the successful candidates, but withdrew its acceptance when it learned that the student was blind.[150] The complainant argued that the Academy's refusal to admit her constituted an infringement of her right to education and that she had suffered discrimination in violation of Article 14 on the basis of her disability.[151]

Citing its previous ruling in *Glor* and the CRPD,[152] the Court concluded that "there can be no doubt that the applicant's blindness was the sole reason for" the Academy's decision to refuse her admission,[153] and that the relevant authorities had failed to "identify the applicant's needs or to explain how her blindness could have impeded her access to a musical education".[154] In light of the Academy's unwillingness to even consider how the student's needs could be met, it had violated Article 14 in conjunction with the right to education (Article 2 of Protocol No. 1).[155]

In *Şahin v. Turkey*, App. No. 23065/12 (Eur. Ct. H.R. 30 January 2018), the ECtHR extended its ruling in *Çam*. The student was a first-year mechanics student at a technical university when he was seriously injured in an accident which left his lower limbs paralyzed.[156] After he had recovered to the point that he was prepared to resume his studies, he requested that the University make building adjustments that would permit him to complete his education on an equal footing with his peers. His requests included the installation of an access ramp on the ground floor, administrative measures to move his classes to the ground floor or installing an elevator in the three-story building, and access to toilets for persons with disabilities.[157] The University responded that the building had been designed to accommodate 3,000 students and that its capability to make adaptations was limited by budgetary constraints. The University promised to help the student as much as it could and proposed that the student could navigate the three-story building "with the help of a companion".[158]

The matter before the ECtHR in *Şahin* differed from *Çam* in that the student in *Çam* never made a request for accommodation. The Court held that the defendant had violated the

[150] *See Çam,* at ¶¶ 1-15.
[151] *See Çam,* at ¶ 39.
[152] *See Çam,* at ¶¶ 53-55.
[153] *See Çam,* at ¶ 60.
[154] *See Çam,* at ¶ 68.
[155] *See Çam,* at ¶ 68.
[156] *See Şahin,* at ¶ 6.
[157] *See Şahin,* at ¶ 41.
[158] *See Şahin,* at ¶ 4.

ECHR because the student had been rejected from the Academy solely on the basis of her disability and the defendant had failed to seriously consider how the student's needs might be met. In *Şahin*, the student made requests for specific types of accommodations, which the defendant rejected, but offered a counter-proposal. The ECtHR therefore needed delve deeper into the concept of "reasonable accommodation". It is notable—and by no means obvious—that the Court concluded that the University's offer to provide a personal assistant was patently unacceptable, since it would be "degrading" to the student and constitute an invasion of his privacy.[159] Similar to *Çam*, the Court found "nothing in the case-file to convince the Court that the support in question was offered after a genuine assessment of the applicant's needs and sincere consideration of its potential effects on his security, dignity, and autonomy".[160] As in *Çam*, the ECtHR concluded that the defendant had violated Article 14 in conjunction with the right to education (Article 2 of Protocol No. 1).

If the analysis were to end here, we might conclude with a fair amount of confidence that the ECtHR has seized upon the adoption of the CRPD to develop a progressive line of disability rights jurisprudence. The Court has shown a willingness to push domestic authorities to reassess the potentially discriminatory effects of general laws on individuals with disabilities (*Glor*; *Guberina*) and placed a rather heavy burden on defendants in higher education to show that they have given serious and genuine consideration to how students with disabilities can be accommodated (*Çam; Şahin*). However, when it comes to access to goods and services, the ECtHR has taken a much more deferential tack. Though the case-law in this area is small, it appears to exhibit different characteristics than the judgments discussed above.

Botta v. Italy, App. No. 153/1996/772/973 (Eur. Ct. H.R. 24 February 1998) predates the entry into force of the CRPD. Mr. Botta was an Italian citizen with a physical disability who alleged that he was unable to access Italian beaches while on vacation. Contrary to Italian law, many beaches lacked access ramps and specially equipped washrooms and lavatories.[161] Mr. Botta complained that as a result of the Italian government's failure to enforce private beach owners' responsibilities to make their establishments accessible for persons with disabilities, he had suffered "impairment of his private life and the development of his personality" in violation of Article 8 of the ECHR in conjunction with Article 14.[162]

[159] *See Şahin,* at ¶ 7.
[160] *See Şahin,* at ¶ 64.
[161] *See Botta,* at ¶ 9.
[162] *See Botta,* at ¶ 27.

The legal question at the heart of *Botta* concerned how broadly the concept of "respect for private life" should be interpreted. The Court acknowledged that "private life" included a person's "physical and psychological integrity" and that Article 8 was intended to prevent interference with the development of an individual's personality in relations with other human beings.[163] Furthermore, the Court recognized that while Article 8 was primarily intended to protect individuals against arbitrary state interference, the State may also be responsible for taking positive actions to ensure that violations of Article 8 do not occur.[164] Therefore, the fact that Mr. Botta's complained of a failure of the State to act did not, in itself, exclude it from the ambit of Article 8.[165] However, Mr. Botta's claim did not succeed because the link between the alleged wrong and the injury to the complainant's private life was, in the Court's opinion, not adequately established:

> . . . [T]he right asserted by Mr. Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.[166]

The Court's holding, i.e. that Mr. Botta's claim was unsuccessful because the causal link between the wrong and the injury was insufficiently "direct", is questionable. The causal chain was, in fact, perfectly straightforward. Mr. Botta wanted access to the beach. Due the establishment's failure to provide ramps and adequate washroom facilities, Mr. Botta was denied access.

The cases that ECtHR cited in support of its position suggest a different rationale was really at work. In fact, in the cases that the Court cites as examples of genuine violations of Article 8 the causal connection between the wrongful action and the alleged injury is, if anything, weaker than in *Botta*. The cases include a judgement against Ireland for failure to provide legal aid in domestic law for separation proceedings;[167] a judgement against the Netherlands for failure to provide practical and effective protection in domestic criminal law for a victim of rape with an intellectual disability;[168] a judgement against Spain for improperly striking a balance between a town's economic well-being and the construction of

[163] *See Botta,* at ¶ 32.
[164] *See Botta,* at ¶ 33.
[165] *See Botta,* at ¶ 33.
[166] *See Botta,* at ¶ 35.
[167] *Airey v. Ireland,* App. No. 6289/73 (Eur. Ct. H.R. 9 October 1979).
[168] *X and Y v. The Netherlands,* App. No.8978/80 (Eur. Ct. H.R. 26 March 1985).

a waste-treatment plant;[169] and a judgment against Italy for the domestic authority's failure to properly communicate the danger that inhabitants of a town might incur if they remained near a factory that produced toxic emissions.[170]

In each of the cases discussed above, the causal link and the alleged harm is more speculative than in *Botta*. *Guerra* is a particularly stark example. In this case, the Court found that there was a "direct and immediate link" even though the complainant alleged no actual harm. In this matter, the Court found that Article 8 had been violated because there were risks that "families *might* run if they continued to live in Manfredonia, a town particularly exposed to danger *in the event of an accident* within the confines of the factory".[171] Although the Court was too diplomatic to state it so bluntly, it seems reasonably clear that Mr. Botta's complaint failed not because the link between the (in)action of the State and the applicant's injury lacked directness or immediacy, but because his alleged harm was not sufficiently grave. Whatever displeasure Mr. Botta suffered because he was denied access to private beaches, it was not serious enough for the Court to find the Italian government in breach of the Convention.

Glaisen v. Switzerland, App. No. 40477/13 (Eur. Ct. H.R. 25 June 2019) is an interesting case because it presented facts similar to *Botta*, but the Court received it after the CRPD had entered into force. It offers an opportunity to test the extent to which the CRPD has influenced the ECtHR's approach to disability rights claims to access to goods and services. *Glaisen* dutifully cites the CRPD, but the legal principles that underpinned *Botta* remain essentially unchanged.[172]

Mr. Glaisen was a Swiss national and paraplegic who used a wheelchair. He wanted to attend a screening of a film that was showing in only one cinema in Geneva. The cinema was inaccessible to wheelchair users without the assistance of able-bodied assistants to lift him and his wheelchair over several steps. Litigation commenced after the defendant-cinema refused to sell Mr. Glaisen a ticket to the show, claiming that the theater was not properly equipped to ensure the safety of Mr. Glaisen and the other spectators in the event of an emergency.[173] The Swiss authorities argued that the facts of Mr. Glaisen's case were

[169] *López Ostra v. Spain,* App. No. 16798/90 (Eur. Ct. H.R. 9 December 1994).
[170] *Guerra and Others v. Italy*, App. No. 116/1996/735/932 (Eur. Ct. H.R. 19 February 1998).
[171] *Botta v. Italy*, App. No. 153/1996/772/973 (Eur. Ct. H.R. 24 February 1998) at ¶ 34 (emphasis added).
[172] For commentary in English, *see* Morgane Ventura*, Glaisen v. Switzerland: The Court Still Gives Up on Reasonable Accommodation*, STRASBOURG OBSERVERS (17 May 2016) https://strasbourgobservers.com/2019/08/15/glaisen-v-switzerland-the-court-still-gives-up-on-reasonable-accommodation/
[173] *See Glaisen*, at ¶ 5.

comparable to *Botta*, and that the ECtHR should rule against Mr. Glaisen for the same reasons.[174] The Court agreed.[175] It declined the offer to extend the scope of Article 8 beyond its ruling in *Botta* and held that the ECHR did not provide the complainant with a general right to access any cinema of his choosing. It was sufficient for the purposes of Article 8 that Mr. Glaisen could access most of the cinemas in Geneva.[176]

The main shift from *Botta* and *Glaisen* is one of emphasis. In *Botta*, the Court stressed that the complainant had failed to meet its causal "direct and immediate link" test. In *Glaisen*, the Court is more forthright about the limits of Article 8 as a tool to promote disability rights. Legal technicalities about causality blend into the background as the Court relies primarily on the relatively minor harm that Mr. Glaisen suffered. It appears that the Court was uneasy about extending Article 8 to strictly regulate a commercial relationship between private parties, particularly when a ruling in favor of Mr. Glaisen would have broadened the scope of Article 8 beyond the requirements set forth in Swiss law, which only was only actionable under circumstances that constituted "shocking" discrimination.[177]

Conclusion

The ECtHR's case-law on individuals with disabilities living in the community presents a mixed picture. Favalli is probably correct that it is "no coincidence" that the line of cases analyzed above began to form shortly after the CRPD entered into force.[178] The ECtHR has proved adept at drawing on the CRPD to bolster the view that a European consensus is forming on questions involving disability rights. The ECtHR, after all, has long taken the view that the ECHR is a "living instrument" that is capable of meeting the needs of evolving social norms.[179]

But the story is not entirely one-sided. First, the Court's jurisprudence on access to goods and services is, particularly in light of its own case-law on adjacent issues, surprisingly restrictive. Second, it is an open question how much influence the ECtHR's decisions will

[174] *See Glaisen*, at ¶ 21.
[175] *See Glaisen*, at ¶ 43.
[176] *See Glaisen*, at ¶ 49.
[177] *See Glaisen*, at ¶ 11.
[178] *See* Silvia Favalli, *The United Nations Convention on the Rights of Persons with Disabilities in the case law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: 'From Zero to Hero'*, 18 HUMAN RIGHTS LAW REVIEW 517, 524 (2018).
[179] *See id.* at 523.

have on domestic legal orders. This is a question that has not been address in this chapter and remains a topic in need of further research.

With regard to the CRPD's independent influence on European states, the balance of the evidence indicates that the CRPD may exert moral suasion on the signatories, but they are well aware that non-compliance will not be met with severe consequences. One should not be too quick to dismiss the power to shape social norms over time or move disability rights issues up the list of political priorities, but we should also resist the temptation to lump all types of influence into one equivalent overarching category. The empirical record suggests that the CRPD's influence to date has been overwhelmingly of a *diffuse* nature. Direct causal relationships between the entry of the CRPD into force and legal and policy outputs are difficult to identify.

Chapter 3: How has the CJEU interpreted the disability rights provisions of Directive 2000/78? An EU-US comparison*

Chapter 2 examined how, and to what extent, the CRPD and the ECtHR were shaping the European disability rights revolution. It concluded that the CRPD's influence was, to date, mainly a conceptual one. It has rarely had a direct causal influence in the strict sense of allowing us to state with confidence that "X caused Y". The strongest argument for direct causation appears to be its influence on the case-law of the ECtHR, and even in this respect, the picture is a mixed one. Nevertheless, the CRPD's capacity to change the tenor of legal and political debate and policy should not be underestimated, particularly when we consider that the CRPD is a relatively young legal instrument whose full effects may take years before they are fully visible.

In the present chapter, the perspective shifts to the EU—specifically, an examination the legal content of Directive 2000/78 and its impact on Member State law. EU law is an important component of the European disability rights revolution in its own right, but it is also, as I will argue below, the subject of a great deal of undeserving scholarly scorn. I suspect that a lawyer who only read the scholarly commentary would conclude that the CJEU has interpreted EU disability rights law in an excessively restrictive manner and that disability rights advocates interested in legal mobilization would be well advised to avoid this venue entirely. In my view, it is, in fact, a promising venue for strategic litigation. I support this position by showing that its jurisprudence is at least as progressive as it more-established U.S. counterpart.

The inclusion of Article 13 in the Treaty of Amsterdam, now codified as Article 19 of the Treaty on the Functioning of the European Union (TFEU), was a crucial moment in the European disability rights revolution. It states:

> Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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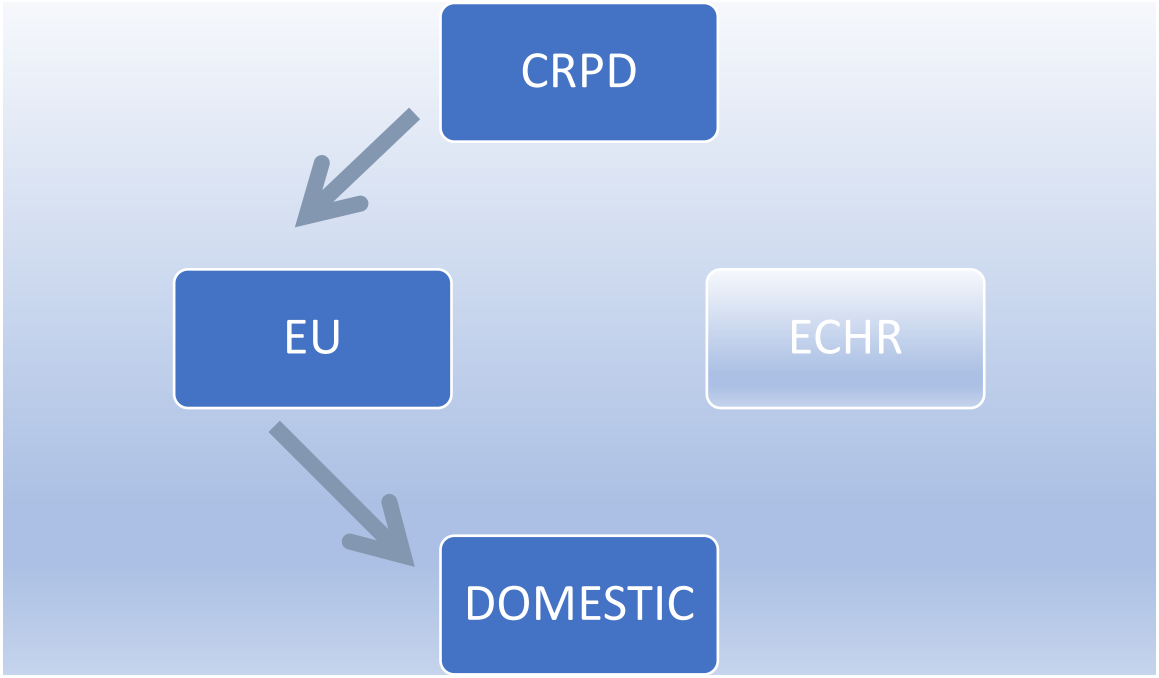
Prior to the 1997 Treaty of Amsterdam, the Community had express powers to take measures to combat national discrimination (Art. 12 EC (Art. 6), in the field of equal pay for men and women (Art. 141 (Art. 119) and social security.[180] Article 13 broadened the scope to include, *inter alia*, discrimination on the basis of disability. The Council adopted Directive 2000/78 in October 2000. A more detailed discussion of the origins of Article 13 of the Amsterdam Treaty and the events that led up to the adoption of Directive 2000/78 is provided in Chapter 4. In the present chapter, we focus on the case-law that the CJEU has produced in the field of disability discrimination.

The diagram below provides a visual representation of the elements of the European disability rights revolution that are the focus of this chapter.

Diagram of Relationships Examined in Chapter 3



The task of establishing causal relationships is relatively easier in the context of EU law than the CRPD or the ECHR. Much of this has to do with the way in which EU law is embedded into the machinery of national legal systems. The legal obligation to transpose EU directives into national law; the very real threat of infringement proceedings and financial penalties for the failure to properly transpose directives; and the preliminary reference

[180] *See* Lisa Waddington. *Article 13 EC: Mere Rhetoric or a Harbinger of Change* 1 CYELS 175, 175-76 (1999); *see also* Mark Bell, *The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?*, MAASTRICHT J. EUR. & COMP. L. 5, 5 (1999).

procedure, combine to restrict European lawmakers and national judges in ways that are qualitatively different than international and regional human rights conventions.[181]

To date, the CJEU has handed down eight key decisions interpreting the disability-related provisions of Directive 2000/78.[182] The lion's share of academic commentary has been extremely critical of the Court. The unifying lament of this body of scholarship has been that while the CJEU gives lip service to the "social model", which conceptualises disability primarily as a social phenomenon that is rooted in social oppression, in reality, the Court's rulings reveal an inability to fully disassociate itself from vestiges of the "medical model", which views disability as a personal tragedy that should be primarily addressed through medical intervention.[183] According to Oliver, who is widely credited with coining the medical/social model dichotomy, the main insight of the social model is a reversal of the conventional view of what causes disability. The medical model "locates the 'problem' of disability with the individual and . . . sees the causes of this problem as stemming from the functional limitations or psychological losses which are assumed to arise from disability". The social model, by contrast, "does not deny the problem of disability but *locates it squarely within society*. It is not individual limitations, of whatever kind, which are a cause of the

[181] For evidence of EU law directly influencing Member State laws in tangible, empirically unambiguous ways, see Part II *infra*.

[182] *See Chacón Navas v Eurest Colectividades SA* (C-13/05) EU:C:2006:456; [2006] 3 C.M.LR. 40; *Coleman v Attridge Law,* (C-303/06) EU:C:2008:415; [2008] 3 C.M.L.R. 27; *HK Danmark (Ring and Skouboe Werge), joined cases C-335/11 and C-337/11* EU:C:2013:222; [2013] 3 C.M.L.R. 21; *Z v A*, (C-363/12) EU:C:2014:159; [2014] 3 C.M.L.R. 20; *FOA* (*Kaltoft v Municipality of Billund)*, (C-354/13) EU:C:2014:2463; [2015] 2 C.M.L.R. 19; *Mohamed Daouidi v Bootes Plus SL and Others,* (C-395/15) EU:C:2016:917; [2017] 2 C.M.L.R. 21; *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, (C-406/15) EU:C:2017:198; *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal*, (C-270/16) EU:C:2018:17; and *DW v Nobel Plastiques Ibérica* SA, C-397/18 (11 September 2019) ECLI:EU:C:2019:703. *See also, Johann Odar v Baxter Deutschland GmbH*, (C-152/11) EU:C:2012:772; [2013] 2 C.M.L.R. 13 and *Bedi*, C-312/17 (19 September 2018) ECLI:EU:C:2018:734 (including disability but primarily interpreting the age discrimination provisions of Directive 2000/78). The CJEU has also addresses disability *outside* of the area of employment in *Wolfgang Glatzel v Freistaat Bayern* (C-356/12) EU:C:2014:350; [2014] 3 C.M.L.R. 52, which deals with Directive 2006/126/EC **(**driving Licences (Recast) and *Gérard Fenoll v. Centre d'aide par le travail "La Jouvene", Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, (C-316/13) EU:C:2015:200, which deals with Directive 2003/88/EC (Working Time Directive).

[183] *See, inter alia,* David Hosking, *A High Bar for EU Disability Rights*, 36 INDUSTRIAL LAW JOURNAL 228 (2007) (criticizing the CJEU in *Chacón Navas* for failing to incorporate the social mode of disability); Lisa Waddington, *Case C-13/05, Chacón Navas v Eurest Colectividades SA*, 44 C. M. L. REV. 487 (2007) ("The definition of disability by the Court in *Chacón Navas* is based on the medical or individual model of disability."); David Hosking, *Fat Rights Claim Rebuffed: Kaltoft v Municipality of Billund* 44 INDUSTRIAL LAW JOURNAL 460, 471 (2015) ("Although EU disability policy is based on a social model of disability, the CJEU's decisions related to disability have been based primarily on a medical model of disability."); Vlad Perju, *Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States* 44 CORNELL INTERNATIONAL LAW JOURNAL 102 (2011) (arguing same); Jared Cantor, *Defining Disabled: Exporting the ADA to Europe and the Social Model of Disability* 24 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 399 (2008) (arguing same).

problem but society's failure to provide appropriate services and adequately ensure the needs of disabled people are fully taken into account in its social organization".[184] This intriguing reformulation of what it means to be disabled has inspired research in a broad range of disciplines, including, but not limited to, sociology, political science, social work, philosophy, medicine, and law. The field has become sufficiently varied and complex that many universities now offer a wide range of courses that lead to undergraduate and graduate degrees in disability studies, coursework based on the premise that it is the "unaccepting society that needs normalizing" rather than the individual with a disability.[185]

Academic critiques of the CJEU's rulings from the social model perspective abound. Schiek contends that the CJEU has demonstrated an excessive concern for the nature and severity of the complainant's disability—evidence of the antiquated "metric/medical" form of analysis— in which "different degrees of disability lead to different levels of entitlement".[186] A social model analysis, by contrast, would focus on the social conditions that cause the impairment to be a disability, rather than the disability itself.[187] In a similar vein, Hosking criticises the CJEU for focusing "on the issue of who is disabled, rather than the mischief which the directive is intended to address"[188] and for failing "to recognize that disability is a complex relationship between impairment and the social environment . . .".[189] According to Hosking, the CJEU's medicalised "approach necessarily means that the prohibition against discrimination will only benefit a limited group within the broader disabled population".[190] Waddington worries that the CJEU's case-law interpreting Directive 2000/78 may not protect "individuals from disability discrimination unless they have some identifiable limitation related to an impairment which also impacts on their ability to work. Being exposed to discrimination which is based on a disability, or perhaps even facing barriers in the form of an inaccessible environment, may not be enough for an individual to be entitled to protection

[184] *See* Mike Oliver, "People with Established Locomotor Disabilities in Hospitals" (1990) paper presented at the Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians (23 July 1990) (emphasis added).
[185] *See generally*, NEW YORK TIMES, "Disability Studies: A New Normal" (1 November 2013) (reporting on the steady increase in disability studies course offerings in North American colleges and universities). A similar trend is emerging in Europe. To name just a few examples, NUI Galway offers an LLM in International and Comparative Disability Law and Policy, the University of Leeds offers an MA in Disability Studies, and the Academy of European Law (ERA) based in Trier, Germany provides training on EU disability law and the CRPD. My thanks to an anonymous reviewer for pointing this out.
[186] *See* Dagmar Schiek*, Intersectionality and the Notion of Disability in EU Discrimination Law* 53 C. M. L. REV. 35, 44 (2016)
[187] *See id.* at 56-58.
[188] *See* David Hosking, *A High Bar for EU Disability Rights*" 36 INDUSTRIAL LAW JOURNAL 236 (2007).
[189] *See id.* at 237.
[190] *See id.* at 236.

under the directive".[191] Those at risk include individuals with illnesses, mild impairments, temporary disabilities, and disabilities that do not have an impact on employment but affect other areas of life.[192]

The Limits of the Social Model of Disability as a Tool of Legal Research

The normative concerns expressed above are not the focus of this paper. Rather, I wish to make a different point: that the practice of analysing individual court cases with respect to the degree to which they conform to the "social model of disability"—which at present is the dominant approach to the study of CJEU case-law—is a path fraught with difficulties.

This is for at least two reasons. First, legal scholarship that employs the social model of disability framework suffers from a serious definitional problem. Simply put, the term "social model" means different things to different people. One of the reasons that the social model has enjoyed so much success—both inside and outside of academia—is its malleability. The same concept has been used in research on the nature of oppression in society, as a political recruiting tool to construct a culturally distinct minority, and as a means of legitimatising public policy interventions. But with flexibility comes operational vagueness. There is no "unitary sense of what 'the social model' of disability is across subfields and professions".[193] As Grue has argued: "Models change according to the discourse in which they are embedded and according to the purposes of those who use them".[194] As the uses for the social model proliferates, its specific meaning becomes tailored for the purpose at hand. In a telling example, Grue notes that his research on Norwegian NGOs revealed that professionals working in the field of disability were familiar with the term "social model", found it useful in their work, and "defined it in any way they found convenient".[195]

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[191] *See* Lisa Waddington, *Saying all the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law,* 22 MAASTRICHT JOURNAL OF EUROPEAN & COMPARATIVE LAW 588 (2015).
[192] *See* Lisa Waddington, '*Not Disabled Enough': How European Courts Filter Non-Discrimination Claims Through a Narrow View of Disability*' 15 EUROPEAN JOURNAL OF HUMAN RIGHTS 11 (2015).
[193] *See* Jan Grue, DISABILITY AND DISCOURSE ANALYSIS at 48 (2016).
[194] *See id.* at 47 (noting that a model "of one author is not that of another author, not in the same way that a single model in physics or mathematics can be employed identically by different researchers. The British social model as articulated by the UPIAS in 1976 is not the same as the model advocated by Mike Oliver in 1990, or by Mike Oliver in 2013."). For a comprehensive critique of the social model from a disability studies perspective, *see* Tom Shakespeare. DISABILITY RIGHTS AND WRONGS REVISITED (2013).
[195] *See* Jan Grue, DISABILITY AND DISCOURSE ANALYSIS at 49.

Attempts to interpret specific CJEU judgements from a social model perspective is a particularly precarious exercise. If there is no uniform definition of the social model, and working definitions vary based on the setting and idiosyncratic author usage, then how can we convincingly claim that a court has embraced or rejected the social model of disability? How can we reliably evaluate the "social model-ness" of a judicial decision if we have no objective tools for measurement? This is particularly slippery terrain for scholars who are already predisposed to favour expansive (i.e. plaintiff-friendly) readings of disability rights laws. When the social model becomes synonymous with that which is normatively appealing, and the medical model with that which is normatively repugnant, it becomes a concept almost devoid of analytic utility.

There is a second compelling reason to avoid the common practice of analysing CJEU judgments through the prism of the social model. Even if we could reach agreement about the core of the concept, if not the specifics, the social model of disability would still be a problematic tool for legal scholarship. Let us assume that at its core, the social model of disability is the axiom that individuals with disabilities face discrimination due to barriers: both societal (e.g. negative stereotypes) and physical (e.g. a lack of wheelchair-accessible restrooms). Even this rather minimalist definition leads us to a fundamental question that has only been briefly discussed by the CJEU thus far: the proper legal interpretation of "reasonable accommodation". In order to understand why, it is necessary to briefly sketch the rights and obligations that derive from Directive 2000/78. At its most basic level, the Directive imposes the following:

1. Employers may not discriminate against employees on the basis of disability;[196]
2. The employer must make an accommodation for a disabled employee
3. unless the accommodation would be unreasonable or impose a disproportionate burden.[197]

Therefore, in order to prevail in a lawsuit under the Directive, the plaintiff must show:

1. that he or she is "disabled" within the meaning of the Directive, and
2. that the requested accommodation is reasonable, and
3. the accommodation would not impose a disproportionate burden in the employer.

The CJEU's judgments have almost exclusively dealt with the first issue, which, in a broader sense, is asking a threshold question: Who is covered under the Directive? But the

[196] *See* Council Directive 2000/78/EC, Preamble (12).
[197] *See* Council Directive 2000/78/EC, Preamble (20) & (21).

principal distinctions between the medical and social models of disability are really captured in the second and third issues, which answer the question: To what extent do employers need to alter the work environment to accommodate a disabled employee's needs? As such, the medical/social model framework is—at least at the current stage of the CJEU's jurisprudence—an analytical tool with some inherent limitations.

Main Arguments

In this chapter, I seek to demonstrate the value of analysing CJEU disability rights law from a perspective other than the dominant paradigm, and to show how a different methodological approach can provide new insights into our understanding of the trajectory of the CJEU's jurisprudence.

This paper contributes to, and departs from, the existing academic literature in two main respects. First, rather than trying to operationalise what constitutes a "medical model" or "social model" judicial orientation, I approach the CJEU's case-law as a line-drawing exercise. On multiple occasions, the CJEU has been asked to specify the scope of Directive 2000/78; i.e. who enjoys its protection and who does not.[198] Instead of using the social model of disability to benchmark how the CJEU has carried out this task, I compare Directive 2000/78 and CJEU case-law to the Americans with Disabilities Act ("ADA") and decisions of US courts.

I have chosen the US as a comparator for several reasons. First, Directive 2000/78 and the ADA share important black-letter similarities. Directive 2000/78 was modelled on the ADA,[199] and briefs submitted to the CJEU[200] and advocate general opinions[201] have referred to the ADA and ADA case-law as persuasive authority. Second, the US, which has provided individuals with disabilities with standing to assert discrimination claims for decades, provides a rich source of judicial interpretation. One of the methodological challenges of analysing the CJEU as a disability discrimination judicial forum is the small

[198] *See* Mary Crossley, *Disability Kaleidoscope* 74 NOTRE DAME LAW REVIEW 669 (1998) (noting that when courts apply a statutory definition of disability, they are invariably making a "threshold eligibility decision").
[199] *See* Gerard Quinn & Eilionóir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AMERICAN JOURNAL OF COMPARATIVE LAW 33, 33-34 (2012).
[200] *See* AG Opinion in *Kaltoft* (C-354/13) at ¶ 52 (noting that Mr Kaltoft "points out in his written observations that obesity has been considered to be a disability under the law of the United States of America"). Specifically, Mr Kaltoft cited to *EEOC v. Resources for Human Dev., Inc.*, 827 F. Supp. 2d 688, 693-94 (E.D. La. 2011).
[201] *See* AG Opinion in *Kaltoft* (C-354/13) at ¶ 34, citing *Bragdon v. Abbott*, 524 U.S. 624 (1998).

number of judgements the Court has issued. The US's experience interpreting disability discrimination legislation provides a useful measure against which CJEU case-law can be compared and contrasted. Finally, for better or worse, the ADA has had an enormous influence on the way that people think about disability rights around the world.[202] The mere fact that the ADA has been the subject of so much debate and analysis—both in the US and abroad—warrants its use in this comparative study.

My second contribution to the existing literature is a new perspective on the role of the CJEU in the development of disability rights in Europe. Most academic commentary based in the medical/social model tradition portrays the CJEU as an obstructionist court that has failed to interpret Directive 2000/78 in an adequately expansive way. My comparative study shows that the CJEU has been integral to the formation of an anti-disability discrimination legal regime that, in some respects, provides stronger protections for employees with disabilities than in the United States—the country that is frequently hailed on both sides of the Atlantic as probably "the best country in the world in which persons with disabilities can enjoy their civil rights".[203] This finding places the CJEU in a different light than research based in the medical/social model tradition, but it is broadly consistent with the view of much of the practicing legal community in the EU. In a series of semi-structured interviews that the present author conducted with practitioners who brought disability discrimination cases before the CJEU, lawyers consistently expressed the viewpoint that the CJEU, more often than not, sides with the employee. In the words of one interviewee: "Employers always oppose references to Luxembourg, and the employees always support it. That's just how it is." In short, there appears to be a mismatch between the prevailing view of academics and legal practitioners on this point. The former take a dim view of the Court, taking it to task for failing to understand the true nature of the social model of disability, while the latter consider it a valuable partner in the advancement of rights for employees with

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[202] *See* Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 LAW & SOCIAL INQUIRY 723 (2002); Stanley Herr, *The International Significance of Disability Rights*, 93 AMERICAN SOCIETY OF INTERNATIONAL LAW 332 (1999); Eric A. Besner, *Employment Legislation for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act?,* 16 COMPARATIVE LABOUR LAW JOURNAL 399 (1995); Nick Wenbourne, *Disabled Meanings: A Comparison of the Definitions of Disability*, *in the British Disability Discrimination Act of 1995 and the Americans with Disabilities Act of 1990*, 23 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 149 (1999); Carol Daugherty Rasnic, *The ADA—A Model for Europe with Sharper Teeth*, 56 LABOUR LAW JOURNAL 59 (2005).

[203] *See* Gerard Quinn and Eilionóir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AMERICAN JOURNAL OF COMPARATIVE LAW 33, 33-34 (2012); *see generally*, Samuel R. Bagenstos and Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VANDERBILT LAW REVIEW 780 (2007) (describing the ADA as "a paradigmatic social-model policy response to disability").

disabilities.[204]

Road Map

The remainder of this paper is divided into three sections. The first section provides a comparison of the statutory language of Directive 2000/78 and the ADA. It shows that although the ADA is more detailed than Directive 2000/78, the legislative documents share many important design features. The second section reviews the CJEU's case-law and makes the argument that the CJEU has gradually built up a regime that increasingly resembles, and partially surpasses in coverage, the legal architecture of the ADA. The third section focuses on the remaining key differences between Directive 2000/78 and the ADA.

1. Directive 2000/78 and the ADA: a statutory comparison

The Statutory Structure of the Americans with Disabilities Act

The ADA Amendments Act,[205] which was enacted on 25 September 2008, and became effective on 1 January 2009, contains over 23,000 words; the federal regulations implementing the ADA's employment provisions run an additional 25,000 words .[206] The case-law interpreting the Act is voluminous. Nevertheless, below I attempt to distil the ADA down its most basic features.

President George Bush signed the original ADA on 26 July 1990.[207] In 2008, the ADA was amended. The Congressional findings section of the Act explains that the legislature had intended for the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual" under the ADA's precursor, the Rehabilitation Act of 1973. In order to restore Congress' original intent, it

[204] An alternative explanation for the divide between academic commentators and practicing lawyers may be that the CJEU's decision may fall short of meeting the standards of the social model of disability, but are nevertheless more progressive than the rulings of Member State courts. My thanks to an anonymous reviewer for bringing this point to my attention.
[205] *See* 42 U.S.C. 12101.
[206] *See* 29 CFR 1630.
[207] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

explicitly overrode two Supreme Court decisions,[208] *Sutton v. United Air Lines, Inc.*,[209] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[210] In *Sutton*, the Supreme Court had ruled that two severely myopic plaintiffs were not disabled for the purposes of the ADA because their vision improved to 20/20 or better with corrective lenses, and the determination whether an individual was disabled should take into account any measures that mitigate the individual's impairment.[211] In *Williams*, the Supreme Court held that in order to qualify as disabled under the ADA, the individual must meet the "demanding standard" that he or she is substantially limited in a major life activity "of central importance to daily life".[212]

Consistent with concerns raised by one of the principal architects of the original ADA and the US National Disability Council,[213] Congress criticised the Supreme Court's decision in *Sutton* for narrowing "the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect"[214] and the *Williams* decision for interpreting the law to require that plaintiffs demonstrate "a greater degree of limitation than was intended by Congress".[215] As a result of the ADA Amendments Act, US courts relaxed the definition of disability considerably. It is therefore important to distinguish between pre- and post-ADA Amendments case-law.

Title I of the ADA prohibits employment discrimination "against a qualified individual on the basis of disability".[216] In order to prevail in an ADA claim, the plaintiff must show, inter alia, that (1) she "is disabled within the meaning of the ADA or perceived to be so by her employer" and (2) "she was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation".[217] The ADA provides three ways for a plaintiff to demonstrate that she is disabled or perceived to be disabled within the meaning of the Act. As set forth in the statute: "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more major

[208] *See* 42 U.S.C. § 12101 (Findings).
[209] *See* 527 U.S. 471 (1999).
[210] *See* 534 U.S. 184 (2002).
[211] *See Sutton* at 475.
[212] *See Williams* at 197-198.
[213] *See* Robert Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*,13 TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS 241, 256 (2007) (explaining that at the time the ADA was adopted and for several years afterwards, the definition of disability was broadly interpreted and rarely contested in lawsuits); US National Council on Disability, *Righting the ADA* (1 December 2004) at 109 (advocating for the incorporation of an explicit reference to the social model into a revised version of the ADA).
[214] *See* 42 U.S.C. § 12101(a)(5) (Findings).
[215] 42 U.S.C. § 12101(a)(7) (Findings).
[216] *See* 42 U.S.C. § 12112(a).
[217] *See Davis v. New York City Dept. of Education,* 804 F.3d 231, 235 (2d Cir. 2015).

life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ".[218]

An employer is not required to provide an accommodation that is deemed to be an undue hardship or a direct threat. According to the Act, "[u]ndue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity".[219] "Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation . . . .".[220]

The ADA also prohibits associational discrimination. This is expressed in the Act as follows: "It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association".[221]

[218] *See* 42 U.S.C. 12102(1).
[219] *See* 29 CFR § 1630.2(p).
[220] *See* 29 CFR § 1630.2(r).
[221] *See* 29 CFR § 1630.8.

The Statutory Structure of Directive 2000/78 Compared

Directive 2000/78 is far less detailed than the ADA. Nevertheless, Directive 2000/78 and the ADA share several key design features. Similar in spirit to the ADA, Directive 2000/78 stated purpose is to "lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect States the principle of equal treatment".[222] This means "that there shall be no direct or indirect discrimination whatsoever on any of the grounds" listed above.[223]

Directive 2000/78 outlines a compliance system similar to the ADA. Both the ADA and Directive 2000/78 require employers to provide, under specified circumstances, a "reasonable accommodation" for individuals with disabilities,[224] which, as the Directive explains, "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".[225] The ADA and the Directive also place comparable limits on the employer's obligation to provide a workplace accommodation. According to Directive 2000/78, the individual with a disability must be able to "perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities".[226] Similar to the ADA, Directive 2000/78 provides that an employer is not required to provide an accommodation that "would impose a disproportionate burden on the employer".[227] Furthermore, Directive 2000/78 contains an exception analogous to the ADA's "direct threat" provision, which recognises that the Directive shall not apply if it conflicts with national laws that are necessary to protect health and safety.[228]

Directive 2000/78 also includes a provision that has no explicit counterpart in the ADA. According to Article 7, headed "positive action", Member States are permitted to maintain measures intended to promote the integration of individuals with disabilities into the workforce. As we shall see *infra*, in *Milkova*, the CJEU interpreted this article to effectively prevent enhanced protections for a specific subset of disabled persons. The *Milkova*

[222] *See* Council Directive 2000/78/EC, Art. 1.
[223] *See* Council Directive 2000/78/EC, Art. 2(1).
[224] *See* Council Directive 2000/78/EC, Art. 5.
[225] *See* Council Directive 2000/78/EC, Art. 5.
[226] *See* Council Directive 2000/78/EC, Preamble (17).
[227] *See* Council Directive 2000/78/EC, Preamble (21).
[228] *See* Council Directive 2000/78/EC, Art. 2(5).

judgement clarified that under EU law, civil servants and private sector workers must enjoy the same level of protections because "comparable situations must not be treated differently" unless the difference is "objectively justified".[229] This imposes obligations that go beyond what the US disability rights regime requires.

To recap: The ADA and Directive 2000/78 share important design features. Both refer to the employer's obligation to provide a "reasonable accommodation"; both require the plaintiff to be able to perform the "essential functions" of the job; both allow employers who refuse to provide accommodations to employers to argue, in their defence, that the proposed accommodation imposes an excessive burden or would result in an unacceptable risk to health and safety. The ADA is more detailed than Directive 2000/78, but in practical terms, the main differences appear to be (1) the detailed definition of disability provided in the ADA versus the absence of any definition of disability in Directive 2000/78, (2) the explicit prohibition of associational discrimination in the ADA versus the lack of any reference to associational discrimination in Directive 2000/78; and (3) Directive 2000/78's "positive action" article, the implications of which only became fully apparent after the *Milkova* judgment was published in 2017. A summary of these findings is presented in the table below.

[229] *See Milkova* (C-406/15) at ¶ 55.

Statutory Comparison of Key Provisions of ADA and Directive 2000/78

	ADA (Title I)	**Directive 2000/78**
Coverage	workplace discrimination	workplace discrimination
Primary Definition of Disability	physical or mental impairment that substantially limits one or more major life activities; or "having a record of" or "regarded as" having disability	[silent]
Supplementary definition	"having a record of" or "regarded as" having disability"	[silent]
Employers' Obligation	provide "reasonable accommodation" (under specified conditions)	provide "reasonable accommodation" (under specified conditions)
Employees' Burden	ability to perform "essential functions" of job	ability to perform "essential functions" of job
Employers' Defences	"undue hardship"; "direct threat"	"disproportionate burden"; protection of health and safety
Associational Discrimination Illegal?	Yes	[silent]
Different Level of Protection Permitted for Public Sector vs. Private Sector?	Yes [230]	[unknown before the *Milkova* judgment of 2017]
Individual Standing to Assert Violation	Yes	Yes

2. Interpreting Directive 2000/78

Given the brevity and lack of specificity contained in Directive 2000/78, it is unsurprising that Member State courts have called on the CJEU to provide them with guidance on several occasions. It is to this task that we now turn. This section examines the CJEU's case-law with a specific focus on three key concepts: the definition of disability, associational discrimination, and enhanced protections for a sub-section of the workforce. In the area of disability rights, the topic that has received the most attention from the CJEU, via the preliminary reference procedure from the Member States, has been the definition of disability, which is not defined in Directive 2000/78. *Coleman* provided the Court with an opportunity to weigh in on whether "associational discrimination"—meaning discrimination that an individual suffers because of his or her association with an individual with a disability—is actionable. *Milkova* provides important guidance into how Article 7 of

[230] As discussed below, federal employees alleging disability discrimination are governed by the Rehabilitation Act of 1973, which provides stronger safeguards than those provided to private sector workers under the ADA.

Directive 2000/78 should be interpreted in the Member States. I argue that as the CJEU's Directive 2000/78 case-law has developed, it has created a legal architecture that is remarkably akin to the ADA, and in some respects, provides for stronger legal protection than in the United States.

Defining Disability

Chacón Navas presented the Court with its first opportunity to interpret the term "disability" in the context of Directive 2000/78.[231] A Spanish court asked the CJEU to clarify whether sickness was covered under the Directive, and if so, how. Advocate General (AG) Geelhoed's opinion provides some interesting insights into the challenges that Ms Chacón Navas' lawsuit posed for the CJEU. For AG Geelhoed, the analysis had to begin with the question of whether the CJEU should provide a legal definition of disability at all. He reached the conclusion that it should. In his view, the "concept of a disability" is a "Community legal concept which must be interpreted autonomously and uniformly throughout the Community legal system . . . if only to ensure a minimum of the necessary uniformity in the personal and substantive scope of the prohibition of discrimination. . . . Otherwise, the protection afforded by that prohibition would vary within the Community".[232] *How* the Community should define the concept of disability, however, was not so obvious.

AG Geelhoed advised that the Court develop a definition of disability that was both "restrained" and open-ended. On the one hand, AG Geelhoed urged the Court to "not endeavor to find more or less exhaustively and fixed definitions of the term 'disability' The Court's interpretation of the term must provide national courts with Community law criteria and points of reference with whose aid it can find a solution to the legal problem it faces". On the other hand, AG Geelhoed firmly supported a "restrained interpretation" of the concept of disability.[233] This was for three principal reasons. First, the legislative history supported a narrow interpretation. During negotiations, the scope of the non-discrimination clause was gradually narrowed as the Treaty of Amsterdam reached its final form.[234] In the Advocate General's view, "The evolution and wording of Article 13 EC reflect the restraint shown by the authors of the Treaty in the drafting of this complementary non-discrimination

[231] *See* AG Opinion in *Chacón Navas* (C-13/05).
[232] *See* AG Opinion in *Chacón Navas* (C-13/05) at ¶¶ 64-65.
[233] *See* AG Opinion in *Chacón Navas* (C-13/05) at ¶ 56.
[234] *See* AG Opinion in *Chacón Navas* (C-13/05) at ¶ 46.

provision".[235] Second, responsibility for disability rights matters should remain primarily in the hands of national legislatures, since the definition of disability would have "potentially far-reaching consequences, economic and financial" for the Member States.[236] Third, discrimination on the ground of disability was an area covered by the Treaty, but "the Community has at best shared, but for the most part complementary powers" with the Member States. All these factors, argued AG Geelhoed, suggested that the CJEU should tread lightly into this sensitive policy area. In the end, AG Geelhoed concluded that: "Disabled people are people with serious functional limitations (disabilities) due to physical, psychological or mental afflictions".[237] Furthermore, "the cause of the limitations must be a health problem or psychological abnormality which is of a long-term or permanent nature".[238]

In a relatively terse judgment, the CJEU adopted the Advocate General's key recommendations. It began its analysis by noting that Directive 2000/78 provided no definition of "disability", nor did it refer to the laws of the Members States for a definition of that concept.[239] After reciting the need for "uniform application of Community law and the principle of equality"[240], it concluded that:

> Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of 'disability' must 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.[241]

The Court distinguished the concept of "disability" from "sickness" in that a disability is a condition which will hinder participation in professional life "over a long period of time".[242] Hence, in order to fall within the definition of "disability" it must be probable that the limitation "will last for a long time".[243] On this basis, the CJEU concluded that "a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combatting discrimination on the grounds of disability by Directive 2000/78".[244]

In *HK Danmark*, a preliminary reference from Danish courts, the CJEU was asked

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[235] *See* AG Opinion in *Chacón Navas* (C-13/05) at ¶ 46.
[236] *See* AG Opinion in *Chacón Navas* (C-13/05) at ¶ 50.
[237] *See* AG Opinion in *Chacón Navas* (C-13/05) at ¶ 76.
[238] *See* AG Opinion in *Chacón Navas* (C-13/05) at ¶ 77.
[239] *See Chacón Navas* (C-13/05) at ¶ 39.
[240] *See Chacón Navas* (C-13/05) at ¶ 40.
[241] *See Chacón Navas* (C-13/05) at ¶ 43.
[242] *See Chacón Navas* (C-13/05) at ¶ 45.
[243] *See Chacón Navas* (C-13/05) at ¶ 45.
[244] *See Chacón Navas* (C-13/05) at ¶ 47 .

again to clarify the meaning of "disability" in Directive 2000/78. As in *Chacón Navas*, the case involved two plaintiffs whose positions had been terminated after absences from work for medical reasons. The CJEU acknowledged that, since its ruling in *Chacón Navas*, the European Union had approved the UN Convention on the Rights of Persons with Disabilities (CRPD) and that the CRPD formed an integral part of the EU legal order.[245] Therefore, Directive 2000/78 "must, as far as possible, be interpreted in a manner consistent with that convention".[246]

In fact, the definition of disability was a major sticking point in the negotiations over the CRPD. Some stakeholders took the position that the Convention should have no definition of disability at all. They feared that any definition would invariably include some people and exclude others,[247] and that defining disability could also undermine the Convention's commitment to the social model, since any definition would necessarily derive from a "medicalised" understanding of disability.[248] An opposing camp argued for a clear definition of disability in the Convention, mainly to pre-empt state parties from excluding certain groups from their domestic policies and laws.[249] The final draft of the CRPD includes a compromise in which a provision on the meaning of disability is included in Article 1 of the Convention, under the heading of "purposes" rather than Article 2, which has the heading "definitions". Article 1 of the CRPD provides: "persons with disabilities' includes '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." In order to bring the EU's case-law in line with the UN Convention, the CJEU reformulated the definition of disability in *Chacón Navas* to: "a limitation which results in particular from physical, mental, or psychological impairments and which *in interaction with various barriers* may hinder the *full and effective* participation of the person concerned in professional life *on an equal basis with other workers*".[250]

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[245] *See HK Danmark* (joined cases C-335/11 and C-337/11) at ¶ 30.
[246] *See HK Danmark* (joined cases C-335/11 and C-337/11) at ¶ 32.
[247] *See* Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE JOURNAL OF INTERNATIONAL LAW & COMMERCE 287, 292 (2006)
[248] *See* Rosemary Kayess and Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUMAN RIGHTS LAW REVIEW 1, 23 (2008).
[249] *See* Grainne De Búrca, *The European Union in the negotiation of the UN Disability Convention*, 35 EUROPEAN LAW REVIEW 174,186 (2010).
[250] *See HK Danmark* (joined cases C-335/11 and C-337/11) at ¶ 38, bold and italics indicating additions to the *Chacón Navas* definition of disability. Here I adopt, and am indebted to, the explanatory approach provided in David Hosking, *Fat Rights Claim Rebuffed: Kaltoft v Municipality of Billund* 44 INDUSTRIAL LAW JOURNAL 460, 468 (2015). As an anonymous reviewer noted, one of the curious results of the *HK Danmark* judgment was that it had the effect of revising the definition of disability for the purposes of Directive 2000/78 on the basis of a "non-definition" of disability contained in the CRPD.

The CJEU held that so long as the individual met the definition of disability, it was irrelevant whether the impairment was curable or incurable.[251] Similarly, the definition of disability "does not depend on the nature of the accommodation measure such as the use of special equipment".[252] "The nature of the measures to be taken by the employer is not decisive for considering that person's state of health is covered by" the concept of disability.[253]

The next case, *Z v A,* involved a post-primary school teacher in Ireland employed by a government department.[254] Ms Z had no uterus and could not support a pregnancy. She and her husband decided to pursue a surrogacy arrangement in California, USA, which has detailed laws regulating surrogate pregnancies and births.[255] Ms Z travelled to California to be present for her child's birth in 2010. The child was the biological genetic child of Ms Z and her husband, and as a matter of California law, Ms Z and her husband were considered the baby's parents.[256] In May 2010, Ms Z, her husband, and the child returned to Ireland, where surrogacy is unregulated.[257] The terms and conditions for Ms Z's employment provided for maternity leave and adoptive leave.[258] Since she was never pregnant, Ms Z did not qualify for paid maternity leave. Since she had not adopted a child, she did not qualify for adoptive leave.[259] There were no provisions in Ms Z's contract of employment relating to surrogacy.[260] Ms. Z made an application to her employer for leave equivalent to adoptive leave, which was rejected.[261] In November 2010, Ms Z filed a lawsuit against her employer before the Irish Equality Tribunal, alleging discrimination on the grounds of gender, family status, and disability.[262] The Equality Tribunal stayed the case and referred several questions to the CJEU. The disability-related questions asked whether a person in Ms Z's situation was covered by Directive 2000/78 and whether the UN Convention was "capable of being relied

[251] *See HK Danmark* (joined cases C-335/11 and C-337/11) at ¶ 41.
[252] *See HK Danmark* (joined cases C-335/11 and C-337/11) at ¶ 44.
[253] *See HK Danmark* (joined cases C-335/11 and C-337/11) at ¶ 47.
[254] *See Z v A* (C-363/12) at ¶ 34. The case is primarily about gender discrimination. Its most important statements about disability are confined to a brief discussion about international law on the last page of the judgment. For present purposes, we will focus mainly on its implications for the definition of disability.
[255] *See Z v A* (C-363/12) at ¶ 35 .
[256] *See Z v A* (C-363/12) at ¶ 37.
[257] *See Z v A* (C-363/12) at ¶ 37.
[258] *See Z v A* (C-363/12) at ¶ 38.
[259] *See Z v A* (C-363/12) at ¶ 39.
[260] *See Z v A* (C-363/12) at ¶ 40.
[261] *See Z v A* (C-363/12) at ¶ 41.
[262] *See Z v A* (C-363/12) at ¶ 44.

on for the purposes of interpreting, and/or of challenging the validity of Directive 2000/78".[263]

Regarding the first question, the Court and AG Wahl agreed that Ms Z was not covered because the concept of 'disability' within the meaning of Directive 2000/78 presupposes that the disability "may hinder that person's full and effective participation *in professional life* on an equal basis with other workers".[264] Although Ms Z otherwise met the criteria to qualify her as disabled, her circumstances did not, "in principle, prevent [her] from having access to, participating in or advancing in employment.[265] Accordingly, Ms Z was not disabled for the purposes of Directive 2000/78 and could not avail herself of the Directive's protections.

The CJEU next applied its definition of disability to the case of *Kaltoft.* Mr Kaltoft alleged that he was terminated from his position as a child-minder with the Municipality of Billund (Denmark) due to his obesity. The parties agreed that Mr Kaltoft had worked as a child-minder for the Municipality for fifteen years, and that he was obese as defined by the World Health Organization during the entire time he was employed by the defendant.[266]

Mr Kaltoft argued, inter alia, that obesity is a form of disability, and that discrimination of the basis of obesity is actionable pursuant to Directive 2000/78. On 25 January 2013, a Danish court asked the Court of Justice via preliminary reference—in essence—whether Mr Kaltoft's interpretation was correct.[267] In paragraph 59 of its decision, the Court responded with a qualified "yes."

> . . . in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78[.]

The CJEU ruled that the circumstances under which an individual becomes disabled or contributed to the onset of the disability are irrelevant to the determination of whether the individual falls within the scope of the Directive.[268]

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[263] *See Z v A* (C-363/12) at ¶ 45.
[264] *See Z v A* (C-363/12) at ¶ 80 (emphasis added).
[265] *See Z v A* (C-363/12) at ¶ 81.
[266] *See Kaltoft* (C-354/13) at ¶ 18.
[267] To be more precise the question posed in *Kaltoft* was: "Can obesity be deemed to be a disability covered by the protection provided for in Council Directive 2000/78/EC … and, if so, which criteria will be decisive for the assessment as to whether a person's obesity means specifically that that person is protected by the prohibition of discrimination [on] grounds of disability as laid down in that directive".
[268] *See Kaltoft* (C-354/13) at ¶ 56.

The case that followed, *Daouidi* can be read in some respects as an elaboration on the legal principles expressed in *Kaltoft*. The facts that led to a preliminary reference from the Social Court No. 33, Barcelona, Spain, are as follows: On 17 April 2014, Bootes Plus, a restaurant, hired Mr Daouidi as a kitchen assistant for 20 hours per week.[269] On 1 July 2014, Bootes Plus and Mr Daouidi agreed to convert his contact into a full-time contract for 40 hours per week.[270] On 3 October 2014, Mr. Daouidi was involved in an accident at work when he slipped on a kitchen floor and dislocated his left elbow.[271] On the same day, he applied for recognition of temporary incapacity to work.[272] Two weeks after the incident, the kitchen chef called Mr Daouidi to ask about his health and when he might be able to return to work. Mr Daouidi responded that he was unable to return work immediately.[273] In November 2014, while Mr Daouidi was still temporarily unable to work, he received notice that was being dismissed.[274] The notice claimed that: "The reason for this decision is that you did not meet the expectations of the undertaking or perform at a level the undertaking considers appropriate or suitable for the discharge of your duties in the workplace".[275] On 23 December 2014, Mr Daouidi brought an action against his former employer in the Social Court No. 33, Barcelona, arguing, inter alia, that his dismissal was discriminatory within the meaning of Directive 2000/78.[276] The Spanish court posed five questions to the CJEU, four of which requested guidance regarding the interpretation of the Charter of Fundamental Rights of the European Union.[277] The fifth question—which was the only one that the CJEU addressed in its judgment, asked if "the decision of an employer to dismiss a worker, previously well regarded, merely because he was subject to temporary capacity—of uncertain duration—by reason of an accident at work" constituted an act of direct discrimination on the grounds of disability as envisaged in Articles 1, 2, and 3 of Directive 2000/78.[278]

After a recitation of the law and relevant facts, AG Bot advised the Court that "it would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability",[279] adding that because the Court

[269] *See Daouidi* (C-395/15) at ¶ 17.
[270] *See Daouidi* (C-395/15) at ¶ 19.
[271] *See Daouidi* (C-395/15) at ¶ 21.
[272] *See Daouidi* (C-395/15) at ¶ 21.
[273] *See Daouidi* (C-395/15) at ¶ 22.
[274] *See Daouidi* (C-395/15) at ¶ 23.
[275] *See Daouidi* (C-395/15) at ¶ 23.
[276] *See Daouidi* (C-395/15) at ¶ 24.
[277] *See Daouidi* (C-395/15) at ¶ 36.
[278] *Daouidi* (C-395/15) at ¶ 36 (5).
[279] *See* Opinion of AG in *Daouidi* (C-395/15) at ¶ 42.

had adopted a "functional" approach to the concept of disability, "the cause of the disability is irrelevant. I conclude from this that, where a person is unable to work as a result of an injury caused by an accident at work, that person may, if he fulfils the conditions in the definition adopted by the Court, come within the concept of 'disability' for the purposes of Directive 2000/78".[280]

Whether Mr Daouidi qualified as disabled under the directive was a question for the national court to determine, and would likely hinge on whether his condition was "long-term".[281] The fact that Mr Daouidi's condition was initially classified as 'temporary' did not rule out the possibility that he could produce medical evidence that showed that he had a long-term disability.[282] Since the Charter of Fundamental Rights only applies when the legal situation comes within the scope of EU law, and it was unclear whether the national court would determine that Mr Daouidi was disabled for the purposes of Directive 2000/78, it was premature to decide whether the Charter of Fundamental Rights applied to his case.[283]

In its judgment, the CJEU mainly followed AG Bot's advice. Beginning its analysis with the fifth question, the Court concluded that "the referring court asks, in essence, whether Directive 2000/78 must be interpreted as meaning that the fact that a person find himself or herself temporarily unable to work, as defined in national law, for an indeterminate period of time by reason of an accident at work implies, by itself, that the limitation of that person's capacity can be defined as 'long-term', within the meaning of 'disability' under that directive".[284] As such, the CJEU agreed with AG Bot that the difficult question was whether Mr Daouidi's disabling condition was of sufficiently long duration, and that neither Directive 2000/78 nor the UN Convention defined long-term with any precision.[285] While insisting that it was for the national court to make the factual determination of whether Mr Daouidi condition qualified as long-term, the Court provided the following guidance:[286]

> The evidence which makes it possible to find that a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or, as the Advocate General has, in essence, noted in point 47 of his Opinion, the fact that that incapacity is likely to be significantly prolonged before that person has recovered.

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[280] *See* Opinion of AG in *Daouidi* (C-395/15) at ¶ 44.
[281] *See* Opinion of AG in *Daouidi* (C-395/15) at ¶ 46.
[282] *See* Opinion of AG in *Daouidi* (C-395/15) at ¶ 49.
[283] *See* Opinion of AG in *Daouidi* (C-395/15) at ¶ 34 & ¶ 52.
[284] *See Daouidi* (C-395/15) at ¶ 37.
[285] *See Daouidi* (C-395/15) at ¶¶ 48-49.
[286] *See Daouidi* (C-395/15) at ¶¶ 56-57.

> In the context of the verification of the 'long-term' nature of the limitation of capacity of the person concerned, the referring court must base its decision on all of the objective evidence before it, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data.

The Court, following AG Bot's opinion, agreed that because Mr Daouidi had not established at this stage in the proceedings that his situation was covered by EU law, the CJEU did not have jurisdiction to answer the first four questions posed by the referring court regarding the applicability of the Charter of Fundamental Rights.[287]

Critiques of the CJEU's Definition of Disability

Most of the academic literature, which views the CJEU's case-law from the perspective of the medical/social model, has reached the conclusion that the CJEU's definition of disability leaves much to be desired. To take just one example, in her case note on *Chacón Navas*, Waddington places the CJEU's judgment squarely in the medical model camp because, in her opinion, the Court concluded that for individual with disabilities, "the problem lies in the individual, and not in the reaction of society to the impairment or in the organization of society".[288] She argues that the Court placed an unfair burden on the plaintiff to first "prove" (quotation marks in original) that she had a disability before she was permitted to move on to the second step: namely, showing that she was a victim of discrimination.[289] CJEU judgments that have narrowed the scope of the Directive or have placed a burden on the plaintiff to demonstrate how they are disabled have been frequently criticized in academic commentary as taking a "medicalised" approach to disability.[290]

By the standards set by scholars working in this tradition, the CJEU has certainly fallen short of what the social model requires. Indeed, if we adopt this framework, it seems doubtful that any legal system would qualify as fully embracing the social model of disability. So let us place the social/medical dichotomy aside for the moment, and compare the CJEU's definition to another existing legal system.

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[287] *See Daouidi* (C-395/15) at ¶¶ 64-68.
[288] *See* Lisa Waddington, *Case C-13/05, Chacón Navas v Eurest Colectividades SA*, 44 C. M. L. REV. at 491 (2007)
[289] *See id.* at 493.
[290] *See e.g.,* David Hosking, *Fat Rights Claim Rebuffed: Kaltoft v Municipality of Billund* 44 INDUSTRIAL LAW JOURNAL 460, 471 (2015) (expressing concerns that "the CJEU has looked primarily to the medical model for its interpretation of the ground of disability . . . the Court acknowledges a social dimension to disability discrimination but in practical effect this additional element does not add much to the analysis in individual cases").

When we move from theory to practice, we can see that in the cases cited above, the CJEU was asked to engage in a line-drawing exercise. Each preliminary reference was essentially asking the Court to more precisely delineate which plaintiffs were covered by the Directive, and which were not. As AG Geelhoed's openly acknowledged in his opinion in *Chacón Navas*, this placed the Court in a difficult position. The definition of disability should, on the one hand, be explicit enough to provide the Member States with a baseline definition that would lead to the uniform application of Directive 2000/78. On the other hand, the definition should not be so detailed that it effectively forecloses the Member States from exercising the freedom to develop their own definitions.

How does the CJEU's evolving definition of disability fare in comparative perspective? The US case-law on disability discrimination on the basis of obesity provides a useful point of reference. In the early years of the ADA, US courts required plaintiffs to show that their obesity was caused by a medical condition (a thyroid condition, for example) to fall within the scope of the statute—and as a result, US courts regularly held that plaintiffs could not prevail in their lawsuits because they were unable to present a prima facie case of discrimination on the basis of disability. Since the ADA was amended in 2008, the US and the EU case-law are in basic agreement that there is no need to take the cause of the disability into account. Rather, the only relevant question is how the disability affects the plaintiff in the workplace.

The pre-ADA Amendments case-law on obesity-as-a-disability took shape over many years and involved a dialogue between several different federal US jurisdictions. However, by the mid-2000s, US courts held with increasing confidence that obesity was not an impairment for the purposes of the ADA unless the plaintiff could show that her obesity was based on an underlying physiological disorder. *EEOC v. Watkins Motor Lines, Inc*., 463 F.3d 436 (6th Cir. 2006), is an instructive example. The plaintiff, Stephen Grindle, worked as a Driver/Dock Worker for the defendant employer.[291] Following a work-related injury, Mr Grindle was directed to see the industrial clinical doctor, who determined that Mr Grindle weighed 405 pounds and could not safely perform his job.[292] Mr Grindle's employment was terminated and he filed a lawsuit alleging a violation of the ADA.[293] The Sixth Circuit denied the plaintiff's appeal, finding that the district court had properly held that "non-

[291] *See EEOC v. Watkins Motor Lines, Inc*. at 438.
[292] *See EEOC v. Watkins Motor Lines, Inc.* at 439.
[293] *See EEOC v. Watkins Motor Lines, Inc*., at 439.

physiologically morbid obesity is not an 'impairment' under the ADA".[294] And "if a physical characteristic is not an ADA impairment, an employer is permitted to prefer one physical characteristic over another".[295]

Cases decided after the 2008 ADA Amendments adopt an approach to obesity-as-a-disability that is much closer to the CJEU's *Kaltoft* ruling.[296] For example, in *EEOC v. Resources for Human Development, Inc*., 827 F. Supp. 2d 688 (E.D. La. 2011), the US District Court of Louisiana considered a case in which a woman who weighed 527 pounds alleged that she was terminated from her employment due to her obesity.[297] As in *Kaltoft*, the court concluded that the cause of the plaintiff's disability and the extent to which her condition was "voluntary" was irrelevant to the inquiry. Quoting the plaintiff's brief with approval, the court agreed that "[t]o require establishment of the underlying cause of the impairment in a morbid obesity [case], but not in any other disability cases, would epitomise the very prejudices and stereotypes which the ADA was passed to address".[298]

In short, when the CJEU's case-law on the definition of disability for the purposes of Directive 2000/78 is compared with US case-law from the pre- and post-ADA Amendments era, the CJEU's definition of disability is more in line with progressive, post-ADA Amendments rulings than the narrow pre-ADA Amendments period.

Associational Discrimination

In *Coleman*,[299] the CJEU addressed the question whether Directive 2000/78 must be interpreted as prohibiting discrimination against an employee who is not himself disabled, but suffers less favourable treatment by reason of his association with an individual who is disabled.[300]

Ms Coleman worked for her former employer as a legal secretary. She gave birth to a

[294] *See EEOC v. Watkins Motor Lines, Inc*., at 441.
[295] *See EEOC v. Watkins Motor Lines, Inc*., at 441.
[296] *See* Maura Flaherty McCoy, *Classifying Obesity as a Disability under the Americans with Disabilities Act: How Seff v. Broward County Is Incongruent with Recent ADA Litigation,* 64 CATHOLIC UNIVERSITY LAW REVIEW 539 (2015).
[297] *See id*. at 690.
[298] *See id.* at 695 (citations omitted). *See also In Lowe v. American Eurocopter LLC,* (reaching a similar conclusion to the *Resources for Human Development,* with similar reasoning). *But see, Morriss v. BNSF Railway Company*, No. 8: 13CV24 (D. Neb. Nov. 20, 2014) (arguing that *EEOC v. Resources for Human Development, Inc*., was wrong decided and that "a more sensible interpretation" would require a plaintiff to show that the impairment was "the result of a physiological disorder") (fn. 7).
[299] *Coleman v Attridge Law* (C-303/06).
[300] *See Coleman v Attridge Law* (C-303/06) at ¶ 33.

son who experienced apnoeic attacks and congenital laryngomalacia and bronchomalacia. His condition required specialised care and Ms Coleman was her son's primary caregiver.[301] Ms Coleman alleged that when she returned from maternity leave, her employer gave her a different job, described her as "lazy" when she requested time off to care for her son, and that she suffered "abusive and insulting comments . . . about both her and her child".[302]

On preliminary reference, a UK employment tribunal asked the CJEU to clarify whether an employee who is treated less favourably, not because she is disabled, but because she has an association with an individual with a disability, is covered under the Directive.[303] The Court held such an association was, in fact, covered under the law:

> Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.[304]

Associational Discrimination under the ADA

Associational discrimination is statutorily prohibited under the ADA.[305] Frequently characterised in the academic literature as a "little-known provision",[306] its contours have rarely been litigated in US courts.[307] However, the interpretative guidance contained in the appendix to the federal regulations governing this provision (29 CFR § 1630.8) are rather detailed. It states that it is "intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability". As examples, the interpretive guidance explains that it would be illegal for an employer to decline to hire a candidate for a position because the candidate disclosed that he had a disabled spouse or because he mentioned during a job interview that he did volunteer work with people who have AIDS.

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[301] *See Coleman v Attridge Law* (C-303/06) at ¶ 19-20.
[302] *See Coleman v Attridge Law* (C-303/06) at ¶ 26.
[303] *See Coleman v Attridge Law* (C-303/06) at ¶ 27.
[304] *See Coleman v Attridge Law* (C-303/06) at ¶ 51.
[305] *See* 29 CFR § 1630.8.
[306] *See* Patricia Quinn Robertson, *In Sickness and in Health: Recent Judicial Developments in Americans with Disabilities Act Association Discrimination Cases*, 21 EMPLOYEE RESPONSIBILITIES AND RIGHTS JOURNAL 171, 172 (2009).
[307] *See* Lawrence Rosenthal, *Association Discrimination Under the Americans with Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs,* 22 HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL 132 (2004).

The limitations on US law and EU law on associational discrimination are also broadly similar. Neither jurisdiction recognises the right of an individual to claim associational discrimination on the basis of a failure to provide an accommodation for the non-disabled person. For example, the interpretive guidance to the US regulations rules out the entitlement to a modified work schedule to accommodate an employee who cares for an individual with a disability. In the case of *Coleman*, interviews conducted by the present author with Ms Coleman's legal team revealed that the team deliberately narrowed the scope of the legal question it sought to resolve on preliminary reference and did not make the argument before the CJEU that the duty of reasonable adjustments should be extended to individuals who are not disabled. In other words, Ms Coleman did not allege that she had been unlawfully discriminated against because her employer failed to provide her with more flexible working hours to care for her son. Instead, the legal team limited its argument to direct discrimination in the form of harassment. It did so because Article 5 of Directive 2000/78, which covers the concept of reasonable accommodation, was drafted in such a way that it would be more difficult to argue that it applied to individuals other than the disabled person. Article 1 prohibits discrimination "on the grounds of" disability, but Article 5 explicitly refers to reasonable accommodation as an obligation to "*enable a person with a disability* to have access to, participate in, or advance in employment". (emphasis added).[308]

In sum, as with the definition of disability, here too we observe the CJEU interpreting Directive 2000/78 in a way that appears very consistent with the approach that US courts take when they apply the ADA. The holding in *Coleman*, which clarifies that Directive 2000/78 extends to associational discrimination on the basis of disability, applies a logic that strongly resembles US court decisions that address the same legal issue.

Enhanced Protections

Milkova[309] is the first case to interpret Article 7 of Directive 2000/78 in the area of disability rights. Interestingly, the CJEU declined to follow the AG's opinion in *Milkova* in practically every respect—revealing an intriguing disagreement about the nature of EU anti-discrimination law.

[308] One caveat to the otherwise very similar legal status of associational discrimination under the ADA and Directive 2000/78 should be noted here. How close the relationship between the disabled and non-disabled person must be to fall within the ambit of Directive 2000/78 is still an open question. The CJEU, perhaps with deliberate ambiguity, limited its holding to "an employee in a situation such as that in the present case", which, in this particular matter, was a mother-son relationship. Whether the CJEU would look favourably on an associational discrimination claim outside of a familial relationship remains to be seen.

[309] *See Milkova* (C-406/15).

Milkova, a preliminary reference from the Supreme Administrative Court of Bulgaria, presented the Court with the following facts: Ms Milkova had worked since 10 October 2012 as a civil servant in the directorate of a Bulgarian government agency responsible for privatisation and post-privatisation monitoring (hereinafter, "the Agency").[310] In 2014, the number of posts in the Agency was reduced from 105 to 65.[311] The Agency informed Ms Milkova that her employment would be terminated effective 1 March 2014 in accordance with the Bulgarian Civil Service Law.[312] Thereafter, Ms Milkova lodged an action against the Agency before the Administrative Court of the City of Sofia, Bulgaria, in which she claimed that it was illegal to dismiss her without prior authorization of the labour inspectorate, pursuant to a requirement set out in the Bulgarian Labour Code. The court rejected Ms Milkova's claim on the basis that the Bulgarian Labour Code did not apply to civil servants. Although the parties agreed that Ms Milkova had a disability, and presumably would have been entitled to the protections provided in the Bulgarian Labour Code had she worked in the private sector, due to the nature of her employment relationship, she had been lawfully terminated.[313] Ms Milkova appealed the decision to the Supreme Administrative Court, Bulgaria, arguing that the lower court had reached an erroneous conclusion.[314]

The Supreme Administrative Court stayed the proceedings to pose a series of question to the CJEU via the preliminary reference procedure, which asked, in essence, whether a law which provides enhanced legal protections for individuals with disabilities in the private sector, but not for civil servants, conflicted with the requirement to ensure equality in employment and occupation under EU law and the UN Convention. The referring court explained that the protections for individuals with disabilities was introduced in 1987, but effectively withdrawn for civil servants in 1999.[315]

In his opinion, AG Øe argued that Ms Milkova's claim did not fall within the scope of Directive 2000/78, and therefore there was no need for the CJEU to interpret the Directive in this case.[316] In the AG's view, the important point was that Ms Milkova was treated differently than private sector employees not because of her disability, but because of her status as a civil servant. Article 1 of Directive 2000/78 sets out an exhaustive list of grounds upon which a plaintiff may allege discrimination, and the "particular nature of the working

[310] *See Milkova* (C-406/15) at ¶ 26.
[311] *See Milkova* (C-406/15) at ¶ 22.
[312] *See Milkova* (C-406/15) at ¶ 24.
[313] *See Milkova* (C-406/15) at ¶ 25.
[314] *See* Opinion of AG in *Milkova* (C-406/15) at ¶ 26.
[315] *See* Opinion of AG in *Milkova* (C-406/15) at ¶ 28-32.
[316] *See* Opinion of AG in *Milkova* (C-406/15) at ¶ 4 & ¶ 47.

relationship" is not one of the grounds.[317] If the Court ruled that Ms Milkova was covered by the Directive, then it would be adding "a new differentiating criterion", namely, "the type of employment situation under which a disabled person works"—an interpretation that would be inconsistent with the wording of the Directive and the Court's case-law.[318]

The CJEU reached a very different conclusion. It held that Ms Milkova's situation came within the scope of Article 7 of Directive 2000/78, which provides, under the heading "Positive Action", that "[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages" and specifically with regard to individuals with disabilities, member states shall not be prevented from adopting "measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment".[319] The mere fact that a Member State is not required to maintain or adopt such measures does not disturb the conclusion that, in exercising its discretion, the Member State actions fall within the ambit of EU law.[320] Hence, the general principles of EU law, which includes the principle of equal treatment and the Charter applied to the national legislation in question.[321] Pursuant to Articles 20 and 21 of the Charter, "comparable situations must not be treated differently and . . . different situations must not be treated the same way unless such treatment is justified".[322]

The Court did not rule that Ms Milkova's situation constituted a violation of EU law. In fact, it went to great lengths to stress that this was a decision for the national court to decide, and that it was possible that the principle of equal treatment had not been violated, so long as the protections afforded to individuals with disabilities in the private sector and public sector were "comparable". In making its determination, the national court should take into account the specific purpose of the protection against dismissal at issue in the case.[323] But in the event that the national court concluded that the protections afforded public sector employees and civil servants were not comparable, EU law required national rules protecting employees with disabilities to be extended to civil servants as well.[324]

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[317] *See* Opinion of AG in *Milkova* (C-406/15) at ¶¶ 51-53.
[318] *See* Opinion of AG in *Milkova* (C-406/15) at ¶ 54.
[319] *See Milkova* (C-406/15) at ¶ 11 & ¶ 50.
[320] *See Milkova* (C-406/15) at ¶ 52.
[321] *See Milkova* (C-406/15) at ¶¶ 53-55.
[322] *See Milkova* (C-406/15) at ¶ 55.
[323] *See Milkova* (C-406/15) at ¶ 78.
[324] *See Milkova* (C-406/15) at ¶ 78.

The CJEU's interpretation of Directive 2000/78 goes beyond what US disability employment law requires. In the United States, federal employees and private sector employees are protected under different laws. Private sector discrimination law is governed by the ADA.[325] But federal workers who allege that they have been victims of disability discrimination have recourse to Sections 501 and 505 of the Rehabilitation Act of 1973.[326] Under the Rehabilitation Act, federal employees have access to additional procedural safeguards that private sector employees do not enjoy, including the right to have one's case heard before an Equal Employment Opportunity Commission (EEOC) administrative law judge and, in the event of an adverse decision, the possibility to appeal the administrative law judge's decision to an EEOC appellate body. If the plaintiff is still dissatisfied with the EEOC's decisions, he has the right to file a lawsuit in federal court. The federal worker not only benefits from additional procedural safeguards, but also the opportunity to rely on a more progressive body of judgements to support his argument. Over the years, the EEOC's appellate body has built up a substantial corpus of case-law pertaining to anti-discrimination in the workplace that is friendlier to plaintiffs than US federal court case-law interpreting the ADA.[327]

Were the US an EU Member State subject to Directive 2000/78, this discrepancy would run afoul of the CJEU's *Milkova* judgment. The privileges that the Rehabilitation Act extends to federal workers would be interpreted as an unjustified difference in treatment of individuals in comparable situations.[328] In the US, there is nothing to prevent lawmakers from providing federal civil servants, a subset of workers with disabilities, with enhanced anti-discrimination protections that other similarly-situated workers in other sectors do not enjoy.

[325] Provided that the business employs 15 or more people. See definition of "employer" in the ADA at 42 U.S.C. § 12111 (5)(A).
[326] *See* 29 *U.S.C.* § 701.
[327] Observation based on the author's personal experience representing individuals with disabilities in both federal sector and private sector employment discrimination cases. See https://www.eeoc.gov/federal/decisions.cfm (providing a partial database of federal sector appellate decisions in the field of workplace anti-discrimination).
[328] *Milkova* (C-406/15) at ¶¶ 55-58.

Current State of Play

A table that reflects the changes to the EU's disability rights regime as a result of CJEU judgments is provided below. The text in ***bold and italics*** represents judge-made, rather than statutory, EU law.

Current State of Play: ADA and Directive 2000/78 Compared

	ADA (Title I)	**Directive 2000/78**
Coverage	workplace discrimination	workplace discrimination
Primary Definition of Disability	physical or mental impairment that substantially limits one or more major life activities	***"a limitation which results in particular from physical, mental, or psychological impairments and which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" (see HK Danmark; Kaltoft; Daouidi)***
Supplementary Definition	"having a record of" or "regarded as" having disability"	[silent]
Employers' Obligation	provide "reasonable accommodation" (under specified conditions)	provide "reasonable accommodation" (under specified conditions)
Employees' Burden	ability to perform "essential functions" of job	ability to perform "essential functions" of job
Employers' Defences	"undue hardship"; "direct threat"	"disproportionate burden"; protection of health and safety
Associational Discrimination Illegal?	Yes	***Yes, but only settled case law with respect to direct discrimination (see Coleman)***
Different Level of Protection Permitted for Public Sector vs. Private Sector?	Yes	**No.** ***Similarly-situated employees in publics sector and private sector must be treated equally (see Milkova)***
Individual Standing to Assert Violation	Yes	Yes

3. Remaining EU-U.S. differences: perceived disability and positive action

The table above reveals two remaining key difference between the EU and US disability rights regimes. First, the US has no requirement that would lead to a result comparable to the CJEU's holding in *Milkova*. In the US, federal civil servants and private sector workers are covered by different laws. The Rehabilitation Act provides stronger safeguards for federal workers than the ADA does for the private sector workers, and the

disparity in protection for a subset of the US workforce is permissible. Second, the ADA explicitly protects individuals who are "regarded as" having a disability or "have a record" of having a disability, even if the individual is not, in fact, disabled. Directive 2000/78 and the CJEU's case-law are silent on this matter.

Kaltoft provides a compelling set of facts for extending Directive 2000/78 to protect individuals who suffer discrimination based on a perceived disability. The parties in *Kaltoft* agreed that Mr Kaltoft was obese for the entire period of time that he worked as a child minder. Mr Kaltoft also asserted that his obesity was not an impairment that hindered his ability to perform his job. He contended that he was discriminated against because his employer assumed, incorrectly, that he was incapable of carrying out the essential functions of his job because he was overweight. At present, it is unclear whether an individual in Mr Kaltoft's position is protected under EU law. A strict interpretation of the CJEU's rulings might suggest that such individuals are covered only if they "experience a limitation in combination with various barriers which hindered their participation in professional life".[329] If this is correct, then Mr Kaltoft may not be a member of the protected class.[330] Similarly, individuals with conditions such as asymptomatic HIV would fall outside the ambit of the non-discrimination law.

Critics who view the CJEU's case-law through the prism of the medical/social model correctly point out that the CJEU has never made a definitive statement about the pernicious effects of prejudice and stereotypes on the employment opportunities of individuals with disabilities. What is sometimes forgotten or underemphasised is that the CJEU's current case-law does not preclude it from doing so in the future. The CJEU's docket in this area depends entirely on questions posed by Member State courts via the preliminary reference procedure. The CJEU has never been directly asked whether disability discrimination that occurs solely on the basis of employer prejudice is actionable under Directive 2000/78. AG Jääskinen notes in his Kaltoft opinion that the question of "falsely presumed disability" was raised during oral argument, but *AG* Jääskinen advised that it was neither necessary nor desirable for the Court to "take a stand on this difficult legal question in the context of the present

[329] *See* Lisa Waddington, *Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law*, 22 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 587 (2015).
[330] *See generally*, David Hosking, *A High Bar for EU Disability Rights*, 36 INDUSTRIAL LAW JOURNAL 228, 233 (2007) (arguing that decisions of the Supreme Court of Canada provide guidance for how the CJEU could bring its case-law in line with the social model).

preliminary reference".[331] The CJEU evidently followed the Advocate General's advice. The CJEU's Kaltoft judgment makes no reference to it.

Critics of the CJEU's disability discrimination jurisprudence also tend to underemphasise that several Member State laws already recognize this kind of discrimination as illegal. In fact, when Mr Kaltoft's case returned to Denmark, the national court went beyond the CJEU's holding and acknowledged that he might prevail if he could show that he had been treated unfairly because of a perceived disability.[332] Furthermore, in some Member States, this type of discrimination is already explicitly prohibited by statute. For example, The Irish Equal Status Acts 2000-2015, prohibits discrimination based on characteristics "imputed to the person concerned".[333]

Conclusion

In the course of this chapter, I have provided a counter-narrative to the mainstream view of the CJEU's case-law on disability discrimination. The accepted wisdom is that the CJEU "talks the talk" but has failed to "walk the walk" of the social model of disability. It has interpreted the disability-related provisions of Directive 2000/78, to the detriment of EU citizens with disabilities, in an excessively narrow manner. I suggest that the medical/social model framework is—at least at the current stage of the CJEU's jurisprudence—an analytical tool with limited utility. When we instead compare it to existing case-law in the US, we find that the CJEU has been gradually building a legal framework that increasingly resembles the more progressive post-ADA amendments legal framework. In fact, the CJEU's rulings emerge as quite plaintiff-friendly compared to US case-law—a finding which is consistent with the views of many practicing lawyers in the EU, but rarely acknowledged in academic writing. At bottom, much of the criticism that has been directed at the CJEU is speculation about an unsettled question of law. Unlike the US, the CJEU has never ruled that a victim of disability discrimination based strictly on the unjustified, false prejudices of an employer regarding what an employee can and cannot do falls within the ambit of Directive 2000/78. There is, however, nothing to prevent the CJEU from making such a pronouncement in the

[331] *See* AG Opinion in *Kaltoft* (C-354/13) at ¶ 48.
[332] *See* Pressemeddelelser, Dom afsagt den 31. marts 2016, Retten i Kolding. Available at http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/ Domafsagtden31marts2016.aspx. *See* "Opfattet som handicappet".
[333] *See* Irish Equal Status Act, 2000 Section (3(1)(a). *See also Estlin v. Central Manchester University Hospitals NHS Foundation Trust* (analysing the status of perceived disability in the context of the UK Equality Act 2010).

future. Will the CJEU formally recognise that individuals who are "regarded as" disabled and/or "have a history" of being disabled are protected under EU law? If the EU-US comparison described in this chapter provides any indication of what lies ahead, the chances that the CJEU will take the leap appear more promising than the current state of the art suggests.

This chapter has also addressed, albeit briefly, the link between the CPRD and the EU. The CJEU's interpretation of the extent of its obligations to follow the CRPD has met with scholarly disapproval,[334] but is broadly consistent with how it has approached other international agreements to which the EU is a party.[335] In *Ring/Werge*, the CJEU ruled that the CPRD was part of the EU's legal order and was willing to rely on it to interpret the definitions of disability and reasonable accommodation. However, in *Z v. A*, an Irish court posed the following question: "Is the [UN Convention] capable of being relied on for the purposes of interpreting, and/or of challenging the validity of Directive 2000/78, the Employment Equality Directive]?"[336] In short, the Court answered "no".[337] The CPRD was only "programmatic" and could not invalidate secondary EU legislation. The CJEU concluded:

> . . . it must be held that the provisions of that Convention are not, as regards their content, provisions that are unconditional and sufficiently precise within the meaning of the case-law . . . and that they therefore do not have direct effect in European Union law. It follows from this that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention.[338]

The fact that not only the Member States, but the EU itself had signed and concluded the CRPD[339] does not appear to have had a profound effect on the logic of the CJEU's judgments thus far.

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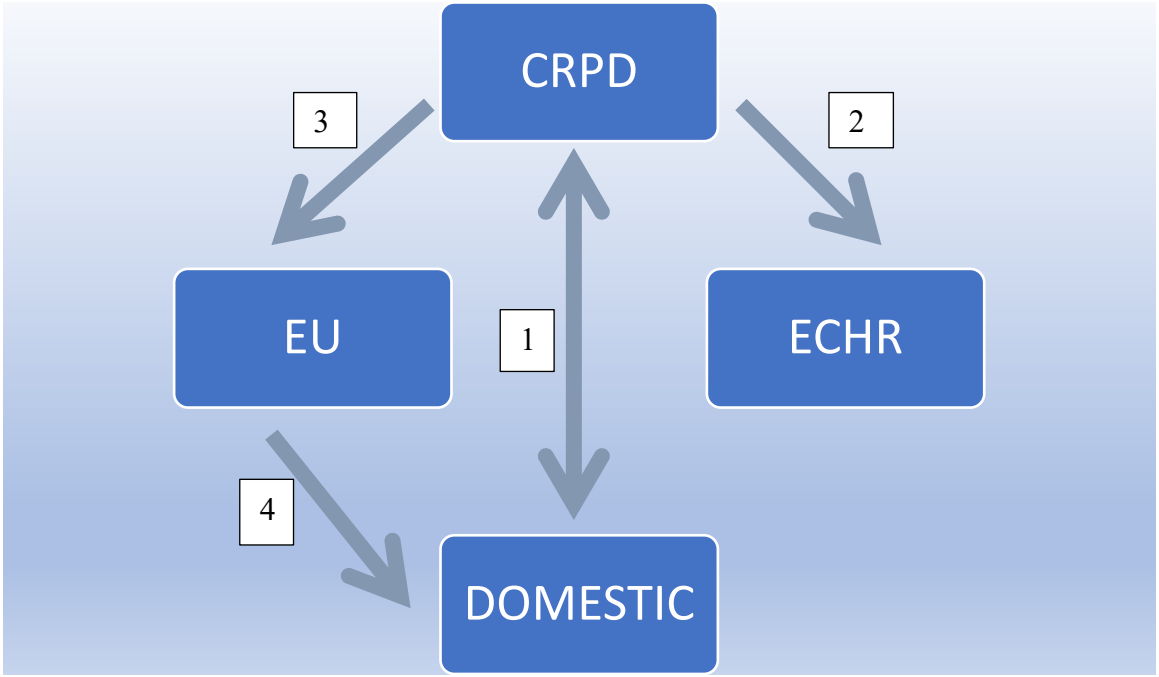
[334] *See* Lisa Waddington, *The European Union,* in Lisa Waddington and Anna Lawson (eds.), THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS*,* 131 (2018).
[335] *See* Mario Mendez, THE LEGAL EFFECTS OF EU AGREEMENTS (2013).
[336] *See Z v A* (C-363/12) at ¶ 45.
[337] *See Z v A* (C-363/12) at ¶¶ 84-91.
[338] *See Z v A* (C-363/12) at ¶ 90.
[339] This was the first time in the EU's history that it had become a party to an international human rights treaty. *See* Lisa Waddington, *The European Union,* in Lisa Waddington and Anna Lawson (eds.), THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS*,* 131, 131 (2018).

Conclusion to Part I

Part I of this PhD dissertation examined socio-legal and legal questions about European disability rights revolution from the vantage point of international, regional, and European Union law. To assist in the process of taking stock of the findings unearthed thus far, the diagram below assigns a number to each of the four relationships that have been addressed in the dissertation up to this point:



(1) Chapter 2 examined the relationship between the CRPD and domestic law through the lens of "experimental governance". Although the analysis did not falsify the experimental governance hypothesis, it showed that in the case studies investigated in this PhD thesis; the UK, Germany, and Denmark—there was little support for de Búrca's theory of a harmonious exchange of information and goal reassessment between the center and "lower level actors". While we cannot rule out the possibility that the CRPD's has had a more direct impact in other Member States or outside of the European Union, the power of the CRPD on the case studies investigated here is best characterized as diffuse.

(2) Chapter 2 also analyzed the relationship between the CRPD and the case-law of the ECtHR. Here, we see the clearest evidence of direct impact, as the ECtHR's formation of a new line of jurisprudence on individuals with disabilities living in the community anchored in Article 14 of the ECHR coincides with the entry into

force of the CRPD. However, two caveats are in order. First, while the ECtHR almost always cites the CRPD in cases involving individuals with disabilities, it has been reluctant to expand the scope of Article 8 to provide stronger disability rights in the area of access to goods and services. Second, this dissertation has not examined whether the ECtHR's case-law has had an appreciable effect on domestic law in Europe.

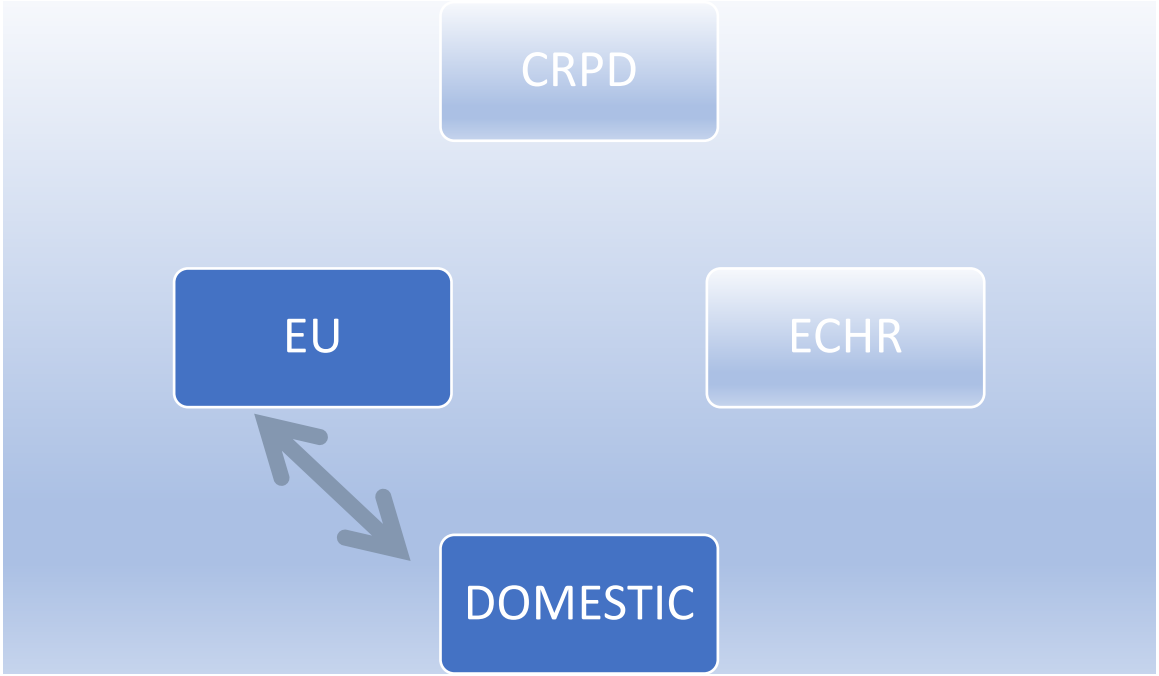
(3) Chapter 3 examined, somewhat briefly, the relationship between the CRPD and the CJEU. The CJEU has ruled that the CPRD is part of the EU's legal order, and was willing in the case of HK Danmark to rely on it to interpret the definitions of disability and reasonable accommodation, but held in *Z v. A* that the CPRD was only "programmatic" and could not invalidate secondary EU legislation.

(4) Chapter 3 also examined the CJEU's case-law on the anti-disability discrimination provisions of Directive 2000/78. When we compare it to existing case-law in the US, we find that the CJEU has been gradually building a legal framework that increasingly resembles the more progressive post-ADA amendments legal framework. The CJEU's rulings emerge as quite plaintiff-friendly compared to US case-law.

Part II: Law Production in the EU

In Part II, we shift our focus to EU disability rights in the context of legal and political mobilization. Preliminary references and infringement proceedings help us to understand how EU law should be interpreted, but the full range of a directive's socio-legal impact begins to come into view only when we take a broader approach. Indeed, even the *same judgments* can take on a very different character when viewed from a Member State perspective. Judgements that have been discussed in Part I, such as *Coleman* and *Ring/Werge*, reappear in Part II, but in a new light.

Diagram of Relationships Examined in Part II



There are several vantage points from which to study EU disability rights mobilization. These include:

(1) mobilization to adopt EU anti-disability discrimination legal instruments;

(2) mobilization in the Member States at the time of transposition of Directive 2000/78 into national law;

(3) mobilization via lawsuits brought before the CJEU; and

(4) mobilization via lawsuits brought before national courts.

Chapter 4 is dedicated to the origin story, i.e. item (1) on the list above. More specifically, it asks: Why did the Member States decide to make disability rights an EU competence? Chapters 5-7, which are comprised of case studies of the UK, Denmark and Germany,

investigate the other potential entry points for political and legal mobilization, identified above as items (2), (3), and (4).

One potential research design, which I have consciously decided not to follow, would be to analyze developments in the Member States in a more-or-less chronological order and give equal attention to the transposition of Directive 2000/78, preliminary references to the CJEU, and legal mobilization before national courts. Instead, I have opted to focus on the specific aspects of legal mobilization that were particularly relevant for the case study. For example, the transposition of Directive 2000/78 was the subject of a vigorous and protracted debate in Germany. Conversely, in Denmark and the UK, the transposition of Directive 2000/78 attracted very little attention. It would be neither useful nor particularly enlightening to devote too much attention to the transposition in Denmark or the UK. But in the German case, examining the transposition of Directive 2000/78 reveals a great deal about its legal culture and is worthy of careful consideration.

Another example: The UK chapter does not examine the effects of Directive 2000/78 in the domestic setting in any detail. This is because the UK, unlike Denmark and Germany, already had disability rights laws in effect before Directive 2000/78 entered into force. Therefore, the task of evaluating the independent effects of EU law on the domestic legal system (other than in the isolated case of the *Coleman* preliminary reference) is simply too difficult.

In short, the research design employed in Part II below is not ideal from a strictly comparative standpoint, but it is advantageous in the sense that it is tailored to bring to light the most compelling aspects of how disability rights have developed in each of the Member States.

Overview of the Forms of Mobilization Examined in Part II Case Studies

	UK	Denmark	Germany
Mobilizing during transposition of Directive 2000/78			√
Mobilizing via Preliminary Reference Procedure	√	√	√
Mobilizing EU Law in the Domestic Courts		√	√

In each of the case studies we observe unanticipated preliminary reference behavior. Examining the root causes of this behavior has the potential to teach us a great deal about what drives the European disability rights revolution forward.

If any EU Member State should have been unaffected by the transposition of Directive 2000/78 into national law, it is the UK. Wells observes that "the UK can be set apart [from other Member States] in two respects. Firstly, it is the only Member State to experience extensive and complex litigation concerning the definition of disability contained in its anti-discrimination legislation; secondly, it is one of the few Member States where a duty to make reasonable adjustments for disabled people was already in place" before EU legislation required it.[340] The UK Disability Discrimination Act 1995 (DDA) made discrimination illegal in employment, services, and the sale or rental of property. Indeed, between 1995 and 2018, UK courts published a large number of judgments related to the DDA. However, despite its comparatively long experience in using and interpreting disability rights laws, one of the most important CJEU judgments on disability discrimination was driven by sophisticated public interest litigators seeking—successfully—to use Directive 2000/78 to expand the scope of disability rights protections under UK law.

Most of the chapter on the UK traces the long arc of *Coleman v. Attridge Law*, from its origins in the UK labor courts, to the CJEU, and back to the member state courts. From a methodological point of view, the *Coleman* case was an excellent candidate for "thick description"[341] because it produced an unusually voluminous public record of court judgements, which gives us a particularly clear picture of the national context in which the *Coleman* litigation took place. *Coleman* produced two lengthy judgments in the UK courts before it reached the CJEU. The CJEU judgement itself clarified important principles of EU disability discrimination law, and the outcome of the CJEU judgement became the subject of a lengthy domestic court decision. With the objective of producing the clearest possible picture of how these events unfolded, in 2016, the present author supplemented his analysis of the public record with a series of in-depth semi-structured interviews with the *Coleman* legal team.

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[340] *See* Katie Wells, *The Impact of the Framework Employment Directive on UK Disability Discrimination Law*, 32 INDUSTRIAL L. J. 253, 254 (2003).
[341] *See* Joseph G. Ponterotto, *Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept Thick Description,* 11 THE QUALITATIVE REPORT 538 (2006).

Denmark and Germany have also acted against expectations in the disability rights field, but in a different way. Danish courts, which have a well-deserved reputation for infrequently making preliminary references to the CJEU, uncharacteristically referred several in the area of disability discrimination. Germany presents the inverse: German courts, which have a well-deserved reputation for frequently referring cases to the CJEU, have referred only two, both of which focus on a narrow issue closely related to pre-existing German law.[342]

In a series of articles published over the past decade, scholars have noted that the aggregate upward trend in preliminary references masks substantial variations in the rate of references from individual Member States.[343] Denmark—indeed all Nordic members of the EU—appear to invoke Article 267 rather infrequently. This finding holds up in studies that control for population size and length of time that a country has been a member of the European Union.[344] Among others, Marlene Wind attributes Denmark's hesitance to refer cases to the CJEU to its tradition of *majoritarian democracy*—a feature that, in broad strokes, is evident in all Nordic countries. In contrast to *constitutional democracies*, which embrace judicial review of legislation as an essential component of what it means to be a "true" democracy, majoritarian democracy is based on the principle of parliamentary supremacy or sovereignty. Hence, the role of the courts in a majoritarian system is comparatively limited. Judicial review of legislative acts to ensure their conformity with the Danish Constitution, while formally permitted by law, has happened only once in the past 150 years.[345] The prevailing view in Denmark is that unelected judges should strike down acts of Parliament

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[342] *Odar*, Case C-152/11 (6 December 2012) ECLI:EU:C:2012:772; *Bedi*, Case C-312/17 (19 September 2018) ECLI:EU:C:2018:734.

[343] *See* Jens Elo Rytter and Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 INT'L J. CONST. L. 470-504 (2011); Marlene Wind, *The Nordics, the EU and the Reluctance towards Supranational Judicial Review*, 48 JOURNAL OF COMMON MARKET STUDIES 1039-1063 (2010); Marlene Wind et al., *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, 10 EUROPEAN UNION POLITICS 63-88 (2009); Andreas Follesdal & Marlene Wind, *Nordic Reluctance towards Judicial Review under Siege*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 131 (2009); Marlene Wind, *When Parliament Comes First-The Danish Concept of Democracy Meets the European Union*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 272 (2009); Sten Schaumburg-Muller, *Parliamentary Precedence in Denmark-A Jurisprudential Assessment,* 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 170 (2009); Uffe Jakobsen, *The Conception of Nordic Democracy and European Judicial Integration*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 221 (2009); Palle Svensson, *Conceptions of Democracy and Judicial Review*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 208 (2009); Martin Scheinin, *Constitutionalism and Approaches to Rights in the Nordic Countries*, in CONSTITUTIONALISM: NEW CHALLENGES, EUROPEAN LAW FROM A NORDIC PERSPECTIVE 135 (Joakim Nergelius ed., 2008).

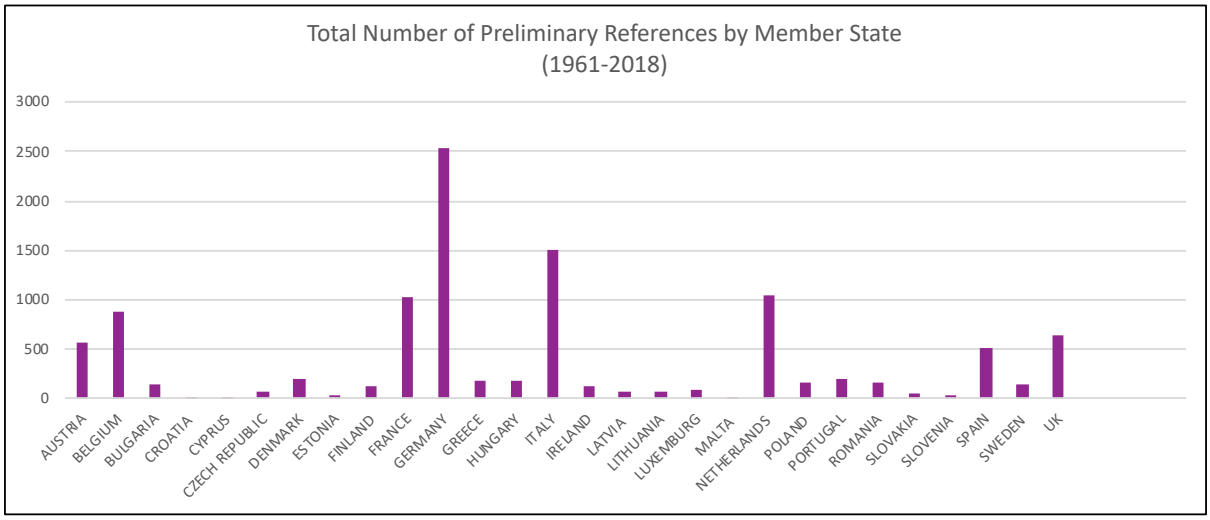
[344] S*ee* publications cited, *supra*.

[345] *See* Jens Peter Christensen, *The Supreme Court in Today's Society*, in Jens Peter Christensen et al. (eds.) THE SUPREME COURT OF DENMARK (2015) at 29 (noting that this is commonly referred to in Denmark as the "Twind" case).

only under extraordinary circumstances. Parliament, above all others, is the institution that embodies the legitimate representation of the popular will. Wind et al. claim that because Denmark has no tradition of judicial review of legislation, Danish courts (and other Nordic courts) treat the preliminary reference procedure with suspicion.[346]

Wind et al. provide a plausible account for the behavior of Danish courts towards the preliminary reference procedure as a whole, but when we scratch beneath the surface, the dichotomous majoritarian democracy/constitutional democracy distinction loses some explanatory power. As shown in **Figure 1**, it is true that countries such as Germany, Belgium, and Austria appear to refer cases to the CJEU on a more regular basis than others.[347]

FIGURE 1

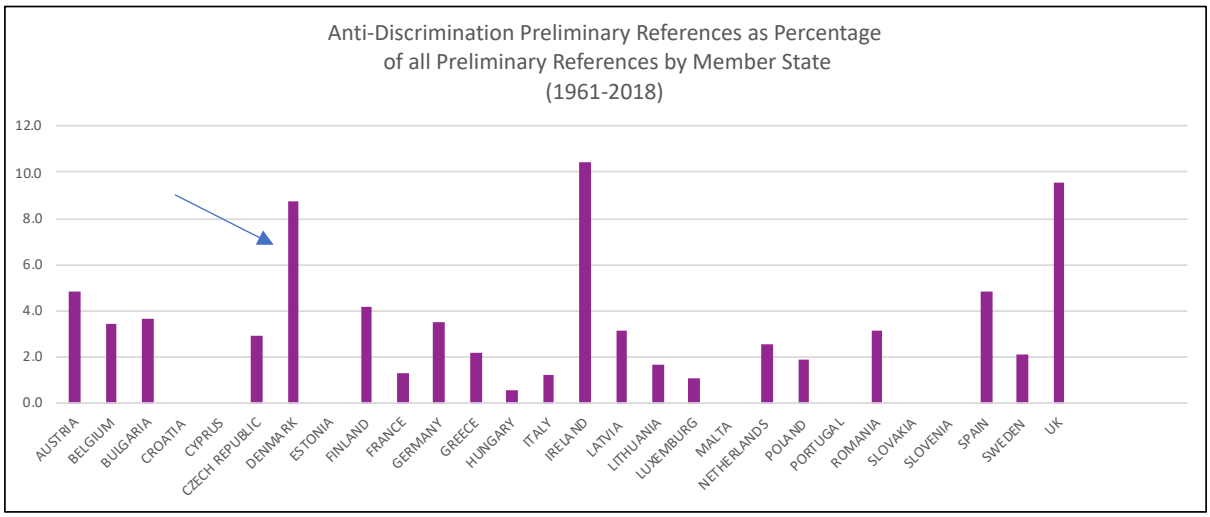


Sources: Annual Report of the Court of Justice of the European Union: Judicial Activity (2017) and Curia Website
N=10,684

But in the field of primary concern in this paper, EU anti-discrimination law, Danish courts do not appear to demonstrate their typical reticence. In fact, as shown in **Figure 2**, when we chart Member State preliminary references in the field of anti-discrimination as a percentage of all preliminary references, Denmark transforms from a laggard into a leader.[348] Germany presents the converse.

[346] S*ee* publications cited, *supra*.
[347] J Miller, Equality Law in Europe: A New Generation *CJEU Database, Total Number of PRs by Member State (1961-2018).*
[348] J Miller, Equality Law in Europe: A New Generation *CJEU Database, Anti-Discrimination PRs as Percentage of all PRs (1961-2018).*

FIGURE 2



Sources: Equality Law in Europe: A New Generation *CJEU Database*; Annual Report of the Court of Justice of the European Union: Judicial Activity (2017); Curia Website.

This general finding about anti-discrimination preliminary references is even more pronounced in the sub-field of disability discrimination law. Denmark's preliminary references produced the leading case on EU disability rights law (*Ring/Werge*) and a judgment that clarified that the scope of EU disability rights law should be interpreted broadly (*Kaltoft*). By contrast, Germany's only preliminary references have focused on narrow questions relating to the calculation of German pension benefits at the end of a disabled worker's career (*Odar, Bedi*). These results call into question whether the factors that create a context conducive to the generation of preliminary references are more sector- or policy-specific than Wind et al. suggest.

Domestic Legal Mobilization of EU Law

The case studies also draw insights from the literature on European Legal Mobilization, which is described in a recent review as the study of "how individuals, groups, and companies use European law to pursue their interests",[349] to examine the effects of EU law on domestic legal systems. More specifically, we probe the "micro-level factors" that characterize the pool of potential litigants.[350] The literature has identified four factors that are

[349] *See* Lisa Conant et al. *Mobilizing European Law*, JOURNAL OF EUROPEAN PUBLIC POLICY (2017).
[350] *See id.* Conant et al. divide the factors that influence legal mobilization into three broad groups: (1) macro-level factors, (2) meso-level factors, and (3) micro-level factors. By macro-level factors, Conant et al. mean the factors that derive from the development of European law. Historically, EU law has emphasized economic rights, which was of greatest interest to businesses and workers who stood to benefit from market integration.

particularly relevant in this context. The first is "legal consciousness". The actor must have some minimal awareness that the law exists and may be helpful in advancing the actor's cause. Second, the actor must have sufficient resources to mobilize European law. Resources are defined in rather broad terms. It may refer to financial resources, but also to access to legal knowledge, which may be obtained through in-house counsel, access to *pro bono* legal services, or privately retained lawyers. The third factor is "identity", or how the actor perceives its role in the world. Stated less abstractly, does the actor see litigation as a legitimate and desirable way to achieve its goals? The fourth factor focuses on the actor's relationship with other actors. The main insight here is that certain groups, for example in a neo-corporatist structure,[351] may have a privileged relationship with policymakers. It stands to reason that some groups may calculate that they have more to gain by working through policy channels than to make legal challenges. Hence, the "politically disadvantaged" or "outsiders" in the policymaking process are posited to be more likely to turn to litigation than those who enjoy an "insider" status.

The main weakness of mobilization literature appears to be the sheer number of potentially relevant factors. The literature has only begun to tackle the very difficult question of determining which of the many factors that it has identified are the most important for mobilization, and under which conditions certain factors are more important than others.

The chapters below throw into stark relief how context-dependent European Legal Mobilization can be. The *Coleman* litigation, discussed in Chapter 5, highlights the importance of legal consciousness. The UK has a comparatively long history of viewing disability discrimination as a legal issue that can and should be addressed in the courtroom. Drawing on a deep repertoire of experience litigating anti-discrimination matters, Ms.

Existing research shows that companies that engaged in cross-border trade have often been at the forefront of EU-level litigation that challenged, inter alia, national product standards and tax laws.[350] EU legislation also appears to be evolving in a manner that requires Member States, via the transposition of EU directives, to introduce national procedural rules that provide a stronger framework for private litigation.

The meso-level, by contrast, encompasses the ways in which national legal opportunity structures condition the ability of potential litigants to use EU law to advance their interests. The literature has identified a number of attributes that could plausibly influence this calculus, including the ability of courts to control their dockets; standing rules; court costs; access to legal services; requirements that plaintiffs be represented by a licensed lawyer; "loser pay" rules, which make plaintiffs potentially responsible for the opposing party's legal fees; length of time to complete a legal proceeding; the length of statutes of limitations; and the availability of legal insurance, which reduces the financial risk of litigation.

[351] *See* Philippe C. Schmitter, *Still The Century of Corporatism?*, 36 THE REVIEW OF POLITICS 85, 93-94 (1974) ("Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demand.")

Coleman's legal team quickly and deftly took advantage of the new opportunity that Directive 2000/78 offered to expand the scope of UK anti-disability discrimination law. The Danish case study also evinces several attributes identified in the European Legal Mobilization literature. Denmark's experience with disability rights (and anti-discrimination legislation more generally) features actors with privileged relationships with policymakers resisting the use of litigation to achieve their goals *as well as* legal entrepreneurs with deep pockets who sought to alter the *status quo* by relying on EU legislation and litigation. The German case study, on the contrary, provides an example of a legal culture that has yet to fully embrace EU anti-disability discrimination. Rather than fully exploit the new opportunities that EU law offers, for the most part, German disability litigation remains firmly anchored in pre-existing domestic laws.

Chapter 4: How and why did disability discrimination become an EU competence?

A crucial moment in the European disability rights revolution was the inclusion of Article 13 in the Treaty of Amsterdam, now codified as Article 19 of the Treaty on the Functioning of the European Union (TFEU), which states:

> Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 13 of the Treaty of Amsterdam provided the European Commission with the legal basis it believed it needed to propose anti-discrimination legislation beyond the grounds of gender and nationality. Directive 2000/43, which was adopted immediately prior to Directive 2000/78, introduced anti-racist legislation at the EU level for the first time.

This chapter examines how and why this core component of the disability rights revolution came into being. The literature on the creation of the other two main components of the European disability rights revolution, the CRPD and ECHR, is much more extensive than on Directive 2000/78.[352] As the factors that led to EU anti-disability discrimination legislation remains a comparatively under-researched topic, an in-depth study of the EU provides a more promising route to uncover new and useful information about what drives the European disability rights revolution forward.

It also presents a puzzle in its own right. The Commission's proposals touched on sensitive national policy areas that were long considered beyond the reach of bureaucrats in Brussels. Equally curious, why did they agree on an approach to combating discrimination that was alien to the legal cultures of many of the Member States? In the view of at least one scholar, through their adoption of Directive 2000/78, which prohibits discrimination in the workplace on the grounds of religion or belief, disability, age or sexual orientation,[353] Member States opted for American-style "adversarial legalism" instead of the more cooperative and less lawyer-driven approach that European policymakers have traditionally used.[354] Prior to the adoption of Directive 2000/78 many governments actively opposed

[352] On the CRPD, *see e.g.* Arlene S. Kanter, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (2014). On the ECHR, *see e.g.* Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 LAW & SOCIAL INQUIRY 137-159 (2007).
[353] *See* Art. 1
[354] *See* R. Daniel Kelemen, EUROLEGALISM (2011).

rights-based anti-discrimination legislation as an unwelcome Anglo-American import.[355] Why would European policymakers willingly bind themselves in this way?

One of the most robust findings in social psychology is that we are wiser in hindsight.[356] Once an event has happened, "people consistently exaggerate what could have been anticipated . . . They not only tend to view what has happened as having been inevitable, but also to view it as having appeared 'relatively inevitable' before it happened . . . They even misremember their own predictions so as to exaggerate in hindsight what they knew in foresight".[357] With the passage of time, one could easily forget that there was nothing inevitable about the adoption of Directive 2000/78, and certainly no reason to assume that the directive would embrace a rights-based approach to anti-discrimination. In fact, as discussed below, much of the historical record would have led to the expectation that EU anti-disability discrimination legislation would not occur at all. Nevertheless, once it did happen, much of the research on EU disability discrimination law—particularly legal scholarship—quickly moved on to questions with more doctrinal implications, most commonly through close readings of the meaning of the finalized text of Directive 2000/78 and the CJEU's emerging case-law. Almost two decades later, we still know very little about the negotiations that led the Member States to adopt Directive 2000/78 and the extent to which they understood what they had agreed to.[358]

In the course of studying the primary research question that this chapter investigates—how and why EU disability discrimination legislation occurred when it did—one thing has become quite clear to me: it is very difficult to understand its implementing secondary legislation, Directive 2000/78, in isolation. There are a number of important milestones that preceded Directive 2000/78. These events not only strongly influenced the

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[355] *See id*.; *see also* Robert Kagan, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).
[356] *See* Lawrence J. Sanna and Norbert Schwarz, *Debiasing the Hindsight Bias: The Role of Accessibility Experiences and (Mis) attributions*, 39 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 287, 287 (2003).
[357] *See* Baruch Fischhoff, *Debiasing*, in Daniel Kahneman et al. (eds.) JUDGMENT UNDER UNCERTAINLY: HEURISTICS AND BIASES 422, 428 (1982); Historian Georges Florvsky describes the problem succinctly: "The tendency toward determinism is somehow implied in the method of retrospection itself. In retrospect, we seem to perceive the logic of events which unfold themselves in a regular or linear fashion according to a recognizable pattern with an alleged inner necessity. So that we get the impression that it really could not have happened otherwise". *See* Gorges Florovsky, *The Study of the Past* in R.H. Nash (ed.) IDEALS OF HISTORY: VOLUME 2 (1969) at 369, quoted in Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in Daniel Kahneman et al. (eds.) JUDGMENT UNDER UNCERTAINLY: HEURISTICS AND BIASES 335-51, 341 (1982). *See also* David Hackett Fischer. HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT (1971).
[358] *See* Deborah Mabbett, *The Development of Rights-Based Social Policy in the European Union: The Example of Disability Rights*, 43 JOURNAL OF COMMON MARKET STUDIES 97, 110 (2005). ("The process of agreeing the FETD does not reveal how the Member States understood its significance and what they anticipated would be the main issues in its transposition. Little information on the negotiations that led to the Employment and Social Affairs Council unanimously agreeing a text at its meeting on 17 October 2000 is publicly available . . .)".

atmosphere in which Directive 2000/78 was adopted, but also the form and content of the legislation that was finally approved. Chief among them were the inclusion of Article 13 in the Treaty of Amsterdam and the adoption of Directive 2000/43. And though it would go beyond the scope of this chapter to examine the topic in too much depth, looking further back in time, there are clear signs that Directives 2000/43 and 2000/78 take inspiration from, and build on, a much longer tradition of innovative EU gender discrimination legislation.[359]

To understand why EU disability discrimination legislation occurred when it did and why it took the form that it did, it is necessary to understand the wider context in which these events took place. It requires us to be familiar with the factors that led Member States to agree to include a non-discrimination provision, Article 13, in the 1997 Amsterdam Treaty. The provision prohibits discrimination on race, ethnic origin, religion or belief, disability, age and sexual orientation, but one would be mistaken to conclude that it was inevitable that disability would be included among these explicitly identified groups. In fact, we know that during the Dutch Presidency, disability was stricken from the draft provision, only to be re-inserted at a later date. Had disability been left out of the list of protected grounds in Article 13, it seems highly unlikely that we would have EU-level disability discrimination legislation today. Similarly, there is little doubt that the circumstances that led to the adoption of Directive 2000/43 had a strong influence on Directive 2000/78. It is probably not an overstatement to say that the fate of Directive 2000/78 was so closely tied to Directive 2000/43 that Directive 2000/43 was a prerequisite for the successful adoption of Directive 2000/78.

But as soon as we recognize that the outcome of EU disability discrimination legislation was contingent on the outcome of prior events, we are immediately faced with more unresolved puzzles. Why did the Member States agree to revise the Treaties to include Article 13? Why did they adopt Directive 2000/43? These too are questions to which scholars have dedicated significant attention without reaching a consensus. And so, the researcher is placed in a difficult position: extend the scope of the inquiry too wide, and one could easily lose track of the primary research question. Focus too narrowly on the ground of disability, and one runs the risk of missing the bigger picture. This chapter is designed with

[359] *See* Álvaro Oliveira, *What Difference Does EU Law Make? The Added Value of EU Equality Directives on Access to Justice for Collective Actors*, in Elise Muir et al. (eds.)
HOW EU LAW SHAPES OPPORTUNITIES FOR PRELIMINARY REFERENCES ON FUNDAMENTAL RIGHTS, 7 EUI Working Paper Law No. 2017/17 (2017) (tracing the expansion of equality legislation in the EU, both in terms of additional covered grounds and instruments to ensure compliance, such as the reversal of the burden of proof).

the hope of plotting a middle path: one that keeps disability as the main subject of inquiry, but allows the reader to not lose sight of the forest for the trees.

Section I provides a review of the EU's activities in the field of disability legislation prior to the adoption of Directive 2000/78. The aim is not to provide an exhaustive historical account of this period. This would not only be unnecessarily detailed, but also redundant, as several excellent works on this topic already exist.[360] My more modest objective is to show that the EU had been active in disability policy for several decades prior to the adoption of Directive 2000/78, but mainly in the form of financial support for conferences and non-binding declarations. Directive 2000/78, an instrument that provides a path for EU citizens to assert discrimination claims and recourse to an effective judicial remedy, represents a sharp departure from what came before it.[361]

Section II focuses on the most important events that led to the adoption of Directive 2000/78 during the late 1990s and early 2000s: the preparations for the 1996 Intergovernmental Conference, the revision of the Treaties to include Article 13, the Commission's proposals for secondary implementing legislation, and the adoption of Directives 2000/43 and 2000/78. Official EU institutional documents are primary materials for this Part.

Section III shifts to an analysis of scholarship that has attempted to identify the key factors that led to the adoption of anti-discrimination legislation at the EU level during the late 1990s and early 2000s. Drawing on previous legal and social science scholarship, I present several key factors that created an environment in which EU anti-discrimination legislation became possible. I do not take a position regarding which factors were most important in bringing about this unexpected result. Rather, I advance the position that several—mostly complementary—strands of scholarship have identified plausible explanations for the adoption anti-discrimination legislation, but that no mono-causal account is truly convincing. In short, there were many factors at play, some of which may have been necessary, but none appear to have been both necessary *and* sufficient.

In Section IV, we return to the main research question: how and why was *disability* included among the grounds protected by EU anti-disability discrimination legislation. My central argument is that disability activists were not as powerful or influential as activists for

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[360] *See e.g.,* Lisa Waddington, FROM ROME TO NICE IN A WHEELCHAIR, THE DEVELOPMENT OF A EUROPEAN DISABILITY POLICY (2006); R. Daniel Kelemen, EUROLEGALISM (2011).

[361] *See* Evelyn Ellis, *The Principle of Non-Discrimination in the Post-Nice Era*, in Anthony Arnull and Daniel Wincott (eds.) ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION, 291, 292 (2002) (hailing the anti-discrimination directives as "a huge new step" for the European Union).

other grounds, such as, most obviously, anti-racist NGOs. Nevertheless, the disability rights lobby was sufficiently strong to ride in the slipstream of more powerful actors who were pushing for anti-discrimination legislation on other grounds. At key moments, disability rights advocates pushed for the inclusion of disability in anti-discrimination legislation, and were instrumental in preventing disability rights from falling off of the EU agenda. In short, when we narrow our focus to the specific case of disability, NGO lobbying appears to be another necessary, but not sufficient factor, that contributed to the passage of EU disability rights legislation.

Section I: EU Disability Policy 1970-1990

Before the Amsterdam Treaty, the European Treaties did not contain a specific reference to disability. In the absence of an express treaty basis, the Community institutions opted to create non-binding community action programs, which were mainly designed to foster the exchange of information.[362] Binding, anti-disability discrimination legislation is a relatively new phenomenon—not just for the EU, but also for most of its Member States.

Directive 2000/78 has humble roots in the Community action programmes initiated in the 1970s. When the treaty establishing the European Economic Community (EEC) was signed by the original six Member States in 1957 in Rome, the project was clearly conceived as a tool to facilitate economic integration. To the extent that the social dimension entered the equation, the prevailing view held that "if enterprises were allowed to compete on equal terms, the distribution of resources would be optimized, enabling untrammeled economic growth which would automatically result in social development".[363] Hantrais explains: "Social harmonization was seen as an end product of economic integration rather than a prerequisite".[364]

Twelve of the EEC Treaty's 248 articles directly address social policy (Arts. 117-28). They owe their existence to a compromise that France and Germany struck during the negotiation of the Treaty. France raised concerns that the high social costs imposed by the French state, along with the principle of gender pay equality enshrined in the French Constitution, placed it at a competitive disadvantage in an integrated marketplace. Germany took the position that social charges were an issue best left to market forces, and therefore

[362] Lisa Waddington, FROM ROME TO NICE IN A WHEELCHAIR (2006) at 4.
[363] *See* Linda Hantrais, SOCIAL POLICY IN THE EUROPEAN UNION (2d Ed. 2000) at 1.
[364] *See id.*

should not be subject to regulation at the supranational level.[365] The end result was a treaty that included references to social policy, but provided scant details about how such policies should be carried out.[366] Member States established a European Social Fund to assist faltering areas of the economy, but was allocated a very small operating budget.[367]

In 1971, the Commission penned a document titled "Preliminary Guidelines for a Community Social Policy Programme",[368] in which it acknowledged that the EEC had viewed social policy as "primarily an essential adjunct to the move towards customs union and achievement of the more or less spontaneous economic integration which was to follow from it".[369] Now that the Community was clearly heading down the road of economic and monetary union, "social policy appears in a new light" and "The success of the whole process will be jeopardized if economic and monetary integration and social integration do not take place simultaneously".[370]

The Commission's *Preliminary Guidelines* dedicates a significant amount of space to exploring the rather limited instruments and resources that were available to achieve social policy goals. In a section titled "Integration of Handicapped Persons into Active Life", located on the last page of a 62-page document, the Commission left no doubt that it envisioned disability policy as an almost exclusively national affair:

> Most of the measures which can help in achieving this objective are no doubt a matter for the Member States. However, in view of the importance, extent and new aspect of this problem, the Commission considers that it should promote close collaboration between Member States in the matter, on the basis of Article 118 of the EEC Treaty.
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> In so far as a solution for the problem of finding employment for handicapped persons involves vocational training, the Community will give its help, particularly through the work of the Social Fund and especially in setting up pilot projects designed to avoid the repetition of costly experiments and to co-ordinate efforts to devise appropriate methods.[371]

The next milestone in the progression towards a European social policy took the form of a declaration by the heads of state and government of the enlarged Community following a meeting in October 1972 in Paris. Although the Declaration devotes most of its attention to other areas of mutual concern, it includes a section on social policy, which stated:

The Heads of State and Government emphasized that vigorous action the social

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[365] *See id.* at 2-3.
[366] *See id.* at 3.
[367] *See id.* at 1.
[368] Sec (71) 600, Supp. No. 2/71, Annex to the Bulletin of the European Communities No. 4-1971.
[369] *See id.* at 6-7.
[370] *See id*.
[371] *See id*. at 61-62.

> sphere is to them just as important as achieving Economic and Monetary Union. They consider it absolutely necessary to secure an increasing share by both sides of industry in the Community s economic and social decisions. They ask the Institutions after consulting both sides of industry to draw up an action programme before 1 January 1974 providing practical measures and the means for them, within the scope of the Social Fund, based on suggestions put forward by the Heads of Government and the Commission during the Conference.
>
> The programme must implement a coordinated policy for employment and vocational training, to improve working and living conditions, secure the collaboration of workers in the function of undertakings, facilitate according to the conditions in each country the conclusion of collective European agreements in appropriate areas and strengthen and coordinate action for protecting the consumer.[372]

In response to the Declaration's call to action, the Commission published "Guidelines for a Social Action Programme", which was designed to serve as basis for discussion at an upcoming tripartite meeting involving the Council and social partners.[373] As in *Preliminary Guidelines*, published two years earlier, the Commission's introductory statement provided a blunt assessment of the current state of affairs: "Considerable economic progress has been achieved since the setting up of the Community . . . But the Community's social policy has not achieved similar progress in recent years. In its opinion, "from now on both the whole approach and scale of action must be changed".[374] However, when the Commission turned to concrete policy proposals, the document's thunderous opening gives way to a far less strident voice. "It is not the Commission's aim to centralize the solutions of all the social problems of the Community. Nor would it wish to see introduced a single social policy tackling all social problems in the Community in a uniform manner". The Commission explicitly disavowed "the transfer to the Community of responsibilities and functions carried out more efficiently at other levels" (art. 10) and instead stressed the need for "[c]lose and continuous collaboration between national administrations and Community institutions. . . .".[375] With respect to individuals with disabilities, the Commission made only one recommendation: "the establishment of pilot centers and the promotion of pilot experiments in the training of instructors in the rehabilitation of handicapped workers".[376]

The consultations between the Community institutions culminated in a January 1974

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[372] *See* Meetings of the Heads of State or Government, The First Summit of the Enlarged Community, Bull. EC 10-1972 at 19.
[373] *See* Bulletin of the European Committees, Supp. 4/73 (19 April 1973).
[374] *See id.* at 5.
[375] *See id.* at 12.
[376] *See id.* at 9.

Council Resolution "concerning a social action programme",[377] which, as a measure designed to attain "full and better employment in the Community" called for the creation of "a programme for the vocational and social integration of handicapped persons, in particular making provisions for the promotion of pilot experiments for the purpose of rehabilitating them in vocational life, or where appropriate, of placing them in sheltered industries, and to undertake a comparative study of the legal provisions and the arrangements made for rehabilitation at national level".

In June 1974, the Council adopted its first disability-specific resolution "establishing the initial Community action programme for the vocational rehabilitation of handicapped persons".[378] The specific aim of the program was "to improve the opportunities for vocational rehabilitation available within the Community", defined as "guidance, training, employment and assistance during adjustment to the job". Though the goals of the action program was quite broad, the Resolution set forth a rather limited agenda: (1) the creation of a European network of rehabilitation centers "selected in order to encourage the development of, and exchange of information on, new ways and means for vocational rehabilitation and the training of persons capable of applying them", (2) "[s]hort-term projects aimed at improving the quality of vocational rehabilitation facilities currently in operation", which would be financed by the European Social Fund, (3) dissemination of information throughout the Member States regarding the results of the short-term projects. The resolution also calls for two additional activities to take place "concomitant" with the programme: "coordination of study and research and rehabilitation" and "information campaigns aimed at the general public, with a view to the social integration of handicapped persons".[379]

In October 1979, the Commission published its report to the Council on the community action programme from 1974 to 1979.[380] The Commission confirmed that it had, pursuant to the Council's instructions, set up the European Network of Rehabilitation Centres and some demonstration projects had been carried out.[381] According to the Commission, "by promoting these activities, the Community facilitated the implementation of national policies, sometimes to a considerable degree"—a claim that Waddington deems "rather excessive and [] not really supported by the Commission's Report".[382]

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[377] *See* OJ C 13, 21 January 1974)
[378] *See* Council Resolution of 27 June 1974. OJ No. C 80/30 9/7/94.
[379] *See generally*, Lisa Waddington, DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY at 99.
[380] *See* COM(79) 572 final, 26 October 1979.
[381] *See id.* at ¶¶ 21-22.
[382] *See* Lisa Waddington, DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY at 99.

In 1981, the Council adopted a resolution "on the Social Integration of Handicapped People", which, for the most part, replicated the 1974 Resolution. The Commission was invited to continue to develop its work in the areas identified in the 1974 Resolution: namely, supporting the development of the activities of rehabilitation centers, pilot projects, and pooling information and knowledge about best practices. The Member States were "invited to continue, and if possible intensify, their measures to promote the economic and social integration of handicapped people, in order to enable them to make a productive and creative contribution to society . . .".

Perhaps the clearest precursor to the disability-related provisions of Directive 2000/78 is the 1986 European Commission memorandum and draft Council recommendation concerning "The Employment of Disabled People in the European Community". [383] It merits special consideration, not because it was particularly successful or effective in advancing the rights of individuals with disabilities, but because it rather neatly encapsulates attitudes towards disability policy during this period and the conflicting views of the European institutions regarding the most promising way forward.

The Commission presented a memorandum in which it argued that under Articles 117 and 118 of the Treaty of Rome, the Member States had agreed that there was need to "'promote improved working conditions and an improved standard of living for workers'" and that the Commission had been assigned responsibility for "'promoting close co-operation between the Member States in the social field, particularly in matters relating to employment'".[384] The Commission also argued that it was clear that national rules on the employment of disabled people differed from Member State to Member State, which impeded the free movement of workers.[385] Accordingly it was "clear that the Community institutions may take action on questions concerning the employment of disabled people".[386] Nevertheless, the Commission did not consider it "appropriate" to propose measures that would lead to full harmonization.[387] The differences between the Member States not only in terms of national frameworks and social legislation, but also "cultural differences of approach

[383] *See* Memorandum of the Commission to the Council Concerning the Employment of Disabled People in the European Community (COM(86)(9) of 24 January 1986.
[384] *See id.* at ¶ 9.
[385] *See id.*
[386] *See id.*
[387] *See id.* at ¶ 10.

to disability and disabled people" were too great.[388] For the time being, the goal was to "strike a balance between effective common endeavor and unrealistic uniformity".[389]

To the displeasure of the Parliament and the Economic and Social Committee, the Commission proposed that the Council adopt not a directive, but a non-binding recommendation.[390] In fact, the Commission's legal service had advocated for a directive too, but Commissioner Ivor Richard sided with his political advisors, who expressed concerns that during a period of high employment, a draft directive on the employment of individuals with disabilities would face insurmountable hurdles. They predicted that a directive would never be adopted, adopted after a very long delay, or emerge from the legislative process in such a modified form that it would be practically useless.[391]

The first paragraph of the draft recommendation advises the Member States "[t]o take all appropriate measures to promote fair opportunities for disabled people in the field of employment and vocational training", and then goes on to describe, in fairly vague terms, how this should be achieved. Although the draft recommendation includes a call to ensure that "individuals who consider that the principle of fair opportunity has not been applied to them can bring the matter before the courts",[392] when read in context and in conjunction with the submissions of the other EU institutions, it becomes clear that this was not intended as a proposal to create a legally enforceable anti-discrimination regime.

Rather, the main focus of the document—and the principle point of contention—involved whether the Member States should introduce quota legislation; laws requiring businesses of a certain size to include disabled employees as part of their workforce.[393] A brief review of the legislative history of the section on quotas in the Recommendation gives a sense of the disagreement between the institutions: The Commission proposed "the fixing of realistic percentage targets" for employers with more than 20 employees.[394] The Parliament recommended increasing the size of the undertakings to 25, but specifying that at least 5% of the post available must be reserved for individuals with disabilities. It also recommended that

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[388] *See id.*
[389] *See id.*
[390] *See* Resolution of the European Parliament (O.J. No. C 148/95 of 16 June 1986) (¶ 5); Opinion of the Economic and Social Committee on the Draft Council Recommendation on the Employment of Disabled People in the European Community of 23 April 1986 (O.J. No. C 189/90 of 28 July 1986)
[391] *See* Patrick Daunt, MEETING DISABILITY: A EUROPEAN RESPONSE (1991) at 22. (observations based on Daunt's first-hand account as head of the European Commission's Bureau for Action in Favour of Disabled People.)
[392] Memorandum of the Commission to the Council Concerning the Employment of Disabled People in the European Community (COM(86)(9) of 24 January 1986, Draft Recommendation at ¶ 2(a)(iii).
[393] *See id.* at ¶ 2(b)(i)
[394] *See id.* at ¶ 2(b)(i)

a directive should be drawn up if, after two years, it became clear that Member States had not fulfilled this requirement. [395] The finalized version, adopted by the Council, reflects a far more flexible approach than Parliament wanted. Paragraph 2(b)(i) provides:

> bearing in mind differences in sectors and enterprises, the fixing by Member States, where appropriate and after consultation of disabled people's organization and both sides of industry, of realistic percentage targets for the employment of disabled people in public or private enterprises having a minimum number of employees; such a minimum might be set at between 15 and 50. Measures should also be adopted for making these targets public and achieving them.[396]

In 1988, the Council adopted a resolution titled "establishing a second Community action programme for disabled people (Helios)". Perhaps the most striking feature of the Resolution is its emphasis on Member State, rather than Community, activities. The preamble declares that "the main responsibility for social integration and independent way of life of handicapped people lies with the Member States" and that the Community action program is designed only to "complement action at the national level, in particular by ensuring coordination of these actions and exchanges of experience gleaned from them . . .".

To summarize the rather disparate set of events described above, the bottom line is that the rhetoric about the unjust conditions of individuals with disabilities did not translate into binding legislation, and there is little evidence to suggest that the lives of individuals with disabilities improved as a result of EU policies during this period. In fact, only one binding policy proposal was even attempted—a Commission proposed directive to improve transportation conditions for individuals with disabilities on health and safety grounds. The Council never adopted it.[397] Waddington provides the following frank assessment: "Whilst many of the disability specific initiatives adopted during this period were important to those organizations that received funding, their overall impact was minimal. This was especially true of the policy initiatives. Member States were reluctant to accept binding obligations at this time, and unwilling to comply with recommendations requiring concrete changes. Today, it is difficult to identify improvements originating in the European Community legal order during this period, which have benefited disabled people".[398]

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[395] *See* Resolution of the European Parliament (O.J. No. C 148/95 of 16 June 1986).
[396] *See* Council Recommendation of 24 July 1986 on the Employment of Disabled People in the European Community (O.J. No. L 225/43 of 12 August 1986)
[397] *See* European Commission, Proposal for a Council Directive on Minimum Requirements to Improve the Mobility and the Safe Transport to Work of Workers with Reduced Mobility, COM(90) 588 final, 28 February 1991. Commission proposal for a Council Directive on minimum requirements to improve the mobility and the safe transport to work of workers with reduced mobility (COM(90)588 final, 11 February) (OJ C 68/7 16.391), amended proposal (COM(91) 539 final) (OJ C 15/18 21.1.92).
[398] *See* Lisa Waddington, FROM ROME TO NICE IN A WHEELCHAIR (2006) at 11.

Section II: The 1990s: The Breakthrough Amsterdam Treaty

In retrospect, there is strong evidence that the 1990s represented a critical inflection point in the trajectory of EU anti-discrimination policy. During a roughly 10-year period, soft measures, guidelines, and non-controversial (and relatively costless) declarations gave way to concrete, judicially enforceable legislation. Prior to the 1997 Treaty of Amsterdam, the Community had express powers to take measures to combat national discrimination (Art. 12 EC (Art. 6), in the field of equal pay for men and women (Art. 141 (Art. 119) and social security.[399] Article 13 broadened the scope to include, *inter alia*, discrimination on the basis of disability. The Council finalized Directive 2000/43 in June 2000; and the Council adopted Directive 2000/78 in October 2000.

The groundwork for Article 13 can be traced at least as far back as a Commission green paper on social policy[400] that received over 500 reactions from the Member States, various European institutions, and members of civil society.[401] The ensuing 1994 Commission White Paper concluded:

> A number of contributions to the Green Paper - including the European Parliament, the Economic and Social Committee and the ETUC - called on the Commission to take further concrete action to combat discrimination on the grounds of race, religion, age and disability. While the Treaties as they stand do not provide any specific competence for legislation in this area, this is an omission that is becoming increasingly difficult to justify in today's Europe. The Union must act to provide a guarantee for all people against the fear of discrimination if it is to make a reality of free movement within the single market. In addition to its existing work in these areas. (see above and Chapter IV) the Commission therefore believes that, at the next opportunity to revise the Treaties serious consideration must be given to the introduction of specific reference to combatting discrimination on the grounds of race, religion, age and disability. With this in mind, the Commission will undertake further work aimed at demonstrating the value added of specific Union level actions in this field, as a natural complement to what can be achieved at national, regional or even local level.[402]

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[399] *See* Lisa Waddington, *Article 13 EC: Mere Rhetoric or a Harbinger of Change* 1 CYELS 175, 175-76 (1999); *see also* Mark Bell*, The New Article 13 EC Treaty: A Sound basis for European Anti-Discrimination Law?*, MAASTRICHT J. EUR. & COMP. L. 5, 5 (1999).

[400] *See* Commission, Green Paper—European Social Policy: Options for the Union COM(93) 551, 17 November 1993.

[401] *See* Commission, "White Paper—European Social Policy: A Way Forward for the Union", COM(94) 33 final, 27 July 1994 at 3.

[402] *See* Commission, "White Paper—European Social Policy: A Way Forward for the Union", COM(94) 33 final, 27 July 1994 at 39-40; *see also* Commission, "Reinforcing Political Union and Preparing for Enlargement", COM(96) 90 final, 28 February 1996 at 3 (recommending that the IGC incorporate a treaty revision "banning discrimination of any kind").

In its 1995 Report, the Reflection Group, which was tasked by the European Council with providing input in preparation for the 1996 ICG, noted that a majority of the Member States supported a "general clause prohibiting discrimination" on "gender, race, religion, disability, age, and sexual orientation", although one member opposed such legislation on the ground that "increased Community references in these sensitive areas were unnecessary, and that such rights were best secured in a national context".[403] Waddington and Bell agree that the holdout was almost undoubtedly the UK.[404]

In December 1996, the Dublin European Council agreed to draft version of the treaty, which included an anti-discrimination clause,[405] but there was some disagreement about which grounds should be covered. The Dutch government proposed excluding, *inter alia*, disability, but after the European Parliament and NGOs protested, the proposal was dropped.[406] The finalized text of Article 13 provides:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 13 of the Treaty of Amsterdam entered into force on 1 May 1999. Wasting little time, the Commission submitted a package of proposals to implement Article 13 on 25 November 1999. The package included two draft directives and separate proposal for an accompanying action programme to provide financial support to transnational activities to combat discrimination. The first draft proposal concerned a prohibition on racial and ethnic discrimination in employment and other areas of daily life.[407] The second directive called for a prohibition on discrimination in the area of *employment only* on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.[408] In its accompanying, the Commission justified the disparity in legal scope of the anti-discrimination measures between race/ethnicity and the other protected grounds on pragmatic terms. In the Commission's

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[403] *See Reflection Group's Report, Messina 2nd June 1995, Brussels 5th December 1995* at 47.
[404] *See* Mark Bell and Lisa Waddington, *The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article*, 25 INDUSTRIAL LAW JOURNAL 320-336. (1996).
[405] *See* Conference of the representatives of governments of the Member States, European Union Today and Tomorrow - adapting the European Union for the benefit of its peoples and preparing it for the future (1996), CONF/2500/96, 5.12.96.
[406] *See* Euroletter (e-mail edition) 'Dutch Presidency deletes non-discrimination based on age, disability and sexual orientation' (Press Release, Dutch Groenlinks) No. 49, April 1997.Cited in Mark Bell*, The New Article 13 EC Treaty: A Sound basis for European Anti-Discrimination Law?*,
[407] *See* COM(1999) 566 final.
[408] *See* COM(1999) 565 final.

view, there was a stronger political consensus among the governments of the Member States on race and ethnicity than the other grounds.[409]

Section III: The Drivers for Change

Up to this point, this chapter has, for the most part, consisted of a reconstruction of a series of events based on primary EU institutional documents, which led to the adoption of Article 13 of the Amsterdam Treaty and its two implementing directives (Directive 2000/43 and Directive 2000/78). These are, essentially, undisputed facts. However, the factors that led to this rather sudden sea change in EU policy are complex and highly contested. We now turn to scholarship that has attempted to explain the difficult question: why did a rights-based anti-discrimination regime emerge at the EU level during this period?

At the risk of oversimplification, one can discern two schools of thought on this question. The first casts non-governmental actors in the starring role—supplying both the intellectual resources and political pressure to push the Member States to shift competence in the anti-discrimination field to the EU level. The second school of thought, while not completely dismissive of the NGOs achievements, asserts that their contribution to the adoption of EU anti-discrimination legislation has been greatly exaggerated. This opposing school tends instead to emphasize a shift in the political will of the Member States. According to this more state-centric position, the anti-discrimination measures reflect a change in Member State preferences, which were driven by a confluence of unique and unprecedented foreign policy objectives and changes in Member State political leadership. The two schools are ideal-types; none of the scholarship discussed below fits entirely in one camp or another. But the distinction does (I submit) provide a useful cognitive map to understand the similarities and differences between scholars who have studied and published work on this issue.[410]

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[409] *See* COM (1999) 564 final.

[410] The schools of thought described here are roughly analogous to the opposing baseline theories of European integration theory, Liberal Intergovernmentalism and Neo-functionalism. Liberal Intergovernmentalism is an application of rational choice institutionalism to the EU context. It asserts that the process of integration is best understood as "a series of rational choices made by national leaders" operating under identifiable constraints. Accordingly, it usually sees Member State governments as the main drivers of integration. The main rival to Liberal Intergovernmentalism, Neo-functionalism, posits that EU integration pushes forward mainly because actors operating at the European level press for new or modified rules. Hence, neo-functionalists are more likely to highlight the role of players other than Member State governments in EU policymaking. On Liberal Intergovernmentalism, *see* Andrew Moravcsik and Frank Schimmelfennig, Liberal Intergovernmentalism, in EUROPEAN INTEGRATION THEORY 67-87 (2009). On Neo-Functionalism, see Wayne Sandholtz and Alec Stone

1. *Non-State Actors Explanations: Policy Paradigm Shifts and Strategic Frames*

For authors who stress the importance of non-state actors, the key player responsible for the adoption of EU anti-discrimination legislation was the Starting Line Group (SLG), a network of more than 250 pro-migrant NGOs that was formed in 1991 following a series of racist and xenophobic events across Europe.[411] The SLG was initially formed by the British Commission for Racial Equality, the Dutch National Bureau and Racism, and the Churches Commission for Migrants in Europe.[412] From its inception, the SLG decided that its main focus would be to promote legal measures to harmonize anti-racist legislation throughout the EU.[413] In 1993, it presented its first concrete proposal for a Council directive to eliminate racism, known as the *Starting Line*.[414] When the legal services of the European Commission concluded that the Treaties did not provide a proper legal basis for anti-discrimination legislation, the SLG shifted its focus to amending the EU Treaties provide it with the required basis. It issued a new proposal, known as *the Starting Point*, which became the basis for its campaign for the 1996 Intergovernmental Conference (IGC).[415] In June 1997, the Member States signed the Amsterdam Treaty, which contains Article 13, an anti-discrimination clause. In an article published shortly after its adoption, the Director of SLG provided a balanced assessment of both the successes and shortcomings of the NGOs' campaign: "Although the inclusion of this new Article 13 constituted an enormous step forward in the anti-racist battle, the clause is a product of compromise, the only possible way of making it acceptable to Member States of the Union. As such, it is general and does not specifically pertain to racial discrimination as advocated by the SLG, nor does it have direct effect, and it requires unanimity for the adoption of measures".[416]

Sweet. Neo-functionalism and supranational governance in THE OXFORD HANDBOOK OF THE EUROPEAN UNION (2012).

[411] *See* Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 EUR. J. MIGRATION & L. 111, 111 (1999); *see also* Isabelle Chopin et al., *Campaigning against Racism and Xenophobia: From a Legislative Perspective at European Level*, EUROPEAN NETWORK AGAINST RACISM (1999); Jan Niessen, *The Amsterdam Treaty and NGO Responses*, 2 EUR. J. MIGRATION & L. 203 (2000); Isabelle Chopin, *Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals*, 2 EUR. J. MIGRATION & L. 413 (2000).

[412] *See* Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 EUR. J. MIGRATION & L. 111, 111 (1999).

[413] *See id.*

[414] *See* Churches' Commission for Migrants in Europe et al., THE STARTING LINE, A PROPOSAL FOR A DRAFT COUNCIL DIRECTIVE CONCERNING THE ELIMINATION OF RACIAL DISCRIMINATION (April 1993)

[415] *See* Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 EUR. J. MIGRATION & L. 111, 115-16 (1999).

[416] *See id.* at 120.

Having secured an important, albeit partial victory, the SLG launched a new proposal for a directive based on Article 13 shortly after the Amsterdam Treaty was signed.[417] The New Starting Line proposal for a draft Council Directive recommended the adoption of a directive on the elimination of racial and religious discrimination in a broad range of activities.[418] Approximately one year later, the Commission presented its own proposal, which took a less ambitious position.[419] The differences between the New Starting Line proposal and the Commission proposal are discussed at length elsewhere.[420] Possibly the most important difference between the proposals is that the Starting Line proposal allowed for protection on the basis of racial, ethnic or religious origin, while the Commission proposal excluded religion as a protected ground.[421] Following a relatively short period of negotiations, on 29 June 2000, the Council of Ministers adopted Directive 2000/43 "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin".[422]

Geddes and Guiraudon view the passage of EU anti-discrimination legislation during this period as an "empirical puzzle" because they introduced a shift of competence to the EU level in an area that has long been characterized by contrasting national policy paradigms.[423] A policy paradigm is a heuristic concept that refers to the interpretative framework through which policymakers communicate. It is a device that is used not only to help define the goals of a policy, but also delineates the kinds of instruments that the policymaker believes are appropriate to achieve the stated objective.[424] Paradigms are by definition stable, self-

[417] *See* Isabelle Chopin and Jan Niessen, *Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union* (The Starting Line
Group and the British Commission for Racial Equality, 1998).
[418] *See* Isabelle Chopin, *Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals*, 2 EUR. J. MIGRATION & L. 413, 414-15 (2000).
[419] *See* Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, 25.11.1999, COM (1999) 565 final.
[420] *See* Isabelle Chopin, *Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals*, 2 EUR. J. MIGRATION & L. 413, 415-30 (2000).
[421] *See id.* at 417.
[422] *See* Council Directive 2000/43/EC of 29 June 20000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19/07/2000).
[423] *See* Andrew Geddes and Virginie Guiraudon, *The Emergence of a European Union Policy Paradigm amidst Contrasting National Models: Britain, France and EU Anti-discrimination Policy*, 27 WEST EUROPEAN POLITICS 334, 334 (2004).
[424] *See* Peter A. Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 23 COMPARATIVE POLITICS 275-296 (1993).

reproducing, and resistant to change.[425] And yet, during this period, an EU policy paradigm displaced contrasting national models.

In order to explain how the policy paradigm shifted seemingly rapidly in this field, they refer to the power of "frames", by which they mean a "schemata" employed by political actors who "seek to present a problem so that the solutions they propose prevail because they 'resonate' with the wider value and culture of their target audience".[426] National actors who have been socialized to conform to a national policy paradigm may be swayed to adopt a different frame at the EU level, "either because the frame is ambiguous enough to fit different situations – such as the EU-level fight against 'social exclusion'—or because they are able to redefine an issue through linkages to other policy areas—for instance measures necessary for successful single market integration".[427] At bottom, therefore, Geddes and Guiraudon's argument is that an effective frame can, under certain circumstances, become a rallying point to unify Member States, even when the frame challenges entrenched national policy paradigms. An effective frame contains an idea that 'travels well'—often precisely because it is vague and has different connotations in different national contexts.[428]

In Geddes and Guiraudon's account, the SLG played a central role in advancing EU anti-discrimination legislation at the EU level because it developed a frame that resonated with the Member States in spite of the non-existence of rights-based anti-discrimination legislation in most EU countries. They identify several characteristics of this frame that made it effective. First, those who campaigned for the extension of anti-discrimination legislation could point out that that such measures were entirely consistent with longstanding European policies to eliminate barriers to the smooth functioning of the single market. It stood to reasons that certain individuals would be hesitant to exercise their EU rights if it meant giving up strong anti-discrimination protections to move to a country with weaker ones.[429] Second, they could argue that the new anti-discrimination legislation was merely a "logical extension" of past policies by reference to a Treaty article prohibiting discrimination on the grounds of nationality and decades of European legislation and case-law on gender equality. Third, equal treatment provided an attractive way to express concern for the "social

[425] *See* Andrew Geddes and Virginie Guiraudon, *The Emergence of a European Union Policy Paradigm amidst Contrasting National Models: Britain, France and EU Anti-discrimination Policy*, 27 WEST EUROPEAN POLITICS 334, 334 (2004).
[426] *See id.* at 335.
[427] *See id.*
[428] *See id.* at 336-37.
[429] *See id.* at 342.

dimension" EU membership. And finally, the SLG's lawyer-activist approach provided the EU institutions with an expert interlocutor with a concrete, focused policy agenda.[430]

Evans Case and Givens find additional support for the view that SLG played a central role in the adoption of anti-discrimination legislation in their analysis of the content of Directive 2000/43. In their view, while the SLG did not achieve all its objectives, it "was the key actor advocating for a directive that would dramatically liberalize national and European legal opportunity structures". They conclude that, "national politicians were not the most important advocates for a racial equality directive, nor were they the proponents of key measures". On the contrary, "representatives at the European Council's negotiations were largely responding to proposals that had been significantly influenced by the SLG and other European institutions.[431]

Evans Case and Givens argue that legal opportunity structures have three main dimensions and can be classified along a liberal-conservative continuum.[432] Liberal opportunity structures provide legal rules and resources that encourage strategic litigation as a means of influencing policymaking.[433] Conservative legal structures, by contrast, are designed to impede strategic litigation.[434] The first dimension of a legal opportunity refers to its "legal stock": the degree to which the legal system provides "justiciable legal rights, particularly where they are constitutionally entrenched, definitions of discrimination that do not create high evidentiary burdens; and rules that shift to the burden of proof to a respondent once the complainant has established a prima facie case".[435]The second dimension involves the rules that govern access to the courts.[436] Here, Evans Case and Givens refer to how difficult it is to establishing standing, both for individual complainants and interest groups, in the jurisdiction.[437] The third and final dimension of a legal opportunity structure is available resources.[438] Legal advocacy can be expensive, and individuals from historically disadvantaged groups tend to lack the financial means to sustain a long-term litigation

[430] *See id*.
[431] *See* Rhonda Evans Case and Terri E. Givens, *Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive*, 48 JOURNAL OF COMMON MARKET STUDIES 221, 226 (2010).
[432] *See id.* at 223.
[433] *See id.*
[434] *See id.*
[435] *See id.*
[436] *See id.* at 224.
[437] *See id.*
[438] *See id.*

campaign.[439] In such situations, legal systems that provide organizations and funding to engage in strategic litigation are more likely to do so.[440]

Evans Case and Givens point to three components of Directive 2000/43 that have liberalized the EU's legal opportunity structure. First, it explicitly addresses the question of standing. Article 7 requires Members states to "ensure that associations, organizations, or other legal entities" that have "a legitimate interest ensuring that the provisions of the Directive are complied with, may engage in . . . any judicial and/or administrative procedures provided for the enforcement of obligations" under Directive 2000/43. (Art. 7.2). Second, Directive 2000/43 obliges Members States to establish equality bodies for the promotion of equal treatment. (Art. 13). Third, Directive 2000/43 offers the opportunity to generate litigation before the CJEU through the preliminary reference procedure or may pose a question to the CJEU pursuant to Article 234 of the EC Treaty.[441]

Evans Case and Givens argue that the liberalization of opportunity structures described above was the result of a deliberate strategy carried out by "transnational interests, [i.e. the SLG,] as opposed to national governments" that were able to "exploit European institutions as a source of financial, bureaucratic and political support" to achieve its goals.[442] The finalized draft does not go as far as the SLP drafts, or those proposed by the European Commission or European Parliament. Nevertheless, it "provides a new, more elaborate standard that may be used to liberalize their national opportunity structures".[443]

In sum, non-state actor explanations for the adoption of anti-discrimination legislation during the late 1990s and early 2000s stress the importance of NGOs, particularly the SLP, in pushing the Member State to take action during this time period. NGOs provided EU institutions with a conceptual framework that was sufficiently attractive to bridge deeply entrenched national policy paradigms. They also provided Member States with drafts for a new directive that, while not identical to what the Council of Ministers ultimately adopted, strongly influenced the content of the final product. Of critical importance, the final legislation contains language involving the standing of non-governmental associations and the establishment of equality bodies, which have the potential to strengthen enforcement mechanisms and liberalize national opportunity structures.

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[439] *See id.*
[440] *See id.*
[441] *See id.* at 228.
[442] *See id.* at 229.
[443] *See id.* at 228.

2. *State-Centered Explanations: New Political Climate Leads to New State Preferences*

Whereas authors such as Geddes and Guiraudon and Evans Case and Givens see the SLP as the driving force behind EU anti-discrimination legislation, others place a stronger emphasis on the role of the Member States and exceptional political considerations. There are several arguments in support of a more "state-centered" explanation for the adoption of EU anti-discrimination legislation.

High symbolic value for Member States in troubling times. Racism entered the EU policy debate during the period 1985-1990, but the Council consistently blocked all efforts to adopt binding anti-racism legislation.[444] Bell argues that there was no genuine interest in developing such measures, but rather than endorse this politically awkward stance, the Council took refuge in the position that the Treaties did not provide a legal basis for anti-racist legislation. "In this way, the question of competence became a kind of filtering mechanism, a device keep off the agenda issues the Council did not wish to address".[445] Had the political will existed, there was nothing to prevent the Member States from amending the Treaties in the Single European Act or the 1993 Treaty on European Union, but no action was taken.[446] So what changed?

Ellis' work on this subject may come closest to exemplifying the views of the "state-centered" school of thought. Her article, published in 2002, makes no reference to NGOs whatsoever. In her view, the "catalyst" for Article 13 "was undoubtedly a general fear about racism within the EU".[447] There were two issues in particular that pushed anti-discrimination to the top of the agenda. The first was the impending expansion of the European Union to includes countries from Central and Eastern Europe, which many policymakers believed "posed serious problems in relation to racial, ethnic, and religious tolerance, especially as far as the Roma were concerned".[448] The Commission and the Member States were in

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[444] *See* Mark Bell, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION, 62-63 (2002).
[445] *See id.* at 63.
[446] *See id.*
[447] *See* Evelyn Ellis, *The Principle of Non-Discrimination in the Post-Nice Era* in ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 291, 293 (2002).
[448] The European Commission's initial draft proposal for a directive on race discrimination makes the same point, albeit a bit more diplomatically. *See* Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(1999)566 final (26 April 2000) OJ C 116E ("Finally, the Directive will provide a solid basis for the enlargement of the European Union, which must be founded on the full and effective respect of human rights. The process of enlargement will bring into the EU new and different cultures and ethnic minorities. To avoid social strains in both existing and new Member States and to create a common Community of respect and tolerance for racial and ethnic diversity, it is essential to put in place a common European framework for the fight against racism.")

agreement that it was critical that anti-discrimination legislation became part of the *acquis communautaire* before the aspiring entrants became full members.

Although there was a consensus that some sort of action should be taken, in the period leading up to the adoption of Article 13, there was no agreement on the breadth of prohibited grounds that should be addressed other than race and religion. Ellis argues that the expansion of protection to include disability, age, and sexual orientation is mainly the result of the influence of a state actor—the Irish Presidency in the latter half of 1996.[449]

A second concern kept anti-discrimination on the EU agenda—a growing threat from within the EU itself. Ellis (and others) have pointed to the entry of Joerg Haider's right-wing Freedom Party into a coalition Austrian government in February 2000. The Member States responded by imposing diplomatic bilateral sanctions on Austria, and the Portuguese Presidency fast-tracked the Commission's proposed Racial Equality Directive. Because the Portuguese Presidency wanted to complete the directive before the end of its term in June 2000, it reportedly gave Parliament a useful bargaining chip in negotiations with the Council. In exchange for a quick delivery of its opinion, the Council agreed to several amendments that strengthened the directive. According to Bell, "The resulting mechanism also pressured individual Member States to be more flexible in their negotiating positions—with presumably no state wishing to be regarded as blocking new laws combatting racism".[450]

Leadership changes in large Member States leads to changes in policy preferences. Another strand of state-centered explanations sees the changing composition of Member State governments as crucially important to reaching the unanimity required to adopt anti-discrimination legislation. In the mid-1990s, the British conservative government opposed EU Treaty-based anti-discrimination measures, arguing that these were objectives were more effectively addressed at the national level. In 1997, a new center-left government came to power that was eager to demonstrate a stronger commitment to European integration. EU anti-discrimination legislation was a fairly costless way of doing this, as the measures that were being proposed at the EU level were broadly similar to those that already existed in the UK at the domestic level.[451] A newly elected center-left government also came to power in

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[449] *See* Evelyn Ellis, *The Principle of Non-Discrimination in the Post-Nice Era* in ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 291, 294 (2002) (noting that Ireland had the "most sophisticated provisions in the Community" on anti-discrimination at the time).

[450] *See* Mark Bell, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION, 63 (2002); see also Erica Howard, *The EU Race Directive: Its Symbolic Value - Its Only Value?,* 6 INT'L J. DISCRIMINATION & L. 141 (2004); Baroness Blackstone, HANSARD, HL (series 5) vol. 614, col. 1233 (30 June 2000).

[451] *See* Andrew Geddes and Virginie Guiraudon, *The Emergence of a European Union Policy Paradigm amidst Contrasting National Models: Britain, France and EU Anti-discrimination Policy*, 27 WEST EUROPEAN POLITICS 334, 343 (2004).

France in 1997. The government viewed EU anti-discrimination measures as an important part of its domestic agenda, and largely consistent with longstanding pre-existing legislation prohibiting gender-based discrimination.[452]

The devil is in the details. Adam Tyson, a European Commission official who was present during the Member State negotiations over the drafting of Directive 2000/43, also implicitly rejects overemphasizing the importance of the role that SLP and other NGOs played. He recounts a hard-fought battle between national governments over key components of the legislation.[453] His description is not one of a passive Council of Ministers merely reacting to the proposals of NGOs and other EU institutions (as Case Evans and Givens argue), but rather one in which national governments, while committed to the creation of EU anti-racist legislation, held strong opinions about its content that they were willing to forcefully defend. He describes considerable disagreement and concern about fundamental questions, including the definition of discrimination and the material scope of the directive.[454]

Section IV: Why was disability included in EU anti-discrimination legislation?

The passage of EU anti-racist legislation did not, of course, guarantee that the Council of Ministers would act to protect other historically disadvantaged groups, but it certainly seems plausible that it made such legislation much more likely. When I asked an EU official familiar with the drafting of Directive 2000/78 why it came about, the official responded—with a shrug of the shoulders—"*café para todos"*: coffee for everyone. In the EU official's view, at the time, there was strong support for anti-discrimination legislation on the grounds of race, and it would have been too politically awkward not to do *something* for other historically disadvantaged groups. The official was also quick to point out that Directive 2000/78 covered employment only and did not require the establishment of a Member State equality body, and as such was considerably less ambitious in scope than Directive 2000/43. Indeed, as we shall see below, from the beginning, the European Commission advocated for two separate directives. They were intended not only to cover different grounds, but also to differ in scope.

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[452] *See id.*
[453] *See* Adam Tyson, *The Negotiation of the European Community Directive on Racial Discrimination*, 3 EUR. J. MIGRATION & L. 199 (2001)
[454] *See id.*

But even if we assume (as I will for the remainder of this chapter) that Directive 2000/78 was viewed by most Member States as a relatively low-cost, politically expedient document, and that it owes its existence primarily to the strong political will to take action in the field of anti-racism, it was still not a foregone conclusion that the Member States would agree to include disability discrimination as a ground in Directive 2000/78. Indeed, we know that at least one point (the Dutch Presidency) it was dropped from the anti-discrimination provision that later became Article 13 of the Treaty of Amsterdam.

This part contains two main sub-sections. In the first section, I review the publicly available EU institutional documents on the drafting process that concluded in the adoption of Directive 2000/78. In the second sub-section, I argue that in the years leading up to the Treaty of Amsterdam, the Disability NGO community reached a level of organization and strength that, while not comparable to the SLG, was sufficiently influential to keep disability discrimination on the agenda of EU policymakers. The concluding section provides some reflections on the kinds of information and types of research that would lead to more robust findings about the factors that shifted competence for disability rights legislation to the EU.

The Birth of Directive 2000/78

Following the entry into force of the Treaty of Amsterdam, the European Commission published three documents: two proposals for anti-discrimination directives and a "communication on certain Community measures to combat discrimination".[455] The Commission Communication explained that through its adoption of Article 13, the Member States recognized that it was necessary to take action at the EU-level to combat discrimination. However, anti-discrimination was not an area of exclusive competence and therefore the Community should only act if—and only to the extent that—the Article 13 objectives could not be adequately achieved by the Member States, and the Community, for reasons related to scale or effects, were better placed to carry out the objectives.[456] With regard to subsidiarity, the Commission Communication noted that most Member States had provisions in their constitutional or legal orders that outlawed discrimination, but the scope

[455] *See* Communication from the Commission on certain Community measures to combat discrimination, COM(1999) 564 final (25 November 1999) (hereinafter "Commission Communication"); Proposal for a Council Directive establish a general framework for equal treatment in employment and occupation, COM(1999)565 final (27 June 2000), OJ C 177E; Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(1999)566 final (26 April 2000) OJ C 116E.
[456] *See* Commission Communication at 10.

and enforceability of those laws varied considerably across the Member States. The draft directives would provide a set of principles on equal treatment that would be applicable throughout the EU. With regard to proportionality, the Commission Communication made clear that the directive should be sufficiently "flexible in implantation and to avoid interfering with the good practices which already exist in some Member States".[457] The proposals were intentionally confined to "a limited number of requirements based on a number of general principles, allowing Member States considerable discretion in how they choose to implement them".[458]

The Commission's explanatory memorandum on its proposed directive on equal treatment and occupation stated that one out of ten EU citizens had a disability, and that official estimates suggested that individuals with disabilities were far more likely to be unemployed, and to remain unemployed, than the rest of the working population.[459] It referred to an earlier Commission document that set out a new Community strategy on equal opportunities for people with disabilities[460] that expressed support for the shift from a "welfare approach" to a "rights-based approach" to disability policy: "A core element of the new approach is the elimination of . . . discrimination primarily through the reasonable accommodation of the needs and abilities of disabled people".[461] Elsewhere in the same document, the explanatory memorandum states that:

> Essentially, the concept [of reasonable accommodation] stems from the realisation that the achievement of equal treatment can only become a reality where some reasonable allowance is made for disability in order to enable the abilities of the individual concerned to be put to work. It does not create any obligations with respect to individuals who, even with reasonable accommodation, cannot perform the essential functions of any given job. The obligation is limited in two respects. First, it only pertains to what is reasonable. Secondly, it is limited if it would give rise to undue hardship.[462]

The Communication explained that the first proposal was designed to combat discrimination in the labor market on all grounds cited in Article 13 except for gender discrimination, which had a separate legal basis that went back to the 1970s.[463] The second proposal was designed to combat discrimination on grounds of racial and ethnic origin. The

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[457] *See id.*
[458] *See id.*
[459] *See* COM(1999)565 final at 3.
[460] *See* COM(1999)565 final at 4, citing Communication of the Commission on Equal Opportunity for People with Disabilities, COM(96) 406 final.
[461] *See* COM(1999)565 final at 4.
[462] *See* COM(1999)565 final at 9.
[463] *See* Commission Communication at 8.

second directive covered discrimination, including, but also going beyond, the labor market to including access to the supply of goods and services[464] and called for the creation of independent bodies to promote equal treatment.[465] The reason for the distinction between race and ethnic origin and the other grounds was avowedly pragmatic. The Commission wanted to take advantage of the "strong political will which exists to take action to combat as many aspects as possible of racial discrimination".[466] This decision was subsequently criticized in reports published by other EU institutions[467] and in scholarly commentary,[468] but remained substantially unchanged in the finalized versions of the directives.

The directives were adopted according to the Article 289 of the Treaty on the Functioning of the European Union (TFEU) consultation procedure, which is an exception to the "ordinary procedure" defined in 294 TFEU. Under the consultation procedure, the Council is required to consider the opinion of the Parliament, and in certain cases, specialized committees, such as the European Economic Social Committee and the Committee of the Regions, but the Council is not bound by the Parliament's or committees' positions.[469]

The Committee of the Regions adopted its opinion on the directives on 12 April 2000 and [470] the Economic and Social Committee adopted its opinion on 25 May 2000,[471] both of which were relatively brief. On 21 September 2000, the European Parliament's Committee on Employment and Social Affairs delivered a much more detailed assessment of the

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[464] *See* COM(1999)566 final, art. 3 (material scope).
[465] *See* COM(1999)566 final, art. 12 (independent bodies).
[466] *See* Commission Communication at 8.
[467] *See* Opinion of the Committee of the Regions on: the Communication from the Commission on certain Community measures to combat discrimination, the Proposal for a Council Directive establish a general framework for equal treatment in employment and occupation, the Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and the Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006, OJ C 226 (8 August 2000) at paras. 1.15 and 1.19 (Hereinafter "COR Report"); *see also* Opinion of the Economic and Social Committee on: the 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination', the 'Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation', the 'Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin', and the 'Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006', OJ C 204 (18 June 2000) at ¶ 2.3 (hereinafter "Economic and Social Committee Report") (recognizing and supporting "the pragmatic approach taken by the Commission in its decision" due to the "political momentum that exists" but requesting that the Commission propose future legislation to extend protections "modelled on the principles proposed against discrimination racial or ethnic grounds").
[468] For academic commentary, *see* Lisa Waddington and Mark Bell, *More Equal than Others: Distinguishing European Union Equality Directives*, 38 COMMON MARKET L. REV. 587 (2001); *see also* Leo Flynn, *The Implications of Article 13 EC-After Amsterdam, Will Some Forms of Discrimination Be More Equal than Others*, 36 COMMON MARKET L. REV. 1127 (1999).
[469] For a brief overview of the consultation procedure, see the EUR-Lex glossary of summaries: "Consultation Procedure", available at https://eur-lex.europa.eu/summary/glossary/consultation_procedure.html.
[470] *See* COR Report, *supra*.
[471] *See* Economic and Social Committee Report, *supra*.

directives.[472] The document includes the separate opinions of the Committee on Citizens' Freedom and Rights, Justice and Home Affairs; Committee on Legal Affairs and the Internal Market, and Committee on Women's Rights and Equal Opportunities. Parliament proposed several amendments to the Commission's texts. These included an obligation to expand the scope of the directive to include at least all areas of life included in the Race Equality Directive within three years of the adoption of the Framework Directive,[473] the creation of independent equal treatment bodies similar to those proposed in the Race Equality Directive,[474] and an expansion of the directive to make clear that the term "employment" encompassed unpaid and voluntary work.[475]

The Parliament also dedicated a significant amount of attention to the terms "reasonable accommodation" and "undue hardship". The initial Commission proposal provided the following language:

> In order to guarantee compliance with the principle of equal treatment for persons with disabilities, reasonable accommodation shall be provided, where needed, to enable such persons to have access to, participate in, or advance in employment, unless this requirement creates an undue hardship.[476]

Parliament proposed a much more detailed description of these terms:

> In order to guarantee compliance with the principle of equal treatment for persons with disabilities, in all areas of the material scope of this directive as defined by Article 3, reasonable adjustment shall be made, unless this requirement creates an undue hardship.
>
> The term "reasonable adjustment" can be defined as providing or modifying devices, services or facilities, or changing practices or procedures including among other things, training and provision of personal support or assistance, in order for a disabled person to be able to participate under equal conditions in a service, programme, activity or employment.
>
> Undue hardship shall involve more than the nominal cost for the provider but shall be deemed to exist where the employer's general economic situation is such that he cannot reasonably be expected to make adjustments to cater for disabled persons in view of the costs involved. Particular account shall be taken of the size and turnover of the undertaking and of the possibility of obtaining government financial assistance in this context.[477]

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[472] *See* Report of the Committee on Employment and Social Affairs of 21 September 2000 on the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation (A5-0264/2000).
[473] *See id.* at Amendment 19.
[474] *See id.* at Amendment 52.
[475] *See id.* at Amendment 29.
[476] *See* COM(1999)565 final at art. 2.4
[477] *See* Report of the Committee on Employment and Social Affairs at Amendment 25.

The Commission published an amended proposal on 12 October 2000.[478] The amended proposal rejected the Parliament's amendments to set a three-year deadline to expand the scope of the directive to cover all areas included in the Race Equality Directive and its proposed amendment to create independent equality bodies similar to those envisioned in the Race Equality Directive. However, it did accept the Parliament's proposal to include "unpaid or voluntary work" as part of the material scope of the directive.[479] The Commission's proposal provided a slightly revised description of its original article regarding the meanings of "reasonable accommodation" and "undue hardship". It reads:

> In order to guarantee compliance with the principle of equal treatment for persons with disabilities, reasonable adjustment shall be made. This means that the employer shall take measures appropriate to the needs of a given situation in order to enable such persons to have access to, participate in, or advance in employment, or to have access to training, unless this requirement creates a disproportionate burden.[480]

On 29 June 2000 and 27 November 2000, the Council adopted, respectively, directives 2000/43 and 2000/78.[481] Interestingly, the finalized version of the Framework Directive provides a stand-alone article (Article 5) on "reasonable accommodation for disabled persons" that provides clearer and more progressive protections for individuals with disabilities than the Commission's Amended Proposal. 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 concerned.

However, in the other areas described above, Directive 2000/78 takes a more restrictive approach. Directive 2000/78 does not mention the creation of independent equality bodies to monitor the Member State implementation of Directive 2000/78, nor does it make any reference to expanding the scope of the directive to match the Race Equality Directive. In fact, the Council opted to narrow the material scope of the directive more than

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[478] *See* Amended proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty), COM(2000) 652 final, OJ C 62E (27 February 2001) [Hereinafter, "Amended Commission Proposal"]
[479] *See* Amended Commission Proposal at Art. 3(a).
[480] *See* Amended Commission Proposal at Art. 2(4).
[481] *See* Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

the Commission's Amended Proposal. The Commission's Amended Proposal accepted Parliament's amendment to expand the material scope to include "unpaid or voluntary work", but this language was dropped in the finalized text.[482]

The Birth of a Transnational European Disability Rights Movement

In 1993, the Council adopted Helios II, which instructed the Commission to "ascertain the views of a European disability forum", consisting of, *inter alia*, NGOs and representatives of employers' organizations "on all aspects of Helios II". (Art. 9). In practice, this created the foundation for a transnational disability NGO, the European Disability Forum (EDF). This sub-section focuses primarily on the activities of the EDF, not because it was the only important actor disability rights actor during this time period, but because it produced an institutional publication titled, *Guide to the Amsterdam Treaty*,[483] which provides the most complete publicly available description of the campaign activities of disability NGOs in the lead-up to the Treaty of Amsterdam.

To the best of my knowledge, the reasons why disability was included among the protected grounds in the Treaty of Amsterdam has not yet been the subject of sustained scholarly analysis. Nor is this the most auspicious time to study this question. On the one hand, it is still too early to consult most of the European Institutions' archival materials, which adhere to a 30-year rule.[484] On the other hand, my requests to interview experts with first-hand knowledge of these events were frequently met with the response that "that was a long time ago" and that their memories had faded. When I visited the EDF and requested to review the archive of newsletters that it sent to its members to keep them apprised of developments during the drafting of the Treaty of Amsterdam, I was informed that the organization had recently thrown away all of their documents from that time period.

The EDF describes its work on the Treaty of Amsterdam as its "greatest achievement" to date and "the first time that strategic, collective campaign work has taken place involving all EDF members over a sustained period". The *Guide* credits the earlier EC action programmes, in particular HELIOS I and II, as laying the groundwork for the creation of the

[482] In *X v Mid Sussex Citizens Advice Bureau and others [2012] UKSC 59, the UK Supreme Court* upheld a lower court's decision that a volunteer without a contract had no protection under Directive 2000/78.

[483] European Disability Forum, GUIDE TO THE AMSTERDAM TREATY (1998).

[484] *See* Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, *Official Journal L 043, 15/02/1983 at 1-3.*

EDF and a national disability umbrella structure, which gradually became more politicized and focused on a "human rights/equal opportunities approach to recognition of disabled people as full citizens", including an explicit reference to disability and non-discrimination in the EU Treaties. According to the *Guide*, the first decisive initiative at the European level was a meeting between the EDF and Carlos Westendorp, Chair of the Reflection Group. The Reflection Group had been set up under the Spanish Presidency (July – December 1995) to provide advice for an upcoming intergovernmental conference to revise the EU treaties. The Reflection Group recommended that Treaties should be amended to include a general non-discrimination clause on the grounds of, among others, disability, and specific provision on disability in a subsequent chapter.

During the following year (1996), the EDF published the "Invisible Citizens" report, which examined the current status of the Treaties from a legal disability perspective. The report explained in concrete terms the discrimination that individuals with disabilities faced on a daily basis and provided detailed proposals for Treaty amendments. The European Parliament and the European Commission also published their final reports regarding prospective changes to the Treaties in 1996. Both European institutions supported a specific reference in the Treaty to non-discrimination on the ground of disability. Under the Irish Presidency (July – December 1996), Gay Mitchell, the Irish Minister for European Affairs, met with EDF members and expressed a strong commitment to including a reference to disability in the revised Treaties.

Under the Dutch Presidency (January – July 1997), reference to disability was dropped from the Irish draft text. Eager to avoid a significant setback, Dutch NGOs and EDF representatives pushed hard for a meeting with Michiel Patijn, Dutch minister for foreign affairs, which they secured in April 1997. During this period, several MEPs also spoke out in support of (re-)including a reference to disability in the Treaties. It is matter of public record that discrimination on the ground of disability was included in the final draft of Directive 2000/78, but it is not a matter of public record how or why Directive 2000/78 includes a reference to disability as a protected ground.

However, we do know from the public record that Member States were required to transpose Directive 2000/78 into national law by 2 December 2003,[485] with the option to

[485] The 2 December 2003 deadline was extended for new EU Members. For example, Bulgaria and Romania were not required to transpose the Directive until 1 January 2007. *See* Communication from the Commission to the Council, the European Parliament, The European Economic and social Committee and the Committee of Regions, *The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for*

extend the transition of the age and disability provisions by three years, provided that the Member States "report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation".[486] The longer transition times for the age and disability provisions was justified on the basis that these grounds were "particularly difficult to transpose into national law primarily because of the potential impact on the labour market".[487]

A 2014 European Commission joint report on Directives 2000/43 and 2000/78[488] states that all 28 Member States had transposed the Directives. It noted that 25 infringement proceedings due to non-conformity with both directives had been launched against 25 Member States. In one case, an infringement proceeding against Italy, the CJEU found that the Member State had breached its obligation to implement Directive 2000/78 by failing to implement disability-related provision on reasonable accommodation.[489] The report states that Belgium, Estonia, Cyprus, Latvia, Lithuania, Hungary, Poland, and Slovakia also had initial difficulties with the "reasonable accommodation" requirement imposed by Directive 2000/78.[490] The Commission attributed the problems with transposing the directives to "the novelty of the two Directives at the time. Typical problems concerned the definitions of direct and indirect discrimination, harassment, victimisation, legal standing of interested organisations, limitations to the scope and too extensive interpretation of the derogations which are permitted under the Directives".[491]

Conclusion

There is no simple, mono-causal explanation for the Member States' willingness to shift competence for disability discrimination legislation to the EU. In fact, until the 1990s, one could have safely predicted that the EU would continue to steer clear of any binding

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equal treatment in employment and occupation, Brussels, 19.6.2008 SEC(2008) 524, {COM(2008)225 final/2} at 2.

[486] *See* Directive 2000/78, art. 18.

[487] *See* Commission Staff Working Paper, *Implementation of the age and disability discrimination provisions of Directive 2000/78 of 27 November establishing a general framework for equal treatment in employment and occupation*, Brussels, 28.9.2005 SEC(2005) 1176 at 5.

[488] *See* Report from the Commission to the European Parliament and the Council, *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')* Brussels, 17.1.2014, COM(2014) 2 final, SWD(2014) 5 final.

[489] *See* Case C-312-/11, *Commission v Italy* (4 July 2013).

[490] *See* COM(2014) 2 final at fn. 84.

[491] *See* COM(2014) 2 final at 3.

commitments in the field of disability discrimination legislation. So what changed? Undoubtedly, European disability rights advocates benefited from a politically favorable climate. The impetus for anti-racist legislation centered on concerns about the eastward expansion of the EU and the motivation to make a strong symbolic statement after Jörg Haider far-right Freedom Party became part of Austria's governing coalition. In this endeavor, they were assisted by a particularly effective and sophisticated NGO community. Though the subject still requires further research, the available evidence indicates that disability rights advocates did not exercise the same level of influence that the anti-racist NGOs achieved. Nevertheless, mainly by channeling their efforts through the EDF, they were sufficiently effective to keep disability rights on the agenda.

Prospects for Future Research

Although the history of how and why disability was included in Article 13 of the Treaty of Amsterdam and Directive 2000/78 still remains to be written, research on other grounds included in the same legal instruments provide promising starting points for future research. For example, in Martijn Mos' *Of Gay Rights and Christmas Ornaments*, Mos seeks to explain why, "in the absence of active support within the Council of Ministers and even though few Member States had established it as a protected ground prior to the intergovernmental conference",[492] sexual orientation was included as a protected ground in the Amsterdam Treaty. In a statement that would apply with similar force with respect to disability, he states: "Evidently, Article 13 directly contravened the legislative status quo of most Member States. But how did national governments come to adopt an anti-discrimination clause for which there was, by and large, no domestic precedent?"[493] Mos concludes that the European Parliament and advocacy groups worked together to win over an ambivalent Council of Ministers.[494] At the risk of oversimplifying his thesis, Mos argues that the Council of Ministers was particularly vulnerable to strategic lobbying during the Amsterdam treaty negotiations because it faced agenda overload. There was simply too much in flux to keep track of every issue, and even Member States that were not openly supportive of including sexual orientation in the Treaty were "wary of incurring reputational damage by

[492] *See* Martijn Mos, *Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-discrimination in the Treaty of Amsterdam*, *52* JOURNAL OF COMMON MARKET STUDIES 632, 632 (quoting the article's abstract) (2014).
[493] *See id.* at 633.
[494] *See id.* at 634.

raising objections".[495] Mos builds the foundation of his thesis on a series of interviews with activists, European institution officials, and national officials who were involved directly in treaty negotiations.[496]

David Paternotte is another scholar who has examined the role of sexual orientation lobbying during the Treaty of Amsterdam. But in Paternotte's account, the primary factor is the "NGOization" of ILGA-Europe, the lesbian, gay, bisexual, and transgender umbrella organization in Brussels, which "was established in 1996 to represent European LGBT organizations at the European Union, the Council of Europe, and the Organization for Security and Cooperation in Europe".[497] Patternotte stresses how "international organizational dynamics and movement identities"[498]—in this specific case, the evolution of ILGA-Europe into a sophisticated and increasingly professionalized lobbying organization—resulted in better access to decision-makers and an improved capacity to achieve its goals. Patternotte draws on semi-structured interviews with European activists and archival research to support his argument.[499]

In addition to providing a richer historical account of the Treaty of Amsterdam negotiations, which they achieve mainly through interviews and archival research, one of the most striking aspects of Mos and Patternotte's accounts is the near-absence of the role of anti-racist lobbying. Rather than focusing on how *The Starting Line Group* paved the way for other protected groups, as suggested in most of the disability rights literature, Mos and Patternotte depict the inclusion of sexual orientation in the Treaty of Amsterdam as largely the product of strategic alliances (Mos) and internal organizational dynamics (Patternotte). These are not stories of "riding in the wake" of a movement with stronger political backing. Quite the opposite. These are histories of activists and their allies in European institutions pushing hard against status quo defenders.

With an eye to further research on disability rights, regardless of the accuracy of Mos and Patternotte's accounts, they point to a number of potential explanatory factors that are worthy of exploration. To what extent did disability rights activists establish regular contacts with European Institution officials? How has the EDF's self-identification changed over time? Has it, as Pattenotte suggests in the case of ILGA-Europe, become a more sophisticated

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[495] *See id.*
[496] *See id., passim.*
[497] *See* David Paternotte, *The NGOization of LGBT Activism: ILGA-Europe and the Treaty of Amsterdam*, 15 SOCIAL MOVEMENT STUDIES 388, 389 (2016).
[498] *See id.*
[499] *See id.* at 391.

and professionalized lobbying organization? Investigating the answers to these and related questions may lead us to a fuller understanding of how and why disability rights is now an EU competence.

Chapter 5: Disability Rights in the UK

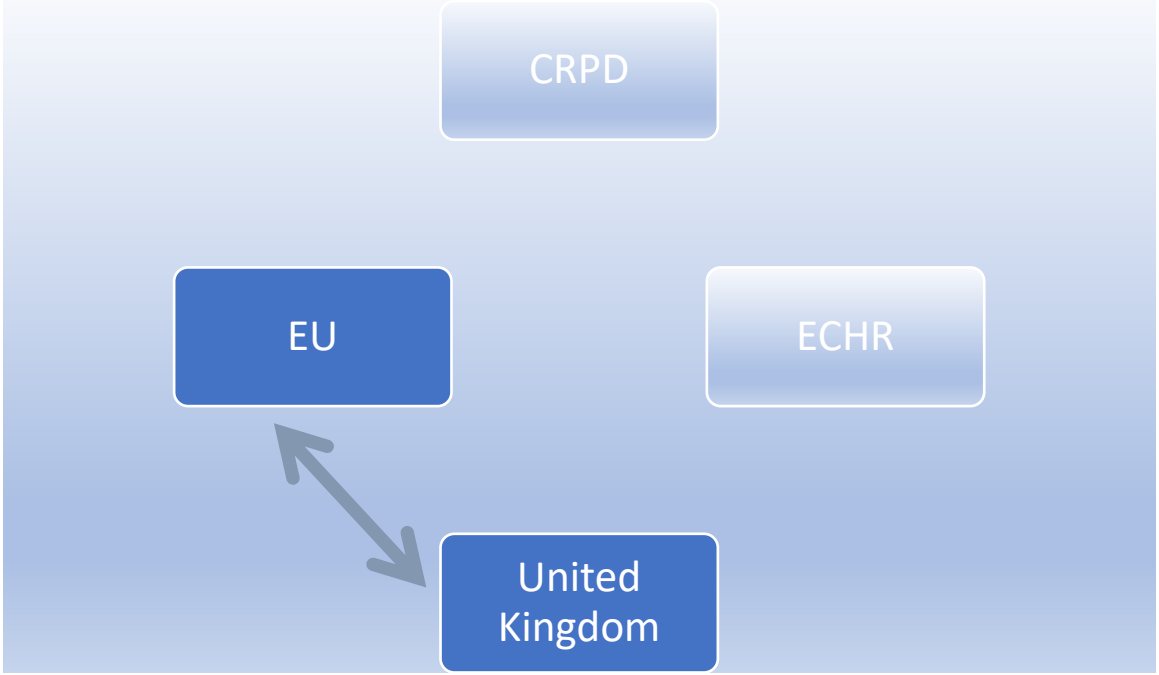
The UK is the only case study in this PhD dissertation that had disability rights legislation in place long before Directive 2000/78 was transposed into national law. The Disability Discrimination Act (DDA) became law in 1995, and the scope of disability rights has subsequently been amended and expanded over the years. Had one attempted to foresee in 2000 which EU Member State would be least affected by Directive 2000/78, the UK, which had decades of experience interpreting disability rights laws, would have been a promising candidate. This leads us to the chapter's central research questions: Did the introduction of Directive 2000/78 make any difference in the UK? And if so, why and how?

The short answer is "yes". Public interest lawyers seized on some nuanced differences between national and EU law to expand the scope of disability rights law in Europe and the UK. To answer the "why" and "how" questions, we engage in an in-depth analysis of *Coleman v. Attridge Law*. The *Coleman* litigation produced a large number of lengthy domestic court decisions, both before and after the reference to the CJEU. These domestic court decisions provide us with an usually rich body of information which can be used to obtain a clear picture of the national context in which the litigation took place. The present author supplemented his analysis of the public record with a series of in-depth semi-structured interviews with the *Coleman* legal team in 2016.

When we place the *Coleman* litigation in a broader context, we can see that after four decades of EU membership, UK courts and tribunals have developed sophisticated means of interpreting domestic law to resolve potential conflicts with EU law. In the public interest sphere, this has translated into opportunities for legal entrepreneurs to push for the expansion of UK anti-discrimination legislation, *Coleman* provides a recent and illuminating example of the means by which UK legal entrepreneurs have seized the opportunities provided by the preliminary reference procedure to press for an expansion of the scope of UK anti-discrimination law, but it is important to stress that this is but one example of the many significant contributions that the UK has made to the corpus of EU equality law via the preliminary reference procedure.[500]

[500] For more detailed examinations of the UK contribution to EU anti-discrimination law, see Robert Wintemute, *Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?* 27 KING'S LAW JOURNAL 387-397 (2016): For an illuminating assessment from a labor law perspective, *see* Michael Ford, *The Impact of Brexit on UK Labour Law*, 32 INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 473-495 (2016).

Diagram of Relationship Examined in Chapter 5



Sharon Coleman worked as a legal secretary in the London law firm, Attridge Law. In 2002, she gave birth to a son who experienced apnoeic attacks and congenital laryngomalacia and bronchomalacia. His condition required specialized care and Ms. Coleman was her son's primary caregiver.[501] Ms. Coleman alleged that when she returned from maternity leave, her employer gave her a different job, described her as "lazy" when she requested time off to care for her son, and that she suffered "abusive and insulting comments . . . about both her and her child."[502] After months of frustration with her working conditions, Ms. Coleman resigned. She was outraged at the way she had been treated and wanted to take legal action.

In a critical first step, Ms. Coleman obtained pro bono legal counsel: Lucy McLynn, a solicitor and partner at Bates, Wells & Braithwaite who frequently litigated cases before UK employment and appeal tribunals.[503] In an interview with the present author, McLynn explained that she met Ms. Coleman through a former client who had suffered discrimination in the workplace. McLynn initially agreed to meet with Ms. Coleman for the limited purpose of advising her about her rights, since Ms. Coleman could not afford legal representation. Ms. Coleman recounted what McLynn described as "an absolutely terrible situation", but felt

[501] *See id.* at ¶¶ 19-20.
[502] *See id.* at ¶ 26.
[503] *See* Ann Stewart et al., *Disability Discrimination by Association: A Case of the Double Yes?*, 20 *Social & Legal Studies* 173, 178 (2011).

obliged to deliver the bad news that UK law probably did not cover people in her situation. The issue, in a nutshell, was this: Ms. Coleman did not claim that she had a disability. Rather, she alleged that she suffered discrimination because of her association with her disabled son. UK courts had never ruled that a non-disabled person had the right to bring a discrimination lawsuit solely on the basis of her *association* with a disabled person.

At the time, the UK's anti-discrimination legislation had evolved into a complex patchwork of laws that provided a variety of approaches to discrimination on the basis of association: the Equal Pay Act 1970; the Sex Discrimination Act 1975; the Race Relations Act 1976; the Disability Discrimination Act 1995; the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Age) Regulations 2006; and the Equality Act (Sexual Orientation) Regulations 2007.[504]

None of the legislation specifically identified discrimination by association as a head of claim.[505] The only existing UK case-law on discrimination by association involved claims of race-based discrimination. The Race Relations Act 1976 s 1(1) (a) prohibited less favorable treatment "on racial grounds", which did not—on a strict statutory interpretation—confine the scope of the law exclusively to the applicant. And, in fact, UK courts consistently held that association with an individual who belonged to a protected racial group was sufficient to invoke the statute if the claim asserted direct discrimination and/or instructions to discriminate.[506]

The same "on the ground of" formulation in the Race Relations Act 1976 was reproduced in the corresponding legislation on sexual orientation and religion or belief. That is, the Employment Equality (Religion or Belief) Regulations 2003 s 3 (1)(a) prohibited discrimination "on grounds of religion or belief" and the Employment Equality (Sexual Orientation) Regulations 2003 s 3 (1)(a) prohibited discrimination on "grounds of sexual orientation".

The DDA, by contrast, did not use the term "on grounds of disability", but rather stated that it was "unlawful for an employer to discriminate against a disabled person". Ms. Coleman's legal team understood and did not deny that the Race Relations Act 1976 and the

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[504] *See* Green Paper 2007, *Discrimination Law Review – A Framework for Fairness: Proposals for Single Equality Bill for Great Britain* (London: Communities and Local Government Publications) at 31.
[505] *See* Simon Honeyball, *Discrimination by Association*, 4 WEB JOURNAL OF CURRENT LEGAL ISSUES 5 (2007).
[506] The most frequently cited cases, listed in chronological order, are: *Race Relations Board v. Applin* [1975] AC 259 *Zarczynska v. Levy* [1979] ICR 184; *Wilson v. T B Steelwork Co. Ltd* (Case No.23662/77); *Showboat Entertainment Centre Ltd. v. Owen* [1984] ICR 6; *Weathersfield Ltd v. Sargent* [1999] ICR 425; *Carter v. Ahsan* [2004] UKEAT/0907/03/(2)/DM; *Redfearn v. Serco Ltd* [2006] IRLR 623.

DDA used different words to explain what kinds of acts were prohibited, and that a literal reading of the DDA suggested that the law protected the person with a disability *only* and not somebody associated with a disabled person.

Indeed, there is a clear record of UK governments carefully considering—and rejecting—recommendations to extend the DDA to cover associational discrimination on the basis of disability. The exclusion of associational disability discrimination from the DDA was not an oversight; it was a deliberate government policy—a policy UK governments defended for many years. When the UK government created a Joint Parliamentary Committee to study a draft bill which eventually became the DDA 2005, it included a discussion of whether the Act should be amended to protect persons associated with persons with disabilities. The Joint Committee's analysis of the issue notes that there was a difference of opinion between the UK Disability Rights Commission (DRC) and the Government on this matter. The DRC, along with the Discrimination Law Association, the Royal College of Nurses, the Equality Commission for Northern Ireland, the Commission for Racial Equality, and the National Aids Trust, argued in favor of an explicit ban on associational disability discrimination. The Joint Committee recommended that the DDA should be amended to prohibit associational disability discrimination,[507] but the UK Government rejected it:

> The DDA is unique because it does not generally prohibit discrimination against non-disabled people. Indeed, it actively requires positive action to be taken to ensure a disabled person has equality of access or outcome. This contrasts with the approach taken in other anti-discrimination legislation . . . extending the Act to cover people who associate with disabled people or people who are perceived to be disabled would fundamentally alter the approach taken in the DDA.[508]

A UK government Green Paper published while Ms. Coleman's case was pending before the CJEU in June 2007 included a section on "Where perception and association should be protected",[509] which provided the government's position on associational discrimination for every ground enumerated in Directive 2000/78, and expressed a preference for, essentially, the status quo. In the areas of race, religion or sexual orientation, the government acknowledged that UK legislation covered associational discrimination, and took the position that this should not change. In the area of disability discrimination, however,

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[507] *See* Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, Twenty-Sixth Report of Session 2008-09, HL Paper 169, HC 736 (12 November 2009) at ¶ 86.
[508] *Cited in* Karon Monaghan, EQUALITY LAW, 66 (2007).
[509] *See* Green Paper 2007, *Discrimination Law Review – A Framework for Fairness: Proposals for Single Equality Bill for Great Britain* (London: Communities and Local Government Publications) at 38.

> the current British legislation takes a narrower approach, limiting protection against discrimination to the actual person who is disabled. Extending protection to people who are perceived to be disabled, but are not disabled, or who associate with disabled people, would potentially extend coverage of the disability legislation to several million extra people who are not themselves disabled. This in turn would significantly extend the responsibilities of those with duties under the legislation. We are not persuaded that this is a proportionate approach, and do not currently propose a change in the law.[510]

The paper trail does not leave much room for speculation. The UK government clearly understood that some anti-discrimination laws recognized associational discrimination while others did not, and it articulated reasons why this should be so. To put it bluntly, the UK government was concerned that extending the law to include associational discrimination in areas such as disability and age had the potential to be extremely expensive for employers.

As luck would have it, Ms. Coleman's solicitor, Lucy McLynn was intimately familiar with the discrepancy between the scope of coverage under the DDA compared to other UK anti-discrimination statutes. She had attended a conference earlier that year where a member of the UK Disability Rights Commission (DRC) had given a lecture on precisely this issue. The DRC explained that it wanted to find a test case that could be used to clarify the law and potentially expand the scope of the DDA's protections. McLynn remembered the lecture well, and had been thinking about the issue of associative discrimination for several months before Ms. Coleman walked through her door. Once Ms. Coleman began to explain her situation, McLynn identified the legal issue immediately. She explained: "Literally from the first meeting, I was thinking, this could be a test case. It wasn't one of those cases that evolves over time, and you think, how did we end up with a test case? It really was quite deliberately done from day one."

McLynn investigated Ms. Coleman's case a bit further, and then wrote to the DRC, informing it that she had come across what she believed to be a good test case to challenge the status of associative discrimination under the DDA. About 10 days before the statute of limitations was set to toll, the DRC responded, thanking McLynn for her referral, but declining to take Ms. Coleman's case. After she recovered from her disappointment, McLynn resolved to represent Ms. Coleman pro bono: "I felt bad for Sharon and felt I needed to do

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[510] *See id.* The UK government's opposition to extending the law to include associational discrimination was not limited to disability. With regard to sex discrimination, the Green Paper states: "We cannot see any practical benefit in extending the law" to include associational discrimination. Regarding age discrimination, the Green Paper concludes: Extending the definition to include association could potentially bring in parents, carers, teachers, dependants and many others, taking the legislation far beyond its intended scope. We therefore do not propose any extension to association." *See id.* at 38-39.

something to help her. And she's such a passionate, brilliant woman. I should fight in her corner for a bit, and even we can't get anywhere, let me at least show her that I support her."

With just over a week to spare, McLynn started to work on Ms. Coleman's claim to the employment tribunal—the document which sets forth the alleged facts and formally initiates legal proceedings. As McLynn was well aware, she was in the unusual position of alleging a legal violation (associational discrimination) that UK courts had never recognized as a cognizable claim under the DDA—and she had to draft the document under strict time constraints. She recalled that she "delivered it by hand on the last day to the tribunal because I was too nervous to send it electronically … I remember physically walking over to the tribunal and getting a receipt and thinking, yes, it's lodged. It's definitely in. There can't be any question" about meeting the statute of limitations.

On 7 November 2005, the parties held a case management discussion. They agreed to list the case for a pre-hearing review, in the presiding judge's words: "to consider the question whether the Claimant is entitled to bring a claim of unlawful disability discrimination against the Respondents based on the concept of associated discrimination on account of the alleged disability of the Claimant's son."[511]

On 17 February 2006, Ms. Coleman's case came before Mary Stacey, who was serving at that time as a judge for the London (South) Employment Tribunal, for a pre-hearing review. Ms. Coleman's legal team asked Chairman Stacey to rule that the DDA be re-written to imply the words "all persons associated with a disabled person" at the relevant points in the disability statute in recognition that Ms. Coleman had a cognizable claim against her former employer. Alternatively, if Judge Stacey "considered that to be too bold a step to take unaided", the team requested that the Tribunal refer the question to the CJEU for a preliminary ruling.[512]

Counsel for Attridge Law countered that the DDA was perfectly clear on this point of law. It did not recognize disability-based associative discrimination as a cause of action. Furthermore, even if the Tribunal assumed that the EU Directive 2000/78 covered associative discrimination, it was "simply not possible to interpret the DDA consistently with the Directive", in which case, the appropriate remedy would be a lawsuit against the UK

[511] *See Miss S Coleman v Attridge Law, Mr Steve Law*, 2006 WL 8077242 (Employment Tribunal) at ¶ 4. [Hereinafter "*Coleman* (Employment Tribunal)"
[512] *Coleman* (Employment Tribunal) at ¶ 18.

Government for improperly transposing Directive 2000/78—what is known as a "Francovich claim"—rather than a request for a preliminary ruling from the CJEU.[513]

Judge Stacey reframed the question as "whether the relevant provisions of the DDA are *acte claire* and their meaning beyond any doubt, and capable of no other reading but that protection from the forms of disability discrimination relied on extend only to disabled persons, and not to the wider category of carers of disabled people to cover discrimination by association, or if there is doubt and ambiguity in the matter such as to require a reference to the European Court of Justice for guidance as to how to interpret the statute by reference to the parent directive the DDA purportedly implements."[514]

Citing to EU case law, Judge Stacey affirmed that when national courts apply the provisions of a national law that are intended to implement an EU directive, they are required to interpret the national provisions, as far as possible, in a manner that achieves an outcome consistent with the directive's purpose. In order to achieve this objective, "words cannot be deleted [from a national statute], but words can be implied to ensure compliance.[515]

Ultimately, Chairman Stacey concluded that a reference to the CJEU was the appropriate course of action.

> It is quite clear to me that on a literal interpretation, associative discrimination is not covered by the DDA. However, nor do I consider it to be totally *acte claire* that on a purposive construction with appropriate interpolations, sections 3A, 3B and 4 of the DDA are incapable of sustaining such an interpretation. It would be possible to imply words to achieve the purpose of the Directive contended by [counsel for Ms. Coleman] as they have indeed shown in their suggested interpolations. It would be too bold a move for me to do so, without the guidance of the Court of Justice of the European Union, but it is just such a matter that is apt for a reference. This is so most especially given the importance of the issue and the extent of the legal and academic debate on the subject.[516]

Judge Stacey's decision to refer the case to the CJEU for a preliminary ruling has been described in the academic literature as "a bold act for an employment tribunal"[517] While there is no question that UK Employment Tribunals have the power to make a reference to the CJEU, the power is discretionary, and at least one UK Employment Appeal Tribunal judge has gone on record as observing that the power is "sparingly used at that level;

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[513] *See Coleman* (Employment Tribunal) at ¶ 19.
[514] *See Coleman* (Employment Tribunal) at ¶ 6.
[515] *See Coleman* (Employment Tribunal) at ¶ 18.
[516] *See Coleman* (Employment Tribunal) at ¶ 29.
[517] *See* Ann Stewart et al., *Disability Discrimination by Association: A Case of the Double Yes?*, 20 *Social & Legal Studies* 173, 178 (2011).

normally it is left to the higher Courts for a reference to be made".[518] In an interview with the author, McLynn confessed that she too was surprised at the outcome: "I didn't think they were going to secure a reference at that point. I thought we might have to go a bit further up through the appeal courts to get a reference. But we had a very bright, able judge at the tribunal who immediately saw the issue and thought that it was really important and was willing to make the reference."

Judge Stacey's uncommon ruling resulted in some unusual responses. The defendant, Attridge Law, appealed Judge Stacey's decision to refer the case to the CJEU for a preliminary ruling to the UK Employment Appeal Tribunal (EAT). For the first time in the history of UK employment law, a party appealed a decision of a chairman of an employment tribunal to refer a question to the CJEU.[519] It is also noteworthy that the UK government department responsible for implementing the DDA, the Department for Work and Pensions, made a last- minute—and ultimately unsuccessful—effort to intervene in the case. EAT Judge Peter Clark, who presided over the appeal, reports in his judgment that counsel for Attridge Law broadly agreed with the UK Department's position, but counsel for Ms. Coleman objected to the UK Department's submission on procedural grounds because the Department had failed to make an application to be joined as a party to the case. Judge Clark found in favor of Ms. Coleman on this point and did not consider the UK Department's submission.[520]

In his decision, EAT Judge Peter Clark framed the question that he was bound to answer as: "whether in referring the question identified in this case [Judge Stacey] has failed to exercise her discretion judicially or has erred in principle".[521] Covering much of the same ground that Judge Stacey had already traversed, Judge Clark decided that there were two separate questions at issue: (1) whether Directive 2000/78 was *acte claire*, such that no referral to the CJEU was necessary and (2) assuming that it was not *acte claire*, whether the DDA could be read purposively in a way that accorded with EU law.[522] He concluded that Judge Stacey had not erred in finding that the Directive was not *acte claire* and that words could be interpolated into the DDA to cover associative discrimination. Rejecting Attridge Law's argument that there was simply no way to interpolate words into the DDA without

[518] *See Attridge Law (A Firm) v Coleman*, 2006 WL 3880344, No. UKEAT/0417/06/DM (2006) at ¶ 11 [Hereinafter, "*Coleman*, Employment Appeal Tribunal I"].
[519] *See Coleman*, Employment Appeal Tribunal I at ¶ 1.
[520] *See Coleman*, Employment Appeal Tribunal I at ¶ 10.
[521] *See Coleman*, Employment Appeal Tribunal I at ¶ 11.
[522] *See Coleman*, Employment Appeal Tribunal I at ¶ 16.

violating basic principles of legal construction, Judge Clark found that "ultimately the precise form of words [that could be interpolated] will depend upon the proper interpretation of the Directive. That is the very question which the Chairman has referred to Europe."[523]

In the concluding paragraphs of his judgment, Judge Clark addresses a procedural issue that, while seemingly technical, had great strategic significance in the eyes of the parties. Judge Stacey had not only made the unusual step of referring the case to the CJEU for a preliminary ruling, she had also asked the CJEU to assume that all of the facts that Ms. Coleman alleged in her complaint were true. This turned the preliminary reference into something akin to a "strike-out case",[524] a procedure whereby the defense argues that the even if all of the facts alleged in the complaint are coherent and true, the case fails because the facts "do not disclose any legally recognisable claim against the defendant".[525] Counsel for Attridge Law requested that the Tribunal defer the decision whether to make a reference to the CJEU until the domestic court had made its own determination regarding the true facts of the case. Judge Clark concluded "whilst normally it is preferable that a case is referred after all of the facts have been found by the domestic Court, I see no bar . . . for the matter to be referred on assumed facts".[526] It was within Chairman Stacey's sound discretion to conclude that in this matter, it was necessary first to obtain the opinion of the CJEU on the issue of associative discrimination before she could proceed further.[527]

How did Ms. Coleman's legal team succeed in obtaining a preliminary reference? Several factors that are rarely discussed in standard texts on preliminary rulings appear to have been relevant.

First, counsel for Ms. Coleman were intimately familiar with the relevant national law (DDA), EU law (Directive 2000/78), and the ambiguous state of UK law on associational discrimination. Ms. Coleman's legal team was able to spot the unresolved legal question at the crux of Ms. Coleman's case early on, and quickly developed a strategy to use the Employment Tribunal pre-hearing review procedure to press for a preliminary ruling as early as possible. The team's early assessment of the strengths and weaknesses of Ms. Coleman's case led to careful planning and a legal strategy that resulted in several tactical advantages.

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[523] *See Coleman*, Employment Appeal Tribunal I at ¶ 19.
[524] *See Coleman*, Employment Appeal Tribunal I at ¶ 24.
[525] *See* UK Ministry of Justice*, Practice Direction 3A—Striking Out A Statement of Case,* available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/pd_part03a
[526] *See Coleman*, Employment Appeal Tribunal I at ¶ 24.
[527] *See Coleman*, Employment Appeal Tribunal I at ¶ 24.

First, the legal team accurately anticipated that Ms. Coleman's case against Attridge Law would be in serious jeopardy if Chairman Stacey determined that it was impossible to interpret the DDA in a manner that achieved Directive 2000/78's purpose. Although the legal team conceded that a literal interpretation of the DDA did not cover associative discrimination, it also provided Chairman Stacey with concrete, specific suggestions about how the national court could purposively construct the statute to comply with the directive—suggestions that Chairman Stacey evidently found convincing. Had Chairman Stacey found otherwise, Ms. Coleman's only form of recourse would have been a *Francovich* claim—a slower and more expensive judicial process that the legal team wanted to avoid at all costs.[528]

Second, the legal team deliberately and explicitly narrowed the scope of the legal question it sought to resolve. It did not make the argument that the duty of reasonable adjustments should be extended to individuals who are not disabled. It did not, for example, allege that Ms. Coleman has been unlawfully discriminated against because it failed to provide her with more flexible working hours to care for her son. Instead, the legal team limited its argument to direct discrimination in the form of harassment. This was for two reasons. First, Article 5 of Directive 2000/78, which covers the concept of reasonable accommodation, was drafted in such a way that it would be more difficult to argue that it applied to individuals other than the disabled person. Article 1 prohibits discrimination "on the grounds of" disability, but Article 5 explicitly refers to reasonable accommodation as an obligation to "*enable a person with a disability* to have access to, participate in, or advance in employment". (emphasis added). Second, the legal team anticipated that opponents to their argument would complain than associative discrimination would be too expensive to implement. By deliberately excluding the argument that associative discrimination included a duty to make a reasonable accommodation, Ms. Coleman's legal team took the wind out of their opponents' sails.

Indeed, this tactic proved highly relevant. Much of Attridge Law's attempt to convince the Tribunal that Directive 2000/78 did not include an associative discrimination mandate relied mainly on the reasonable adjustment duties described in Articles 5 and (2)(2)(b) and paragraphs 8, 16, and 20 of the preamble of the Directive. Since Ms. Coleman's legal team made no claim about reasonable adjustments, the Tribunal dismissed Attridge Law's argument as completely irrelevant.[529]

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[528] Interview with Barrister for Ms. Coleman, Paul Michell, 30 November 2016.
[529] *See Coleman*, Employment Appeal Tribunal at ¶ 24.

Third, the legal team planned for—and succeeded in—its efforts to convince the Tribunal to make a preliminary reference before Ms. Coleman's case had been heard on the merits. This resulted in at least three tactical advantages for Ms. Coleman. First, the facts alleged by Ms. Coleman, if true, pointed to genuinely outrageous conduct by Attridge Law. It certainly did no harm to Ms. Coleman's chances of success that the preliminary reference explicitly asked that the CJEU reach a decision based on the assumption that all of Ms. Coleman allegations were true. Second, an early preliminary reference was also a much safer path for Ms. Coleman. Had the case gone forward on the merits, there was always the risk that the finder of fact would determine that Ms. Coleman had failed to meet her burden of proof. For instance, if Ms. Coleman failed to show that she had been harassed by her former employer, her case could have been dismissed on those grounds alone, rendering a preliminary reference to the CJEU unnecessary. Third, it appears that the UK Government had difficulties keeping up with the pace of litigation and lost control of the process. It tried—and failed—to intervene in the appeal before Judge Clark and had to resort to opposing Ms. Coleman before the CJEU.

Finally, while certainly not dispostive, the legal team was pitching its argument to a DDA expert.[530] Prior to being called to the bench, Chairman Stacey was a senior employment law partner at Thompsons, where she co-authored a nuts-and bolts primer on disability discrimination law titled *Challenging Disability Discrimination at Work*. In the words of the authors: "The aim of this publication is to explain the scope of the employment provisions of the DDA in light of the developing case law. To analyse how the law can be used by union officials and activists in the workplace to protect their disabled members and, if necessary, through Tribunal proceedings. In general, the Act is under-utilised by applicants and their representatives and only partially understood and adhered to by employers."[531] The book was published by the Institute for Employment Rights—an organization that self-identifies on its website as "A think tank for the labour movement."[532] *Challenging Disability Discrimination at Work* does not directly address the issue of associational discrimination, but it consistently argues that the DDA's definition of disability should be expanded to cover more employment situations, that the burden of proof for plaintiffs should be relaxed, and

[530] Interview with Paul Michell, 30 November 2016. Michell pointed out that Judge Stacey had a record of ruling *against* expanding the scope of Directive 2000/78 and *against* a referral to the CJEU in *X v. Mid Sussex CAB*, 2013, IRLR 146.
[531] *See* Mary Stacey and Andrew Short, CHALLENGING DISABILITY DISCRIMINATION AT WORK. Institute of Employment Rights, 3-4 (2000).
[532] http://www.ier.org.uk/publications/challenging-disability-discrimination-work

that the UK Government should introduce "a positive duty to promote equalization of opportunities for disabled people in employment, at least in the public sector, both as employer and by using its purchasing power to promote compliance with equality legislation among contractors and supplies to the public sector".[533]

AG Maduro framed the London Employment Tribunal's preliminary reference as a request to clarify whether an employee who is treated less favorably, not because she is disabled, but because she has an association with an individual with a disability, is covered under the Directive.[534] AG Maduro advised the Court that, in his opinion, it did. He stressed that the stated purpose of Article 1 of Directive 2000/78 was to lay down a general framework to combat discrimination *on the grounds of* religion or belief, age, disability, or sexual orientation,[535] which effectively perform an exclusionary function. It prohibits employers from relying on enumerated "suspect classifications" to treat one employee less favorably than another.[536] For AG Maduro, it was not necessary for Ms. Coleman to show that she had been treated less favorably because of her disability. It was sufficient to show that she had been mistreated *because of* 'disability':[537] "what is important is that that [sic] disability—in this case the disability of Ms. Coleman's son—was used as a reason to treat her less well."[538]

The CJEU adopted a similar logic and reached a similar conclusion. Referring, as AG Maduro did, to the fact that Article 1 of Directive 2000/78 uses the language *on the grounds of*, the Court concluded that the principle of equal treatment applied not to particular category of person, but to the specifically enumerated 'grounds' provided in Article 1.[539] The Court therefore held that: "Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.[540]

On 30 September 2008, the case returned to Judge Stacey for a crucial aspect of Ms. Coleman's case. In a judgement issued on 26 November 2008, Judge Stacey concluded that

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[533] *See* CHALLENGING DISABILITY DISCRIMINATION AT WORK at 67-69.
[534] *See* Opinion of AG in *Coleman v Attridge Law* (C-303/06) at ¶ 1.
[535] *See* Opinion of AG in *Coleman v Attridge Law* (C-303/06) at ¶ 15 (emphasis in original).
[536] *See* Opinion of AG in *Coleman v Attridge Law* (C-303/06) at ¶¶ 7, 18.
[537] *See* Opinion of AG in *Coleman v Attridge Law* (C-303/06) at ¶ 23.
[538] *See* Opinion of AG in *Coleman v Attridge Law* (C-303/06) at ¶ 23.
[539] *See Coleman v Attridge Law* (C-303/06) at ¶ 38, 51.
[540] *See Coleman v Attridge Law* (C-303/06) at ¶ 51.

her task was to interpret the DDA in a way that conformed with the effect of Directive 2000/78, as elaborated upon by the CJEU, by inserting words if necessary, unless the domestic statute contained "an express and unambiguous indication to the contrary."[541] Judge Stacey held that the DDA *could* be interpreted in such a way as to include associative discrimination as a matter of domestic law, and therefore, concluded that the Employment Tribunal had jurisdiction to hear Ms. Coleman's case.[542] This decision was appealed to the UK Employment Appeal Tribunal, overseen by Justice Underhill, who handed down his judgment on 30 October 2009.

This is a rather complex question of law, which may be more accessible if we begin with an analysis of the objections that the defendant raised in its appeal to Judge Stacey's ruling. First, the defendant argued that it was not possible to extend the DDA to achieve conformity with EU law because it "would involve a departure from a fundamental feature of the legislation". The obvious conclusion from a plain reading of the DDA was that it covered only individuals with disabilities, and not individuals associated with them. Not only is the language "unlawful for an employer to discriminate against *a disabled person*" clearly intended to limit the scope of the Act only to individuals with disabilities, the "whole Act is . . . drafted on that basis".[543] Second, the defendant referred the court to the Report of the Joint Committee, which was essentially the legislative history of the bill that would become the Disability Discrimination Act of 2005. The Committee had explicitly considered whether associative discrimination was covered under EU law, and the Minister for Disabled People had informed the Disability Rights Commission that he did not believe that associative discrimination came within the ambit of Directive 2000/78. The defendant argued that this supported the view that the legislator did not intend the DDA to be extended to include associative discrimination.[544] Third, the defendant submitted that Judge Stacey's decision was inconsistent with decisions of the Court of Appeal in *English v. Thomas Sanderson Blinds Ltd.* [2009] IRIL 206 and *Equal Opportunities Commission v. Secretary of State for Trade and Industry* [2007] IRIL 327. In both cases, the court decided that it was impossible to read the UK legislation that it was interpreting—respectively, the Sex Discrimination Act 1975 and Employment Equality (Sexual Orientation) Regulation 2003—in such a way that

[541] *See* EBR Attridge Law LLP (formerly Attridge Law) v Coleman, [2010] I.C.R. 242 (2009) at ¶ 8 (quotation marks in original) [Hereinafter, "*Coleman*, Employment Appeal Tribunal II"]
[542] *See Coleman*, Employment Appeal Tribunal II at ¶¶ 1-2.
[543] *See Coleman*, Employment Appeal Tribunal II at ¶ 18.
[544] *See Coleman*, Employment Appeal Tribunal II at ¶ 19.

they would conform with EU law.[545] In short, the defendant argued that the Tribunal had "distorted and rewritten" the DDA to expand its coverage to include associative discrimination.[546] These were formidable hurdles to overcome.

Justice Underhill began his analysis by stating that it was a principle of EU law that "courts and tribunals of member states should 'so far as possible' interpret domestic legislation in order to give effect to the state's obligations under EU law".[547] Furthermore, citing to *House of Lords in Pickerstone v. Forth Dry Dock & Engineering Co. Ltd.* [1990] 1 AC 546, he concluded that it was now settled law in the UK that a court or tribunal may "go beyond the strict limitations of statutory construction and can read words into a statute in order to give effect to EU legislation which the statute is intended to implement".[548] But UK law also made clear that the phrase "so far as possible" meant that "it is not legitimate in every case" to employ this technique.[549] In sum: "The difficulty is to define the touchstone for distinguishing between the two types of cases, or—to put it another way—the limits of what is 'possible'".[550]

For guidance, Justice Underhill looked primarily to the decision of the *House of Lords in Ghaidan v. Godin-Mendoza* [2004] AC 557, which concerned the UK's obligations with respect to s. 3 (1) of the Human Rights Act 1998 and the implementation of the European Convention on Human Rights. After engaging in a detailed analysis of the reasoning presented in *Ghaidan*, Justice Underhill reached the following conclusion, which is quoted at length because it provides a relatively succinct summary of *Ghaidan's* intricate holding:[551]

> I agree with the Judge [Stacey], and with Judge Clark when the matter was first before this Tribunal, that there is nothing "impossible" about adding words to the provisions of the 1995 Act so as to cover associative discrimination. No doubt such an addition would change the meaning of the 1995 Act, but, as the speeches in *Ghaidan* make clear, that is not in itself impermissible. The real question is whether it would do so in a manner which is not "compatible with the underlying thrust of the legislation" or which is "inconsistent with the scheme of the legislation or its general principles". In *Ghaidan* the majority were prepared to interpret the words "wife or

[545] *See Coleman*, Employment Appeal Tribunal II at ¶ 11 (internal quotation marks in original). The defendant raised a fourth point questioning whether Directive 2000/78 had direct effect at the time that Ms. Coleman brought her lawsuit. For reasons that need not concern us here, the Employment Appeal Tribunal rejected this contention outright. *See id.* at ¶ 20.

[546] *See Coleman*, Employment Appeal Tribunal II at ¶ 10(A) (quotation marks in original).

[547] The leading case on the subject is C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

[548] *See Coleman*, Employment Appeal Tribunal II at ¶ 11.

[549] *See Coleman*, Employment Appeal Tribunal II at ¶ 11.

[550] *See Coleman*, Employment Appeal Tribunal II at ¶ 11 (internal quotation marks in original).

[551] A Westlaw search of citations to *Coleman v. Attridge* in the UK revealed that, by far, the case was most frequent cited for its analysis of *Ghaidan.* The subject matter, associative discrimination, was only relevant to the authors in a small minority of cases.

> husband" in Schedule 1 of the Rent Act 1977 as extending to same-sex partners. That was plainly not the intention of Parliament when the act was enacted, nor does it correspond to the actual meaning of the words, however liberally construed; but the implication was necessary in order to give effect to Convention rights and it went "with the grain of the legislation". In my view the situation with which I am concerned is closely analogous. The proscription of associative discrimination is an extension of the scope of the legislation as enacted, but it is in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted. The concept of discrimination "on the ground of disability" still remains central.[552]

Once it had been firmly established that Ms. Coleman had the right to bring her suit against Attridge Law, the case was listed on the docket for an employment tribunal hearing. Shortly thereafter, Ms. Coleman and Attridge Law settled the case out of court, reportedly for £12,000.[553]

The *Coleman* court saga was unfolding at the same time when the UK legislature was contemplating a complete structural revision of its anti-discrimination statutes—a process that resulted in the Equality Act 2010. The Act replaced nine anti-discrimination laws and was intended to implement fully four EU directives, including Directive 2000/78.[554] The Act has 218 sections and runs 239 pages.[555] Section 13 of the UK Equality Act prohibits less favorable treatment "because of a protected characteristic." According to at least one author, "this provides a clear basis for direct discrimination claims brought by people (such as carers or relatives) who are not themselves disabled but are treated less favourably because of their association with somebody who is"[556]

An explanatory note (Note 63) on the definition of direct discrimination explains that it was drafted to eliminate the dissimilarities that were a feature of previous UK anti-discrimination legislation. To quote the note, it provides "a more uniform approach by removing the former specific requirement for the victim of the discrimination to have one of the protected characteristics of age, disability, gender reassignment and sex. Accordingly, it brings the position in relation to these protected characteristics into line with that for race, sexual orientation and religion or belief in the previous legislation." Another explanatory note (Note 59) on the definition of direct discrimination explains that it "occurs where the reason

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[552] *See Coleman*, Employment Appeal Tribunal II at ¶ 14 (internal citations omitted).
[553] *See* Ann Stewart et al., *Disability Discrimination by Association: A Case of the Double Yes?*. 20 SOCIAL & LEGAL STUDIES 173, 184 (2011).
[554] *See* Bob Hepple, *The New Single Equality Act in Britain*, 5 THE EQUAL RIGHTS REVIEW 11, 15 (2010).
[555] *See id.*
[556] *See* Anna Lawson, *Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated,* 40 INDUSTRIAL LAW JOURNAL 359, 373 (2011).

for a person being treated less favourably than another is a protected characteristic listed in section 4. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief)."

It is practically undeniable that *Coleman* has been an important catalyst for the expansion of rights under UK law. It was instrumental in the re-formulation of the definition of direct discrimination to include associational discrimination, not only in the UK, but across the European Union. By all accounts, it was an extremely successful and well-executed legal campaign. In light of the UK's present intention to leave the European Union, which will invariably raise questions about the legitimacy and precedential value of CJEU judgements in the UK legal order, the fact *Coleman* has already been integrated into domestic statutory law is particularly significant.

That said, one should resist the temptation to paint the holding in *Coleman* with an excessively broad brush. For sound reasons related to legal strategy, from beginning to end, *Coleman* was very consciously a case exclusively about associational discrimination in the field of *direct discrimination*. It says nothing, for instance, about whether associational discrimination on the basis of disability should be extended to include indirect discrimination or reasonable accommodation. In fact, the latter is the subject of a 2014 published opinion,[557] in which the Court of Appeal (Civil Division) rejected the invitation to extend *Coleman* to include a duty to reasonably accommodate the needs of a child of an employee.

Conclusion

In the landmark case *Bulmer v. Bollinger*, Lord Denning famously observed that European Community law was "like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back". Four years later, he returned to the same theme in *Shields v. E. Coomes*: "[T]he flowing tide of Community law is coming in fast. It has not stopped at high water-mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we must learn to become amphibious if we are to keep our heads above water".[558] The litigation in *Coleman v. Attridge Law* throws into stark relief the extent to

[557] *See Hainsworth v. Ministry of Defence*, [2014] 3 C.M.L.R. 43 (2014)
[558] *See Shields v. E. Coomes (Holdings) Ltd.* [19791] All E.R. 456, at p.462.

which UK judges and lawyers have acclimated to EU law; and in the case of Coleman's legal team, learned how to exploit EU law to expand the scope of a domestic anti-discrimination statute that had been on the books since the mid-1990s.

The *Coleman* case is not an isolated incident. On a wide range of anti-discrimination topics, one can find UK litigators seeking, and often finding, a more sympathetic audience before the CJEU than in their local jurisdictions. With CJEU judgments in hand, they have frequently circumvented the traditional judicial hierarchy to obtain better results than would otherwise be possible. When Brexit cuts off this path, it will profoundly affect the legal opportunity structures[559] of public interest litigators.

[559] For a recent treatment of legal opportunity structures, *see* Lisa Vanhala, *Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home* 40 LAW & POLICY, 110 (2018).

Chapter 6: Disability Rights in Denmark*

The past three decades have witnessed dramatic transformations in Danish anti-discrimination law. In the field of gender anti-discrimination, there has been a marked shift from an informal, hierarchical collective bargaining system to a new paradigm that takes EU law, Danish law, and recourse to the Court of Justice of the European Union (CJEU) much more seriously. In the area of disability rights law, Danish courts and tribunals have shifted from a rights-skeptical to a rights-affirming jurisprudence in a remarkably brief period of time. This chapter seeks to explain why and how these changes have occurred, and more generally, to contribute to a growing body of literature from political science, sociology and law that examines the conditions under which Member State courts refer questions to the CJEU pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU).[560]

In this chapter, I argue that the transformations in Danish anti-discrimination law that we observe today are part of a broader movement that started with trade union-sponsored litigation in the late 1980's. At that time, trade unions successfully led the charge for preliminary references to the CJEU in the field of equal pay for men and women. In 2013, trade unions repeated their strategy to support disabled workers, and in doing so, again significantly altered Danish anti-discrimination jurisprudence.

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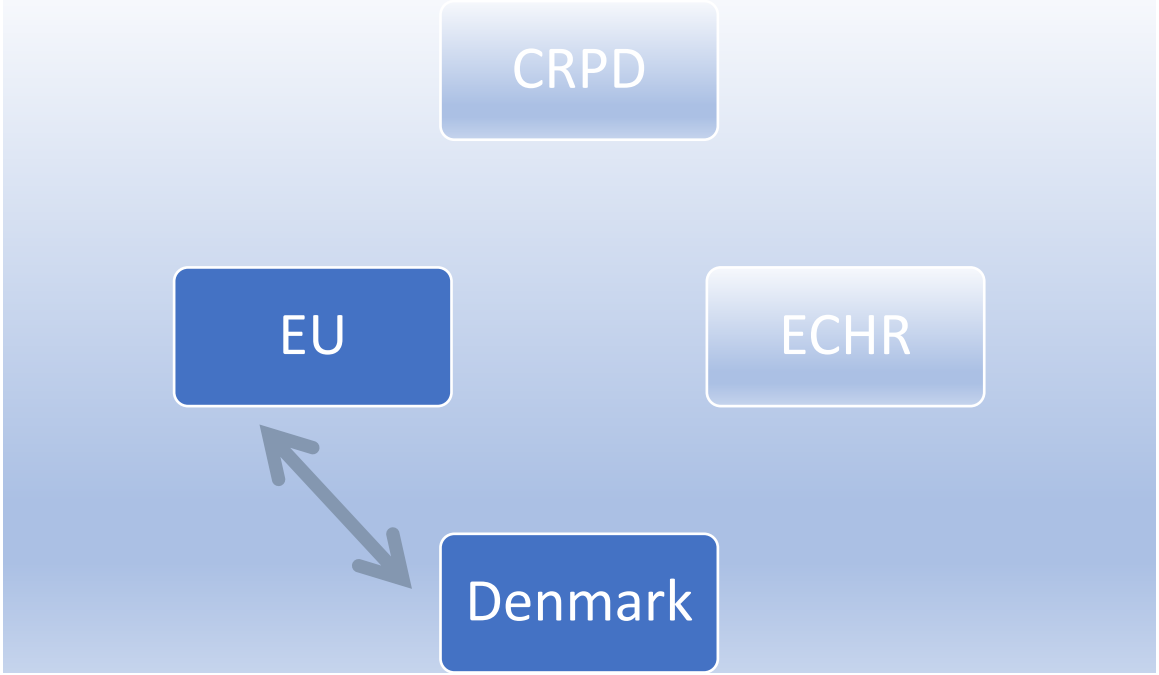
* This chapter is is a slightly edited version of an article in the *Maastricht Journal of European and Comparative Law* vol. 26, issue 4 (2019) with the title: "Explaining Paradigm Shifts in Danish Anti-Discrimination Law"I have benefited from the invaluable input of Claire Kilpatrick, who carefully read several earlier drafts, and the helpful and constructive comments of an anonymous reviewer. This chapter could not have been written without the extremely generous contributions (and patience) of the Danish legal community. I am deeply indebted to the legal staff of the Danish Institute of Human Rights (DIHR) and members of AnsættelsesAdvokater for their excellent feedback on my work during presentations in January 2017 and November 2018, respectively. Special thanks to Kirsten Precht and Maria Ventegodt (DIHR), Jacob Goldschmidt (Elmer Advokater), Anne Vikkelsø (CFD), Inge Storgaard Bonfils (University College Copenhagen), Kasper Bergmann, and Martin Lolle Christensen (EUI).

[560] Some of the best-known works in the field include*:* Karen J. Alter, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2010); Anne-Marie Burley and Walter Mattli, *Europe Before the Court*, 47 INTERNATIONAL ORGANIZATION 41 (1993); Alex Stone Sweet and Thomas Lloyd Brunell, THE JUDICIAL CONSTRUCTION OF EUROPE (2004); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE LAW REVIEW 2403 (1991). For research on Denmark specifically, *see* Jens Elo Rytter and Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms,* 9 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 470 (2011); Marlene Wind, *The Nordics, the EU and the Reluctance towards Supranational Judicial Review*, 48 *Journal of Common Market Studies* 1039 (2010); Marlene Wind et al., *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, 10 EUROPEAN UNION POLITICS 63 (2009); Andreas Follesdal and Marlene Wind, *Nordic Reluctance towards Judicial Review under Siege,* 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 131 (2009); Angelina Atanasova and Jeffrey Miller, 'Collective Actors and EU Anti-Discrimination Law in Denmark', in Elise Muir et al. (eds.), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, EUI Law Working Paper, 2017/17.

Diagram of Relationship Examined in Chapter 6



To use the terminology of social science, *Danfoss,*[561] a seminal gender equal pay case, and *Ring/Werge*,[562] the leading CJEU judgment on disability discrimination, constitute *critical junctures* in the trajectory of Danish anti-discrimination law.[563]

Mahoney defines critical junctures as: 'choice points when a particular option is adopted among two or more alternatives'.[564] He continues:

> In many cases, critical junctures are moments of relative structural indeterminism when willful actors shape outcomes in a more voluntaristic fashion than normal circumstances permit . . . these choices demonstrate the power of agency by revealing how long-term development patterns can hinge on distant actor decisions of the past.[565]

HK Danmark (hereafter 'HK'), a Danish trade union, is a paradigmatic example of Mahoney's 'willful actor'—a stakeholder with the desire and ability to change the rules of

[561] *See* Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, (C-109/88) EU:C:1989:383. *(HK Danmark)*
[562] *See* Joined Cases C-335/1 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskaband and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S,* EU:C:2013:222 (*Ring/Werge*).
[563] Critical juncture research focuses on ''distal historical causation': events and developments in the distant past, generally concentrated in a relatively short period, that have a crucial impact on outcomes later in time.' *See* Giovanni Capoccia, 'Critical Junctures', in THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM 89 (2016).
[564] *See* James Mahoney, THE LEGACIES OF LIBERALISM: PATH DEPENDENCE AND POLITICAL REGIMES IN CENTRAL AMERICA 6 (2001); *see also* James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY AND SOCIETY 507 (2000).
[565] *See* James Mahoney, THE LEGACIES OF LIBERALISM at 7.

the game. Mahoney's 'moment[s] of relative structural indeterminism' are closely linked to periods during which the transposition of EU directives disrupted traditional patterns of legal behaviour. The first notable moment occurred in the late 1980's when, pursuant to its obligations under Directive 75/117,[566] Denmark introduced a new law concerning equal pay for equal work. It arose again in the 2000's when Directive 2000/78 required Denmark to adopt disability rights laws. In both instances, litigants were initially unable to fulfil the objectives of the directives because the new EU legislation challenged deeply-held views about the role of law in Danish society.

As discussed in detail below, HK's decision to seek a preliminary reference before the CJEU on the question of equal pay in *Danfoss* represented a dramatic departure from previous practice. Although the strategy was highly controversial at the time, it proved to be very effective. The success of *Danfoss* spawned a series of additional preliminary references in the field of gender discrimination; and, when it confronted a similar roadblock several decades later, HK turned again to the preliminary reference procedure in *Ring/Werge* to challenge perceived deficiencies in national disability rights jurisprudence—and again it succeeded in leveraging the power of the CJEU judgments to compel Danish courts to revisit deep-seated legal and cultural norms.

This chapter is organized into two major sections: one that focuses on *Danfoss* and another that focuses on *Ring/Werge*.

Section 1, Transformation in Equal Pay for Men and Women, is divided into three sub-sections, which are set out chronologically to clearly chart the stages of the transformation. The first sub-section discusses the Danish political and legal culture pre-*Danfoss*. The second investigates the events leading up to the *Danfoss* preliminary reference and the CJEU judgement itself. The final sub-section argues that *Danfoss* was a critical juncture in Danish anti-discrimination law. The results of a new and comprehensive database on anti-discrimination preliminary references are used to show how *Danfoss* fundamentally altered the relationship between Danish courts and the CJEU in the employment context. It did so by effectively lifting the taboo on using EU law in collective bargaining disputes. Once litigants grasped the power of using EU law to circumvent national status quo

[566] *See* Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] *OJ L 45.* Directive 75/117/EEC has since been amended by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] *OJ L 204.*

defenders, Danish trade unions repeatedly turned to EU law to press for better conditions for their members.

The organisation of **Section 2, Transformation in Disability Rights**, mirrors that of section one. The first sub-section explores Denmark's pre-*Ring/Werge* tradition of disability rights skepticism. This is followed by a discussion of the events leading up to the *Ring/Werge* litigation and the contents of the CJEU judgment. In the third section, I present evidence of the effects of *Ring/Werge* on Danish law through a previously unpublished analysis of over 200 cases of the Board of Equal Treatment (*Ligebehandlingsnævnet*), which is the first instance jurisdiction for the vast majority of discrimination complaints in Denmark. The data show significant differences pre-*Ring/Werge* and post-*Ring/Werge* in the reasons why plaintiffs have won or lost cases. Post-*Ring/Werge* employers face a heavier burden if they wish to show that they have met their obligation to provide a reasonable accommodation to their disabled workers.

Methods and methodologies from both law and the social sciences are used throughout the chapter to support the argument set forth above, including:

- Semi-structured interviews with key stakeholders to reconstruct the circumstances that led to the CJEU's rulings in *Danfoss* and *Ring/Werge*;
- a review of contemporary Danish newspaper accounts to capture the socio-legal environment in which the litigation strategies for *Danfoss* and *Ring/Werge* were carried out;
- an analysis of a previously unpublished database of over 200 decisions of the Danish Board of Equal Treatment that involved allegations of disability discrimination to track longitudinal shifts in Danish disability rights jurisprudence; and
- an examination of a new comprehensive database of all anti-discrimination preliminary references before the CJEU to elucidate the profound effect that Danfoss had on Danish trade union litigation strategies.

1. Transformation in equal pay for men and women

Danfoss was a lawsuit born of frustration.[567] The legal team assembled at HK was tired of losing cases that it knew it should be winning. Denmark had adopted an Equal Pay

[567] The following description of events is based on a lengthy semi-structured interview with Kirsten Precht on 31 January 2018.

Act in 1976[568] to implement the 1975 Equal Pay Directive,[569] but the trade union was locked in a web of cultural and legal norms that hindered its ability to use them effectively.

A. The legal and political culture of Denmark pre-Danfoss

Denmark has a long history of establishing working conditions though collective bargaining. Parliament has been reluctant to interfere in private arrangements through national legislation, and has traditionally done so only when negotiations between social partners have completely broken down.[570] Danish labour organisations enjoy substantial autonomy to conclude collective agreements, and given the high rate of union membership in Denmark, many labour disputes involve disagreements over collective bargaining agreements.

Founded in 1898, Denmark's umbrella employees' union is the Danish Confederation of Trade Unions (LO).[571] Most blue-collar workers' unions and HK are members of LO.[572] The Danish Employers' Confederation (DA) is Denmark's umbrella employers' association. Members of DA include, inter alia, several employers' associations in the manufacturing and service sector.[573]

Nielsen notes that: 'Equal pay [was] for many years a traditional collective labour law issue in Denmark, which was settled by the social partners by collective bargaining without statutory intervention'.[574] In other words, industrial arbitration tribunals were in the business of parsing the meaning of contracts between unionised employers and unionised employees. The Danish Parliament gave the social partners a wide berth to conclude agreements and to resolve disputes without undue interference. Acts of Parliament had little bearing on this autonomous, self-regulated world.

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[568] *See* Ruth Nielsen, *Denmark*, in Susanne Burri and Hanneke van Eijken (eds.), GENDER EQUALITY LAW IN 33 EUROPEAN COUNTRIES: HOW ARE EU RULES TRANSPOSED INTO NATIONAL LAW (2014).
[569] The Danish Equal Pay statute was amended in 1986 following a Commission infringement proceeding on the ground that Denmark had failed to fully implement the directive. In 1989, a new amendment to the Equal Pay Act was introduced which gave the Equal Status Council the power to demand employers disclose pay information.
[570] *See* Jackie Lane and Natalie Videbaek Munkholm, *Danish and British Protection from Disability Discrimination at Work–Past, Present and Future*, 31 INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 91, 101 (2015).
[571] As of 1 January 2019, the name of organisation is *Fagbevægelsens Hovedorganisation* or 'FH'. Because the organisation was referred to as 'LO' throughout the time period under investigation, the name 'LO' is retained in this article. *See* https://fho.dk/om-fagbevaegelsens-hovedorganisation/english-about-fh/
[572] *See* Ole Hasselbach, LABOUR LAW IN DENMARK at 225 *(*4th ed., 2016).
[573] *See id.* at 228.
[574] *See* Ruth Nielsen, EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY—DENMARK at 14 (1995).

Indeed, prior to joining the EU, the Danish Parliament had debated, and overwhelmingly rejected, the adoption of equal pay legislation. The prevailing view was that such matters should be left to the social partners to address as they saw fit.[575] The country's entry into the EU in 1973 required Denmark to adopt equal pay legislation, but it did so cautiously.[576] The original Danish Equal Pay Act provided only for 'equal pay for the same work', which was the phrase most commonly used in collective bargaining agreements. The European Commission brought a successful infringement proceeding against Denmark in 1985,[577] after which the wording of the Equal Pay Act was amended to include the more expansive concept of equal pay for 'work of equal value'.[578]

HK occupied an unusual space in the collective bargaining world. Most of LO's members were male, blue collar workers; HK's members were predominantly female, clerical workers.[579] HK's organisational structure also stood apart. It was larger than most unions under the LO umbrella, had a larger legal staff than the other LO unions; and, of crucial importance, one of its main departments was led by Jens Pors, a dynamic, determined, and well-connected actor who ran his department with a high degree of independence. The composition of HK's membership (predominantly female) meant that the principle of equal pay for work of equal value was a higher priority for HK than for most other Danish trade unions,[580] and the strength of HK's legal department provided it with the tools and resources to effect change.

The robustness of HK's legal department has historical roots. Unlike most employees' unions, a large portion of HK's membership was—and is—covered by Denmark's law on salaried workers (*Funktionærloven)*, which was first adopted in 1938. Originally, workers that fell into this category did not participate in collective bargaining agreements. Rather, their working conditions were determined by Danish law, i.e. legislation drafted by Parliament. As a result, HK had a greater need than other trade unions to develop legal teams that could operate in the ordinary courts and the Labour Court. Over time, HK members were covered by collective bargaining agreements in greater numbers, but HK remained an

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[575] *See id.*
[576] For a more detailed discussion of the transposition of equal pay in Denmark, *see* Dorte Sindbjerg Martinsen, *The Europeanization of Gender Equality – Who Controls the Scope of Non-Discrimination?* 14 JOURNAL OF EUROPEAN PUBLIC POLICY 544, 551 (2007).
[577] *See* Case 143/83 *Commission v. Denmark*, ECLI:EU:C:1985:3
[578] *See* Ruth Nielsen, EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY—DENMARK at 15 (1995).
[579] *See id.* at 7.
[580] The Danish Women Workers' Union (KAD) was the main exception.

outlier in its capacity to move between the national court systems (where Danish law prevailed) and industrial arbitration tribunals (where the collective bargaining agreement was the primary focus).[581]

Nevertheless, HK did not take recourse to EU law lightly. Trade unions had tried to enforce the principle of equal pay several times—mostly without success[582]—through the arbitration tribunals and ordinary courts,[583] before HK took the contentious step of invoking EU law in arbitration proceedings.[584] Initially, LO was strongly opposed to the move. 'Both the LO and employers' associations were afraid that the minimum wage system would collapse', said Jens Pors in a 1992 newspaper article titled *Lukewarm Backing from the LO*.[585] Consistent with its opposition to national equal pay legislation, it saw the intervention of the European court as a major threat to Denmark's collective bargaining system.

Despite stiff resistance from defenders of the status quo, Pors and HK forged ahead with their plans to leverage EU law to improve conditions for HK members. Pors acknowledged that the traditional collective bargaining system might collapse, but it was worth the risk. Establishing equal pay for equal value was the first priority. If the existing collective bargaining system could not deliver equal pay, it was up to the social partners to create a new payroll system that did.[586]

It gradually became apparent that enlisting the support of the CJEU offered HK the most promising way forward.

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[581] Interview with Kirsten Precht, 30 January 2018.

[582] *But see FDB og LO for Kvindeligt Arbejderforbund i Danmark* (Arbitration Award of 8 December 1977) (providing a rare instance in which an arbitration tribunal found, based on an analysis of the Danish Equal Pay Act and EU law, that male and female unskilled employees performed work of equal value, and were therefore entitled to equal pay).

[583] *See* Jens Pors, *Faglig* 'Kamp for Ligeløn,' *Det Fri Aktuelt* ('Battle for Equal Pay') (29 June 1988) (lamenting in an op-ed about HK's mission to ensure equal pay in the workplace that HK had already lost two equal pay cases before arbitration tribunals and one before the Maritime and Commercial Court.)

[584] *See* Handels- og Kontorfunktionærernes Forbund i Danmark mod Dansk Arbejdsgiverforening/Danske Dagblades Forenings Forhandlingsorganisation for Vejle Amts Folkeblad *(Arbitration Award of 11 Feb. 1985) and* Handels- og Kontorfunktionærernes Forbund i Danmark mod Dansk Arbejdsgiverforening for Danfoss A/S *(Arbitration Award of 16 April 1985). For English translations of these cases,* see Ruth Nielsen, EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY—DENMARK at (1995). *But see*, FDB og LO for Kvindeligt Arbejderforbund i Danmark *(Arbitration Award of 8 December 1977)* (providing a rare instance in which an arbitration tribunal found, based on an analysis of the Danish Equal Pay Act and EU law, that male and female unskilled employees performed work of equal value, and were entitled to equal pay).

[585] *LO Avisen*, 'Lunken opbakning fra LO' ('Lukewarm Backing from the LO') (1992). LO did, however, support HK in the end. LO had access to much better statistics about the pay of women and men than HK. According to Kirsten Precht, a member of the HK legal team, these statistics lent invaluable support to HK's case before the CJEU.

[586] *LO Avisen*, 'Lunken opbakning fra LO' ('Lukewarm Backing from the LO') (1992), quoting Jens Pors ('Det er muligt, minimalløn systemet bryder sammen - men det er så den pris, man må betale. Vi må forst have ligelønnen på plads - bagefter må vi så finde et lønsystem, der duer').

B. The *Danfoss* preliminary reference and judgment

Danfoss was a preliminary reference from a Danish industrial arbitration tribunal that posed several questions involving the interpretation of Directive 75/117, commonly known as the 'Equal Pay Directive'.[587] Danfoss paid the same basic wage (*grundloen)* to employees in the same wage group (loengruppe). Pursuant to a collective bargaining agreement, employees were eligible for pay supplements which were calculated on the basis of mobility, training, and seniority.[588] In an earlier case involving the same parties before the Industrial Arbitration Tribunal, HK alleged that women in two wage groups were paid, on average, less than their male counterparts. The Tribunal, in a decision dated 16 April 1985, found that number of employees that formed the basis of HK's calculations were too small to sustain its claim of gender discrimination.[589] HK then brought a second case in which it produced more comprehensive statistics involving 157 workers, which showed that men were paid 6.85% more than women.[590]

The CJEU concluded that Danfoss's opaque system of determining wages and salaries unfairly hindered HK from producing the kind of evidence it needed to prove discriminatory practices, and in the present case, it was sufficient for the plaintiff to show at the initial stage of the litigation that the average pay for 'a relatively large number of' women was less than the average pay for a relatively large number of men. Once this has been established, 'it is for the employer to prove that his practice in matter of wages is not discriminatory'.[591]

After HK secured a victory in the *Danfoss* case, many employee's unions still reacted with muted enthusiasm. Spokespeople from the Danish General Workers' Union (*Specialarbejderforbundet i Danmark*), Danish Metalworkers' Association (*Dansk Metalarbejderforbund*), and even the Women's Workers' Union (*Kvindeligt Arbejderforbund*) wondered aloud if the equal pay legislation would do more harm than good for their members in the long run.[592]

A contemporary Danish newspaper summed up the new reality succinctly: 'Women earn less than men—that is the only thing that the trade unions can prove, and that's not enough to win an equal pay case in Denmark. But with the Court of Justice judgment in

[587] *See* Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] *OJ L 45.*
[588] *See* Case C-109/88 *Danfoss*, ¶ 3.
[589] *See* Case C-109/88 *Danfoss*, ¶ 4.
[590] *See* Case C-109/88 *Danfoss*, ¶ 4.
[591] *See* Case C-109/88 *Danfoss*, ¶ 16.
[592] *LO Avisen*, 'Lunken opbakning fra LO' ('Lukewarm Backing from the LO') (1992).

hand, the day is coming when the employer will have the burden of proving that a difference in pay is not due to gender [discrimination]'.[593] One employment lawyer described the case as a 'bomb under the minimum wage system', and questioned how Danish collective bargaining could survive if all you needed was some statistics that 'men get paid a bit more'.[594] Danfoss's managing director viewed the case as a potential step backward for HK members. In his view, women were not prepared to compete against men in rigorous qualifications assessments.[595]

Unsurprisingly, HK was considerably more upbeat: 'It's clear that we are going to use the Danfoss decision to its utmost', said Pors. The Chairman of LO's Equality Committee, Ib Wistisen, hailed the decision as 'a fantastic advance' in the battle for equal pay.[596]

C. The post-*Danfoss* path

With the benefit of hindsight, we can now see that *Danfoss* taught litigants that EU anti-discrimination law can be an extremely powerful tool to rebuff recalcitrant national actors. With the *Danfoss* judgment in hand, HK and other trade unions obtained results in Danish courts that had eluded them for years. Once this lesson had been internalised, Danish litigants attempted to build on the success of *Danfoss* in other areas of EU competence.[597] In 1994, Nielsen went so far as to declare that 'that there had been a paradigm shift within the Danish labour legislation from collective to individual rights and from the prevalence of collective agreements to the reference to EU treaties and regulations'.[598]

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[593] *Aktuelt*, 'Hvem Skal Nu Bevise', ('Who Must Now Prove') (5 October 1989) ('Kvinder får mindre i løn end mænd— det er stort set det eneste, fagforbundene kan bevise. Og deter ikke nok til at vinde en sag om ligeløn i Danmark. Men med EF ihanden haber HK i dag at komme dertil, hvor arbejdsgiveren skalbevise, at en forskel i løn ikke skyldes køn').

[594] *LO Avisen*, '*Bomben Under Systemet'* ('The Bomb under the System') (1992), quoting Steffen Ebdrup, advokat.

[595] *LO Avisen*, quoting John Brødegaard, personaledirektør på Danfoss (1992).

[596] *Berlingske Tidende,* 'EF-dom kan betyde lønforhøjelser for tusindvis af kvinder' ('The EC Verdict Can Mean Wage Increases for Thousands of Women') (19 October 1989).

[597] This finding is consistent with a large body of scholarship in economics, political science, and sociology—broadly known as 'path dependency' research—which aims to show that 'particular events in the past can have crucial effects in the future, and that these events may be located in the quite distant past' and that the effects of the event may not be 'initially felt but [become] clearly visible at a later point in time'. *See* James Mahoney and Daniel Schensul, *Historical Context and Path Dependence*, in *Robert E. Goodin and Charles Tilly* (eds.) THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS. 454, 457 (2006).

[598] *See* Anette Borchorst and Lise Rolandsen Agustín, 'Judicialization and Europeanization: The Danish Equal Pay Case', Paper til Årsmøde i Dansk Selskab for Statskundskab 9 (2015) (citing *Weekendavisen*, (4 November 1994)).

A new comprehensive database developed by the Academy of European Law reveals the extent to which HK's successful strategy quickly gave rise to a new modus operandi.[599] As illustrated below in **Figure 1**, in the 15 years between its accession the European Union in 1973 and *Danfoss*, Denmark sent 25 preliminary references to the CJEU. None of them involved the interpretation of EU anti-discrimination provisions. Since *Danfoss*,16 additional preliminary references have been sent to the CJEU requesting guidance in interpreting EU anti-discrimination provisions, four of which were brought by HK.[600] From 1988-2018, almost 10% of all references from Danish courts involved EU anti-discrimination provisions. These cases include *Pedersen*[601] and *Tele Danmark*,[602] which produced groundbreaking judgments that strengthened pregnant workers' rights.[603]

[599] *See* Equality Law in Europe: A New Generation *CJEU Database,* available at www.equalitylaw.eui.eu.
[600] In addition to *Danfoss* and *Ring/Werge*, HK has brought preliminary references in Case C-109/00, *Tele Danmark A/S v. HK Danmark* EU:C:2001:513 (*Pedersen*) (involving interpretation of gender equality provisions); Case C-400/95, *Handels- og Kontorfunktionærernes Forbund i Danmark (Larsson) v. Dansk Handel & Service (Føtex Supermarked A/S*) EU:C:1997:259 (requesting guidance on absence due to pregnancy and confinement); Case C-179/88, *Handels- og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening* EU:C:1990:384 (involving absence due to illness attributable to pregnancy or confinement).
[601] *See* Case C-66/96, *Pedersen*, EU:C:1998:549.
[602] *See* Case C-109/00, *Tele Danmark A/S v HK Danmark,* EU:C:2001:513.
[603] For a more detailed analysis of Denmark's evolving gender equality legislation and case law during this time period, *see* Dorte Sindbjerg Martinsen, *The Europeanization of Gender Equality – Who Controls the Scope of Non-Discrimination?* 14 JOURNAL OF EUROPEAN PUBLIC POLICY 544, 551 (2007).

Figure 1: Preliminary References from Danish Courts by Subject Matter (1973-2018)

	Total # of Preliminary References (PRs)	Total # of Anti-Discrimination PRs	Total Anti-Discrimination PRs as % of all PRs
Pre-*Danfoss* (1973-1987)	25	0	**0%**
Post-*Danfoss* (1988-2018)	170	16	**9,4%**

When we compare these figures to the preliminary reference activities for EU Member States as a whole, the effects of *Danfoss* become clear. As shown in **Figure 2**, from 1973-1987, 1,7% of all cases referred to the CJEU involved EU anti-discrimination provisions. From 1988-2018, the percentage of anti-discrimination preliminary references rose only slightly to 3,6%.

Figure 2: Preliminary References from All Member State Courts by Subject Matter (1973-2018)

	Total # of Preliminary References (PRs)	Total # of Anti-Discrimination PRs	Total Anti-Discrimination PRs as % of all PRs
(1973-1987)	1494	26	1,7%
(1988-2018)	9009	326	3,6%

The dramatic increase in references to the CJEU in the field of anti-discrimination law that occurred in Denmark (from 0% to 9,4%) was not replicated on an EU-wide basis. It appears that *Danfoss* radically altered trade union litigation strategies in Denmark, but had little or no influence on preliminary reference behaviour outside of the referring jurisdiction.

At the national level, *Danfoss* was also successfully invoked in several cases involving the burden of proof, work of equal value, and transparency in wage setting.[604] HK actively looked for new cases to enforce equal pay, and prevailed in several of them during the early 1990s.[605]

[604] *See* Anette Borchorst and Lise Rolandsen Agustín, *Judicialization and Europeanization: The Danish Equal Pay Case*, Paper til Årsmøde i Dansk Selskab for Statskundskab 9 (2015).
[605] *See* Anette Borchorst and Lise Rolandsen Agustín, *Judicialization and Europeanization: The Danish Equal Pay Case*, Paper til Årsmøde i Dansk Selskab for Statskundskab (2015)
(citing *Steff-Houlberg*, 1991, and *Frisko Is*, 1992, among others.)

2. Transformation in disability rights

Following the success of *Danfoss*, trade unions in general, and HK in particular, recognised the power of EU law to achieve results that were more beneficial to their members, but faced resistance from status quo defenders.

A. Pre-*Ring/Werge*: Denmark's tradition of disability rights skepticism

Jacob Goldschmidt, lead counsel for Jette Ring, explained in an interview with the present author that after Directive 2000/78 was transposed into Danish law in 2004, there was a great deal of uncertainty in the legal community about how the concept of disability should be interpreted in the area of anti-discrimination employment law.

Danish disability policy has not been insensitive or inattentive to the needs of individuals with disabilities. In some respects—such as income transfers and government expenditures to encourage labour market participation—Denmark's disability policies have been generous compared to most European countries.[606] But the fact remains that Denmark has been slow to embrace the concept of legally enforceable disability *rights*.[607] Several factors have militated against the reception of the disability rights model in Denmark—factors which initially contributed to considerable confusion about how Directive 2000/78 should be enforced.

First, the hierarchical political opportunity structure for interest groups in Danish policymaking stunted the development of a strong, bottom-up movement capable of challenging Denmark's traditionally paternalistic understanding of disability legislation. Consistent with its commitment to corporatist structures, Danish governments have historically preferred to negotiate with 'meta-organisations that can speak on behalf of a number of disability organisations'. This reduces 'the number of actors participating in policy-making', and (in the view of its proponents) makes 'the process more efficient and rational'.[608] Since 1934, the umbrella organisation 'Disabled Peoples Organisation—Denmark' (DPOD) has been the Danish government's principal interlocutor in matters

[606] *See, generally,* Bjørn Hvinden, *Nordic Disability Policies in a Changing Europe: Is There Still a Distinct Nordic Model?* 38 *Social Policy & Administration* 170 (2004).
[607] *See* Lisa Vanhala, *The Diffusion of Disability Rights in Europe*, 37 HUMAN RIGHTS QUARTERLY (2015) 831, 844 (describing Denmark as a 'disability rights laggard').
[608] *See* Inge Storgaard Bonfils, *Disability Meta-Organizations and Policy-Making under New Forms of Governance,* 13 SCANDINAVIAN JOURNAL OF DISABILITY RESEARCH 37 (2011)..

involving issues of interest to individuals with disabilities.[609] DPOD has pursued a strategy rooted in 'dialogue and consensus-seeking.'[610] Bonfils' research on the DPOD's recruiting practices indicate that the organisation promotes 'members who are consensus seeking and good at creating a relation of trust' over 'members who are more critical and provocative'.[611]

Since its creation, DPOD has worked in partnership with Danish governments to achieve a number of important goals for its members. It navigated a shift from a charity-based disability policy to a publicly-funded support system, and successfully lobbied the government to improve educational and work opportunities and benefits for individuals with disabilities.[612] However, DPOD's special mandate has been criticised as giving it 'power to exclude specific groups and organisations of disabled people from the political arenas as they, to some degree, control the routes of access to arenas of influence'.[613]

DPOD was very slow to embrace the rights-based approach to disability discrimination, which helped to legitimise the position of Danish scholars who argued that Denmark's approach to disability policy was superior to the rights-based approach. For example, in an article published in 2000, Steen Bengstsson, a senior researcher at the Danish National Centre for Social Research,[614] argued that 'the Scandinavian model of institutional disability policy is more appropriate in European societies than the American [disability rights] model, which is based on the judicial system.'[615] Bengstsson pointed out that while the passage of the Americans with Disabilities Act sparked a debate about disability rights legislation in Denmark, DPOD 'did not favour such legislation but preferred to continue the development of the negotiation society and its corporatist institutions.'[616] Similarly, when the issue was raised in the context of the Treaty of Amsterdam, the Danish Disability Council, an advisory body on disability issues

> dissociated itself from the American emphasis on anti-discrimination legislation. In the council's view, this legislation is more an expression of American society with its extreme individualism, its division into widely different subcultures without mutualties and its lack of communal solidarity, and hence less appropriate for European societies. In the ongoing debate, the Danish Disability Council has strongly

[609] *See id.* at 41.
[610] *See id.* at 45.
[611] *See id.* at 46.
[612] *See id.* at 41.
[613] *See id.* at 48.
[614] *See* Steen Bengtsson, *A Truly European Type of Disability Struggle: Disability Policy in Denmark and the EU in the 1990s,* 2 EUROPEAN JOURNAL OF SOCIAL SECURITY 363 (2000).
[615] *See id.* at 364.
[616] *See id.* at 371.

argued that legislation which establishes rights is irreconcilable with cooperation with the power structure on implementing concrete measures for people with disabilities.[617]

In the absence of a 'home-grown movement for stronger protection against discrimination' it took Denmark until 2004 to adopt its first law explicitly protecting individuals with disabilities from discrimination in the labour market, which it undertook to comply with its obligations under Directive 2000/78.[618] Ventegodt Liisberg reports that Danish employers' organisations had not lobbied for an anti-disability discrimination law, and the Danish disability movement was split between disability organisations that supported the rights-based approach to equal treatment and those that preferred to rely on the traditional Danish approach.[619] Under these circumstances, it comes as no surprise that Denmark's law went no further than the minimum required to comply with EU law.[620]

In addition to ambivalence in Denmark about the wisdom of a rights-based approach to disability law, the task of transposing Directive 2000/78 (and Directives 2000/43, which covers racial and ethnic discrimination) fell to a center-right government coalition that reportedly—prior to assuming power—had objected to the contents of the directives when they were discussed in a parliamentary European Committee in 2000.[621] As members of the opposition, the center-right parties could not prevent the Council of Ministers from approving the directives, but as members of the government, they were obliged to transpose them into national law.[622] According to Vincents Olsen, the government's view on the anti-discrimination laws 'seemed based on the assumption that the legislation in question had the character of clarification of principles, if not the rules, already in place in Danish society'.[623] In interviews conducted for this chapter, experts consistently reported that Denmark would not have passed new anti-discrimination legislation had it not come under pressure to meet its obligations under EU law.

The government's lack of enthusiasm for the new anti-discrimination legislation probably contributed to uncertainty about how the implementing legislation, known in

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[617] *See id.* at 374.
[618] *See* Maria Ventegodt Liisberg, *Implementation of Article 33 CRPD in Denmark: The Sails Are Up, But Where is the Wind?*, in Gauthier de Beco (ed.), ARTICLE 33 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES —NATIONAL STRUCTURES FOR THE IMPLEMENTATION AND MONITORING OF THE CONVENTION 81 (2013).
[619] *See id.* at 75.
[620] *See id.*
[621] *See* T. V. Olsen, *Discrimination and Anti-discrimination in Denmark.* 11 (*Emile*-European Commission Research DG, Sixth Framework Programme (2008).
[622] *See id.*
[623] *See id.* at 16.

English as The Danish Act on Differential Treatment on the Labour Market, should be enforced. For example, the law does not define the term 'disability' at all. In the view of the authors of the parliamentary preparatory works, Directive 2000/78 did not change the Danish understanding of the concept of disability, and there was no need to propose a definition of the term.[624] Then, in apparent contradiction, it provides in a separate section that the concept of disability must be understood as a 'physical, psychological or intellectual impairment [which] *must be compensated* in order for that person to function on an equal footing with other citizens in a similar situation'. (emphasis added)[625] Prior to the transposition of Directive 2000/78, 'compensation' in the Danish disability context had a rather specific meaning. Pursuant to the Danish National Action Plan, a bedrock of Danish disability policy, compensation meant that 'society helps persons with disabilities and offers benefits and assistive services to minimise the consequences of disability'.[626] Hence, 'compensation' in this context meant public assistance and assistive devices, such as hearing aids and wheelchairs. As shown below, confusion about the proper understanding of the terms 'disability' and 'compensation' in the context of anti-disability discrimination law bedeviled Danish courts, ultimately resulting in a preliminary reference to the CJEU to request clarification on these points.

A final relevant factor is the uncommon flexibility that Danish employers enjoy to dismiss employees. As a rule, Danish employers are given wide discretion to act in the best interest of the business.[627] As a trade-off for low level of protection against employment termination, employees may avail themselves of relatively generous unemployment benefits.[628] Employment flexibility, or 'flexicurity' as it is known in Denmark, does not mesh well with the concept of 'reasonable accommodation'. Flexicurity suggests that judges should be very reluctant to second-guess an employer's business decision. The principle of reasonable accommodation demands the opposite. 'Resonable Accommodation', as defined

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[624] 4.1. Handicapkriteriet: 'Direktivet ændrer ikke ved den danske forståelse af handicapbegrebet. Der foreslås derfor ikke indsat en definition af handicapbegrebet.'
[625] Til nr. 2 (Handicapkriteriet): 'For at tale om et handicap eller en person med handicap må der kunne konstateres en fysisk, psykisk eller intellektuel funktionsnedsættelse, som afføder et kompensationsbehov, for at den pågældende kan fungere på lige fod med andre borgere i en tilsvarende livssituation.' (Translated in M. Ventegodt Liisberg, Disability and Employment. *A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy* (Intersentia, 2011), p. 171).
[626] *See* Maria Ventegodt Liisberg, DISABILITY AND EMPLOYMENT. A CONTEMPORARY DISABILITY HUMAN RIGHTS APPROACH APPLIED TO DANISH, SWEDISH AND EU LAW AND POLICY 171 (2011) (quoting Regeringen: Handlingsplan for handicapområdet, 2003).
[627] *See* Jens Kristiansen, THE GROWING CONFLICT BETWEEN EUROPEAN UNIFORMITY AND NATIONAL FLEXIBILITY: THE CASE OF DANISH FLEXICURITY AND EUROPEAN HARMONISATION OF WORKING CONDITIONS 39-40 (2015).
[628] *See id.* at 64.

in art. 5 of Directive 2000/78 obliges employers to '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'. Unlike the hands-off approach that judges are expected to follow for hiring-and-firing decisions under flexicurity, the reasonable accommodation obligation requires a fact-intensive inquiry into the measures that the employer has taken to accommodate an employee with a disability, and the circumstances under which an individual with a disability can, or cannot, perform the essential functions of the job.

B. *Ring/Werge*: building the case for a disability rights counter-narrative

Against this inhospitable backdrop, Danish trade unions gradually built the foundations for a counter-narrative rooted in a rights-based approach to disability law.[629] Rather quickly, Danish courts began to issue decisions that interpreted the disability-related provisions of Directive 2000/78 quite narrowly. Particularly disconcerting for disability rights advocates, two early cases from the Danish Western High Court determined that plaintiffs with, respectively, multiple sclerosis and post-traumatic stress syndrome, were not disabled. The court reached this result because the plaintiffs had only requested reduced working time as an accommodation for their disabilities, and, in the court's opinion, reduced working time was not an accommodation required by Danish law.[630] These cases deeply concerned employees' representatives. Had the courts concluded that the plaintiffs were disabled, but did not obtain protection under the law because the requested accommodation was not reasonable, that also would have been cause for concern, since it would have suggested that the Danish courts were planning to take a very restrictive view of the extent of an employer's burden to accommodate the needs of a disabled employee. But in the view of disability rights advocates, these judgments were more fundamentally flawed. The courts were conflating the question of whether or not the complaint was disabled with whether or not an employer was required to accommodate the needs of a disabled person. Goldschmidt explained: 'From the day we had those two rulings from the Western High Court, it was on the agenda. Let's try to

[629] The following description of events is based on a semi-structured interview with Jacob Goldschmidt, Counsel for Jette Ring, on 20 January 2017.
[630] *See* Danish Western High Court Judgment of 11 October 2007, published in UFR2008.30V; *see also* Danish Western High Court Judgment of 11 October 2007, No. B-2777-06 (unpublished).

get to the Court of Justice to have this put back on track'.[631] Employee representatives agreed that 'the worst thing that can happen now is that the Danish courts follow a path which seems obviously wrong'.[632] Many employees' representatives became convinced that a preliminary reference could provide Danish courts with greater clarity about the scope and appropriate application of the Directive, and that the CJEU would probably take a more expansive view of the Directive than Danish courts had thus far.

HK represented both of the plaintiffs in *Ring/Werge*. Jette Ring had worked as a customer service center operator for the firm Dansk Almennyttigt Boligselskab (DAB) since 2000.[633] She was dismissed from her position in November 2005 after several absences primarily due to chronic back pain attributable, *inter alia*, to osteoarthreitis between the lumbar vertebrae.[634] Ms Skoube Werge was dismissed from her position as an administrative assistant for Pro Display A/S under similar circumstances.[635]

When Ms Ring was dismissed from her job in 2005, she immediately contacted her union. Goldschmidt recalled: 'She didn't say, 'I have been discriminated against because of my disability.' She was simply saying, 'it's not fair that I have been dismissed'.[636] In fact, when she first approached her union representative, Ms Ring did not consider herself to be disabled at all. Perhaps reflecting the prevailing understanding of Danish employment law at the time, she believed that her condition—arthritis—rendered her in need of accommodation for her illness. To Ms Ring's surprise, her local union representative suggested that she was not ill, but disabled. And so it appears that a non-lawyer working in the local chapter of a trade union was the first person to identify that Ms Ring might be a good candidate to test the contours of the new anti-disability discrimination law before Europe's highest court. Goldschmidt attributed this to how thoroughly information had been disseminated: 'Everybody was looking for the borderlines—it was on everybody's agenda'[637], particularly HK's.

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[631] Interview with Jacob Goldschmidt, Counsel for Jette Ring, on 20 January 2017.
[632] Interview with Jacob Goldschmidt, Counsel for Jette Ring, on 20 January 2017.
[633] *See* Opinion of Advocate General Kokott in Joined Cases C-335/1 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskaband and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S,* EU:C:2012:775 (*Ring/Werge*), ¶ 13.
[634] *See* Opinion of Advocate General Kokott in Joined Cases C-335/1 and C-337/11 *Ring/Werge*, at ¶ 13.
[635] Ms. Skoube Werge was involved in a traffic accident which resulted in whiplash. *See* Opinion of Advocate General Kokott in Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶15. She was initially absent from work for three weeks on sick leave and returned to full-time employment. In late 2004, it became clear that Ms Skoube Werge was still suffering from the effects of whiplash, for which she was given a sickness certificate. Pro Display dismissed Ms Skoube Werge in May 2005.
[636] Interview with Jacob Goldschmidt, Counsel for Jette Ring, on 20 January 2017.
[637] Interview with Jacob Goldschmidt, Counsel for Jette Ring, on 20 January 2017.

The preliminary reference to the CJEU posed several questions,[638] but from the perspective of the employees' representatives, the key goals were to clarify the definition of disability, delineate the step-by-step analysis that a court should take to determine whether a violation of Directive 2000/78 had occurred, and—with a nod to the aforementioned Danish Western High Court judgments of 2007—establish whether a reduction in working hours could be considered a reasonable accommodation.

In her opinion, Advocate General Kokott concluded that for the purposes of determining whether an individual had a disability pursuant to Directive 2000/78, it was irrelevant whether the impairment was caused by a curable or incurable illness, or was permanent or temporary. The only material question was whether the impairment was 'likely to last for a long time'.[639] AG Kokott disposed of the remaining questions without much difficulty. The Danish court had asked if the concept of disability presupposed that the individual needed 'special aids' or whether it was sufficient that the individual was unable to work full-time. AG Kolkott saw no reason to interpret Directive 2000/78 as presupposing the need for a special aid. 'The requirement of a need for special aids seems to be based only on the scenario of a person with physical impairments. If aids were required as a compulsory element of the concept of disability, the mental or psychological impairments explicitly referred to in the directive would not be covered, as they do not normally call for aids'.[640] Rather, 'the only decisive criterion is whether there is a hindrance to participation in professional life'.[641] AG Kokott was equally dismissive of the defendants' argument that a person may only be regarded as disabled if he is *completely* excluded from professional life, meaning that an individual whose condition enabled him to work, albeit only part-time, would not fall within the ambit of Directive 2000/78. 'Even on a general linguistic understanding, the phrase 'hindered from participating in professional life' also covers barriers which are only partial and is not confined only to a comprehensive 'exclusion' from professional life'.[642]

The CJEU judgment largely followed AG Kolkott's opinion. It held that so long as the individual qualified under the legal definition of disabled, it made no difference whether the impairment was curable or incurable.[643] Furthermore, the definition of disability did 'not

[638] *See* Joined Cases C-335/1 and C-337/11 *Ring/Werge*, at ¶ 26 for the complete list of questions.
[639] Opinion of Advocate General Kokott in Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶ 30-38.
[640] Opinion of Advocate General Kokott in Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶ 42.
[641] Opinion of Advocate General Kokott in Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶ 43.
[642] Opinion of Advocate General Kokott in Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶ 44.
[643] Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶ 41.

depend on the nature of the accommodation measure such as the use of special equipment'.[644] Regarding the concept of reasonable accommodation, the CJEU concluded that a reduction in working time could be a reasonable accommodation, but that it was up to the Danish court to determine whether the accommodation constituted a disproportionate burden on the employer.[645]

C. Validating the new post-*Ring/Werge* path in disability rights

To better understand how disability rights laws in Denmark has evolved over time, the present author compiled a dataset of approximately 250 decisions of the Board of Equal Treatment. The dataset does not include decisions of Danish municipal courts, the Labour Court, Denmark's High Courts, or the Danish Supreme Court.

The Board of Equal Treatment (*Ligebehandlingsnævnet*) was established in 2009. Private litigants may address to it claims of discrimination on the grounds of, inter alia, disability, within the labour market. The Board considers complaints on the basis of written observations only; no oral evidence is taken. The Board's decisions are legally binding, and parties have the right to appeal the Board's decision to the national courts. If a defendant does not comply with a Board's decision, the Board may bring an action against the defendant in court, taking over the procedural and financial burden from the plaintiff.[646]

The dataset was built using the Board of Equal Treatment's database, which is a publicly available online resource. The only search criterion was to retrieve cases identified by the Board's database as a disability ('handicap') case. This search returned 241 hits.[647] The cases were then coded in an effort to determine whether Board cases decided prior to the *Ring/Werge* decision could be meaningfully distinguished from Board cases decided after the *Ring/Werge* decision. Fortunately for the purposes of this project, once the CJEU judgment in *Ring/Werge* had been handed down, the Board explicitly cited to the case as binding precedent in almost all of its cases involving questions of disability discrimination. Therefore, the Board's decision can be divided into 'pre-*Ring/Werge*' and 'post-*Ring/Werge*' periods with a good amount of precision. A closer examination of the cases revealed that approximately 40 cases fell into the 'pre-*Ring/Werge*' category'; 132 cases fell into the 'post-

[644] Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶ 44.
[645] Joined Cases C-335/1 and C-337/11 *Ring/Werge*, ¶ 59.
[646] *See* Pia Justesen. *Country Report Non-discrimination Denmark* 76-77 (2016).
[647] *See* Danish Board of Equal Treatment database, available at https://ast.dk/naevn/ligebehandlingsnaevnetafgorelser-fra-ligebehandlingsnaevnet (last accessed 15 January 2018)

Ring/Werge' category. The remaining cases were removed from the dataset because the Board did not issue a decision on the merits or because the case involved allegations of associational discrimination.[648]

Two limitations of this research design should be acknowledged from the outset. First, because the dataset draws exclusively from the Board of Equal Treatment's case-law, it cannot test whether the patterns identified below are equally evident in the jurisprudence of other adjudicative bodies in Denmark. Nevertheless, a focus on the Board of Equal Treatment is justified because it decides the vast majority of disability discrimination cases in Denmark, and thereby produces a much larger number of cases to analyse than any other institution. Furthermore, because Board decisions can be challenged in the ordinary court system, and the Board must follow the decisions of the ordinary courts, it is not unreasonable to posit that Board decisions do not deviate very much, if at all, from the case-law of the other Danish adjudicative bodies.

A second limitation of the research design is my inability to control for the kinds of cases that came before the Board. I am able to track changes in the jurisprudence of the Board of Equal Treatment over time, but I cannot rule out the possibility that some of the changes that I observe in the data are the result of complainants bringing stronger cases to the Board's attention, or, alternatively, that employers/defendants have changed their behaviour in ways that could influence my findings.[649]

I first examined whether plaintiff win rates and Board findings that the plaintiff had a disability had changed in the pre-*Ring/Werge* and post-*Ring/Werge* periods. The data showed that plaintiff win rates had increased from 20% to 27% over time. However, the percentage of plaintiffs who were found to have a disability slightly decreased from 63% to 62%. Hence, it appears that, measured as a percentage of cases in which the Board had made a finding that the plaintiff has a disability, the situation has not changed very much following the *Ring/Werge* litigation.

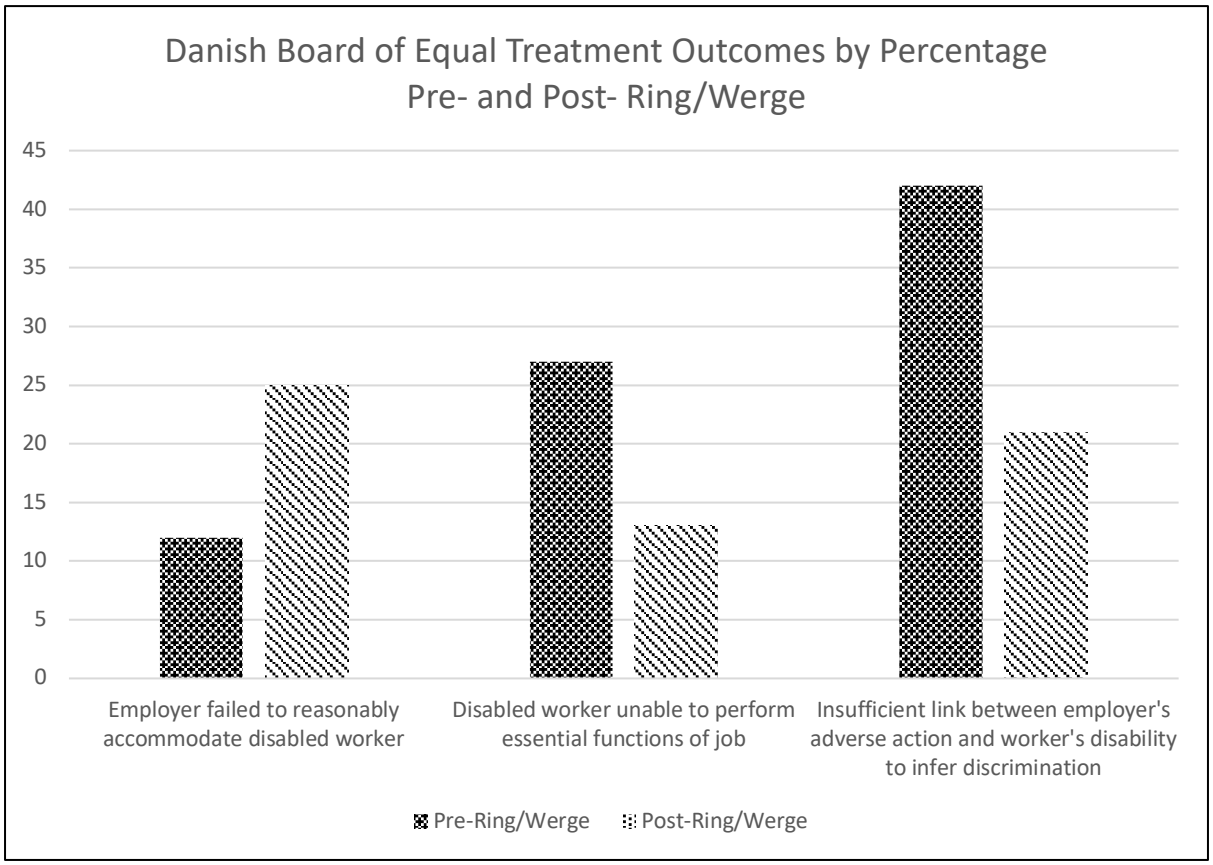
A different story emerges, however, when we take a closer look at the reasons the Board has given for why plaintiffs have won and lost cases before it. As shown in **Figure 3**, in the pre-*Ring/Werge* period, 42% of all plaintiffs lost their case because they failed to show

[648] Dataset on file with author. There were several reasons why the Board declined to make a decision on the merits. On occasion, the Board determined that a final decision required oral testimony, which the Board is not authorized to take. Other reasons included cases in which the Board concluded that it did not have jurisdiction and the failure of the plaintiff to file the case in a timely manner. In a few instances, the search results provided two case numbers for an identical case. When this happened, the case was counted only once in the dataset.

[649] My thanks to an anonymous reviewer and Jonas Christoffersen for bringing these points to my attention.

that disability was a factor in the defendant's decision. This figure dropped to 21% in the post-*Ring/Werge* period. In the pre-*Ring/Werge* period, the Board found that 27% of all plaintiffs were unable to perform the essential functions of their jobs. In the post-*Ring/Werge* period, this percentage dropped to 13%. Approaching the issue from the perspective of why defendants lose, I found that in the pre-*Ring/Werge* period, the Board found in 12% of all cases that the defendant had failed to meets its burden to reasonably accommodate the plaintiff. This number increased to 25% in the post-*Ring/Werge* period. These figures suggest that if plaintiffs are able to show that they have a disability, defendants now face a heavier burden if they wish to show that they have met their obligation to provide a reasonable accommodation to their disabled workers.

Figure 3: Danish Board of Equal Treatment Outcomes by Percentage
2009-2018
N= 173



The Board developed a markedly different approach to disability discrimination law after the *Ring/Werge* decision. Frequently citing directly to *Ring/Werge*, the Board now places a heavier burden on employers. They are now less deferential to employers who argue that disabled employees cannot perform the essential functions of the job, and/or cannot be reasonably accommodated in the workplace. I contend that the *Ring/Werge* decision is the most important proximate cause of this shift in the jurisprudence. With the support of the CJEU, Danish trade unions compelled a revision in the legal relationship between employers and disabled employees – in effect, setting in train a new consolidated line of jurisprudence from a welfare-focused, individual rights-skeptical jurisprudence, to a more rights-based approach to disability law that, while conscious of the relatively relaxed hire-and-fire policies that undergird the Danish flexicurity model of employment, place a greater weight on the countervailing right of disabled employees to obtain reasonable accommodations in the workplace.

The evolution of the Board's jurisprudence on deaf rights illustrates what this paradigm shift has meant in practice: in March 2015, an employer identified as 'an organisation working to combat discrimination' advertised that it was hiring a part-time employee.[650] It sought a candidate with, among other skills, experience working in the field of financial management in an international or Danish NGO. In April 2015, a claimant applied for the job. He informed the employer that he had the background and skills to succeed in the position, and though he was deaf, he was fully capable of performing the required tasks. Shortly thereafter, the employer invited him for a job interview. The claimant wrote back to confirm the date and time of the interview, and to remind the employer that he would bring a sign language interpreter to the meeting.

Later that day, the employer cancelled the interview, explaining that it had not realised that the claimant was deaf when it offered him the interview. The claimant pressed for the meeting to go forward, but when it became clear that the parties had reached an impasse, he filed a complaint with the Board of Equal Treatment. The Board concluded that the employer had unlawfully rejected the claimant's application. Citing *Ring/Werge*, it found that the claimant was entitled to recover monetary damages due to the employer's failure to show that hiring the claimant would result in a disproportionate burden.

The claimant's case was the first to acknowledge that an employer could be responsible for providing a sign language interpreter as a reasonable accommodation.[651] Less than a year later, another deaf plaintiff successfully sued an employer for failing to hire him because he needed a sign language interpreter.[652] In December 2017, a deaf nursing student prevailed in a complaint against her university for failing to provide a sign language interpreter.[653]

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[650] *See* Danish Board of Equal Treatment, Case J.nr. 2015-6811-30838.
[651] In the four previous cases involving deaf plaintiffs, the complainants lost because the Board concluded that they were unable to perform the essential functions of the job. See Danish Board of Equal Treatment, Case J.nr. 7100249-12 (6 Feb. 2013) (finding deaf plaintiff was unable to perform the essential functions of the job); Danish Board of Equal Treatment, Case J.nr. 7100165-12 (15 Nov. 2012) (same); Danish Board of Equal Treatment, Case J.nr. 2500149-10 (14 Dec. 2011) (same); Danish Board of Equal Treatment, Case J.nr. 2500148-10 (14 Dec. 2011) (same).
[652] *See* Danish Board of Equal Treatment, Case J. nr. 2016-6810-10812 (27 Feb. 2017).
[653] *See* Danish Board of Equal Treatment, Case J. nr. 2017-6810-23913 (22 Dec. 2017).

Conclusion

Danfoss and *Ring/Werge* were embedded in, and facilitated by, the actions of a relatively small group of 'willful actors' who had the desire and opportunity to upset traditional national legal practices. In both *Danfoss* and *Ring/Werge*, the same institutional player—HK—led the charge against deeply entrenched legal modes of operating and thinking. HK's use of the preliminary reference procedure in *Danfoss* proved to be controversial, but highly effective. In the 1980's and 1990's, HK and other trade unions exploited the preliminary reference procedure during periods of legal uncertainty to achieve better results for their members. When HK faced analogous circumstances following the introduction of disability rights legislation, it returned to a legal strategy that had served it well. Via the *Ring/Werge* preliminary reference, HK again succeeded in shifting the trajectory of Danish anti-discrimination jurisprudence in a more expansive direction.

In this case study, multiple methodologies—from semi-structured interviews and contemporary newspaper articles to empirical analyses of new datasets—have been employed to elucidate the causes and nature of Danish transformations in anti-discrimination law. By focusing on the agency of a small group of well-funded and sophisticated legal actors, it builds—and offers a fresh perspective—on the existing literature from political science, sociology and law that investigates where, why and how Member State courts engage with EU law and the preliminary reference procedure. Most of the existing literature focuses on the strategic behaviour of Member State courts and judges.[654] In this chapter, I shift the focus to the strategic actions of the litigants. And I find that, at least in this field of anti-discrimination in Denmark, focusing on the motivations of litigants provides new and valuable insights into dynamics that create preliminary references to the CJEU.

This case study also provides a solid point of departure for further research. At present, the analysis only covers the case-law of the Board of Equal Treatment. It remains to be examined whether the ordinary courts in Denmark and the Labour Court have exibited an analogous turn to a stronger rights-based approach to disability discrimination. Expanding this study to other areas of anti-discrimination law in Denmark, or to other parts of the EU, may also provide paths that lead to a fuller understanding of how EU law is created and interpreted in the Member States.

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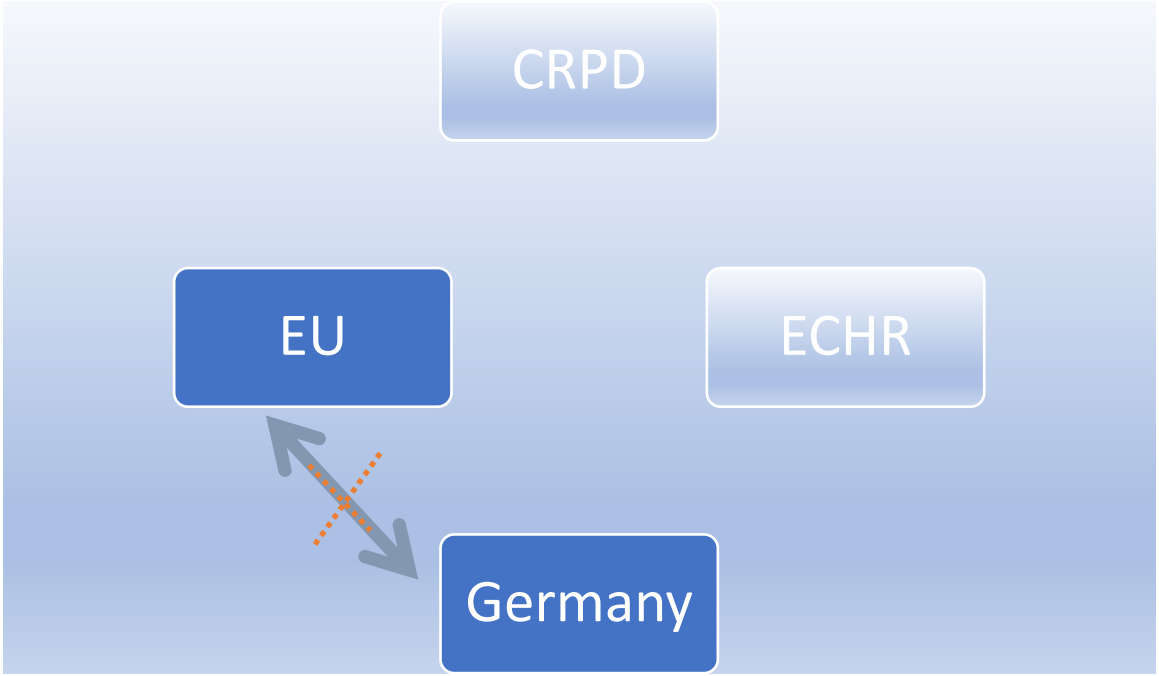
[654] For a classic example of work in this tradition, *see* Joseph H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors* 26 COMPARATIVE POLITICAL STUDIES (1994).

Chapter 7: Disability Rights in Germany

The German experience with the introduction of disability rights laws provides a useful contrast to Denmark. Neither country had specifically tailored disability discrimination legislation prior to the transposition of Directive 2000/78. In this respect, they share a history of an EU directive imposing disability rights laws "from above". But most of the similarities end there.

Diagram of Relationship Examined in Chapter 7



Take, for instance, preliminary reference behavior. It is well established that Denmark rarely refers cases to the CJEU,[655] but Danish national courts have been quite active in referring cases in the field of anti-discrimination law, and particularly in the area of disability rights law.[656] By contrast, Germany is the EU's overall leader in preliminary reference referrals during the course of the EU's existence,[657] and has even referred the highest number of cases involving Directive 2000/78,[658] but has made only two preliminary references that involved the disability-related provisions of Directive 2000/78. In other words, Germany refers many cases to the CJEU, but has exercised this power only twice with

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[655] *See* Chapter 4, *supra*.
[656] *See HK Danmark v Dansk almennyttigt Boligselskab* (C-335/11); *FOA v Kommunernes Landsforening (KL) (Kaltoft)* (C-354/13) EU:C:2014:2463; [2015] 2 C.M.L.R. 19.
657 *See* Jeffrey Miller, *Equality Law in Europe: A New Generation CJEU Database, Total Number of PRs by Member State (1961-2018)*.
[658] As of July 2019, 29 cases had been referred to the CJEU from German courts involving Directive 2000/78. (based on CJEU website search, available at http://curia.europa.eu/juris/recherche.jsf?language=en)

respect to disability rights legislation, and in both instances the preliminary references sought guidance on narrow issues of involving pension payouts for "severely disabled" workers at the end of their careers.[659] Denmark provides the opposing picture: it refers relatively few cases, but has been very active in referring cases that involve the interpretation of core disability rights concepts.

The debates leading up to the transposition of Directive 2000/78 were also quite different. In Denmark, the adoption of Directive 2000/78 elicited almost no public attention and appears to have attracted very little interest beyond a small group of policymakers and activists.[660] But in Germany the transposition of Directive 2000/78 unleashed a vigorous, protracted, and sometimes acrimonious debate.[661]

The remainder of the chapter unfolds as follows: **Section 1** provides an analysis of legal scholarship and the legislative history (including position papers and speeches in the Bundestag) to investigate the long process of transposing Directive 2000/78 into national law. **Section 2** has two main purposes. Drawing on a unique dataset of approximately 250 cases, I seek to establish empirically that, for the most part, German litigants have not fully embraced the legal opportunities that EU law offers. The dataset reveals that EU law is rarely invoked as the primary source of law at issue in a lawsuit. Rather, most litigation is brought primary to enforce German laws that pre-date the adoption of EU law, and litigants use EU law in a subsidiary fashion to buttress their primary claim.

I then attempt to explain *why* German litigants have been slow to take advantage of the new legal opportunity structure that EU law offers. I offer two primary explanations for this outcome. First, I argue that Germany has not been at the forefront of preliminary references to the CJEU on disability rights issues because the pre-existing disability laws unwittingly created a legal landscape that has allowed German courts to skirt around some of the issues that other jurisdictions have found so vexing. Many questions posed via the preliminary reference procedure have asked, in one form or another, for guidance in interpreting the legal definition of disability.[662] But long before the transposition of Directive 2000/78, Germany introduced a system in which state officials assessed the degree of an

[659] *Odar*, Case C-152/11 (6 December 2012) ECLI:EU:C:2012:772; *Bedi*, Case C-312/17 (19 September 2018) ECLI:EU:C:2018:734.
[660] *See* T. V. Olsen, *Discrimination and anti-discrimination in Denmark.* (*Emile*-European Commission Research DG, Sixth Framework Programme, 2008).
[661] This debate is discussed in detail, *infra*.
[662] *See* chapter 2, *supra*.

individual's disability on a scale from 1-100%.[663] Although this system of determining the severity of one's disability—and thereby the benefits and legal protections to which a disabled person is entitled—may appear highly problematic from the vantagepoint of the social model of disability, it has also meant that German courts rarely needed to ponder the question of whether the plaintiff was disabled, since the German state had, in most cases, already made a factual determination that satisfied the court. Therefore, there has been less pressure on courts to refer questions to the CJEU for clarification on this key issue. A second contributing factor to the seeming reluctance to fully embrace the opportunities that EU law provides in Germany may be traced back to an early case in which a disability organization not only lost its lawsuit but paid a heavy financial penalty for doing so.[664] It seems plausible that other disability rights organizations who may have been contemplating strategic litigation to advance and clarify the scope of the AGG may have been deterred by this case from taking on a similar risk.

1. The long road to general anti-discrimination legislation

In the discussion below, we begin with the academic debate over anti-discrimination legislation, most of which was written before the Bundestag seriously engaged with drafting an anti-discrimination bill. Section 2 examines the legislative history of Germany's anti-discrimination law.

The Academic Debate over the forthcoming Anti-Discrimination Law

The forthcoming transposition of Directives 2000/43 and 2000/78 unleashed a torrent of academic commentary.[665] One quickly gets a sense of the tenor of the debate over the

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[663] *See generally*, SOZIALGESETZBUCH IX (SGB IX). For a (somewhat dated) overview of the laws pertaining to "severely disabled" individuals and reforms thereto in English, *see* Fiona Geist et al. *Disability Law in Germany*, 24 COMP. LAB. L. & POL'Y. J. 564 (2002).

[664] *See* Mathias Moeschel, *Litigating Anti-Discrimination Cases in Germany: What Role for Collective Actors?* at 74 in Elise Muir et al. (eds.) HOW EU LAW SHAPES OPPORTUNITIES FOR PRELIMINARY REFERENCES ON FUNDAMENTAL RIGHTS, 7 EUI Working Paper Law No. 2017/17 (2017)

[665] *See* Klaus Adomeit, *Diskriminierung–Inflation eines Begriffs*, NEUE JURISTISCHE WOCHENSCHRIFT 22.2002 (2002): 1622-1623; Klaus Adomeit, *Schutz gegen Diskriminierung–eine neue Runde*, NEUE JURISTISCHE WOCHENSCHRIFT 16.2003 (2003): 1162; Klaus Adomeit and Jochen Mohr, *Verantwortung von Unternehmen für diskriminierende Stellenanzeigen durch Dritte* (BVerfG, NJW 2007, 137)." NEUE JURISTISCHE WOCHENSCHRIFT 60.35 (2007): 2522-2524; Susanne Baer, *„Ende der Privatautonomie "oder grundrechtlich fundierte Rechtsetzung?Die deutsche Debatte um das Antidiskriminierungsrecht*, ZEITSCHRIFT FÜR RECHTSPOLITIK (2002): 290-294; Johann Braun, Forum: *Übrigens–Deutschland wird wieder totalitär*, JURISTISCHE SCHULUNG 424 (2002); Sibylle Raasch, et al. *Die Anwendung des AGG in der betrieblichen Praxis*, Projektbericht.

drafting of a general anti-discrimination law merely from the titles of these works: Braun calls his article: "By the Way – Germany is becoming Totalitarian Again";[666] Saecker calls his contribution: "The New Jacobians' Virtuous Republic";[667] Adomeit settles for the comparatively sober: "Discrimination – The Inflation of a Term."[668] Some of the hypotheticals that the authors use to explain how the anti-discrimination law will function in practice are also quite revealing. Braun argues that a parent advertising for a piano teacher for her youngest daughter would not be permitted to take into account whether an applicant was a pedophile.[669] Adomeit, weary of Europe's "discrimination manhunt" presents the example of an advertisement for a mason that would be illegal under the AGG: "Seeking a robust young man, not disabled, German speaking, and inconspicuously religious." Evidently in defense of the language used in the advertisement, Adomeit concludes: "It is difficult to say why it must be a man, but one doesn't see women on [construction] scaffolding. Apparently nature has reasons that no dogma can access".[670]

Universität Hamburg, Fakultät Wirtschafts-und Sozialwissenschaften inZusammenarbeit mit dem Zentrum GenderWissen (2009);Christoph Schmelz, *Vernunft statt Freiheit!—Die Tugendrepublik der neuen Jakobiner*, ZEITSCHRIFT FÜR RECHTSPOLITIK (2003): 67-67; Thomas Wölfl *Vernunft statt Freiheit!—Die Tugendrepublik der neuen Jakobiner*, ZEITSCHRIFT FÜR RECHTSPOLITIK (2003): 297-297. For works in English, *see* Nicola Vennemann, *The German Draft Legislation On the Prevention of Discrimination in the Private Sector*, 3 GERMAN LAW JOURNAL (2002), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=137; Karl-Heinz Ladeur, *The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann*, 3 GERMAN LAW JOURNAL (2002) available at http://www.germanlawjournal.com/index.php?pageID=11&artID=152; Viktor Winkler, *The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur*, 3 GERMAN LAW JOURNAL (2002), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=158; Frank Selbmann, *The drafting of a law against discrimination on the grounds of racial or ethnic origin in Germany: constraints in constitutional and European Community law*, 3 JEMIE - JOURNAL ON ETHNOPOLITICS AND MINORITY ISSUES IN EUROPE, 1-19 (2002) available at http://nbn-resolving.de/urn:nbn:de:0168-ssoar-62086.; Matthias Mahlmann, *Prospects of German Antidiscrimination Law*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1045 (2004-2005); Viktor Winkler, *Dubious Heritage: The German Debate on the Antidiscrimination Law*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1007 (2004-2005); Florian Stork, *Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law*, 6 GERMAN LAW JOURNAL 533 (2005); Oliver Treib, *Les conflits politiques en Allemagne autour de la transposition de la directive européenne contre le racisme*, 33 CRITIQUE INTERNATIONALE 27-38 (2006); Franz Christian Ebert and Tobias Pinkel, *Restricting Freedom of Contract through Nondiscrimination Provisions-A Comparison of the Draft Common Frame of Reference (DCFR) and the German general Equality Law*, 10 GERMAN LAW JOURNAL 1417 (2009); Susanne Baer, *The Basic Law at 60-Equality and Difference: A Proposal for the Guest List to the Birthday Party*, 11 GERMAN LAW JOURNAL 67 (2010).

[666] *See* Johann Braun, Forum: *Übrigens–Deutschland wird wieder totalitär*, JURISTISCHE SCHULUNG 424, 424 (2002).

[667] *See* Franz-Jürgen *Säcker, „Vernunft statt Freiheit!" - Die Tugendrepublik der neuen Jakobiner - Referentenentwurf eines privatrechtlichen Diskriminierungsgesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK 286 (2002).

[668] *See* Klaus Adomeit, *Diskriminierung–Inflation eines Begriffs*, NEUE JURISTISCHE WOCHENSCHRIFT 22.2002 (2002): 1622-1623.

[669] *See* Johann Braun, Forum: *Übrigens–Deutschland wird wieder totalitär*, JURISTISCHE SCHULUNG 424, (2002).

[670] *See* Adomeit, Klaus. "Schutz gegen Diskriminierung–eine neue Runde." NEUE JURISTISCHE WOCHENSCHRIFT 16.2003 (2003): 1162, p. 1162.

All of the authors cited above opposed the introduction of a general anti-discrimination law on the basis that it would effectively abolish private autonomy in contract formulation, with potentially cataclysmic consequences. The argument develops as follows: The division between state and society is one of most important achievements of modern Western civilization. It epitomizes the rejection of the disastrous policies of the French Jacobianians period (1793-94), during which a "terror of virtue" reigned. The general anti-discrimination law is the first step towards a new "puritanical regime of virtue".[671]

Braun contends that a state that does not distinguish between private and public spheres of life is totalitarian. Morality becomes a public—rather than a private—matter, and the state uses its power to impose its idiosyncratic views on its citizens. In short, it becomes "a dictatorship of values".[672] Arguing along similar lines, Saeckler contends that citizens are entitled to a sphere of privacy vis-à-vis the state, which includes protection against being compelled to reveal and justify one's private thoughts. When the state becomes a guardian of morality, it comes at the cost of a citizen's inner freedom.[673]

The positions articulated by these jurists is difficult to reconcile with the historical record. If German law ever experienced a period of pure freedom of contract, there can be no question that this era—at least strictly speaking—came to an end with the *Lueth* decision of 1958, in which the German Constitutional Court ruled that the constitution could, under certain circumstances, regulate behavior between private citizens.[674] In later cases, the German Constitutional Court has asserted that the principles enshrined in the constitution are (indirectly) applicable, and take precedence over, the right to private autonomy in a number of transactions between private parties, including the law of defamation, labor law contracts, and landlord-tenant law.[675] Private autonomy was further eroded when the German Civil

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[671] *See* Franz-Jürgen *Säcker, „Vernunft statt Freiheit!" - Die Tugendrepublik der neuen Jakobiner - Referentenentwurf eines privatrechtlichen Diskriminierungsgesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK 286, 288 (2002).
[672] *See* Johann Braun, Forum: *Übrigens–Deutschland wird wieder totalitär*, JURISTISCHE SCHULUNG 424, 424 (2002).
[673] *See* Franz-Jürgen *Säcker, „Vernunft statt Freiheit!" - Die Tugendrepublik der neuen Jakobiner - Referentenentwurf eines privatrechtlichen Diskriminierungsgesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK 286, 289 (2002).
[674] For a translation of the case into English, *see* https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369. For analysis of the case in the English language, *see* Peter E Quint, *Free Speech and Private Law in German Constitutional Theory*, MD. L. REV. 48 (1989): 247. Articles in German are abundant. *See, e.g*. Werner Heun, *Private Autonomy and Discrimination*, ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EOTVOS NOMINATAE 52 (2011): 77.
[675] *See* Mattias Kumm and Victor Ferreres Commella, *What Is So Special about Constitutional Rights in Private Litigation?*, in Andras Sajo and Renata Uitz (eds.) THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM, 241, 255 (2005) and the case-law cited therein.

Code was amended in 1980 to comply with EU directives on equal pay[676] and equal treatment[677] in the workplace.[678]

Legislative History of Germany's General Anti-Discrimination Law[679]

The German Allgemeines Gleichbehandlungsgesetz (AGG), known in English as the "General Anti-Discrimination Act", entered into force in August 2006. The law transposes four EU directives: 2000/43, 2000/78, 2002/73, and 2004/113. Its purpose is to prohibit and eliminate discrimination on the basis of race or ethnic origin, sex, religion or belief, disability, age or sexual orientation. (§1, AGG). In order to achieve this goal, individuals who believe they have been victims of discrimination on one of these grounds have standing to take legal action and seek compensation against public and private employers. (§§ AGG 7, 13, 15).

The transposition process started in December 2001, when the German Ministry of Justice submitted the first proposal to insert a general anti-discrimination law into the German Civil Code (Bürgerliches Gesetzbuch or BGB). The proposal sparked an intense parliamentary debate.

The academic commentary and legislative history on Germany's anti-discrimination law reveal a clear difference in emphasis regarding the threat to the concepts of private autonomy and contract freedom. In the legal scholarship, this appears to be the primary—nearly exclusive—problem with anti-discrimination laws. Concerns about contract freedom is not absent from the political debate, but it does not reach the same degree of importance as it did in academic circles, and its salience seems to decline over time. In February 2005, the Bundesrat issued a resolution criticizing the government's proposed anti-discrimination bill. The opening paragraph strongly objects to the government's proposed "further limitation on

[676] *See* Council Directive of 10 Feb. 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 75/117/EEC.
[677] *See* Council Directive of 9 Feb. 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 76/207/EEC.
[678] *See generally*, Ninon Colneric, *Making Equality Law More Effective: Lessons from the German Experience*, 3 CARDOZO WOMEN'S L. J. 229, 250 (1996).
[679] The following section draws from the website of Das Zentrum für Arbeitsbeziehungen und Arbeitsrecht (ZAAR), which is housed at the Ludwig-Maximilians-Universität München (Germany). Its webpage on the AGG includes an overview of the legislative process and links to many of the primary document. The information (in German) is available at http://www.zaar.uni-muenchen.de/forschung/dokumentation/gesetzgebung/agg/index.html.

the freedom of contract" (*weitergehenden Einschränkung der Vertragsfreiheit*).[680] But the only parliamentarian who seriously grappled with the issue at length during the legislative debates was Norbert Röttgen, a conservative member of parliament and licensed lawyer with a doctorate in law.[681] When the Bundesrat re-visited the proposed anti-discrimination law shortly before it became law,[682] it produced a long list of grievances, but limitations on the freedom of contract was not among them. For a tabular summary of the objections to a general anti-discrimination laws raised in German parliamentary debates, *see* Annex 1.

(Failed) Predecessors to the AGG

On 10 December 2001, the Federal Ministry of Justice presented a draft proposal for a general law to "prohibit discrimination in private law" to bring German law into conformity with Directive 2000/43.[683] The proposal explained that Article 3 of the Basic Law (*Grundgesetz*) requires the German State to treat all citizens equally. Public authorities were not permitted to place individuals at a disadvantage because of their gender, ancestry, race, disability, religion or faith, or political views.[684] The right to equal treatment can also be found in the general clauses (*Generalklauseln*) of the BGB.[685] In the view of the Federal Ministry of Justice, the principle of equal treatment was widely taken for granted in Germany, but there were still some cases in which people faced illegal discrimination. The draft proposal acknowledged that it was possible to enforce anti-discrimination norms indirectly through the general clauses of civil law, and in fact, courts had done on occasion.[686] But two problems remained. First, anti-discrimination cases were relatively low profile and not firmly anchored in private law. Second, action could be taken against fellow

[680] Bundesrat, Beschluss des Bundesrates, Drucksache 103/05, Entschließung des Bundesrates zum Entwurf der Fraktionen von SPD und BÜNDNIS 90/DIE GRÜNEN eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien (Resolution of the Bundesrat on the draft of the parliamentary groups of the SPD and Alliance 90/The Greens regarding a law to transpose the European anti-discrimination directives) (18 February 2005).
[681] *See* CV of Norbert Röttgen, available at https://www.norbert-roettgen.de/artikel/lebenslauf
[682] Bundesrat, Stellungnahme des Bundesrates, Entwurf eines Gesetzes zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung (Draft Law Implementing the European Directives to Implement the Principle of Equal Treatment), Drucksache 329/06 (Beschluss) (16 June 2006).
[683] *See* Bundesministerium der Justiz (Federal Ministry of Justice, BMJ), Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht (Discussion Draft of an Act to Prevent Discrimination in Private Law) (10 December 2001)[Hereinafter, "BMJ Diskussionentwurf"].
[684] *See* BMJ Diskussionentwurf, "Begründung" at 17.
[685] *See* BMJ Diskussionentwurf, "Begründung" at 17 (referring in particular to §§ 138, 226, 242 and 826 of the BGB).
[686] The text gives the example of a German court that held that a singing club that refused to admit homosexual members had violated §826 BGB. BMJ Diskussionentwurf, "Begründung" at 18.

citizen only under specific circumstances governed by the general clauses.[687] For these reasons, the Social Democratic Party (SDP) and the Green Party had already proposed an anti-discrimination law during the 13th Voting Period,[688] with the goals of making anti-discrimination law governing relations between private parties clearer and more efficient.[689] The proposal automatically died at the end of the legislative period.

On 6 May 2004, the Federal Ministry for Family, Seniors, Women and Youth (*Projektgruppe EuRi*) proposed draft legislation to transpose EU anti-discrimination directives 2000/43, 2000/78 and 2002/73,[690] and on 16 December 2004, the German Government submitted a draft law to implement the European anti-discrimination directives.[691] Although the debate and legislative re-drafting process would continue in Germany for another year and a half, a side-by-side comparison of the December 2004 draft and the finalized AGG makes clear that the December 2004 draft became the primary reference document for future negotiations. Most of the language contained in the draft legislation became part of the AGG, and the structure of the two documents are quite similar.[692] Going beyond what is required under EU law, the December 2004 draft envisioned a law that would provide the same, broad material scope for race or ethnicity, gender, religion or belief, disability, age, and sexual orientation.[693] Similarly, the December 2004 draft proposed an equality body (*Stelle des Bundes zum Schutz vor Diskriminierung*) that would be responsible for monitoring not just race and ethnicity (as required by Directive 2000/43), but all of the grounds covered in Directive 2000/78.[694] The envisioned equality body would provide individuals with information about their rights, perform independent research, issue recommendations to the Bundestag and Bundesrat, and engage in dialogue with relevant stakeholders. The proposal mentions the possibility of using the equality body to mediate

[687] *See* BMJ Diskussionentwurf, "Begründung" at 18.
[688] *See* BT-Drs. 13/9706 and 13/10081.
[689] *See* BMJ Diskussionentwurf, "Begründung" at 18.
[690] *See* Bundesministerium fuer Familie, Senioren, Frauen und Jugend (BMFSFJ), Entwurf eines Gesetzes zum Schutz vor Diskriminierungen (Draft of an Act for the Protection from Discrimination in Private Law, ADG) (6 May 2004) [Hereinafter "Projektgruppe EuRi Proposal].
[691] *See* Deutscher Bundestag, Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien (Draft Law Implementing European Anti-discrimination Directives), 15. Wahlperiode, Drucksache 15/4538 (16 December 2004)
[692] *Compare* Drucksache 15/4538 *with* Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, Bundesgesetzblatt Jahrgang 2006 Teil I Nr. 39 (17 August 2006).
[693] *See* Drucksache 15/4538 at §§ 1 & 2.
[694] *See* Drucksache 15/4538 at §§ 26–31.

amicable settlements, but does not appear to authorize the equality body to represent individuals before independent courts or tribunals.[695]

On 21 January 2005, the Bundestag completed the first reading of the draft law,[696] and on 18 February 2005, the Bundesrat published a resolution on the Government's draft.[697] This was followed by a public hearing on the draft anti-discrimination law on 7 March 2005 before the Bundestag's Committee on Family, Senior Citizens and Youth. The Committee received position papers from over 20 law professors, employers' unions, employees' unions, and professional organizations.[698] On 17 June 2005, following committee deliberations, the Bundestag passed the second and third reading of the draft law. The opposition parties, the CDU/CSU and FDP, voted against it.[699] On 8 July 2005, the Bundesrat called for a conciliation committee meeting.[700] On 5 September 2005, the conciliation committee decided to postpone providing its opinion on the anti-discrimination law. The bill automatically died at the end of the legislative period.

Legislative History of AGG

The 2005 German federal elections strongly influenced the timing and form of the AGG that is in force today. From 2002 to 2005, the Bundestag was governed by a coalition consisting of the Social Democratic Party (SPD) and the Green Party. On 22 May 2005, following a series of bruising losses in regional (*Land*) elections, the SPD's chancellor, Gerard Schroeder, announced that he would seek to dissolve the parliament a year ahead of

[695] *See* Drucksache 15/4538 § 28. The tasks proposed for the German equality body in the December 2004 draft appear to be strongly influenced by the recommendations contained in the Projektgruppe EuRi Proposal. *See* Projektgruppe EuRi Proposal at pp. 39-40.
[696] *See* Deutscher Bundestag, Plenarprotokoll 15/152, Tagesordnungspunkt 16, Stenografischer Bericht,152. Sitzung, Berlin, Freitag, (21 January 2005).
[697] *See* Bundesrat, *Entschließung des Bundesrates zum Entwurf der Fraktionen von SPD und BÜNDNIS 90/DIE GRÜNEN eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien* (Resolution of the Bundesrat Resolution of the Bundesrat on the draft of the SPD and Alliance 90/The Greens regarding a law to transpose the European Anti-Discrimination Directives) Drucksache 103/05 (18 February 2005).
[698] Copies of the position papers are available on the ZAAR website at http://www.zaar.uni-muenchen.de/forschung/dokumentation/gesetzgebung/agg/index.html.
[699] *See* Bundesrat, Gesetzesbeschluss des Deutschen Bundestages, Drucksache 445/05, Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien (Law implementing European Anti-discrimination Directives) (17 June 2005).
[700] *See* Deutscher Bundestag, Anrufung des Vermittlungsausschusses Drucksache 5/5915, 15. Wahlperiode 14.07. 2005 Unterrichtung durch den Bundesrat Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien– Drucksachen 15/4538, 15/5717 (8 July 2005)

schedule of the 4-year fixed term.[701] The election resulted in the following parliamentary seat shares (%):[702]

CDU/CSU	36,8
SPD	36,2
FDP	9,9
The Left	8,8
Green Party	8,3

The election returns meant that neither the former governing SPD-Green Party alliance, nor a center-right CDU/CSU-FDP alliance would command a majority in parliament (reaching only 44,5% and 46,7%, respectively). Germany does not have a tradition of minority government formation, and it does not appear that this possibility was seriously considered.[703] Rather, the two largest parties, the Christian Democratic Union (CDU/CSU) and the SPD agreed to form a "grand coalition", which provided the government with a solid majority in both the Bundestag, and Germany's influential second chamber, the Bundesrat.[704]

The new governing arrangement proved to be far more auspicious for the passage of anti-discrimination legislation. Prior to the 2005 federal election, support for an anti-discrimination bill split parliament down party lines. The governing SPD and Green Party were in favor of it; the CDU/CSU and FPD opposed it. But once the CDU/CSU became part of the ruling coalition, it threw its support behind the bill—presumably a condition that was agreed upon during the broader negotiations between the grand coalition partners. The upshot was that the small, pro-business FDP became the lone voice of opposition. The FDP railed against the CDU/CSU's politically-motivated about-face,[705] but it was powerless to do much else. The Green Party, now in opposition, assured the governing coalition that it would continue to support the anti-discrimination bill—and even, should it be necessary, provide additional votes if individual members of the CDU/CSU decided to break rank.[706]

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[701] Geoffrey K. Roberts, *The German Bundestag Election 2005*, 59 PARLIAMENTARY AFFAIRS 668, 668-69 (2006).
[702] *See* election results reported in Sven-Oliver Proksch and Jonathan B. Slapin, *Institutions and Coalition Formation: The German Election of 2005*, 29 WEST EUROPEAN POLITICS 540, 542 (2006).
[703] *See* Hermann Schmitt and Andreas M. Wüst, *The Extraordinary Bundestag Election of 2005: The Interplay of Long-Term Trends and Short-Term Factors*, 24 GERMAN POLITICS AND SOCIETY 27, 41 (2006).
[704] *See id.*
[705] *See* Deutscher Bundestag, Antrag der Fraktion der FDP, Bürokratie schützt nicht vor Diskriminierung – Allgemeines Gleichbehandlungs- gesetz ist der falsche Weg, 16. Wahlperiode, Drucksache 16/1861(20 June 2006), p.2 ("Es ist bedauerlich, wie schnell die Bundesregierung ihre eigenen Versprechen gebrochen hat").
[706] *See* Deutscher Bundestag, Plenarprotokoll 16/38, Stenografischer Bericht, 38. Sitzung Berlin (20 June 2006), speech of Volker Beck (Green Party), pp. 3524-3525.

With the political obstacles removed, the legislation proceeded quickly. On 4 May 2006, the Federal Ministry of Justice submitted a draft for a "General Anti-Discrimination Act".[707] Approximately three months later, the AGG entered into force.[708]

2. How have disability rights laws been used in practice?

Data analysis may help to shed light on how the AGG is working in practice. To that end, the present author created a database of all cases reported in *Juris*, a for-profit provider of electronic copies of the legal judgments of the German courts,[709] from 2007 to the end of 2017, that cite to the AGG. At the conclusion of a two-step filtering process,[710] the dataset included approximately 250 cases. It should be noted that the dataset focuses exclusively on disability discrimination cases. The German critics of the general anti-discrimination law did not single out disability discrimination legislation as a particular problem. For the most part, their opposition was directed at all types of anti-discrimination laws without regard to the protected ground.[711] The decision to limit the database to disability rights litigation was made on the basis that disability is the topic of primary concern in this PhD dissertation.

Although the *Juris* database covers the whole of Germany and is frequently used in empirical studies of German law,[712] it poses some methodological hurdles. Coupette and Fleckner report that *Juris* depends entirely on the courts to determine which cases are included in the database. In their in-depth study of one court (XI. Zivilsenats des BGH) over a ten-year period, they estimate that only about 20% of the court's judicial decisions are available through *Juris*.[713] There is reason to believe that that higher courts are over-represented in the database.[714] Nor can it account for the possibility that some frivolous

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[707] *See* Deutscher Bundestag, Entwurf eines Gesetzes zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, 16. Wahlperiode, Drucksache 16/1780 (8 June 2006).
[708] *See* Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, Bundesgesetzblatt Jahrgang 2006 Teil I Nr. 39 (17 August 2006).
[709] *See* Juris Website at www.juris.de/jportal/index.jsp.
[710] The present author began to build the dataset by including all cases that were returned with the search term "AGG Behindert*". In the second stage, the author read the cases, and excluded all cases that were false positives, i.e. judgements that did not address disability discrimination at all, or only made a passing reference to it.
[711] For a tabular summary of the objections to a general anti-discrimination laws raised in German parliamentary debates, *see* Annex 1, *infra.*
[712] For a recent example, *see* Valentin Aichele, *Germany*, in Lisa Waddington and Anna Lawson (eds.), THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS, 160 (2018) (using the *Juris* database, while acknowledging that it is an incomplete dataset).
[713] *See* Corinna Coupette and Andreas Martin Fleckner. *Quantitative Rechtswissenschaft* (Quantitative Legal Studies)." 73 *JuristenZeitung (JZ)* 379 (2018).
[714] *See id.*

lawsuits are settled without directly involving the court system. On a brighter note, because the German disability discrimination law dataset is fairly large (250 cases), we can conclude with relatively high confidence that the sample size mirrors the attributes of the entire population of cases that address disability discrimination in Germany.[715]

Germany's Particular Approach to Defining Disability and Using the AGG

German AGG case-law has developed in a peculiar way. Before the AGG came into force, Germany introduced a system in which the German State assessed the degree of an individual's disability on a scale from 1-100% in 10% increments.[716] Under the system, codified in SGB IX,[717] an individual may be classified as simply "disabled" or "severely disabled". An individual is officially recognized as "severely disabled" when he or she obtains a diagnosis of 50% or higher. Severely disabled individuals are entitled to stronger legal protections and entitlements. These benefits include stronger protections against dismissals from employment, special considerations for newly advertised job postings, longer vacations, and tax advantages. Detailed guidelines for determining the degree of disability are set forth in the *Versorgungsmedizin-Verordnung mit den Versorgungsmedizinischen Grundsätzen*[718] and initial decisions may be appealed. Many labor lawyers in Germany specialize in representing clients with the objective of increasing the degree of their disability to at least 50%.[719]

Although German courts established in an early case that the AGG and SGB IX were, formally speaking, distinct laws, and that there was no need for a claimant to prove that he or she had a certain percentage of disability to meet the definition of "disabled" under the

[715] For a non-technical explanation of how the sample size affects the reliability of quantitative research findings, *see* Scottish Government, *Information about the calculation of confidence intervals for point estimates and measuring change.* ("Increasing the sample size will reduce confidence intervals and result in more precise estimates, but it must be remembered that diminishing returns will be realised from doing this; i.e. after a certain size of sample it is not really worth increasing the sample any more.)

[716] The institution responsible for making this assessment is the *Versorgungsamt*.

[717] During the period under investigation in this project, the SGB IX underwent a revision, which modified the text, but more importantly for present purposes, changed the paragraph numbers. To minimize unnecessary confusion, this chapter will refer to the SGB IX without reference to specific paragraphs. The revisions to SGB IX do not alter the findings presented here.

[718] Available for download on the website of the Federal Ministry of Labour and Social Affairs, at www.bmas.de/DE/Service/Medien/Publikationen/k710-anhaltspunkte-fuer-die-aerztliche-gutachtertaetigkeit.html

[719] A YouTube search for "Kündigung bei Schwerbehinderung" returned several videos of lawyers offering their services for this product and explaining common techniques to increase the percentage of disability above the 50% threshold.

AGG,[720] in practice, German courts very frequently referred to the claimant as "severely disabled" or "disabled" pursuant to the SGB IX scale, and in many cases, the percentage of the claimant's disability was accepted by the court as sufficient to prove that the claimant came within the scope of individuals protected under the AGG.[721] The upshot, in stark contrast to the Danish dataset, is that almost every claimant (93%) was explicitly or implicitly identified as "disabled" for the purposes of the AGG, and defendants very rarely argued that the claimant was not disabled. The only clear exceptions to this rule appeared in cases alleging disability discrimination stemming from obesity[722] and illness,[723] which account for a very small number of the total cases in the German dataset.

Two further observations may be worthy of note: First, the *de facto* reliance of German litigants and courts on the SGB IX scale to determine whether an individual is disabled for purposes of the AGG has meant that German courts have rarely been faced with the challenge of making a personalized, fact-specific determination about the nature of the claimant's disability. Rather, most courts have simply taken the SGB IX scale as sufficient to meet that element of the claimant's case. As a result, German courts have come under less pressure than other jurisdictions to develop a nuanced interpretation of what constitutes a disability, which as we have seen in Chapter 3, has been the primary focus of most preliminary references on the disability-related provisions of Directive 2000/78. It seems plausible that German courts have not referred many cases to the CJEU on disability discrimination issues because the question of "who is disabled?" has been an infrequent problem for the German courts. The SGB IX scale, for better or worse, has in most instances taken that question off the table.

Second, very few cases in the dataset are "pure" AGG cases, by which I mean cases that could not have been brought *but for* the entry into force of the AGG. ***46%*** of the cases involve allegations that a disabled job applicant was unfairly treated in the hiring process.

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[720] *See* VG Frankfurt, Urteil vom 08. Februar 2007 – 9 E 3882/06 –, juris, ¶ 24.

[721] For examples of cases in which a percentage of disability established pursuant to SGB IX was sufficient to meet the burden of proving that the claimant was disabled for purposes of the AGG, *see, i.e.,*VG Wiesbaden, Urteil vom 01. April 2008 – 8 E 735/07 –, juris, ¶ 25 (Bei dem Kläger, bei dem ein Grad der Behinderung von 40% vorliegt, ist somit das Merkmal der Behinderung gegeben); BAG, Urteil vom 13. Oktober 2011 – 8 AZR 608/10 –, juris (Der Kläger, der an einem essentiellen Tremor leidet und für den seit dem 23. September 1997 ein Grad der Behinderung von 60, also eine Schwerbehinderung, festgestellt ist, unterfällt damit dem Behindertenbegriff des § 1 AGG.); BAG, Urteil vom 22. August 2013 – 8 AZR 574/12 –, juris Der Kläger ist schwerbehinderter Mensch mit einem Grad der Behinderung von 50. Damit unterfällt er dem Behindertenbegriff des § 1 AGG).

[722] *See, i.e.* VG Gelsenkirchen, Urteil vom 25. Juni 2008 – 1 K 3143/06 –, juris; ArbG Düsseldorf, Urteil vom 17. Dezember 2015 – 7 Ca 4616/15 –, juris.

[723] *See, i.e.* LArbG Berlin-Brandenburg, Urteil vom 07. Oktober 2010 – 25 Sa 1435/10 –, juris; BAG, Urteil vom 28. April 2011 – 8 AZR 515/10 –, juris.

These cases primarily derive from rights enumerated in the SGB IX. In failure-to-hire claims, the AGG violation is almost always raised as a subsidiary claim. The same is true for cases in which disabled individuals challenge their dismissal from work, which accounts for ***12%*** of the cases in the dataset. A severely disabled person may not be dismissed without the consent of the *Integrationsamt*, a government institution with a mandate to support the integration of individuals with disabilities in the workplace. Another common type of claim involves challenges to the legality of collective bargaining agreements and/or pension schemes. In short, these cases technically-speaking, rely on the AGG and are classified as disability rights litigation, but they rely on pre-existing German laws, not only to make the factual determination that the claimant is disabled, but also to specify the harm that the claimant has suffered and the appropriate remedy. The most common issues that arise in other jurisdictions, such as—What constitutes a reasonable accommodation in the present circumstances?; What are the essential job functions of the post?; What constitutes an undue hardship?—are few and far between.

The two German preliminary references concerning the disability-related aspects of Directive 2000/78 reflect a similar focus on pre-existing German law. The plaintiffs in *Odar* and *Bedi* are both identified in the CJEU judgements as disabled according to the SGB IX scale. In official court docuemnts, Odar is "recognized as being disabled, with his degree of disability being 50%".[724] Similarly, Bedi is "classified as a severely disabled person, with a 50% disability rating".[725] Odar's claim of discrimination was based on a complex calculation of the money that he was entitled to receive in retirement. In his particular circumstances, a German law that was intended to provide more favorable circumstances for individuals with disabilities by lowering the pensionable age to 60 (rather than 63 for non-disabled workers) had a negative impact on his retirement income.[726] Bedi's claim presented an analogous problem, and was based in part on the same German law at issue in *Odar,* which permitted individuals with disabilities to receive a pension at an earlier age.[727] In neither case do the courts need to wrestle with the issues that are usually at the heart of a disability discrimination case, such as whether or not the plaintiffs were disabled, had been provided with reasonable accommodations, or were able to perform the essential functions of their jobs with or without reasonable accommodation.

[724] *See Odar*, at ¶ 16.
[725] *See Bedi*, at ¶ 12.
[726] *See Odar*, at ¶¶ 57-58.
[727] *See Bedi*, at ¶¶ 51-52.

This raises an intriguing question. Neither Denmark nor Germany had disability rights legislation prior to the transposition of Directive 2000/78. In Denmark, Directive 2000/78 was a watershed moment. Denmark was at the forefront of posing questions about disability rights via the preliminary reference procedure and the judgements that the CJEU handed down genuinely transformed the way that Danish courts interpret employers' obligations in the employment sector (which is the only field of law that Denmark opted to cover under its minimalist transposition of Directive 2000/78). Nothing comparable appears to have occurred in Germany. Why? The difference may be a product of pre-existing disability laws. Although Denmark had strong legal protections for individuals with disabilities, these rights did not extend to the employment sphere. Therefore, Directive 2000/78 entered an almost completely unoccupied space, where union litigators moved quickly to seek clarity about the scope of the new law. By contrast, in Germany, laws that provided special protections for individuals with disabilities in the workplace were already well entrenched before the arrival of Directive 2000/78. The way that workers qualify for this special status is anathema to the disability rights approach. Employees need to demonstrate by means of a thoroughly "medicalized" procedure that they are sufficiently disabled to deserve special treatment. Those that reach the 50% threshold are entitled to a number of benefits that those that have disabilities under the 50% threshold do not. Nevertheless, it is certainly plausible that for individuals with disabilities facing discrimination in the workplace, using the pre-existing German laws, which are more familiar to German courts, may provide a more effective means of achieving their personal objectives than the AGG offers.

Another factor that may have contributed to a reluctance to exploit the new opportunities that EU law provides may be an early and costly strategic lawsuit that failed. A disability rights organization brought a reasonable accommodation case against the German railway company. The German Supreme Administrative Court (*Bundesverwaltungsgericht*) not only ruled against the plaintiffs, but also imposed a heavy financial toll on it. Moeschel argues, quite plausibly, that this "early decision and the high reimbursement requested had a chilling effect on disability associations that might have entertained challenging other structural issues relating to disability discrimination . . . [A]ssociations that effectively have

the power to bring disability claims against the state were shocked into silence by this early decision".[728]

Conclusion

The most striking feature of German disability discrimination law is its continuity with the past. In almost every instance in the dataset, the claims that came before the courts involved alleged violations of laws that were already on the books and were interpreted and adjudicated with those pre-existing German laws in mind. In light of the foregoing, the most relevant question appears not to be whether the German legal system can adapt to Directive 2000/78, but whether German claimants and their advocates have learned to fully harness the new powers they have been given. In the course of this chapter, I have provided two possible explanations for this empirical result. First, the pre-existing laws concerning individuals with disabilities in Germany have inadvertently provided a makeshift solution to some of the more challenging disability rights concepts. In particular, the practice of rating an individual's disability on a scale of 0-100% on the basis of a medical exam according to criteria set forth in SGB IX has usually been deemed sufficient by the courts to determine whether the claimant had proved that he or she was disabled for the purposes of the AGG. Second, an early foray into strategic litigation in the field of reasonable access to German trains resulted into a costly defeat for a disability rights organization. Like-minded organizations may have concluded that litigation was simply too risky to pursue.

Returning to the European Legal Mobilization factors described in the introduction to Part II: legal consciousness, resources, identity, and "insider v. outsider" relationships with policymakers, it is clear that the results of the data analysis cannot shed light on all these issues. However, the results do suggest that, unlike Denmark and the UK, the German case-law on disability rights has not been advanced by public interest litigators with deep pockets and litigation know-how. The rather large number of cases in the dataset suggest that Germans are not opposed, in principle, to using the courts to advance anti-discrimination causes. That is to say, the failure to fully embrace the AGG does not appear to have its roots in a litigation-averse legal culture.[729] But litigants and their representatives appear much more

[728] *See* Mathias Moeschel, *Litigating Anti-Discrimination Cases in Germany: What Role for Collective Actors?* at 74 in Elise Muir et al. (eds.) HOW EU LAW SHAPES OPPORTUNITIES FOR PRELIMINARY REFERENCES ON FUNDAMENTAL RIGHTS, 7 EUI Working Paper Law No. 2017/17 (2017) (citing the case BVerwG, 9 C 1.05, 5 April 2006 ¶45 and *Beschluss*).

[729] *See* Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany* 46 THE AMERICAN JOURNAL OF COMPARATIVE LAW 1 (1998) (exploring the use of litigation rates as a proxy for legal culture).

likely to build their case on pre-existing German laws rather than fully exploit the independent power that the AGG offers.

Conclusion to Part II

According to the standard EU law textbook, EU laws should be interpreted uniformly across the Member States. If the European Commission concludes that a directive has been improperly or incompletely transposed into national law, it can bring an infringement proceeding against a Member State to induce compliance. When in doubt, Member State national judges may—and in some cases must—pose questions to the CJEU to provide them with guidance in how to properly interpret EU law. Pursuant to the doctrines of supremacy, primacy and direct effect, CJEU judgments, regardless of where the referring court resides, create binding precedents across the entirety of the EU. In a process not dissimilar from U.S. Supreme Court rulings,[730] the binding nature of the CJEU's jurisprudence contributes to the coherent interpretation of EU law, despite its use in multiple legal fora.

The findings unearthed in this Part suggest that the evolution of EU law is more complex than the standard textbook account would have us believe. To be sure, we see evidence of the compliance-enhancing features of the EU legal system at work, but in each of the Member States examined in this Part, we also see a tremendous amount of variation in how the law is transposed into national law and used (or not used) by potential litigants. This variation only becomes evident when we look beyond the activities of EU institutions and investigate what is happening at the Member State level.

In each of the Member States examined in this dissertation, EU disability rights legislation confronted deeply-rooted national traditions. In Germany, the transposition of EU anti-discrimination directives unleashed a bruising—and at times vicious—debate about the (in)congruence of anti-discrimination laws with the right to private autonomy in contract. In Denmark, disability rights laws encountered sustained resistance from an entrenched national tradition of paternalistic disability legislation. Even in the UK, an outlier in the sense that it had a long history of national disability rights laws prior to the transposition of the Employment Equality Act, we find creative lawyers successfully using Directive 2000/78 to expand the scope of national disability rights legislation in the face of strong opposition from the UK government.

When we unpack the "black box" of Member State machinery to investigate how EU law is practiced before national courts, we encounter a diverse set of judicial structures, cultural norms, and legal entrepreneurs that would remain hidden from view if we restricted

[730] *See* Mauro Cappelletti and David Golay, JUDICIAL REVIEW, TRANSNATIONAL AND FEDERAL: ITS IMPACT ON INTEGRATION, EUI Working Paper No. 4. (September 1981).

our analysis exclusively or primarily to the activities of peak EU institutions. We discover that the EU legal system contains many powerful tools to enhance the uniform interpretation of its laws, but uniformity is not a foregone conclusion, particularly with respect to how potential litigants use, or choose not to use, new legal opportunity structures. The national legal context matters—and sometimes it matters a great deal.

This Part also lends support to the argument that the literature on European Legal Mobilization provided a helpful toolbox to explain why potential litigations use or do not use EU law to advance their interests. The UK case study suggests that EU law is more likely to be exploited in environments where potential litigants identify the courts as a legitimate and effective tool to advance their interests. Arguably, it is no coincidence that we found sophisticated public interest litigators seeking—successfully—to use Directive 2000/78 to expand the scope of disability rights protections in a country that already had experience litigating disability rights issues. The UK had not only become conditioned to thinking about disability rights as a legal issue, UK public interest litigators also have a relatively long and positive history of using EU law to advance the domestic anti-discrimination agenda. Viewed in this light, *Coleman* is a classic example of UK public interest litigators using EU law to increase the scope of domestic anti-discrimination law.

The Danish case study exhibits several of the features identified in the European Legal Mobilization literature. When we take a longer-term view, disability rights can be seen as the latest installment of a decades-long battle over insider groups, who sought to maintain privileged relationships with policymakers, and outsider groups, who were determined to upset the *status quo* and had the legal expertise and financial resources to carry out their mission.

The German case study is most notable for what we do *not* find. By and large, disability litigation in Germany continues to be dominated by pre-existing German laws. To the extent that German litigants and their representatives make use of Directive 2000/78 (as transposed in national law in the AGG), it usually arises as a subsidiary claim, invoked to bolster a primary argument based on pre-existing German law. Unlike Denmark and the UK, we did not find a cadre of well-resourced litigators prepared to push the boundaries and expand the scope of disability rights law. Indeed, the initial foray in this direction in Germany was not only unsuccessful, but very expensive. It would be unsurprising if this result did not give pause to others who might have been contemplating a similar litigation-based strategy to improve the rights of individuals with disabilities.

Concluding Remarks

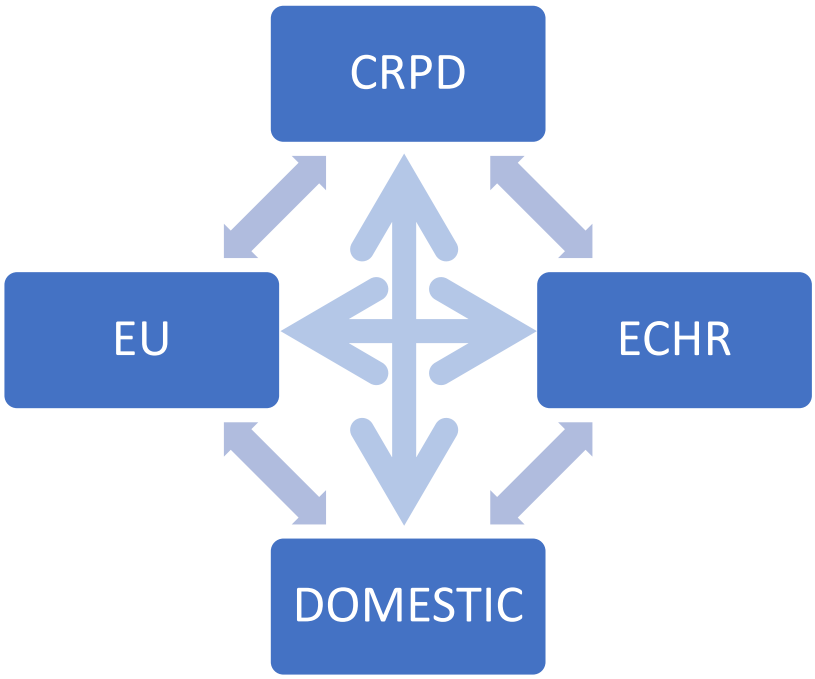
By virtue of a fortuitous coincidence, I have a friend whom I consider to be the "Picasso" of newspaper opinion writing. Before the age of 30, he had already published two popular books and become the youngest op-ed writer on the staff of the *New York Times*. We rarely discuss politics when we meet, but on one occasion after a particularly tense week on Capitol Hill I broke our unwritten code and asked him if he could please make sense of the events that had recently unfolded. "Do you remember the movie *Apocalypse Now*?" he asked, referring to the 1979 war film about a soldier who was ordered to navigate up the Nùng River to assassinate a special forces officer who had reportedly gone rogue. The farther the solider sailed upriver, the stranger and less comprehensible his environment became. The apex of the plot involves a meeting between the two protagonists, as recounted in his op-ed:

> "THEY told me," Martin Sheen's Willard says to Marlon Brando's Kurtz in "Apocalypse Now," at the end of a long journey up the river, "that you had gone totally insane, and that your methods were unsound."
>
> His baldness bathed in gold, his body pooled in shadow, Kurtz murmurs: "Are my methods unsound?"
>
> And Willard — filthy, hollow-eyed, stunned by what he's seen — replies: "I don't see any method at all, sir.[731]

Obvious differences in circumstances aside, in the course of writing this dissertation, I have sometimes felt an uncomfortable empathy for both Willard and Kurtz. The deeper I became immersed in this subject, the greater was my sensation of becoming unmoored.

[731] Ross Douthat, *The Kurtz Republicans*, N.Y TIMES (12 October 2013).

In Chapter 1, I introduced for the first time the diagram reproduced below.



Even this daunting web of relationships is a simplified version of a much more complex reality. To use just one example for illustrative purposes, the blue box titled "domestic" is a stand-in for 28 distinct Member States, each with their own national judicial systems, administrative staffs, cadres of lawyers, plaintiffs and defendants. Adding to the confusion, these are domestic institutions in constant flux. Individuals come and go over time; they change their minds, adjust to new circumstances, and move from one organization to another. Channeling my skeptical inner-Willard, I have sometimes wondered if I was merely engaging in magical thinking, intent on systematizing a fictious order that existed only within the confines of my own mind.

But on further reflection, I decided that I was falling prey to the fatalistic trap of Sartori's "over-conscious thinker", the researcher who becomes so consumed by the potential flaws inherent in every methodological and theoretical decision that he or she cannot work at all. Taking Sartori's advice to heart, instead of resignation, I have sought to plod ahead with the imperfect tools of the trade; to plunge my hand into the water without a thermometer, and to report on what I have found, even if this is "simply by saying hot and cold, and warmer and cooler".

Chapter-by-Chapter Summary of Findings

In Chapter 1, I outlined the basic components of the European disability rights revolution. As late as the mid-1990s, most programs to support individuals with disabilities in the workplace involved quota systems.[732] The quota systems were based on the assumptions that employers would not hire individuals with disabilities unless they were required to do so by law and that individuals with disabilities were unable to compete on an equal footing with non-disabled workers.[733] The landscape in Europe changed quickly.

(1) In 2006, the United Nations adopted the CRPD.
(2) In 2009, the ECtHR held for the first time in the Court's history in *Glor v. Switzerland*,[734] that a government had violated Article 14 of the ECHR by engaging in disability discrimination.
(3) Drawing on new competences provided in Article 13 of the Treaty of Amsterdam, in 2000, the European Council approved Directive 2000/78

This meant that in a relatively short time span, European disability rights law, which was once a matter of domestic law, also became European Union law, regional human rights law, and international law.

The remainder of the dissertation was divided into two main parts. ***Part I, Potential Drivers of Change: International, Regional, and European Law***, provided a *top-down* view of the European disability rights revolution and followed a mainly doctrinal research design.

Chapter 2 examined the impact of the CRPD and ECtHR on the European disability rights revolution through the lens of an analytical distinction between *diffuse* impact and *direct* impact. It concluded that thus far, there was not much evidence that the CRPD has had a direct impact on domestic laws and policies, but that the capacity of the CRPD to influence law and policy in a *diffuse* manner should not be minimized. One area where there did appear to be a strong direct effect was on the case-law of the ECtHR. However, two caveats are in order. First, the ECtHR's case-law on access to goods and services is surprisingly narrow. Second, it remains an open question whether the ECtHR's case-law will shape domestic legal orders in a significant way.

[732] *See* Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. LJ 62, 62 (1996)
[733] *See id.* at 71.
[734] App. No. 13444/04 (Eur. Ct. H.R. Apr. 30, 2009).

In Chapter 3, I challenged the dominant narrative in European disability rights scholarship which, in Waddington's memorable phrase, "talks the talk" on the importance of realizing the objective of moving away from the medical model of disability to the social model of disability, but fails to "walk to the walk". I argued that the ideal-type medical/social model dichotomy that is so commonly invoked in disability rights discourse does not offer a very useful framework for legal analysis. As an alternative, I engaged in an in-depth comparison of EU and US case-law, and found that in most instances the CJEU has interpreted the disability-related provisions of Directive 2000/78 in a manner that is at least as expansive—and in some cases in a *more* expansive way—than US courts after the passage of the ADA Amendments Act of 2008.

In ***Part II: Law Production in the EU,*** the perspective shifted mainly to the Member States and an assessment of the European disability rights revolution from the *bottom-up*. I did not discard traditional doctrinal methods, but research questions designed to examine the socio-legal contexts in which the European disability rights revolution operated took center stage.

Chapter 4 examined why the Member States agreed to shift competence for disability rights to the EU level. Specifically, it investigated the factors that led to the inclusion of Article 13 in the Treaty of Amsterdam and the adoption of Directive 2000/78. I argued that, far from being a foregone conclusion, the inclusion of disability rights among the protected grounds in EU law owes more to fortuitous confluence of events than strategic lobbying from disability rights advocates.

Starting with Chapter 5, the dissertation adopted the vantage point of the Member States. The first case study assesses the impact of Directive 2000/78 on the UK. One might have anticipated that a country that had decades of experience with disability rights laws and litigation would be unaffected by a directive that, by and large, replicated what the UK already had in place. In fact, research conducted on the *Coleman* case revealed experienced public interest litigators strategically exploiting some very technical and nuanced differences between domestic law and Directive 2000/78 to expand the scope of UK law beyond what UK policymakers intended.

Chapters 6 and 7 were comprised of case studies of the Danish and German experience. At first blush, Denmark and Germany appeared to have many similarities that would lead us to hypothesize that the effects of Directive 2000/78 at the Member-State level would converge. Neither Denmark nor Germany had disability rights laws before the introduction of Directive 2000/78; both are civil law countries with well-functioning

judiciaries; their common history and shared border increased the likelihood of policy diffusion.[735]

And yet, I found a great deal of variance in how the Directive was transposed and used by legal actors. In Denmark, Directive 2000/78 passed through parliament almost unnoticed. In Germany, it led to an acrimonious debate, with some commentators predicting cataclysmic consequences. Denmark opted for a bare minimum transposition of Directive 2000/78, which limited its application exclusively to the field of employment. Over strongly-worded opposition, Germany's legislators passed an anti-discrimination law that went well beyond what was required under EU law. In Denmark, most disability discrimination suits were routed to a specialized body, the Board of Equal Treatment.[736] In Germany, disability discrimination claims were addressed in the regular court system.

With the passage of time, it became clear that Denmark and Germany diverged not only in the scope of their anti-discrimination laws and the fora in which claims were heard, but also in how legal actors reacted to the new legal opportunity structures. In what evolved into a central puzzle for this dissertation, Denmark and Germany were clearly acting against-type. Danish courts, which have a well-deserved reputation for infrequently referring cases to the CJEU, were uncharacteristically referring several in the area of disability discrimination. Germany presented the inverse: German courts, which have a well-deserved reputation for frequently referring cases to the CJEU, uncharacteristically referred only two.

Drilling deeper into the data, I found that in Demark, the modal case involved an employee who developed a disability on the job, and at a certain point was fired. The employee then sued his or her former employer, claiming that the employee had suffered discrimination on the ground of disability. The outcome of the case almost always involved the resolution of fact-specific issues, such as whether the claimant was actually disabled, could perform the essential functions with or without reasonable accommodations, and the earnestness with which the employer had considered ways to accommodate the employee's disability. By contrast, in Germany the modal case involved an allegation that the employer had unlawfully failed to invite the claimant to a job interview. In almost every case, the German State had already officially determined through a state-sanctioned bureaucratic procedure that the claimant was a person with a disability. Cases in which a German court decided that the claimant was not disabled were exceedingly rare. In the German dataset, I

[735] David Brian Robertson and Jerold L. Waltman, *The politics of policy borrowing: Something Borrowed, Something Blue* (1992).
[736] If a claim goes beyond the Board's narrow jurisdiction, it is referred to the ordinary judicial organs.

found that courts explicitly or implicitly accepted that the claimant was disabled 93% of the time. The corresponding figure for the Danish dataset was 63%.

General Findings and Prospects for Future Research

In the general introduction to this dissertation, I stated that I would examine the European disability rights revolution from several different vantage points, but retain a focus on some core questions: What is the legal position individuals with disabilities in Europe? How have these rights been obtained? And, which factors contribute to the further production and refinement of the law? I also introduced a research agenda that was centered more on hard law than soft law and situations in which the evidence suggested a clear cause-and-effect chain of causality. In this concluding sub-section, I would like to make some general remarks related to these questions and discuss some prospects for future research. These remarks are limited to the rights of individuals *living in the community*, which has been the main topic of this thesis. It necessarily places to one side several important issues of that are highly relevant to disability rights law, such as guardianship, mistreatment in mental health facilities, and sub-standard prison conditions.

The explanation for why the CRPD, ECtHR,[737] and EU became fora for disability rights during a relatively short time span remains somewhat mysterious. The research design employed here proved too narrow to reach any conclusions that are not easily refuted as tainted by hindsight bias. Combing over the historical record, I found no mono-causal "smoking gun". My intuition is that the European disability rights revolution was long in the making—the result of years of advocacy aimed at changing how societies think about disability. The CRPD, ECtHR, and EU are the most tangible evidence that support for stronger disability rights had reached a critical mass or "tipping point"[738] not just in Europe, but across the globe. This question probably would have been more productively approached at a higher level of abstraction. Thomas Kuhn's work on the causes of paradigm shifts,[739] and the stream of scholarship that it inspired, probably would have provided a better starting point to address this question than the sources and literature that I consulted for this dissertation.

[737] In the case of the ECtHR, it is more accurate to say that a new line of jurisprudence on the rights of individuals with disabilities living in the community began during this period. It already had a long history of adjudicating cases involving individuals with disabilities living outside of the community.
[738] Malcolm Gladwell, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).
[739] Thomas S. Kuhn THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2012).

The scope of this dissertation was also too narrow to adequately address an important part of the European disability rights revolution; namely, the linkages between different anti-discrimination grounds. These linkages take many forms. At the level of international, regional, and EU level, the story of anti-disability discrimination cannot be fully told in isolation. European disability rights advocates have undoubtedly benefited from advances in legal protections for gender and racial discrimination in particular. As the Denmark case study has tried to show, EU gender discrimination legislation not only provided a partial template for Directive 2000/78 and Directive 2000/43, but also became the forum in which many litigators cut their teeth on how to harness the power of anti-discrimination laws to advance the interests of their clients. The extent of the spill-over or "lessons learned" from gender discrimination litigation, which were later applied to disability discrimination, has not been fully fleshed out in this dissertation. I think it is a topic that deserves further research.

With respect to the production of law, the most striking finding—and one that I did not anticipate at the outset—is the fragile and almost haphazard way in which international disability rights legal instruments have affected domestic legal orders. I do not mean to suggest that disability rights laws evolve in a completely random fashion. The actors that contribute to the creation of a preliminary reference or rely on disability rights instruments in domestic legal setting are operating within structural constraints. In hindsight, it perhaps not so surprising that *Coleman* started as a pro bono case. The UK has a stronger pro bono than most of the other Member States. Again, in hindsight, it may be unsurprising that the Danish disability rights preliminary references were bankrolled and spearheaded by Danish unions. There is a long history of Danish unions pushing for preliminary references when they face anti-discrimination law roadblocks in the domestic courts. The same could be said of Germany. Why should German litigants invest heavily in supra-national disability rights instruments when the pre-existing domestic law is fit for purpose? But at the same time, it would be misleading to underemphasize the crucial role of legal entrepreneurs in the production of disability rights law. In all of the interviews that I conducted in the course of writing this thesis, including several interviews on cases that have not been discussed in this dissertations, there is a central figure pushing the litigation forward, and this is almost always a lawyer (or team of lawyers) with a strategic plan to remedy a specific problem. The prominent role of lawyers as disability rights law entrepreneurs makes it difficult to anticipate in advance which issues will rise to the top of the disability rights agenda and who the key players in the next chapter of disability rights litigation will be. The only prediction that I can

make with relatively high confidence is that the next big case will likely be lawyer-driven and deployed with a strategic purpose.

I conclude on a methodological note. One of the key lessons I have learned in the course of writing this dissertation is that we cannot fully understand the legal impact of EU law on the Member States if we focus exclusively on the small number of cases that come before the CJEU. Preliminary references and infringement proceedings help us to understand how EU law should be interpreted, but the full range of a directive's socio-legal impact begins to come into view only when we take a broader approach. This means looking at more than the strategies of collective actors[740] or the jurisprudence of peak courts.[741] The bulk of lawsuits that come before Member State courts are brought by individuals, and precious few of them reach the highest courts or result in a preliminary reference to the CJEU. One run-of-the-mill lawsuit in a lower administrative court may be of limited utility, but when we analyze hundreds of them, patterns arise, and these patterns have much to teach us about how EU law really operates. The effects of EU law may not always be easy to spot in Member State rulings, and sufficient data may not always be available to conduct larger-N analyses of national jurisprudence. But in many instances, such information is readily available. It is my hope that this dissertation has convinced the reader that, where the conditions are favorable, the methodologies adopted in this dissertation provide productive strategies to advance our understanding of how European law operates.

[740] *See* Elise Muir et al., (eds.) *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, EUI Law Working Paper, 2017/17.
[741] *See* Alec Stone Sweet and Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95*, 5 JOURNAL OF EUROPEAN PUBLIC POLICY 66 (1998); Jonathan Golub, *The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice*, 19 WEST EUROPEAN POLITICS 360 (1996).

Annex 1

Arguments of Political Opponents to Anti-Discrimination Legislation in Germany: Analysis of Key Documents

Date	Author	Document	Objection
18 February 2005	Bundesrat	Drucksache 103/05	Limitation on freedom of contract
18 February 2005	Bundesrat	Drucksache 103/05	Beyond scope of what EU requires
18 February 2005	Bundesrat	Drucksache 103/05	Excessive cost for businesses
18 February 2005	Bundesrat	Drucksache 103/05	Excessive bureaucracy
18 February 2005	Bundesrat	Drucksache 103/05	Disadvantage in international trade
18 February 2005	Bundesrat	Drucksache 103/05	Unclear legal terminology/legal uncertainty
18 February 2005	Bundesrat	Drucksache 103/05	Burden of proof
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Maria Eichorn (CDU/CSU)	Freedom of Contract
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Maria Eichorn (CDU/CSU)	Beyond scope of what EU requires
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Maria Eichorn (CDU/CSU)	Excessive bureaucracy
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Maria Eichorn (CDU/CSU)	Excessive cost for businesses (particularly small businesses)
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Maria Eichorn (CDU/CSU)	Unclear legal terminology/legal uncertainty
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Maria Eichorn (CDU/CSU)	Burden of proof
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Maria Eichorn (CDU/CSU)	Flood of lawsuits
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Dr. Heinrich L. Kolb (FDP)	Beyond what EU requires
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Dr. Heinrich L. Kolb (FDP)	Flood of lawsuits

21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Dr. Heinrich L. Kolb (FDP)	Better in BGB than a stand-alone law
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Dr. Heinrich L. Kolb (FDP)	Burden of proof
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Dr. Heinrich L. Kolb (FDP)	Antidiskriminierungsstelle = more bureaucracy ("Wir brauchen kein neues buerokratisches Monstrum, keine neue Behoerde")
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Karl-Josef Laumann (CDU/CSU)	We have strong employer protections. We don't need anti-discrimination legislation.
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Karl-Josef Laumann (CDU/CSU)	Beyond what EU requires
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Karl-Josef Laumann (CDU/CSU)	Will only profit Anti-Discrimination groups.
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Karl-Josef Laumann (CDU/CSU)	Flood of lawsuits
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Karl-Josef Laumann (CDU/CSU)	Law won't work. There will be progress through societal awareness, not lawsuits.
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Norbert Röttgen (CDU/CSU)	Freedom of Contract
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Norbert Röttgen (CDU/CSU)	Burden of Proof
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Norbert Röttgen (CDU/CSU)	Bureaucracy
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Norbert Röttgen (CDU/CSU)	We have strong employer protections. We don't need anti-discrimination legislation.
21 January 2005	Erste Lesung, Tagesordnungspunkt 16	Plenarprotokoll 15/152, Norbert Röttgen (CDU/CSU)	Disadvantage in international trade

BIBLIOGRAPHY

United Nations

Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007)

Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties Denmark, CRPD/C/DNK/1 (7 May 2013).

Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of Denmark, CRPD/C/DNK/Q/1 (12 May 2014).

Committee on the Rights of Persons with Disabilities, Replies of Denmark to the list of issues, CRPD/C/DNK/Q/1/Add.1 (15 July 2014).

Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Denmark, CRPD/C/DNK/CO/1 (30 October 2014).

Committee on the Rights of Persons with Disabilities, Information received from Denmark on follow-up to the concluding observations, CRPD/C/DNK/CO/1/Add.1 (23 November 2017).

Committee on the Rights of Persons with Disabilities, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention, Report of the Committee, CRPD/C/15/R.2/Rev.1 (6 October 2016).

The United Kingdom Government Response to the Report by the United Nations Committee on the Rights of Persons with Disabilities under article 6 of the Optional Protocol to the Convention.

Committee on the Rights of Persons with Disabilities Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties due in 2011, United Kingdom of Great Britain and Northern Ireland CRPD/C/GBR/1 (3 July 2013)

Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of the United Kingdom of Great Britain and Northern Ireland CRPD/C/GBR/Q/1 (20 April 2017)

Committee on the Rights of Persons with Disabilities, Replies of the United Kingdom of Great Britain and Northern Ireland to the list of issues, CRPD/C/GBR/Q/1/Add.1 (21 July 2017); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1 (3 October 2017).

Press Release, General Assembly, General Assembly Adopts Groundbreaking Convention, Optional Protocol on Rights of Person With Disabilities: Delegations, Civil Society Hail First Human Rights Treaty of Twenty-First Century, U.N. Doc. GA/10554 (Dec. 13, 2006), http://www.un.org/News/Press/docs/2006/gal0554.doc.htm

Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties Germany, CRPD/C/DEU/1 (7 May 2013).

Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of Germany, CRPD /C/DEU/Q/1, (12 May 2014).

Committee on the Rights of Persons with Disabilities, Replies of Germany to the list of issues, CRPD/C/DEU/Q/1/Add.1 (15 January 2015).

Volume of Appendices, Responses to the questions from the List of Issues in connection with the first German country review (CRPD/C/DEU/Q/1/Add.1) (15 January 2015).

Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1 (13 May 2015).

Committee on the Rights of Persons with Disabilities, Information received from Germany on follow-up to the concluding observations, CRPD/C/DEU/CO/1/Add.1 (27 November 2017).

European Court of Human Rights

A.-M.V. v. Finland, App. No. 53251/13 (Eur. Ct. H.R. 23 March 2017).

A.N. v. Lithuania, App. No. 17280/08 (Eur. Ct. H.R. 31 May 2016).

Ābele v. Latvia, App. Nos. 60429/12 and 72760/12 (Eur. Ct. H.R. 5 October 2017).

Airey v. Ireland, App. No. 6289/73 (Eur. Ct. H.R. 9 October 1979).

Alajos Kiss v. Hungary, App. No. 38832/06 (Eur. Ct. H.R. 20 May 2010).

Béláné Nagy v. Hungary, App. No. 53080/13 (Eur. Ct. H.R. 13 December 2016).

Blokhin v. Russia, App. No. 47152/06 (Eur. Ct. H.R. 23 March 2016).

Botta v. Italy, App. No. 153/1996/772/973 (Eur. Ct. H.R. 24 February 1998).

Butrin v. Russia, App. No. 16179/14 (Eur. Ct. H.R. 22 March 2016).

Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, App. No. 47848/08 (Eur. Ct. H.R. 17 July 2014).

Cînța v. Romania, App. No. 3891/19 (Eur. Ct. H.R. 18 February 2020).

D.R. v. Lithuania, App. No. 691/15 (Eur. Ct. H.R. 26 June 2018).

Đorđević v. Croatia, App. No. 41526/10 (Eur. Ct. H.R. 24 July 2012).

Fernandes de Oliveira v. Portugal, App. No. 78103/14 (Eur. Ct. H.R. 28 March 2017).

Dupin v. France, App. No. 2282/17 (Eur. Ct. H.R. 18 December 2018).

Glaisen v. Switzerland, App. No. 40477/13 (Eur. Ct. H.R. 25 June 2019)

Glor v Switzerland, App. No. 13444/04 (Eur. Ct. H.R. Apr. 30, 2009).

Grimailovs v. Latvia, App. No. 6087/03 (Eur. Ct. H.R. 25 June 2013).

Guerra and Others v. Italy, App. No. 116/1996/735/932 (Eur. Ct. H.R. 19 February 1998).

Hadžimejlić and Others v. Bosnia and Herzegovina, App. Nos. 3427/13, 74569/13 and 7157/14 (Eur. Ct. H.R. 3 November 2015).

I.B. v Greece, App. No. 552/10 (Eur. Ct. H.R. Oct. 13, 2013).

Ivinović v. Croatia, App. No. 13006/13 (Eur. Ct. H.R. 18 September 2014).

J.D. and A v. the United Kingdom, App. Nos. 32949/17 and 34614/17 (Eur. Ct. H.R. 24 October 2019)

Jasinskis v. Latvia, App. No. 45744/08 (Eur. Ct. H.R. 21 December 2010).

Kiyutin v. Russia, App. No. 2700/10 (Eur. Ct. H.R. 10 March 2011).

Kocherov and Sergeyeva v. Russia, App. No. 16899/13 (Eur. Ct. H.R. 29 March 2016).

*Koroviny v. Russia***,** App. No. 31974/11 (Eur. Ct. H.R. 27 February 2014).

L.R. v. North Macedonia, App. No. 38067/15 (Eur. Ct. H.R. 23 January 2020).

Lashin v. Russia, App. No. 33117/02 (Eur. Ct. H.R. 22 January 2013).

López Ostra v. Spain, App. No. 16798/90 (Eur. Ct. H.R. 9 December 1994).

M.H. v. the United Kingdom, App. No. 11577/06 (Eur. Ct. H.R. 22 October 2013).

M.S. v. Croatia (No. 2), App. No. 75450/12 (Eur. Ct. H.R. 19 February 2015).

McDonald v. the United Kingdom, App. No. 4241/12 (Eur. Ct. H.R. 20 May 2014).

Mihailovs v. Latvia, App. No. 35939/10 (Eur. Ct. H.R. 22 January 2013).

Mockutė v. Lithuania, App. No. 66490/09 (Eur. Ct. H.R. 27 February 2018).

N. v. Romania, App. No. 59152/08 (Eur. Ct. H.R. 28 November 2017).

Nikolyan v. Armenia, App. No. 74438/14 (Eur. Ct. H.R. 3 October 2019).

Plesó v. Hungary, App. No. 41242/08 (Eur. Ct. H.R. 2 October 2012).

R.P. and Others v. the United Kingdom, App. No. 38245/08 (Eur. Ct. H.R. 9 October 2012).

Rooman v. Belgium, App. No.18052/11(Eur. Ct. H.R. 31 January 2019).

S.H.H. v. the United Kingdom, App. No. 60367/10 (Eur. Ct. H.R. 29 January 2013).

Sanlisoy v. Turkey, App. No. 77023/12 (Eur. Ct. H.R. 8 November 2016).

Seal v. the United Kingdom, App. No. 50330/07 (Eur. Ct. H.R. 7 December 2010).

Semikhvostov v. Russia, App. No. 2689/12 (Eur. Ct. H.R. 6 February 2014).

Stanev v. Bulgaria, App. No. 36760/06 (Eur. Ct. H.R. 17 January 2012).

Stoian v. Romania, App. No. 289/14 (Eur. Ct. H.R. 25 June 2019)

Topekhin v. Russia, App. No. 78774/13 (Eur. Ct. H.R. 10 May 2016).

X and Y v. The Netherlands, App. No.8978/80 (Eur. Ct. H.R. 26 March 1985).

*Z.H. v. Hungary***,** App. No. 28973/11 (Eur. Ct. H.R. 8 November 2012).

European Union

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] *OJ L 45.*

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

Council Directive of 10 Feb. 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 75/117/EEC.

Council Directive of 9 Feb. 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 76/207/EEC.

Court of Justice of the European Union, *Annual Report 2016, Judicial Activity* (providing information on the number of preliminary references over time). The 2016 Report and for previous years are available at http://curia.europa.eu/jcms/jcms/Jo2_7000/en/.

Sec (71) 600, Supp. No. 2/71, Annex to the Bulletin of the European Communities No. 4-1971.

Meetings of the Heads of State or Government, The First Summit of the Enlarged Community, Bull. EC 10-1972.

Bulletin of the European Committees, Supp. 4/73 (19 April 1973).

Council Resolution of 21 January 1974 concerning a social action programme, OJ No. C 13/1.

Council Resolution of 27 June 1974 establishing the initial Community action programme for the vocational rehabilitation of handicapped persons OJ No. C 80/30.

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45.

Report from the Commission to the Council on the initial community action programme for the vocational rehabilitation of handicapped persons, COM(79) 572 final, 26 October 1979.

Memorandum of the Commission to the Council Concerning the Employment of Disabled People in the European Community (COM(86)(9) of 24 January 1986.

Resolution of the European Parliament (O.J. No. C 148/95 of 16 June 1986)

Opinion of the Economic and Social Committee on the Draft Council Recommendation on the Employment of Disabled People in the European Community of 23 April 1986 (O.J. No. C 189/90 of 28 July 1986)

Resolution of the European Parliament (O.J. No. C 148/95 of 16 June 1986).

Council Recommendation of 24 July 1986 on the Employment of Disabled People in the European Community (O.J. No. L 225/43 of 12 August 1986).

European Commission, Proposal for a Council Directive on Minimum Requirements to Improve the Mobility and the Safe Transport to Work of Workers with Reduced Mobility, COM(90) 588 final, 28 February 1991.

Commission proposal for a Council Directive on minimum requirements to improve the mobility and the safe transport to work of workers with reduced mobility (COM(90)588 final, 11 February) (OJ C 68/7 16.391), amended proposal (COM(91) 539 final) (OJ C 15/18 21.1.92).

Commission, Green Paper—European Social Policy: Options for the Union COM(93) 551, 17 November 1993.

Commission, "White Paper—European Social Policy: A Way Forward for the Union", COM(94) 33 final, 27 July 1994.

Commission, "Reinforcing Political Union and Preparing for Enlargement", COM(96) 90 final, 28 February 1996.

Conference of the representatives of governments of the Member States, European Union Today and Tomorrow - adapting the European Union for the benefit of its peoples and preparing it for the future (1996), CONF/2500/96, 5.12.96.

Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, OJ L 043.

Council Directive 2000/43/EC of 29 June 20000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(1999)566 final (26 April 2000) OJ C 116E.

Communication from the Commission on certain Community measures to combat discrimination, COM(1999) 564 final (25 November 1999).

Proposal for a Council Directive establish a general framework for equal treatment in employment and occupation, COM(1999)565 final (27 June 2000), OJ C 177E.

Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(1999)566 final (26 April 2000) OJ C 116E.

Opinion of the Committee of the Regions on: the Communication from the Commission on certain Community measures to combat discrimination, the Proposal for a Council Directive establish a general framework for equal treatment in employment and occupation, the Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and the Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006, OJ C 226 (8 August 2000).

Opinion of the Economic and Social Committee on: the 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination', the 'Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation', the 'Proposal for a Council Directive implementing the principle of equal treatment between persons

irrespective of racial or ethnic origin', and the 'Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006', OJ C 204 (18 June 2000).

Report of the Committee on Employment and Social Affairs of 21 September 2000 on the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation (A5-0264/2000).

Amended proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty), COM(2000) 652 final, OJ C 62E (27 February 2001).

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

Communication from the Commission to the Council, the European Parliament, The European Economic and social Committee and the Committee of Regions, The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*,* Brussels, 19.6.2008 SEC(2008) 524, {COM(2008)225 final/2} at 2.

Commission Staff Working Paper, Implementation of the age and disability discrimination provisions of Directive 2000/78 of 27 November establishing a general framework for equal treatment in employment and occupation, Brussels, 28.9.2005 SEC(2005) 1176.

Report from the Commission to the European Parliament and the Council, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'*)* Brussels, 17.1.2014, COM(2014) 2 final, SWD(2014) 5 final.

Reflection Group's Report, Messina 2nd June 1995, Brussels 5th December 1995.

Bedi, Case C-312/17, ECLI:EU:C:2018:734 [2018].

Chacón Navas v Eurest Colectividades SA, Case C-13/05, EU:C:2006:456 [2006].

Coleman v Attridge Law, Case C-303/06, EU:C:2008:415; [2008]

Commission v. Denmark, Case C-143/83, ECLI:EU:C:1985:3 [1985]

Commission v Italy, Case C-312/11, ECLI:EU:C:2013:446 [2013].

Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal, Case C-270/16, EU:C:2018:17 [2018].

Danfoss, Case 109/88, ECLI:EU:C:1989:383 [1989].

HK Danmark (Ring and Skouboe Werge), joined cases C-335/11 and C-337/11 EU:C:2013:222 [2013].

Mohamed Daouidi v Bootes Plus SL and Others, Case C-395/15, EU:C:2016:917 [2017].

DW v Nobel Plastiques Ibérica SA, Case C-397/18 ECLI:EU:C:2019:703. [2019]

Gérard Fenoll v. Centre d'aide par le travail "La Jouvene", Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon Case C-316/13, EU:C:2015:200 [2015].

FOA (*Kaltoft v Municipality of Billund)*, Case C-354/13, EU:C:2014:2463 [2015].

Wolfgang Glatzel v Freistaat Bayern, Case C-356/12 EU:C:2014:350 [2014].

Handels- og Kontorfunktionærernes Forbund i Danmark (Larsson) v Dansk Handel & Service (Føtex Supermarked A/S) Case C-400/95, EU:C:1997:259. [1997]

Handels- og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening, Case C-179/88, EU:C:1990:384 [1990].

Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89, ECLI:EU:C:1990:395 [1990].

Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control, Case C-406/15, EU:C:2017:198 [2017]

Johann Odar v Baxter Deutschland GmbH, Case C-152/11, EU:C:2012:772 [2013].

Pedersen, Case C-66/96, EU:C:1998:549 [1998].

Tele Danmark A/S v. HK Danmark, Case C-109/00, EU:C:2001:513 [2001]

Z v A, C-363/12, EU:C:2014:159; [2014]

Denmark

Danish Western High Court Judgment of 11 October 2007, published in UFR2008.30V

Danish Western High Court Judgment of 11 October 2007, No. B-2777-06 (unpublished).

Pressemeddelelser, Dom afsagt den 31. marts 2016, Retten i Kolding. Available at http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/ Domafsagtden31marts2016.aspx. "Opfattet som handicappet".

Handels- og Kontorfunktionærernes Forbund i Danmark mod Dansk Arbejdsgiverforening/Danske Dagblades Forenings Forhandlingsorganisation for Vejle Amts Folkeblad (Arbitration Award of 11 Feb. 1985)

Handels- og Kontorfunktionærernes Forbund i Danmark mod Dansk Arbejdsgiverforening for Danfoss A/S (Arbitration Award of 16 April 1985).

FDB og LO for Kvindeligt Arbejderforbund i Danmark (Arbitration Award of 8 December 1977).

Danish Board of Equal Treatment, Case J. nr. 2016-6810-10812 (27 Feb. 2017).

Danish Board of Equal Treatment, Case J. nr. 2017-6810-23913 (22 Dec. 2017).

Danish Board of Equal Treatment, Case J.nr. 2015-6811-30838 (23 July 2016).

Danish Board of Equal Treatment, Case J.nr. 7100249-12 (6 Feb. 2013).

Danish Board of Equal Treatment, Case J.nr. 7100165-12 (15 Nov. 2012).

Danish Board of Equal Treatment, Case J.nr. 2500149-10 (14 Dec. 2011).

Germany

SOZIALGESETZBUCH IX.

Bundesministerium der Justiz (Federal Ministry of Justice, BMJ), Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht (Discussion Draft of an Act to Prevent Discrimination in Private Law) (10 December 2001).

Bundesministerium fuer Familie, Senioren, Frauen und Jugend (BMFSFJ), Entwurf eines Gesetzes zum Schutz vor Diskriminierungen (Draft of an Act for the Protection from Discrimination in Private Law, ADG) (6 May 2004).

Deutscher Bundestag, Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien (Draft Law Implementing European Anti-discrimination Directives), 15. Wahlperiode, Drucksache 15/4538 (16 December 2004).

Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, Bundesgesetzblatt Jahrgang 2006 Teil I Nr. 39 (17 August 2006).

Deutscher Bundestag, Plenarprotokoll 15/152, Tagesordnungspunkt 16, Stenografischer Bericht,152. Sitzung, Berlin, Freitag, (21 January 2005).

Bundesrat, *Entschließung des Bundesrates zum Entwurf der Fraktionen von SPD und BÜNDNIS 90/DIE GRÜNEN eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien* (Resolution of the Bundesrat Resolution of the Bundesrat on the draft of the SPD and Alliance 90/The Greens regarding a law to transpose the European Anti-Discrimination Directives) Drucksache 103/05 (18 February 2005).

Bundesrat, Gesetzesbeschluss des Deutschen Bundestages, Drucksache 445/05, Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien (Law implementing European Anti-discrimination Directives) (17 June 2005).

Deutscher Bundestag, Anrufung des Vermittlungsausschusses Drucksache 5/5915, 15. Wahlperiode 14.07. 2005 Unterrichtung durch den Bundesrat Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien– Drucksachen 15/4538, 15/5717 (8 July 2005)

Deutscher Bundestag, Antrag der Fraktion der FDP, Bürokratie schützt nicht vor Diskriminierung – Allgemeines Gleichbehandlungs- gesetz ist der falsche Weg, 16. Wahlperiode, Drucksache 16/1861(20 June 2006)

Deutscher Bundestag, Plenarprotokoll 16/38, Stenografischer Bericht, 38. Sitzung Berlin (20 June 2006), speech of Volker Beck (Green Party), pp. 3524-3525.

Deutscher Bundestag, Entwurf eines Gesetzes zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, 16. Wahlperiode, Drucksache 16/1780 (8 June 2006).

Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, Bundesgesetzblatt Jahrgang 2006 Teil I Nr. 39 (17 August 2006).

Bundesrat, Beschluss des Bundesrates, Drucksache 103/05, Entschließung des Bundesrates zum Entwurf der Fraktionen von SPD und BÜNDNIS 90/DIE GRÜNEN eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien (Resolution of the Bundesrat on the draft of the parliamentary groups of the SPD and Alliance 90/The Greens regarding a law to transpose the European anti-discrimination directives) (18 February 2005).

Bundesrat, Stellungnahme des Bundesrates, Entwurf eines Gesetzes zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung (Draft Law Implementing the European Directives to Implement the Principle of Equal Treatment), Drucksache 329/06 (Beschluss) (16 June 2006).

Landesarbeitsgericht Hamm (Westfalen), Urteil vom 13. Juni 2017 – 14 Sa 1427/16 –, juris.

Landesarbeitsgericht Baden-Württemberg, Beschluss vom 13. August 2007 – 3 Ta 119/07 –, juris.

Landesarbeitsgericht Hamm (Westfalen), Urteil vom 04. Februar 2016 – 11 Sa 1000/15 –, juris.

Landesarbeitsgericht Hamm (Westfalen), Urteil vom 03. Februar 2016 – 5 Sa 1139/15 –, juris.

VG Freiburg (Breisgau), Urteil vom 10. Mai 2011 – 5 K 989/10 –, juris.

VG Gelsenkirchen, Urteil vom 05. August 2008 – 14 K 2326/07 –, juris.

Saarländisches Oberlandesgericht Saarbrücken, Urteil vom 09. September 2009 – 5 U 26/09 - 9 –, juris.

OLG Hamm, Urteil vom 03. März 2017 – I-12 U 104/16 –, juris.

VG Frankfurt, Urteil vom 08. Februar 2007 – 9 E 3882/06 –, juris, para. 24.

VG Wiesbaden, Urteil vom 01. April 2008 – 8 E 735/07 –, juris, para. 25 (Bei dem Kläger, bei dem ein Grad der Behinderung von 40% vorliegt, ist somit das Merkmal der Behinderung gegeben);

BAG, Urteil vom 13. Oktober 2011 – 8 AZR 608/10 –, juris.

BAG, Urteil vom 22. August 2013 – 8 AZR 574/12 –, juris (Der Kläger ist schwerbehinderter Mensch mit einem Grad der Behinderung von 50. Damit unterfällt er dem Behindertenbegriff des § 1 AGG).

VG Gelsenkirchen, Urteil vom 25. Juni 2008 – 1 K 3143/06 –, juris; ArbG Düsseldorf, Urteil vom 17. Dezember 2015 – 7 Ca 4616/15 –, juris.

LArbG Berlin-Brandenburg, Urteil vom 07. Oktober 2010 – 25 Sa 1435/10 –, juris; BAG, Urteil vom 28. April 2011 – 8 AZR 515/10 –, juris.

United Kingdom

Constitutional Reform Act, 2005, c. 4 (U.K.)

Tribunals, Courts and Enforcement Act, 2007, c. 15 (U.K.).

ECA, Section 3 (1)

Human Rights Act 1998, 2(1).

Baroness Blackstone, HANSARD, HL (series 5) vol. 614, col. 1233 (30 June 2000).

Green Paper 2007, *Discrimination Law Review – A Framework for Fairness: Proposals for Single Equality Bill for Great Britain* (London: Communities and Local Government Publications).
Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, Twenty-Sixth Report of Session 2008-09, HL Paper 169, HC 736 (12 November 2009).

UK Ministry of Justice*, Practice Direction 3A—Striking Out A Statement of Case,* available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/pd_part03a

Miss S Coleman v Attridge Law, Mr Steve Law, 2006 WL 8077242 (Employment Tribunal)

Attridge Law (A Firm) v. Coleman, 2006 WL 3880344, No. UKEAT/0417/06/DM (2006).

EBR Attridge Law LLP (formerly Attridge Law) v Coleman, [2010] I.C.R. 242 (2009).

Race Relations Board v. Applin [1975] AC 259

Zarczynska v. Levy [1979] ICR 184.

Wilson v. T B Steelwork Co. Ltd (Case No.23662/77)

Showboat Entertainment Centre Ltd. v. Owen [1984] ICR 6

Weathersfield Ltd v. Sargent [1999] ICR 425

Carter v. Ahsan [2004] UKEAT/0907/03/(2)/DM

Redfearn v. Serco Ltd [2006] IRLR 623.

Shields v. E. Coomes (Holdings) Ltd. [19791] All E.R. 456.

X v. Mid Sussex CAB, 2013, IRLR 146.

Hainsworth v. Ministry of Defence, [2014] 3 C.M.L.R. 43 (2014)

Estlin v. Central Manchester University Hospitals NHS Foundation Trust

Ireland

Irish Equal Status Act, 2000 Section (3(1)(a).

United States

42 USC § 12101 *et seq.* (Americans with Disabilities Act).

29 *U.S.C.* § 701

29 CFR § 1630 (Interpretive Guidance on Title I of the Americans With Disabilities Act).

Bragdon v. Abbott, 524 U.S. 624 (1998).

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006).

Davis v. New York City Dept. of Education, 804 F.3d 23 (2d Cir. 2015).

EEOC v. Resources for Human Dev., Inc., 827 F. Supp. 2d 688 (E.D. La. 2011).

Lowe v. American Eurocopter, LLC, 2010 W.L. 5232523 (2010).

Morriss v. BNSF Railway Company, No. 8: 13CV24 (D. Neb. Nov. 20, 2014)

Martin v. Herzog, 126 N.E. 814, 176 App. Div. 614 (1920).

Secondary Literature

Klaus Adomeit, *Diskriminierung–Inflation eines Begriffs*, 22 NEUE JURISTISCHE WOCHENSCHRIFT 1622 (2002)

Klaus Adomeit, *Schutz gegen Diskriminierung–eine neue Runde*, 16 NEUE JURISTISCHE WOCHENSCHRIFT (2003)

Klaus Adomeit and Jochen Mohr, *Verantwortung von Unternehmen für diskriminierende Stellenanzeigen durch Dritte*, NEUE JURISTISCHE WOCHENSCHRIFT 60.35 (2007): 2522-2524;

Valentin Aichele, *Germany*, in Lisa Waddington and Anna Lawson (eds.), THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS, (2018).

AKTUELT, *Hvem Skal Nu Bevise*, ('Who Must Now Prove') (5 October 1989).

Karen Alter, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001).

Karen J. Alter & Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMPARATIVE POLITICAL STUDIES 33 452 (2000).

Oddný Arnardóttir, *Cross-fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights–the Case of the Discrimination Grounds under Article 14 ECHR*, 33 NORDIC J. HUM. RTS. 220 (2015).

Angelina Atanasova and Jeffrey Miller, *Collective Actors and EU Anti-Discrimination Law in Denmark*, in Elise Muir et al. (eds.), HOW EU LAW SHAPES OPPORTUNITIES FOR PRELIMINARY REFERENCES ON FUNDAMENTAL RIGHTS: DISCRIMINATION, DATA PROTECTION AND ASYLUM, EUI Law Working Paper, 2017/17.

Susanne Baer, *The Basic Law at 60-Equality and Difference: A Proposal for the Guest List to the Birthday Party*, 11 GERMAN LAW JOURNAL 67 (2010).

Susanne Baer, *„Ende der Privatautonomie "oder grundrechtlich fundierte Rechtsetzung?Die deutsche Debatte um das Antidiskriminierungsrecht*, ZEITSCHRIFT FUR RECHTSPOLITIK 290 (2002).

Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VANDERBILT LAW REVIEW 780 (2007).

Ilias Bantekas et al., (eds.) THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (2018).

BBC NEWS, *UN: 'Grave' disability rights violations under UK reforms*, (7 November 2016).

Mark Bell*, The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?*, MAASTRICHT J. EUR. & COMP. L. 5 (1999).

MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION (2002).

Mark Bell and Lisa Waddington. *The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article*, 25 INDUSTRIAL LAW JOURNAL 320 (1996).

Steen Bengtsson, *A Truly European Type of Disability Struggle: Disability Policy in Denmark and the EU in the 1990s,* 2 EUROPEAN JOURNAL OF SOCIAL SECURITY 363 (2000).

BERLINGSKE TIDENDE, 'EF-dom kan betyde lønforhøjelser for tusindvis af kvinder' ('The EC Verdict Can Mean Wage Increases for Thousands of Women') (19 October 1989).

Eric A. Besner, *Employment Legislation for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act?,* 16 COMPARATIVE LABOUR LAW JOURNAL 399 (1995).

Anette Borchorst and Lise Rolandsen Agustín, *Judicialization and Europeanization: The Danish Equal Pay Case*, Paper til Årsmøde i Dansk Selskab for Statskundskab (2015).

Johann Braun, Forum: *Übrigens–Deutschland wird wieder totalitär*, JURISTISCHE SCHULUNG 424 (2002).

Andrea Broderick and Delia Ferri, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY (2019).

Robert L. Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS 241 (2007).

Anne-Marie Burley and Walter Mattli, *Europe Before the Court*, 47 INTERNATIONAL ORGANIZATION 41 (1993).

Michael Byers, *International Law*, in Christian Reus-Smit and Duncan Snidal (eds.) THE OXFORD HANDBOOK OF INTERNATIONAL IN RELATIONS (2008).

Jared D. Cantor, *Defining Disabled: Exporting the ADA to Europe and the Social Model of Disability*, 24 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 399 (2008).

Giovanni Capoccia, *Critical Junctures*, in THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM (2016).

Valerie J. Caracelli and Jennifer C. Greene. *Data Analysis Strategies for Mixed-Method Evaluation Designs*, 15 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 195 (1993).

Isabelle Chopin et al., *Campaigning against Racism and Xenophobia: From a Legislative Perspective at European level*, EUROPEAN NETWORK AGAINST RACISM (1999).

Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 EUR. J. MIGRATION & L. 111 (1999).

Isabelle Chopin, *Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals*, 2 EUR. J. MIGRATION & L. 413 (2000).

CHURCHES' COMMISSION FOR MIGRANTS IN EUROPE ET AL., THE STARTING LINE, A PROPOSAL FOR A DRAFT COUNCIL DIRECTIVE CONCERNING THE ELIMINATION OF RACIAL DISCRIMINATION (April 1993).

Jens Peter Christensen, *The Supreme Court in Today's Society*, in Jens Peter Christensen et al. (eds.) THE SUPREME COURT OF DENMARK (2015).

Constantin Cojocariu*, Stoian v. Romania: The Court's Drift on Disability Rights Intensifies*, STRASBOURG OBSERVERS (5 September 2019) https://strasbourgobservers.com/2019/09/05/stoian-v-romania-the-courts-drift-on-disability-rights-intensifies

Ninon Colneric, *Making Equality Law More Effective: Lessons from the German Experience*, 3 CARDOZO WOMEN'S L. J. 229 (1996).

Lisa Conant et al., *Mobilizing European Law*, 25 JOURNAL OF EUROPEAN PUBLIC POLICY 9, 1376 (2017).

Corinna Coupette and Andreas Martin Fleckner. *Quantitative Rechtswissenschaft* (Quantitative Legal Studies), 73 *JuristenZeitung* 379 (2018).

John W. Creswell et al., *Advanced Mixed Methods Research Designs*, HANDBOOK OF MIXED METHODS IN SOCIAL AND BEHAVIORAL RESEARCH 240 (2003)

Mary Crossley, *Disability Kaleidoscope*, 74 NOTRE DAME LAW REVIEW 669 (1998).

DANISH INSTITUTE FOR HUMAN RIGHTS, PARALLEL REPORT TO THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (2014).

Carol Daugherty Rasnic, *The ADA—A Model for Europe with Sharper Teeth*, 56 LABOUR LAW JOURNAL 59 (2005).

Patrick Daunt, MEETING DISABILITY: A EUROPEAN RESPONSE (1991).

Gauthier De Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, EUROPE REGIONAL OFFICE (2014).

Gráinne de Búrca, *The European Union in the Negotiation of the UN Disability Convention,* 35 EUROPEAN LAW REVIEW (2010).

Gráinne de Búrca et al. *New Modes of Pluralist Global Governance*, 45 NYU J. Int'l L. & Pol. 723 (2013).

Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277 (2017).

Valentina Della Fina et al. (eds), THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (2017).

Theresia Degener, *10 Years of Convention on the Rights of Persons with Disabilities*, 35 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 152 (2017).

Martin Diller, *Scheinbewerber agieren immer dreister (Dishonest Job Applicants Are Increasingly Brazen),* FRANKFURTER ALLGEMEINE ZEITUNG (24 June 2015).

DISABLED PEOPLE AGAINST CUTS (DPAC) AND INCLUSION LONDON, FOLLOW UP SUBMISSION: RESPONSE TO UNCRPD INQUIRY (14 March 2017);

DISABILITY RIGHTS UK, A HUMAN CATASTROPHE – NEW UN CONDEMNATION FOR UK HUMAN RIGHTS RECORD (31 August 2017).

Artur Dyevre et al., *The Future of European Legal Scholarship: Empirical Jurisprudence*, 26 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 348 (2019).

Franz Christian Ebert & Tobias Pinkel, *Restricting Freedom of Contract through Nondiscrimination Provisions-A Comparison of the Draft Common Frame of Reference (DCFR) and the German General Equality Law*, 10 GERMAN LAW JOURNAL 1417 (2009).

Evelyn Ellis, *The Principle of Non-Discrimination in the Post-Nice Era*, in Anthony Arnull & Daniel Wincott (eds.) ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION, 291(2002).

Charles Epp, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

EQUALITY AND HUMAN RIGHTS COMMISSION, MONITORING THE IMPLEMENTATION OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: THE UK INDEPENDENT MECHANISM LIST OF ISSUES INTERIM REPORT (December 2014)

EQUALITY AND HUMAN RIGHTS COMMISSION, UK INDEPENDENT MECHANISM UPDATED SUBMISSION TO THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES IN ADVANCE OF THE PUBLIC EXAMINATION OF THE UK'S IMPLEMENTATION OF THE UN CRPD (July 2017)

EQUALITY AND HUMAN RIGHTS COMMISSION, UN CRPD DISABILITY REPORT RESPONSE (31 August 2017)

EQUALITY AND HUMAN RIGHTS COMMISSION, HOW IS THE UK PERFORMING ON DISABILITY RIGHTS? THE UN'S RECOMMENDATIONS FOR THE UK (January 2018).

EUROPEAN DISABILITY FORUM, GUIDE TO THE AMSTERDAM TREATY (1998).

Rhonda Evans Case and Terri E. Givens, *Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive*, 48 JOURNAL OF COMMON MARKET STUDIES 221 (2010).

Silvia Favalli, *The United Nations Convention on the Rights of Persons with Disabilities in the case law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: 'From Zero to Hero'*, 18 HUMAN RIGHTS LAW REVIEW 517 (2018).

Stanley Fish, SAVE THE WORLD ON YOUR OWN TIME (2008).

Maura Flaherty McCoy, *Classifying Obesity as a Disability under the Americans with Disabilities Act: How* Seff v. Broward County *Is Incongruent with Recent ADA Litigation* 64 CATHOLIC UNIVERSITY LAW REVIEW 539 (2015).

Leo Flynn, *The Implications of Article 13 EC-After Amsterdam, Will Some Forms of Discrimination Be More Equal than Others*, 36 COMMON MARKET L. REV. 1127 (1999).

Andreas Follesdal & Marlene Wind, *Nordic Reluctance towards Judicial Review under Siege*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 131 (2009).

David H. Freedman, *Why Scientific Studies Are So Often Wrong: The Streetlight Effect*, DISCOVER MAGAZINE 26 (2010).

Gorges Florovsky, *The Study of the Past,* in R.H. Nash (ed.) IDEALS OF HISTORY: VOLUME 2 (1969).

Andrew Geddes and Virginie Guiraudon, *The Emergence of a European Union Policy Paradigm amidst Contrasting National Models: Britain, France and EU Anti-discrimination Policy*, 27 WEST EUROPEAN POLITICS 334 (2004).

Fiona Geist et al., 24 *Disability Law in Germany*, COMP. LAB. L. & POL'Y. J. 563 (2002).

GERMAN INSTITUTE FOR HUMAN RIGHTS, SUBMISSION OF THE NATIONAL CRPD MONITORING BODY OF GERMANY TO THE CRPD COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES ON THE OCCASION OF THE PREPARATION OF A LIST OF ISSUES BY THE COMMITTEE IN THE REVIEW OF GERMANY'S INITIAL REPORT IN 2014 (2014).

GERMAN INSTITUTE FOR HUMAN RIGHTS, PARALLEL REPORT TO THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (March 2015).

Jonathan Golub, *The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice*, 19 WEST EUROPEAN POLITICS 360 (1996).

Malcolm Gladwell, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).

Jan Grue, DISABILITY AND DISCOURSE ANALYSIS (2016).

Tamas Gyorfi, *The Legitimacy of the European Human Rights Regime–A View from the United Kingdom.* 8 GLOBAL CONSTITUTIONALISM 123 (2019).

David Hackett Fischer, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT (1971).

Emilie M. Hafner-Burton and Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises,* 110 AM. J. SOCIOLOGY 1373 (2005).

Peter A. Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 23 COMPARATIVE POLITICS 275-296 (1993).

Linda Hantrais, SOCIAL POLICY IN THE EUROPEAN UNION (2d Ed. 2000).

Ole Hasselbach, LABOUR LAW IN DENMARK (4th Ed, 2016).

Bob Hepple, *The New Single Equality Act in Britain*, 5 THE EQUAL RIGHTS REVIEW 11 (2010).

Stanley Herr, *The International Significance of Disability Rights*, 93 AMERICAN SOCIETY OF INTERNATIONAL LAW 332 (1999).

Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 LAW & SOCIAL INQUIRY 723 (2002).

Werner Heun, *Private Autonomy and Discrimination*, 52 ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EOTVOS NOMINATAE 77 (2011).

Christof Heyns and Frans Viljoen. *The Impact of the United Nations Human Rights Treaties on the Domestic Level,* 23 HUMAN RIGHTS QUARTERLY 483 (2000).

Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*, 11 IND. J. CONST. L. 1 (2008).

Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 469 (1897).

Jakob Holtermann, *Philosophical Questions at the Empirical Turn*, 12 EUROPEAN JOURNAL OF LEGAL STUDIES 5 (2019).

Jakob Holtermann and Mikael Rask Madsen, *Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 1001, 1005-06 (2016)

Simon Honeyball, *Discrimination by Association*, 4 WEB JOURNAL OF CURRENT LEGAL ISSUES 5 (2007).

David Hosking, *Fat Rights Claim Rebuffed: Kaltoft v Municipality of Billund*, 44 INDUSTRIAL LAW JOURNAL 460 (2015).

Erica Howard, *The EU Race Directive: Its Symbolic Value - Its Only Value?,* 6 INT'L J. DISCRIMINATION & L. 141 (2004).

Bjørn Hvinden, *Nordic Disability Policies in a Changing Europe: Is There Still a Distinct Nordic Model?*, 38 SOCIAL POLICY & ADMINISTRATION 170 (2004).

Uffe Jakobsen, *The Conception of Nordic Democracy and European Judicial Integration*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 221 (2009).

Urszula Jaremba & Juan A. Mayoral, *The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms*, JOURNAL OF EUROPEAN PUBLIC POLICY 1 (2018).

Pia Justesen, COUNTRY REPORT NON-DISCRIMINATION DENMARK. 2016.

Robert Kagan, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

Daniel Kahneman et al. (eds.) JUDGMENT UNDER UNCERTAINLY: HEURISTICS AND BIASES 422 (1982).

Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287 (2007).

Arlene S. Kanter, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (2014).

Rosemary Kayess and Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUMAN RIGHTS LAW REVIEW 1 (2008).

R. Daniel Kelemen, EUROLEGALISM (2011).

Jens Kristiansen, THE GROWING CONFLICT BETWEEN EUROPEAN UNIFORMITY AND NATIONAL FLEXIBILITY: THE CASE OF DANISH FLEXICURITY AND EUROPEAN HARMONISATION OF WORKING CONDITIONS (2015).

Thomas S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2012).

Jackie Lane & Natalie Videbaek Munkholm, *Danish and British Protection from Disability Discrimination at Work–Past, Present and Future*, 31 INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 91 (2015).

Karl-Heinz Ladeur, *The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann*, 3 GERMAN LAW JOURNAL (2002) available at http://www.germanlawjournal.com/index.php?pageID=11&artID=152

Anna Lawson, *Uses of the Convention on the Rights of Persons with Disabilities in Domestic Courts* in Lisa Waddington & Anna Lawson, (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS (2018).

Jack S. Levy, *Case Studies: Types, Designs, and Logics of Inference,* 25 CONFLICT MANAGEMENT AND PEACE SCIENCE 1 (2008).

Johan Lievens and Marie Spinoy*, Dupin v. France: The ECtHR Going Old School in Its Appraisal of Inclusive Education?* STRASBOURG OBSERVERS (11 February 2019) https://strasbourgobservers.com/2019/02/11/dupin-v-france-the-ecthr-going-old-school-in-its-appraisal-of-inclusive-education

LO AVISEN, *Bomben Under Systemet* ('The Bomb under the System') (1992).

Janet E. Lord & Michael A. Stein, *The Domestic Incorporation of Human Rights Law and The United Nations Convention on the Rights of Persons with Disabilities* 83 WASH. L. REV. 449 (2008).

Deborah Mabbett, *The Development of Rights-Based Social Policy in the European Union: The Example of Disability Rights*, 43 JOURNAL OF COMMON MARKET STUDIES 97 (2005).

Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 LAW & SOCIAL INQUIRY 137 (2007)
.
Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMP. PROBS. 141 (2016).

Matthias Mahlmann, *Prospects of German Antidiscrimination Law*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1045 (2004-2005)

James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY AND SOCIETY 507 (2000).

James Mahoney, THE LEGACIES OF LIBERALISM: PATH DEPENDENCE AND POLITICAL REGIMES IN CENTRAL AMERICA (2001).

James Mahoney and Daniel Schensul, *Historical Context and Path Dependence*, in Robert Edward Goodin, and Charles Tilly (eds.) THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS 454 (2006).

Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties: A Comparative International Law Analysis of CEDAW*, 109 AM. J. INT'L L. 534 (2015);

Christopher McCrudden, *Human Rights Theory and Comparative International Law Scholarship*, in Lisa Waddington & Anna Lawson, (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS 594 (2018).

Mario Mendez, THE LEGAL EFFECTS OF EU AGREEMENTS (2013).

Karon Monaghan, EQUALITY LAW (2007).

Andrew Moravcsik & Frank Schimmelfennig, *Liberal Intergovernmentalism*, in Antje Wiener & Thomas Diez (eds.) EUROPEAN INTEGRATION THEORY 67 (2nd Ed., 2009).

Martijn Mos, *Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-discrimination in the Treaty of Amsterdam*, 52 JOURNAL OF COMMON MARKET STUDIES 632 (2014).

Elise Muir, *Concluding Thoughts: Legitimacy Rationale and Extent of the Incidental Proceduralisation of EU Law*, 8 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 177 (2015).

Elise Muir et al., (eds.) *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, EUI Law Working Paper, 2017/17.

Rachel Murray and Kelly Johnson, *Implementation of Article 33 CRPD in the United Kingdom: The Need to Consolidate Civil Society Engagement,* in Gauthier De Beco (ed.) ARTICLE 33 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: NATIONAL STRUCTURES FOR THE IMPLEMENTATION AND MONITORING OF THE CONVENTION (2013).

NEW YORK TIMES, *Disability Studies: A New Normal* (1 November 2013).

Ruth Nielsen, EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY (1995).

Ruth Nielsen, *Denmark*, in Susanne Burri & Hanneke van Eijken (eds.), GENDER EQUALITY LAW IN 33 EUROPEAN COUNTRIES: HOW ARE EU RULES TRANSPOSED INTO NATIONAL LAW (2014).

Jan Niessen, *The Amsterdam Treaty and NGO Responses*, 2 EUR. J. MIGRATION & L. 203 (2000).

Rory O'Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR* 29 LEGAL STUDIES 211 (2009)

Mike Oliver, “People with Established Locomotor Disabilities in Hospitals” (1990) paper presented at the Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians (23 July 1990).

Álvaro Oliveira, *What Difference Does EU Law Make? The Added Value of EU Equality Directives on Access to Justice for Collective Actors*, in Elise Muir et al. (eds.) HOW EU LAW SHAPES OPPORTUNITIES FOR PRELIMINARY REFERENCES ON FUNDAMENTAL RIGHTS, 7 EUI Working Paper Law No. 2017/17 (2017).

T. V. Olsen, DISCRIMINATION AND ANTI-DISCRIMINATION IN DENMARK. (*Emile*-European Commission Research DG, Sixth Framework Programme (2008).

David Paternotte, *The NGOization of LGBT Activism: ILGA-Europe and the Treaty of Amsterdam*, 15 SOCIAL MOVEMENT STUDIES 388 (2016).

Vlad Perju, *Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States*, 44 CORNELL INTERNATIONAL LAW JOURNAL 102 (2011).

Mark Pollack, THE ENGINES OF INTEGRATION (2003).

Joseph G. Ponterotto, *Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept Thick Description,* 11 THE QUALITATIVE REPORT 538 (2006).

Jens Pors, Kamp for Ligeløn, DET FRI AKTUELT (‘Battle for Equal Pay’) (29 June 1988).

Sven-Oliver Proksch & Jonathan B. Slapin, *Institutions and Coalition Formation: The German Election of 2005*, 29 WEST EUROPEAN POLITICS 540 (2006).

Gerard Quinn & Eilionóir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AMERICAN JOURNAL OF COMPARATIVE LAW 33 (2012).

Patricia Quinn Robertson, *In Sickness and in Health: Recent Judicial Developments in Americans with Disabilities Act Association Discrimination Cases*, 21 EMPLOYEE RESPONSIBILITIES AND RIGHTS JOURNAL 172 (2009).

Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

Sibylle Raasch, et al., *Die Anwendung des AGG in der betrieblichen Praxis*, Projektbericht. Universität Hamburg, Fakultät Wirtschafts-und Sozialwissenschaften inZusammenarbeit mit dem Zentrum GenderWissen (2009)

Anthea Roberts*, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 57 (2011).

Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467 (2015)

Anthea Roberts et al., COMPARATIVE INTERNATIONAL LAW (2018).

Geoffrey K. Roberts. *The German Bundestag Election 2005*, 59 PARLIAMENTARY AFFAIRS 668 (2006).

Lawrence D. Rosenthal, *Association Discrimination Under the Americans with Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs*, 22 HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL 132 (2004).

Jens Elo Rytter and Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 INT'L J. CONST. L. 470 (2011).

Franz-Jürgen *Säcker, „Vernunft statt Freiheit!" - Die Tugendrepublik der neuen Jakobiner - Referentenentwurf eines privatrechtlichen Diskriminierungsgesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK 286 (2002).

Urška Šadl, *A Method of (Free) Choice*, 12 EUROPEAN JOURNAL OF LEGAL STUDIES 1, 1 (2019).

Wayne Sandholtz & Alec Stone Sweet, *Neo-functionalism and Supranational Governance,* in THE OXFORD HANDBOOK OF THE EUROPEAN UNION (2012).

Lawrence J. Sanna & Norbert Schwarz. *Debiasing the Hindsight Bias: The Role of Accessibility Experiences and (Mis) Attributions*, 39 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 287 (2003).

Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 AM. POLITICAL SCIENCE REV. 1033 (1970).

Sten Schaumburg-Muller, *Parliamentary Precedence in Denmark-A Jurisprudential Assessment,* 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 170 (2009).

Martin Scheinin, *Constitutionalism and Approaches to Rights in the Nordic Countries*, in Joakim Nergelius (ed.) CONSTITUTIONALISM: NEW CHALLENGES, EUROPEAN LAW FROM A NORDIC PERSPECTIVE 135 (2008).

Dagmar Schiek*, Intersectionality and the Notion of Disability in EU Discrimination Law* 53 C. M. L. REV. 35 (2016).

Christoph Schmelz, *Vernunft statt Freiheit!—Die Tugendrepublik der neuen Jakobiner*, ZEITSCHRIFT FUR RECHTSPOLITIK 67 (2003).

Philippe C. Schmitter, *Still The Century of Corporatism?*, 36 THE REVIEW OF POLITICS 85, 93-94 (1974).

Hermann Schmitt and Andreas M. Wüst, *The Extraordinary Bundestag Election of 2005: The Interplay of Long-Term Trends and Short-Term Factors*, 24 GERMAN POLITICS AND SOCIETY 27 (2006).

Jason Seawright and John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options,* 61 POLITICAL RESEARCH QUARTERLY 294 (2008).

Frank Selbmann, *The drafting of a law against discrimination on the grounds of racial or ethnic origin in Germany: constraints in constitutional and European Community law*, 3 JEMIE - JOURNAL ON ETHNOPOLITICS AND MINORITY ISSUES IN EUROPE, 1-19 (2002) available at http://nbn-resolving.de/urn:nbn:de:0168-ssoar-62086.

Tom Shakespeare, DISABILITY RIGHTS AND WRONGS REVISITED (2013).

Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1994)

Beth A. Simmons, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

Dorte Sindbjerg Martinsen, *The Europeanization of Gender Equality – Who Controls the Scope of Non-Discrimination?*, 14 JOURNAL OF EUROPEAN PUBLIC POLICY 544 (2007).

Anne-Marie Slaughter et al., *International law and International Relations Theory*, 92 AM. J. INT'L L. 367 (1998).

Anne Marie Slaughter et al., THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE & JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (1998).

Reinhard Slepcevic, *The Judicial Enforcement of EU law through National Courts: Possibilities and Limits,* 16 JOURNAL OF EUROPEAN PUBLIC POLICY 378 (2009)

Mary Stacey and Andrew Short, CHALLENGING DISABILITY DISCRIMINATION AT WORK, Institute of Employment Rights (2000).

Jill Stavert, Glor v. Switzerland*: Article 14 ECHR, Disability and Non-Discrimination* 14 EDINBURGH L. REV. 141 (2010).

Michael A. Stein, *Disability Human Rights*, 95 CALIFORNIA L. REV. 75 (2007).

Ann Stewart et al., *Disability Discrimination by Association: A Case of the Double Yes?*. 20 SOCIAL & LEGAL STUDIES 173 (2011).

Alex Stone Sweet and Thomas Lloyd Brunell, THE JUDICIAL CONSTRUCTION OF EUROPE (2004).

Alec Stone Sweet and Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95*, 5 JOURNAL OF EUROPEAN PUBLIC POLICY 66 (1998).

Inge Storgaard Bonfils, *Disability Meta-Organizations and Policy-Making under New Forms of Governance,* 13 SCANDINAVIAN JOURNAL OF DISABILITY RESEARCH 37 (2011).

Florian Stork, *Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law*, 6 GERMAN LAW JOURNAL 533 (2005).

Palle Svensson, *Conceptions of Democracy and Judicial Review*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 208 (2009).

Jacobus TenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).

Andrew Tickell, *More "Efficient" Justice at the European Court of Human Rights: But at Whose Expense?* 2 PUBLIC LAW 206 (2015).

Transcript*, Conference on the Ethics of Legal Scholarship*, 101 MARQ. L. REV. 1083 (2018).

Oliver Treib*, Implementing and Complying with EU Governance Outputs*, 9 LIVING REVIEWS IN EUROPEAN GOVERNANCE (2014) Available at www.livingreviews.org/lreg-2014-1.

Oliver Treib, *Les conflits politiques en Allemagne autour de la transposition de la directive européenne contre le racisme*, 33 CRITIQUE INTERNATIONALE 27-38 (2006)

Adam Tyson, *The Negotiation of the European Community Directive on Racial Discrimination*, 3 EUR. J. MIGRATION & L. 199 (2001).

Lisa Vanhala, *The Diffusion of Disability Rights in Europe*, 37 HUMAN RIGHTS QUARTERLY 831 (2015).

Lisa Vanhala, *Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home,* 40 LAW & POLICY 110 (2018).

Nicola Vennemann, *The German Draft Legislation On the Prevention of Discrimination in the Private Sector*, 3 GERMAN LAW JOURNAL (2002), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=137

Maria Ventegodt Liisberg, DISABILITY AND EMPLOYMENT. A CONTEMPORARY DISABILITY HUMAN RIGHTS APPROACH APPLIED TO DANISH, SWEDISH AND EU LAW AND POLICY (2011).

Maria Ventegodt Liisberg, *Implementation of Article 33 CRPD in Denmark: The Sails Are Up, But Where is the Wind?*, in Gauthier de Beco (ed.), ARTICLE 33 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES —NATIONAL STRUCTURES FOR THE IMPLEMENTATION AND MONITORING OF THE CONVENTION (2013).

Morgane Ventura, *Glaisen v. Switzerland: The Court Still Gives Up on Reasonable Accommodation*, STRASBOURG OBSERVERS (17 May 2016) https://strasbourgobservers.com/2019/08/15/glaisen-v-switzerland-the-court-still-gives-up-on-reasonable-accommodation/

Lisa Waddington, DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY (1995).

Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L. J. 62 (1996)

Lisa Waddington, *Article 13 EC: Mere Rhetoric or a Harbinger of Change,* 1 CYELS 175 (1999).

Lisa Waddington*,* '*Not Disabled Enough': How European Courts Filter Non-Discrimination Claims Through a Narrow View of Disability,* 15 EUROPEAN JOURNAL OF HUMAN RIGHTS (2015).

Lisa Waddington, *Saying all the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law*, 22 MAASTRICHT JOURNAL OF EUROPEAN & COMPARATIVE LAW 588 (2015).

Lisa Waddington, FROM ROME TO NICE IN A WHEELCHAIR, THE DEVELOPMENT OF A EUROPEAN DISABILITY POLICY (2006).

Lisa Waddington, *Case C-13/05*, Chacón Navas v Eurest Colectividades SA" 44 C. M. L. REV. 487 (2007).

Lisa Waddington and Mark Bell, *More Equal than Others: Distinguishing European Union Equality Directives*, 38 COMMON MARKET L. REV. 587 (2001).

Lisa Waddington, *The Domestication of the Convention on the Rights of Persons with Disabilities: Domestic Legal Status of the CRPD and Relevance for Court Judgments* in Lisa Waddington and Anna Lawson (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS 538 (2018).

Lisa Waddington, *The European Union,* in Lisa Waddington and Anna Lawson (eds.), THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS*,* 131 (2018).

Lisa Waddington & Anna Lawson, (eds.) THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS (2018).

Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L. REV. 2403 (1991).

Joseph H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors,* 26 COMPARATIVE POLITICAL STUDIES 510 (1994).

Katie Wells, *The Impact of the Framework Employment Directive on UK Disability Discrimination Law*, 32 INDUSTRIAL L. J. 253 (2003).

Nick Wenbourne, *Disabled Meanings: A Comparison of the Definitions of Disability*, *in the British Disability Discrimination Act of 1995 and the Americans with Disabilities Act of 1990*, 23 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 149 (1999).

Robin West, *The Ethics of Normative Legal Scholarship,* 101 MARQ. L. REV. 981 (2017)

Marlene Wind, *When Parliament Comes First-The Danish Concept of Democracy Meets the European Union*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 272 (2009)

Marlene Wind et al., *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, 10 EUROPEAN UNION POLITICS 63-88 (2009)

Marlene Wind, *The Nordics, the EU and the Reluctance towards Supranational Judicial Review*, 48 JOURNAL OF COMMON MARKET STUDIES 1039 (2010)

Viktor Winkler, *The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur*, 3 GERMAN LAW JOURNAL (2002), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=158

Viktor Winkler, *Dubious Heritage: The German Debate on the Antidiscrimination Law*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1007 (2004-2005).

Robert Wintemute, *Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?*, 27 KING'S LAW JOURNAL 387 (2016).

William C. Wohlforth, *Realism*, in Christian Reus-Smit and Duncan Snidal (eds.) THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS, 1 (2008).

Thomas Wölfl, *Vernunft statt Freiheit!—Die Tugendrepublik der neuen Jakobiner*, ZEITSCHRIFT FUR RECHTSPOLITIK 297 (2003).

Interviews

Kirsten Precht, Counsel HK in *Danfoss* (CJEU Case 109/88) on 31 January 2018.

Paul Michell, Counsel for Coleman, in *Coleman* (CJEU Case C-303/06) on 30 November 2016.

Lucy McLynn, Counsel for Coleman, in *Coleman* (CJEU Case C-303/06) on 7 February 2017.

Jacob Goldschmidt, Counsel for Ring in *Ring/Werge* (CJEU Case C-335/11) on 20 January 2017.

Author-Created Datasets, Author-Co-Created Datasets, and Graphs based on those Datasets

Equality Law in Europe: A New Generation *CJEU Database,* available at www.equalitylaw.eui.eu.

J Miller, Equality Law in Europe: A New Generation *CJEU Database, Total Number of PRs by Member State (1961-2018).*

J Miller, Equality Law in Europe: A New Generation *CJEU Database, Anti-Discrimination PRs as Percentage of all PRs (1961-2018).*

Germany: Disability Rights Case Law Dataset (on file with author).

Denmark: Disability Rights Case Law Dataset (on file with author).