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Intersectionality and the Notion of Disability in EU Discrimination Law

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Intersectionality and the Notion of Disability in EU discrimination law

*Professor Dagmar Schiek**

1. Introduction

Fifteen years after the EU first legislated against discrimination on grounds of disability,[1] CJEU case law on the notion of disability has gained some momentum: moving on from a single case on distinguishing disability from long-term illness in 2006,[2] the Court has delivered no less than six rulings on the definition of the term disability in EU discrimination law, culminating in the Kaltoft ruling of December 2014,[3] which indicated that dismissal on the grounds of extreme obesity might constitute discrimination on grounds of disability within this framework.

Disability law experts have already commented on these rulings from the perspective of EU disability law and policy,[4] focusing on the question whether the Court goes beyond a medical model of disability and embraces the social model of disability, making reference to the UN Convention on the Rights of Persons with Disabilities (CRPD).

However, this series of cases deserves a more fundamental analysis due to the central relevance of the categories on the basis of which discrimination is outlawed (discrimination grounds) for the wider field of EU discrimination law. Their definition not only demarcates the boundaries of discrimination law, but also harbours the danger of compartmentalising the field into discrete sections such as sex discrimination law, race discrimination law and disability discrimination law. Such compartmentalisation weakens discrimination law, for example by refusing to award remedies to those at the intersections of discrimination grounds – one of the points made be socio-legal researchers who developed intersectionality theory.[5] This article argues that intersectionality theory can and should also inform

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[1] By Directive 2000/78/EC, of 27 November 20000 establishing a general framework of equal treatment in employment and occupation O.J. 2000 L303/16.

[2] Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades* SA, EU:C:2006:456.

[3] Case C-354/13 *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening* (KL), EU:C:2014:2463

[4] See, for example, Waddington, "Case C-13/05 Chacón Navas ", 44 *Common Market Law Review* (2007), 487-99,"HK Danmark (Ring and Skouboe Werge) Interpreting EU Equality Law in the light of the UN Convention on the rights of persons with disabilities", 17 *European Anti-Discrimination Law Review* (2013), 13-22, "Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definition of disability in EU", 22 MJ (2015), 576-91; McTique, "From Navas to Kaltoft: The European Court of Justice's evolving definition of disability and the implications for HIV-positive individuals", 16 *International Journal of Discrimination and the Law* (2015), 1-15; Hosking, "Fat Rights Claim Rebuffed", 44*Industrial Law Journal* (2015), 460-71; Favalli & Ferri "Defining Disability in EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints 22 *European Public Law* (2016), forthcoming.

[5] Kimberlee Crenshaw coined the term intersectionality in the 1980s when critiquing the neglect of black women's discrimination by US anti-discrimination law (Crenshaw "Demarginalizing the intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, feminist Theory and Antiracist Politics" (1989) *University of Chicago Legal Forum,* 107-

the central categories of discrimination law: it demands that courts, in defining discrimination grounds, avoid exclusion across grounds, for example by failing to recognise the disabling effect of impairments typically suffered by women or ethnic minorities. The question how discrimination grounds should be defined in order to avoid such seemingly discriminatory effects of the definition as such has not yet been the subject of academic debate. Suggestions can be derived from the reconceptualization of discrimination law through organising its categories around the interconnected nodes of sex/gender, race/ethnicity and disability, which mirror disadvantage resulting from ascribed otherness. [6] Disability discrimination law is an ideal field for exploring this further, and the exploration can also contribute to a more adequate legal definition of disability.

In order to develop this argument, the next section will outline the relevance of EU disability discrimination law for defining the categories of EU discrimination as a whole, and specify which aspects of the wider field disability law and policy are and are not relevant to the discussion. This will be followed by a summary of the Court's first and last judgment on the notion of disability,[7] which the Court's AGs classify as progressively adopting a social model of disability. The fourth section will develop a theoretical frame for analysing the case law by mapping the debate around the medical and social model of disability as sociological concepts and locating its impact on the CRPD and developing in more detail the relevance of intersectionality theory for a suitable definition of disability and other discrimination grounds by reference to the nodes mentioned before. The fifth section critically analyses the six judgments, exposing that the Court does neither use the social model nor the CRPD's guidelines for defining disability. The analysis will also expose that neither model of disability is suitable for a legal definition of a discrimination ground, especially as both tend to exclude disproportionally disabilities afflicted upon those who are not white middle class men, illustrating that last point with examples from the intersection of gender and disability. The article concludes that much remains to be done for developing an adequate definition of disability for EU discrimination law.

2. The relevance of disability law for the field of discrimination law.

As a prism gathers sunlight and reflects it in multiple colours, disability discrimination law underlines the multiple challenges to be met in defining the characteristics on the grounds for which discrimination is targeted by law (discrimination grounds), which are again central to its mission.

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167). Intersectionality theory has recently been re-phrased as a socio-legal research agenda by group of authors including Crenshaw (Cho; Crenshaw, McCall "Towards a Field of Intersectionality Studies: Theory, Applications and Praxis" 38 *Signs Journal of Women in Culture and Society* (2013), 785-810). European intersectionality studies initially concentrated in sociology and political science (e.g. Anthias, Yuval-Davis, "Contextualizing feminism: ethnic, gender and class divisions." 15 *Feminist Review* (1983), 62–75; Krzsán, Skeje, Squire *Institutionalising Intersectionality: The Changing Nature of European Equality Regimes* (Basingstoke: Macmillan 2012), and only recently involve legal scholars (see for example Grabham, Cooper et al (eds), Intersectionality and Beyond: Law, Power and the Politics of Location (Routledge: 2009); Schiek & Lawson (eds), *EU Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination* (Ashgate, 2011), specifically on remedies as added value of intersectionality see Schiek, "Multiple Discrimination in EU law: Opportunities for legal responses to intersectional gender discrimination? (Executive Report)", in Burri and Schiek (Eds) *Multiple Discrimination in EU law: Opportunities for legal responses to intersectional gender discrimination?* 1-26, at 19-20, see also the examples in the national reports in this study (coordinated by Susanne Burri and Hanneke van Eyken).

[6] Schiek, "Organising EU Equality Law Around the Nodes of 'Race', Gender and Disability", in Schiek & Lawson (op.cit. *supra* note 5) 11-27.

[7] Cases C-13/05, *Chacón Navas* and *C*-354/13 FAO Kaltoft.

Since EU discrimination law emerged from socio-political movements, initially focused on discrete experiences,[8] its application tends to insulate the experience of discrimination into discrete strands. The resulting compartmentalisation is criticised because it does not capture discrimination at the intersection of discrete grounds adequately.[9] Beyond this, compartmentalisation also reduces the impact of discrimination law: as a multifaceted field it is potentially more powerful than the sum of each of its components. However, the injustices addressed by discrimination law may seem very discrete and diverse: racist hate crime and the refusal to promote women to managerial posts may not seem connected at first sight. While the EU, in combining a competence for outlawing discrimination on grounds of sex, race, ethnic origin, age, disability, sexual orientation and religion and belief in one provision (Article 19 TFEU) has conceptualised EU discrimination law as one socio-legal field, protagonists do not readily acknowledge an overarching rationale unifying the discrete experiences. As a result, the practical application of EU discrimination law still fails in addressing intersectional discrimination.

Disability discrimination law constitutes a microcosm of this same problem, due to the wide variety of conditions which may lead to recognising a disability. Those conditions range from those easily perceptible in everyday contact such as missing limbs, facial deformation or sensual deviations such as visual or hearing impairments to other conditions which are not easily discernible, including illnesses such as heart disease, diabetes, clinical depression or chronic fatigue syndrome. Such diversity seems ill-suited for instigating spontaneous solidarity across different disabilities.[10] Nevertheless, defining disability as a discrimination ground has the potential of combining these disparate experiences into a socio-legal field of its own. The disability rights movement[11] at national and European levels seems to have achieved just that, by establishing a common cause for those very diverse experiences by shifting focus. Traditionally, disability had been perceived as a deficit of the person, which possibly can be cured, and as long as it is not cured requires compensation. The focus on the individual person who deviated from normalcy implied countless specific responses, frequently associated with paternalism and de-recognition.[12] By contrast, the disability rights movement focused on the reaction of society to the (alleged) deviance from normalcy, partly going as far as viewing disability as merely a "social construct".[13] Unifying all the different individuals under a social construct notion of disability also defined

[8] For an evaluation from political science perspectives see Verloo "Intersectional and Cross-Movement Politics and Policies: Reflections on Current Practices and Debates" 38 *Signs Journal of Women in Culture and Society* (2013) 893-915, from a legal studies perspective Schiek, "EU non-discrimination law & policy: gender in the maze of multidimensional equalities", in Hohmann-Dennhardt, Koerner and Zimmer (eds) *Geschlechtergerechtigkeit*, (Baden-Baden: Nomos, 2010), 472-88.

[9] More detail below sub 4.2.

[10] Hendriks, "The UN Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law be Modelled Accordingly?" 2 European Yearbook of Disability Law (2010) 7-26, at 21.

[11] The term "Disability Rights Movement" best captures the focus of the national and European level activist groupings engaging for the inclusion of disabled persons into society (Vanhala *Making Rights a Reality? Disability Rights Activists and Legal Mobilisation* (CUP 2011); Kemple, Ahmad, Girijashanker "Shaping Disability Rights through Shaping the Disability Movement "3 (3) *Journal of Human Rights Practice* (2011), 355-363). Nevertheless, the European umbrella organisation is known by the name "European Disability Forum" (Mabbet, "The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights", 43 *JCMS* (2005), 97-120.)

[12] See for this development Degener "Disabled People, Non-Discrimination of" in: Wolfrum, (ed) *Encyclopaedia of Public International Law* (OUP 2013)

[13] This term even made it into the 2003 Commission Action Plan on Equal Opportunities for People with Disabilities OM (2003)650 final, page 6, see Lawson, "The EU Rights Based Approach to Disability: Strategies for Shaping an Inclusive Society", 6 *International Journal for Discrimination and the Law* (2006), 269-87. For a critical assessment of "social construct phase" see Quinn, Flynn, "Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the

an overarching aim for the ban of disability discrimination, claiming a common cause for overcoming disadvantage based on a wide variety of conditions. Such success surely holds lessons for discrimination law at large.

Accordingly, this article is not dedicated to EU disability law and policy as a whole,[14] which overlaps with, but is both wider and narrower than EU discrimination law and policy. On a pragmatic definition, EU discrimination law comprises a body of secondary EU law aiming at securing equal treatment irrespective of sex, racial or ethnic origin, religion and believe, disability, age and sexual orientation.[15] While these directives are predominantly based on what is today Article 19 TFEU,[16] primary law provides normative underpinnings in Articles 8, 10 and 157 TFEU and Articles 21 -26 Charter of Fundamental Rights (CFREU).

The EU discrimination directives are quite explicit (and as such limiting) on the notion of discrimination:[17] they demand that Member States enact legislation banning discrimination on all the six "discrimination grounds" in the fields of employment. Race and sex discrimination also need to be addressed beyond employment to various degrees, for example in relation to social security, education, health and access to and provision with goods and services. Banning discrimination requires providing effective remedies beyond criminal prosecution against direct discrimination, indirect discrimination, harassment and instruction to discriminate. Only for disability discrimination, the refusal to provide reasonable accommodation of difference also constitutes discrimination.[18]

However, the directives are silent (and thus less limiting) on another central element of the field: the definition of the characteristics for which discrimination is targeted by law (discrimination grounds) is specified neither at EU level nor in most national laws.[19] Since this field is left to judicial interpretation,

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Ground of Disability", 60 *AJCL* (2012), 23-48 (28-31).

[14] A regular update on EU disability law and policy is published in part 2 of the European Yearbook of Disability Law (5th edition 2015, edited by Gerard Quinn and Lisa Waddington).

[15] The main directives are Council Directive 2000/78/EC (footnote 1), Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin O.J. 2000 L 180/22, Council Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004 L 373, 37–43 as well as Directive 2006/54/EC of the Parliament and the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) O.J. 2006 L 204/23 2006/54 and Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security O.J. 1979 L 6, 24 - 25. While at times a narrower notion of EU discrimination law is used, comprising Directives 2000/43 and 2000/78 only, because those directives marked a new era (e.g. Bell, "The Principle of Equal Treatment: Widening and Deepening", in Craig and de Búrca (eds) *The Evolution of EU Law* (OUP, 2011), 611-39, at 623), most academic writers perceive of EU anti-discrimination law as encompassing sex discrimination (see for more references Schiek, op.cit. supra (note 8) at 472-481.

[16] The Directives targeting sex discrimination in employment are based on what is today Articles 153 TFEU. The reasons for this split in competence deserve their own critique, which lies beyond the scope of this article.

[17] On the notion of discrimination in EU law see the relevant chapters in Ellis, Watson, *EU Anti-Discrimination Law*, 2nd edn (OUP, 2012). Hepple, *Equality - The New Framework*, 2nd edn (Hart, 2014).see also Schiek, "Elements of a New Framework for the Principle of Equal Treatment of Persons in EC Law: Directives 2000/43/EC, 2000/78/EC and 2002/73/EC changing Directive 76/207/EEC in context", 8 *ELJ* (2002), 137-57.

[18] The exclusion of discrimination grounds such as sex, age and religion, from this concept has been criticised, alongside the limited potential of reasonable accommodation to promote structural change (Schiek, "Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law" 12 *MJ* (2005), 427-466, at 463-464).

[19] The two common law jurisdictions, and notably UK law, have partly been an exception to this rule, see Quinn & Flynn,

the first six judgments of the European Court of Justice on disability hold lessons for the definition of discrimination grounds at large, as well as the opportunity to establish new directions for the interrelation of intersectionality and law.

3. The Court's route from Chacón Navas to Kaltoft– a first impression

The Court's first and the last ruling on the notion of disability illustrate well the development of the case law under analysis: the latest case FOA (Kaltoft),[20] concerning obesity, partly confirms the very first one, Chacón Navas,[21] concerning long-term illness. Although this may indicate that the Court moves in circles, its AG's present these cases as start and end-point of a move towards accepting a social model of disability.

The Chacón Navas case dates back to 2006, and concerned the dismissal of a female employee with a catering provider on grounds of long periods of absence on grounds of illness. While this dismissal was unlawful under Spanish labour law, the only remedy available was a compensation. Had the dismissal been discriminatory, the remedy would have been reinstatement. This inspired the Madrid labour court to refer the case to the Court of Justice, with two main questions. First the national court enquired whether EU law must be interpreted as including a ban on discrimination on grounds of long term illness, and in the second instance it wished to know whether the notion of disability in Directive 2000/78/EC encompasses long term illness.

The Court of Justice answered the first question in the negative on the rationale that today's Article 19 TFEU does not, in itself, prohibit discrimination, but rather provides an EU competence to legislate against discrimination. This competence again is limited to ban discrimination on a finite number of grounds, and neither the competence nor the legislation based on it can be expanded by interpretation.[22]

In its second question on the notion of disability, the referring court cited the World Health Organisation's International Classification of Functioning, Disability and Health (ICF), which stress the fluid boundaries between health, sickness and disability. This indicated the national judges' hope of achieving a broad notion of disability under EU law, which might encompass long-term illness under certain circumstances. The Court of Justice was not inspired to follow these suggestions. While it grasped the opportunity to claim the notion of disability under Directive 2000/78/EC as an autonomous concept under EU law,[23] it also delivered a relatively narrow definition, stating that 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".*[24]

op. cit. *supra* (note 13) at 40-41.

[20] C-354/13, *FAO Kaltoft*.

[21] Case C-13/05 *Chacon Navas*.

[22] Paragraphs 55-56 of the judgment.

[23] Paragraphs 40-42 of the judgment.

[24] Case C-13/05 *Chacón Navas*, paragraph 43.

From this narrow notion of disability the Court concluded that disability must be distinguished from sickness,[25] in particular through its long duration.[26] This chimed with AG Geelhoed's concern that a finding of disability discrimination will "always entail a substantive claim to equal access to or continued employment" with "potentially far-reaching consequences, economic and financial",[27] which in his view warranted a "precise definition" of disability, while the principal competence of the Member States for social policy mitigated against "widening the scope of Article 13 EC [now: 19 TFEU] by relying on the general policy of equality".[28] While the AG acknowledged that disability was an "indeterminate concept"[29], "undergoing a fairly rapid evolution",[30] he proposed the narrow definition accepted by the Court.[31]

The FOA Kaltoft ruling[32] related to the dismissal of a childminder employed by a Danish municipality, who had been classed as obese in line with the WHO ICD from 1998. After his return from a period of family-related leave in March 2010, Mr. Kaltoft's limited success in losing weight through employer-supported fitness training was discussed in several unannounced meetings with the organization's director. When demand for municipal child-care decreased, Mr. Kaltoft was selected for dismissal. His obesity had been mentioned in the relevant consultation meeting, though the employer contested that the dismissal was based on obesity.

The national court mainly wished to explore whether EU law, due to Articles 21-26 CFREU now being legally binding, contains a general prohibition of obesity discrimination or a general ban of discrimination in employment. The question whether obesity can be classified as disability under Directive 2000/78[33] was only their secondary concern. The Court referred to and confirmed the principles developed in Chacón Navas: the list of grounds on which discrimination is banned by Directive 2000/78/EC cannot be expanded by way of interpretation, and there is no general ban on weight discrimination to be derived from the CFREU. [34] The Court only made very scant reference to the CFREU, omitting to mention any specific Article.[35] AG Jäskinnen's opinion explains this omission. While the list of discrimination grounds in Article 21 CFREU is open ended, and might thus include obesity, the CFREU must not expand the EU's competences.[36] The AG thus returned to the concern raised by AG Geelhoed in Chacón Navas: Member States' prerogatives in social policy matters are to be safeguarded. The CFREU principles would only bind a Member State if its legislation falls within the substantive scope of

[25] Paragraph 44.

[26] Paragraph 45.

[27] Paragraph 50 of his opinion.

[28] Paragraphs 53 – 54 of his opinion.

[29] Paragraph 57 of his opinion.

[30] Paragraph 58 of his opinion.

[31] Paragraphs 76-77 of AG Geelhoed's opinion.

[32] C-354/13 *FAO Kaltoft*.

[33] Directive 2000/78/EC, op. cit., supra note 1.

[34] The Court cited paragraph 56 of the Chacón Navas (C-13/05) ruling, as well a paragraph 46 of the Coleman ruling, which is mainly relevant for acknowledging discrimination by association (Case C 303/06, *S. Coleman v Attridge Law and Steve Law*, EU:C:2008:415).

[35] Paragraph 39 of the judgement

[36] Paragraph 19 of his opinion, with reference to cases C-617/10 *Åkerberg Fransson* EU:C:2013:105, paragraph 23 and C-370/12 *Pringle* EU:C:2012:756 paragraph 179.

EU legislation or directly effective Treaty law: a legislative competence such as Article 19 TFEU is not sufficient to achieve this.[37] In so far, the case law has come full circle.

However, as regards the notion of disability, the Court quoted the definition of disability developed by its Grand Chamber earlier:

> *Following the ratification by the European Union of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35), the Court held the concept of 'disability' must be understood as referring to a limitation which results in particular from long-term physical, mental or psychological impairments 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.*[38]

The Court thus stressed that it now adheres to the notion of disability promoted by the CRPD, while AG Jääskinen suggested that the Court had moved towards the social model of disability.[39] It is open to doubt, however, whether the argumentation of the Court and its AG's in the younger case law on disability complies with the social model of disability. [40] In addition, the point can be made that the dichotomy between a medical and a social model of disability is not a sufficient starting point to develop the notion of disability for the purposes of EU discrimination law, especially if addressing intersectional inequalities.

Before we can analyze the case law in detail in the light of these considerations, it is necessary to summarize the discussion on the notion of disability initiated by the disability rights movement and its relation to the CRPD, as well as developing a theoretical frame for legal definitions of discrimination grounds in the light of intersectionality theory.

4. Notions of disability and intersectional inequality - theoretical frame

4.1. Medical and social models of disability and the UN CRPD

As already indicated, the terms "medical" and "social model of disability" have been developed in the disability rights movement. The underlying socio-political discourse perceives the move from the medical to the social model of disability as progressive, which seems to indicate that there is no space for the medical model in applying EU discrimination law.

The medical model appears as a "parody"[41] at times: by defining disability mainly with reference to an impairment attached to a person, the medical model allegedly suggests that such limitations for persons with disabilities can and should be overcome by medical cures or treatment, and if this fails by physical or technological processes addressing the impairment. Such processes aim at reinstating a

[37] Paragraphs 22 and 23 of his opinion.

[38] Case C-354/13 *FAO Kaltoft*, paragraph 53, with reference to case C-335, 337/11 *HK Danmark* EU:C:2013:222 paragraphs 37-39, C-363/12 *Z. v A Government department and The Board of management of a community school* EU:C:2014:159, paragraph 76 and C-356/12 *Wolfgang Glatzel v Freistaat Bayern* EU:C:2014, paragraph 45.

[39] Paragraph 41 of his opinion.

[40] This is also supported by the case notes referenced in note 4.

[41] See Quinn & Flynn, op. cit., supra (note 13), 28

state of normalcy, idealizing a world in which human beings do not differ too much: disability is defined as deviation from the average state of health.[42]

Those categorisations originate not from discrimination law, but rather from specific legislation creating entitlements for disabled persons, for example special benefits replacing or supplementing income from employment, or claims to specific services allowing participation.[43] This purpose corresponds to a metric approach to defining disability, since different degrees of disability lead to different levels of entitlement. These differentiations constitute contestable political choices: it would be entirely possible to grant assistance or benefits in relation to individual need without requiring a medical statement related to a degree of disability.[44] The distinction between disability benefits and "normal" unemployment benefits, for example, can be traced back to more favourable treatment of war veterans with impairments related to the loss of limps or similar to unemployed persons.[45] Modern welfare states have overcome the underlying causal approach to disability, according to which those who suffered impairment while engaged for a good cause are most deserving, followed by those suffering impairment without contributing (e.g. by being born with an impairment or involvement in an accident), and by those who somehow contributed to their impairment. Nevertheless, the medicalisation of deviance has remained decisive for classifying persons as disabled.

This classification is criticised as a social construct, based on interaction of law and medicine,[46] and perceived as a starting point for discrimination and exclusion of those labelled as belonging into the category of disabled persons. The social model of disability was developed with the aim of politically challenging such discrimination and exclusion.[47] Its proponents suggested that disability results from society's reaction to impairments, and not the impairments as such. In its most radical form, the social model was originally developed by the *British Union of Physically Impaired Against Segregation* (UPIAS). [48] Their refined policy statement established in 1975 relied on the slogan that "it is society which disables physically impaired people". The core idea is the distinction between impairment and disability. Disability refers to the restriction of activity participation. It results from the lack of taking into account physical impairments, but not from the physical impairments as such. Parallels have been drawn to the feminist distinction between sex, which has a biological base, and gender, which is an ascription of roles to women.[49]

Since the 1970s, the debates on sociological models of disability have been refined. In particular, the UPIAS definition has been criticized for neglecting the impact of impairment on the life-experience of

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[42] Geist, Petermann and Widhammer, "Disability Law in Germany", *Comparative Labor Law & Policy Journal*, 24 (2003), 563-6-8.

[43] See Degener op. cit. *supra* (note 12) marginal number 2, 6; see also Mabbet "Some are More Equal Than Others: Definitions of Disability in Social Policy and Discrimination Law in Europe" 34 *Journal of Social Policy* (2002) 215-233.

[44] Ob cit, 222-224

[45] Welti, *Behinderung und Rehabilitation* (Mohr 2005), 25-46.

[46] See Quinn, Degener, Bruce *Human Rights and Disability: The Current Use and Future Potential of UN Human Rights Instruments in the Context of Disability*, (Geneva, 2002), at 10.

[47] See for a recent defence Barnes, "The Social Model of Disability: Valuable or Irrelevant?", in Watson et al (eds) *The Routledge Handbook of Disability Studies* (Routledge , 2012), 12-29.

[48] Shakespeare, "The Social Model of Disability", in Davis (ed) *Disability Studies Reader*, 4th ed (Routledge 2013) 214-221.

[49] Garland-Thomson, "Integrating Disability, Transforming Feminist Theory", in Davis (ed) *Disability Studies Reader* , 4th ed (Routledge 2013), 333-346.

disabled people[50] as well as for rejecting any positive role of medical cures or treatment for the life experience of people with impairments. Treating or curing impairments in line with a true medical mission, which is not driven by the paternalistic urge to normalize, can be beneficial to someone suffering from ill health.[51] Any model of disability that neglects impairment will downplay the experience of chronic illness, especially if involving high levels of pain, or of conditions such as depression, arthritis, chronic fatigue syndrome (ME) or diabetes. These only fit the "barrier" model of disability with difficulty: prejudices aside, there is no single barrier (such as a staircase) the removal of which will alleviate suffering from those long-term conditions. Accommodating these conditions into models of disability requires acknowledging suffering, for which there is limited room in the social model of disability.

While the social model of disability has been critiqued, medical approaches to disability have also changed, as mirrored in the International Classification of Functioning, Disability and Health (ICF), approved by the 54th WHO assembly in 2001. The ICF aims at "measuring health and disability at both individual and population level". It is thus firmly based on a metric notion of disability. However, it acknowledges that every human being may experience illness and disability throughout her life-course. It is also claimed that

> *"ICF takes into account the social aspects of disability and does not see disability only as a 'medical' or 'biological' dysfunction. By including Contextual Factors, in which environmental factors are listed ICF allows to records the impact of the environment on the person's functioning."*[52]

If disability is an aspect of life in so far that very few people command about all abilities a human can have, strategies in disability policy can focus on adapting the environment to a wider spectrum of abilities, and to abandon expectations of "normality".[53] The ubiquity of disability under this notion also potentially increases the attractiveness of disability as a subject of funded research:[54] as age,[55] disability is perceived as a condition that is likely to affect everyone in due course. Accordingly, one might expect a coalition of powerful white men to support research in, and juridical responses to disabilities because disability of some kind will be likely experienced by themselves and their peers. If this is the case, care must be taken to not prioritise the disabilities of some through the way in which disability is defined.

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[50] Shakespeare, op. cit. *supra* (note 48).

[51] Similarly Quinn & Flynn, op. cit., *supra* (note 13) 28-29.

[52] [http://www.who.int/classifications/icf/en/ - visited on 6 July 2015]

[53] Fredman, *Discrimination Law*, (Oxford: 2nd ed. 2011), at 96 with further references.

[54] For example, Alexander Somek's scalding critique of EU Anti-Discrimination law, which ignores most of the literature on the subject, only perceives of disability discrimination law with its fluid categories and the concept of reasonable accommodation as worthy of being maintained (*An Essay on EU Anti-Discrimination Law,* Oxford 2013).

[55] Schiek, "Age discrimination before the ECJ – conceptual and theoretical issues", 48 CML Rev (2011), 777-99.

Overall, the path from the medical to the social model of disability is not a clear route to progress. Degener even suggested that the social model does not, in itself, "give any guidance as how to alternatively legally define disability"[56] because it lacks a clear distinction between characteristic and treatment. [57] Vlad Perju argued that this lack of precision leads judges to revert to the medically inspired categorisations.[58]

A human[59] or civil[60] rights model has been promoted as moving beyond both the medical and the social model of disability. The UN Convention on the Rights of Persons with Disabilities (CRPD), as a legal instrument, constitutes an attempt to address such criticism. [61] It refrains from blending out impairment, while acknowledging the social conditioning which, in interaction with impairment, creates disability, and demands a structural instead of an individual response. As a consequence of concerns about defining disability, the CRPD does not provide a comprehensive definition, leaving scope for future development.[62] Its first article states:

> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

This open definition acknowledges the role of impairment as well as the relevance of socio-economic barriers hindering full participation. However, it does not fully incorporate the social model of disability, as suggested by the reference to "persons with disabilities" in its title. By contrast, adepts of the social model of disability prefer speaking of "disabled persons" instead of "persons with disabilities". [63] Since the UN Convention not only bans discrimination, but also provides for socio-economic rights for persons with disability, the notion of disability may well differ in discrimination law inspired by the Convention on the one hand and laws creating entitlements to subsidies on the other hand. Article 2 defines disability discrimination as exclusion and deprivation related to disability – thus refraining from specifying a definition for the purposes of discrimination law. Relying on Article 1, the definition of disability in discrimination law may take impairment as a starting point.[64] Its exact shape is left to implementing legislation – and as we have seen, EU legislation does not provide such a definition. All

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[56] Degener, "The Definition of Disability in German and Foreign Discrimination Law", (2006) *Disability Studies Quarterly*, 26, under 2) a).

[57] Ibidem.

[58] Perju "Impairment, Discrimination and Legal Construction of Disability in the European Union and the United States" 44 *Cornell International Law Journal* (2011) 279-348, at 341-345, at 331.

[59] See on this Degener, op. cit., *supra* (note 11) and Quinn, Degener, Bruce, op. cit., supra (note 46).

[60] Quinn & Flynn op. cit., *supra* (note 13)

[61] See also Kayess, French "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" (2008) *Human Rights Law Review* 8 (1) 1-34, at 22-24.

[62] Kayess & French, ibidem, at 22-24.

[63] See Lawson and Priestley, "Potential, principle and pragmatism in concurrent multinational monitoring: disability rights in the European Union" (2013) *The International Journal of Human Rights*, 739. See Morris, "Impairment and Disability: Constructing an Ethics of Care that Promotes Human Rights", 16 *Hypatia*, (2011), 1-16, at 9; Kaper, *Feminist, Queer, Crip* (Indiana, 2013).

[64] Degener, *Definition of Disability* (2004). Study produced under the European Community Action Programme to combat discrimination (2001-2006) available at *http://www.pedz.uni-mannheim.de/daten/edz-ath/gdem/04/disabdef.pdf*; Wells, "The Impact of the Framework Employment Directive on UK Disability Discrimination Law", 32 ILJ (2003), 253-273, at 261-262.

we can derive from the legal instruments which emanated from decades of debate on the notion of disability is that there is scope for taking impairment as a starting point, though disability in the sense of depriving persons from participation in society only emerges from the interaction of impairment with social factors.

4.2 Defining disability without reinforcing discrimination – intersectionality and the definition of grounds

A definition of disability for the purposes of discrimination law surely must not be discriminatory in itself. This leads to another dimension of critique of the social model.

The remaining advocates of a "pure" social model tend to highlight certain categories of disability, in particular the visible lack of a limb or part thereof, or certain sensual capacities, such as vision or speech.[65] Such perspective has been criticized as being based on a limited ideal person, namely a virtuous individual, mainly a young male wheel chair user, who otherwise is "fit and never ill",[66] while the majority of wheelchair users are women over 60 suffering from long-term illness which does not totally exclude the use of stairs.[67] Also, the majority of people affected by chronical illness with high levels of pain, or by conditions such as depression, arthritis, chronic fatigue syndrome (ME) or diabetes are women, [68] indicating a gender bias of the social model of disability: it blends out real-life experiences of women more frequently than those of men.[69] Acknowledging the role of impairment in defining disability may thus reduce sexist elements of the notion of disability. This indicates that relevance of intersectionality theory for the definition of disability.

Intersectionality as a term was initially coined by Kimberlee Crenshaw in order to challenge how US American discrimination law de-recognised disadvantage experienced specifically by black women. By her own accord, Crenshaw aimed to create a meso-level theory which would inform action research.[70] Her initial focus was on adequate remedies for discrimination at the intersection of grounds. Intersectionality theory has been taken up by sociologists and political scientists as an instrument of analysing categories of disadvantage in society. The resulting complex theory has been criticised as being of little relevance to law.[71] Indeed, since law is a blunt sword, discrimination law depends on a finite number of categories in order not to be overly diluted.[72] Clearly this poses dilemmas for defining discrimination grounds, in particular if discrimination law addresses socio-economic reality and not just state and other public action. As has become apparent from the short summary of the first and last CJEU case on the notion of disability, defining discrimination grounds also specifies the scope of discrimination

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[65] This may be illustrated by the publication by US disability activists who define the impairment that leads to disability as "lacing part or all of limb, organ or mechanism of the body" (Loewen and Pollard, "The Social Justice Perspective", 23 *Journal of Postsecondary Education and Disability* (2010), 5-18, at 10.

[66] See Morris, op.cit. *supra* (note 63) at 9, and Crow "Including all of our Lives: Renewing the Social Model of Disability", in Barnes & Mercer (eds) *Exploring the Divide*, (Leeds 1996), at 58 (using the term "SuperCrip").

[67] Crow, ibidem.

[68] Wendell, "Unhealthy Disabled: Treating Chronical Illnesses as Disabilities", in Davis (ed) *Disability Studies Reader*, 4th ed (Routledge: 2013), 161-176.

[69] Crow, op. cit., supra (note 66) at 68, Morris, op. cit., *supra* (note 66), at 9-10.

[70] See Crenshaw (1989) and Cho, Crenshaw and McCall (2013), op. cit., *supra* note 5

[71] See, for example, Conaghan, "Intersectionality and the Feminist Project in Law", in Grabham et al (eds), op. cit. *supra* (note 6) 21-48.

[72] For more detail see Schiek, op cit supra (note 6).

law and the intensity of its intervention. Thus, principles such as the rule of law instigate precision of this definition, as well as a focus on differences that make a difference.

The point made by the intersectionality discourse highlights two dilemmas in principle.[73] First, while each of the discrimination grounds acknowledged as relevant in law is based on a specific social experience of disadvantage, each person is characterised by each of the discrimination grounds: either they suffer discrimination (for example because they are classified as disabled, as female or as racialized other), or they profit from discrimination (for example because they are classified as healthy, male or white). Second, discrimination law, in banning ground-specific discrimination may rest on different rationales, which may even clash: for example, the protection against ethnic and religious discrimination may rest on a rationale that pursues the preservation of closed communities engaging in practices that marginalise women or those choosing a lifestyle non-compliant with heteronormativity.

This creates a complex matrix in two respects. First, due to the asymmetric character of discrimination, persons may suffer from discrimination and at the same time profit from it. For example, a person with a mobility impairment may, due to being perceived as male, be able to command free services of female relatives helping not only to accommodate this impairment but also alleviating him form performing his own housework. While that person may be protected by disability discrimination law, the person serving him unpaid or underpaid may need protection by sex discrimination law. Second, if rationales for protecting against discrimination on different grounds clash, equal protection against discrimination of all these grounds seems elusive. Instead, discrimination regimes frequently create a hierarchy of equalities, which again do not provide adequate protection for those on the intersection of grounds.

These dilemmas call for an integrated approach to discrimination law.[74] Such an integrated approach presupposes a common rationale for the whole field of discrimination law, and all the discrimination grounds to be addressed by the field. Achieving this requires both an abstraction from ground-specific rationales and a refocusing of discrimination law around a finite number of dimensions.

The common rationale for banning discrimination on all grounds consists of overcoming disadvantage derived from ascribed otherness. Ascribing otherness is a social process through which persons are categorised by others. Such categorisation through heteronomous acts challenges self-determination and autonomy.

Being excluded from full participation in economic, social or political life on the basis of a heteronomous ascription sums up the harm inflicted by discrimination. Since ascription as a heteronomous act, for the purposes of discrimination law it does not matter whether a person carries a certain characteristic. Accordingly, in order to show discrimination on grounds of sexual orientation, the affected person does not have to show that he is actually homosexual, as long as he is perceived as homosexual. Similarly, in order to show disability discrimination, it is sufficient that the affected person demonstrates that she is perceived as disabled. This makes any metric approach to disability not only unnecessary, but fundamentally wrong for the purposes of discrimination law.

In addressing the harm of discrimination by ascription, discrimination law must respond to two underlying rationales at the same time: enabling individuation and respecting difference.

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[73] The following g paragraph constitutes a very short summary of Schiek, "Towards a Multidimensional Conception" op. cit. supra (note 18), at 441-453.

[74] Ibidem, p. 460-464.

Individuation demands that persons are allowed to move outside the box created by expectations based on ascribed otherness. Discrimination law in this dimension combats stereotyping, for example by ensuring that women can move beyond a restricted set of roles frequently circumscribed by the terms mother and sex-worker, that persons ascribed an inferior status on the basis of alleged race or ethnicity can act as fully accepted members of any community and that persons perceived as disabled must not be subjected to restricting expectations. Individuation, beyond stereotyping, frequently also entails the right to change one's identity – to forswear a religion or an alleged race, or to undergo medical treatment in order to overcome an impairment if that is possible.

Respecting difference, on the one hand, demands protecting strands of identity a person does not wish to and should not be expected to give up. On the other hand, respecting difference requires guaranteeing equality in practice in spite of durable differences, such as the ability to become pregnant, or the different abilities of those considered disabled, as well as decline through the process of ageing. Lack of opportunities to participate partly results from the normativity of certain abilities being ingrained in the design of buildings, communication and transport, there are also hard differences. Beyond the need to surpass formal notions of equality, discrimination grounds such as sex, disability and age require that the law accepts the need to accommodate difference, as the CRPD accepts by defining the refusal to accommodate difference is a form of discrimination.[75]

Refocusing discrimination law in such a way that potential intersections between grounds are recognised can be achieved by organising EU discrimination law around the three nodes of sex/gender, race/ethnicity and disability/impairment.[76] The concept proposes to re-organise EU discrimination law as a socio-legal field around the nodes sex/gender, race/ethnicity and disability/impairment. The notion of the socio-legal field alludes to Bourdieu's notion of a *champ social*[77] comprising a social space established by social interaction on the basis of power struggles.[78] For the context of EU law, the socio-legal field needs to embrace interrelations between different levels of socio-economic governance as well as the shaping of interaction through authoritative legal texts.[79] In short the field comprises legal texts, including case law, as well as institutional actors and socio-economic and cultural actors engaging in the field of discrimination law and policy.

The three nodes comprise centres and orbs, allowing the attribution of discrimination grounds such as sexual orientation and transsexuality to the gender/sex nodes, of religious minority, language and culture to the race/ethnicity node and of age, pregnancy and long-term illness to the disability node.

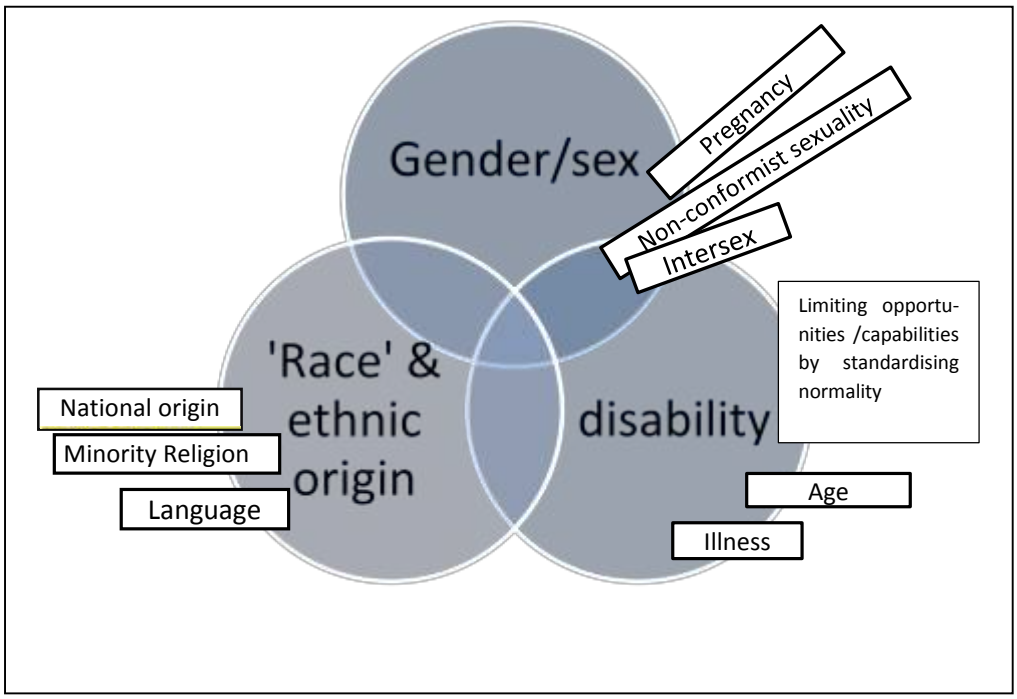
[75] Article 2 CRPD, Degener, op.cit. *supra* (note 12) marginal number 3.

[76] Schiek, op.cit. *supra* note 6.

[77] A short definition of the concept reads 'A field is a structured social space, a field of forces, a force field. It contains people, who dominate and people who are dominated. Constant permanent relationships of inequality operate inside this space, which at the same time becomes a space in which various actors struggle for the transformation or the preservation of the field' (Bourdieu, P. *On Television*. Translated by P. Parkhurst Ferguson. (New Press, 1998), 40-41.

[78] Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (OUP, 2008), 8.

[79] Nash, *The Cultural Politics of Human Rights - Comparing the US and the UK* (CUP, 2009), 30-34.



The nodes concept also provides orientation for developing notions for individual discrimination grounds in ways that are feasible for adjudication and avoid the reinforcement of intersectional inequalities within individual categories. The disability node is related to the notion of bodily and mental autonomy and access to social interaction as well as other resources. Disability discrimination emerges from defining average abilities as a standard for normality, [80] as well as from society's desire to avoid the perception of suffering. The combination of avoidance and standardisation leads to exclusion on different bases: there is stereotyping as well as the reluctance to accommodate different abilities.

Standardising assumed normality results in partly socially constructed disability. However, social construction is no less decisive to other discrimination grounds. Race may be even more a social construct than disability: there is no scientific justification for dividing humankind into different races. Similar to disability, gender can be seen as a social construct based on physical difference. Within the reference frame of heteronormativity, normalisation is also a decisive barrier to gender equality. Limiting opportunity by standardising assumed normality is thus a common issue across all three nodes.

As the few examples specified initially highlight, the purposes of discrimination law would be ill served if, for example, disability would be defined in such a way that impairments frequently suffered by women are not addressed by disability discrimination law. The principle that discrimination grounds cannot be defined in a discriminatory way also applies to the other grounds, and warrants other dimensions within disability. The concept of interrelated nodes illustrates this normative demand as well: if all the nodes overlap, limiting protection within any one category to those not suffering from other discrimination would leave an incomplete picture. Accordingly, the definition of any individual

[80] Davis, "Introduction: Normality, Power and Culture" in: Davis (ed) *Disability Studies Reader* 4th ed (Routledge 2013) 1-19, makes this point, while attempting to highlight similarities with gender and racism studies – though reinforcing gendered stereotypes (of each woman becoming a mother) on page 1.

discrimination ground must be such as to maximise protection from discrimination for those suffering disadvantage on other grounds. Thus, the definition of disability must encompass disabilities resulting from the interaction of impairment with other forms of discrimination.

4.3. Summary: two challenges for defining disability

This section has demonstrated that, in defining disability the Court had to address two formidable and interlinked challenges. First, it needed to move beyond a purely medical approach measuring disability in metric terms, while not sacrificing precision. Secondly, it had to define disability in such a way that impairments related to gender inequality or the exclusion of those classified as ethnic or racial minority are not disproportionally excluded from the field. The next section will consider how the six cases decided by the Court deal with these challenges.

5. Analysing the Court's case law against this back ground

5.1. The Court's case law between models of disability

Do all these cases constitute a steady progression from a medical towards a social model of disability?

In the 2006 Chacon Navas case,[81] the Court's definition of disability in relation to discrimination law started out from the medical model. However, even in this initial ruling the Court stated that disability in particular – but not necessarily exclusively - results from an impairment limiting the individual capabilities. It thus left scope for acknowledging other causes for the limitation constituting disability. Similarly, AG Geelhoed, though concluding that "disabled people are people with serious limitations due to physical, psychological or mental afflictions",[82] also perceived of a role for the social environment of disabled people in so far as a disability which is not perceived in the social environment will hardly lead to discrimination.[83] Nevertheless, neither the Court nor its AG considered any specific contribution of the socio-economic environment to the limitations, and as a consequence excluded long-term illness from the notion of disability. As a consequence, Sonia Chacon Navas could not claim remedies under discrimination law, but was left with the weaker remedies for unfair dismissal.

The next five cases concerning the notion of disability were decided after the EU became a signatory to the CRPD.

The Grand Chamber ruling on HK Danmark (Ring & Skouboe Werge)[84] concerned two secretaries who suffered from illnesses resulting in chronic back pain and, in order to remain able to continue employment, required work-related relief in the form of part time work and a height adjustable desk respectively. Because the employers did not adjust the working environment in line with the employees' requests, the employees frequently were absent on grounds of pain, and accrued sufficient time of sick leave to justify a dismissal under Danish law in line with their specific contracts of employment. The employees and the trade unions representing them claimed that their frequent illnesses and the subsequent dismissal were caused by their disability, and that the dismissals constituted disability discrimination. The employers insisted that they suffered from long-term illnesses which, as decided in Chacon Navas, would not qualify as disability. Accordingly, the Court had the opportunity to revisit the

[81] C-13/05 *Chacon Navas.*

[82] Paragraph 76 of his opinion (EU:C:2006:184).

[83] Paragraph 62 of his opinion.

[84] Case C-335/11.

question how to qualify long term illnesses in relation to the notion of disability.[85] Referring explicitly to the CRPD, the Court first phrased the definition quoted above,[86] a phrase that was praised for recognising the role of the socio-economic environment in constituting disability.[87]

The Grand Chamber did not, however, overrule Chacón Navas. Instead, it repeated that illness indeed cannot be equated with disability[88] and added that also the inability to work unlimited did not constitute disability.[89] Next the Court reaffirmed that a disability presupposes a "limitation which results in particular from physical, mental or psychological impairments" if that "limitation is long term".[90] Between these two phrases, which are repeated verbatim from the Chacon Navas ruling, the Court added that the limitations in interaction between impairment and "various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers".[91] Thus the Court only modified the Chacon Navas ruling as far as absolutely necessary to pay respect to the CRPD. It certainly did not follow the social model of disability: in its reasoning societal barriers do not cause the disability. While creating a hindrance from full and effective participation, they potentially add to the limitation which continues to be linked to the impairment suffered by the person so disabled. Nevertheless, the HK Denmark ruling became the main reference point in the Court`s future case law has since become an important reference point.

The Z case,[92] as far as the notion of disability is concerned,[93] evolved around the question whether the claimant was disabled by the refusal of her employer to grant maternity leave after having a child through the use of a surrogate mother. Z had been born without a womb, while displaying all the chromosomes that classical medicine associates with femininity. As she wanted to become a biological mother, she and her husband decided to conclude a commercial agreement on the use of another woman's womb to carry a child combined from their genes. Z's employer offered generous arrangements for parental leave, but did not provide maternity leave, since Z had not become a mother. In one limb of her argument, Z relied on disability discrimination law.

The Court again duly referred to the CRPD and stated that disability referred to a limitation resulting from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder full participation in professional life.[94] However, subsequently the Court focused on the impairment alone, stating that the inability to give birth due to the lack of a uterus constitutes a condition which at the same time constitutes a limitation.[95] Thus, the focus on the medical condition

[85] The HK Danmark ruling also contains important statements on the concept of reasonable accommodation, which lie beyond the scope of this article.

[86] See above footnote 38, paragraph 38 of the HK Danmark ruling.

[87] See the case notes referenced in footnote 4.

[88] Paragraph 42

[89] Paragraph 43

[90] Paragraph 47

[91] Ibidem.

[92] Case C-363/12, op. cit. *supra* (note 38).

[93] For a detailed case note including deliberations on the gender discrimination aspects see Finck and Kas, "Surrogacy leave as a matter of EU law: CD and Z", 52 *CMLRev* (2015), 281-198

[94] Paragraph 76.

[95] Paragraph 79.

causing a limitation. The Court consequently concluded that "the inability to have a child by conventional means does not in itself (…) (constitute) a hindrance to the exercise of her professional activity".[96]

In this case the Court clearly struggled with finding a notion of disability which reacts to the impairment and the social conditions which turn the impairment into a disability. On the one hand it focused on the physical status, on the other hand on the limitations of professional activity, seemingly unable to combine the two. Thus, the weakness already visible in the HK Danmark ruling can be observed more openly in this ruling, demonstrating that the Court still relies on medicalised notions of disability. This focus on the physical elements of impairment can be criticised as a move away from a human rights model of disability to a misunderstanding of disability. As a result of all these considerations, the Court held that a person displaying all the markers of femininity except having a womb cannot be considered as disabled in working life, and thus cannot claim maternity leave after entering into a commercial contract concerning the pregnancy of another woman on the basis of reasonable accommodation. We will return to this gendered aspect of the case below.

The Glatzel case[97] seemed to underline the Court's gradual return to the medical model of disability. The claimant was a lorry driver, who had lost his driving licence due to driving under the influence of alcohol. When he applied for a new licence, the application was refused on another basis: he was perceived as unable to safely conduct heavy good transporters due to national legislation implementing EU Directive 2006/126, which again excluded persons with certain visual impairments from driving heavy goods vehicles.[98] The referring court wished to achieve a ruling invalidating Annex III of that Directive because it discriminated on grounds of disability. The Court did not comply with that request, finding that limiting the professional life of persons with visual impairments was justified by public health concerns. While the Court cited its own reasoning in HK Denmark, indicating openness to the social model of disability, the Court also analysed the actual visual capacity of the claimant. Finding that the claimant had full binocular visual acuity, the Court concluded that it "does not have sufficient information to ascertain whether such an impairment constitutes a disability".[99] Accordingly, the Court tried to derive the disability from the impairment as such, omitting any reference to the interaction between society and impairment which creates disability.[100]

This narrow view contrasted with the opinion of AG Bot, who did conceive of Mr Glatzel as disabled by the restrictive legislation following the EU Directive. As the Court, the AG observed that Mr Glatzel had limited visibility caused by a physical impairment. AG Bot then considered the inflexible definition of full visibility in Directive 2006/126, and concluded that it was this definition which resulted in hindering Mr Glatzel in exercising his profession, thus leaving him disabled. Had the Court followed this argument, it would have acknowledged a moderate social model of disability.[101] However, the Court was not ready to do so. This is surprising because AG Bot came to the same conclusion as the Court in its

[96] Paragraph 81.

[97] C-356/12.

[98] Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences O.J. 2006 L 403/18.

[99] Paragraph 47.

[100] See O'Brien, "Driving Down Disability Equality? Case C-356/12 Wolfgang Glatzel v Freistaat Bayern", 21 *MJ* (2014), 723-38, at 726.

[101] Paragraphs 34-40 of his opinion in case C-365/12 (EU:C:2013:505).

final recommendation: he opined that Mr Glatzel had been treated differently on grounds of disability, but that withholding professional options from Mr Glatzel was justified as it was necessary to uphold public safety. Accordingly, an adequate notion of disability would not have led to a different result.

Arguably, in the Kaltoft case the Court continued on the path of moving away from a moderate version of the social model of disability. Again, the definition of disability developed in the HK Denmark (Ring & Skouboe Werge) as well as the UN Convention were duly quoted.[102] However, the Court then moved on to state that Mr Kaltoft might be a disabled person "if the obesity (…) hindered his full and effective participation in professional life (…) on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity".[103] Similarly, AG Jääskinnen engaged in physical assessment of obese persons, coming to the conclusion that only obesity class III, requiring a BMI of 40 or higher, can ever lead to disability.[104] Thus, he qualified the degree of deviance from a normal weight as a threshold to accept disability. In the social model of disability, the refusal of an employer to take on a person on grounds of a certain weight might well constitute the barrier which converts the specific weight of that person's body into a disability. As AG Jääskinnen correctly noted, prejudicial actions such as this could also constitute discrimination.[105] The adequate remedy would not be providing "reasonable accommodation" but rather demanding that employers refrain from stigmatisation.

Analysing all these rulings, we can observe a Court hesitating to embrace the social model of disability, or the CRPDs human rights model. Instead it returned to a definition relying on physical elements of a disability concept which seemed no longer relevant after the CRPD. Neither did the Court consider finding a definition of disability inspired by the purposes of EU discrimination law, i.e. to prevent discriminatory exclusion on the basis of ascribed otherness. As mentioned, this would suggest defining disability for the purposes of discrimination law without reference to degrees of disability, categories of obesity or levels of pain. All these metric/medical approaches ultimately demand that the disabled person needs to establish their own disability before being able to claim protection.

For the purposes of discrimination law it is completely sufficient that exclusion results from the ascription of disability. Thus, unequal treatment based on the assumption that a certain appearance or feature constitutes a barrier to full participation, which constitutes disability.

For example, if an employer believes that an obese person needs to lose weight in order to fulfil their tasks, this belief will constitute a disability for obese persons dealing with this employer, irrespective of the truth of that belief. Similarly, if an employer believes that a facially disfigured salesperson will not achieve sufficient profits, this belief will also constitute a disability for persons with facial disfigurements. As long as courts have to deal with mere stereotypes, any definition of thresholds of impairment is wholly dysfunctional. For the Kaltoft case, this would imply that an employer who urges a childminder to lose weight with a weight loss plan obviously is convinced that weight impacts on performance. This would be sufficient to consider the obesity as disability in dealing with this employer. The Court could have gone towards a definition of disability adequate for discrimination law and assumed that the employer's concern with her employee's weight indicates that being overweight constituted a disability in this environment. Similarly, in the Glatzel case, any metric proof by the claimant

[102] Paragraphs 53 and 64 of the judgement, for the definition see above text accompanying note 38.

[103] Paragraph 60.

[104] Paragraph 60 of his opinion in case C-354/13 (EU:C:2014:2106).

[105] Paragraph 39 of his opinion.

would have been unhelpful. The Court should have held that the threshold established in Directive 2006/126 transformed certain visual impairments into disabilities for heavy goods drivers. This would not have answered the question whether this exclusion is justified in the interest of health protection. Similarly, stereotypes excluding those affected by non-manifest illnesses (such as HIV infection or so-called "dry alcoholism") transform those conditions into disabilities, although they do not constitute impairments.

Defining disability without recourse to metrics or medicalisation is more difficult if those affected by impairments really have different abilities than others. In cases such as HK Denmark where an impairment such as chronic back pain actually reduces the ability to work for more than a few hours a day or other than in a certain bodily position, disability seems to result from the imposition of employment standards that do not respect that difference. Still, any metric approach would not have helped deciding these cases. Instead a substantive assessment of the employers' reluctance to accommodate would allow the assessment whether chronic back pain is a disability under these circumstances. If an employer as soon as the employee is dismissed introduces the variable height desk the employee had required, there is every indication that the dismissal may be discriminatory instead of rational would still not result from the impairment, but rather the social environment's (lack of) reaction to it.

5.2. A Court insensitive to intersectional inequalities? Gendered aspects of defining disability

In its first six rulings on the notion of disability, the Court also had to address the second challenge in defining disability – avoiding the intersectionality trap.[106] While disability may also intersect with race and ethnicity, in these cases gendered aspects were more relevant, and thus the intersection of gender and disability will be the focus of these deliberations.

The employment realities as well as the illnesses at stake in HK Denmark (Ring & Skoboe Werge) are typical for women: the majority of secretaries are female,[107] and conditions leading to chronic pain in the back are typically triggered by activities involving spatial confinement, which is frequently typical for those office posts offered to women.[108] Also, chronic pain and associated reduced capacity to perform are typical for impairments disabling women.[109] Accordingly, the Court's reluctant approach towards acknowledging long-term conditions as impairment giving rise to disability ensures that conditions more frequently occurring in women are less prone to bring their bearers within the fold of discrimination law. Such gender discrimination in defining disability should be avoided.

The gender dimension is even more pronounced in the Z case, relating to the inability of a person considered female due to her genetic constitution to bear children. Society continues to expect all women to bear children. Consequently, infertility is experienced as more stigmatising by women than

[106] See above 4.2.

[107] On gender segregation in occupation in Europe see European European Commission's Expert Group on Gender and Employment, *Gender Segregation in the Labour Market* (Brussels: European Commission, 2009) and Burchell, Hardy, Rubery, Smith, *A New Method to Understsand Occupational Gender Segregation in European Labour Markets* (Brussels, 2014), with specific statistics detailing the percentage of women among "office clerks" at over 70% at page 51.

[108] Burchell et al, op.cit. *supra* (note 107), at 84-85 with figure 53.

[109] See above notes 68 to 67.

by men.[110] Infertility has been defined as illness as recently as 2009,[111] and this is perceived as an aspect of the medicalisation of women's lives in highly industrialised societies.[112] And while women are generally stigmatised if they do not bear children for whatever reason, disabled women are frequently subjected to forced abortion and sterilisation, thus depriving them of the choice to bear children. Thus, the Z case necessitated a gendered perspective on disability in particular. However, this perspective would not have called for accepting that not being able to bear children is a disadvantage in employment. To the contrary, men's inability to bear children is routinely held up as the reason for women's weaker employment market position. Accordingly, in the field of employment the lack of a womb will not be the starting point for disability. In so far the ruling in Z would not have had to change under this perspective.

While Mr Kaltoft is not a woman, the case still involved a field of occupation where female workers outnumber male workers: care work is still gendered female.[113] Also, more women are obese than men.[114] A number of studies found that obesity has more negative effects on the employment opportunities and wage levels of women than of men.[115] More particularly, for women even mere overweight impacts negatively on employment opportunities.[116] The negative impact of overweight and obesity is particularly pronounced for black women.[117] Thus the question whether a child minder can be dismissed because of obesity in the 3rd degree is of more practical relevance to women than to men, and may frequently create situations of inequality at the intersections between gender and disability. In this context it is particularly worthy of note that according to AG Jääskinnen, only morbid obesity should be considered as a disability. Next to not being in line with the social model of disability, this reasoning is also likely to deprive more women than men from the protection of disability discrimination law.

So far, none of the cases that found their way to the Court of Justice has established ethnic or racial dimensions of disability. However, such dimensions undoubtedly exist. The more negative impact of

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[110] On the gendered nature of the infertility stigma see Fenton, Rees and Heenan, "'Shall I be a Mother?' Reproductive Autonomy, feminism and the Human Fertilisation and Embryology act 2008", in Jones et al (eds) *Gender, Sexualities and the Law* (Routledge 2011).

[111] Ireni-Saban, "Give me Children or Else I Die: The Politics and Policy of Cross Border Reproductive Care", 41 *Politics and Policy*, (2013), 5-38.

[112] Greil, McQullan and Slauson-Blevins, "The Social Construction of Infertility", 5 *Sociology Compass*, (2011), 738-46.

[113] On occupational segregation by gender in Europe see European European Commission's Expert Group on Gender and Employment, *Gender Segregation in the Labour Market* (Brussels: European Commission, 2009), with a specific case study on professional child care at 81-85; on gender segregation in professional childcare see also Peeters, "Including Men in Early Childhood Education: Insights from the European Experience", 10 *NZ Research in Early Childhood Education*, (2007), 1-13.

[114] The main measurement for obesity is the Body Mass Index, calculated as a function of height and weight, classes a woman as obese if her BMI is above 30. According to WHO statistics, in 2008 10 % of men and 14 % of women were obese. In Europe, the sex difference was less pronounced: 22 % of women and 20 % of men were obese. http://www.who.int/gho/ncd/risk_factors/obesity_text/en/.

[115] Boeri, Patacchini, Peri, *Unexplored Dimensions of Discrimination* (OUP, 2015), 158-165 ; Shinall, *Why Obese Workers Earn Less : Occupational Sorting and Its Implications for the Legal System,* Vanderbilt Law School Working Paper (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379575.

[116] Fikkan, Rothblum "Is Fat a Feminist Issue? Exploring the Gendered Nature of Weight Bias", (2012) *Sex Roles* (DOI 10.1007/s11199-011-0022-5).

[117] Fikkan & Rothblum, ibidem, Solanke, "A Legal Remedy for Corpulent Women of Colour", in Schiek & Lawson (ed) op. cit. *supra* (note 5), with further references.

obesity on employment opportunities of women of colour has already been mentioned as an example. While not debated before the Court of Justice yet, the stigmatisation of Roma children as mentally disabled in order to achieve ethnically segregated schools has been brought before the European Court of Human Rights.[118]

6. Conclusion

Developing the notion of disability for the purposes of EU discrimination law, the Court certainly has made progress from its first ruling in 2006 to its sixth one in 2014. However, as so frequently in EU law, progress has been halting and fitful. There is still some ground to cover for the Court to arrive at an acceptable and workable definition of disability for the purposes of discrimination law.

This article has argued that a steady move from a medical to a social model of disability is not the solution for defining disability for the purposes of discrimination law. Instead it has argued that a definition of all discrimination grounds, including disability, can be derived from the purposes of discrimination law: protecting against the harm of exclusion on the grounds of ascribed otherness, and protecting individuation as well as respecting difference. The fact that there is a common rationale of discrimination law for the three interconnected nodes sex/gender, race/ethnicity and disability also suggests that discrimination grounds should be defined in such a way that they are not mutually exclusive, but rather reinforce each other.

It has been shown that for disability discrimination, this approach mitigates against a metric approach to disability, which would derive the definition of disability from a certain level of impairment.

Beyond that, a workable purposive definition of disability will be easy to find where false stereotyping results in excluding persons perceived as disabled from participation in employment or other activities. Such exclusion may be based on an employer's reference, as in the HK Danmark case, or on legislation, as in the Glatzel case. In cases where impairment restricts the radius of activities with acute relevance to the desired form of participation, disability is established when access to or progression in employment for those persons is hindered through a lack of flexibility to adapt. The impairment clearly constitutes a starting point for acknowledging disability in these cases.

It has further been demonstrated that neither the social model of disability nor the Court's case law avoids the intersectionality trap. Instead, the definition of disability tends to move impairments suffered disproportionally by women beyond the reach of disability discrimination law. Especially in cases of chronic illnesses involving pain, recognising the impairment through suffering while defining disability is important from the perspective of intersecting nodes of discrimination grounds: defining disability in such a way that impairment typically suffered by women are not typically recognised as protected under disability discrimination law constitutes gender discrimination. This has also shown that intersectionality theory plays an important role in defining individual discrimination grounds.

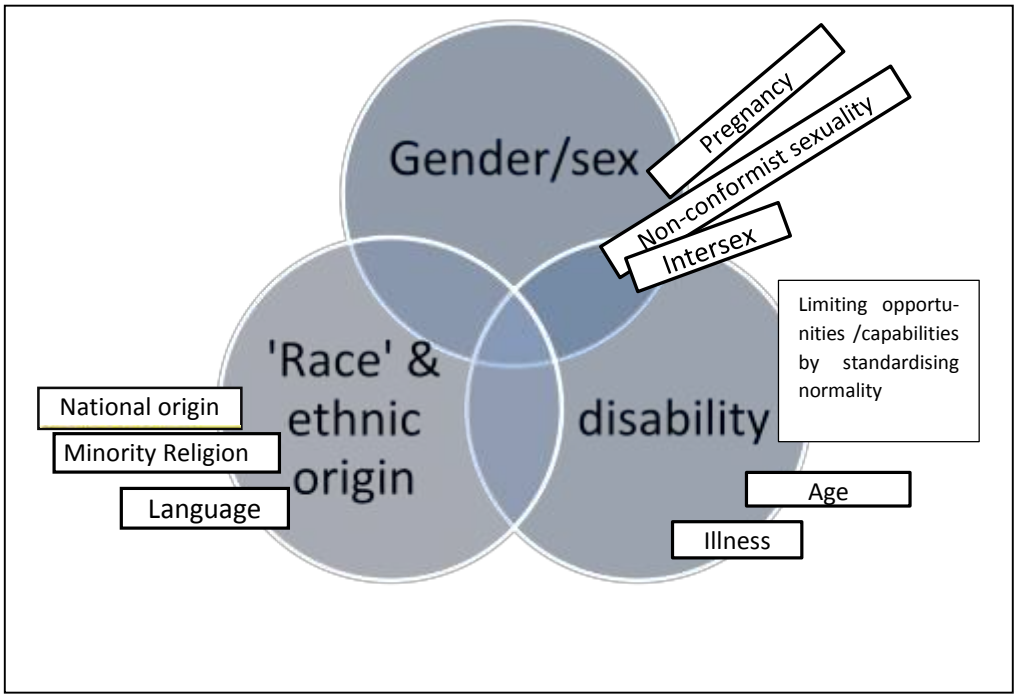
All this results in a clearly defined, but nevertheless wide notion of disability. In all six cases discussed above, the Court should have stated that the claimants had been disabled, with the exception of the Z case. The wide notion of disability is balanced by the exceptions allowing unequal treatment on grounds of disability, including the bona fide occupational requirement (Article 2 Directive 2000/78), as well as limitations on the obligation to provide reasonable accommodation.

[118] DH and Others v the Czech Republic, ECtHR (Grand Chamber) Application No 57325/00 13 November 2007

These limitations also show the limits of disability discrimination law clearly is unable to bring about the desired participation of disabled persons in all areas of life. In line with the human rights approach to disability promoted by the CRPWD a range of rights and policies are required to ensure that disabled people are included and able to fully participate in society on equal terms.[119] Its limited reach is due to the specific mission of discrimination law as a whole, which is best achieved if the focus of discrimination law is not lost.

[119] Degener, op.cit. *supra* (note 12), marginal number 5.

Graph (insert at page 13)



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