A CRITICAL STUDY OF EUROPEAN UNION LAW AND POLICY

RELATED TO DISABILITY

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Abstract:

This thesis examines the extent to which European Union (EU) law and policy reflect an approach to disability consistent with Critical Disability Theory (CDT). Before examining the four policy areas selected for study, the thesis identifies the antecedents of CDT in critical social theory and Critical Legal Studies and then develops its parameters. CDT centres disability, adopts a social model of disability, interprets concepts of equality and rights in ways which promote social inclusion and identifies disabled people as primary actors in the production of knowledge about disability and the development of progressive disability policy.

The fundamental elements of EU disability policy are identified and assessed against CDT's approach to disability. That policy, based on a social model of disability and the active participation of disabled people in the formulation and implementation of disability policy, is expressed in language which is quite consistent with CDT.

The first area of EU law and policy examined is the prohibition against discrimination based on disability. The promise and limitation of the Employment Equality Directive and the proposed directive related to the provision of goods and services are considered in light of inherent limitations in EU law arising from its liberal conception of rights, the competencies of the EU and exceptions and exemptions in the directives themselves.

The three other areas of EU law and policy examined against CDT are the European Social Fund, transport policy and the social inclusion Open Method of Coordination. These policy areas provide examples of the variety of policy instruments which are utilised by the EU to advance its disability policy. The thesis reveals the different elements of CDT which are reflected to different degrees in each of these policy areas and assesses the strengths and weaknesses of EU policy to transform the social condition of disabled people.

Acknowledgements

I would like to thank my supervisor, Professor Mark Bell, for his invaluable help throughout the writing of this thesis. I would not have been able to complete the thesis without his advice and support. On a personal note I would like to thank my family, especially my partner, Ken Steffenson, for their support.

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1.   Introduction

More than 600 participants of the 2002 European Congress on Disability met in anticipation of the European Union's 2003 European Year of People with Disabilities and drafted a new vision for some 80 million Europeans who live with a disability. This vision, contained in the Madrid Declaration, provides a path **away** from the social, economic and political marginalisation of disabled people **towards** a Europe in which disability is no impediment to individuals fully participating in their communities.

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[1] European Congress on People with Disabilities, 'Madrid Declaration' (*European Disability Forum*, 2002) <http://www.edf-feph.org/Page_Generale.asp?DocID=12536> accessed 5 July 2011.

In the first three quarters of the twentieth century most organizations which provided material and emotional support to disabled people and advocated on their behalf were disability specific charities established and managed by non-disabled people.[2] With the exception of some disabled voices in the wilderness, it was not until the early 1970s that disabled people in many parts of the world began to organise and challenge the beliefs and values upon which national disability policies were based.[3] Disabled people began to develop a political consciousness and sense of community which enabled them to begin their own struggle for emancipation from the oppression they suffered in inhospitable societies.[4] Jerome Bickenbach has described it as a burgeoning social movement empowering disabled people to speak with their own voices and to ask and answer the questions 'What does it mean to have a disability?' and 'What does society owe to disabled people?'.[5]

The number and variety of organisations established and governed by disabled people greatly expanded throughout the 1970s and 1980s as disabled people began to actively resist the constraints and limitations on their individual liberty imposed by a social environment which failed to accommodate their difference and diversity. From these beginnings, a worldwide disability rights movement has grown.[6] James Charlton, in his study of disability consumer groups on several continents, concluded that, although the political, social, and economic dynamics of disability and the forms of resistance to exclusion and marginalisation vary widely around the world, the key

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[2] See, for example, Jerome E. Bickenbach, *Physical Disability and Social Policy* (University of Toronto Press 1993) 150; Ken Davis, 'Disability and legislation: rights and equality' in Gerald Hales (ed), *Beyond Disability: Toward an Enabling Society* (Sage Publications 1996) 125; Michael Oliver and Colin Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (Longman 1998) 32.

[3] James I. Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press 1998) 130.

[4] Bickenbach (n 2) 150; Charlton (n 3) 130.

[5] Bickenbach (n 2) 9.

[6] Charlton (n 3) 19; Oliver and Barnes (n 2) 87.

principles of empowerment and human rights, independence and integration, and self-help and self-determination create solidarity within this emerging disability rights movement.[7]

In 1980 two events occurred which both built upon and reinforced the growth of the disability rights movement. First, 1981 was named by the United Nations as the International Year of Disabled People which was followed by the UN Decade of Disabled Persons. In many countries these two UN initiatives were the catalyst for the formation of a range of disabled consumer controlled organizations.[8] As will be seen in chapter four, it was also a catalyst for reinvigorating the EU's programming initiatives for disabled people. In addition, the principles behind the Year reinforced the developing notion of disabled people as rights holders not merely recipients of charity or state support. Second, the 1980 World Congress of Rehabilitation International, an international organization of social workers and rehabilitation professionals, adopted a charter on disability which included a call for governments to take 'all necessary steps ... to ensure the fullest possible integration of, and equal participation by, disabled people in all aspects of the life of their communities'.[9] A group of disabled delegates, referring to the just adopted charter, proposed that Rehabilitation International itself should be controlled by disabled people.[10] When that proposal was rejected, the disabled delegates founded Disabled Peoples' International[11] which is currently composed of organizations controlled by disabled people from 136 countries (19 EU Member States).[12]

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[7] Charlton (n 3) 3.

[8] ibid 132.

[9] Michael Oliver, *The Politics of Disablement: A Sociological Approach* (St. Martin's Press 1990) 116.

[10] ibid.

[11] ibid.

[12] Disabled People International <http://www.dpi.org/> accessed 9 July 2011.

In 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities along with its Optional Protocol.[13] The guiding principles of the Convention are respect for the inherent dignity, autonomy and independence of disabled people, non-discrimination, social inclusion, respect for difference, equality of opportunity, accessibility, equality between men and women and respect for the evolving capacity and identity of disabled children. The Convention has particular relevance to the EU since it is the first international treaty the Union has signed and ratified in its own name and about which it will have report on actions it has taken to implement the Convention and be accountable on the international stage.[14]

Disabled people are a significant proportion of the total EU population who have major impacts on social protection and social assistance programmes and who are increasingly engaged in the internal market. They have, therefore, a major impact on the European economy. Determining how many disabled people live in the EU, their ages

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[13] UNGA, 'Convention on the Rights of Persons with Disabilities' A/Res/61/106 (13 December 2006).

[14] ibid. The EU signed the Convention as a 'regional integration organisation', which gives it the same standing as a State Party, on 30 March 2007 and ratified the Convention on 23 December 2010. The Convention includes civil and political rights as well as social and economic rights: it commits the States Parties to positive duties to adopt laws, policies and programmes to achieve the rights set out in the Convention and to consult closely with disabled people and their representative organisations. With regard to economic, social and cultural rights, States Parties undertake 'to take measures to the maximum of [their] available resources … with a view to achieving progressively the full realization of these rights'(arts 3 & 4).

The Convention establishes a Committee on the Rights of Persons with Disabilities, composed of experts serving in their personal capacity, to which States Parties must submit a comprehensive report on measures taken to implement the Convention. The Committee is to consider the reports and make suggestions and recommendations arising from the reports as it considers appropriate.

The Optional Protocol allows the Committee to receive communications from individuals or groups claiming to be victims of violations of the Convention. The Committee may refer the communication to the State Party and require a response within 6 months explaining or clarifying the matters raised in the communication or carry out an inquiry on its own volition. The Committee must send its suggestions and recommendations, if any, upon reviewing all the submissions and any result of an inquiry to the State Party and the petitioner.

The Commission has proposed the EU sign and ratify the Optional Protocol (Commission, 'Proposal for a council decision concerning the conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities' COM(2008) 530 Vol II) but the proposal has not been adopted by the Council.

See generally Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2006-2007) 34 Syracuse J Int'l L & Com 563.

and gender distribution, and their social condition is a very complex issue.[15] Difficulties in cross national comparison are the result of differences in methods of recording, terminology, definition of degrees of disability and eligibility criteria for a variety of state supported programmes and differences in the national data bases used to assemble European data.[16] Van Oorschot and Balvers, in their 2009 study, concluded that '[t]he present state of the art concerning EU-comparative data on the situation of disabled persons is far from what would be needed to be able to monitor and benchmark this situation cross-nationally over time'.[17]

In 2007 a study reported that an average of 16 per cent of people aged 16-64 reported a 'long standing health problem or disability', ranging from around six to seven per cent to over 30 per cent among the Member States with similar rates between men and women in each country.[18] (This extreme spread in disability rates reflects the substantial differences in definitions and counting methodology among the Member States.) Of those reporting a long standing health problem or disability, between ten and 50 per cent depending on country, with an EU average of 33 per cent, reported no employment restrictions or limitations in their mobility to and from work. The study concluded that '10% of all men and women aged 16-64 report being restricted in the *kind* or *amount* of work they can do, their mobility *to and from work*, or some

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[15] For a study of the multitude of possible data bases at European and Member State levels and the lack of compatibility among them see, for example, Wim van Oorschot and Maarten Balvers *European Comparative Data on the Situation of Disabled People: an annotated review* (Report prepared for the Academic Network of European Disability Experts (ANED) 2009) <http://www.disability-europe.net/content/aned/media/ANED%20report%20European%20Comparative%20Data%20on%20the%20Situation%20of%20Disabled%20People%20(corrected).pdf> accessed 7 July 2011.

[16] See, for example, Isilda Shima, Eszter Zólyom and Asghar Zaidi, 'The Labour Market Situation of People with Disabilities in EU 25' (European Centre for Social Welfare Policy and Research, 2008) <www.euro.centre.org/researchers> accessed 4 July 2011, 14; APPLICA & CESEP & European Centre for Policy Research, *Study of Compilation of Disability Statistical Data from the Administrative Registers of the Member States* (OOPEC 2007).

[17] Van Oorschot and Balvers (n 15) 43.

[18] APPLICA & CESEP & ALPHAMETRICS, *Men and Women with Disabilities in the EU: Statistical Analysis of the LFS Ad Hoc Module and the EU-SILC* (OOPEC 2007) 10 (based on a 2002 labour force survey in 23 EU countries).

combination of these'.[19] The number of people whose long standing health problem or disability limited their employment opportunities increased with age: less than four per cent of those aged 16-24, nine per cent of those aged 25-54 and 21 per cent of those aged 55-64.[20] The employment rate of those reporting they experienced 'considerable' restriction of their ability to work was 28 per cent compared with 68 per cent for those without any restrictions and 62 per cent for those reporting they were restricted 'only to some extent'.[21] Despite significant variation among the Member States, disabled people consistently experience greater difficulty entering and remaining in the labour market and consistently have lower participation and higher unemployment rates than non-disabled people.[22]

The Commission currently uses the statistic of one in six people in the Union (seventeen per cent), approximately 80 million people, as having a disability ranging from mild to severe and being restricted in some manner from fully participating in the social, economic, cultural and political life of the community.[23] Their rate of poverty is 70 per cent higher than the average.[24] Of people over the age of 75, fully a third have some degree of disability and 20 per cent have a severe disability.[25]

The social and economic status of disabled people appeared on the EU agenda with the development of the social dimension of the then European Community in the early 1970s. Today, disability policy is a permanent feature of the EU agenda. The

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[19] ibid.

[20] ibid.

[21] ibid 13.

[22] See, for example, ibid 13; Bent Greve, 'The labour market situation of disabled people in European countries and implementation of employment policies: a summary of evidence from country reports and research studies' (Academic Network of European Disability experts (ANED) 2009) <http://www.disability-europe.net/en/themes> accessed 20 March 2011; Shima, Zólyom and Zaidi (n 16).

[23] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' COM(2010) 636 final 3.

[24] ibid 3.

[25] ibid 3.

Commission presents four major reasons for the EU's involvement with disability policy: these are, first, the continuing social exclusion and economic marginalisation of disabled people contravene the fundamental rights of disabled people as expressed in the EU treaties, international treaties and the general principles of Union law; second, discrimination in the labour market reduces economic efficiency and is a drag on achieving the employment objectives of the Europe 2020 Strategy; third, disabled people are a significant portion of the EU's total population and have a major impact on the functioning of the internal market as employees and consumers; fourth, the social and economic exclusion of disabled people imposes unsustainable costs on the welfare state.

2.   *Literature review*

Critical disability theory (CDT) is an emerging approach to studying disability and the relationship between disabled people and society. Despite its natural affinity to critical feminist theory and critical race theory, unlike those theoretical approaches to their subject matter there is a singular absence of literature dealing with the philosophical origins and content of CDT. The only extensive treatment of CDT as a theory is provided by Richard Devlin and Dianne Pothier in their introduction to *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*.[26] Devlin and Pothier characterised the social, economic and political marginalisation of disabled people as a 'regime of dis-citizenship'.[27] They advanced 'an anti-necessitarian understanding of

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[26] Richard Devlin and Dianne Pothier, 'Introduction: Toward a Critical Theory of Dis-citizenship' in Richard Devlin and Dianne Pothier (eds), *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (University of British Columbia Press 2006). See also Richard F. Devlin, 'Jurisprudence For Judges: Why Legal Theory Matters For Social Context Education' (2001) 27 Queen's L J 161.

[27] Devlin and Pothier, 'Introduction: Toward a Critical Theory of Dis-citizenship' (n 26) 1.

disability that focuses on genuine inclusiveness,'[28] characterising their agenda for

realising that inclusiveness as critical disability theory.[29] They presented their

conception of CDT in seven themes – language and definition, voice, politics and

power, conception of disability, philosophy, responsibility and citizenship/dis-

citizenship. An important theme for Devlin and Pothier, which is not taken up in the

version of CDT applied in this thesis, is the concept of citizenship as a practice locating

individuals in their community and how disability diminishes or limits the citizenship of

disabled people.

Key themes for CDT are the attempt to understand the nature of disability and to

explain the social marginalisation of those labelled disabled. These themes are

developed in the paradigm shift from viewing disability as the inevitable consequence

of individual impairment to disability as the consequence the physical and social

environment which fails to take into account the needs of all the members of society.

This shift began in earnest in the mid-1960s with the emergence of the independent

living movement in the United States, the United Kingdom and (in the context of a

different social policy background) Sweden. An extensive literature has developed

proposing a variety of materialist and idealist basis supporting various conceptions of

disability within this socio-political family of models of disability all of which stand in

contrast to the medical model which locates disability in the individual's impairment.[30]

American writers such as Jacobus tenBroek, Floyd Matson and Harlan Hahn advanced a

form of social model of disability derived from the US civil rights struggle describing

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[28] ibid 2. Anti-necessitarian social theory argues that there is nothing inevitable or necessary about social structures or categories and, therefore, it is possible to radically change society to open possibilities for human emancipation: see generally Robero Mangabeira Unger, *False necessity: anti-necessitarian social theory in the service of radical democracy* (Verso 2001).

[29] Richard Devlin and Dianne Pothier, 'Introduction: Toward a Critical Theory of Dis-citizenship' (n 26) 2.

[30] Mark Priestley, 'Constructions and Creations: idealism, materialism and disability theory' (1998) 13 Disability & Society 75.

disabled people as a minority group.[31] Another form of social model, the social

oppression model, was advanced by a group of disabled activists in Britain which saw

disability as the result of 'contemporary social organisation which takes no or little

account of people who have physical impairments and thus excludes them from

participation in the mainstream of social activities. Physical disability is therefore a

particular form of social oppression.'[32] Theoretical support from a socialist perspective

was provided by academic writers such as Michael Oliver[33] and Vic Finklestein.[34] In

what Tom Shakespeare has called its 'strong social model' form[35] proponents of this

model denied the relevance of impairment at all. Feminist writers argued for an

acknowledgment of the role of impairment in the disabled experience and modified the

strong social model to take account of the personal experiences of pain and limitations

in personal capacity.[36] Another major category of social model of disability locates the

disabled experience in the relationships between people considered to have, or treated as

having, an impairment and those who are not. This relational model is particularly

associated with Scandinavian disability policy.[37] Jerome Bickenbach's *Physical*

Disability and Social Policy is an excellent *tour d'horizon* of the evolution of models of

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[31] See, for example, Jacobus tenBroek and Floyd W. Matson, 'The Disabled and the Law of Welfare' (1966) 54 California Law Review 809; Harlan Hahn, 'Disability and rehabilitation policy: is paternalistic neglect really benign?' (1982) 43 Public Administration Review 385.

[32] Union of the Physically Impaired Against Segregation (UPIAS), 'Fundamental Principles of Disability' <http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/UPIAS%20Principles%202.pdf> accessed 13 October 2007.

[33] See, for example, Oliver, *The Politics of Disablement: A Sociological Approach* (n 9); Oliver and Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (n 2).

[34] Vic Finkelstein, 'An Administrative Challenge? (The Health and Welfare Heritage)' in Michael Oliver (ed), *Social Work: Disabled People and Disabling Environments* (Jessica Kingsely Publishers 1991)

[35] Tom Shakespeare, 'Social models of disability and other life strategies' (2004) 6 Scandinavian Journal of Disability Research 8.

[36] See, for example, Marian Corker and Sally French (eds), *Disability Discourse* (Open University Press 1999); Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (Routledge 1996).

[37] See, for example, Christian Wendelborg and Jan Tøssebro, 'Marginalisation processes in inclusive education in Norway: A longitudinal study of classroom participation' (2010) 25 Disability & Society 701; Shakespeare (n 35).

disability.[38] It seems reasonable to suggest that the next phase in modelling will be a period of consolidating a consensus on the three constituent elements of disability – impairment, individual response and the social environment – and fine tuning our understanding of the relationships between economic systems and social discourses to the experience of disability.

The academic literature on European Union disability policy almost exclusively deals with EU human rights and equality law. Lisa Waddington, exceptionally, in her 1995 work made a detailed review of the treatment of disability in various social action programmes and the three disability specific action programmes that operated between 1981 and 1996.[39] She also examined the opportunities for the European Community to take a much more prominent role in promoting the social inclusion of disabled people before specific competence was granted in the Treaty of Amsterdam to combat discrimination. Her key argument was that the EC needed to adopt non-discrimination legislation to protect the right to equality. Anne Waldschmidt has also tracked the evolution of EU disability policy from its early focus on social protection, the addition of a labour market focus and on to its recent emphasis on equality and social inclusion.[40]

While the ground of disability is regularly featured in these works, for the most part they focus on the potential of article 19 TFEU (ex art 13 EC) to deal with discrimination and on the relationships between the 2000 equality directives and the well established equality law related to nationality and gender. Lisa Waddington, for example, analysed the potential for the then new Treaty provision giving the EU

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[38] Bickenbach (n 2).

[39] Lisa Waddington, *Disability, Employment and the European Community* (Blackstone 1995).

[40] Anne Waldschmidt, 'Disability policy of the European Union: The supranational level' (2009) 3 European Journal of Disability Research 8.

specific competence to combat discrimination[41] and Dagmar Schiek, for example,

analysed the principles of the 2000 equality directives.[42] EU legislation does not treat all

prohibited grounds of discrimination equally. Different grounds have different levels of

protection from discrimination and different exemptions and exclusions from coverage.

These issues have been explored by, for example, Lisa Waddington, Mark Bell and

Erica Howard.[43] There is, however, very little academic literature which focuses

specifically on the ground of disability except when dealing with the issue of reasonable

accommodation which only applies to disability.[44]

A review of academic literature on the European Social Fund, transport policy and

the social OMC revealed disabled people and disability to be almost invisible. In the

ESF literature disability is submerged into the general notion of the vulnerable group.

Jacqueline Brine's comprehensive study of the ESF identifies disabled people as one

segment of the population targeted for assistance through the Fund.[45] Surprisingly,

considering the prominence of disability issues in both transport policy and the social

OMC, the academic literature on these policy areas refers to disability only incidentally

as an example of a marginalised group.

Apart from the essay by Devlin and Pothier, the academic literature which

purports to apply CDT does not actually discuss what it is. While academics and policy

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[41] Lisa Waddington, 'Testing the Limits of the EC Treaty Article on Non-discrimination' (1999) 28 ILJ 133.

[42] Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 ELJ 290.

[43] Lisa Waddington, 'European Developments--Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive' (2000) 29 ILJ 176; Lisa Waddington and Mark Bell, 'More Equal Than Others: Distinguishing European Union Equality Directives' (2001) 38 CMLRev 587; Erica Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13 MJ 445.

[44] See, for example, Richard Whittle, 'Disability rights after Amsterdam - the way forward' (2000) EHRLR 33; Richard Whittle, 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective' (2002) 27 ELR 303; Lisa Waddington, 'Implementing the Disability Provisions of the Framework Employment Directive: National Options and Choices' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, 2005).

[45] Jacqueline Brine, *The European Social Fund and the EU* (Sheffield Academic Press Ltd. 2002).

makers increasingly refer to the social model of disability, they do not make any distinction among the variations in that concept and frequently simply substitute the word 'disability' for 'handicap' or 'impairment'. The thesis responds to these gaps in the literature. As part of the theorisation of disability, the thesis examines the evolution of the social model of disability. The thesis also makes an important contribution to the literature on disability policy in the EU. As well as looking at the equality directives with a much stronger emphasis on the ground of disability, the thesis adds to the very small body of literature on EU disability policy and its implementation through the ESF, transport policy and social OMC.

3. *Research question and methodology*

A number of different approaches to studying disability policy in the EU are available. One interesting approach would be to examine how the domestic policy of Member States is influenced by initiatives at the European level. Another approach would be to inquire how EU disability policy is influenced by developments in disability policy at the level of the Member States. The approach taken in this thesis is to focus only on the European level which puts the relationship between EU and domestic disability policy beyond its scope.

Although the Member States have primary responsibility for disability policy, as European integration deepens and widens and processes of Europeanisation transfer EU policies deeper into the daily workings of the Member States, EU disability policies will inevitably have greater direct and indirect impact on the lives of disabled people throughout Europe. These developments make an examination of disability policy at the EU level worthwhile as EU disability policy increasingly imposes policy choices on the Member States and expands into policy areas previously considered the exclusive

competence of the Member States with a variety of hard and soft law measures which attempt to directly and indirectly influence the direction of domestic disability policy.

The research question for this thesis asks 'To what extent does EU disability policy reflect the CDT approach to disability?' This overall research question is divided into the sub-questions 'What is CDT?', 'What is an adequate model of disability to support effective policy development?' and, for the four policy areas examined in the thesis, 'To what extent does the policy area under consideration reflect a CDT approach?'.

The theoretical basis for the thesis is critical disability theory which is a recently emerging theoretical approach to disability studies in law. Although a search of the literature reveals numerous references to variations of the term 'critical disability theory,' examination of the references reveals that the term is almost always used without explanation and often without any particular meaning other than as a critique of some law or policy about disability.[46] The development of CDT as a theoretical approach to disability studies and as the basis for a disability centred jurisprudence is one of the original features of thesis.

Since CDT is disability centred, it requires some conception of disability to contain its subject matter. What disability means, who is disabled and what it means to be disabled are complex questions which have undergone a paradigm shift in the last three decades. The thesis explores this shift through a review of the literature, World Health Organisation documents and statements and declarations issued by a variety of disability non-governmental organisations in order to describe and situate the particular conception of disability applied by CDT.

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[46] A search of legal data bases, as of 14 July 2011, returned only 54 hits for the term 'critical disability theory' of which only two dealt with the substance of the theory: Hein-on-line returned 38 hits; WestlawUK returned one; Lexis Library returned none; Wiley Interscience returned 14, none of them for law journals; IngentiaConnect returned one.

The analysis of EU disability law and policy in chapters four, five and six is based on primary and secondary sources including the EU treaties, regulations and directives, case law of the European Court of Justice, communications from and research undertaken on behalf of the Commission, decisions, resolutions and declarations of other EU institutions and academic literature. The thesis takes account of developments up to October 31, 2011. The thesis offers an original contribution to knowledge of EU disability law and policy through its treatment of the four areas of EU law and policy which it covers from the perspective of how they reflect major themes of CDT.

4. Thesis outline

(i) *Critical Disability Theory*

The theoretical basis for the thesis, critical disability theory, is developed in chapter two, which begins with an historical overview of the evolution of CDT from the development of critical social theory in 1930s Germany, through American legal realism and Critical Legal Studies to the emergence of CDT as a contemporary identity jurisprudence.

The key elements of CDT developed in chapter two include the model for understanding disability which underpins the theory, the multidimensionality of the disabled experience, an adequate concept of equality which welcomes diversity and promotes social inclusion, the role of individual and social rights in protecting the interests of disabled people, the central role of participation by disabled people and the role of language.

Critical disability theory is intentionally political in that its objective is to support the transformation of society so that disabled people are welcomed in their diversity. Disability, equality, rights and social inclusion are all social constructs which evolve

over time. CDT provides a conceptual framework to understand the relationship between impairment, disability and society and to inject disability interests into all policy areas.

(ii)   *Models of disability*

In every society throughout history there has been disability and disabled people. The social response to this inevitable aspect of the human condition and the role and status assigned to individuals labelled disabled have been as diverse as the societies in which people live. Chapter three traces the evolution of the meaning of disability in the Western world which provides the historical background from which the particular conception of disability applied in CDT has evolved.

Early European ideas about disability reflecting the will of God or the influence of the devil gave way, with the rise of scientific medicine, to a conception of disability as the result of an individual's impairment in mind or body with an accompanying social policy of treatment, rehabilitation and segregated care facilities. By the turn of the 19th century, this medical model had become the dominant conception of disability in the Western world. Jerome Bickenbach's term, the 'bio-medical model'[47] and Michael Oliver's and Colin Barnes' use of the terms 'individual' and 'personal tragedy' model[48] captures the focus on individual impairment of this conception of disability.

In the last quarter of the 20th century, the medical model has been challenged by a variety of models which approach the idea of disability from the perspective that the primary location of disability is in the social environment not the individual. Under the general label of 'social model' of disability, these approaches focus on the role of the social environment, which includes the physical structures of society from buildings to

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[47] Bickenbach (n 2).

[48] Oliver and Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (n 2).

modes of transport, the policies and practices which govern social interaction at home and at work as well as attitudes towards and beliefs about disability, in the creation of disability. The major divisions of the social model – the minority group, social oppression and interaction/relational models – are examined in this chapter.

The chapter closes with a description of the CDT version of the social model which is based on the World Health Organisation's International Classification of Functioning, Disability and Health.

(iii)   *EU disability policy*

From very minor beginnings in the early 1970s, EU disability policy has matured to the point where the EU has become a significant player in the development and implementation of disability policy in the Member States. EU disability policy and the Commission's implementation strategies are the subject of chapter four.

The first part of the chapter provides an overview of disability initiatives prior to the watershed 1996 Commission proposal for a new approach to disability policy. The second part of this chapter begins with the major paradigm shift to the social model/rights based disability policy expressed in the Commission's 1996 communication 'A New European Community Disability Strategy'.[49] In that communication the Commission proposed an equal opportunities model which was premised on the notion that disabled people have been marginalised and socially excluded primarily because of the social environment. The policy objective of the new strategy is to promote the social inclusion of disabled people and is to be achieved through identifying and removing barriers to equal opportunities. The third part of the chapter considers the strategies which the Commission has employed in pursuit of this objective.

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[49] Commission, 'A New European Community Disability Strategy' COM(1996) 406 final.

(iv)   *The equality directives and disability*

One of the major themes of EU disability policy is that disabled people have a right to equality and that programming to respond to the particular needs of disabled people is justified on the basis of the right to equality not on claims to charity or of social solidarity. The extent to which the equality directives reflect a CDT approach to disability is the subject of chapter five.

The chapter begins with an overview of the legal basis for EU competence to deal with issues related to discrimination based on disability which is followed in the second part of the chapter by an overview of the Employment Equality Directive [50] and the proposed directive on equal treatment in the provision of goods and services,[51] particularly as they relate to disability.

The third part of the chapter focuses on aspects of these directives of particular interest to disabled people. The first issue considered is the conception of equality which is reflected in the directives. EU law has traditionally adopted a formal conception of equality which is primarily concerned with treating people consistently without distinction based on prohibited grounds such as sex or race and without regard to differences in the social situation of the individuals or groups involved. Disability, of course, presents difficulties for this approach to equality because of what Martha Minow has called the 'dilemma of difference', which arises when deciding whether equality may be better advanced by acknowledging difference or ignoring it.[52] To avoid the limitations of formal equality it is frequently argued that the law should adopt a

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[50] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[51] Council, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Consolidated text' (15 July 2011) 12446/11.

[52] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990).

substantive form of equality which is able to take into account the social context in which a law operates. The limitations of formal equality and the potential for a shift towards interpreting the equality directives through a substantive equality lens are considered in this part of the chapter.

While many instances of discrimination against disabled people result from stereotyping and bias, there are frequently situations where the disability does make an objective difference. Without some mechanism to get passed the disability, non-discrimination law cannot be effective in promoting the social inclusion of disabled people. The mechanisms which are employed in equality law, the principle of reasonable accommodation and, for the proposed directive on equal treatment in the provision of goods and services, accessibility, is the second issue dealt with in this part of the chapter. A different approach to advancing the principle of equal treatment is through positive action measures, which is the third issue discussed in this part of the chapter. One form positive action for disabled people might take is a mirror of positive action measures taken for women. Although there is some indication the ECJ is relaxing its strict interpretation of the positive action provisions in the sex equality directives, it is likely that positive action in favour of disabled people will be justified by the specific provisions for disabled people which are found in the directives' articles allowing for positive action. The focus of the discussion is on these special provisions.

The fourth issue relates to the definition of disability. The ECJ's decisions touching this issue as well as the definition in the UN Convention on the Rights of Persons with Disabilities are examined. As will be seen in chapter five, it is very probable that the ECJ's definition will be substantially changed the next time the Court considers the issue. This chapter closes with some considerations about the potential of the directives for transforming the lives of disable people.

(v)   *Three EU programme areas*

The last substantive chapter of the thesis looks at the extent to which CDT is reflected in the law and policy of three programme areas – the European Social Fund, transport policy and the social inclusion OMC. The three programmes were selected for study because they combine law and policy in different ways and use different policy instruments to contribute to the overall EU policy objective of promoting the social inclusion of disabled people.

The first part of the chapter deals with the European Social Fund. Since the programme became operational in 1960, applying Jacqueline Brine's typology, the Fund has undergone seven major reforms.[53] It now accounts for a significant share of the total EU budget and is the primary programme implementing EU employment policy. The second part of the chapter deals with transport policy. The EU was slow to develop its transport policy and it was not until the late 1980s that it began to acquire the significant role in the completion of the common market and in European integration which it now has. Examples of rights based legislation (passengers' rights regulations), internal market policy (type approval standards) and progressive realisation of equal access in high capital expenditure and long life structures (the Trans-European Network – Transport) are examined. The last part of the chapter deals with the social inclusion OMC which is the primary institutional process through which the EU contributes to the reduction in poverty and social exclusion of marginalised groups.

The thesis draws to a close with a summary of findings about the extent to which overall EU disability policy and the four specific areas of law and policy covered in the

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[53] Brine (n 45).

thesis reflect the CDT approach to disability and with some speculation about the direction of EU disability policy in the future.

5.   *Conclusion*

This thesis examines the EU's disability policy and the extent to which the CDT approach is reflected in the EU's overall disability policy and four major areas of law and policy. The literature specifically addressing disability policy in the EU deals almost exclusively with the area of human rights and equality law. The development of CDT as an approach to disability studies and the transversal approach to EU disability policy presented in this thesis provide an original study of disability policy at the European level.

Chapter II

Critical Disability Theory

1.   *Introduction*

Our understanding of disability and how public policy should respond to disability have

undergone rapid change in the last few decades. Critical disability theory (CDT) is an

emerging theoretical framework for the study and analysis of disability. A disability

jurisprudence based on CDT identifies with the legal realist tradition and builds on the

Critical Legal Studies' critique of positivist legal liberalism.[1] For CDT the relationship

between law and disability is a complex combination of two social constructs – 'law'

and 'disability'. A critical jurisprudence of disability (1) identifies the overt and covert

sources of oppression within the law and legal institutions and, by means of that

exposure, seeks to relieve disabled people from that oppression and (2) identifies the

potential positive role of law and seeks to create law, use existing law and enlist legal

institutions in the struggle for the emancipation of disabled people which is the rationale

for CDT itself.

This chapter outlines the conception of CDT applied in this thesis. The rather long

introductory parts of this chapter are necessary into order to understand the historical

roots of the theory and the philosophical and legal regime which it critiques and seeks to

transform. To explain CDT's relationship to critical theory, the first part of this chapter

consists of a brief sketch of the Kantian and Marxist roots of critical theory, Max

Horkheimer's introduction of the term 'critical theory' and its development by him and

others of the Frankfurt School, and Jürgen Habermas's revitalization of critical theory.

An overview of liberalism and legal liberalism leads into an overview of Critical Legal

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[1] More commonly called 'liberal legalism' in legal theory but this word order is consistent with the terms
'legal positivism' and 'legal realism', avoids the negative connotations of the word 'legalism', and
reflects that the term is referring to the application of liberalism in the legal context.

Studies. In the third part, CDT itself is introduced as a new member of the critical

theory tradition. Eight aspects of CDT are considered: visibility, the social model of

disability, multidimensionality, valuing diversity, rights, voices of disability, language,

and transformative politics.

Since its first articulation in 1937, critical social theory has branched into a broad

medley of social theories. Douglas Tallack defines 'Critical Theory' as the 'most

acceptable, if imprecise, generic name for a body of texts which reflects critically upon

claims for disciplinary knowledge while occupying an (almost) indispensable position

in a number of humanities and social science disciplines'.[2] For Alan How critical theory

is 'immanent (indwelling) and refers to challenging the ostensible claims society makes

about itself with the truth of what is actually going on'.[3] While the critical theory

tradition encompasses an eclectic range of views, any adequate critical theory must be

> explanatory, practical,[4] and normative, all at the same time. That is, it must
> explain what is wrong with current social reality, identify the actors to change
> it, and provide both clear norms for criticism and achievable practical goals for
> social transformation.[5]

CDT, as a member of the critical theory family, is a theoretical approach to the

study of disability which is simultaneously explanatory, purposive and normative.

2.   *Critical Theory*

A 'critique', in the philosophical sense, suggests a systematic inquiry into the conditions

and consequences of ideas and an attempt to understand the limitations of those ideas.

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[2] Douglas Tallack, 'Introduction: Critical Theory: Canonic Questions' in Douglas Tallack (ed), *Critical Theory: A Reader* (Harvester Wheatsheaf 1995).

[3] Alan How, *Critical Theory* (Palgrave Macmillian 2003) 184.

[4] The word 'practical' in this context means 'purposive' in the sense that critical theory is intended to serve a purpose beyond mere explanation: James Bohman, 'Habermas, Marxism and social theory: the case for pluralism in critical social science' in Peter Dews (ed), *Habermas: A Critical Reader* (Blackwell Publishers 1999) 53.

[5] James Bohman, 'Critical Theory' (*The Stanford Encyclopedia of Philosophy*) <http://plato.stanford.edu/archives/spr2005/entries/critical-theory/> accessed 12 January 2007, 1.

As explained by Donald Jenner, the idea of critique, first presented in Immanuel Kant's inaugural dissertation (1770),[6] was most clearly formulated in Kant's Critique of Judgement (1790) in which he contrasted a 'critical' with a 'dogmatic' perspective. To deal with an object dogmatically is, Kant said, to consider it in relation to another conception of that object and assess the object in terms of that other conception through a process of reason. In other words, when approaching a phenomenon dogmatically a theory about that phenomenon is present in the mind from the beginning and the phenomenon is evaluated against that pre-existing theory – thus the phenomenon can become known by means of reason alone. Observations and sensations are interpreted in the context of that theory to give them meaning and to assess their value. In contrast, Kant argued that 'we deal with [a concept] merely critically if we consider it only in reference to our cognitive faculties and consequently to the subjective conditions of thinking it, without undertaking to decide anything about its object.'[7] When the dogmatic approach does not offer a sufficient answer to the question 'how is this possible?' the critical approach interprets phenomena through the medium of our senses allowing for an interpretation which is not determined by pre-existing theory about what the phenomena are. Over time, Kant's conception of 'critique' has come to refer to any systematic inquiry into the underlying meaning of phenomena and the limits to knowledge or understanding of those phenomena.

At the beginning of the 19th century, the German Idealist movement, of which GWF Hegel was a leading proponent, began its climb to dominance in the world of philosophy. German Idealism, in essence, proposed that what can be known is only that which follows from understanding. As it evolved through the 19th century, Idealism

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[6] Donald Jenner, 'What "Critical" Means in "Critical Thinking"' (*City University of New York*, 1997) <http://www.citigraphics.net/jenner/djenner/archive/CritiqueAndCriticalThinking.pdf> accessed February 12, 2007, 1.

[7] ibid: s. 74 as cited by Jenner.

came to claim that only the known is 'really real'. For Donald Jenner, Idealism claims

that:

> [t]hat which is merely *perceived* in sensible intuition, a putative external,
> independent reality, is not really real. That is, Idealism asserts that the Ideal is,
> both epistemologically and metaphysically, the *only* reality'.[8]

In contrast, Kant's critical philosophy insisted on metaphysical Realism, that there is an

underlying reality independent of human perception. It was a materialist conception of

the universe which posited that the physical universe exists independently of humanity.[9]

The next stop on the road to the Frankfurt School is Karl Marx, whose early work

in philosophy focused on a critique of Hegelianism. Marx adopted Hegel's new form of

logic, known as dialectics (popularized in the phrase 'thesis, antithesis and synthesis'),

but attached it firmly to materialism and focused the dialectic on the class struggle. For

Marx the contradictions inherent in capitalism would be its undoing as the proletariat

assumed its historic destiny and, by revolutionary action, heralded the institution of

communism at which time the state would wither away. Famously, Marx proposed that

the economic infrastructure of a society, its particular mode of production, determined

its super-structure – its arts, laws, politics. In the words of Sebastino Timpanaro,

'Marxism was born as an affirmation of the *decisive primacy* of the socioeconomic level

over juridical, political and cultural phenomena, and as an affirmation of the historicity

of the economy'.[10] Despite its primacy, however, the relationship of base to

superstructure is not direct and fixed. For Timpanaro the dependence of the

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[8] ibid 2 (italics in original).

[9] ibid 2.

[10] Sebastiano Timpanaro, 'Considerations on Materialism' in Douglas Tallack (ed), *Critical Theory: A Reader* (Harvester Wheatsheaf 1995) 333 (italics in original).

superstructure on the (economic) base applies only at 'its macroscopic and catastrophic aspects, … that is in relation to social revolutions'.[11]

By the beginning of the 20th century, Sigmund Freud's theories about the nature of the mind and his methodology of psychoanalysis were providing explanations of the working of the human psyche. Freud and Marx had in common the notion of the hidden – for Freud the unconscious and for Marx the false consciousness that results from capitalist ideology misleading the proletariat as to their real circumstances. Freud's exposition of the idea of the unconscious, his explanation of the development of the ego, and the psychological basis for the relationship between child and parent were foundational elements of critical theory.[12]

Critical theory as we know it today evolved from the work of scholars at the Frankfurt School, a term which refers to a group of Western Marxist social researchers and philosophers originally working at the Institute of Social Research at the University of Frankfurt am Main. The early critical theorists built on both Marx's critique of the political economy of liberal capitalism and Freud's exposition of the role of the unconscious in the formation of the human psyche in an effort to explain the persistent domination of 'late capitalism' and to propose a means to achieve human emancipation.

The origin of the term 'critical theory' dates from 1937 when Max Horkheimer presented his 'critical theory of society' in the essay *Traditional and Critical Theory*.[13] Horkheimer contrasted what he called 'traditional theory' with 'critical theory', which

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[11] ibid 335.

[12] Raymond Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (Cambridge University Press 1981) 1; Stephen Eric Bronner and Douglas MacKay Kellner, 'Introduction' in Stephen Eric Bronner and Douglas MacKay Kellner (eds), *Critical Theory and Society: A Reader* (Routledge 1989) 15; Joel Whitebook, 'The marriage of Marx and Freud: Critical Theory and psychoanalysis' in Fred Rush (ed), *The Cambridge Companion to Critical Theory* (Cambridge University Press 2004) 74-75; How (n 3) 30.

[13] Max Horkheimer, 'Traditional and Critical Theory' in *Critical Theory: Selected Essays* (Matthew J. O'Connell and Others (trs) Herder and Herder 1972).

he proposed as a theoretical approach to providing 'an account of the social forces of domination that takes its theoretical activity to be practically connected to the object of the study'.[14] Traditional theory, which reflects Kant's dogmatic perspective, finds validity in any theoretical proposition through its correspondence with an object already constituted (or theorised in its ideal form) before its examination. Theory is a pure activity of thought because the subject (the researcher) is divorced from the object of knowledge. The subject is portrayed as a disinterested observer who is simply describing the world as it is. For Horkheimer the essential limitation of the traditional approach was its separation of the thing being examined from the 'process of knowledge formation' and the researcher.[15] In addition, traditional theory aimed only to understand and explain the world; its methodology was grounded in positivism and so it necessarily separated inquiry from normative judgement. Horkheimer's critical theory understood the process of research and knowledge formation as engaging reflexively both the 'socially preformed' subject and object of study. Both subject and object are the result of complex social processes; the task of critical social theory is to examine the structures of society and the theories which attempt to explain society against its normative background. For Horkheimer, philosophy and empirical social science should influence and inform each other's work.[16] Critical theories are to be both explanatory and normative at the same time.

The European context at the time the Frankfurt School was founded included the authoritarianism of orthodox Marxism in the Soviet Union, (another) crisis in capitalism

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[14] Fred Rush, 'Conceptual foundations of early Critical Theory' in Fred Rush (ed), *The Cambridge Companion to Critical Theory* (Cambridge University Press 2004) 8.

[15] Simone Chambers, 'The politics of Critical Theory' in Fred Rush (ed), *The Cambridge Companion to Critical Theory* (Cambridge University Press 2004) 220.

[16] Max Horkheimer, 'The State of Contemporary Social Philosophy and the Tasks of an Institute for Social Research' in Stephen Eric Bronner and Douglas MacKay Kellner (eds), *Critical Theory and Society* (Routledge 1989) 32.

and the rise of National Socialism in Germany. By the mid-20th century, with the consolidation of state capitalism in both its Soviet and American forms, the hegemony of Western mass culture, and the proletariat showing no interest in overthrowing capitalism, critical theory, originally optimistic that society could move toward socialism, had become deeply pessimistic. Critical theory seemed to have reached an impasse.

Jürgen Habermas, writing in the 1960's and afterward, reconstituted and reanimated critical theory with his theory of communicative rationality. Habermas identified the cause of the impasse in critical theory as 'the fragility of the Marxist philosophy of history'.[17] Breaking with critical theory's Marxist roots, Habermas insisted that the Lebenswelt (the 'lifeworld' – the everyday experiences of people in their communities), which reflects the moral and practical knowledge of people in a community, is just as important an influence on society as are the means of production.[18]

With his Theory of Communicative Action, Habermas overcame the limitations of early critical theory by switching from a 'paradigm of consciousness', being the separation of subject and object, to a 'paradigm of communication', which avoids the duality of subject and object by reconceptualising the 'subject as inherently intersubjective'.[19] It is the linguistic basis of the individual's lifeworld which provides the (presupposed) foundation for the community of which the subject is a member which is the scaffold upon which the individual subject is constituted. In other words, any socialised individual is inherently constituted from the interaction with other members of the lifeworld which they all share. It is from this common beginning that

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[17] Jürgen Habermas, 'The Tasks of a Critical Theory of Society' in Stephen Eric Bronner and Douglas MacKay Kellner (eds), *Critical Theory and Society* (Routledge 1989) 296.

[18] How (n 3) 135.

[19] Ben Agger, *Critical Social Theories: An Introduction* (Westview Press 1998) 94 & 96.

subjects interact communicatively to reach agreement on the myriad matters that make up a functioning society. Central to Habermas's theory is the idea that communicative action is aimed at achieving mutual agreement. Communication requires that the communicants exchange information and beliefs as they seek a state of agreement. Communication, through the use of language, is a universal and uniquely human capacity which contains the potential for rational social practices. The ideal of a social fact produced by communicative rationality is the normative measure against which actual social facts are assessed. Communicative action has its own intersubjective validity derived from the communicative process of seeking to reach agreement or consensus. This contrasts with instrumental reason for which the validity of a claim is derived from empirically based knowledge.

Since it was first proposed by Max Horkheimer in 1937, critical theory has taken on a pluralist complexion. It now encompasses a wide range of descriptive and normative bases for social inquiry which have the practical aim of maximizing human freedom and ending the domination of some groups by others defined by class, power, race or other social construct. Early critical theory privileged the proletariat as the historic agent of emancipation. With the failure of the proletariat to live up to its historic destiny, a variety of social liberation movements have been identified which may, over a broader or narrower range, be agents of transformative social action. Unlike traditional theory, critical theory makes no claim to be normatively objective – its purpose is to explain oppression and to transform society with the objective of human emancipation. Critical theory today encompasses a wide range of multidisciplinary approaches to social inquiry all with the objective of providing the most complete explanation of social oppression and offering the most practical responses.

### 3.	*Liberalism and Legal Liberalism*

Since the conception of Critical Disability Theory used in this thesis is derived from critical theory as an immanent critique of liberalism, it is appropriate to take a moment to provide an overview of liberalism and legal liberalism. This will set the stage for the overview of Critical Legal Studies in the next section and for the description of CDT which is set out in the last section.

Liberalism is premised upon the belief that two complementary types of equality are inherent in all human beings. Amy Gutmann refers to them as the 'assumption of equal passions' and the 'assumption of equal rationality'.[20] Equality of passions refers to a basic human yearning for security and pleasure – everyone seeks both in individual measures and each combination is of equal value. The other essential equality is the assumption that everyone is sufficiently rational, or has the capacity for rationality, so as to formulate reasonable life plans and to have a sense of justice in order to live in society.[21] Gutmann argues that 'people's use of reason is both limited and mediated by their passions, yet the passions do not necessarily lead people to act against what would be the dictates of their reason'.[22]

Liberalism treats the individual as the basic unit of society and hypothesises the individual as ontologically prior to community. The liberal individual, as described by Richard Devlin, is a 'rational, free choosing, autonomous self that is prior to, and independent of, both the community and other selves'.[23] A key consequence of the liberal conception of the individual is that only individuals count and each only counts as one: some are not more important than others nor should some have a greater voice than others. Each individual is presumed to be free in the sense that they have the

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[20] Amy Gutmann, *Liberal Equality* (Cambridge University Press 1980) 18.

[21] ibid 1.

[22] ibid 42.

[23] Richard F. Devlin, 'Mapping Legal Theory' (1994) 32 Alta L Rev 602, 610.

'capacity to be an agent,' that is, 'a being who is capable of conceiving values and projects, including projects whose fulfilment may not be within the range of that being's immediate experience'.[24] As a free agent, the individual is autonomous. David Johnson describes three aspects of autonomy. In addition to autonomy as agency there is moral autonomy, referring to an individual's capacity to develop an effective sense of justice and to recognize that others have the same agency with their own interests which may impose limits on what the individual can fairly do, and personal autonomy, referring to the capacity to be self-defining, to determine one's own projects and to make up one's own mind without being unduly influenced by what others want or think.

Although what has come to be known as classical liberalism and, its current form, neo-liberalism, centres the individual with little regard for the community of which that individual is necessarily a member, there has been a significant stream of liberal thought, from the late 19th century on, which has recognized the essential role of the community. Originally called new liberalism, it is commonly referred to today by the terms social liberalism or left liberalism. John Rawls, for example, was a strong proponent of a form of liberalism which purported to accommodate the interdependence of the individual and the community. He intended his theory of justice as fairness to apply to a democratic society[25] characterised as 'a fair system of cooperation over time from one generation to the next, where those engaged in cooperation are viewed as free and equal citizens and normal cooperating members of society over a complete life'[26] within which equality and reciprocity are embedded.[27] Ronald Dworkin integrates community even more firmly in the heart of liberalism. He accounts for the essential

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[24] David Johnston, *The Idea of a Liberal Theory* (Princeton University Press 1994) 22.

[25] John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Harvard University Press 2001) 39.

[26] ibid 4.

[27] ibid 95-96.

role of community by arguing that in a liberal community 'an integrated citizen accepts that the value of his own life depends on the success of his community in treating everyone with equal concern'.[28] Dworkin argues that 'it is objectively important that any human life, once begun, succeed rather than fail - that the potential of that life be realized rather than wasted'.[29] It is 'objectively important', according to Dworkin, because the success of the lives of all individuals is important to all members of a society, not just the person whose life it is. For Dworkin liberty, equality, and community are three complementary aspects of a single political vision of egalitarian liberalism.[30]

In modern, Western democratic states the dominant theory of jurisprudence, at least outside of academia, is legal liberalism which is characterised by doctrines of formalism, neutrality, abstraction and rights. The doctrine of 'formalism' refers to two related concepts. First, formalism refers to the proposition that legal rules allow a logically deduced outcome to any legal case – that legal rules provide a basis for a determinate result in any case governed by law.[31] Second, formalism refers to the concept of formal equality which is discussed in more detail below.

The doctrine of 'neutrality' requires that legal rules and legal decisions are not based on any one person's or group's conception of the good or moral right. This reflects the principle of reasonable value pluralism upon which political liberalism is based, which is that, within a reasonable range, in a liberal political system individuals are free to pursue their own conception of the good life. The doctrine of neutrality also

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[28] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 233.

[29] ibid 448.

[30] ibid 237.

[31] Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Fernwood Publishing 1999) 21.

requires that, once the legal rule is established, the rule is to be applied neutrally as to the participants in any particular adjudicative proceeding.

Legal liberalism requires that law operate at a high level of abstraction. Laws are intended to be generalised across a broad spectrum of situations so that they can be applied consistently (the formalist approach of deducing the result in all cases from the established legal rules) without regard to social context (neutral adjudication by applying the same rules to everyone regardless of social context). A context sensitive approach, it is said, would run the risk of having judicial decisions in apparently similar fact situations so individualized that the law would have neither the consistency required by formalism nor the equal treatment required by neutrality. The abstraction of legal liberalism is required so law can operate according to legal reasoning and not just be the unconstrained application of the personal values and decisions of individual judges.

Legal liberalism has a strong affinity for the principles of individual autonomy, freedom and equality which lie at the heart of liberal philosophy.[32] A consequence of this is that liberalism distinguishes a private sphere separate from the public sphere which is represented by the state. For liberalism, even of the social liberal variety, the state is seen, in varying degrees depending on the particular form of liberalism, as a threat to the natural liberty of the individual and restrictions on that liberty are treated with suspicion.[33] In the private sphere, the state is not to interfere with the free pursuit of the individual's own goals. Although the various forms of liberalism will dispute the boundaries of the public/private divide, the separation is a fundamental concept of liberalism. The boundary line is marked by the concept of rights. The liberal individual

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[32] Devlin (n 23) 610. See also Collen Sheppard, 'Inclusive Equality and New Forms of Social Governance' (2004) 24 SCLR (2d) 45, 60.

[33] Richard S. Grayson, 'Social Democracy or Social Liberalism? Ideological Sources of Liberal Democrat Policy' (2007) 78 The Political Quarterly 31, 37.

is armed with rights against other individuals and against the state (which in many cases is coextensive with the 'community') which allow, within the private sphere, the free pursuit of the individual's own freely crafted life plans in a world of equal opportunity.

4. *Critical Legal Studies*

Critical theory was not systematically applied to law until the 1970s with the emergence of the Critical Legal Studies (CLS) movement in the United States which merged a revitalised American legal realism with critical theory.[34] American legal realism was concerned with the actual workings of the legal system and the indeterminacy of legal rules. Traditional positivist/liberal jurisprudence posits that judges rely on legal materials, such as statutes and case law, and arrive at their judgments through the application of law, as expressed in these sources, through established processes of legal reasoning. Legal realists reject this simplistic conception of legal decision making. Realists look behind the substantive and procedural rules of law to argue that law is inherently indeterminate and legal decisions are explicable only by taking into consideration, along with traditional sources of law, factors outside those sources, including the personalities of the participants in a judicial proceeding and ideological trends and political pressures of the day. The realist perspective became so accepted in the United States that by the mid-20th century it had become conventional wisdom and realist scholarship faltered until Critical Legal Studies came on the scene with its merger of realism and critical theory.[35]

Critical Legal Studies contests fundamental principles of the liberal conception of law. Where liberalism argues that law is separate from other forms of social control, CLS argues that law is an integral part of the available social controls. Where liberalism

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[34] Allan C. Hutchinson, 'The Last Emperor?' in Alan Hunt (ed), *Reading Dworkin Critically* (Berg Publishers 1992) 49.

[35] G. Edward White, 'The Inevitability of Critical Legal Studies' (1984) 36 Stan L Rev 649.

argues law consists of formal rules which define their own scope of application, CLS argues that legal rules are indeterminate and political and social factors outside of those rules have a significant influence on defining the scope of law. Where liberalism posits that law is the codification of objectively normative rules to govern society, CLS argues that law reflects subjective value choices that may be contested by those whose interests are not served, or are poorly served, by the value choices institutionalized by legal rules.

For Critical Legal Studies law is inherently contingent and unprincipled. CLS deconstructs law to show how it reflects class interests and relations of power and that judicial decisions are essentially political in that, within the institutional boundaries of legal reasoning, judges base their decisions on their subjective assessment of the available policy options which will be informed by their personal beliefs and current political and economic pressures of the day. CLS is 'heir to legal realism' but is a more comprehensive critique of legal liberalism. CLS may be distinguished from realism by its rejection of legal formalism which necessarily entails its rejection of the philosophy of political liberalism (distinguished from the practice of political liberalism) because liberalism relies on some variety of formalism.[36] Law acts to achieve particular social objectives and the analysis of law must account for both the purpose and effect of a law in its social context. Richard Delgado, writing as a critical race theorist, criticises formalism for downplaying power, emotion, history and content in favour of legal text and precedent. As a result, the judicial system silences vulnerable and oppressed people by preventing them from explaining who they are and the social context which forms the background to the story of how they came before the judicial system.[37]

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[36] Mark V. Tushnet, 'Perspectives on Critical Legal Studies' (1984) 52 Geo Wash L Rev 239, 239.

[37] Richard Delgado and Jean Stefancic, 'The Racial Double Helix: Watson, Crick, and *Brown v. Board of Education*' (2003-2004) 47 Howard LJ 473.

CLS argues that all legal rules are indeterminate and malleable. In particular, rights, as a species of legal rule, tend to legitimise existing power arrangements instead of providing real protection for the interests of disadvantaged groups in society. Political and judicial recognition of rights claims act as a pressure value to defuse social unrest but later judicial interpretation narrows those rights and administrations fail to enforce or delay implementation of the courts' decisions. Rights arguments distract people from seeking fundamental structural change in society. A more fundamental CLS critique of the concept of rights is that, while they encompass a variety of civil and political rights such as freedom of speech and religion, the right to vote, and to standards of police conduct, they do not include economic justice, without which the rights on offer have little meaning. CLS views rights as a source of the alienation people feel in their lives since they are based on the individual against the community – they only protect individual security and property. CLS foregrounds the idea of community which must underlie any liberal society and gives precedence to the community over the individual. CLS claims 'that even engaging in rights discourse is incompatible with a broader strategy of social change'.[38]

Critical Legal Studies proclaimed the unity of theory and praxis: through the exposure of the political and economic interests underlying law, political actors would be galvanized to transform society. CLS as a movement, however, has never been able to articulate a specific direction or form for this transformation and a recurrent criticism of CLS is that its prescriptions for the future direction of society are vague and utopian.[39]

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[38] Kimberlé Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' in E. Nathaniel Gates (ed), *The Judicial Isolation of the "Racially" Oppressed* (Garland Publishing 1997) 88.

[39] White (n 35) 661. A view contested by CLS scholars: see, for example, Mark G. Kelman, 'Trashing' (1984) 36 Stanford Law Review 293.

Later, in the 1980s and 1990s, identity jurisprudences, such as feminist legal theory, critical race theory and queer theory, identified limitations in CLS theorizing which arose from the underlying structural biases of society which CLS itself had inadequately exposed. Critical Race Theory, for example, evolved from the failure of CLS to adequately account for the role of race in American society and legal institutions and its inability to respond to the interests of oppressed minorities.

Richard Delgado, a leading critical race theorist, identifies a number of CLS concepts that 'repel and in fact threaten minorities'[40] with the CLS critique of rights being 'the most problematic aspect of the CLS program'.[41] He argues that the idea of rights and the belief that something called rights is part of the social structure, however imperfectly expressed, can and does constrain racism by private actors and public officials. CLS has provided no alternative to the concept of rights which would be an effective replacement. Furthermore, rights claims serve as a 'rallying point' which brings minority groups closer together.[42] CLS tends to dismiss piecemeal reform, arguing that it merely postpones the day of reckoning when the social order is overturned and the new age is inaugurated. Delgado condemns this attitude, arguing that minorities know that the occasional victory does not change the world and this attitude of CLS proponents is 'imperialistic in that it tells minorities and other oppressed peoples how they should interpret events affecting them'.[43] A judicial order to government to provide housing may not bring the revolution but it may be more important to families who have no housing than a revolution that never comes!

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[40] Richard Delgado, 'The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?' (1987) 22 Harv CR - CL L Rev 301, 303.
[41] ibid 304.
[42] ibid 304-305.
[43] ibid 307.

Delgado argues CLS has an idealist conception of social reality which argues that the principle barriers to the ideal society are mental categories that prevent people from envisioning a better world. Delgado sees this as a form of millenarianism arguing that '[t]he forces that hold us back are not largely mental, legal, nor even political. What holds us back is, simply, racism – the myriad of insults, threats, indifference, and other "microagressions" to which we are continually exposed'.[44]

Delgado allows that CLS's application of the Marxist concept of false consciousness may apply to the proletariat who may be co-opted into a status quo which oppresses them and who may 'accept their own subordination because they believe that the constitutional system protects their property against taking by the state, and that it elevates their status above that of the lowest class'.[45] However, Delgado argues, this does not hold true for minorities who are (at least in the US) well aware of how they are oppressed and little of the subordination of racial minorities is caused

> by uncritical absorption of self-defeating ideologies, as opposed to other forces.
> Much more of our current plight is due to other factors: coercion by the
> dominant group; exclusion from clubs, networks, information, and needed help
> at crucial times; microaggressions; and the paralysis and hopelessness caused
> by the majority culture's denial of our pain and reality.[46]

Building on this critical base and joining the family of identity jurisprudences is critical disability theory.

5.   *Critical Disability Theory*

The various components of CDT are often approached within an interdisciplinary 'Disability Studies' framework, but, by grounding CDT within the critical theory tradition, the conception of CDT used in this thesis incorporates particular philosophical

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[44] ibid 309.

[45] ibid 310.

[46] ibid 311.

approaches which derive from that tradition which are not necessarily encompassed within the idea of 'Disability Studies'.[47] As an identity jurisprudence, CDT builds on the critique of CLS pioneered by critical feminist, race and queer theorists.

Critical disability theory, as an immanent critique of the dominant traditions of political and legal liberalism, centres disability as it compares liberalism's norms and values with their actualization in the daily lives of disabled people. National disability policies in EU Member States where liberalism has been significantly influenced by social democratic thought fare no better in integrating disabled people into the daily life of their communities, social attitudes to disability and disabled people, or facilitation of independent living options.[48] Newer Member States in Central and Eastern Europe add lack of physical infrastructure and adequate services to the factors which contribute to the social and economic disadvantage and social exclusion of disabled people. The point is not to diminish the numerous instances where governments, non-government organizations and the social partners have made significant strides toward integrating disabled people into their communities, particularly over the past two or so decades, but only to argue that CDT is a relevant approach to research at the EU level and in all of its Member States.

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[47] Disability studies may be described as a structure for interdisciplinary research centring disability as a socially constructed category. The term serves to 'organize and circumscribe a knowledge base that explains the social and political nature of the ascribed category, disability': Simi Linton, *Claiming Disability: Knowledge and Identity* (New York University Press 1998) 117. Disability studies may, but does not necessarily, inform research related to, and treatment of, impairments themselves.

[48] Johannes Schädler, Albrecht Rohrmann and Stephanie Schür, *The Specific Risks of Discrimination Against Persons in Situation of Major Dependence or with Complex Needs Report of a European Study: Volume 2: Research and Analysis* (Inclusion Europe 2008) 17. See also, for example, Katharina C. Heyer, 'The ADA on the Road: Disability Rights in Germany' (2002) 27 Law & Social Inquiry 723, in which she noted, at 727-28, that 'German disability policy follows a difference or special-treatment doctrine, providing for disability needs in segregated settings' and Jitka Sinecka, 'The Czech Republic: Report on the Current State of Disability Law and Policy' (2009) 19 Journal of Disability Policy Studies 195. See also Camilla Parker and Luke Clements, 'The UN Convention on the Rights of Persons with Disabilities: A New Right to Independent Living' (2008) 4 EHRLR 508, 1, noting that Sweden was a leader in independent living with its first moves in that direction starting as early as 1954.

(i)   *Centring disability – visibility*

CDT centres disability which means that the examination of social structures or particular social policies takes place from the perspective of disabled people. An initial step in such an analysis is to make disability visible: take any policy or programme and ask how it deals with disabled people. Even noticing that the policy or programme does not deal with disabled people is to make disability visible. Centring disability means to pull disability to the fore – making it visible – when considering the subject matter in question.

When disability is not visible in a policy or programme it is likely that disabled people's interests and needs have not been considered adequately or even at all. For example, if a national employment policy failed to mention disabled people one would reasonably expect that the policy would not effectively respond to the needs of disabled school leavers trying to enter the labour market. Or disability may be identified in order to be dismissed as when, for example, jury selection laws identify mentally disabled, deaf and blind residents as not eligible for jury duty instead of setting out the processes for identifying and providing reasonable accommodation for a disabled juror. If a mid-sized firm makes no reference to disability in its written or unwritten policy it is likely it will not be able to deal appropriately with a disabled job applicant or customer. To centre disability is to ask where disabled people are in this policy/programme. To centre disability is to make disabled people visible if only by revealing their absence.

(ii)   *Models of disability*

A theory which centres disability and proceeds from the perspective of disabled people needs to have a conception of disability which is sufficiently inclusive to encompass the population with which it is concerned. What this conception should be and how any definition can avoid being over- or under-inclusive is a key concern of CDT. Because of

its central position, a brief overview of the CDT version of the social model of disability is presented here. The evolution of the social model and its variations is discussed in detail in chapter three.

The dominant paradigm for understanding disability throughout most of the 20th century has been the medical model which identifies the source of the disadvantage experienced by disabled people as their medical condition or their impairment. This essentialist model sees disability as an inherent characteristic of a person arising from an objectively identified impairment of the mind or body. Broadly stated, liberalism has traditionally conceived of disability in light of this medical model. The result is that liberalism treats disability as a personal misfortune preferably to be prevented and definitely to be cured, privileges 'normalcy' over the 'abnormal', presumes non-disabled norms are inevitable and values economic productivity as an essential aspect of personhood.[49] In the legal context, these principles are reflected in how the law and legal institutions respond to disabled people as individuals and as groups in the general population.

In contrast, CDT adopts a model of disability based on the principles that (1) disability is a social construct, not the inevitable consequence of impairment, (2) disability is best characterised as a complex interrelationship between impairment, individual response to impairment, and the physical, institutional and attitudinal (together, the 'social') environment, and (3) the social disadvantage experienced by disabled people is caused by the social environment which fails to meet the needs of people who do not match expectations of 'normalcy'. Although the essential idea that this model expresses had been proposed as early as the 1920s, it was only starting in the

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[49] Richard Devlin and Dianne Pothier, 'Introduction: Toward a Critical Theory of Dis-citizenship' in Richard Devlin and Dianne Pothier (eds), *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (University of British Columbia Press 2006) 2.

early 1970s that this alternative view, formulated as and named the 'social model,' was adopted and promoted by disabled people themselves. Since then, the 'social model' has been widely adopted by institutions and governments as the theoretical basis for national disability policies and has been adopted as a guiding principle of the United Nations' Convention on the Rights of Persons with Disabilities.[50]

Public policy must respond to both the biomedical and social aspects of disability. Prevention, treatment and rehabilitation are all appropriate responses to the biomedical, or impairment, aspects of disability. For those people who continue to experience social marginalization despite interventions responding to their biomedical circumstances, the appropriate policy response is to change the social environment to combat the social disadvantage experienced by disabled people. There is, however, an inherent tension between the medical model which seeks to abolish disabling impairments and the social model which accepts and truly values disabled people as equal, integrated members of society. CDT probes this tension by questioning, among other things, concepts of personal independence and interdependence, the social construction of 'non-disability' as well as disability, the concept of normalcy, fundamental values of individual dignity and respect in democratic societies, and issues at the intersection of disability with class, gender, race, sexual orientation, ethnicity and other socially constructed categories.

(iii)   *Multidimensionality*

Critical disability theory as jurisprudence is one of the family of identity jurisprudences the members of which are related by their focus on some identifying characteristic which serves as an organising principle for the study of how law and legal institutions impact individuals and groups sharing that identity. Identity jurisprudence grows out of identity politics which, as the name implies, are politics structured around a social

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[50] UNGA, 'Convention on the Rights of Persons with Disabilities' A/Res/61/106 (13 December 2006).

identity. One of the dangers of identity based politics is that the need to define the identity of the group tends to exclude potential members, demands members conform to group ideology, and makes diversity within the group disappear.[51]

Multidimensionality theory serves both as a means to avoid the pitfalls of exclusion and conformity which identity politics tends to perpetrate and to reflect the reality that individuals have a variety of identities. It reflects that disabled people, for example, are a diverse and variable population within any particular social structure (country, ethnic group, class, etc.) who are also members of all other social classifications. As explained by Ian Hutchinson, multidimensionality theory builds upon the ground breaking work of Kimberlé Crenshaw, who is credited with introducing the term 'intersectionality' to jurisprudence.[52]

Kimberlé Crenshaw, in her work developing a 'Black feminist criticism', identified a 'tendency to treat race and gender as mutually exclusive categories of experience and analysis'.[53] She described how the analytical approach of anti-discrimination law applied a 'single-axis' framework to analyze claims of discrimination raised by Black women which 'perpetuated' this tendency, which was also reflected in feminist theory and antiracist politics. She argued that the single-axis framework contributed to the exclusion of Black women and Black women's experience from both feminist and anti-racist discourse because of the failure to appreciate that the interaction

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[51] See, for example, Elisabeth Holzleithner, 'Mainstreaming Equality: Dis/Entangling Grounds of Discrimination' (2004-2005) 14 Transnat'l L & Contemp Probs 927 and Nancy Ehrenreich, 'Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems' (2002-2003) 71 UMKC L Rev 251.

[52] Darren Lenard Hutchinson, 'New Complexity Theories: From Theoretical Innovation to Doctrinal Reform' (2002-2003) 71 UMKC L Rev 431, 433. Hutchinson, at 440, says the concept of intersectionality had existed in the humanities and social sciences for many years before it was introduced by Crenshaw in 1989.

[53] Kimberlé 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 139, 139.

of race and gender adds another dimension to their experience of oppression. Crenshaw argued that '[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated'.[54] Feminist theorizing which analyses women's experience in terms of patriarchy, sexuality or liberal separate spheres theory fails to account for the role of race in Black women's lives:

> Feminists thus ignore how their own race functions to mitigate some aspects of sexism and moreover, how it often privileges them over and contributes to the domination of other women. Consequently, feminist theory remains white, and its potential to broaden and deepen its analysis by addressing nonprivileged women remains unrealized.[55]

Anti-racism theorizing which fails to take into account the influence of the patriarchal nature of society on Black men similarly fails to reflect adequately the experiences of Black women.

In its early form intersectionality referred to the intersection of one axis of oppression with another. Crenshaw's particular focus was on the intersection of gender and race, as the US civil rights and women's movements both ignored the distinct experiences of Black women.[56] As Elisabeth Holzleithner explained:

> Intersectionality theory has warned how single-issue politics start out from norm figures that are reproduced hand in hand with their privileges that stem from ignoring those outside of the norm. Single-issue politics are becoming "exclusive". They tend to articulate first and foremost the interests of the "privileged" members within the disadvantaged group, namely those who are only "singly burdened".[57]

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[54] ibid 140.

[55] ibid 154 (citations omitted).

[56] Holzleithner (n 51) 945.

[57] ibid 97.

The result was that the U.S. civil rights movement focused on the privileged members of the Black community, that is Black men in comparison to Black women, and the women's movement focused on privileged women, white (and middle and upper class) women in comparison to Black (and working class) women.

Nancy Ehrenreich has coined the term 'hybrid intersectionality' to describe the intersection of an axis of privilege with an axis of subordination.[58] The singly burdened will often simultaneously be in a privileged position relative to others who experience additional axes of subordination. This concept is particularly relevant for CDT because a large proportion of disabled people developed their impairment after they became adults – their formative years were not influenced by disability. Suddenly the privileged white, young, heterosexual man might experience the subordination of disability but he may well remain relatively privileged over a person disabled from birth or who has another axis of subordination.

Multidimensionality theory reflects the presence of the multiple interconnected memberships which individuals have as they go about their daily lives. Recognizing that everyone is multidimensional allows for structural analysis of society while recognising that every group is made up of multidimensional members. The idea of multidimensionality reflects the various axes of domination and subordination which intersect as individuals interact with each other.

(iv)   *Equality with diversity*

A fundamental value of liberalism is the principle of political and legal equality. Building on its theory of the individual as sovereign, classical liberalism's conception of equality, based on the writings of Aristotle, may be stated as: 'Things (and persons) that are alike should be treated alike, while things that are unalike should be treated unalike

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[58]Ehrenreich (n 51) 257.

in proportion to their unalikeness'.[59] This formulation does not offer any criteria for determining alikeness or for determining how treatment should vary in response to unalikeness. In consequence, choosing which differences should be deemed irrelevant, and how to vary treatment proportionately when differences cannot be ignored, is a continuous and dynamic process which responds to changes in political influence of various socially constructed groups. Race, gender, sexual orientation, ethnicity are all differences to which liberalism has had to respond. With race and ethnicity, and to lesser extents gender and sexual orientation, the response has been to deem what used to be relevant differences to be no longer relevant. In this way, political and legal equality could be extended to these claimants without disturbing the basic structures of society. The consequence of this approach is, however, that diversity must be suppressed: the claimant must appear like the comparator or else the claimant is found to be different and thus legitimately subject to different treatment. Any difference must be minimized so that the formal equality paradigm can be preserved.

For disabled people, however, this approach to responding to demands for political and legal equality frequently will not be a successful response strategy. Disability epitomises Martha Minow's 'dilemma of difference' which arises when it is necessary to decide whether to deal with difference by acknowledging and responding to it or by ignoring it.[60] Depending on context, equality objectives may be promoted by acknowledging and respecting difference in ways which effectively ignore it or in ways which respond to it. In the case of disability, in most cases, difference should not just be dismissed as irrelevant, because ignoring the difference usually has the effect of rejecting and marginalizing the person. Instead, a response which takes account of the

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[59] Aristotle, *Nicomachean Ethics*, as cited by Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 ELJ 290, 303.

[60] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990).

disability so that adjustments can be made to eliminate the obstacle to welcoming the individual and enabling the person to participate as an equal is required.

In classical liberal theory, the value underlying the principle of equality is that equal treatment is the morally just way to organize society. However, for CDT the underlying value expressed in the equality norm is the opportunity and capacity to participate as an equal which promotes the social objective of inclusion of all the members of the community. This requires a conception of equality which incorporates the diversity which disability (or gender, race, ethnicity, etc.) reflects. The dominant approach to responding to diversity is to argue for some form of substantive, as opposed to formal, equality – assessing equality in terms of outcome or result not process. This justifies different treatment under the rubric of equality. An alternative approach, advocated by Hugh Collins, which may be applied in the field of equal treatment legislation is to identify the underlying value as the promotion of social inclusion. Equality is reduced to an instrumental rule to be applied where it promotes social inclusion. If it does not then it may be set aside for alternative measures which do promote the objective of social inclusion.[61] CDT advocates a form of equality which promotes the underlying value of social inclusion and accommodates diversity rather than ignoring it.

For CDT being identified, and identifying, as a disabled person is central to understanding one's self, one's social position with its attendant opportunities and limitations and one's knowledge of the world. For many disabled people it is difficult to claim pride in their impairment and disability, even if it is acknowledged that the disabling social environment is the major impediment to the quality of life of disabled people. The strong claim for valuing diversity is the celebration and welcoming of the

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[61] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16.

diversity represented by physical and mental impairment. The lesser claim is the assertion of 'the value of people with impairment' while refusing to 'glorify incapacity'.[62] CDT recognises and welcomes the inevitability of difference without valorising impairment and conceives of equality within a framework of diversity as supporting an underlying value of social inclusion.

(v)   *Rights*

Rights are a basic feature of a liberal polity. Building on its ontology of the self, classical liberalism conceived of rights as claims against others, either individuals or the state, who infringe the individual's autonomy. Most forms of liberalism today have a more comprehensive conception of rights which recognises the necessity of balancing claims against others and the state with the interests of the community, incorporates what Isaiah Berlin referred to as negative and positive liberty,[63] and recognizes a legitimate role for positive action by the state to support the common good and for positive action by private and public actors to assist socially excluded populations. Despite much scepticism about the relevance of legal rights to disadvantaged groups in society, CDT embraces legal rights as an indispensable tool to advance the equality claims of disabled people and to promote social inclusion.

CDT's central concerns with disabled people's (individual) rights to autonomy and (social) rights to full participation in society are reflected in the tension between the social welfare- and rights-based approaches to disability policy. Critical theory presents an 'ideal of a cooperative self-actualization in which the freedom of the individual

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[62] Colin Barnes, Geof Mercer and Tom Shakespeare, *Exploring Disability: A Sociological Introduction* (Polity Press 1999) 207.

[63] Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 121-122. Negative liberty refers to the absence of constraints on choice: one has negative liberty when neither others nor the state prevent a particular choice of action. Positive liberty refers to the presence of enabling circumstances such as a developed personal autonomy, the material resources, or the ability to allow the implementation of a choice of action. Berlin was suspicious of positive liberty since it often appeared to justify oppressive state action in the name of true freedom.

makes possible that of others'.[64] Its normative ideal of society is just as incompatible with the individualism of classical liberalism as it is with the collectivity of communitarianism. Axel Honneth argues that cooperative self-actualization means that individuals are unable to achieve success in social life without recognizing the common core values underlying their individual interests. Contrary to communitarianism and liberalism, critical theory posits that 'the turn to a liberating praxis of cooperation should not result from affective bonds or from feelings of membership or agreement, but rather from rational insight'.[65] CDT does not reject liberal rights: it exposes the ways in which liberal rights theory has failed to respond adequately to the needs and interests of disabled people individually and collectively.

(vi)   *Voice*

The dominant positivist theory of knowledge reduces all knowledge 'to that furnished by the empirical sciences,' applying scientific methodology which presupposes an independent observer, distinctly separate from the object being studied, reporting the results of observations as simple reflections of reality.[66] When the social sciences first emerged they modelled themselves on the natural sciences and proposed to discover universal laws equivalent to those in the natural sciences. It was against these claims that Max Horkheimer directed his famous essay *Traditional and Critical Theory*. Contrary to traditional theory's claim to be pursing objective knowledge, Horkheimer argued that

> [t]he facts which our senses present to us are socially preformed in two ways:
> through the historical character of the object perceived and through the historical
> character of the perceiving organ. Both are not simply natural; they are shaped by

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[64] Axel Honneth, 'A social pathology of reason: on the intellectual legacy of Critical Theory' in Fred Rush (ed), *The Cambridge Companion to Critical Theory* (Cambridge University Press 2004) 342.

[65] ibid 344.

[66] William Outhwaite, *Habermas: A Critical Introduction* (Stanford University Press 1994) 20.

human activity, and yet the individual perceives himself as receptive and passive in the act of perception.[67]

With traditional theory the object of study is not affected by the theory (it might be that the object is influenced by the subject but this just becomes one more fact). With critical theory the object and the subject are both influenced by the theory which itself adjusts to changing historic circumstances. Horkheimer proposed a critical social theory in which knowledge in the social sciences is wholly contingent on its historical context. For Horkheimer '[a] consciously critical attitude, however, is part of the development of society' and understanding the course of history as being driven by the economic system contains both a protest against the system and 'the idea of self-determination for the human race, that is the idea of a state of affairs in which man's actions no longer flow from a mechanism but from his own decision'. The object of the theory is very much influenced by the theory itself: 'Every part of the theory presupposes the critique of the existing order and the struggle against it along lines determined by the theory itself.'[68] Positivism assumes a rational progress of accumulating knowledge through a value neutral process of empirical science and privileges credentialised expertise. Critical theory challenges these presumptions and explores issues such as how knowledge claims are made, how they are propagated, what is acceptable argument and evidence, the politics of the accreditation of authority and who gets to be an expert and to speak on the subject. Based on its view of the reflexive nature of critical social inquiry, critical theory 'addresses the subjects of inquiry as equal reflective participants, as knowledgeable social agents'.[69]

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[67] Horkheimer (n 13) 200.
[68] ibid 229.
[69] Bohman (n 5) 16.

In the medical model of disability, with its primary concern being the cure of biomedical impairments, medical professionals presume to be, and have been accepted as, the fount of knowledge: the other participants in medical praxis, the sick and injured and those who live with disabilities, have been treated as mere objects to be studied. Traditionally, the voices of disabled people who contested mainstream conceptions of disability and the potential and role of disabled people have been suppressed and marginalized.[70] If one starts with a belief that disability is lack and inability, unchosen and despised, then the voices of disabled people can always be interpreted as symptoms of a person's healthy or unhealthy relation to that disability. When the disabled voice says what the non-disabled perspective wants to hear, it is heard: when it says something the non-disabled perspective does not want to hear, it can simply be dismissed as the inappropriate response of a person who has developed an unhealthy response to the impairment.[71]

CDT, building on the reflexive approach to social inquiry characteristic of critical theory, privileges the stories of disabled people – it gives them voice. This is not a minor matter. Non-disabled people think about disability from their non-disabled perspective. For them being severely disabled is imagined as unmanageable suffering, a life subject to constant dependency and without value. It is only by listening to and valuing the perspectives of those who are living disabled lives that the non-disabled can begin to understand that even severe disability does not have to prevent a joyful and desired life.

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[70] Andrew Weis, 'Jumping to Conclusions in "Jumping the Queue"' (1998-1999) 51 Stan L Rev 183.

[71] Tanya Titchkosky, *Disability, Self, and Society* (University of Toronto Press 2003) 162.

(vii)   *Language*

Another theme of CDT deals with how language influences the concept of disability and the status of disabled people. This theme includes both the words used to describe or label disabled people and the words and images used to portray disability. Language is popularly assumed to be a transparent, neutral means of communication. Critical theory, however, understands language to be inherently political. Language carries with it ideological implications which are more or less transparent.

In the late 1970s and early 1980s many new terms were proposed by an increasingly diverse disabled community. Words and terms such as 'handicapped,' 'crippled,' 'disabled,' 'physically challenged,' and 'special needs people' were proposed, tried on for size, and generally abandoned. The etymology of the 'dis' prefix of the word 'disability' connotes separateness, lack of, not, or absence. The word has strong connotations of incapacity, deficiency, and impairment. Despite this, by the early 1980s, the English speaking disabled community reclaimed the word 'disability' and began to mould it to fit their interests. Phrases such as 'disabled people,' 'people with disabilities' and 'the disabled community' were adopted by the community in preference to the other options. The consensus on using the word 'disability' has held over the past three decades.

For some disability theorists there is a significant distinction between 'people with disabilities' and 'disabled people.' Use of 'people with disabilities' is intended to counter tendencies to essentialism by making disability a description, not a defining characteristic, of the person. In this view, use of this term focuses attention on the person first and then, only if the context requires, on the person's disability. By the 1990s it became more common to use the term 'disabled person'. Despite arguments by some that this term implies that the medical condition 'totally engulfs' the individual

and implies an essentialist understanding of disability, proponents of the term object

that the phrase 'person with disabilities' makes it seem disability is not quite part of

personhood and not quite part of the self. Tanya Titchkosky prefers the term 'disabled

people' which she employs as a way to reflect that disability is the relationship between

the body and society, a relationship which is in a constant state of flux.[72] For Simi

Linton use of the term 'disabled people' is intended to call attention to disability as the

marker of identity to which the person and the group wish to draw attention in support

of their equality seeking agenda.[73] Michael Oliver argues strongly that 'disabled

person' is preferable because 'person with disability' implies that disability is a mere

appendage to the person. He argues that in reality a person's disability is an essential

part of the self – it becomes nonsensical to talk about the person and the disability

separately when disabled people are demanding acceptance as they are – as disabled

people.[74]

The words and images used to portray disabled people, the second language

theme of CDT, have a direct effect on social attitudes towards disabled people.

Historically and today, in print and visual media, in high and low culture, disabled

people have been and are portrayed as deficient, pitiable, wicked or malign, dangerous

or valueless. Despite the introduction of many euphemisms, the media and what Adorno

and Horkheimer termed, in *Dialectic of Enlightenment*, the 'culture industry' still

consistently reflect the negative attitudes towards disabling impairments which the

medical model reflects. As Robert Burgdorf, Jr. has cautioned: 'The power of words to

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[72] ibid 283.

[73] Linton (n 47) 13.

[74] Michael Oliver, The Politics of Disablement: A Sociological Approach (St. Martin's Press 1990) xiii. It is common for disabled people to say that if there was an effective treatment to eliminate their impairment they would not accept it since their disability is so integral to their sense of self. The contrary is also common. Many disabled people feel their impairment as a burden regardless of their environment and desire to assimilate with the mainstream without their impairment not self-identity as disabled: Tom Shakespeare, *Disability Rights and Wrongs* (Routledge 2006) 72ff.

affect people's lives by subtly influencing their conceptions of reality, emotional associations, and self-concepts should not be underestimated.'[75] CDT examines how these negative attitudes are revealed through a discourse of personal tragedy with disability rendering individuals powerless, vulnerable and dependent. Unless, of course, the person is a 'super-crip' who is resourceful, brave and amazing and has overcome their tragic disability!

(viii)   *Transformative politics*

One of the ways in which Horkheimer distinguished his critical theory from traditional theory was his insistence that theory must be both explanatory and normative. Marx, in his famous eleventh thesis on Feuerbach, had declared that 'Philosophers have hitherto only interpreted the world in various ways; the point is to change it'.[76] Marx and Engels were competing for influence in the world of nineteenth century socialism against a range of socialist thinkers, among them those whom Marx called the utopian socialists, such as Robert Owen and Henri de Saint-Simone, who sought to improve the lot of humanity through an enlightened philanthropy, cooperation, friendly societies and other innovations. Marx and Engels dismissed the transformative potential of these initiatives and declared that the proletariat could only break free of their chains by their own self-transforming action, that is, by revolutionary action guided by adequate theory. As a theorist in the Western Marxist tradition, Horkheimer's critical social theory retained both the idea that theory is explanatory and normative and the expectation that the proletariat was historically destined to overthrow capitalism and herald a new era of emancipation. Changing the economic, political and social structure of society with the

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[75] Robert L. Burgdorf Jr. (ed), *The Legal Rights of Handicapped Persons: Cases, Materials, and Text* (Paul H. Brooks 1980) 48.

[76] Karl Marx, 'Theses On Feuerbach' <www.marxists.org/archive/marx/works/1845/theses/index.htm> accessed 12 March 2007.

objective of emancipating humanity was always the purpose of critical theory and the Frankfurt School scholars.

CDT retains this linkage between theory and praxis from its critical theory roots and is 'a self-consciously politicized theory. Its goal is not theory for the joy of theorization, or even improved understanding and explanation; it is theorization in the pursuit of empowerment and substantive, not just formal, equality'.[77] CDT is about power and 'who and what gets valued'.[78]

The policy response to the medical model of disability focuses on preventing and curing disability or providing support for those who do not respond to medical interventions. In most Western democracies there has been a progressive democratisation of disability related social welfare programs, but they are still characterised by paternalism and inflexibility. And often democratisation disguises central government cost cutting measures which disproportionately impact on disabled people and other socially excluded communities. CDT provides the theoretical basis for different policy responses to disability – those being policies of inclusion, equality and autonomy.

While it is obvious that CDT does not suggest that prevention and cure are not important elements of a complete national disability policy, medical interventions and the discourse of prevention and cure both have been highly problematic for the equality and social rights of disabled people. The capabilities of medical science in the areas of genetic screening, reproductive technology, treatment of premature babies and sustaining life through the use of life support technology, to name a few, are examples of science progressing faster than our moral compass can be reset. CDT, by exposing

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[77] Devlin and Pothier (n 49) 8.
[78] ibid 9.

hidden motivators, identifying how social attitudes are conditioned by the portrayal of disability in the print and visual media, showing that the choices made for the directions and goals of empirical research are the result of contingent social processes and demonstrating the contingent nature of the social construction of disability, provides a theoretical basis for the development of more effective policy responses to disability and stronger, democratic political control of social institutions which deal, in one way or another, with issues related to disability.

6.   *Conclusion*

Critical disability theory is a framework for the analysis of disability which centres disability and challenges the ableist assumptions which shape society. CDT is derived from the critical social theory first outlined by Max Horkheimer which has today become a diverse family of critical theories which offer various approaches to social inquiry. As a theory of jurisprudence, CDT builds on the Critical Legal Studies movement which merged critical theory with legal realism. Criticism of the CLS movement for its own failure to escape from the deep structural inequalities of society led to the development of identity jurisprudences focused on factors such as gender and race. In this chapter, CDT has been developed and presented as the newest of these identity jurisprudences.

CDT's central theme is that disability is a social construct not the inevitable result of impairment. As an immanent critique of liberalism, CDT examines the ways in which disabled people are dominated and oppressed by the failure of liberalism to live up to its own promises of equality and justice. CDT values diversity and recognizes the full subjectivity of disabled people. CDT is a consciously political theory which provides the basis for practical action to advance the interests of disabled people.

This chapter has laid the ground work for responding to the overall research question for this thesis described in chapter one by outlining the philosophical underpinnings of CDT and its major constitutive elements. In the following chapters the degree to which the CDT approach to disability policy is reflected in the overall EU disability policy and in four specific areas of law and policy will be explored. A brief introduction to the CDT conception of the social model of disability was presented earlier in this chapter. The evolution of models of disability leading to an explanation of the conception of the social model applied in CDT is the subject of the next chapter.

Chapter III

Models of Disability

1.   Introduction

For the past several decades, two families of disability models have dominated the public policy environment. The first family is composed of impairment based models and is usually referred to as 'the medical model'. The second family is composed of models based on the claim that disability is primarily a socially imposed designation and is usually referred to as 'the social model'. Various authors have given their version of a model different names or focused on particular applications or aspects of the disabled experience, but all of the models can be placed in one or other of these families. An adequate model of disability is essential for the development of effective public policy. This chapter provides an overview of the evolution of the major versions of disability models and sets out the variety of social model, a synthesis of medical and social models, which informs critical disability theory.

Disability appears in many forms. It may be related to a physical, mental, developmental or sensory impairment or, frequently, a combination of all of these. The functional consequences of any impairment, the individual response to that impairment and how the impairment and the social environment interact are infinitely variable. Given this diversity within the disabled population, does the category 'disability' have any analytical power at all?

One approach to countering negative and invalidating attitudes towards disabled people is to argue that everyone is impaired in some way or has the potential to become impaired. Proponents of a 'universalising' theory approach to disability point to the inherent frailty of humanity in the face of external pressures and the near inevitability of

impairment in later life.[1] By arguing that everyone is equally vulnerable and everyone at some time in their lives, particularly near the end of life, should expect to experience impairment, this approach tries to erase the distinction between disabled and 'not currently disabled' people to eliminate the social disadvantage associated with disability. Underlying this approach is the claim that '[d]isability is not a human attribute that demarks one portion of humanity from another …; it is an infinitely various but universal feature of the human condition'.[2] No one has all the abilities humans can have and the boundary between ability and disability is inevitably variable and culturally determined. The purpose behind this approach is to remove the specialness of disability; since everyone will have special needs sometime during their lives '[d]isablement policy is therefore not policy for some minority group, it is policy for all'.[3]

But not all people have an impairment or are disabled by any reasonable understanding of those concepts. Acknowledging that a great deal of what is labelled 'normal' is historically and socially prescribed, there are still certain parameters for the capacities of *homo sapiens* established by our genetic code. To merge disability into a universal of humanity is to make disabled people vanish into the general population leaving only a group of people with greater impairment than the norm without any particular social significance. This does not answer why only some are labelled disabled and experience social disadvantage derived from that label.

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[1] See, for example, Irving Kenneth Zola, 'Toward the Necessary Universalizing of a Disability Policy' (1989) 67 Supplement 2 (Part 2) The Milbank Quarterly 401; Jerome E. Bickenbach and others, 'Models of disablement, universalism and the international classification of impairments, disabilities and handicaps' (1999) 48 Social Science & Medicine 1173; Tom Shakespeare, 'The Social Model of Disability: An Outdated Ideology?' (2002) 2 Research in Social Science and Disability 9, 23ff.

[2] Bickenbach (n 1) 1182.

[3] ibid.

A 'universalist' conception of disability, which proposes that everyone may be placed on a continuum from disabled to 'not yet disabled' and argues that disability is universal since everyone is disabled at sometime in their lives, is an insufficient basis upon which to analyse the social condition of disabled people and develop social policy which is responsive to the interests of this very diverse population. Disabled people do experience social exclusion because of disability and addressing that issue requires some conception of disability which reasonably identifies the population in question without relapsing into essentialism: 'In a disablist society, it does not matter how one defines disability because the qualities ascribed to the status will always appear negative in comparison with those associated with "able-bodied being"'.[4] As Simi Linton argues, as long as disabled people experience social exclusion and are limited in their life options because of a hostile, uncaring and insensitive society the category of 'disabled people' is a necessary analytical construct.[5]

In the next section of this chapter, the medical model is introduced starting with a basic description of the model followed by an overview of the evolution of disability as an administrative category and then a discussion of the social construction of impairment. Following that, the social model is introduced starting with a general overview followed by discussion of the major versions of that model. This chapter finishes with a restatement of the medical/social model synthesis which is the CDT model of disability which was outlined in chapter 2.

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[4] Bill Hughes, 'Being disabled: towards a critical social ontology for disability studies' (2007) 22 Disability & Society 673, 678.

[5] Simi Linton, *Claiming Disability: Knowledge and Identity* (New York University Press 1998) 13.

2.   *The medical model*

The basic premises of the medical model of disability are that disability is the result of an impairment suffered by an individual and the social disadvantage associated with disability is a consequence of that impairment. The medical model appears in a variety of forms, each emphasising a particular aspect of the disability experience. Jerome Bickenbach has used the term 'bio-medical model'[6] to emphasise its focus on impairment. Michael Oliver and Colin Barnes refer to the 'individual model' and the 'personal tragedy model'[7], emphasising the individual locus of disability and the primary response being cure or rehabilitation at the level of the individual or segregated care for those who cannot fit themselves to society as it is. Lisa Waddington and Matthew Diller have called it the 'social welfare' model[8] focusing on the provision of segregated facilities for long term care and income support (wage replacement or pension) programmes. Harlan Hahn has referred to the medical model as the 'functional limitations paradigm' because it deals with the functional consequences of impairment.[9]

This section starts with an overview of the medical model, which is followed by a brief overview of how disabled people became a distinct social category and came to be segregated from their communities. The section ends with a deconstruction of the medical model's fundamental organising principle, the concept of the objectively identifiable impairment.

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[6] Jerome E. Bickenbach, *Physical Disability and Social Policy* (University of Toronto Press 1993).

[7] Michael Oliver and Colin Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (Longman 1998) ; see also Colin Barnes, Geof Mercer and Tom Shakespeare, *Exploring Disability: A Sociological Introduction* (Polity Press 1999).

[8] Lisa Waddington and Matthew Diller, 'Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law' (*Disability Rights Education & Defence Fund*, 2000) <www.dredf.org/international/papers_w-d.html> accessed 28 February 2005.

[9] Harlan Hahn, 'Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas' (1994-1995) 4 S Cal Rev L & Women's Stud 97, 101.

(i)   *The development of the medical model of disability*

Before the nineteenth century the dominant European view of impairment and disability

was that they were simply a reflection of God's will or were a just, divine punishment

for sin. St Augustine wrote that 'fools' 'are a punishment for the fall of Adam and other

sins' while 'Luther was more inclined to blame the sins of the parents'.[10] Despite this

dominant view, some streams of thought rejected the negative valuation of disabled

people and accepted them as evidence of some positive divine purpose.[11]

It was not until the late seventeenth century that medicine began to distinguish the

patient from the disease. Michel Foucault argued that in France, after a number of

alternative models were tried through the Revolutionary period, by '1816, the doctor's

eye has been able to confront a sick organism. The historical and concrete *a priori* of

the modern medical gaze was finally constituted'.[12] Between 1840 and 1890 scientific

understanding of the causes of disease underwent a radical paradigm shift with the

development of the germ theory of disease which proposed that independent, organic

agents caused disease, not personal behaviour and morality, and that these external

agents could be overcome by medical treatment. Science moved medicine from folk

lore and basic nursing to understanding the underlying causes of disease. Over time

external, morally neutral causes were identified for more and more diseases and

impairments. The scientific physicians of the early and mid nineteenth century faced

competition from older forms of medical intervention. By the latter half of the

nineteenth century, however, they had seen off that competition with the advances they

had made in dealing with communicable disease, anaesthetics and antisepsis and,

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[10] Joanna Ryan and Frank Thomas, *The Politics of Mental Handicap* (Penguin Books 1980) 87.

[11] Brendan J. Gleeson, 'Disability Studies: a historical materialist view' (1997) 12 Disability & Society 179, 187.

[12] Michel Foucault, *The Birth of the Clinic* (A. M. Sheridan Smith tr, Pantheon Books 1973) 192.

through political struggle, quickly acquired the monopoly on medical practice which has held firmly until very recently.[13]

The medical model of disability is a development of scientific medicine which posits that disability is the functional limitation imposed on an individual caused by some physical or mental impairment. An impairment, in turn, is some objective abnormality in functioning within an individual. This model presumes that impairment can be ascertained by neutral, scientific means and, once a diagnosis is made, that scientific medicine can be applied to cure the problem. The model assumes there is an objective, statistical normal for every element of human functioning and labels as disabled those who negatively deviate sufficiently from that norm. Since the model is dependent on highly trained practitioners, it is dominated by health professionals, led by physicians but including psychologists, pharmacologists, kinesiologists, physiotherapists, etc. It is characterised by the active expert who treats and controls the passive patient who is the recipient of expert ministration. It has an affinity for isolating and segregating patients to make treatment, cure and rehabilitation administratively more efficient. It often objectifies the individual since the focus is on the impairment and its cure; the whole person in his/her environment is incidental to the impairment, although, of course, this does not mean that the personnel in the various medical professions lack human compassion and concern.

By locating the problem of disability in the individual and describing the nature of disability in medical terms, disability social policy is properly directed at 'patients' and their special needs. In the medical model the social disadvantage experienced by disabled people flows from their biological impairment; biology determines destiny.[14]

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[13] See Foucault, ibid, for France and Peter Conrad and Joseph W. Schneider, *Deviance and Medicalization: From Badness to Sickness* (Temple University Press 1992) for the United States.

[14] Bickenbach (n 6) 82.

Those who cannot be cured, those who are unable for whatever reason to exit Talcott Parsons' sick role,[15] are 'looked after' outside the mainstream of society or, if they had been in the workforce, 'pensioned off' into some type of income replacement scheme. Whatever the particular nature of the impairment, the person who cannot be cured and returned to a productive role in society is treated as innately different, defective, and inferior.

(ii)   *Evolution of disability as a distinct administrative category*

Despite its generally devalued status, disability is the basic eligibility criterion for a great number of social programmes, ranging from workers' compensation benefits, disability pensions and incapacity benefits through to favourable tariffs on public transit systems and additional teaching options in various educational institutions. The evolution of disability as a distinct category in the administration of various public relief and benefit schemes and the use of the medical model as the primary gate keeper to these schemes began in early modern Europe.

Deborah Stone, in her seminal work *The Disabled State,* argued that societies have two primary mechanisms for the distribution of material resources, the work-based and the need-based systems, each with a variety of sub-mechanisms. She located the origins of the administrative category of disability in fourteenth century English laws regulating vagrancy. She found the intersection of vagrancy with disability in the notion that both categories were unstable with people entering and leaving the category

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[15] Talcott Parsons, applying his sociological theory that the stability of the social structure is maintained by its members fulfilling their social roles, proposed that since a state of health is the normal position illness is disruptive to the system. Sickness is a form of social deviance which must be controlled if the society is not to become unbalanced. The social system manages the sick person by assigning the person a temporary 'sick role'. One of the features of this role is that the person is exempted from the person's normal social role and responsibilities proportionate to the nature and severity of the illness. See generally, Talcott Parsons, *The Social System* (The Free Press 1951) 436-437; Talcott Parsons, 'The Sick Role and the Role of the Physician Reconsidered' (1975) 53 Milbank Memorial Fund Quarterly 257, 258.

depending on circumstances. In both categories, a major concern, reflected in the vagrancy and poor relief laws, was to distinguish the genuine from the false.[16]

The fear that claimants to the need-based system simply do not want to work through character defect, idleness, or dishonestly has pervaded the history of European poor relief and remains today a major theme of poverty reduction social policy. One of the techniques of deception attributed to European vagrants was to pretend illness and disability ranging from faking injuries, blindness, and leprous sores through to inflicting wounds on themselves or dependent children, either their own or those taken from orphanages. Over time, poor laws increasingly specified the reasons, such as old age, pregnancy or disability, which in addition to mere destitution justified people moving into the need-based distribution system.

Michel Foucault traced a similar history in France and Germany.[17] Beginning around the middle of the seventeenth century, France introduced an equivalent to the English poorhouse, under the name 'hôpital général', in which vagabonds, beggars, and others not attached to the labour force, including disabled people, particularly those called mad, were confined and subject to a regime of strict discipline and often forced labour. In Germany, under the name 'Zuchthäusern', or house of correction, similar institutions were established. The number of these institutions increased through to the middle of the eighteenth century after which they began a slow decline. Foucault argued that the normative basis of these institutions was the moral value of labour: 'What made it necessary was an imperative of labor. Our philanthropy prefers to recognize the signs of a benevolence toward sickness where there is only a condemnation of idleness'.[18] For the indigent person, the price of being looked after was the loss of liberty: 'Between

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[16] Deborah A. Stone, *The Disabled State* (Temple University Press 1984) .

[17] Michel Foucault, *Madness and Civilization* (Richard Howard tr, Pantheon Books 1965) 38ff.

[18] ibid 46.

him and society, an implicit system of obligation was established: he had the right to be fed, but he must accept the physical and moral constraint of confinement'.[19]

It is important to note that in these pre-industrial societies, when most economic activity occurred in the home and immediately surrounding agricultural lands, most people with impairments were integrated into the economic system. Even if regarded as unfortunate and deserving of pity, the individual was part of the community not segregated out of sight and out of mind. Without machines, an enormous amount of human labour was needed to extract resources from nature and there was always productive work which could contribute to the community's well being. A misleading impression is left if one imagines vast numbers of impaired people separated from their families and wandering the countryside begging for bare survival.[20]

Administrators of nineteenth century English poor law recognized 'children, the sick, the insane, "defectives," and the "aged and infirm,"'[21] as potential recipients of poor relief, each category with its own definition (often merely 'understood' by everyone and not written down), means of identification and treatment regimen, all of which varied over time and, in actual implementation, by location. Those identified as insane were frequently caught up in the separate system of public asylums as opposed to the work houses of the poor law. A person who did not fit one of those categories was by default determined to be independent, mentally competent and able-bodied which forced them into the work-based distribution system or criminal and vagrant/beggar lifestyles. The evolution of disability into its own category in the need-based system was completed in the nineteenth century but the linkage between disability and

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[19] ibid 48.

[20] Brendan Gleeson, *Geographies of Disability* (Routledge 1999) 95ff.

[21] Stone (n 16) 40.

deception remained.[22] The new administrative category of 'disabled' was the system which maintained control over those accessing the disability related need-based programmes.

Stone outlined a different history for the development of the disability category in Germany.[23] From 1871 the unified German state led a rapid industrialization programme in which it retained ownership of railways, canals, mines, and utilities, was a leading source of capital for private industry and supported its new industrial and agricultural sectors with protective tariffs. The *Invalidity and Pension Law* of 1899 was the last of a trio of social insurance laws which Bismarck designed as a means to tie the worker and labourer classes to the new state. This law defined disability as the inability to perform a person's regular work or to earn at least the amount of the minimum disability pension because of the persons 'physical or mental condition,' thus explicitly tying the idea of disability to earning capacity.[24] From the beginning, despite Bismarck's desire that the state play a major role in the administration of the programme, the scheme was financed by employers and employees with the state making a relatively token contribution, retaining a supervisory role in its administration and acting as adjudicator for disputes between local administrative agencies and workers. In 1911, a separate scheme was instituted for white collar workers at their request which provided better benefits as compared to the earlier scheme for blue collar workers. This class difference persisted until 1957 and, Stone claimed, continued informally thereafter.

At the same time as the institutional systems to respond to the needs of indigent disabled people were undergoing change, rapid industrialization both increased the number of impaired people and contributed to creating disability as a distinct category

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[22] ibid 29ff.

[23] ibid 56-68.

[24] ibid 58.

and to segregating disabled people into institutions outside the mainstream of society. Because of 'the speed of factory work, or working to the rhythms of machinery, often undertaking complex, dextrous tasks, the regimented discipline, and production demands'[25] many people who had been contributing members of their communities were unable to fit the new ideal of the productive worker. Michael Oliver argues that the expansion of capitalist means of production demanded that workers present themselves as individuals separated from their communities and families. The ideology of the individual as labourer required the idea of the able-bodied worker. Thus disabled people were separated out (no longer members of a family or community) and treated as deviant individuals needing to be cured and returned to the work-based system of distribution or excluded from that system and moved to the needs-based system. Asylums for the insane, then later residential schools or institutions for blind, deaf or intellectually disabled people and permanent care institutions were all designed to segregate those who could not meet the characteristics of workers needed by industrial society and move them permanently out of the work-based distribution system. These institutions rapidly became oppressive, abusive warehousing operations as isolation from public scrutiny and lack of political and financial support abandoned the inhabitants to their fates.

The initial use of disability as a separate administrative category for the needs-based system occurred before scientific medicine provided any contribution to the issue of impairment. It was the job of magistrates, parish councillors and poor law administrators to determine who was disabled. With the rise and eventual ascendency of scientific medicine, doctors became the adjudicators of disability applying the medical model to identify those whose impairments qualified them for the benefits of the

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[25] Barnes, Mercer and Shakespeare (n 7) 18.

programme in question. For Stone '[t]he link between the formation of disability as an administrative category and its definition as a medical phenomenon is the concept of deception'.[26] During the nineteenth century, as positivist medicine evolved into a distinct discipline, the task of determining the genuineness of a disability claim was slowly transferred to the purportedly scientific objectivity of medical science. As medicine developed new techniques for examining individuals which did not rely on the patient's subjective recounting of symptoms, such as the stethoscope, ophthalmoscope, microscope and x-rays, the apparent objectivity of the clinical judgement was adopted as the factual foundation for the disability exemption from the work-based system.

A number of authors identify a separate and distinct economic model of disability which deals with individuals who do not participate in the labour market.[27] However, the economic model is really just a programme specific application of the medical model. It presumes that disability is located in the individual and that the individual needs to be treated or rehabilitated to enable the person to join or rejoin the labour market. If that is not possible the person is moved over to the care institutions or moved from the labour force into an income replacement pension or benefits programme. Reflecting its medical model foundation, this model presumes that limitations on the ability to work are a direct consequence of the functional limitations imposed by the impairment. Its concern is to change the individual through treatment and rehabilitation to allow for participation in the labour force rather than changing the nature of the labour force to accommodate the individual.[28]

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[26] Stone (n 16) 28.

[27] See, for example, Stone (n 16); Harlan Hahn, 'Toward a Politics of Disability: Definitions, Disciplines, and Policies' <http://www.independentliving.org/docs1/ilanrp2005.html> accessed 17 October 2007; Bickenbach (n 6); Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (Routledge 1996) .

[28] See, for example, Harlan Hahn, 'Disability and rehabilitation policy: is paternalistic neglect really benign?' (1982) 43 Public Administration Review 385, 387.

(iii)   *The social construction of impairment*

In the medical model disease, illness and injury reflect the presence of a pathology or trauma of some nature that adversely affects the normal functioning of the person. It was only with the development of statistics in the nineteenth century that the concepts of normal, norm and average entered the language.[29] When applied to humanity, statistical measurement purported to provide objective standards to assess average human characteristics. Impairment was identified as an undesirable characteristic outside the statistical norm. With the growth of the use of measurement of physical and later, mental, characteristics of populations, the statistical concept of the norm was transformed into the biological concept of the normal individual. The apparent scientific objectivity of measurement led to the empowerment of technical experts, who had access to the individuals and who developed the tools to measure them (the military, schools, social welfare agencies), to define the terms of normalcy and abnormalcy.[30]

But impairment itself is a social construct: how far from an ideal of normalcy an individual characteristic must be before it is noticed as an impairment and can be labelled as a disability varies over time and among cultures. For any physiological condition to be labelled illness the society in which it occurs must identify and label it as illness. If disease is the underlying pathology, illness is the label for the symptoms described by the person and the signs which are noted by an observer. The symptoms and signs must be socially recognized as illness. This distinction allows for the presence

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[29] Lennard J Davis, 'Constructing Normalcy' in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge 1997) 11.

[30] Although abnormal can be equally used for people who find themselves on either side of the norm, the word has a pejorative sense that cannot be overcome in today's English. It does not make sense in the vernacular to call an Olympic gold medallist abnormal!

of illness without disease and disease without illness. This 'body/social dichotomy has the advantage of permitting analysis on both the physiological and social levels.'[31]

An example of measurement leading to labelling people disabled is the widespread administration of the IQ test in the early twentieth century. This was hailed as an objective measure of intellectual capacity which led to the unexpected outcome that there were many more intellectually impaired people than had previously been thought to exist. Children and adults who had been fully integrated with their communities suddenly found themselves labelled 'mentally deficient' with adverse consequences for their education, work options and their futures.[32] Once special institutions were established for this new social category, the system became self-perpetuating – as more individuals were identified, institutions which served their presumed needs grew which led to a need to fill them.

Importantly, the labelling of a condition as illness has social consequences. As Peter Conrad and Joseph Schneider express it:

> Think for a moment of the difference in consequences if a person's inability to function is attributed to laziness or to mononucleosis, seizures to demon possession or epilepsy, or drinking habits to moral weakness or alcoholism. Medical diagnosis affects people's behaviour, attitudes they take toward themselves, and attitudes others take toward them.[33]

The medical model is inherently expansionist. The mechanism of expansion is the medicalisation of diversity and deviance which are two sides of a coin. On the one side, diversity is medicalised when difference is labelled impairment and becomes the province of scientific medicine to be cured or corrected. Difference can become impairment if social institutions do not know how else to respond to behaviours which

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[31] Conrad and Schneider (n 13) 30.
[32] Ryan and Thomas (n 10) 22.
[33] Conrad and Schneider (n 13) 31.

are found to be undesirable. Examples of this phenomenon are the enormous increase in the prescription of Ritalin in response to diagnoses of hyperactivity attention deficit disorder in children when there is a strong suspicion the children are actually just boisterous and the parents and teachers are overwhelmed by a system which does not meet their needs, let alone those of the children. Another example is the expansion of the diagnosis of autism by adding a variety of behaviours to create what is now called autism spectrum disorder. Sexual orientation is a rare example of the demedicalisation of diversity.

On the other side, deviance becomes medicalised when what was criminal or morally reprehensible comes to be seen as a condition better addressed by medicine than by criminal law or moral sanction.[34] Major examples of this process are alcoholism and drug addiction, which also illustrate that medicalisation is a highly contested claim and there are strong social forces that reject efforts to move these issues out of the criminal justice arena.

Peter Conrad and Joseph Schneider have argued that redefining moral-social problems as illness gives the medical system its valid claim to take possession of that social policy area. By taking the sin out of behaviours, the doctors gain the authority to control those now labelled patients and become agents of social control.[35] Medicalisation depoliticises structural failings of society and returns them to being the problem of the individual who is responsible for following doctor's orders to be cured.

(iv)   *Conclusion*

For all its weaknesses, the medical model did, for the most part, supplant the previous model of disability, which ascribed the source of impairment to some type of moral

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[34] ibid.

[35] See Parsons (n 15) particularly 454-465 and 477-479.

culpability or other sinful behaviour, with a more objective discourse. The medical model provided what was believed to be an objective basis to assess eligibility for the new social support programmes for disabled people which grew with the developing welfare state through the twentieth century. Despite its more objective approach, the medical model retains a strong moral component including requiring the disabled person to try hard to get better, holding up to admiration those who show how well they have overcome or adapted to their disability and excluding various disabilities which are seen as being caused by moral deviance, such as alcohol or drug addiction, from the scope of various programmes.

The medical model shows its oppressive side when impairment is generalized to the rest of the person's life options so that the impairment and its functional limitations come to dominate the perception of the person. The inability to do certain things becomes interpreted as a general loss of ability to look after oneself and leads to diminished social status. Harlan Hahn described how the medical model reflects the 'pervasive cultural understanding of disability as a "personal misfortune,"' with the individual seen as being victimized by impairment, lacking personal autonomy and dependent on others for essential care and nurturing.[36]

Since disability in this model is purely a personal misfortune, a question of chance or fate, the individual can make no claim as of right on society to respond to the individual's needs arising from the disability. The primary responsibility for dealing with the consequences of the disability rests with the individual or the individual's

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[36] Hahn, 'Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas' (n 9) 105-106; see also, Barnes, Mercer and Shakespeare (n 7) 21.

family.[37] With the medical model the normative basis for social policy responses to disability is charity, compassion or a welfarist cost/benefit calculation.[38]

3.   *Socio-political models of disability*

Socio-political models of disability, also commonly referred to as social models or homogenised under the term 'the social model', challenge the key assumption of the medical model which is that the disadvantage arising from disability inheres in the individual's biological condition. Socio-political models all approach disability from the perspective that it is the social environment which has been constructed without regard for the interests of disabled people, not objective, scientifically described impairments, which causes, defines or exaggerates disability. The social environment encompasses physical and architectural barriers, institutional rules, systems, policies and practices and cultural attitudes all of which, in various combinations, prevent or limit the full and equal participation of disabled people in their communities.[39] The label 'disabled' is an attribution assigned to an individual based on a non-disabled perspective of what it must be like to have an impairment which presumes not only the parameters, but also the superiority, of 'normalcy'.[40] This 'ableist'[41] ideology encompasses erroneous assumptions about a disabled person's capacity to perform which magnify the

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[37] Oliver and Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (n 7) 8.

[38] Bickenbach (n 6) 192ff.

[39] See, for example, Tanya Titchkosky, *Disability, Self, and Society* (University of Toronto Press 2003) 197; Richard K. Scotch, 'Models of Disability and the Americans with Disabilities Act' (2000) 21 Berkeley Journal of Employment and Labor Law 213, 218; Oliver and Barnes (n 7) 18.

[40] Dianne Pothier, 'Miles To Go: Some Personal Reflections on the Social Construction of Disability' (1992) 14 Dalhousie Law Review 526, 528.

[41] The term ableism has been developed to refer to the dominant culture's conception of disability as an absence of ability or a lack of capacity. Ableism describes the dominant culture's socio-political bias in favour of the non-disabled, its privileging of non-disability, its presumption of the intrinsic superiority of non-disability, its centring of the non-disabled experience: 'ableist' refers to a person who believes in the inherent superiority of being non-disabled: Linton (n 5) 9.

consequences of impairment and consequentially diminish those who do not meet socially determined norms of capability.[42]

Socio-political models of disability come in a variety of forms each emphasising different features of the social model approach. Harlan Hahn and Jerome Bickenbach have used the term 'socio-political' model to emphasise that an adequate response to disability is inherently political,[43] Michael Oliver and Colin Barnes have used the term 'social oppression' model to emphasise the role that the social environment plays in creating disability [44] and Lisa Waddington and Matthew Diller the 'civil rights' model to emphasise the civil rights legislative response to disability.[45]

In some versions of the social model, disability is entirely socially constituted and the matter of impairment itself is ignored.[46] These versions make the claim that the social disadvantages associated with disability could be overcome simply by changing the social environment: most of the limitations experienced by disabled people have nothing to do with the functional consequences of biological differences and everything to do with the way people react to those differences.[47] Other versions of the model acknowledge to varying degrees the role that impairment plays in the disability experience.

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[42] Pothier (n 40) 528. See also Adrienne Asch, 'Critical Race Theory, Feminism , and Disability: Reflections on Social Justice and Personal Identity' (2001) 62 Ohio State Law Journal 391, 397, where she says the burden of proof is high for persons with disabilities to claim 'it is not a tragedy to live with an impairment. However, it is more than that – the burden of proof is high to show that one can live competently at all'.

[43] Hahn, 'Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas' (n 9) 101; Bickenbach (n 6) 62.

[44] Oliver and Barnes (n 37).

[45] Waddington and Diller (n 8).

[46] Some authors, particularly among 'Deaf Culture' advocates, argue that all of the disadvantage associated with impairment results from the social environment and that the actual impairment has no negative impact on their lives: See, for example, Harlan Lane, 'Constructions of Deafness' (1995) 10 Disability & Society 171.

[47] Bickenbach (n 6) 136-137.

Another major divide among the socio-political models occurs along the idealist/materialist philosophical fault line.[48] In practice this divide is between those who give precedence to the 'social construction' of disability, locating the source of the social disadvantage experienced by disabled people in the minds of non-disabled people (idealism) and those who give precedence to the 'social creation' of disability, locating the source of the social disadvantage in the structures and institutional practices of society (materialism).[49]

This section starts with an explanation and critique of the minority group model which was popularised by Harlan Hahn and has been a major influence on North American disability studies. Next, the social oppression model is introduced. This approach was developed by a British disability rights group and has been a major influence on British disability studies. The section ends with an overview of interaction/relational versions of the social model which developed in reaction against the apparent absence of a role for impairment in both the minority group and social oppression versions.

(i)   *The minority group model*

Despite the dominant influence of the medical model, the idea that disability included a social dimension was recognized early in the last century.[50] In the 1950s disabled people were occasionally referred to as a disadvantaged minority for whom negative attitudes and social exclusion, as much as any limitation caused by an impairment, limited life

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[48] Mark Priestley, 'Constructions and Creations: idealism, materialism and disability theory' (1998) 13 Disability & Society 75.

[49] Michael Oliver, *The Politics of Disablement: A Sociological Approach* (St. Martin's Press 1990) 87.

[50] Paul K. Longmore, *Why I Burned My Book and Other Essays on Disability* (Temple University Press, 2003) chapter two 'Life of Randolph Bourne' (a disabled, pre-world war I activist) and chapter four 'The League of the Physically Handicapped and the Great Depression'.

options similar to the experience of Black Americans.[51] Writing in 1966, Jacobus

tenBroek and Floyd Matson proposed distinguishing between what they referred to as

disability and handicap:

> For the most part it is the cultural definition of disability, rather than the scientific
> or medical definition, which is instrumental in the ascription of capacities and
> incapacities, roles and rights, status and security. Thus a meaningful distinction
> may be made between 'disability' and 'handicap' – that is, between the 'physical
> disability', measured in objective scientific terms and the 'social handicap'
> imposed upon the disabled by the cultural definition of their estate.[52]

Through the 1970s many disability activists and academics used the term

'handicapism' to refer to this early social model of disability. Handicapism was defined

as the collection of assumptions and practices that lead to the negative treatment of

disabled people because of apparent or assumed physical, mental, or behavioural

differences.[53] The causes of handicapism were identified as:

> the socially learned attitudes, preconceptions, and misunderstandings of the able-
> bodied; the denial of usual rights and responsibilities of other members of
> society; the stigma attached to disability; the expectation that disabled persons
> have no future in normal social life; and the inaccessibility of the labour force
> and the benefits that come from that.[54]

Using the concept of handicapism, parallels were drawn between the

marginalisation of disabled people and that of women and racial minorities. The term

'handicapism' did not survive the 1970s, but the idea was taken up and evolved into the

socio-political family of models of disability with the sudden expansion of disability

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[51] Hahn (n 27) 10, citing Roger G. Barker, B.A. Wright, L. Meyerson, and M.R. Gonick, *Adjustment to Physical Handicap and Illness: A Survey of the Social Psychology of Physique and Disability* (New York: Social Science Research Council, 1953) 102; Paul Abberley, 'The Concept of Oppression and the Development of a Social Theory of Disability' (1987) 2 Disability & Society 5 citing RG Barker, 'The social psychology of physical disability' (1948) 4 Journal of Social Issues 28.

[52] Jacobus tenBroek and Floyd W. Matson, 'The Disabled and the Law of Welfare' (1966) 54 California Law Review 809, 814.

[53] Robert Bogdan and Douglas Biklen, 'Handicapism' in Allen D. Spiegel (ed), *Rehabilitating People with Disabilities into the Mainstream of Society* (Noyes Medical Publications 1981) 16.

[54] Marcia H. Rioux, 'Labelled Disabled and Wanting to Work' 1985 Research Studies of the Commission on Equality in Employment (Canada) 614, 626.

theory and activism from the 1980s and on. Building on the re-emergence of the social dimension of disability and its claim that political choice was the source of much of the disadvantage experienced by disabled people, Harlan Hahn, in 1982, proposed that:

> disabled people can be viewed as a minority group just as other ethnic or racial minorities. They have been subjected to the same assumptions of biological inferiority, stereotyping, stigmatizing, segregation, prejudice, and discrimination as other deprived and disadvantaged segments of the population.[55]

Hahn argued that this approach to disability 'also implies that attitudinal discrimination rather than organic conditions comprise a fundamental source of difficulty which disabled people share with other minority groups'.[56] He opined that 'disability may even be regarded primarily as the consequence of a "disabling environment"'.[57] In criticising Deborah Stone's *The Disabled State* for its reliance on the medical model, Hahn said that:

> [u]nless researchers and policy makers are prepared to admit that unemployment and other serious problems confronting disabled citizens are primarily created by discriminatory practices in an inhospitable environment, there appears to be no solution to the problem of the continued growth of programmes providing disability benefits.[58]

He criticised Stone for failing to recognize the 'extent to which disability is primarily a product of a disabling environment created by government policies rather than of functional limitations or of administrative categorization.'[59]

Hahn argued that the 'devaluation of disabled persons ... has resulted from the reluctance of society to recognize their dignity and worth as human beings or to grant

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[55] Hahn, 'Disability and rehabilitation policy: is paternalistic neglect really benign?' (n 28) 387.

[56] Hahn, 'Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas' (n 36) 101-102; see also, Harlan Hahn, 'Public Support for Rehabilitation Programs: the analysis of U.S. disability policy' (1986) 1 Disability, Handicap & Society 121, 125.

[57] Hahn, 'Toward a Politics of Disability: Definitions, Disciplines, and Policies' (n 27) 7.

[58] Harlan Hahn, 'The disabled state' (1985) 45(6) Public Administration Review 878, 879.

[59] ibid 878.

them civil rights as members of a political community'.[60] He went on to propose a 'minority group model' of disability in which it is the attitudinal and behavioural response of able-bodied society based on perceptions formed in response to the visible and permanent characteristics of a minority which lead to the devaluing of disability and the disadvantages disabled people experience. These negative attitudes may have developed from able bodied persons' 'existential anxiety,' or their fears that they too might one day be stricken with some debilitating condition.[61] Hahn offered as a second or alternative explanation for the development of negative attitudes the emotional reaction of most people to the physical appearance of many disabled people resulting in what he called 'aesthetic anxiety'. According to this view, prejudice against, and the consequent exclusion of, disabled people is the result of the reaction to physical difference as much as it is the result of impaired ability. In one version of his minority group model, Hahn proposed that the disadvantage of disability was caused by the stigma of difference rather than any functional limitations of the individual.

Hahn's model is primarily a social constructionist theory because of his emphasis on the attitudinal sources of prejudice and discrimination against disabled people. However, his claim that the social environment is the result of public policy decisions and his suggestion that the exclusionary social environment may have developed with a 'discernible, though barely conscious intent'[62] implies elements of a social creationist approach which has been developed much more fully and explicitly in the social oppression model.

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[60] Hahn (n 27) 7.

[61] H Hahn, 'The Politics of Physical Differences: Disability and Discrimination' (1988) 44 Journal of Social Issues 39, 42-43.

[62] Hahn, 'Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas' (n 37) 105.

(ii)   *The Social Oppression Model*

The 'social oppression' or 'social barriers' model was first proposed by the British self-help disability group the Union of the Physically Impaired Against Segregation (UPIAS) which was founded in 1975. UPIAS objected to the biomedical bias in definitions of disability and argued instead that 'it is society which disables physically impaired people'.[63] They argued that the means for the complete integration of disabled people were readily available and their continued segregation was condemning them to 'social death'. The root cause of the social disadvantage and poverty experienced by disabled people was the exclusionary social environment.[64]

UPIAS distinguished impairment, defined as the functional limitation resulting from 'lacking part of or all of a limb, or having a defective limb, organ or mechanism of the body',[65] from disability, defined 'as the disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities'.[66] UPIAS argued that '[d]isability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. …Physical disability is therefore a particular form of social oppression'.[67] This was not to deny the reality of impairment but to place the emphasis on the disabling nature of the social environment.

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[63] Union of the Physically Impaired Against Segregation (UPIAS), 'Fundamental Principles of Disability' <http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/UPIAS%20Principles%202.pdf> accessed 13 October 2007, 3.

[64] Vic Finkelstein, 'An Administrative Challenge? (The Health and Welfare Heritage)' in Michael Oliver (ed), *Social Work: Disabled People and Disabling Environments* (Jessica Kingsely Publishers 1991) 25.

[65] Later amended to include sensory and intellectual impairments as well as physical impairments: Barnes, Mercer and Shakespeare (n 7) 28.

[66] UPIAS (n 63) 4.

[67] ibid 4.

James Charlton explained the oppression of disabled people, especially in the developing world, as the result of systematic 'political, economic, cultural, or social degradation because they belong to a social group'.[68] The locus of oppression is the political-economic and socio-cultural arenas not particularly the attitudes of able-bodied people. Paul Abberley was another of the rare academics who tried to define the concept of oppression as used in this model. He noted that oppression is historically specific and, therefore, its contours change over time and culture. Empirically, oppression is evidenced by the inferior position of most members of a definable group, in this case disabled people, over multiple significant dimensions in comparison to other social groups. Oppression entails a dialectical relationship between the disadvantages experienced by the oppressed group and the ideology which justifies and perpetuates their oppressed status. These ideologies and disadvantages are socially constructed, not natural and inevitable. It also is to claim that there are beneficiaries from the oppression of others.[69]

This social oppression model became 'the social model' for most British disability activists and scholars and has come under serious challenge in the UK only in the past decade.[70] The key features of this version of the social model are the claim that disability is imposed on 'top of our impairments' and that disability refers to the social disadvantage, or oppression, of disabled people separate from impairment. The idea of impairment was defined but then ignored and its content and impact on the lives of disabled people were left to the medical model.[71] This model intended that the word

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[68] James I. Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press 1998) 6.

[69] Abberley (n 51) 7.

[70] See, for example, Shakespeare (n 1) and Tom Shakespeare, *Disability Rights and Wrongs* (Routledge 2006).

[71] Only recently has the British disability movement made room for issues related to impairment as distinct from a pure social model of disability. For discussion of the contentiousness of the issue of

'disability' and its cognates be reserved for the barriers, biases and social oppression consequent on a society's failure to structure itself to include its members who have one or more impairments.[72]

Abberley, one of the few social model theorists to acknowledge the presence of impairment, sought to accommodate it within the social oppression model. His solution was to advance the notion of the structural creation of impairment. He presented the examples of high levels of industrial injury, adverse effects from approved pharmaceutical products, the adverse reactions of a few to widespread vaccination programmes, improved capacity of medical science to keep people alive and the currently unknown adverse health consequences of widespread chemical contamination of everything as impairments created by the economic, political and social structures of modern societies.[73]

The major objection to this version of the social model is its failure to adequately account for the meaning and role of impairment in the disability experience. Tom Shakespeare credits disabled feminist writers for pressing the necessity of incorporating the personal experience of impairment into any adequate model of disability.[74] The effort to unify the personal experience of impairment with the social creation and construction of disability led to the development of interaction/relational models of disability.

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impairment and associated issues of treatment and cure in the UK disability rights movement see, for example, Tom Shakespeare, Disability Rights and Wrongs (n 70); Karen Beauchamp-Pryor, 'Impairment, cure and identity: 'where do I fit in?'' (2011) 26 Disability & Society 5.

[72] Shakespeare (n 1) 14.

[73] Abberley (n 51) 9-12.

[74] Tom Shakespeare, *Imagining Welfare: Help* (Venture Press 2000).

(iii)   *Interaction/Relational models*

Interaction and relational models, which acknowledge the relevance of impairment, are members of the socio-political family because of their strong emphasis on the social dimension of disability. This section starts with an overview of the World Health Organization's (WHO) International Classification of Impairment, Disability and Handicap (ICIDH) which attempted to account for the impairment and social dimensions of disability in a unified classification scheme. Although almost universally criticised by disabled activists and academics in the field of disability studies, throughout the 1980s its impairment/disability/handicap classification was a common starting point for theorising disability. The second part of this section provides an overview of the relational model which incorporates both the impairment and social environment contributions to disability with a particular focus on the intersubjective nature of disability. The section ends with the 2002 WHO International Classification of Functioning, Disability and Health (ICF) which attempts to provide a synthesis of the medical and social models.

a) International Classification of Impairment, Disability and Handicap

In the early 1970s, the World Health Organization began work to develop a common classification scheme of the consequences of disease to facilitate the objective evaluation of health care systems and to enable comparisons of the effectiveness and efficiency of health systems in different countries. The result was the *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classifications Relating to the Consequences of Diseases* which was adopted by the WHO in 1980 for trial purposes. The ICIDH distinguished 'impairment,' 'disability' and 'handicap,' presenting them as three interrelated, but separate, elements of the disability experience.

'Impairment' was defined as any 'loss or abnormality in psychological, physiological or anatomical structure or function' assessed against (unstated) 'established biomedical norms'.[75] Impairment could be temporary or permanent, serious or minor, progressive or stable. 'Disability,' the term used to describe the functional consequences of an impairment, was any 'restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being'.[76] Many impairments, of course, have no disabling consequences. But where one or more impairments do restrict a person's ability to perform an activity in the way or within the range that a society considers normal, that person was said to have a disability. Disability was then, by definition, a relational concept: it was first necessary to specify the context before making any assessment whether a person was disabled by an impairment. An impairment that does not restrict activity may not be a disability; the same impairment could result in different degrees of disability depending on the person and the environment in which the person functions. The concept of disability was inherently indeterminate as it reflected the relationship between impairments and the social environment in which they occur.

'Handicap' was defined as 'a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual:'[77]

> Disadvantage accrues as a result of his being unable to conform to the norms of
> his universe. Handicap is thus a social phenomenon, representing the social and
> environmental consequences for the individual stemming from the presence of

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[75] WHO, *International Classification of Impairments, Disabilities, and Handicaps* (World Health Organization 1980) 27.

[76] ibid 28.

[77] ibid 29.

impairments and disabilities.[78]

Although clearly identifying the disabling impact of the social environment, the ICIDH was criticized by disability activists and others for its not surprising basis in the medical model with its presumption that impairment can be objectively, scientifically identified and labelled and its essential premise that disability originates in a deviation from (unstated) standards of normalcy. It was criticised for reinforcing the notion that the social disadvantage experienced by disabled people was based on individual impairment and not the physical and social environment in which the individual lived. Although recognising the role of the social environment in creating handicap, the ICIDH had no capacity to measure or record the impact of the social environment on individuals with impairments. Furthermore, despite its conception of handicap which linked disability to the social environment, the scheme assumed the environment was a given and that the appropriate policy response to handicap should focus on adapting the individual to that environment.[79]

b) Interaction/relational models

Mark Rapley, writing about the social construction of intellectual disability, identified a 'second wave' of social model theorising which critiqued the 'first wave' for ignoring the role of culture in producing and reproducing disability.[80] This second wave may be characterised by a focus on the experience of both impairment and disability and by an orientation towards the discursive (idealist), rather than the materialist, production of disability. Second wave writers focus on the intersubjective construction of disability and minimise or even disregard the material base upon which interaction occurs: disability is located in the minds of disabled and non-disabled people whether as

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[78] ibid.

[79] See, for example, Oliver and Barnes (n 37) 15-17; Bickenbach (n 1).

[80] Mark Rapley, *The Social Construction of Intellectual Disability* (Cambridge University Press 2004) 1.

individual prejudice or collective bias. Culturally produced and reproduced negative, devalorising and hostile social attitudes towards impairment are said to explain the social disadvantage experienced by disabled people. This idealist approach argues that disability is constructed through the words used in relation to, and the images of, disabled people. The claim is that there is no 'pure or natural body, existing outside of discourse. Impairment is only ever viewed through the lens of disabling social relations'.[81] Applying these concepts to the field of intellectual disability, Rapley argues that intellectual impairment is always simply a socially constructed state and, that being the case, it can also be socially deconstructed.[82] He finds support for this counterintuitive claim from examples of labelling people as intellectually disabled solely as a result of changes in the measures of assessment as well as the absence of any identified physical anomaly in the brains of people so labelled.

Michelle Fine and Adrienne Asch were early proponents of applying the insights of feminism to the subject of disability. They noted that feminist writers had mostly ignored disabled women despite their presence at various conferences and in feminist activities. There was a sense that disabled women represented the image of the vulnerable and dependent woman which the feminist movement was trying to overcome. Fine and Asch argued that the feminist movement had to make room for disabled women and recognise that what disabled women and women, both socially constructed categories, 'share is similar treatment by a sexiest and disability-phobic society'.[83] The physical and attitudinal barriers to full integration which, more than any biological condition, limit the full participation of disabled people both produce and

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[81] Shakespeare (n 1) 18.
[82] Rapley (n 80) 66.
[83] Michelle Fine and Adrienne Asch (eds), *Women with Disabilities: Essays in Psychology, Culture, and Politics* (Temple University Press 1988) 6.

reproduce disability. Just as gender, class, race and other socially constructed

classifications affect people's life options so too does disability. Individuals with the

same disability experience different life options depending on these other factors as well

as the attitudes, abilities and life options of their parents and friends.

Susan Wendell applied feminist theory to embody disability and proposed that the

social construction of disability was found in the 'the interaction of the biological and

the social to create (or prevent) disability.'[84] In her view 'the social response to and

treatment of biological difference constructs disability from biological reality,

determining both the nature and the severity of disability.'[85] She reported that when she

first became interested in disability theory, with the onset of her own impairment, she

was struck by how the social model on offer failed to acknowledge the reality of the

bodily experience of impairment. She argued that '[w]e need to acknowledge that social

justice and cultural change can eliminate a great deal of disability while recognizing that

there may be much suffering and limitation that they cannot fix'.[86]

A relational model of disability is particularly associated with the Nordic

countries, coexisting with the medical and social oppression models.[87] This model

'stresses the complex and situated interaction between disability factors relating to the

individual and ones that relate to the environment'.[88] As Anders Gustavsen explains

> the interactionist perspective is also understood as an alternative to essentialism,
> emphasizing a multi-level approach, that is, a theoretical perspective that rejects
> assumptions about any primordial analytical level and rather takes a
> programmatic position in favour of studying disability on several different

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[84] Wendell (n 27) 35.

[85] ibid 42.

[86] ibid 45.

[87] Christian Wendelborg and Jan Tøssebro, 'Marginalisation processes in inclusive education in Norway: A longitudinal study of classroom participation' (2010) 25 Disability & Society 701, 701.

[88] ibid 702.

analytical levels.[89]

c) International Classification of Functioning, Disability and Health

In 2002 the World Health Organisation, in response to ongoing internal and external

critique of the ICIDH, published a completely revised version under the title

International Classification of Functioning, Disability and Health (ICF).[90] Whereas the

ICIDH was designed as a classification of the 'consequences of disease,' the ICF is

designed as a classification of the 'components of health'. The purpose of the ICF is to

provide a standardised framework and terminology to describe health and health-related

states. It is intended to be a tool for organizing the collection and reporting of health

related statistics, for measuring outcomes or quality of life factors of health and health

related policy, for needs assessment or rehabilitation programming in a clinical setting,

and to assist in social security planning or the design of compensation systems. The

common framework is intended to allow for international comparison of health and

health systems despite the vast differences between countries.

The ICF scheme is based on 'health domains' which describe sets of related

physiological functions, anatomical structures and activities. These are described from

the perspective of the body, the individual, and the individual in society by selecting

from two lists – a list of Body Functions and Structures and a list of Activities and

Participation. Since health domains, not individuals, are classified, an individual may be

described by a number of ICF classifications. Bickenbach argues that the scheme:

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[89] Anders Gustavsson, 'The role of theory in disability research – springboard or straitjacket?' (2004) 6 Scandinavian Journal of Disability Research 55, 62.

[90] The description of the ICF which follows is based on WHO, 'Towards a Common Language for Functioning, Disability and Health: ICF The International Classification of Functioning, Disability and Health: Beginner's Guide' <http://www.who.int/classifications/icf/site/beginners/bg.pdf> accessed 7 August 2007 ['ICF, Beginners'] and WHO, 'ICF The International Classification of Functioning, Disability and Health: Introduction' (*World Health Organization*, 2002) <http://www.who.int/classifications/icf/site/intros/ICF-Eng-Intro.pdf> accessed 7 August 2007['ICF, Introduction']. In 2007 WHO published a version of the ICF (ICF-CY) which made provision for the special health, functioning and developmental situation of children and youth.

embodies the principle of universalism … [it] is a clarification of human functioning and disablement, it is neither a classification of persons with disabilities, nor of attributes of persons with disabilities. It provides the essential language and structure for scientific investigations of the consequences of health conditions in the human population.[91]

The ICF mainstreams the experience of disability by reflecting that everyone can experience a decrease in health and functioning at various times in their lives. The system is designed to allow reporting on the health status of a population, not just those who are disabled – it has 'universal application'.[92] But the ICF clearly identifies itself as a scheme for the classification of health and health related conditions: restrictions or exclusions which people may experience because of gender, religion, ethnicity, or socio-economic factors are specifically excluded.[93]

The ICF classification describes human functioning in two parts, the first deals with 'Functioning and Disability', the second with 'Contextual Factors'. Functioning and Disability is divided into the 'Body' component, which encompasses body systems and body structures, and the 'Activities and Participation' component, which covers the individual and societal aspects of functioning. While conceding that the scheme may be designed to be capable of including everyone in its categories, it still applies the concept of impairment as a deviation from population norms for the various body functions and structures. 'Activity' is defined as the 'execution of a task or action by an individual and 'activity limitations' are difficulties in executing activities. This seems very close to the ICIDH concept of disability or functional limitation due to an impairment. Finally, 'participation' is defined as 'involvement in a life situation' and that concept is paired with 'participation restrictions' which are problems experienced in involvement in a life

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[91] Bickenbach (n 1) 1184. This article discusses a 1997 draft of the ICIDH-2 which was to become the ICF.

[92] ICF Introduction (n 90) 7. See also ICF Beginners (n 90) 14.

[93] ICF Introduction (n 90) 7.

situation[94] – an apparent match for the previous term 'handicap'. The distinction between activity and participation is so fine that the system provides only one list for both components and invites users to decide whether and how to divide the list.

Contextual Factors are divided into 'Environmental Factors' and 'Personal Factors'. There is no list of Personal Factors because of their extreme individual variation. They include gender, race, age, class, lifestyle, education and 'character'. The Environmental Factors are a list of things which make up the physical, social and attitudinal environment in which individuals live. These may be divided into individual and societal environmental factors. Individual factors relate to the immediate environment such as home, workplace or school while societal factors relate to formal and informal structures in society and the principles which guide disability policy and the work of relevant organizations and governments.

An ICF classification may indicate non-problematic aspects of health summarized under the term *functioning* or the presence of impairments, activity limitations or participation restrictions under the term *disability*. The term *functioning* is intended to be value neutral since it is to be applied to anyone in a population regardless of their health status. The single term *disability* takes the place of the combination of impairment, disability and handicap in the ICIDH – this concept reappears in what the ICF proposes as a distinct model of disability. Disability is treated as a location on a continuum of health instead of a separate category. Despite this claim, in practice disability is identifiable and an obvious use of the scheme is to identify disabilities so as to improve treatment, prevention and rehabilitation programmes and to analyse programme trends for government budgeting purposes.

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[94] ibid 10.

The ICF recognizes that there can be participation limitations even with no impairment: these are classified as 'health-related' outcomes. The classic example is discrimination against a person because of a history of mental illness. And there can be participation limitations caused by impairments that do not cause capacity limitations, such as those arising from bias against those with a disfigurement. Further, some impairments do not result in disability if there is a fully compensating accommodation, for example, the use of glasses to fully compensate for limited visual acuity.

The ICF was designed to integrate the medical and the social model through a 'synthesis [of the two], in order to provide a coherent view of different perspectives of health from a biological, individual and social perspective'.[95] That synthesis is called the 'biopsychosocial' approach in which:

> Disability is characterised as the outcome or result of a complex relationship between an individual's health condition and personal factors, and of the external factors that represent the circumstance in which the individual lives. Because of this relationship, different environments may have a very different impact on the same individual with a given health condition.[96]

(iv)   *Conclusion*

The minority group model was developed in the United States in the image of the civil rights struggles of women and Blacks and other racial minorities. Its primary claim is that the disadvantage experienced by disabled people is due to prejudice and discrimination resulting from their impairments. Prejudice is caused by a variety of social-psychological factors and is reproduced through a discourse of impairment which permeates every medium of cultural transmission – language, literature, movies, etc. As with other civil rights movements in the US, the policy response was to implement laws to prohibit discrimination so that disabled people could be integrated into the existing

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[95] ibid 20.
[96] ibid 17.

economic system. Its political claims are for equal treatment to level the playing field: it accommodates special programmes to benefit disabled people just as the US legal and political system accommodates affirmative action programmes for women and Blacks and others racial minorities. Although vulnerable to arguments that disabled people are not a minority group because of the diversity of disability, alternative primary identities, and an organizational history focused on improving services for disabled people, the minority group model has sustained the vigorous growth of disability rights organizations focused on both political action and improved service provision controlled by the disabled consumer of those services over the past three decades.

The social oppression model, developed from the UPIAS declaration in 1974 in the United Kingdom, minimizes the experience of impairment in order to make the point that disability is the result of economic and political institutions which systemically exclude disabled people. Disability, defined by this model as only meaning the social disadvantages experienced by impaired people, is a form of social oppression. Positive change for disabled people does not occur by education about bias and correcting negative individual attitudes but by changing powerful institutions whose practices produce and reproduce the exclusion of disabled people from the economic and social life of their communities. A key vulnerability of this model is its failure to incorporate a role for biomedical impairment. Tom Shakespeare, in an article highly critical of what he called the 'British social model', quoted Isaiah Berlin's aphorism, 'Few new truths have ever won their way against the resistance of established ideas save by being overstated',[97] by way of explaining the formulation and persistence of a model of disability which ignores impairment. The refusal to account for impairment was not to deny the reality of impairment, which properly calls for a medical response, but to

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[97] Shakespeare (n 1) 9.

emphasise the role of the social environment which must be the object of political action. Many feared that to admit to a biological basis for disability would undermine political strategies for fundamental structural change because the focus would return to the biomedical and reinforce the still dominant medical model.[98] As with the minority group model, despite its theoretical limitations, the social oppression model has been the foundation of a very successful grass roots political movement by and for disabled people which has led to significant changes in the physical and institutional environment in both the UK and, more recently, the European Union.

The interaction/relational models of disability recognise both the biomedical and social aspects of disability and explain disability as a complex relationship between the biomedical impairment, the individual reaction to the impairment and the social environment.[99] Interaction/relational models are as critical of the medical model's failure to incorporate the role of environment in its understanding of disability as any of the other socio-political models but insist that there is a reality to impairment that has to be taken into account in any adequate disability model. To argue that much of disability is socially constructed is not to deny that much of impairment does have a real and negative impact on the life options of individuals.

The ICIDH was an early attempt to conceptualise this relationship. Although it has been superseded, the ICIDH was for much of the late twentieth century a primary reference point for theorising socio-political models of disability. First, its distinction between impairment, disability and handicap was used to support the proposition that the social disadvantage of disability was a result of the configuration of the social environment not the inevitable result of impairment. Second, distinguishing the three

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[98] Barnes, Mercer and Shakespeare (n 7) 92.

[99] The Scandinavian countries were the earliest to base disability policy on relational models of disability: See, for example, Wendelborg and Tøssebro (n 87).

concepts disaggregated disability allowing for disability policies to be directed at different aspects of the experience of disability. Third, the incorporation of impairment in the model provided a boundary to the concept of disability so that political action could be organised around the idea of disability. Ironically it was this feature of the scheme that drew the most ire from the newly emerging disability rights movement and disability activists.

By the end of the 1980s, the distinction between impairment and disability in the ICIDH scheme had collapsed into a single concept of impairment and the word handicap had been replaced by disability. The ICIDH's grass-roots, disabled activist formulated competition, the emerging social model, minimised, ignored and sometimes even denied the relevance of impairment. Many scholars, notably those with a feminist background, came to criticise early versions of the social model for their failure to incorporate the reality of impairment. Attaching the subjective experience of impairment to the social construction of disability, these theorists proposed a revised social model which better accounted for the embodied lives of disabled people. They recognized the complexity inherent in the concept of impairment and located the origins of the social disadvantage of disabled people, not in the primary structures of society as did the social oppression model, but in the attitudes, fears, and stereotypes able-bodied people held about disabled people which framed the discourse of disability.

Responding to both internal and external criticisms of the ICIDH, the WHO in 2002 published a completely revised version under the name International Classification of Functioning, Disability and Health. This scheme was designed to incorporate disability into a universal classification of the components of health with the idea that disability would no longer be a separate category of humanity but simply an aspect of the human experience. As might be expected, it is still based on assessment against

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scientifically defined concepts of normal and abnormal physiological and psychological functioning but purports to fully account for the social environment's contribution to the disabled experience. The ICF is implemented in research and clinical settings through various ICF Core Sets and other tools such as the 'Disability Assessment Schedules' designed to provide a common language to support multidisciplinary treatment teams and researchers.[100] Its broad appeal will lie in its synthesis of the medical and socio-political models in its 'biopsychosocial' model which recognizes disability as a complex relationship between impairment, the individual, and the social environment.

4.   Conclusion

National disability policies must encompass a wide variety of public policy issues from the provision of health care, through income replacement and other economic supports for those not in the work-based distribution system and employment policies, to various policies promoting the social inclusion of disabled people. Models of disability matter because models inform the development of social policy: an effective national disability policy cannot be developed and implemented with an inadequate model of disability. Universal models, in which disability is subsumed into the human condition, are incapable of responding to the needs of that group in the general population who, despite the indeterminate boundaries of the group, have historically been and remain substantially excluded from participation in their communities because of some form of impairment. If disability becomes simply an aspect of the human condition, a new word will be needed to describe that group in a population who have been historically devalued and disadvantaged because of some deviation from what Jerome Bickenbach

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[100] A. Rauch, A. Cieza and G. Stucki, 'How to apply the International Classification of Functioning, Disability and Health (ICF) for rehabilitation management in clinical practice' (2008) 44 Eur J Phys Rehabil Med 329.

calls the 'norms of capability,' meaning the particular combination of abilities and behaviours expected of members of their society.[101]

The use of disability as an administrative category used to justify access to what Deborah Stone called the needs-based distribution system pre-date the ascendency of the medical model. The boundary of the category was as indeterminate as it is now and local magistrates, gentry or church officials were the guardians of the boundary. As the successes of scientific medicine and the development of diagnostic tools through the nineteenth and early twentieth centuries increased its claim to offer an objective basis for assessing impairment and degrees of functional limitation consequent on that impairment, the guardianship of the disability boundary was slowly transferred to the medical establishment. The medical model of disability limits itself to issues of impairment and functional limitations arising from impairment. Disability inheres in the individual and the social policy response is prevention, cure and rehabilitation. The social construction of impairment is seldom acknowledged.

Ruth Pinder explains the variety of socio-political models as the playing out of 'the agency-structure dialectic,'[102] in which the relative contribution to the disabled experience of the personal and the social is continuously contested. The earliest socio-political models asserted explicitly or implicitly that disability was completely socially constructed. These models gave little attention to the lived experience of impairment itself and failed to acknowledge and take account of biological limitations of capacity.[103]

For critical disability theory, the biopsychosocial model proposed in the ICF most adequately reflects the various components of the disabled experience. Each of the three

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[101] Bickenbach (n 6) 40.

[102] Ruth Pinder, 'A Reply to Tom Shakespeare and Nicholas Watson' (1997) 12 Disability & Society 301, 301.

[103] Linton (n 41) 138 argues that the disability rights movement has yet to theorise impairment which is just as 'nuanced and complex a construct as "disability"' perhaps because of the difficulty of avoiding any tendency to essentialise disability.

elements of this synthesis of the medical and social models must be understood to consist of a complex relationship between an objective or subjective deviation from a theoretical biomedical norm and the subjective and social responses to that condition.

The CDT interpretation of the social model incorporates impairments and accompanying functional limitations as well as the notion that the social disadvantage experienced by disabled people is both socially constructed by attitudes and the policies and practices of institutions and socially constituted by the economic system and the physical environment. The disabled experience occurs in the intersections between impairment, the individual and the social context. One consequence of this model is that there is no objective, external definition of disability. Asking who is disabled always implies the question 'disabled for what purpose?'

The policy response flowing from the CDT version of the social model must respond to both the biomedical and social aspects of disability. On the one hand, prevention, treatment and rehabilitation are all appropriate responses to the biomedical aspect of disability. On the other hand, disabled people are a permanent feature of society and the appropriate policy response is to change the social environment to eliminate obstacles to equal participation by disabled people. Thus, in assessing the potential for EU disability policy it is important to keep in mind that both social welfare and rights based policy responses are essential components of a complete disability policy.

The following chapters examine European Union law and policy related to disability in which both the medical and social models are reflected. In the next chapter, the evolution and parameters of EU disability policy are examined in order to assess the extent to which the policy and its implementation strategies reflect the CDT approach to disability.

Chapter IV

EU Disability Policy

1.   Introduction

Although the EU has undertaken a variety of disability related activities since at least 1974, it was not until 1996 that an EU disability policy, in the sense of a coherent combination of law and policy initiatives and the identification of a range of policy instruments to pursue those initiatives, can be identified.[1] The origins of this policy can be found in early Community programmes dealing with disability issues, developments at the United Nations and the Council of Europe and a disability rights consumer movement which expanded exponentially throughout the 1980s.[2]

The purpose of this chapter is to describe the main themes of the Union's disability policy and the key implementation strategies and assess the extent to which that policy reflects the CDT approach to disability. Understanding the overall EU disability policy and the range of strategies employed to implement that policy will also serve to situate the four policy areas to be studied in the following chapters – *viz.* equality legislation, the European Social Fund, transportation policy and the social inclusion OMC – within the overall policy context.

CDT, as described in chapter 2, offers a particular analytical approach to understanding the nature of disability and exposing the mechanisms of disability oppression with a view to a transformative politics of emancipation. CDT centres disability as it identifies the potential for the social conditions of disabled people to be other than what they are. As outlined at the end of chapter three, CDT applies a form of social model of disability which finds disability at the intersection of impairment,

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[1] Commission, 'A New European Community Disability Strategy' COM(1996) 406 final.

[2] For a brief historical overview of EU disability policy see Anne Waldschmidt, 'Disability policy of the European Union: The supranational level' (2009) 3 European Journal of Disability Research 8.

individual response to impairment and a social environment which fails to meet the needs of people who do not match a society's expectation of 'normalcy'. CDT applies a conception of equality rights which values diversity and responds to the needs of disabled people with the objective of promoting social inclusion. CDT privileges the voices of disabled people and relies on their voices to challenge the negative attitudes toward disability commonly expressed by able-bodied people and so often reiterated in print and visual media. CDT explores the way language creates and sustains the social disadvantage experienced by disabled people but also can be a source of emancipation and social inclusion.

This chapter begins with an overview of early EU initiatives in the field of disability. These initiatives reflected the limits of European Community competences in this field, the Commission's efforts to develop mechanisms to circumvent resistance from Member States to greater EU involvement and the model of disability which lay behind these initiatives. They also show the continuity of strategies to promote greater social inclusion of disabled people. This sets the stage for the second part of this chapter which provides an overview of the paradigm shift, from a medical model to a social model of disability, which underpins current EU disability policy. This is followed by a discussion of EU disability policy which, in its broad themes, has been in place since that paradigm shift. After that, the various strategies employed to implement the policy, which have also been consistently applied since that time, are discussed. The conclusion offers an assessment of the extent to which EU policy reflects the CDT approach to disability.

2.   *Early Community initiatives related to disability*

At their 1972 meeting in Paris the Heads of State and Government declared that the aim

of economic expansion within the Community was to bring about an increase in

standards of living and invited the Commission to develop a social action plan to

improve employment opportunities and working conditions, promote a general increase

in the standard of living and increase participation by labour and management in

economic and social decisions of the Community.[3] Following this direction, the first

Community social action programme was adopted in 1974. As part of that programme

the Commission was to develop a 'programme for the vocational and social integration

of handicapped persons' in 'an open market economy'.[4] Particular reference was made

to initiating pilot projects leading to rehabilitation into 'vocational life' or placement in

'sheltered industries', undertaking a comparative study of the arrangements for

rehabilitation among the Member States and using the European Social Fund to assist

migrant and 'handicapped' workers.

Several months later, the Council adopted an action programme for the vocational

rehabilitation of handicapped persons which declared that Community efforts 'on behalf

of the handicapped must be to help these people to become capable of leading a normal

independent life fully integrated into society'.[5] This programme, which defined the term

handicap as any impairment which affected daily activity or work by reducing the

person's 'social contribution, ... employment prospects, ... [or] ability to use public

services',[6] was intended to improve the opportunities for rehabilitation and eventual

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[3] As cited in Jacqueline Brine, *The European Social Fund and the EU* (Sheffield Academic Press Ltd. 2002) 37.

[4] Council Resolution of 21 January 1974 concerning a social action programme [1974] OJ C 013/1.

[5] Council Resolution of 27 June 1974 establishing the initial Community action programme for the vocational rehabilitation of handicapped persons [1974] OJ C 80/30, Part I, first paragraph. For a fuller discussion of these early European Community disability specific programmes, see generally Lisa Waddington, *Disability, Employment and the European Community* (Blackstone 1995) chapter three.

[6] Council Resolution of 27 June 1974 establishing the initial Community action programme for the

placement in non-sheltered employment. The programme supported three categories of activities – cooperation between rehabilitation and training bodies to encourage the development and exchange of information, short term demonstration projects aimed at improving the quality of vocational rehabilitation facilities and longer term projects extending the measures covered in the first two categories. Projects were to ensure gradual and closely supervised transitions for handicapped persons from vocational guidance through training, to employment and adaptation to the new environment. Both programmes also funded information campaigns aimed at the general public promoting the principle of the social integration of handicapped persons.

These initiatives were first steps – their aims and achievements were modest and did not amount to anything which could be called a disability policy – but they did provide a measure of confidence that the Community had a role in disability policy.[7] Despite the passing references to social integration, the programmes focused on vocational integration. The definition of handicap fit with the then current vocational rehabilitation medical model of disability which, as discussed in chapter three, focused on the person's impairment as the cause of the limitation on the person's ability to work. The only reference to consultation with disabled people was the statement that in relation to information campaigns about the 'problems of handicapped persons' the Commission would 'seek in particular the assistance of associations for handicapped persons'.[8]

The Commission did not propose an extension or replacement of the 1974 vocational rehabilitation action programme beyond its expiry at the end of 1975. It was

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vocational rehabilitation of handicapped persons (n 5) Part I, third paragraph.

[7] Waddington, *Disability, Employment and the European Community* (n 5) 100.

[8] Council Resolution of 27 June 1974 establishing the initial Community action programme for the vocational rehabilitation of handicapped persons (n 5) Part III, item 2.

only in response to the United Nations' 1981 Year of Disabled People that the

Commission reactivated its efforts in the field of disability by proposing the first of

what would be three action programmes devoted to disability issues.[9] In its proposal for

a disability specific action programme, the Commission argued that the UN Year

provided the opportunity for the European Community to renew its activities related to

disability.[10] Disabled people, the Commission declared, had 'as much right' to

participate in and contribute to all aspects of their communities as other people: '[t]he

social integration of disabled people – to enable them to exercise their rights – is an aim

shared by all Member States' which, in the Commission's view, implied the necessity to

take action to remove exclusionary barriers by both 'compensatory and rehabilitative

measures' and 'by taking account of the needs of disabled people, whatever the nature

of their disability, in the planning and organization of social structures influencing their

living, learning and working environments'.[11] The Commission proposed a limited role

for the Community consisting of establishing and supporting a network of locally-based

demonstration projects, improving systems for disseminating information, policy

research, reinforcing the existing network of rehabilitation centres and disseminating the

results of the Community's pilot action in the area of integrated housing.[12]

    The action programme that was adopted by the Council had the objectives of

promoting the economic and social integration of 'handicapped' people to enable them

'to make a productive and creative contribution to society' by having the Member States

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[9] Waddington, *Disability, Employment and the European Community* (n 5) 100. Support from the European Parliament for a wide range of initiatives by the Commission and Member States to promote the integration of disabled people came in the form of a Resolution of the European Parliament, of 11 March 1981, on the motions for resolutions concerning the economic, social and vocational integration of disabled people in the European Community with particular reference to the International Year of Disabled Persons 1981 [1981] OJ C77/27.

[10] Commission, 'The social integration of disabled people - A framework for the development of Community action' COM(1981) 633 final.

[11] ibid para 4.

[12] ibid para 14.

take due account of the need to remove barriers to participation, facilitate the coordination of services for handicapped people, promote the participation of handicapped people in framing and implementing measures directly affecting them, promote measures to allow for independent living and to integrate handicapped people into mainstream education and training systems 'wherever possible'. The Commission was authorised to establish a set of 'development actions' to promote local coordination, further develop the network of rehabilitation centres, continue to promote pilot housing projects and to ensure the exchange of information between service agencies and representatives of handicapped people.[13] The programme was authorised for the period 1983-1988.

It is interesting to note the difference in language between the Commission's proposal and the Council's resolution: the term 'disabled', taken from the name of the UN's theme year, was replaced with 'handicapped' and the Commission's rights discourse reverted to a social welfare discourse. As discussed in chapter three, at the time the use of the term 'disabled' would have implied a movement towards a rights-based disability policy whilst retaining the term 'handicapped' implied retaining a social welfare based disability policy. These seemingly minor changes may be read as indications of resistance by Member States to adopting a rights-based/social model disability policy despite the references to barrier removal and independent living. The specific mention of participation by disabled people in the development and implementation of programmes affecting them and the reference to taking account of barriers to participation which appeared in the Commission's proposal were retained in the Council resolution.

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[13] Council Resolution of 21 December 1981 on the social integration of handicapped people [1981] OJ C 347/1 (referred to as the Community Social Action Programme on the Social Integration of Handicapped People, 1983-88).

A 1986 Council recommendation on the employment of disabled people declared that disabled people have the same right as all other workers to equal opportunity in training and employment and that special measures were needed at Community and national levels to achieve this end. Disabled people included 'all people with serious disabilities which result from physical, mental or psychological impairments'. The Council recommended that Member States take 'all appropriate measures to promote fair opportunities' in the fields of employment and vocational training, take positive action in favour of disabled people such as establishing employment quotas and, notably, for the first time, calling for the elimination of negative discrimination.[14] While the Council adopted the term disabled, the recommendation is still clearly applying a medical model of disability with strong social welfare responses, e.g. support for employment national quota systems, albeit modified by the call for equality of opportunities and elimination of negative discrimination. Significantly, as Mark Priestley has noted,

> the 1986 Recommendation benchmarked four emergent European policy themes
> — a preoccupation with employment, the move towards a rights-based approach,
> the subsidiarity (sic) of member states in implementation and the involvement of
> disabled people's organisations in the policy community.[15]

As will be seen, these themes were consolidated in succeeding years and form the basis for EU disability policy today.

A second action programme, commonly known as HELIOS I, was adopted in 1988.[16] Its purpose was, first, to respond to the specific needs of disabled people in

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[14] Council Recommendation 86/379/EEC of 24 July 1986 on the Employment of Disabled People in the Community [1986] OJ L 225/43. At the beginning of 1986 the Commission had advocated the adoption of employment quotas across Europe in its communication, 'The employment of disabled people in the European Community' (COM (1986) 9 final), with the support of the European Parliament. This failed to be supported in Council which adopted the Recommendation instead.

[15] Mark Priestley, 'In search of European disability policy: Between national and global' (2007) 1 European Journal of Disability Research 61, 66.

[16] Council Decision of 18 April 1988 establishing a second Community action programme for disabled

vocational training, rehabilitation and economic integration and to promote social integration and independence. The programme consisted of the coordination and implementation of a range of activities to foster innovation, facilitate the exchange of experience and to disseminate good practices. A second aim was to establish a system for the collection, updating and exchange of information using (then new) information technologies. A special liaison group consisting of representatives of governments, disabled people and their families (endeavouring to include a range of disabilities and drawing from transnational organizations) and a representative from each of the social partners, was established. For the purposes of the programme, 'disabled people' referred to people with 'serious disabilities resulting from physical or mental impairments',[17] which reflected the term 'disability' as used in the International Classification of Impairments, Disability and Handicap (ICIDH – discussed in chapter three). The scope of HELIOS I reflected the resilience of medical model/social welfare disability policy. The only reference to rights was a paragraph in the Preamble noting that the 1986 Recommendation recognised that disabled people have the same right as other workers to equal opportunities in training and employment and that it was important to ensure disabled people lived in an environment where it was possible for them to benefit from education and training and make their full contribution to the economy.

Approximately a year into HELIOS I, the Community Charter on the Fundamental Social Rights of Workers, adopted in 1989 by the European Council in Strasbourg, proclaimed that disabled people 'must be entitled to additional concrete measures aimed at improving their social and professional integration', including

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people (Helios) [1988] OJ L 104/38. HELIOS was an acronym for 'Handicapped people in the European Community Living Independently in an Open Society'.

[17] ibid art 2.

'according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing'.[18]

The third action programme, HELIOS II, was adopted in 1993.[19] The Commission's initial proposal had retained the previous language of social services and special treatment.[20] The European Parliament and various non-governmental organizations (NGOs) argued that 'progress demand[ed] an holistic approach to integration and disability, with a primary focus on rights and equal opportunities'.[21] In the Commission's amended proposal the purpose of the programme was described as being to 'promote equal opportunities for and the integration of disabled people'.[22] Although this rights policy language was carried over into the Council's Decision, the programme's objectives, reflecting social welfare approaches, were to continue to develop and enhance the exchange and dissemination of information, to promote best practices and to promote cooperation with Member States and interested European and national NGOs in relation to employment rehabilitation, educational integration, vocational training, economic and social integration and 'an independent way of life for disabled people'.[23] To achieve these objectives the Commission was directed to coordinate, undertake and encourage activities based on specific annual themes which promoted innovation, facilitated exchanges of successful experiences and effective

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[18] Community Charter on the Fundamental Social Rights of Workers <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/communitycharteroft hefundamentalsocialrightsofworkers.htm> accessed 7 August 2011 art 26.

[19] Council Decision 93/136/EEC of 25 February 1993 establishing a third Community action programme to assist disabled people (Helios II 1993 to 1996) [1993] OJ L 56/30.

[20] Commission, 'Proposal for a Council decision establishing a third Community action programme to assist disabled people (HELIOS II (1992-96))' COM(1991) 350 final.

[21] Robin Lovelock and Jackie Powell, *Disability: Britain in Europe (An evaluation of UK participation in the HELIOS programme (1988-1991))* (Ashgate Publishing Limited 1994) 198.

[22] Commission, 'Amended Proposal for a Council decision establishing a third Community action programme to assist disabled people (HELIOS II (1992-96))' COM(1992) 482 final, amending proposed art 1.

[23] Council Decision 93/136/EEC of 25 February 1993 establishing a third Community action programme to assist disabled people (Helios II 1993 to 1996) (n 19) art 3.

practices, encouraged disabled people to take part in Community programmes and ensured close coordination with activities undertaken at the international level. References in the Commission's Proposal that this programme lead to a 'community disability policy' were removed by Council which replaced them with a 'policy at Community level of cooperation',[24] which only in the '"muddled machinations" of the institutions of the Community' could be thought of as a disability policy.[25] The definition of disabled people was the ICIDH concept of disability.[26] In its implementation, however, the Commission promoted an equal opportunities as opposed to a social welfare orientation.[27] For the first time, the programme included a formal structure for consultation with disabled people and their representative organisations.

The Council did not support a continuation of these initiatives after the HELIOS II programme ended. It was not until 2000 that disability again featured in an action programme, this time as one part of a programme combining disability with the grounds of racial or ethnic origin, religion or belief, age and sexual orientation.[28]

This historical sketch illustrates the evolution of the EU's understanding of disability from a medical model with social welfare responses, focused on rehabilitation leading to vocational training and integration or re-integration with the work force, to a tentative embrace of a social model of disability and a rights discourse with themes of inclusion, participation and non-discrimination. The programme initiatives such as coordination of services, exchanges of information and best practices, research, awareness campaigns and funding of demonstration projects have been carried over into

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[24] ibid art 3(c).

[25] Waddington, *Disability, Employment and the European Community* (n 5) 124.

[26] Council Decision 93/136/EEC of 25 February 1993 establishing a third Community action programme to assist disabled people (Helios II 1993 to 1996) (n 19) art 2.

[27] Commission, 'Evaluation of the Third Community Action Programme to Assist Disabled People - HELIOS II (1993-1996)' COM(1998) 15 final.

[28] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006) [2000] OJ L303/23.

the current disability strategy. The impact of these programmes on disability policy,

measures of social inclusion, and actual practical benefit to individual disabled people is

hard to measure but certainly less positive than official EC evaluations suggest.[29]

Nevertheless, they were essential first steps and set the stage for the Commission's 1996

proposal for a new European Community disability strategy which is the subject of the

following section.

3. *EU disability policy*

(i) *The paradigm shift in the EU's disability model*

In the last quarter of the 20th century, as discussed in chapter three, a worldwide process

of issue redefinition was transforming the concept of disability away from medical or

deficit models to social models of disability with the attendant argument that 'a

society's failure to adequately address unnecessarily exclusive infrastructures creates

rights-based public challenges surrounding the experiences of individuals with

disabilities'.[30] The competitive process of issue definition[31] is reflected in the HELIOS II

Council resolution in which the use of rights language associated with the social model

of disability appears along social welfare disability initiatives associated with the

medical model of disability.

Debra Mabbett and Helen Bolderson describe the consequence of the

Commission's approach of 'finding "footholds" within Member States, and thereby

side-stepping opposition from national governments and business interests' as allowing

for the development of a major change in the political environment and the mobilisation

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[29] See generally, Waddington, *Disability, Employment and the European Community* (n 5) chapter three, particularly pp 109,120 & 121.

[30] Dana Lee Baker, 'Issue definition in rights-based policy focused on the experiences of individuals with disabilities: an examination of Canadian parliamentary discourse' (2008) 23 Disability & Society 571, 572.

[31] ibid 574.

of community support (or at least interest group support) for European level disability initiatives.[32] In addition, Mabbett has noted the importance of the Commission's promotion of trans-European networks, such as the European Disability Forum, Inclusion Europe and the European Network on Independent Living, through the action programmes in allowing 'the Commission to bypass national governments and promote a European level social policy discourse ... framed around potential European-level actions and reforms, notably the promotion of rights'.[33] Rune Halvorsen and Bjørn Hvinden have also remarked on the importance of the Commission's cultivation of non-governmental organisations as partners in bringing along reluctant Member States and countering opposition from European employers' federations.[34]

In 1992 the Council of Europe adopted a Recommendation respecting disability policy which set out a comprehensive strategy for the rehabilitation and integration of people with disabilities.[35] Despite its reliance on the ICIDH conception of disability, rights language was used when, for example, the Recommendation supported the objectives of guaranteeing full and active participation in community life and the provisions of assistance for disabled people to lead independent lives according to their own wishes. In 1993 the United Nations adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities which applied a form of social model

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[32] Deborah Mabbett and Helen Bolderson, 'A Significant Step Forward? EU Social Policy and the Development of a Rights-based Strategy for Disabled People' (unpublished manuscript; Department of Government Brunel University 2002) 15.

[33] Deborah Mabbett, 'The Development of Rights-Based Social Policy in the European Union: The Example of Disability Rights' (2005) 43 JCMS 95-102.

[34] Rune Halvorsen and Bjørn Hvinden, 'Convergence towards a libertarian model of active citizenship? The future of anti-discrimination regulations in European disability policy' (COST A13 research seminar Changing Labour Markets, Welfare Policies and Citizenship, meeting no 9 in Malta, November 1-2, 2002) <www.sv.ntnu.no/iss/Rune.Halvorsen/Malta_COSTA13.doc> accessed 3 May 2010, 8.

[35] Council of Europe, 'Recommendation No. R (92) 6 of the Committee of Ministers to Member States on a Coherent Policy for People with Disabilities' (Adopted by the Committee of Ministers on 9 April 1992 at the 474th meeting of the Ministers' Deputies).

based on the ICIDH conceptions of disability and handicap.[36] The European Parliament was also an important institutional voice pressing for a rights based disability policy.

The Commission 'signalled its reaction' to the growing demands from disability NGOs and the European Parliament for a social model/rights based disability policy[37] with an early attempt to reframe disability policy in the language of rights in its 1993 Green Paper on Social Policy.[38] The Green Paper declared that 'social segregation, even with adequate income maintenance and special provision, is contrary to human dignity and corrosive of social solidarity and community morale'.[39] While special facilities and institutions for disabled people were said to be necessary, they were not to be an obstacle to social inclusion through mainstreaming in policy development and programme implementation.[40]

In response to this Green Paper, the European Parliament, the Economic and Social Committee and numerous NGOs argued for specific legislation to combat discrimination based on disability.[41] The Green Paper's disability themes were carried forward in the follow up White Paper on Social Policy in which the Commission proposed to take action to promote accessibility to programmes as well as transport and public buildings, to prepare a code of good practice of its own personnel policies and recommended that at the 'next opportunity to revise the Treaties serious consideration

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[36] UNGA, 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities' Res 48/96 (20 December 1993).

[37] R. Daniel Kelemen and Lisa Vanhala, 'The Shift to the Rights Model of Disability in the EU and Canada' (2010) 20 Regional & Federal Studies 1, 11.

[38] Commission, 'Green Paper: European Social Policy - Options for the Union' COM(93) 551 final.

[39] ibid 54.

[40] ibid 54.

[41] Lisa Waddington, 'Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws' (1996) 18 Comparative Labour Law Review 62, 98.

must be given to the introduction of specific reference to combating discrimination on the grounds of race, religion, age and disability'.[42]

(ii)   *EU disability policy*

Two years after the White Paper the Commission brought all these strands together and set out its vision of a disability policy in its communication, *A New European Community Disability Strategy*.[43] The Commission specifically noted the degree of disadvantage and exclusion experienced by disabled people in education, employment, mobility and access, housing and welfare systems, signalling that the disability policy field was much larger than just employment. The Commission proposed an equal opportunities model based on 'the core value of equality ... [which forms] the essence of the rights-based approach to disability'.[44]

The resolution which the Council adopted in response to the Commission's proposal significantly watered down its emphasis on disability rights and, thus, its potential for transforming the lives of disabled people. The resolution called on Member States to adopt and promote the principles of equality of opportunity in the development of comprehensive policies in the field of disability and of avoiding or eliminating any form of 'negative discrimination' on the ground of disability. Member States were to examine their disability policies against the criteria of empowering disabled people to participate in all aspects of their communities, mainstreaming disability in policy formulation, removing barriers to participation, raising awareness within the general population of the abilities of disabled people and promoting the involvement of disabled people and their representative organisations in the development and implementation of

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[42] Commission, 'European Social Policy - A Way Forward for the Union' COM(1994) 333 final 40.

[43] Commission, 'A New European Community Disability Strategy' (n 1).

[44] ibid 4.

disability policy.[45] In addition, by referencing both the UN's 1993 Standard Rules[46] which applied the ICIDH concepts of disability and handicap and the Council of Europe's resolution on the rehabilitation of disabled people which had a heavy reliance on the social welfare rehabilitation approach to disability policy,[47] the resolution was somewhat ambiguous about its support of rights-based over social welfare based disability policy. The social model definition of disability and references to 'avoiding or abolishing any form of discrimination grounded on disability' were deleted as was an annex to the Commission's proposal which included non-discrimination and reasonable accommodation provisions. Nevertheless, Lisa Waddington has described these two documents as the 'first steps towards developing a global disability policy' for the EU.[48] The four emerging themes which Mark Priestly had identified in the 1986 Council resolution were confirmed as the building blocks for EU disability policy.[49]

Based on these foundations, it is possible to identify an EU disability policy which has retained its essential structure since that time: EU disability policy is to promote the social inclusion of disabled people in every aspect of their communities through a rights oriented approach based on the core value of equality in the form of equal opportunity.[50] Recognising the primary role of the Member States in the development and implementation of disability policy, the principle of subsidiarity being particularly

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[45] Council Resolution of 20 December 1996 on equality of opportunity for people with disabilities [1997] OJ C 012/1.

[46] UNGA, 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities' (n 36).

[47] Council of Europe (n 35).

[48] Lisa Waddington, 'From Rome to Nice in a Wheelchair: The Development of a European Disability Policy' <www.gripvzw.be/sociaalcultureelmodel/docs/Bijlage%207%20-%20inaugurale%20rede%20prof.%20Waddington.doc> accessed 22 December 2008, 3.

[49] Priestley, 'In search of European disability policy: Between national and global' (n 15).

[50] Commission, 'A New European Community Disability Strategy'(n 1) 4; Commission, 'Towards a Barrier Free Europe for People with Disabilities' COM(2000) 284 final; Commission, 'Equal opportunities for people with disabilities: A European Action Plan' COM(2003) 650, 4-5; Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' COM(2010) 636 final 4.

applicable to this sensitive policy area, EU disability policy focuses on initiatives which bring a European level added value to domestic policies which can be 'secured from the adoption of common guidelines toward a shared core of policy objectives'.[51] EU involvement in this policy area supports key objectives of the Union, including freedom of movement, the completing of the internal market and guaranteeing the rights of EU citizenship. The policy has been reiterated in numerous variations by the Commission and the Council over the years as the treaty and legislative background evolved, activities were undertaken to implement aspects of the policy in concrete form and implementation strategies were updated.

Kelemen and Vanhala, noting the rapidity of the 'paradigm shift' from a medical model/social welfare to a social model/rights based policy, argue that the Commission's reframing of disability policy as a rights discourse was a response to the singular lack of effectiveness of the action programmes in the harmonising of disability policies.[52] It also fit with a general high profiling of rights in the EU. A consequence of these developments and the Commission's cultivation of transnational and domestic disability rights organisations was 'a convergence of interests between activists in the disability rights movement arguing for rights protections and centralized policy makers with their own agendas'.[53] For those who wanted to establish a stronger EU role in disability policy as a way to deepen integration or enhance the legitimacy of the EU by showing its practical value to Union citizens, the rights model was 'very attractive' and disability

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[51] Commission, 'A New European Community Disability Strategy' (n 1) 9. See also Commission, 'Towards a Barrier Free Europe for People with Disabilities' (n 50).

[52] Keleman and Vanhala (n 37) 10-11.

[53] ibid 2.

interests groups had an interest in EU actions which would avoid having to fight the same battles in each Member State.[54]

There has also, however, been resistance to the EU's role in the disability policy area and to many of the rights elements of that policy since that time.[55] Wim van Oorschot and Bjørn Hvinden have postulated that a source of resistance may lie in national social policy being 'an important source of legitimacy for governments' and that the '[l]arge differences in existing policy arrangements, levels and patterns of spending and traditions between the countries are also likely to have reinforced path dependencies'.[56] Halverson and Hvinden have argued that the Member States 'would consider it more controversial if the EU should interfere in redistributive policy such as income maintenance, employment, vocational training and medical rehabilitation' because this policy field is already crowded with wide variations in programme structure and differences in the roles of the state, the social partners and civil society.[57] They argue that soft EU measures will predominate in the redistributive aspects of disability policy. In contrast, the regulatory field is significantly less occupied and there is greater scope for EU regulatory intervention – such as the equality directives and regulations and directives respecting transport, health and safety and product standards.

EU disability policy sets out the parameters of the Union's policy objectives related to disabled people. A variety of strategies may be applied in pursuit of these

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[54] ibid 16.

[55] Evidence of this resistance may be implied from the tardiness and frequent incompleteness of the transposition of the Employment Equality Directive (see, for example, Commission, 'Non-discrimination and equal opportunities for all - A framework strategy' COM(2005) 224 final and Commission, 'The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation' COM(2008) 225 final), the failure to make progress on the proposed equality in the provision of goods and services (see chapter five) and the lack of any measureable progress through the social OMC process (see chapter six).

[56] Wim van Oorschot and Bjørn Hvinden, 'Introduction: towards Convergence'? Disability Policies in Europe' (2000) 2 European Journal of Social Security 293, 300.

[57] Halvorsen and Hvinden (n 34) 11.

objectives and a very broad range of activities may be undertaken within each of those strategies. In the next section, the Commission's implementation strategies will be reviewed.

4. *The Commission's Disability Strategies*

The Commission's strategies to implement the Union's disability policy can be grouped into the following six categories: legislation, analysis and research, mainstreaming, capacity building, cooperation and encouragement, employment, and awareness raising. The details within these strategies have varied over time, being adjusted to meet the perceived needs of the times and the current political possibilities. These adjustments have been influenced by previous actions which have gained acceptance or outlived their usefulness, political opportunities and pressures, particularly from organizations representing disabled people and the European Parliament, and the influence of disability champions within the Commission and the European Parliament, particularly the Disability Intergroup.

(i) *Legislation*

The Commission's 1996 communication proposing a new approach to disability emphasised the role of rights and protection from negative discrimination and noted that the Commission's submission to the Intergovernmental Conference had proposed a treaty amendment giving the Community competence to legislate against discrimination on grounds in addition to nationality and sex. Implied by the rights discourse was the expectation that the Community would exploit opportunities to adopt legislation to protect those rights especially the right to equal treatment. The Commission has considered legislation to be a key instrument to implement the rights based disability policy and exploits legislative opportunities as they become available.

Upon ratification of the Treaty of Amsterdam, the Commission moved quickly to propose the Employment Equality Directive (EED) which prohibits discrimination in employment and vocational training. Soon after the EED was adopted, pressure began to adopt a directive dealing with discrimination in the provision of goods and services. The Commission proposed such legislation in 2008 but the EU has yet to fill this gap in its equality legislation scheme. In the 2010-2020 Disability Strategy the Commission indicated its intention to continue researching the issue with the view to bringing forward a proposed for a European Accessibility Act in 2012 which may include product standardisation provisions, a prohibition against discrimination in the provision of goods and services and/or measures to require purchase of accessible products for public procurement contracts.[58] The EED and the goods and services proposal are discussed in chapter five. Other legislative instruments have included regulations in the area of passenger rights and directives related to product standards which are discussed in chapter six.

(ii)   *Research and analysis*

Research and analysis respecting disability, the social situation of disabled people and innovative policy initiatives is an ongoing strategy to implement the Union's disability policy.[59] This research agenda has focused on issues related to the clarification and harmonisation of basic concepts and terminology, developing and disseminating a comparable statistical series allowing for trans-European comparative studies, providing an accurate knowledge-base of domestic policies, anti-discrimination legislation and

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[58] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 50) 5.

[59] Commission, 'A New European Community Disability Strategy' (n 1) para 34; Commission, 'Equal opportunities for people with disabilities: A European Action Plan' (n 26); Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 50) 7 and 10.

programme initiatives, and evaluating the effectiveness of anti-discrimination policy and practice at the EU and domestic levels.[60]

In the 2010-2020 Strategy, for the first time, the Commission explicitly acknowledged the multidimensionality of disability discrimination and committed itself to 'pay attention to the cumulative impact of discrimination that people with disabilities may experience on other grounds, such as nationality, age, race or ethnicity, sex, religion or belief or sexual orientation'.[61] No details were provided about what the Commission would actually do but the commitment was in a section that mentions awareness raising and support for the work of EU level NGOs, so it may be implied that the Commission will support research and education about the issue.

(iii)   *Mainstreaming*

As is the case with mainstreaming in other areas such as gender or race,[62] mainstreaming disability 'requires well-informed policy-making and wide participation in the policy process to ensure that disabled people, and their diverse needs and experiences, are at the heart of policy-making each time it has an impact, directly or indirectly, on their lives'.[63] As with gender mainstreaming, mainstreaming disability

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[60] Commission, 'A New European Community Disability Strategy' (n 1) para 34. See also Commission, 'Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001 - 2006' COM(1999) 567 (the proposal was adopted by Council, 'Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006)') and Commission, 'Towards a Barrier Free Europe for People with Disabilities' (n 50) 4.

[61] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 50) 6.

[62] There is extensive literature dealing with mainstreaming. See, for example, Fiona Beveridge, Sue Nott and Kylie Stephen, 'Mainstreaming and the engendering of policy-making: a means to an end?' (2000) 7 Journal of European Public Policy 305; Mark A. Pollack and Emilie Hafner-Burton, 'Mainstreaming gender in the European Union' (2000) 7 Journal of European Public Policy 432; Fiona Beveridge and Sue Nott, 'Mainstreaming: A Case for Optimism and Cynicism' (2002) 10 Feminist Legal Studies 299; Fiona Beveridge, 'Building Against the Past: the impact of mainstreaming on EU gender law and policy' (2007) 32 ELR 193; Sophie Jacquot, 'The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain' (2010) 33 West European Politics 118.

[63] Commission, 'Equal opportunities for people with disabilities: A European Action Plan' (n 50) 6.

implies the integration of the disability perspective into every stage of policy processes – from design and implementation to monitoring and evaluation – with a view to promoting equal opportunities for people with disabilities.[64]

Mainstreaming may take an 'integrationist' or an 'agenda-setting' or 'transformative' form. Integrationist approaches insert the subject matter into existing policy formation structures: agenda setting or transformative approaches seek to change the policy formation structures including policy objectives and the way policy arenas function. In either case, mainstreaming may be implemented through expert/ bureaucratic or a participatory/democratic mechanisms. For gender mainstreaming, 'the EU has largely adopted the "dominant" Nordic, top-down, expert-bureaucratic model of gender mainstreaming'.[65] Mark Bell has described the mainstreaming of anti-racism as 'incline[d] towards the integrationist model, predominantly reliant on elite-bureaucratic methods'.[66] This is also true of disability mainstreaming as the Commission injects disability into existing policy structures and policy envelopes such as transportation, employment or equality legislation and has relied on the transnational NGOs and its own High Level Group of Experts as its primary sounding boards for policy initiatives.

Mainstreaming was the most prominent element of the Commission's implementation strategies in the 1996 communication, *A New European Community Disability Strategy.*[67] Deborah Mabbett attributes the adoption of mainstreaming as its primary implementation strategy to the apparent minimal effectiveness of the previous

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Confusingly, in disability policy 'mainstreaming' may also refer to the principle that disabled people participate in mainstream programmes rather than be segregated into disability-specific programmes whenever this is possible. In the context of primary and secondary education, for example, 'mainstreaming' often refers to disabled children and young people being placed in regular classrooms with the necessary supplemental supports required for them to take part in the programme with others of their age group (also known as 'inclusive education').

[64] ibid 13.

[65] Sonia Mazey, 'Gender Mainstreaming Strategies in the E.U.: Delivering on an Agenda?' (2002) 10 Feminist Legal Studies 227, 232.

[66] Mark Bell, *Racism and Equality in the European Union* (OUP 2008) 86.

[67] Commission, 'A New European Community Disability Strategy' (n 1) paras 45-58.

disability specific action programmes.[68] Mainstreaming was an attractive concept for the

Commission since it 'allowed references to disability to be inserted into established areas

of competence, instead of having to struggle to achieve recognition of disability policy as a

new, separate area of competence.'[69]

Although mainstreaming is only referenced once in the 2010-2020 Disability

Strategy in the context of EU funding programmes,[70] mainstreaming was highlighted as

an element of the general disability policy framework in the Council resolution

directing the Commission to prepare a disability strategy covering the period 2010-

2020.[71] Furthermore, the approach the Commission describes for achieving many of its

objectives related to the eight specific subject areas addressed in the Strategy –

accessibility, participation, equality, employment, education and training, social

protection, health and external affairs – implies mainstreaming as well as specific

disability initiatives. For example, in employment the Commission will ensure

employment for disabled people is reflected in its Europe 2020 employment strategy

and in the ESF, regarding education and training disabled students will find support in

the Youth on the Move initiative , the ET 2020 strategic framework and the Lifelong

Learning Programmes and regarding social protection systems the Commission will

consider disabled people in the European Platform against Poverty and the

administration of the ESF.[72]

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[68] Mabbett (n 33) 100.

[69] Mabbett and Bolderson (n 32) 16.

[70] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 50) 10.

[71] Council Resolution of 7 June 2010 of the Council on a new European disability framework [2010] OJ C 316/1, 7.

[72] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 50) 8.

(iv)   *Capacity Building*

Given the overall objective of increasing social inclusion and the significant reliance on mainstreaming as an implementation strategy, the Commission has identified the need to help build capacity in the disabled community to participate as equals in Union activities.[73] Capacity building focuses on strengthening the capacity of disabled people and their representative organisations to contribute to policy and programme development and implementation. The Commission contributes to this process by promoting partnerships among organisations of disabled people, other NGOs and the social partners, supporting events and processes which encourage greater engagement and consultation and encouraging the exchange of information and knowledge through transnational networks.[74] Under the category of capacity building, the Commission provides core funding for relevant European level NGOs (e.g. the European Disability Forum).[75]

The voices of disabled people most often are heard through formal consultation processes with trans-European disability groups. Inevitably, concerns can be raised about the degree to which these groups represent primarily the elite of the disabled community. However, Commission assistance in building the capacity of disabled people's representatives organisations and the practice of seeking the participation of disabled people in Union sponsored activities at the domestic level provide avenues for additional voices to filter through.

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[73] Commission, 'A New European Community Disability Strategy'(n 1); Commission, 'Towards a Barrier Free Europe for People with Disabilities (n 50) 19; Council, 'Resolution of the Council of the European Union and the Representatives of the Governments of the Member States, meeting within the Council, on a new European Disability Framework' (7/8 June 2010) [2010] OJ C 316/1 paras 16 & 24; Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe'(n 50) 5-6.

[74] Commission, 'A New European Community Disability Strategy' (n 1) 7; Commission, 'Towards a Barrier Free Europe for People with Disabilities' (n 50) 19.

[75] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006) [2000] OJ L303/23.

(v)   *Employment*

A key strategy to implement the overall policy objective of increasing social inclusion is to increase participation in the labour market.[76] The Commission argues that it is through employment that disabled people can be integrated into the key social institution of the world of work which in turn spawns inclusion into a range of other activities. Work also provides an independent disposable income allowing the opportunity to engage fully in the community. Participating in the labour force also promotes individual dignity and personal independence. Components of this strategy are found in the employment OMC, the European Social Fund, and health and safety and equality legislation.

Van Oorschot and Hvinden have noted how the emphasis on employment may be a double edged sword.[77] Many national governments in the 1990s were concerned that the growth in the number of recipients and overall cost of disability benefit programmes was becoming unsustainable. The EU emphasis on employment tied into domestic initiatives to reduce the costs of these programmes by pushing people back to work. Member States and the EU correctly point out that participation in employment promotes social inclusion, independence and a sense of self-worth. But the other side of this coin is the increasing demand that those receiving disability benefits must cooperate with programming designed to enable them to enter or return to the labour force. These initiatives may lead to fewer choices and a more oppressive government intrusion in their lives. Van Oorschot and Hvinden caution that

> from this perspective, any measures to promote participation in gainful
> employment will be judged in the context of their co-ordination with other

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[76] Commission, 'A New European Community Disability Strategy' (n 1) 8-9; Commission, 'Equal opportunities for people with disabilities: A European Action Plan' (n 50) 15; Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 50) 7.

[77] Van Oorschot and Hvinden, 'Introduction: towards Convergence'? Disability Policies in Europe'n (n 56) 293-295.

provisions, such as suitable housing, home support services, personal assistance and accessible transport.[78]

(vi)   *Awareness raising*

Since the first community action programme, a key feature of the EU's disability strategy has been to attempt to influence fundamental social values about disability and towards disabled people. Awareness raising was identified as a 'priority' in the Commission's 1996 communication,[79] had a prominent place in the 2003 *A European Action Plan*[80] and is a major element of the 2010-2020 Strategy.[81] Awareness-raising contributes to the achievement of the Union's disability policy by raising the general public's understanding and acceptance of disability and of the potential of disabled people to be valuable contributing members of society, as well as contributing to domestic political support for the rights-based, social model approach to disability. Practical application of the equality directives requires employers and service providers to actually implement the legislative requirements in daily practice and for this to occur widespread understanding of and support for the social model of disability and disability rights at the political, judicial and administrative levels are required.

5.   *Conclusion*

Each of the Member States has an extensive and highly diverse range of disability policies which provide significant programmatic rights. With these policies occupying the field, there has been limited room for the EU to insert itself into this policy area.[82] In the words of Deborah Mabbett and Helen Bolderson, '[t]hat any European policy has

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[78] ibid 295.

[79] Commission, 'A New European Community Disability Strategy' (n 1) para 42.

[80] Commission, 'Equal opportunities for people with disabilities: A European Action Plan' (n 50) 17ff.

[81] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 50) 6 & 9.

[82] Mabbett (n 33) 97.

developed in the area of disability is testament to the Commission's determination and its skill in expanding its remit from small foundations.'[83]

The EU's earliest interventions in the field of disability policy were primarily based on a medical model of disability with associated social welfare policy responses focusing on assisting the disabled individual, through vocational rehabilitation, to return to the workforce. Through the 1980s and 1990s, influenced by the dissemination of the social model of disability, the EU moved towards a rights based approach which looked to the removal of attitudinal and physical barriers to equal participation.

In 1996, with the publication of 'A New European Community Disability Strategy,' a clearly identifiable EU disability policy emerged.[84] The fundamental themes of this policy have continued to guide EU activities related to disability with successive documents using stronger language to reinforce the essentials of the policy and, over time, stronger policy instruments applied in pursuit of the policy. The Commission's strategies to implement the policy – legislation, research and analysis, mainstreaming, capacity building, employment and awareness raising – have remained consistent with variations in emphasis responding to current political opportunities and restraints. Mark Priestley has called EU disability policy 'a characteristically "European" policy project, involving a socially-oriented but legalistic rights-based discourse,'[85] which, despite the

> radical shift in EU policy discourse, [continues] to rely on relatively "soft" mechanisms of policy transfer (ranging from facilitation of cross-border lesson learning and the insemination of policy initiatives from the Commission, with some elements of harder regulation and legislation).[86]

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[83] Mabbett and Bolderson (n 32) 14.

[84] Commission, 'A New European Community Disability Strategy' (n 1).

[85] Priestley, 'In search of European disability policy: Between national and global' (n 15) 61.

[86] ibid 68.

EU disability policy reflects a belief that significantly increasing the social inclusion of disabled people requires action at both Union and Member State levels. Summarising its approach to disability policy, the Commission has commented that:

> Achieving equal opportunities for people with disabilities requires a multi-pronged strategy aimed at full participation, combating discrimination, facilitating independent living, promoting greater social integration, avoiding poverty and social exclusion, enhancing the opportunities for education, training, lifelong learning and employment and increasing the availability and quality of care and assistive technologies. In short, it is more a question of identifying disabling situations rather than disabled people.[87]

Several of the key themes of CDT as outlined in chapter two are reflected in EU disability policy. First, disability policy is highly visible and has retained its own identity while at the same time being specifically featured in other policy envelopes, reflecting the implementation strategy of mainstreaming disability initiatives. Despite the enthusiasm for mainstreaming, there are strong political, organisational and practical pressures to ensure that disability retains its identity as a distinct EU interest. The fear is that disability issues would disappear if they were merged into general equality programmes with a corresponding loss of political and financial support for disability related initiatives. Furthermore it is claimed that disability equality issues have their own particularities which require specialist knowledge and experience. With the adoption of the European Disability Strategy 2010-2020, it seems likely that disability will retains its own policy identity for the next decade.

Second, EU disability policy is based on a form of the social model of disability which locates disability at the intersection of impairment, the individual's response to that impairment and the social environment.[88] This reflects the disability model adopted

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[87] Commission, *The social situation in the European Union - 2003* (OOPEC 2003) 103.

[88] Commission, 'A New European Community Disability Strategy' (n 1); Commission, 'Towards a Barrier Free Europe for People with Disabilities' (n 50) 4; Commission, 'Equal opportunities for people with

by the WHO's International Classification of Functioning, Disability and Health, as discussed in chapter three, and the definition of disability in the UN Convention on the Rights of People with Disabilities[89] which will be looked at in chapter five. This conception of disability substantially reflects critical disability theory's social model as described in chapter three.

Third, the objective of EU disability policy is to promote social inclusion through the promotion of equality through a rights-based policy. This rights-based foundation of EU disability policy has been constitutionalised in the TFEU and the Charter of Fundamental Rights of the European Union. Article 10 TFEU requires that in carrying out its activities the Union must 'aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[90] Article 21 of the Charter prohibits 'any discrimination' based on, among other grounds, disability and Article 26 affirms that 'the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.[91]

Fourth, reflecting CDT's concern with the voices of disabled people, participation by disabled people and their representative organisations is an ongoing theme of the Union's disability policy. Consultation respecting particular EU initiatives occurs primarily at the European NGO level but the Commission does attempt to promote participation at regional and local levels in the design and implementation of

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disabilities: A European Action Plan (n 50); Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe'(n 50) 3. See chapter five for a discussion of the narrower, medical model of disability which has been applied by the ECJ.

[89] UNGA, 'Convention on the Rights of Persons with Disabilities' A/Res/61/106 (13 December 2006) art 1.

[90] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

[91] Charter of Fundamental Rights of the European Union (2000) OJ C 364/1, amended (2007) OJ C 303/1. By Article 6 TEU the Charter is now of the 'same legal value as the Treaties': Consolidated Version of the Treaty on European Union [2008] OJ C 115/13.

programmes and projects supported by EU funds. The Commission's careful cultivation of these NGOs has produced a source of political support for the Commission's disability policy which, to some extent, is a counterbalance to the tendency of Member States to resist the expansion of EU disability initiatives. At a conceptual level, EU policy reflects CDT's concern with listening to the voices of disabled people but the practical application of this ideal leaves much to be desired.

The CDT theme of multidimensionality has been conspicuously absent. The most recent iteration of the EU's disability strategy makes an oblique reference to multidimensionality, with an undefined commitment that the Commission will 'pay attention to the cumulative impact of discrimination' on other grounds that disabled people 'may experience'.[92] Otherwise, the Commission has been and remains silent on this theme.

The transformational potential of EU disability policy is constrained not only by the limits to the EU's competences but also by the principle of subsidiarity which is particularly relevant in this policy area where so much of the field has been occupied by the extensive social policies of the Member States. Despite developments at the European level (including developments which the Member States have formally supported in Council resolutions and decisions), within many of the Member States there remains significant resistance to adopting a social model of disability and resistance to adapting disability policies towards the rights based approach which the model implies. The inertia of existing disability policy is a heavy drag on efforts to transform national disability policy to a social model/rights based approach but there is

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[92] See text at n 61.

also justified concern that adopting this approach will necessarily lead to a reduction in the social welfare programmes which traditionally have supported disabled people.[93]

The Commission must remain sensitive to the diversity of disability policies among the Member States, conscious of the primacy of the Member States and the particular importance of the principle of subsidiarity in this policy area, in order to maintain political support for EU initiatives which are, for most countries, based on a significantly different approach to disability policy. If the Commission pushes too hard, its proposals will simply not be adopted, the effectiveness of measures which are adopted will be attenuated by domestic resistance and the influence of a variety of EU supported coordination and knowledge transfer programmes may be reduced if faced with an adverse domestic policy environment.

The transformational potential of the various Union initiatives varies depending on which Member State is considered. Nevertheless, for most Member States the Union's policy is a radical change from their traditional approaches to disability and implementation, even at a moderate level of effectiveness, will lead to significant improvements in the material and social quality of life for many thousands of individuals. For those countries which did not have any equality legislation even a moderately effective implementation of the EED and the expected directive dealing with discrimination in the provision of goods and services may have a significant benefit for disabled individuals. The soft law initiatives may also lead to far reaching changes in disability policies of many countries but those are likely to require a much

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[93] See, for example, Teodor Mladenov, 'Deficient bodies and inefficient resources: the case of disability assessment in Bulgaria' (2011) 26 Disability & Society 477; Heyer; Edit Kajtár, 'Changing Perspective on Social Inclusion of People with Disabilities: A European – Hungarian Outlook' (2008) 141 Studia Iuridica Auctoritate Universitatis Pecs 167, 184-89; Christian Wendelborg and Jan Tøssebro, 'Marginalisation processes in inclusive education in Norway: A longitudinal study of classroom participation' (2010) 25 Disability & Society 701; Lisa Pfahl and Justin J.W. Powell, 'Legitimating school segregation. The special education profession and the discourse of learning disability in Germany' (2011) 26 Disability & Society 449.

longer time frame before widespread noticeable improvement in the social inclusion of disabled people occurs.

In the following chapters, the application of EU disability policy in the equality directives and in the law and policy of the European Social Fund, transport policy and the social inclusion OMC will be examined.

Chapter V

The Equality Directives and Disability

1.   *Introduction*

The CDT version of the social model of disability necessarily implies that the social

response to disability must be based on rights not social welfare principles. As

discussed in chapter four, one of the key strategies to implement EU disability policy is

the use of legislation either to specify certain rights applicable to disabled people (e.g.

passenger rights regulations[1]) or, more generally, to implement the principle of equal

treatment by prohibiting discrimination based on disability. This chapter deals with the

latter type of legislation: disability as a prohibited ground of discrimination is found in

the Employment Equality Directive (EED)[2] and the proposed directive on equal

treatment in the provision of goods and services (proposed GSED)[3] along with religion

and belief, age and sexual orientation. While there has been a great deal of academic

comment on these and the other personal equality directives, there has been much less

written about them specifically from the perspective of the ground of disability.[4]

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[1] See the section on transport policy in chapter six.

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[3] Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM(2008) 426 final. See text at n 15.

[4] There is an extensive literature dealing with the treatment of equality in Union law and the EED. See, for example, Sandra Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145; Paul Skidmore, 'EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?' (2001) 30 ILJ 126; Waddington and Bell, 'More Equal Than Others: Distinguishing European Union Equality Directives'; Mark Bell, 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive' (2002) 8 ELJ 384; Colm O'Cinneide, 'A New Generation of Equality Legislation? Positive Duties and Disability Rights' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, 2005); Lisa Waddington, 'Recent Developments and the Non-Discrimination Directives: Mangold and More' (2006) 13 MJ 365; Noreen Burrows and Muriel Robison, 'An Assessment of the Recast of Community Equality Laws' (2007) 13 ELJ 186; Mark Bell, 'The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?' (2008) 79 The Political Quarterly 36; Nathalia Berkowitz, 'Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV.' (2008) 22 JIANL 375; Erika Szyszczak, 'Antidiscrimination Law in the European Community' (2008-

As discussed in chapter two, CDT adopts a conception of equality which welcomes and respects diversity and argues that equality is not to be treated as an end in itself but as a means to promote social inclusion. This objective requires measures to combat discrimination in the sense of bias and stereotyping and features of the physical and social environment which act to exclude as well as measures designed to prevent or compensate for disadvantage. The concept of rights has been the traditional approach to asserting claims to equality and CDT acknowledges the important role that rights can play in the struggle for equality. A central theme for CDT is the ongoing tension between disabled people's (individual) rights to autonomy and (group) rights to full participation in society which is reflected in the tension between the rights based and the social welfare approaches to disability policy. An adequate policy response to disability – and an adequate foundation for non-discrimination legislation – requires application of a model of disability which accurately reflects the nature of the disabled experience. The CDT version of the social model locates disability at the intersections of impairment, the individual functional and psychological response to that impairment and the social environment. This inclusive understanding of disability allows for diversity in programme specific definitions of disability. CDT understands disability to be multidimensional – the disabled experience is influenced by disability and issues of class, race, sex, age, etc. Effective policy responses to the disadvantage experienced by disabled people must have the flexibility to accommodate this multidimensional character of disability. The research question for this chapter asks to what extent the EED and the proposed GSED reflect the CDT approach to disability.

Article 19 TFEU (ex Art 13 EC) authorizes the Council, 'acting unanimously and in accordance with a special legislative procedure and after obtaining the consent of the

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2009) 32 Fordham Int'l LJ 624.

European Parliament', to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[5] Article 19 is the legal basis for both the EED and the proposed GSED. While article 19 TFEU is the most direct source of EU competency in the field of non-discrimination legislation, the Charter of Fundamental Rights and Freedoms,[6] which is of equal legal status with the treaties,[7] is also a source of law from which the non-discrimination norm is derived. Article 21 prohibits 'any discrimination' because of an open ended list of grounds which specifically includes disability, while article 26 provides that 'the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. In addition, the non-discrimination norm has become one of the general principles of Union law and has been expressly incorporated in the treaties governing the Union. Article 2 TEU relates that 'the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights ...' while article 6(2) TEU commits the Union to acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[8] In addition, articles 8 (ex art 3(1) EC) and 10 TFEU require the Union to 'aim to eliminate inequalities' in all its activities and '[i]n defining and implementing its

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[5] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU). A second paragraph of article 19 allows for the European Parliament and Council, using the ordinary legislative procedure, to adopt 'the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States' to combat discrimination.

[6] Charter of Fundamental Rights of the European Union' [2000] OJ C364/1 amended [2007] OJ C303/1.

[7] Consolidated Version of the Treaty on European Union' [2008] OJ C 115/13 (TEU) art 6(1) (ex TEU art 6(1)).

[8] ibid.

policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[9]

A key event which occurred after the Commission published its proposed GSED in 2008 was the ratification by the EU of the United Nations Convention on the Rights of Persons with Disabilities (the UN Convention).[10] By this act the EU committed itself to implementing the terms of the Convention and it is, therefore, a source of law for the European Court of Justice which may be taken into account in the interpretation of the equality directives. Typically for a UN convention, it is open to a wide range of interpretations and it may in reality have little practical influence on the Court since it can be argued that Union law already meets its objective requirements and the bulk of the document consists of aspirational declarations, the real impact of which will be felt through political action in the EU and the Member States, all of whom are signatories to the Convention.

In the next section, the key provisions of the EED and proposed GSED are outlined to provide a foundation for the following sections in which various themes from the directives are analysed from the CDT perspective. The first theme relates to the conception of equality reflected in the directives and the roles played by the concepts of accessibility, reasonable accommodation and positive action in this conception of equality. The second theme deals with the definition of disability applied to the directives. The chapter concludes with some comments about the potential for the directives to improve the lives of disabled people and an overall assessment of the degree to which CDT is reflected in the Union's equal treatment legislation.

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[9] TFEU (n 5) arts 8 & 10.

[10] UNGA, 'Convention on the Rights of Persons with Disabilities' A/Res/61/106 (13 December 2006). See chapter one at n 13 & n 14.

2. *Overview of the EED and proposed GSED*

The EED, which prohibits discrimination based on religion or belief, age and sexual orientation in addition to disability, applies to all persons in the public and private sectors in relation to all aspects of employment and self employment or the pursuit of an occupation, access to all types of vocational guidance and training and membership and participation in worker, employer and professional organisations.[11] Member States may choose not to apply the prohibition of discrimination because of age and disability to employment in their armed forces.[12]

In 2008 the Commission issued a proposal for a directive prohibiting discrimination because of religion or belief, disability, age or sexual orientation outside the labour market which was to be the completion of the anti-discrimination legal framework under article 19 TFEU and the instrument by which the EU would meet some of its commitments under the UN Convention.[13] Following a European Parliament resolution under the consultation procedure proposing numerous amendments[14] and many negotiating sessions of the Council's Working Party on Social Questions, the original proposal has undergone significant revision. It is this revised proposed GSED (referred to hereafter simply as the 'proposed GSED' but cited to the revised version) which will be examined.[15] Although at the time of writing this proposed GSED has not

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[11] EED (n 2) art 3(1).

[12] ibid art 3(4)

[13] Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' (n 3) 2.

[14] European Parliament, 'European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS))' P6_TA(2009)0211.

[15] Council, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Consolidated text' (15 July 2011) 12446/11. The Working Party has continued negotiations into November, 2011, but this is the most recent un-redacted text available on the EU's website. For a review of the proposal as originally published, see Mark Bell, 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 Equal Rights Review 7.

been adopted and there is every likelihood that it will be withdrawn and replaced with an entirely new proposal,[16] it is being examined here as it represents the most recent proposal dealing with discrimination based on disability under article 19 TFEU and responding to the EU's commitments under the UN Convention.

The proposed GSED would cover 'social protection, including social security, social assistance, social housing and healthcare', 'education' and 'access to and supply of goods and other services, including housing, which are available to the public and which are offered outside the context of private and family life'. As with the EED, the proposed directive would apply to service providers in the public and private sectors.[17] The directive would not apply to matters covered by family law, the organisation of social protection systems, the competences of the Member States to determine the type of health services provided, the content of teaching and the organisation of educational systems, including provisions for special needs education.[18]

The EED and proposed GSED prohibit both direct and indirect discrimination. Direct discrimination, defined identically in both directives, 'shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any' of the prohibited grounds of discrimination. In both directives, indirect discrimination refers to 'an apparently neutral provision, criterion, or practice [which] would put persons' having a particular protected characteristic 'at a particular disadvantage compared with other persons unless' the provision can be 'objectively justified by a legitimate aim and the means of achieving that aim are

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[16] Lisa Waddington, 'Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive' (2011) 36 ELRev 163 in which she argues that although the proposed GSED is unlikely to be adopted, a directive dealing solely with the ground of disability is likely to be sympathetically received and would have the support of the Member States.

[17] The term 'service provider' is used throughout as a shorthand term to include all those covered by the proposed GSED providing any type of goods or services.

[18] Proposed GSED (n 15) art 3(1) & (2).

appropriate and necessary'.[19] In addition, the EED excepts from the definition of indirect discrimination provisions which impose a particular disadvantage on disabled people if there is a duty under national legislation to provide reasonable accommodation.[20] Both directives specify that harassment and instructions to discriminate are also forms of prohibited discrimination.

Both directives, in the articles setting out the 'concept of discrimination', specify that the prohibitions against discrimination are 'without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security,' the maintenance of public order, the prevention of crime, the protection of health and the protection of the rights and freedoms of others.[21] The proposed GSED allows for proportionate differences in treatment based disability in the provision of financial services if 'the health condition underlying the disability is a determining factor in the assessment of risk ... and this assessment is based on actuarial principles and relevant and reliable statistical data or, [where no such data is available] for a certain health condition, on relevant and reliable medical knowledge'.[22] The provision continues to require that financial service providers who apply this limited exemption 'provide information on the reasons justifying those differences in treatment'.[23]

The EED provides that a difference of treatment based on any of the grounds does not constitute discrimination if the ground 'constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement

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[19] EED (n 2) art 2(2)(b)(i): proposed GSED (n 15) art 2(2)(b).

[20] EED (n 2) art 2(2)(b)(ii).

[21] ibid art 2(5); proposed GSED (n 15) art 2(8).

[22] Proposed GSED (n 15) art 2(7). There is a similar provision allowing differences in treatment based on age in the provision of financial services. This draft of the proposed GSED amended the wording of the similar provision in the earlier draft in response to Case C 236/09 *Association belge des Consommateurs Test-Achats ASBL v Belgium* [2011] ECR 00000 in which the ECJ decreed a time limit to the similar provision in the gender equality directive. This wording appears to be an attempt to avoid the *Test-Achats'* requirement that such derogations be time limited.

[23] ibid.

is proportionate'.[24] The proposed GSED does not have a provision equivalent to the EED`s genuine occupational requirement exemption.

The treatment of reasonable accommodation is dealt with differently in the two directives. The EED provides for a duty to provide reasonable accommodation in a stand-alone provision apparently unconnected to the prohibition against discrimination.[25] In contrast, but reflecting the UN Convention, the proposed GSED defines a denial of reasonable accommodation as a form of discrimination.[26] The most significant innovation of the proposed GSED is the general duty placed on Member States to take measures to ensure equal access to goods and services covered by the directive.[27] This issue will be taken up again in the section on reasonable accommodation and accessibility.

To ensure 'full equality in practice', both the EED and proposed GSED make provision for Member States to take specific action to prevent or compensate for disadvantages linked to any of the grounds.[28] With respect to disability, the EED has a special provision dealing with the rights of Member States to adopt provisions for 'the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting [disabled people's] integration into the working environment'.[29] A similar provision in the proposed GSED allows for 'more favourable provisions' for disabled people regarding access to social protection, healthcare, education and 'certain goods and services ... in order to promote their

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[24] EED (n 2) art 4(1).

[25] ibid art 5.

[26] Proposed GSED (n 15) art (2)(1)(e).

[27] ibid art 4.

[28] EED (n 2) art 7(1); proposed GSED (n 15) art 5(1).

[29] EED (n 2) 7(2).

economic, cultural or social integration'.[30] These provisions are discussed further in the section on positive action.

Both the EED and the proposed GSED have various provisions related to their implementation. Member States must ensure that effective procedures are available to enforce the rights protected by the directives either by an aggrieved individual or appropriate organisations on behalf or in support of an individual, the burden of proof is placed on the respondent once a complainant has presented facts from which it may be presumed there has been discrimination to prove there has been no discrimination and that complainants have protection from victimisation when they enforce their rights.[31] Member States are to take appropriate action to bring the provisions of the directives to the attention of those affected by them, encourage dialogue between the social partners to promote equal treatment and encourage dialogue with appropriate non-governmental organisations which have an interest in combating discrimination and promoting equal treatment.[32] Unlike the EED, the proposed GSED requires Member States to designate a body to promote equal treatment including through provision of independent assistance to victims of discrimination, conducting independent surveys and publishing independent reports on issues related to discrimination.[33]

3. *The Conception of Equality Underlying the Equality Directives*

The purpose of the EED and proposed GSED is to 'lay down a general framework for combating discrimination ... with a view to putting into effect in the Member States the principle equal treatment'.[34] The principle of equal treatment is defined as treatment

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[30] Proposed GSED (n 15) art 5(2).

[31] EED (n 2) arts 9, 10 & 11; proposed GSED (n 15) arts 7, 8 & 9.

[32] EED (n 2) arts 12, 13 & 14; proposed GSED (n 15) 10 & 11.

[33] Proposed GSED (n 15) art 12.

[34] EED (n 2) art 1; proposed GSED (n 15) art 1.

without prohibited discrimination.[35] In this section, the extent to which the two directives reflect a conception of equality consistent with that of CDT is considered. The first subsection provides an overview of the two broad conceptions of equality, formal and substantive, which dominate the European judicial and political landscape.[36] The particular dilemma which disability poses for equality theories is then introduced. The second and third subsections deal, respectively, with the concepts of reasonable accommodation and accessibility and the treatment of positive action measures in the directives. This section concludes with an assessment of the extent to which the formal equality paradigm which has underpinned EU law has incorporated concepts of substantive equality which are more consistent with the CDT approach to equality.

(i)   *Formal and substantive equality*
The traditional liberal conception of equality is concerned with consistency of treatment and protecting individuals from unfair treatment based on a prohibited factor such as race or sex. This formal conception of equality derives from Aristotle's proposition that '[t]hings (and persons) that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness'.[37] Formal equality is focused on the individual and seeks to prevent negative differential treatment or the imposition of disadvantage on individuals as a result of stereotypes related to irrelevant personal characteristics. As discussed in chapter two, the paradigm of formal equality is integral to theories of legal liberalism which abstract legal rights from social structures

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[35] EED (n 2) art 2(1); proposed GSED (n 15) art 2(1).

[36] These two concepts are sometimes described as 'liberal,' 'symmetrical' or 'individual justice' models contrasting with 'asymmetrical' or 'group justice' models: Mark Bell and Lisa Waddington, 'Reflecting on inequalities in European equality law' (2003) 28 ELR 349, 350.

[37] Aristotle, *Ethica Nichomacea,* as cited by Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 ELJ 290, 303. See also Lisa Waddington and Aart Hendriks, 'The Expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' [2002] International Journal of Comparative Labour Law and Industrial Relations 403, 406.

and ignore the contradictions between theoretically equal citizens and the reality of social inequality. Legal liberalism has a strong affinity for the principles of individual autonomy, freedom and equality which lie at the heart of liberal philosophy and which are reflected in the idea of formal equality.[38] Formal equality models leave little room for specific measures related to particular grounds and do not reflect the 'inherently collective nature of discrimination' or the 'entrenched inequality experienced by certain groups in diverse aspects of social life – such as education, accommodation and healthcare – [which] undermines the capacity of individual members of the group to compete effectively with other individuals'.[39]

The most significant response to the limitations inherent in the formal equality paradigm has been to propose a substantive form of equality which is concerned with the 'actual distribution of resources, opportunities and choices within a society'.[40] Substantive equality focuses on the impact of a challenged law, policy or practice and the social and economic context in which the impugned rule operates. Assessing context requires looking beyond the four corners of the rule and identifying external conditions of inequality that affect its actual impact. Substantive equality is concerned with avoiding the imposition of further disadvantage on groups already experiencing social, political or economic disadvantage.[41] In practice substantive equality theories argue that there are circumstances in which the formal equal treatment norm must be disregarded in order to achieve a substantively equal outcome. A relatively uncontroversial example

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[38] Richard F. Devlin, 'Mapping Legal Theory' (1994) 32 Alta L Rev 602, 610. See also Collen Sheppard, 'Inclusive Equality and New Forms of Social Governance' (2004) 24 SCLR (2d) 45, 60.

[39] Mark Bell and Lisa Waddington, 'Reflecting on inequalities in European equality law' (n 36) 353. See also Waddington and Hendriks, 'The Expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (n 37) 407.

[40] Donna Greschner, 'Does *Law* Advance the Cause of Equality?' (2001-2002) 27 Queen's L J 299, 303. See also Sheppard (n 38) 60.

[41] Bruce Ryder, Cidalia C Faria and Emily Lawrence, 'What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions' (2004) 24 SCLR (2d) 103, 106.

of this is the requirement that employers grant women pregnancy and maternity leave and protect their employment status while on leave to achieve equal treatment of men and women in employment. Substantive equality theories give the liberal concept of equality sufficient flexibility to allow for different treatment if that is what is required to advance social policy objectives such as increased social inclusion.

Disability presents particular concerns for equality theories because of what Martha Minow has described as the 'dilemma of difference' which arises when it is necessary to decide whether to deal with difference by acknowledging and responding to it or by ignoring it.[42] Depending on context, equality objectives may be promoted either by ignoring or by acknowledging and responding to difference. With disability, in most cases, difference must not just be dismissed as irrelevant, because ignoring the difference usually has the effect of rejecting and marginalizing the person. Instead, a response which takes account of the disability so that adjustments can be made to eliminate the obstacle which prevents the person from participating as an equal is required. When difference must be ignored, formal equality can protect the rights of disabled people: when difference must be acknowledged, the flexibility of substantive equality is required.

(ii)   *Reasonable Accommodation and Accessibility*
This section begins with a discussion of the purpose and scope of reasonable accommodation and its relationship to the principle of equal treatment. Following that, the manner in which the duty to provide reasonable accommodation is incorporated in the directives is explored. This is followed by a critique of the reasonable accommodation concept. The section ends with a description of the attempt in the

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[42] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990).

proposed GSED to move beyond the limitations inherent in the principle of reasonable accommodation.

In cases where a disabled person is treated differently and adversely because of bias, stereotyping or unwarranted assumptions of capacity, when Minow's dilemma of difference is resolved by ignoring the disability, the prohibition against discrimination because of disability can operate as it does for the other grounds. In many cases, however, when the disability does have an impact on the ability to do the job or utilise the service, it is not possible to achieve equality by ignoring the disability. Including disability within non-discrimination legislation depends on a mechanism to respond to these situations. The mechanism employed in the directives is the duty to provide reasonable accommodation.[43] With a duty to accommodate, legislation prohibiting discrimination can respond to both barriers based on stereotypes, bias, and stigma and those which are caused by features of the physical and social environments which fail to take account of the needs of disabled people. The duty to provide reasonable accommodation reflects a substantive equality approach since the difference in treatment is an integral element of the equality norm as it is essential, in the words of the directives, '[i]n order to guarantee compliance with the principle of equal treatment'.[44]

The UN Convention provides a concise definition of the concept of reasonable accommodation:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on

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[43] For an in depth discussion of reasonable accommodation see Lisa Waddington, 'Reasonable Accommodation' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007).

[44] EED (n 2) art 5; proposed GSED (n 15) art 4a(1).

an equal basis with others of all human rights and fundamental freedoms.[45]

Because the purpose of reasonable accommodation is to enable an individual disabled person to participate equally in the labour force or to have equal access to goods and services, it must be that an accommodation that is not effective to achieve those purposes cannot be treated as reasonable. It follows from this that a request for an accommodation which does not, objectively, increase the degree of equality (including the dignity element of equality) even though it is subjectively desired by a claimant, could be refused on the basis that refusing to accede to a request for an accommodation that did not achieve at least a marginal increase in equality would not be an act of discrimination. A related point is that in most cases there will be a range of accommodation options. When there is a choice of options, by definition each one being reasonable, then the duty to accommodate ought to require that the one to implement is the one which most respects of the dignity of the person, meets the person's needs, promotes individual autonomy and independence and promotes social inclusion. The duty is to provide reasonable accommodation not to implement the perfect or most desirable accommodation from the point of view of the disabled person. If the choice among reasonable options for accommodation still leaves some residue of inequality, it may be that the duty to accommodate has been exhausted. Furthermore, although a reasonable accommodation is one that does not impose a disproportionate burden on the duty bearer, some additional burden may be placed on the duty bearer in order to achieve equal treatment. In summary, the principles for implementing the duty to provide reasonable accommodation should include a requirement that an accommodation be effective to provide at least a marginal increase in equality, that the accommodation option which most promotes equal treatment and social inclusion must

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[45] Convention (n 10) art 2 Definitions.

be chosen when various options are available and that the duty bearer may have to bear some, although not a disproportionate, burden as a result of providing the accommodation.

Article 5 of the EED requires that 'reasonable accommodation shall be provided' in order to comply with the principle of equal treatment for disabled persons. This direction is followed by a requirement that employers '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 … unless such measures would impose a disproportionate burden on the employer.' Although this provision appears to be a free standing duty, reasonable accommodation is to be provided 'in order to comply with the principle of equal treatment' which the directive defines as the absence of direct and indirect discrimination. Enforcement of the duty to provide reasonable accommodation must, therefore, be through a claim of direct or indirect discrimination.

Direct discrimination occurs when a person is treated less favourably than another who is or would be 'in a comparable situation'. Determining whether a claimant is 'in a comparable situation' to a non-disabled person must take place after reasonable accommodation has been made. The prohibition of direct discrimination would be fatally undermined if the disability was not removed from consideration by provision of the accommodation. Once reasonable accommodation has been provided, a person may still be directly discriminated against because of disability as may happen if, for example, a supervisor is biased because of the disability or if the person is harassed because of disability. Alternatively, direct discrimination may occur if the employer fails to provide reasonable accommodation. In such a case, the focus of a preliminary reference should deal with the nature of the duty to accommodate and what constitutes a disproportionate burden. A related issue is the relationship between the duty to

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accommodate and the exemption for a genuine occupational requirement (GOR). As long as the 'objective is legitimate and the requirement is proportionate', Member States may provide that differences in treatment based on a prohibited characteristic are not discrimination if, for 'the particular occupational activities concerned', that characteristic (or its absence) is a GOR. It may be that a GOR by definition is incompatible with the duty to accommodate – if it is truly a GOR then exceptions cannot be made. Alternatively, depending on how narrowly the GOR must be tailored, there may be room for the duty to accommodate to operate.

There is a different relationship between the duty to provide reasonable accommodation and the prohibition of indirect discrimination. Indirect discrimination occurs when 'an apparently neutral provision, criterion or practice' puts persons with a 'particular disability' (or other ground) at 'a particular disadvantaged compared with other persons' unless the policy or practice is objectively justified or, with respect to disability, national legislation imposes a duty to provide reasonable accommodation, (which should apply in all cases since the directive requires the Member States to require reasonable accommodation).[46] The policy or practice which would otherwise amount to indirect discrimination which, if it was to remain in place, would have to be objectively justified, is deemed not discrimination if its adverse effect is remedied by provision of reasonable accommodation. For the ground of disability the duty to accommodate always mitigates the individual impact of the indirectly discriminatory policy or practice even though, for the other grounds, the policy or practice would have to be objectively justified. Although it seems counterintuitive, the wording of the EED strongly suggests that even if no accommodation is possible the disabled claimant is foreclosed from arguing in the alternative that the policy or practice is not objectively

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[46] EED (n 2) art 2(b)(i) & (ii).

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justified. This suggests that the focus of a preliminary reference should be on whether the national legislation adequately transposed the concept of reasonable accommodation, not whether any particular action had fulfilled that obligation or no accommodation was possible. It may be, however, that the ECJ would require more from national legislation than a simple statutory statement that reasonable accommodation must be provided since that would, in effect, leave all the substance of the duty to the vagaries of domestic judicial interpretation.

In contrast to the EED, the proposed GSED defines the denial of reasonable accommodation as a form of discrimination. This avoids all the difficulties of integrating the concept of reasonable accommodation into either direct or indirect discrimination which the EED presents. It also removes any reference to comparison with anyone else which eliminates the difficulties associated with identifying appropriate comparators. There is simply always a duty to provide reasonable accommodation for a disabled person. The duty is, however, described in similar language: 'In order to guarantee compliance with the principle of equal treatment ... reasonable accommodation shall be provided ... unless this would impose a disproportionate burden'.[47] Reasonable accommodation is defined as 'necessary and appropriate modifications and adjustments, not imposing a disproportionate or undue burden, where needed in a particular case to ensure' the equal enjoyment of 'all human rights and fundamental freedoms'.[48] Reflecting ongoing concerns respecting the potential costs of the duty to provide reasonable accommodation, the most recent draft specifies that providers of housing need not 'make structural alterations to the premises

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[47] Proposed GSED (n 15) art 4a(1).
[48] ibid art 4a(2).

or to pay for them' but they must 'accept such alterations' if someone else pays for them.[49]

The two directives differ in how they deal with the factors to be considered in assessing claims that an accommodation would impose a disproportionate burden. In the EED the factors which may be considered in assessing a claim of disproportionate burden are only set out in recital 21, with the exception that Article 5 specifies that a burden is not disproportionate if it is 'sufficiently remedied' by existing state subsidies. Recital 21 says:

> To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.[50]

In contrast, the proposed GSED sets out factors which should be taken into account in the assessment of disproportionate burden in a substantive article in the directive. These include 'the size and resources of the organisation or enterprise', 'the estimated cost', 'the estimated benefit for persons with disabilities' taking into account the impact of not providing the accommodation and the frequency of use of the goods or services, 'the life span of infrastructures and objects which are used to provide a service', 'the historical, cultural, artistic or architectural value of the movable or immovable property in question' and 'whether the measure in question is impracticable or unsafe'.[51] As with the EED, '[t]he burden shall not be deemed disproportionate when it is sufficiently remedied' by existing measures in domestic disability policy.[52]

The ECJ has not yet had a reference for a preliminary ruling dealing with reasonable accommodation but it has, in *obiter*, commented on the issue. In *Chacón*

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[49] ibid art 4a(3).

[50] EED (n 2).

[51] Proposed GSED (n 15) art 4b(1).

[52] ibid.

Navas the Court commented that the protection from dismissal based on disability applied only if the dismissal was, subject to the duty to provide reasonable accommodation, 'not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post'.[53] This suggests that current ability to perform the job is a threshold requirement for claiming protection from discrimination which would exclude one of the most common accommodation requirements of employees, namely time to recover from, stabilize, or adjust to a disability, from the scope of the duty to provide reasonable accommodation.

Deborah Mabbett has suggested that the range of options for meeting the duty to provide reasonable accommodation open to the Member States may lead the Court to take a very high level view of what the directives require:

> One reading of Article 5 [EED] is that Member States retain competence to address the problem of burden-sharing through policies of their choice. This in turn might be taken to imply that the ECJ will not endeavour to enforce a certain level of reasonable accommodation as part of the fundamental right of non-discrimination. The Court could instead take the view that subsidiarity should govern the determination of levels of accommodation: in other words, that what is reasonable or proportionate has to be determined within each state in the light of its social policies.[54]

However, with the increased prominence of fundamental rights as general principles of law, the elevated status of the Charter of Fundamental Rights and the ratification of the UN Convention, it is just as likely that the Court will approach the subject from a value based perspective and require accommodation measures that effectively achieve their objective of increased social inclusion. This would put greater emphasis on the benefits to the claimant rather than the degree of burden. This suggests

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[53] Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467 para 51.

[54] Deborah Mabbett, 'The Development of Rights-Based Social Policy in the European Union: The Example of Disability Rights' (2005) 43 JCMS 95, 111-112.

that the Court would require that a disproportionate burden be both significant and proven through hard data rather than estimates and opinion evidence. This would call for careful consideration of how the proposed accommodation would affect the interests of unionised and non-unionised co-workers and others as well as the claimant.

The concept of reasonable accommodation is an individual, reactive response to barriers to equal treatment. As an individual right, it 'leaves unchallenged and unaffected the underlying discriminatory policy which resulted in the initial exclusion'.[55] It does not challenge the imbalance of power between worker and employer, customer and supplier, resident and the state or the construction of the social environment to ableist norms. Reasonable accommodation is neither designed for, nor capable of, responding to deep structural barriers.[56] The reasonable accommodation provisions of the directives do not require any significant change to the status quo, only the provision of relatively minor special or exceptional treatment of disabled individuals who would otherwise be excluded from or disadvantaged in the labour market or in their access to goods and services.[57]

On the positive side, despite the limitations inherent in the concept, in the majority of Member States, which had no legal requirement and no expectation that disabled people should be able to claim accommodation as of right, the requirement to

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[55] Waddington and Hendriks, 'The Expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (n 37) 414-415.

[56] Samuel R. Bagenstos, 'The future of disability law' (2004) 114 Yale Law Journal 84. See generally Ian B. McKenna, 'Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?' (1997-98) 29 Ottawa Law Review 153, 176 and Waddington and Hendriks, 'The Expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (n 37) 414. The European Expert Group on Employment for Disabled People estimates the number of disabled individuals of working age who could, because of EED based anti-discrimination legislation, potentially gain access to the labour market is between 2.5 and 3 million in the EU15 or about ten percent of the disabled population: Commission, *The employment situation of people with disabilities in the European Union* (OOPEC 2001) 53.

[57] See Colleen Sheppard, 'Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.' (2000-2001) 46 McGill L J 533, 550ff for a discussion of reasonable accommodation as an agent for institutional change.

provide reasonable accommodation should progressively increase the social inclusion of disabled people. Non-discrimination legislation with its requirement for the provision of reasonable accommodation is a key policy instrument supporting the integration of disabled people in cases where bias and stereotyping or relatively minor modifications to physical structures or established routines will open opportunities for equal participation. At a practical level, it is likely that once employers and service providers get used to the idea of accommodation they will be able to more easily and effectively respond to the next request for accommodation and in many cases will already have made the necessary modifications by the time the next person who needs that accommodation comes along.

A significant innovation in the proposed GSED is the provision which would impose on the Member States a duty 'take the necessary and appropriate measures to ensure accessibility for persons with disabilities, on an equal basis with others' subject to the proviso that the 'measures should not impose a disproportionate burden'.[58] The current draft defines accessibility as 'includ[ing] general anticipatory measures to ensure the effective implementation of the principle of equal treatment ... [, and with a medium or long-term commitment]'.[59] The measures must include 'the identification and elimination of obstacles and barriers to accessibility'.[60] This duty would apply to only the common areas of multi-unit housing, subject to the duty to provide reasonable

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[58] Proposed GSED (n 15) art 4(1).

[59] Proposed GSED (n 15) art 4(1a). The UN Convention does not contain a specific clause related to equal treatment by anticipation but it is reasonable to suggest that this provision is intended to respond to the Convention requirement that States Parties take appropriate measures to ensure to persons with disabilities equal access to the physical environment, transportation, information and communications and other facilities and services open or provided to the public (art 9); take effective measures to recognise the right of disabled people to live in the community including having access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community (art 19); and, facilitate the personal mobility of disabled people in the manner and at the time of their choice at an affordable costs (art 20).

[60] Proposed GSED (n 15) art 4(2).

accommodation and a duty on the Member States to 'progressively take the necessary measures to ensure sufficient housing is accessible' to disabled people.[61]

The provisions respecting accessibility apply to the 'design and manufacture of goods' but neither the reasonable accommodation nor accessibility provisions apply where other legislation provides 'detailed standards or specifications' respecting particular goods or services.[62]

The proposed GSED would give Member States four years to come into compliance. For the accessibility provisions, Member States, 'if necessary', may take up to five years after adoption to come into compliance for 'new buildings, facilities, vehicles and infrastructure' or 'buildings, facilities and infrastructure undergoing significant renovation' and up to 20 years after adoption for 'all other existing buildings, facilities, vehicles and infrastructure'.[63] The factors which may be taken into account in determining whether a measure to promote accessibility would impose a disproportionate burden are the same as apply in the case of a reasonable accommodation.

If the anticipatory duty survives the legislative process, in its current extremely indeterminate form, what it could mean in practical terms beyond the non-discrimination norm and the duty to provide accommodation remains uncertain. The provisions may have the effect of indicating that making European infrastructure accessibility has political support and these provisions should be given some substantive content. However, given the current economic situation and the level of accessibility in Europe the cost implications of these provisions suggest a very constrained interpretation should be expected. It may be that their major contribution will be to

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[61] ibid art 4(6) & (7).

[62] ibid art 4b(2) & (3). See examples of such standards in the section on transportation policy in chapter 6.

[63] ibid art 15(2).

impose on Member States a duty to plan for the progressive transformation of the physical environment to maximise accessibility. If such a duty were taken seriously, significant improvement in the physical accessibility of communities could occur relatively quickly.

The scope of the duty to provide reasonable accommodation will vary depending on the particulars of the domestic non-discrimination legislation and its interpretation, the nature of the employer or service provider and the extent of a Member State's disability support mechanisms and their funding. It is also clear that the interpretation of the principle of reasonable accommodation in each Member State will be affected by the economic strength of the country, the political interest in pursuing equality and non-discrimination for disabled people and the nature of the existing disability policy including the roles played by the state, the social partners and disability based NGOs. Despite these caveats, in the majority of Member States which had no legal requirement to provide reasonable accommodate, implementing the duty as set out in the directives should progressively increase the social inclusion of disabled people.

The duty to provide reasonable accommodation goes some way to promoting equality with diversity leading to increased social inclusion which is the transformative objective of CDT. A broader brush is, however, required to move beyond the individual focus of the duty. The two directives, under the rubric of 'positive action', make provision for group based policy responses to discrimination and social exclusion. This is the subject of the following section.

(iii)   *Positive Action*
Under the title 'positive action' the two directives make provision, '[w]ith a view to ensuring full equality in practice', for Member States to maintain or adopt 'specific

measures to prevent or compensate for disadvantages linked' to any of the grounds.[64] With regard only to the ground of disability, the EED has additional provisions related to the protection of health and safety and special programmes for safeguarding or promoting integration.[65] Similarly, only in regard to disabled people, the proposed GSED specifies that Member States retain the right to 'maintain or adopt more favourable provisions' for access to goods and services 'in order to promote social integration'.[66] These provisions reflect the UN Convention provision that 'specific measures which are necessary to accelerate or achieve de facto equality of persons with disability shall not be considered discrimination'.[67] The two general positive action provisions are designed to allow public policies which benefit disadvantaged groups characterised by a prohibited ground of discrimination. The special provisions related to disability reflect not only the particular nature of disability but also the need to preserve the wide variety of disability programming in the Member States. These provisions complement the principle of (individual) reasonable accommodation by allowing for group based policies and programmes which promote increased social inclusion.

There is an extensive academic literature about positive action in EU law with a particular focus on women and gender equality issues.[68] The ECJ has had relatively few opportunities to consider the scope of positive action and each has been in the context of

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[64] EED (n 2) art 7(1); proposed GSED (n 15) art 5(1).

[65] EED (n 2) art 7(2).

[66] Proposed GSED (n 15) art 5(2).

[67] Convention (n 10) art 5(4).

[68] See, for example, Catherine Barnard, 'The principle of equality in the Community context: P, Grant, Kalanke and Marschall: Four uneasy bedfellows?' (1998) 57 CLJ 352; Todd Joseph Koback, 'The Long, Hard Road to Amsterdam: Effects of *Kalanke v. Freie Hansestadt Bremen* and the Treaty of Amsterdam on Positive Action and Gender Equality in European Community Law' (1999) 17 Wis Int'l L J 463; Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 Cambridge LJ 562; Lizzie Barmes and Sue Ashliany, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 ILJ 274; Colm O'Cinneide, 'Positive Action and the Limits of Existing Law' (2006) 13 MJ 351; Sacha Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes' (2004) 41 CMLR 533.

gender equality. In its early judgments dealing with positive action the Court interpreted the positive action provisions narrowly, considering them to be exceptions to the principle of equal treatment rather than tools to promote equal treatment.[69] As a result of concerns that these judgements would jeopardise a wide range of domestic positive action programmes, a provision was added in the Treaty of Amsterdam to specify that the principle of equal treatment did not 'prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.[70]

The Court considered the effect of this change in two decisions handled down three months apart in 2000. In the earlier case, the Court was more responsive to the objectives of positive action and allowed a complex programme designed to overcome under representation of women which gave priority to women in situations where male and female candidates had equal qualifications and granting priority was necessary to achieve the objectives of the programme 'provided that that ... the specific personal situations of all candidates' were taken into account.[71] In the later case, the Court affirmed, in substantially the same words, its previous decisions that a programme which gave absolute priority to women would violate the gender equality directive but

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[69] See Case 312/86 *Commission v France* [1988] ECR 6315 in which a variety of special measures for women were held to exceed the scope of what the Court called the exceptions to the equality norm allowing provisions for the protection of women and for measures to promote equality between men and women. See also Case C- 450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-03051 and Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-06363. Both cases dealt with tie-breaker policies which gave preference to the woman when having to choose between 'equally qualified' male and female candidates.

[70] Koback (n 68) 483-485 (art 157(4) TFEU, ex art 141(4) EC).

[71] Case C-158/97 *Badeck and Others v Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-01875, para 38.

one which required a second level assessment of individual circumstances after candidates had been found equally qualified would not.[72]

The Court continued its increased willingness to recognise that the different social reality of men and women justified positive action programmes in order to achieve the objective of equal treatment in a case in which an employer's scheme to respond to extensive under-representation of women provided a limited number of subsidised nursery places only for women. The Court allowed the scheme but only if men 'who take care of their children by themselves have access to that nursery places scheme on the same conditions as female officials'.[73] The Court used the concept of proportionality to require that the programme allow for men in the same real position of having responsibility for child care to access the same benefit. Though, of course, fathers with sole responsibility for their children are not in quite the same position as mothers who have a partner who does not adequately share child care duties. But, it was perhaps the best the Court could do to fit the different social realities of men and women into the legal framework it had built.[74]

Despite some movement towards a substantive equality perspective, the judgements reflect essentially an equal opportunities, formal equality approach. Even though the most recent judgements acknowledge that the social conditions of women and men may differ, they still require that women and men who are 'factually' in similar

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[72] Case C-407/98 *Abrahamsson v Elisabet Fogelqvist* [2000] ECR I-05539, para 44.

[73] Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visseri* [2002] ECR I-02891, para 50.

[74] See also Case C-366/99 *Griesmar v. Ministre de l'Économie, des Finances et de l'Industrie* [2001] ECR I-09383 in which a pension credit for women, but not men, who raised children was held to be invalid to the extent that it did not allow men who could show they had in fact raised children to obtain the same credit and Case C-319/03 *Briheche v France* [2004] ECR I-08807 in which a scheme to permit widows who had not remarried and needed to work access to public sector employment beyond the usual maximum age was precluded to the extent that it excluded widowers who were in the same position.

positions be treated the same.[75] The wording of article 157(4) TFEU – allowing for

measures 'providing specific advantages ... for the underrepresented sex' – is much

stronger than the positive action wording in the EED and proposed GSED – allowing

for 'specific measures to prevent or compensate for disadvantages'. It is arguable that

the Court would take a stricter view of the principle of equal treatment if presented with

a programme giving disabled people specific advantages or priority claims in the

employment context than it has done with gender equality programmes. It may,

however, be equally argued that the Court would focus on the issue of proportionality

and allow special measures which were proportionate to the achievement of the

purposes of the programme. Thus, for example, a quota scheme which by definition

reserves certain jobs for disabled people could be considered proportionate to the need

to provide employment options for disabled people.

Because of the Court's decisions regarding positive action, the question arose

whether employment quotas and special employment programmes for disabled people

might violate the principle of equal treatment. There was sufficient concern that the

Netherlands insisted on a provision in the EED to protect them from challenge.[76] This

provision reads:

> [w]ith regard to disabled persons, the principle of equal treatment shall be
> without prejudice to the right of Member States … [to adopt] measures aimed at
> creating or maintaining provisions or facilities for safeguarding or promoting
> their integration into the working environment'.[77]

A reasonable interpretation of this paragraph is that it specifically protects both

sheltered and semi-sheltered employment programmes as well as employment quota

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[75] The problem with this position is that even when men and women appear to be equally situated they are
not in reality equally situated due to the nature of the patriarchal society.

[76] Richard Whittle, 'The Framework Directive for equal treatment in employment and occupation: an
analysis from a disability rights perspective' (2002) 27 ELR 303, 319.

[77] EED (n 2) art 7(2).

schemes. It seems much clearer in this provision that these programmes are not exceptions to the principle of equal treatment but policy options which are available at the discretion of the Member State which may be used to achieve full equality in practice. It seems that the general positive action clause could be used for public or private sector employment programmes (as well as for programmes dealing with the provision of goods and services under the equivalent clause in the proposed GSED) which are designed to prevent or compensate for disadvantage based on disability while programmes which give a distinct advantage to or are restricted to disabled people would be permitted under the disability specific clause.

CDT aims to promote social inclusion. A key consequence of adopting the social model of disability is that disability policy must be based on rights which means that segregated or special facilities for disabled people are, in general, not appropriate policy instruments. Assuming the motivation for adding this clause was to protect sheltered and semi-sheltered employment programmes and employment quota schemes, this provision supports, if not encourages, the continued use of these policy instruments which do not fit the CDT rights based approach to achieving equality. As discussed in chapter two, for CDT the purpose of the equality norm is to promote social inclusion. This is a form of substantive equality which looks to the impact of a particular policy on the social situation of the claimant and allows for differences in treatment where that does in practice promote social inclusion or reduce social disadvantage. With respect particularly to quota schemes, the theory behind the rights based approach is that prohibiting discrimination based on disability will lead to equality in employment.

Quota schemes are an ineffective and inappropriate social welfare policy which increase social exclusion and replicate conditions of disadvantage.[78]

A similar provision, but one which is more reflective of the 'specific advantages' language of the TFEU gender equality provisions, is found in the proposed GSED. This specifies that the principle of equal treatment

> shall be without prejudice to the right of Member States to maintain or adopt more favourable provisions for persons with disabilities as regards conditions for access to social protection ... and certain goods or services ... in order to promote their economic, cultural or social integration.[79]

This clause appears to allow for more favourable treatment of disabled people. However, in addition to the objection that differential but more beneficial treatment is inconsistent with the equal rights approach to disability policy, it is important to ensure that this does not morph into a form of 'separate but equal' provision of services.

These provisions recognize that specific measures designed to promote equality for disabled people may be necessary to increase the pace of change which may be expected simply from the implementation of anti-discrimination law. They are permissive, allowing Member States to make provision for such programmes by public and private actors but not imposing any duty to do so.

The EED has one further disability specific clause under the positive action heading which allows Member States 'to maintain or adopt provisions on the protection of health and safety at work ...'.[80] It is unclear whether this provision is intended to protect disabled workers from themselves or to protect other workers from their disabled colleagues. Considering the duties imposed on employers under the 1989

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[78] See generally Lisa Waddington, 'Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws' (1996) 18 Comparative Labour Law Review 62, 63-70.

[79] Proposed GSED (n 15) art 5(2). This may be to compensate for deleting 'social advantages' from the scope of the directive which appeared in the Commission's first draft (n 3).

[80] EED (n 2) art 7(2).

framework Health and Safety Directive,[81] the special mention in the EED of authority to adopt provisions for health and safety at work betrays uncertainty about how equal disabled workers can be. It is clear that this provision has the potential for perpetuating stereotypes about and paternalist attitudes toward disabled workers. All work has inherent risk to all employees. A careful balancing of risk factors including the probability and magnitude of the risk and who is likely to bear the burden of the risk (recognising the right of disabled workers to accept a reasonable risk of injury to themselves) is required to ensure that the equal treatment norm is not minimized by the moral imperative of reasonable consideration for others.

(iv)   *Conclusion on the conception of equality in EU law*
The formal equality paradigm, with its central concern for consistent treatment, is the primary orientation of Union law. There are, however, clear indications that substantive equality principles are influencing the interpretation of the personal equality directives. While the EED and proposed GSED reflect a formal conception of equality, they also contain provisions reflecting substantive equality. Furthermore, there are increasing indications that the ECJ is becoming more willing to take a substantive approach to equality, particularly evidenced in cases dealing with positive action for women. As well, the heightened emphasis on fundamental rights as a result of the adoption of the Lisbon Treaty suggests that the personal equality directives may increasingly be interpreted through a lens of substantive equality.

The prohibition of direct discrimination in the two directives responds to instances which violate the formal equality norm. Direct discrimination occurs when, due to bias, paternalism, stereotyping or combinations of these factors, a respondent

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[81] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

treats a person differently and adversely based on a prohibited ground. The prohibitions related to harassment and victimisation may be included as types of direct discrimination because the impugned action is directly related to the prohibited ground.

The directives also contain several elements which appear to advance a substantive conception of equality. First, the prohibition of indirect discrimination reflects a concern with substantive equality. A revolutionary development when first developed by the ECJ and still a concept with which a number of Member States' courts have difficulty,[82] the prohibition of indirect discrimination responds to instances where apparently neutral provisions put, or would put, persons with a protected characteristic at a particular disadvantage compared to others. This responds to many of the structural barriers throughout employment and service systems which reproduce patterns of disadvantage. It reflects a substantive approach to equality since the inquiry is focused on the impact of the impugned policy or practice on the actual situation of the complainant.[83] Another example is the direction in the directives that the purpose of positive action is 'to ensure full equality in practice' which leads to the presumption that the equality value advanced by positive action measures is increased social inclusion, which reflects substantive equality rather than just formally equal treatment.[84] Substantive equality is also reflected in the provisions requiring reasonable accommodation and imposing a duty to 'take the necessary and appropriate measures to ensure' disabled persons equality of access to goods and services.[85]

Interpreting the principle of equal treatment within the paradigm of formal equality promotes an equal opportunities, rather than an equal outcomes, conception of

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[82] Alexander Somek, 'A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law' (1999) 5 ELJ 243, 254-256; Prechal (n 68) 535-536.

[83] See, for example, Prechal (n 68) 537.

[84] EED (n 2) art 7; proposed GSED (n 15) art 5(1).

[85] EED (n 2) art 5; proposed GSED (n 15) art 4.

equality.[86] The tenacity of the formal equality paradigm can be seen when the ECJ, even while acknowledging that 'the aim [of the positive action provision of the 1976 Gender Equality Directive] is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society,' held that this was to be done by 'improving [women's] ability to compete on the labour market and to pursue a career on an equal footing with men'.[87] Colm O'Cinneide has commented that the ECJ 'appears to oscillate between approaches rooted in formal equality, and others that are based to some degree on substantial equality, social inclusion or group rights theories'.[88]

A thinner form of substantive equality can be seen as a stronger mechanism to achieve an equal opportunities environment whereas a thicker form of substantive equality can promote more of an equal outcomes, socially inclusive, result. Positive action, for example, may be limited to special outreach measures to a disadvantaged community with the expectation that if more members of that community are invited to compete for jobs more of them will get jobs. More contentious positive action measures involve quotas, preferences, and reserved jobs which reflect a determination to ensure members of targeted disadvantaged groups are employed in greater numbers or until their workforce representation is equal to a pre-determined comparison group, typically white, able-bodied men.

It is still too early to make any definitive statement about how the ECJ will respond to the increased prominence of equality rights reflected in the constitutionalisation of the Charter of Fundamental Rights and Freedoms,[89] the treaty

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[86] See, for example, *Kalanke v. Freie Hansestadt Bremen* (n 69) para 23, where the Court held that 'in so far as [the impugned policy] seeks to achieve equal representation of men and women … such a system substitutes for equality of opportunity … the result which is only to be arrived at by providing such equality of opportunity'.

[87] *Briheche v France* (n 74) para 25.

[88] O'Cinneide (n 68) 356.

[89] In two recent judgments the ECJ relied on the Charter to partially annul secondary legislation which it

commitment to accede to the European Convention on Human Rights and the direction in the TFEU that in all its activities 'the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. However, given the general trend towards increased application of substantive equality approaches and the specific provisions in the directives which clearly promote substantive equality, it is reasonable to expect that the court will gradually modify its approach to give greater prominence to the need to respond to differences in social situations when interpreting the equality directives. Of particular note in this regard for disabled people is the potential influence of article 26 of the Charter which declares 'the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.

4. *Conception of Disability Applied in the Directives*

As discussed in chapter three, the limitations of the medical model, which locates disability in an individual's impairment, led to the development of social models of disability which take account of impairment and the social environment. A combination of medical and social models has come to dominate public policy related to disability. The EU transition from a substantially medical model to a form of social model was described in chapter four. This model is reasonably consistent with the CDT conception of disability which sees disability occurring at the intersection of impairment, psychological response to that impairment and the social environment.

Social models allow for highly contingent definitions of disability for the purposes of implementing social programmes in which the definition of disability

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found to violate rights protected therein: Joined Cases C-92/09 and C-93/09 *Volker & Eifert v Land Hessen* [2010] ECR I-000.

depends on the objectives of the programme. A person who is reliant on a wheelchair may be considered disabled for the purposes of access to a para-transit system but not for the purposes of accessing publically funded personal care attendant services. A person with a learning disability such as dyslexia may be disabled for the purpose of accessing a publically funded educational support programme but not for the purpose of a supplementary allowance programme under a social assistance scheme. It is, in effect, impossible to propose a definition of disability without knowing the purpose of the definition. The EED and proposed GSED declare their purpose to be a framework for combating discrimination on various prohibited grounds including disability 'with a view to putting into effect in the Member States the principle of equal treatment'. The definition of disability in the directives should, therefore, be broad enough to respond to the various ways in which discrimination manifests itself. This section looks at how the ECJ has interpreted the concept of disability in the EED, how that interpretation might change and how it fits with CDT's conception of disability.

The EED, following the pattern of the other equality directives, does not provide any definition of disability. Member States have adopted a wide range of definitions for the purposes of their anti-discrimination legislation (both pre-existing the EED and in transposing the directive) ranging from strict medical models through to broadly based social models and with some Member States providing no legislative definition.[90] It was against this diversity among the Member States that the ECJ, in its first substantive decision on the disability provisions of the EED, was presented with the issue of the definition of disability.[91] Briefly, the facts were that in October 2003 Sonia Chacón

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[90] Lisa Waddington, 'Implementing the Disability Provisions of the Framework Employment Directive: National Options and Choices' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005).

[91] *Chacón Navas v Eurest Colectividades SA* (n 53). The discussion draws upon David L. Hosking, 'A High Bar For EU Disability Rights: *Chacón Navas v Eurest Colectividades SA*, (Case C-13/05)' (2007)

Navas became unable to work and began receiving temporary incapacity benefits. She was dismissed without notice in May 2004. In Spanish law a dismissal because of disability is 'void' and the employee is entitled to 'immediate reinstatement' and back pay but if a dismissal is otherwise 'unlawful' the employee is only entitled to compensation. By the time of the domestic hearing into her challenge to her dismissal in September 2004 she was still unfit and 'it was not envisaged that she would return to work in the short term'.[92] Throughout the case, all the parties described Chacón Navas's dismissal as having been based on 'sickness' and the question referred to the ECJ was whether sickness was subsumed into the concept of disability for the purposes of the EED.[93]

Advocate General Geelhoed premised his analysis on a 'restrained interpretation and application of Directive 2000/78' which he argued was appropriate given the legislative history and the wording of article 19 TEFU (ex art 13 EC), the wording and content of the directive, the potentially 'far-reaching economic and financial consequences' of the prohibition of discrimination based on disability and the balancing of interests which is reflected in the numerous qualifying provisions of the directive.[94]

The court began its analysis by noting that where Community law makes no express reference to national law to guide its interpretation it 'must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and [its] objective'.[95] The Court noted the EED's purpose is to lay down a framework for combating discrimination on any of the listed grounds in

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36 ILJ 228.

[92] Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467, Opinion of AG Geelhoed, para 22.

[93] The Court rejected the argument that sickness could be added as a ground to the directive on the basis that the list of prohibited grounds was exhaustive.

[94] *Chacón Navas* (n 92) paras 51-56.

[95] *Chacón Navas* (n 53) para 40.

employment and occupation. Later the court referred to the objective as being 'to combat certain types of discrimination' and baldly declared:

> 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 [and which will] ... probab[ly] ... last for a long time.[96]

The Court reasonably argued that disability should not be interpreted as synonymous with sickness. However, it provided no additional guidance on how to separate the two concepts beyond the idea of duration - the directive does not protect workers 'as as soon as they develop any type of sickness'.[97]

All parties to this case described Chacón Navas's dismissal as having been based on 'sickness'. The Court provided no analysis of how a condition that made her unfit for work for eight months and even then she was not ready to return to work 'in the short term' and required an operation yet to be scheduled should be described as a sickness. The judgment implies that having been labelled as sick she could not also be disabled for the purposes of the directive. Lacking any details about her medical condition, it would have been more appropriate for the Court to have given its definition of disability and then let the Spanish court determine if her medical condition met that definition. It may be that one consequence of the judgment is that semantics could determine whether a person is covered by the directive or not.[98]

Despite the Advocate-General's references to the social model, neither he nor the Court examined the possibility that that model might better respond to the social problem at which the directive was aimed. It is likely that the Court's definition is not capable of encompassing discrimination because of past disability, commonly

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[96] ibid paras 43 & 45.
[97] ibid para 46.
[98] Hosking (n 91) 232-233.

experienced by, for example, those who have had a mental illness, or perception of disability, commonly experienced by people with asymptomatic impairments that employers fear may impose costs in the future. In both of these circumstances, the individual who was adversely treated could easily be, and should be, included within the category of disabled for the purposes of anti-discrimination legislation.

The current conception of disability as used in the EED is a narrow and minimalist interpretation of disability based on the medical model. The second part of this section looks to the future and considers the possibilities the Court will take a more inclusive view of disability when next it is called upon to consider the issue.

There are social, economic, legal and political pressures which may bring about a modification of the Court's interpretation of disability making it more consistent with the social model which is applied in the EU's disability policy as described in chapter four. But there are also countervailing pressures which may restrain the Court from a wholesale jump to the social model and its conception of disability. Speculating on the reasons the Court adopted such a narrow interpretation of disability in *Chacón Navas,* it may be that the Court was cognisant that non-discrimination legislation is only one part of national disability policy and, mindful of the principle of subsidiarity, the Court felt that it should not impose a conception of disability which would be much broader than that which is used in most of the Member States. The Court's definition accords with the most restrictive national definitions while at the same time being fully encompassed within more the inclusive definitions found in some Member States.[99] Against these considerations, there are influences which should encourage the Court to take a more expansive view of the meaning of disability. The three which will be discussed in the following pages are the value based approach to interpreting the ground of disability

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[99] ibid 237.

taken in *Coleman v Attridge Law*,[100] the EU's ratification of the UN Convention and provisions of the proposed GSED which support a broader interpretation for that directive which would almost certainly be reflected the next time the Court considers the disability provisions of the EED.

The issue in *Coleman*, the Court's second decision respecting the ground of disability, was whether the protection against discrimination because of disability extended to discrimination because of an association with a person with a disability. Sharon Coleman was the primary care giver to her newborn infant who was disabled and required specialised care. Upon her return to work after her maternity leave, she alleged her employer discriminated against her because of her child care responsibilities in comparison to women who had children without disabilities by, for example, not allowing her to return to the job she had before she went on maternity leave and refusing to grant her the same flexibility in working arrangements as others with non-disabled children and by harassing her by, for example, calling her 'lazy' when she attempted to take time off to care for her child. Although the judgement did not examine the scope of the ground, the reasoning behind the decision is markedly different from that in *Chacón Navas*.

Advocate General Poiares Maduro began his analysis by noting that the interpretation of the directive must be consistent with the goals of article 19 TFEU (ex art 13 EC), namely to put into effect the principles of equal treatment and non-discrimination. He identified the values underlying the principle of equal treatment as human dignity and personal autonomy. Discrimination demeans a person's human dignity and undermines personal autonomy.[101] He went on to argue that the human

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[100] Case C-303/06 *S. Coleman v Attridge Law & Steve Law* [2008] ECR I-5603.

[101] See generally Lisa Waddington, 'Case Comment Case C-303/06 *S. Coleman v Attridge Law & Steve Law*' (2009) 46 CMLR 665; Tim Connor, 'Discrimination by association: a step in the right direction'

dignity and personal autonomy of people who are members of a group protected by

article 13, as it then was, may equally be undermined by targeting not them 'but third

persons who are closely associated with them and do not themselves belong to the

group' and that a 'robust conception of equality entails that these subtler forms of

discrimination should also be caught by anti-discrimination legislation'.[102] He argued

that it is the use of any of the grounds listed in the directive to treat an employee

wrongfully that attracts the protection of the directive: 'The directive operates at the

level of grounds of discrimination. The wrong that it was intended to remedy is the use

of certain characteristics as grounds to treat some employees less well than others'.[103]

The Court, without commenting on the AG's analysis of the values protected by

the directive, also focused on the prohibition against using one of the listed grounds as a

basis for treatment. The Court noted the references in the directive to discrimination and

harassment 'on the grounds of religion or belief, disability, age or sexual orientation'

and declared, '[c]onsequently, it does not follow from those provisions' that the

directive is limited to people who are themselves disabled.[104] The Court then held:

> the purpose of the directive, as regards employment and occupation, is to combat
> all forms of discrimination on grounds of disability. The principle of equal
> treatment enshrined in the directive in that area applies not to a particular
> category of person but by reference to the grounds mentioned in Article 1.[105]

The *Coleman* decision, reflecting a broader understanding of how discrimination

based on disability is manifest, suggests that the Court may move toward a more

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(2010) 32 Journal of Social Welfare and Family Law 59. For a discussion of the liberal basis for the
AG's opinion and how the judgement fails to take account of the value of caring itself see Ann
Stewart, Silvia Niccolai and Catherine Hoskyns, 'Disability Discrimination by Association: A Case of
the Double Yes?' (2011) 20 Social & Legal Studies 173;

[102] Case C-303/06 *S. Coleman v Attridge Law & Steve Law* [2008] ECR I-5603, Opinion of AG Poiares
Maduro, para 12.

[103] ibid para 22 (italics in original).

[104] *Coleman* (n 100) para 38.

[105] ibid.

inclusive conception of disability. In future cases the Court may, as the AG did in this case, emphasise the underlying values of protecting human dignity and personal autonomy. Such an approach could lead to an interpretation of disability which better responds to the ways in which disabled people experience discrimination such as adverse treatment based on a past temporary disability which carries a continuing stigma or an asymptomatic impairment because the employer fears it will become a disability in the future.[106] Support for this value based approach to interpreting the directives may be found in the higher profile accorded to both the EU Charter of Fundamental Rights and the European Convention on Human Rights with the adoption of the Lisbon Treaty.

A second influence which may lead the Court to revisit its interpretation of disability is the EU's ratification of the UN Convention.[107] The Commission was a fully engaged negotiating partner throughout the drafting of the Convention which was adopted by the General Assembly in December 2006.[108] During the negotiations a great deal of debate took place over whether to include a definition of disability because of the difficulty in finding agreement on what a suitable definition would entail. In the end, a paragraph was added to Article 1, 'Purpose', which provides that 'persons with disabilities':

> include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[109]

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[106] After *Coleman* (n 100) the proposed GSED (n 15) was amended by the addition of a prohibition against direct discrimination and harassment by association on any of the prohibited grounds: arts 2(1)(f) & (2)(e).

[107] Council, 'Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC)' [2010] OJ L 23/35. The instrument of ratification was deposited in December 2009.

[108] See Gráinne de Búrca, 'The European Union in the Negotiation of the UN Disability Convention' (2010) 35 ELR 174.

[109] UN Convention (n 10) art 1 para 2.

It is worth noting that this description of disability is not included in the immediately following article which sets out various definitions of words used in the Convention.

In the Commission's proposal to Council that the EU sign the Convention, it took the view that the judgement in *Chacón Navas* was consistent with this paragraph: 'Disability is defined against a set of criteria which both reflect the social model of disability and the recent ECJ jurisprudence on the definition of disability (case C-13/05)'.[110]

Lisa Waddington has argued that *Chacón Navas* is not consistent with the Convention paragraph, arguing that the Convention 'embraces the social model and recognizes both the role of impairments and their interaction with society in creating disability'.[111] It is, however, equally arguable that they are consistent as the Convention paragraph can be interpreted through either a medical or social model lens. A medical model lens would emphasise the issue of impairment in the Convention paragraph whilst a social model lens would emphasise the issue of barriers. Persons with long term impairments are likely to be hindered in their participation in their society due to various barriers, whether social, environmental or institutional. The possibilities for a restrictive interpretation of disability based on the Convention paragraph include the length of 'long term', the degree of severity of the impairment, whether a barrier will be ignored or even not recognized, and whether fully compensating aids (e.g. eye glasses, drugs) negate the designation of disabled. Who else might be included in a definition of disability is left to the States Parties allowing the EU to expand on the Convention paragraph as it sees fit. While recognising that the Convention paragraph can support

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[110] Commission, 'Proposal for a council decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol' COM(2007) 77, 2.

[111] Lisa Waddington, 'Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006' (2007) 44 CMLR 487, 498.

both a medical and social model interpretation of disability, the rest of the Convention with its strong emphasis on the inherent dignity, autonomy and independence of disabled people, non-discrimination, social inclusion, respect for difference, equality of opportunity and accessibility provides strong support for an expanded EU definition which can adequately respond to the many different forms of disability discrimination.

Although the EU's signature to the Convention in March 2007 did not lead the Commission to include a definition of disability in its July, 2008, proposal for the GSED, the legislative history of that proposal to date is a third influence encouraging a more expansive interpretation of disability the next time the Court addresses the issue. The European Parliament, in its resolution on the Commission proposal under the consultation procedure, proposed an amendment which would add the clause '"disability" is to be understood in light of the UN Convention on the Rights of Persons with Disabilities and persons with chronic diseases are included'.[112] This formulation suggests the same level of uncertainty about an appropriate definition of disability for non-discrimination legislation was present in the European Parliament as in the UN. The need to specify that persons with chronic diseases are included in the idea of long-term impairment reflects how indeterminate the concepts in play are.

In the most recent consolidation of Council's deliberations on the proposed GSED a new recital has been added which quotes in its entirety the Convention paragraph.[113] Its location in the introductory recitals means that it is not of binding force on the Court but it does provide a point of reference in support of a more expansive interpretation of disability were the Court to be so inclined.

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[112] European Parliament resolution (n 14) amendment 55.
[113] GSED (n 15) recital 19a.

The interpretation of disability for the purposes of the EED and the proposed GSED is in a state of flux. The Court's interpretation in *Chacón Navas,* based on a medical model, does not support efforts to achieve many of the objectives of the directives. A strictly medical conception of disability cannot respond to the full range of social manifestations of disability discrimination because it focuses on an individual's impairment instead of the obstacles in the social environment which limit the opportunities of disabled people. There are, however, a number of influences which may lead the Court to take a broader view of the scope disability as a ground. These include the persuasiveness of the value based approach the AG took in his *Coleman* opinion, the ratification by the EU of the Convention and indications that the Convention's definition will be included in the proposed GSED which may have an influence on the interpretation of its companion directive.

The CDT conception of disability, in contrast to the Court's conception in *Chacón Navas*, requires anti-discrimination legislation to utilise a definition of disability which includes those who are excluded due to bias against and stereotyping of disabled people as well as those excluded by a social environment which does not accommodate their needs. Three key influences have been identified which may encourage the Court to take a broader view of the meaning of disability in equal treatment directives. A value based approach to interpretation combined with an appreciation of the overarching themes of the UN Convention of human dignity and personal autonomy would provide a solid foundation for the Court to provide an interpretation of disability which would allow the equal treatment directives to achieve their purpose.

5. *Conclusion*

The purpose of the EED and the proposed GSED is to combat discrimination with the view to putting into effect the principle of equal treatment. CDT acknowledges the benefits of legal rights enforceable through the courts while recognizing the inherently contingent nature of the judicial process. In this chapter, after setting out an overview of the directives, the extent to which the two directives reflect the CDT approach to disability has been assessed in relation to the CDT conceptions of equality and disability.

The EED prohibits direct and indirect discrimination as well as harassment and instructing a person to discriminate in the fields of public and private employment, vocational guidance and training, membership and involvement in organisations of workers or employers as well as self-employment and occupation. Disabled people may be excluded from a position where lack of disability (or lack of the person's particular disability) is a genuine occupational requirement or based on an apparently neutral policy or practice which puts the person at a particular disadvantage which can be objectively justified and reasonable accommodation is not possible. In order to comply with the principle of equal treatment, employers must provide reasonable accommodation for disabled persons unless to do so would impose a disproportionate burden.

The proposed GSED would prohibit direct and indirect discrimination, harassment and instructing a person to discriminate in the provision of a wide range of goods and services in both the public and private sectors. It would also treat failure to provide reasonable accommodation as a form of discrimination and prohibit direct discrimination and harassment by association. Sensitive to the predominate role that the

Member States have in this area, the proposed directive contains numerous limitations and exceptions to the general principle of equal treatment.

The ECJ is strongly inclined to apply a formal conception of equality to the interpretation of the principle of equal treatment. Despite this tendency, the Court has increasingly been sensitive to differences in the actual social condition of disadvantaged groups. This trend together with the provisions of the directives which clearly call for application of a substantive model of equality suggest that the Court will in future be more receptive to interpreting the directives in ways which promote substantive equality.

The two directives allow for Member States to take special measures 'to prevent or compensate for disadvantage linked to' a prohibited ground of discrimination. To date the ECJ has only considered this type of positive action in the context of gender equality. Despite some indications in the more recent cases that the Court is moving towards a substantive conception of equality which better reflects the differences in the social conditions of women and men, to head off concerns about the scope of permissible positive action and to ensure the continuation of programmes which specifically target disabled people such as sheltered and semi-sheltered employment the directives have additional clauses which clarify that the principle of equal treatment does not prejudice these special programmes. Since CDT champions a conception of equality which reflects and supports diversity and the equal rights of disabled people, these special provisions for continued segregation and special treatment are problematic. Provision for reasonable accommodation and a serious and funded commitment to the progressive realisation of a barrier free society would be a much preferable way forward.

In its first case dealing with disability, the ECJ interpreted the term 'disability' in the EED through the lens of the medical model of disability.[114] CDT recognizes the contribution of impairment to disability but holds that disability is actually a complex combination of individual impairment, psychological response to that impairment and the social environment. The Court's restrictive interpretation of disability means that a great number of people disadvantaged by disability will not be able to claim the protection offered by the directives. The judgment leaves unprotected those who experience disadvantage because they are thought to be disabled or feared to become disabled in the future, who experience the sigma of past disability, particularly of concern with mental disability issues, and those with short term (or short term but recurrent) disabilities.

Any definition of disability is informed by the objectives of the programme to which the definition applies. The mischief which anti-discrimination law in a liberal legal regime aims at should be unequal treatment arising from stereotypes, stigma or bias or barriers to participation which exist due to inaccessible infrastructure and failure to accommodate differences that are not relevant to the activity in question. If those are the objectives of the directives' prohibition against discrimination because of disability, then the social model, which is more able to reveal the ways in which disability discrimination manifests itself, can inform a more appropriate definition of disability to achieve those objectives.

The Court in *Chacón Navas* focused on the issue of who is disabled, and thus entitled to claim protection from discrimination, rather than the mischief which the directive is intended to address. Given the Court's progressive judgment in *Coleman*[115]

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[114]   *Chacón Navas v Eurest Colectividades SA* (n 53).
[115]   *S. Coleman v Attridge Law & Steve Law* (n 100).

and the EU's ratification of the UN Convention, it is likely that this limited interpretation of the term disability will be significantly broadened the next time the Court has the opportunity to visit this issue.

In summary, the conception of equality applied to the directives does not fit with that of CDT very well. It tends to the formal and the potential for a much more substantive approach has not yet been demonstrated. Similarly, the conception of disability is a narrow, medical model approach which does not reflect the CDT social model. While there is the potential for it being modified into a more inclusive social model approach, at this time there is no solid indication that this potential will be realised. To maximise the benefits of the directives, the Court will need to take a purposive and broadly inclusive approach which will require a broader interpretation of disability, a reorientation from the formal to a substantive conception of equality, a generous reading of the duty to provide reasonable accommodation and allow the Member States a wide margin of appreciation in the design of special measures to promote equality for disabled people.

Despite concerns about the capacity of legal rights to support social transformation, these directives, when properly transposed into domestic law and effectively interpreted and enforced by national courts, have the potential to make a real and sustained contribution to increasing the degree of social inclusion of disabled people especially in those Member States which do not have a history of such legislation.

The primary means of implementing the equal treatment rights protected by the directives is through individuals who believe themselves to be victims of discrimination initiating complaints through their national judicial/administrative systems. The limitations of this individual rights based approach to equality has been extensively

explored in the literature.[116] Member States are required to bring the directives to the attention of the public and to promote dialogue between the social partners and with non-governmental organisations and other stakeholders which have 'a legitimate interest in contributing to the fight against discrimination'. These provisions go some way to implementing the EU's obligations under the UN Convention to consult with and actively involve disabled people in the development of disability policy, raise awareness of disability issues, combat stereotypes and prejudices and promote awareness of the capabilities and contributions of disabled people.[117] If these soft law measures, which are well represented in the EU's disability strategy as discussed in chapter four, are actually implemented at the European and domestic levels they should, in combination, be an effective complement to the judicial/administrative individual enforcement process.

While recognizing the potential of non-discrimination legislation, it is often not the best and certainly not the only way to pursue an equality agenda for disabled people.[118] Much of the social disadvantage experienced by many disabled people is the consequence of barriers to their equal participation in their communities which continue to exist because societal neglect and lack of political influence perpetuate an inhospitable social environment and insufficient provision of resources. Responding to these sources of inequality requires resort to a broad range of social welfare legislation and programming. The directives' contribution to equality for disabled people is to

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[116] See, for example, Philip Alston and J. H. H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy' (1998) 9 EJIL 658, 668; Whittle, 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective' (n 76) 317; Bell and Waddington, 'Reflecting on inequalities in European equality law' (n 39) 351; Sandra Fredman, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005) 599.

[117] UN Convention (n 10) arts 4(3) & 8.

[118] Jerome E. Bickenbach, 'Disability and Equality' (2003) 2 JL & Equal 7, 12. See also Schiek (n 37) 299 and Bell and Waddington, 'Reflecting on inequalities in European equality law' (n 39) 351.

establish a minimum non-discrimination norm in Union law: they do not purport to respond to inequality caused by distributive injustice. As such, the rights based policy response to disability implemented through non-discrimination legislation must be seen 'as playing an essential, but limited, role in the equality agenda.'[119] In the following chapter, three areas of law and policy, the European social fund, transport policy and the social inclusion OMC, which take a variety of other approaches to promoting equality for disabled people, are explored.

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[119] Bickenbach (n 118) 13.

Chapter VI

A Critical View of Disability in Three Areas of EU Law and Policy

1.   *Introduction*

A core feature of a rights based approach to disability is legislation prohibiting discrimination which incorporates a duty to provide reasonable accommodation where required to implement the principle of equal treatment. The examination of the EU equality directives in chapter five concluded that non-discrimination law is a necessary but not complete response to the social exclusion of disabled people. In this chapter a critical view is taken of three areas of law and policy which are of particular relevance to the interests of disabled people which illustrate the application of a variety of alternative equality promoting policy instruments. These areas are the European Social Fund (the 'ESF' or the 'Fund'), transport policy and the Social Protection and Social Inclusion Open Method of Coordination ('social OMC'). The objective of the chapter is to examine to what extent the CDT approach to disability is reflected in these areas of law and policy. This will be done by assessing them against five core themes of CDT.

First, to what degree is disability visible within the EU policy? As discussed in chapter two, CDT centres disability and, therefore, analysis of any social policy requires assessing the visibility of disabled people in that policy. Whether disability is specifically mentioned in the relevant EU documents has a direct impact on the likelihood that disability issues will be adequately taken into account in the implementation of that policy area at the EU level and when the policy is activated within the Member States. Disability need not have a standalone status in order to ensure that disabled people benefit from a programme, but the absence of specific mention in foundation documents frequently results in their being passed over and

forgotten amongst the other competing priorities. Often, explicitly linking disabled people with other categories of vulnerable or marginalised people will provide additional political support for policy initiatives leading to significant, positive social change for disabled people and the other groups. Frequently, these linkages respond to multidimensionality concerns as disability and other group characteristics combine in a variety of forms of oppression.

Second, to what degree does the policy area apply the CDT social model of disability? As discussed in chapter three, the medical model locates disability in the impairment of the individual and addresses disability issues by policies of treatment, rehabilitation and alternative, usually segregated, remedial or compensatory programmes. The social model, in contrast, locates disability in the social environment and, in some of its varieties, denies any role for impairment in the analysis of disability. For CDT, disability is located at the intersection of impairment, the individual response to that impairment and the social environment. The model of disability applied in a policy area affects the potential scope of the programme, which aspects of disablement the policy deals with and who benefits.

Third, to what extent are disabled people equal participants in programme development and implementation. Participation is essential to ensure that the voices of disabled people are heard and that programmes adequately reflect the diversity within the disabled community and take account of the multidimensionality of the disabled experience.

Fourth, to what extent does the policy area reflect the CDT notion of equality? The CDT conception of equality, discussed in chapter two, is a form of substantive equality which acknowledges and welcomes diversity. Union law, as discussed in chapter five, is very much focused on a liberal, or formal, conception of equality with

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minimal concessions to political and legal pressures to adopt a substantive approach to equality. To some extent, law and policy within a policy area may diverge in this regard. The more the policy area relies on the classic 'Community method' of legislating, the more a formal, liberal conception of equality will hold sway. Where policy is implemented through new governance mechanisms there is greater potential for a substantive conception of equality to guide policy development and implementation.

Fifth, and lastly, what is the potential for the law and policy of each policy area to transform the lives of disabled people? The purpose of the CDT approach is to transform society so as to maximise the social inclusion of disabled people not merely to promote equal treatment by the elimination of bias and stereotyping. The ways of doing things from the organisation of work, what children are taught and how they are educated through to the building of the physical infrastructure must be significantly modified to accommodate the diversity of disability.

The ESF was selected because employment is a primary mechanism to promote the social inclusion of disabled people. In addition to inclusion in the social institution of work itself, which is a significant site of social interaction, with employment comes the money which allows for the choice to take part in the social, cultural and political opportunities offered in one's community. Disabled people have lower labour market participation rates as well as higher unemployment and under-employment rates and higher long-term unemployment rates than many other social groups across the EU.[1]

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[1] See, for example, Commission, *The employment situation of people with disabilities in the European Union* ; Commission *Study of Compilation of Disability Statistical Data from the Administrative Registers of the Member States* APPLICA & CESEP & European Centre; Bent Greve, 'The labour market situation of disabled people in European countries and implementation of employment policies: a summary of evidence from country reports and research studies' Academic Network of European Disability experts (ANED) 2009 <http://www.disability-europe.net/en/themes> accessed 20 March 2011.

The ESF is the largest financial instrument to implement the employment and social policies of the Union, with an annual budget in the order of €10 billion and with some 8.5 million people a year benefiting from ESF programmes.[2] The ESF provides co-financing along with the Member States for vocational training, counselling and other support to increase the employability of people who are unemployed, under-employed, first entering the labour market as school leavers and re-joining the labour force after, for example, injury or child care responsibilities.

European transport law and policy was chosen because transportation is an essential aspect of social inclusion. The employment of disabled people is directly affected by options for transportation to and from the job: without accessible transport disabled people cannot get to political, social or cultural activities in their communities. The role of the EU in transportation policy is very different from its role in employment policy through the ESF or its role in social policy through the social OMC. Although the founding treaties provided for a European transport policy, its parameters are very much constrained by the limited competences of the Union. The policy instruments by which the EU influences transportation policy include financial supports, the classic 'Community method' of directly legislating for disability rights and indirectly influencing the physical transportation infrastructure by means of internal market legislation.

The social OMC has been selected as the third policy because it deals with a wide range of social policy sectors relevant to disability. The objectives of this OMC are 'to promote social cohesion and equal opportunities for all through adequate, accessible, financially sustainable, adaptable and efficient social protection systems and social

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[2] Commission, *Progress: The EU programme for employment and social solidarity 2007-2013* (OOPEC 2007) 8.

inclusion policies'.[3] It aims to complement the Union's economic strategy and to strengthen governance and the involvement of stakeholders in the design and implementation of social policy. The OMC is an approach which relies on the full range of new governance instruments to the exclusion of the classic 'Community method'. This OMC also presses against the edges of Union competences and significant domestic forces align to resist EU initiatives. The OMC extends beyond employment and the labour market and thus is relevant to all those disabled people who are not, and who are not going to be, part of the labour market.

2. European Social Fund

The first part of this section provides a brief overview of the purposes of the ESF[4] and the primary principles governing its implementation. The second part examines the Fund to assess the extent to which it reflects the key themes of CDT as itemised in the introduction to this chapter.

(i)   Evolution of the ESF

The ESF has been an integral part of the European project since its beginning. Recognising that not all regions nor all social groups would benefit equally from the then new European Economic Community, the founding Treaty provided for a fund which aimed to 'improve opportunities of employment of workers' and 'contribute to raising the standard of living' by promoting 'employment facilities and the geographical and occupational mobility of workers'.[5] The Fund, which became operational in 1960, supported the re-employment of displaced workers through occupational re-training and

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[3] Commission, 'Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union' COM (2005) 706 final 5.

[4] Provision for the Fund is found in Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereafter TFEU) art 162 TFEU (ex art 146 EC). The current wording first appeared in art G(34) of the Treaty Establishing the European Community (Maastricht 1993).

[5] Treaty Establishing the European Economic Community ('the EEC Treaty' 1957) art 123.

provision of resettlement allowances when it was impossible to continue employing them in their previous occupation. Assistance was conditional on the beneficiaries being employed in a directly training-related new occupation for at least 6 months.[6] The Fund was also used, particularly in West Germany, to retrain people injured at work so they could return to the labour force.[7] Robert Geyer described the Fund in its early years as 'a mixture of market-enhancing strategies, indirect redistribution and mechanisms for encouraging labour to view the common market strategy more positively.'[8]

Since its inception, the Fund has undergone seven major reforms, the most recent of which was in 2006.[9] These changes have focused on three themes: adjustments to the balancing of the Commission's and Member States' relative authority and control, adjustments to the emphasis of the Fund between social cohesion and social exclusion objectives and increasingly trying to focus expenditures on the most needy regions and social groups.

Today, the ESF operates within the general framework of the Union objective of strengthening its economic, social and territorial cohesion, in particular by aiming to reduce 'disparities between levels of development of the regions and the backwardness of the least favoured regions'.[10] The ESF and the European Regional Development Fund (ERDF) are the two programmes making up the Structural Funds.[11] The Cohesion Fund is the third fund supporting the economic and social cohesion objectives of the Union.

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[6] ibid art 125.

[7] Commission, *European Social Fund: 50 years investing in people* (OOPEC 2007) 11.

[8] R. Geyer, *Exploring Europen Social Policy* (Polity 2000) 134.

[9] For a detailed study of the numerous changes to the ESF up to 2000 and how its priorities changed with the changing economic and political climate, see generally Jacqueline Brine, *The European Social Fund and the EU* (Sheffield Academic Press Ltd. 2002).

[10] art 174 TFEU (ex art 158 TEC) (n 4).

[11] The ERDF was established in 1975 and incorporated into the EEC Treaty by the Single European Act, 1986.

These funds are governed by a general regulation covering the use of all three funds and separate regulations providing implementation details for each of the funds.

The general regulation sets out three objectives for the funds for the 2007-2013 programming period.[12] The 'Convergence objective' is focused on those regions whose gross domestic product per capita is less than 75% of the average GDP for the EU-25 for the 2000-2002 period. It is 'aimed at speeding up the convergence of the least-developed Member States and regions by improving the conditions for growth and employment' by investing in physical and human capital, developing innovation and the knowledge society and promoting adaptability to economic and social change. This objective is the priority for all the funds.[13] The 'Regional competitiveness and employment objective', which applies outside the least-developed regions covered by the Convergence objective, aims to strengthen regional competitiveness and attractiveness as well as employment. This is to be accomplished by anticipating economic and social change, investing in human capital, innovation and the promotion of the knowledge society and by increasing the adaptability of workers and businesses as well as developing inclusive job markets.[14] The third objective, 'European territorial cooperation,' is aimed at strengthening cross-border cooperation through joint local and regional initiatives.[15]

The three cohesion funds all operate under six implementing principles. First, the funds provide assistance which complements national actions, is consistent with the activities, policies and priorities of the Union and is coordinated with assistance

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[12] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 [2006] OJ L 210/25 art 3.

[13] ibid art 3(2)(a).

[14] ibid art 3(2)(b).

[15] ibid art 3(2)(c).

provided by other EU financial instruments.[16] Second, funding is provided through

multi-annual programmes which incorporate a range of projects and draw from one or

more of the funds.[17] Once the Commission approves an Operational Programme, the

Member States and their implementing authorities manage their fund allocations,

'selecting thousands of projects which will be funded, and, through management

authorities, monitoring and assessing their operation and results, feeding [information]

back to the Commission'.[18] Third, Member States must establish partnerships with

domestic public authorities, the social partners and other 'appropriate bodies

representing civil society, environmental partners, non-governmental organisations, and

bodies responsible for promoting equality between men and women'.[19] These

partnerships are to cover the preparation, implementation, monitoring and evaluation of

the operational programmes. The fourth principle, 'additionality', requires that EU

funds be in addition to, not a replacement for, national expenditures.[20] Fifth, gender

equality is to be promoted at every stage and 'appropriate steps' must be taken to

prevent discrimination on the grounds of sex, race or ethnic origin, religion or belief,

disability, age or sexual orientation.[21] Finally, the objectives of the funds are to be

pursued within the framework of sustainable development and protecting and improving

the environment.[22]

   The role of the ESF is to contribute to the strengthening of 'economic and social

cohesion by improving employment and job opportunities, encouraging a high level of

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[16] ibid art 9.

[17] ibid art 10.

[18] Over the 2007-2013 funding period, it is expected that some 450 Operational Programmes will be adopted: Jo Shaw, Jo Hunt and Chloë Wallace, *Economic and Social Law of the European Union* (Palgrave MacMillan 2007) 455.

[19] General regulation (n 12) art 11.

[20] ibid art 15.

[21] ibid art 16.

[22] ibid art 17.

employment and more and better jobs' by supporting Member State employment and social inclusion policies.[23] Projects supported by the Fund must contribute to 'increasing the participation of economically inactive people in the labour market, combating social exclusion — especially that of disadvantaged groups such as people with disabilities — and promoting equality between women and men and non-discrimination'.[24]

(ii)   *Visibility of disabled people in the ESF*
Although specific mention of disabled people has appeared and disappeared in the various reforms of the ESF, disabled workers have always been a target group of the Fund. The first reform in 1971 referred to 'the absorption and reabsorption into active employment of the disabled, and of older workers, women and young workers'.[25] The implementing regulation provided for assistance for 'handicapped persons who may be able to pursue a professional or trade activity after medical rehabilitation, vocational training or retraining'.[26] As with displaced textile and agricultural workers, provision was made for assistance to help disabled people become self-employed.[27] Again, in the 1977 reform, 'handicapped persons who it is assumed may be able to pursue an occupation after functional rehabilitation, vocational adaption or re-adaption' were among the targeted social groups. The Regulation allowed for funding to 'aid to eliminate obstacles which make access to available employment difficult for

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[23] Council Regulation (EC) No 1081/2006 of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999 [2006] OJ L 210/12 art 2(1).

[24] ibid art 2(2).

[25] Council Decision of 1 February 1971 on the Reform of the European Social Fund (71/66/EEC) OJ L28/15 [1971(I)] OJ Spec Ed Series I chapter 924/52 art 5(1).

[26] Council Regulation (EEC) No 2396/71 of the Council of 8 November 1971 Implementing the Council Decision of 1 February 1971 on the Reform of the European Social Fund [1971] OJ L249/54 (English special edition: Series I Chapter 1971(III) P 0924) art 1(3).

[27] Council Regulation (EEC) No 2398/71 of the Council of 8 November 1971 on Assistance from the European Social Fund for Persons who Are to Pursue Activities in a Self-employed Capacity [1971] OJ L249/919 and again in Council Decision 74/328/EEC of 27 June 1974 on Action by the European Social Fund for Handicpaped Persons [1974] OJ L85/22.

handicapped persons, to facilitate the adaption of jobs to their requirements or to facilitate their vocational adaptation or re-adaptation'.[28]

The third reform, in 1983, continued the focusing of the Fund on disadvantaged social groups and regions.[29] The first priority for the Fund, which was to account for 75 per cent of the available funds, was the promotion of employment of young people under the age of 25 and the long-term unemployed.[30] After that, funding was available to promote employment of those who were over age 25 and were unemployed or underemployed and those threatened with unemployment, women returning to work, 'handicapped people who are capable of working in the open labour market', migrant workers and people who required retraining.[31] Of particular interest was a provision for funding 'in the case of vocational integration of the handicapped, the adaptation of workplaces'.[32] An Annex clarified that 'expenditure in respect of vocational training includes that relating to the vocational adaptation or re-adaptation of the handicapped, but excludes medical expenses incurred in functional rehabilitation' and 'assistance for recruitment or work experience shall also apply to women and to the disabled, provided that the people concerned are young job-seekers under 25 or long-term unemployed'.[33]

The 1988 reform continued the Fund's focus on specific social groups identified as the long term unemployed and young people. There was no mention of disabled people in the implementing regulations.[34] However, this reform introduced ring fenced

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[28] Council Regulation EEC/2893/77 of 20 December 1977 amending Regulation EEC/2396/71 Implementing the Council Decision of 1 February 1971 on the Reform of the European Social Fund [1977] OJ L337/1 arts 1(2) and 3(d).

[29] Council Regulation EEC/2950/83 of 17 October 1983 on the Implementation of Decision 83/516/EEC on the Tasks of the European Social Fund [1983] OJ L289/1.

[30] Council Decision 83/516/EEC of 17 October 1983 on the Tasks of the European Social Fund [1983] OJ L 289/38 arts 4(1) and 7.

[31] ibid art 4(2).

[32] Regulation EEC/2950/83 (n 29) art 1(b).

[33] ibid, Annex, para (a).

[34] Council Regulation EEC/2052/88 of 24 June 1988 on the Task of the Structural Funds and their

funds, five per cent of the ESF budget, controlled by the Commission for 'Community initiatives' to finance innovative schemes including studies, technical assistance and the exchange of experience and transfer and dissemination of good practice.[35] With the 1993 reform, disability again was not mentioned specifically but the Commission extended its own disability related Community initiatives as authorised by the 1988 reform.[36]

The 1999 sixth reform increased the flexibility of the Fund and made it 'the key instrument within the European Strategy for Employment, channelling funds to those regions of current and future Member States in greatest need.'[37] Specific reference to disability was again absent from this version of the general structural fund regulation.[38] There was, however, a passing reference to disability in recital 5 that the funds' operations 'may also make it possible to combat any discrimination on the grounds of race, ethnic origin, disability or age by means in particular of an evaluation of needs, financial incentives and an enlarged partnership.[39] Similarly, the 1999 ESF implementing regulation did not refer to disability but it could be fitted into the

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Effectiveness and on coordination of the Activities between Themselves and with the Operations of the European Investment Bank and other Existing Financial Instruments [1988] OJ L185/9 art 1(3) and (4) and Council Regulation EEC/4255/88 of 19 December 1988 Laying Down Provisions for Implementing Regulation (EEC) No 2052/88 as Regards the European Social Fund [1988] OJ L374/21 art 2(a).

[35] Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments [1988] OJ L374/1 art 11.

[36] Council Regulation (EEC) 2081/93 of 20 July 1993 Amending Regulation (EEC) No 2052/88 on the Tasks of the Structural Funds and their Effectiveness and on Coordination of their Activities between Themselves and with the Operations of the European Investment Bank and the other Existing Financial Instruments [1993] OJ L93/5and Council Regulation 2084/93/EEC of 20 July 1993 Amending Regulation EEC/4255/88 Laying Down Provisions for Implementing Regulation EEC/2052/88 as Regards the European Social Fund [1993] OJ L193/39.

[37] Brine (n 9) 103. See also Cristina Lion, Paola Martini and Stefano Volpi, 'Evaluating the Implementation Process: A Contribution within the Framework of the European Social Fund (ESF) Programme' (2006) 12 Evaluation 313, 316.

[38] Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds [1999] OJ L 161/1.

[39] ibid.

objective of 'promoting equal opportunities for all in accessing the labour market, with particular emphasis on those exposed to social exclusion.'[40]

The greater interest in measures to promote social cohesion, as opposed to social inclusion, reflected in the sixth reform in 1999, according to Brine, anticipated the decision of the 2000 Lisbon European Council to have the Commission present a new initiative for cooperation in the field of poverty and social exclusion.[41] The consequence of this decision was, as expressed by Brine, that:

> the concern with social exclusion and poverty were, in future, to be addressed by a separate programme, not the Social Fund. The Social Fund was henceforth to act exclusively as an instrument of labour market policy.[42]

Disability was next specifically mentioned in the most recent, 2006, iteration of the general regulation which coincides chronologically with the Commission's championing of EU participation as a distinct legal entity in the negotiations leading to the UN Convention on the Rights of Persons with Disabilities. The 2006 reform contains a specific provision enjoining the Member States and the Commission to ensure that appropriate action is taken to prevent any discrimination based the Article 19 TFEU grounds during the various stages of implementing the funds.[43] That provision continues on to specify that 'accessibility for disabled persons shall be one of the criteria' taken into account during the various stages of implementation.[44] Authority for funding Commission controlled Community initiatives as part of the ESF was removed in this reform.[45]

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[40] Council Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund [1999] OJ L213/5 art 2(1)(b).

[41] Council, 'Presidency Conclusions: Lisbon European Council 23 and 24 March 2000' <http://europeeuint/council/off/conclmar99-enpdf > accessed 5 April 2011.

[42] Brine (n 9) 94.

[43] See text at n 21.

[44] General regulation (n 12) art 16.

[45] For the most part, those programmes moved to a separate Commission managed initiative called the 'Programme for Employment and Social Solidarity (2007-2013) – PROGRESS': Council Decision No

The 2006 ESF specific regulation requires that, in carrying out the tasks assigned to the Fund, regard be had to Community priorities regarding 'increasing the participation of economically inactive people in the labour market, combating social exclusion — especially that of disadvantaged groups such as people with disabilities — and promoting equality between women and men and non-discrimination.'[46] The actions which may be supported by the ESF include those which 'reinforc[e] the social inclusion of disadvantaged people with a view to their sustainable integration in employment and [combat] all forms of discrimination in the labour market.' Disabled people are mentioned as specific examples of disadvantaged people along with 'people experiencing social exclusion', early school leavers, minorities, and 'people providing care for dependent persons'.[47]

The need for special programming to assist disabled people to join the labour force or re-enter employment after a disabling injury has been recognized since the Union was first created as the European Economic Community. Although there was no specific mention of disability in the 1988, 1993 and 1999 iterations of the Structural Funds' general regulation, funding was always available for disabled people as an identifiable group subject to disadvantage in the labour market. As well, the Commission's Community initiatives, provided for in the 1988 reform, included specific programmes related to disability.[48] Disability is again mentioned in the 1999 reform but only as part of the new anti-discrimination competence provided by the

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1672/2006/EC of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress [2006] OJ L 315/1.

[46] Council Regulation (EC) No 1081/2006 of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999 (n 1) art 2(2).

[47] ibid art 3(1)(c).

[48] For example, the HORIZON programme, which provided training and employment programmes for disabled people, was funded under this provision to the tune of 300 million ECU from 1989-1993 and the EQUAL programme which followed (2001-2008) included disabled people as one of its target groups.

Treaty of Amsterdam. Disabled people reappeared as a specified vulnerable group in the 2006 version of the ESF regulation. Disability, when it receives specific mention in the governing regulations, appears as one of many disadvantaged groups who are inactive or marginalised in the labour market. Disability is mainstreamed in ESF governance to be considered along with the many other disadvantaged groups experiencing social exclusion. While it is fair to say that disabled people are recognised as a target group for the ESF, the Fund clearly does not have any special interest in disability over other disadvantaged groups or give it special prominence as it does gender equality.

(iii)   *Conception of disability*

The description of disabled people in the early iterations of the ESF was a reflection of the dominant policy of rehabilitation/vocational training and return to work of injured workers or segregated provision for those unable to fit the workforce as it was. Specific mention in the 1983 reform to employment of 'handicapped people' reflected the then current conception of disability set out in the WHO's International Classification of Impairment, Disability and Handicap, as discussed in chapter three. Even though the drafting of this revision would have started some 18 months earlier, which was just after the UN International Year of Disabled Persons in 1980, and it was adopted coincidentally at the start of the UN Decade of Disabled Persons from 1983-1993, the Council amended the Commission's draft and retained the use of the word 'handicap'. As discussed in chapter four, European Community disability policy had not yet converted to the social model of disability.

In none of the reforms of the general structural funds or the ESF specific regulations is there any definition of either the earlier term 'handicap' or the later term 'disability'. There has been no attempt to reflect the evolving conceptions of disability in EU policy, as described in chapter four, in the ESF's regulations. It could be argued

that the Employment Equality Directive (EED) provides a minimal definition of disability which must be applied to programmes supported by the Fund. As discussed in chapter five, the ECJ`s interpretation of disability as it appears in that directive allows for a very restrictive conception of disability derived from the medical model. That conception of disability clearly is not sufficient to meet the employment interests of disabled people. Leaving open the choice of conceptions of disability, and within the medical or social models of disability its precise definition, allows Member States maximum flexibility in deciding who to target as beneficiaries of ESF funding.

The matter of disability may appear in two contexts in the Operational Programmes. First, there is the general requirement that there be no discrimination against disabled people in the implementation of individual projects. That requirement responds to discrimination resulting from individual bias and the lack of reasonable accommodation to allow disabled people to compete equally in the open labour market. The second context is in projects specifically designed to provide vocational training, skills upgrading and other activities to improve the employability of disabled people. These projects are forms of positive action and Member States, if they choose to support these projects with ESF funding, are free to restrict access to these programmes to categories or classes of disabled people in accordance with their domestic disability employment policies and priorities.

The social model of disability is most suitable to respond to these two different contexts. The ESF, however, does not attempt to define disability for its programming purposes. The minimum requirement is that the definition meet the ECJ's interpretation of disability as it appears in the EED. Beyond that, project administrators are free to devise definitions of disability which allow them to focus projects on sub-groups of the disabled population. The ESF does not reflect the CDT conception of disability. Subject

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to the requirements of the EED, projects funded through the ESF may apply a range of definitions which reflect the particular objectives of those projects.

(iv) *Participation*

The most recent partnership requirements in the 2006 regulation call for 'the objectives of the Funds [to] be pursued in the framework of close cooperation', referred to as 'partnerships', between the Commission and the Member States.[49] These partnerships are to include appropriate organisations representing civil society.[50] The additional admonition that the Member State should partner with 'the most representative partner[s]' may reasonably be interpreted as the organisations most representative of the target groups of particular operational programmes.[51] The partnerships are to cover the preparation, implementation, monitoring and evaluation of the operational programmes.

Jacqueline Brine has argued that:

> The tension [which exists] between the Commission and Member States persisted throughout and grew more important as, on one hand, the Commission tried to make the Fund as much a proactive instrument as possible and, on the other hand, the Members States wanted increased freedom to use the resources of the Fund as part of their own national strategies. The reforms of the Fund can be read as a tale of struggle between the Commission and the Members States ...[52]

John Sutcliffe identified the 1993 reform as the point when Member States began their re-assertion of control over the ESF. Not only was the authority of the Commission constrained but also, while the continuation of the principle of partnership was accepted, 'it was clearly expressed that subnational actors would be included only if the central

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[49] Identifying the partnership between the Commission and the Member States as a key governing principle was a response to the almost complete exclusion of Commission controls over the use of the structural funds and was introduced with the 1988 reform: Geyer (n 8) 142. This principle gave the Commission authority to set criteria for success, monitor the development of programmes and have a say in the implementation of the individual projects.

[50] See text at n 19.

[51] General regulation (n 12) art 11.

[52] Brine (n 9) 13. See also Geyer (n 8) 150-153.

government concerned agreed'.[53] By 1999 the administration of the fund, with its requirement for the involvement of Member States, regional and local authorities, the social partners and civil society organizations, had become so complex that 'often the Commission had neither the staff nor the expertise to deal with this growing complexity'.[54] The 1999 reform brought about a marked shift to Member State control of the fund's administration and reduction in the Commission's own initiative funding.

The resistance to disadvantaged group participation was even more sharply identified by De Rynck and McAleavey who argued that, once intergovernmental bargaining has set the budget, '[s]tructural Fund policy exhibits more of the features of a patronage-based distributive policy' or a clientism approach.[55] They identified the clients as:

> mostly national or regional public administrations, training and development
> agencies, other governmental or semi-governmental bodies at sub-national level
> involved in economic development, research institutes and businesses in the
> eligible areas.[56]

As a consequence of this approach:

> unorganized actors in the region will often be unable to come on to the policy
> scene. Low-income groups, which tend to be less integrated socially, will face the
> considerable barrier of organizing collective action first, before being able to gain
> access to partnerships and become beneficiaries. Also, once the budgetary
> envelope is fixed, the highest political level exerts ample pressure to spend (on
> time) what has been agreed. Such pressure gives a natural advantage to the
> strongly organized groups within the regions, which tend to be better informed
> and linked to the relevant networks – typically those elites whom policy-makers
> needed to reconcile with the idea of creating a Single Market and lifting national

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[53] John B. Sutcliffe, 'The 1999 reform of the structural fund regulations: multi-level governance or renationalization?' (2000) 7 Journal of European Public Policy 290, 299.

[54] Geyer (n 8) 150.

[55] Stefaan De Rynck and Paul McAleavey, 'The cohesion deficit in Structural Fund policy' (2001) 8 Journal of European Public Policy 541, 545.

[56] ibid 545.

protective mechanisms.[57]

As with the low income groups, so too for disability groups which are, in much of the EU, a relatively unorganised community with little political influence.

The participation of disabled people in the preparation of ESF Operational Programmes and throughout the implementation of its constituent projects, despite the exhortations of the Commission and requirements of the various governing regulations, is highly contingent on decisions of the Member State central governments. The degree of practical participation by disabled people in ESF funded employment programming is entirely dependent on domestic politics. The CDT concerns with the participation and voice of disabled people are only barely reflected in the actual implementation of the ESF.

(v)   *Equality*

The Structural Funds' general regulation requires Member States and the Commission to 'ensure that equality between men and women and the integration of the gender perspective is promoted' at all stages of implementing the funds and that 'appropriate steps' are taken to prevent discrimination on any of the prohibited grounds set out in Article 19 TFEU.[58] There appears to be an intention to place more emphasis on gender equality in the implementation of the Fund than equality based on the other grounds. For grounds other than sex, 'appropriate steps' should be understood to be those which are dealt with in the equality directives which include the prohibition of discrimination with the provision of reasonable accommodation when required as well as the use of positive action measures and special measures to benefit disabled people. Apart from the equality and non-discrimination provisions of Union law, the ESF is not a strong

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[57] ibid 546. See also Joanne Scott, 'Law, Legitimacy and EC Governance: Prospects for 'Partnership'' (1998) 36 JCMS 175, for a critique of the partnership principle using as a case study the structural fund assistance for the Highlands and Islands (Scotland) during the 1994-1999 programming period.

[58] General regulation (n 12) art 16.

force for diffusing a strongly substantive conception of equality as the promotion of social inclusion. Depending on domestic law, a variety of positive actions to promote the employability of disabled people may be supported by the ESF but at a minimum reasonable accommodation must be made available on all ESF funded projects. As already noted, however, for disabled people in much of the EU even this conception of equality has the potential to increase significantly the opportunities for disabled people to participate in the labour force or receive training to enhance their employability.

(vi)   *Transformative potential*

Despite the presence or absence of specific mention of disability in any of the various iterations of the Fund's governing regulations, there has been no requirement that any of a Member State's Operating Programmes contain specific projects in support of disabled people.

Table 1: Participation of disabled people in ESF funded projects, 2009[59]

Participation of disabled people in percent	Number of Member States (25 reporting)
0 %	2
> 1 %	4
1 % - > 3 %	5
3% - 10%	12
< 10 %	2

As shown in Table 1, Member States use the ESF for different social policy objectives with only a minority looking to the ESF for a significant contribution to their domestic disability employment policy. In addition to projects designed for disabled people, it is likely that a great number of people with disabilities have participated in the vocational training and employment projects supported by the Fund which are not

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[59] Commission ESF website <http://ec.europa.eu/employment_social/esf/discover/statistics_en.htm> accessed 21 August 2010.

specifically designed for disabled people and who are not reflected in the statistics reported to the Commission.

Disabled people who do participate in ESF funded activities appear to have a lower likelihood of transitioning into regular employment. The Commission reports that for the 2000-2006 funding period employment success rates for women who received assistance from ESF projects ranged from about 70 per cent down to 35 per cent, depending on country, while the employment success rate for people who received employment assistance targeted at specific disadvantaged groups, including disabled people, were 'typically' in the 10 – 20 per cent range.[60] This compares with Commission statistics of sixteen per cent of the working age population being disabled with only 40 per cent of these in employment.[61] These numbers seem to bear out the prediction of a 2001 study by a European Expert Group on Employment for Disabled People that in the order of eight to fourteen per cent of disabled people currently not active in the labour force could potentially be integrated into the labour force.[62] These low expectations reflect the limitations of the non-discrimination approach to promoting equality despite the claims of social model enthusiasts, the lack of consistency of definition for the statistics which are available and the failure to disaggregate the statistics on the disabled working age population to distinguish degrees of difficulty in employability.[63]

In conclusion, the ESF plays an important role in contributing to the employment of disabled people. Although one may reasonably expect disabled people to claim their

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[60] Commission, *Growing Regions, Growing Europe: Fourth report on economic and social cohesion* (OOPEC 2007) 100. The structure of the fifth cohesion report, Commission, *Investing Europe's Future: Fifth report on economic, social and territorial cohesion* (POEU 2010), does not provide updated data on this issue.

[61] ibid 170.

[62] Commission, *The employment situation of people with disabilities in the European Union* (OOPEC 2001) 53.

[63] Even taking a broad view of what 'work' consists of, a large percentage of disabled people in the working age cohorts cannot effectively participate in the labour force as it is currently structured.

fair proportion of the funds available, the ESF is not the mechanism to spark major reforms in the nature of work itself. It is only one part of a much larger effort which must be made to significantly improve the opportunities for disabled people to participate equally in their communities. The next section will look at EU transportation policy – transportation to get to the ESF funded employment programme and then to get to work once the person completes the programme and to enable participation in other aspects of community life.

3. *Transport policy*

After a brief overview of the Union's transport policy, the second part of this section examines examples of legislation dealing directly with disability and transportation and legislation which is primarily related to internal market policy but which has a direct impact on transport for disabled people. In the third part, these legislative measures are analysed in order to assess the extent to which they reflect key themes of CDT.

(i) *EU transport policy*

The EU's competence in the transportation sector is set out in Title VI, TFEU.[64] Article 90 provides that 'the objectives of the Treaties shall ... be pursued within the framework of a common transport policy' (CTP). Using the ordinary legislative procedure, the Union 'shall' establish common rules for international transport into and within the Union, conditions for non-resident carriers to operate within a Member State, 'measures to improve transport safety' and 'any other appropriate provisions'.[65] Other articles govern issues such as state aids to transportation, rates and a prohibition of

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[64] TFEU (n 4). Title VI includes art 90 (ex art 70 EC) to art 100 (ex art 80 EC). Art 58(1) TFEU (ex art 51(1) EC) excludes 'services in the field of transport' from the general provisions related to the free movement of services.

[65] ibid art 91(1) (ex art 71 EC). These are the same 4 objectives which were set out in art 75 of the 1957 EEC Treaty (n 5).

discrimination based on country of origin. Title VI applies to transport by rail, road and inland waterways while sea and air transport are subject to 'appropriate provisions' enacted by the ordinary legislative procedure.[66] Title VI is supplemented by provisions requiring the Union to 'contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.[67]

Up to the mid-1980s there was very little progress towards any form of common transport policy due to the resistance of the Member States and their inability to reach any consensus on what a common transport policy should cover.[68] It was not until the European Parliament took action against the Council for failure to act that progress began to be made.[69] After the ECJ's decision, in conjunction with a change in Commission strategy from one of attempting to harmonise national transportation regimes to one of linking the CTP to the developing single market, the CTP began to

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[66] TFEU (n 4) art 100 (ex art 80 EC).

[67] ibid Title XVI – Trans-European Networks, art 170 (ex art 154 EC) to art 172 (ex art 156 EC).

[68] See generally, for example, Christoph Knill and Dirk Lehmkuhl, 'How Europe Matters. Different Mechanisms of Europeanization' (1999) 3(7) European Integration online Papers (EIoP) <http://eiop.or.at/eiop/texte/1999-007a.htm> accessed 14 November 2010; Michael Schmidt and Liana Giorgi, 'Successes, Failures and Prospects for the Common Transport Policy' (2001) 14 Innovation: The European Journal of Social Science Research 293; Liana Giorgi and Michael Schmidt, 'European Transport Policy-A Historical and Forward Looking Perspective' (2002) 2(4) German Policy Studies <http://www.spaef.com/article.php?id=864 > accessed 14 November 2010; Marco teBrömmelstroet and Tobias Nowak, 'How a court, a commissioner and a lobby group brought European transport policy to life in 1985' (2008) 72 GeoJournal 33; Paul Stephenson, 'Let's get physical: the European Commission and cultivated spillover in completing the single market's transport infrastructure' (2010) 17 Journal of European Public Policy 1039.

[69] Case 13/83 *European Parliament v Council of the European Communities* [1985] ECR 1513. In 1983 the European Parliament began proceedings in the ECJ against the Council for failure to act in relation to transport policy as the Treaties required. The Commission and the EP had in previous years made a number of proposals related to transport to which Council did not adequately respond. The Court held (at para 70) that Council had failed to act in relation to freedom to provide services in the transport sector. Since action in relation to transport has to take place within the Common Transport Policy the effect of the ruling was to require adoption of a CTP, the contents of which were at the discretion of the Council.

take shape.[70] Since that time, the Commission's broad vision of the CTP has remained remarkably consistent.[71]

The Common Transport Policy encompasses 3 themes: economic, social and environmental. CTP as it relates to economic interests includes issues such as the development of sufficient transport systems/facilities to carry goods and people, implementing and maintaining the competitive single internal market in transport services while accommodating the public service aspects of transport, the financing of infrastructure investment, pricing and taxation policy and interoperability and intermodality rationalisation and technology. The social aspects include issues related to maintaining high levels of safety, particularly reducing the incidence of road deaths, improving the working conditions of transportation workers and promoting passengers' rights and responsibilities which include mitigation of the negative effects resulting from market liberalisation. The environmental aspect focuses on reducing green house gases, congestion and noise.[72]

In 1991 the Council tasked the Commission with developing an action programme regarding accessibility of transport for 'persons with reduced mobility'.[73] The action programme which was adopted consisted of various short, medium and long term measures, applying policy instruments from directives to guidelines to codes of practice

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[70] Dirk Lehmkuhl, 'Harmonisation and Convergence? National Responses to the Common European Transport Policy' (2002) 2 German Policy Studies <http://www.spaef.com/article.php?id=865 > accessed 19 November 2010, 3.

[71] Commission, *The Future Development of the Common Transport Policy: A global approach to the construction of a Community framework for sustainable mobility* (OOPEC 1993) (cited as '*Future Development of the CTP*'); Commission, 'Cohesion and Transport ' COM(1998) 806 final; Commission, 'European transport policy for 2010: time to decide' COM(2001) 370 (cited as '*Transport policy for 2010*'); Commission, 'A sustainable future for transport: Towards an integrated, technology-led and user friendly system' COM(2009) 279 (cited as '*A sustainable future for transport*').

[72] See generally, *Transport policy for 2010* (n 71) and *A sustainable future for transport* (n 71).

[73] Council Resolution of 16 December 1991 concerning a Community action programme on the accessibility of transport to persons with reduced mobility [1992] OJ C 18/1.

and research initiatives.[74] The principle of subsidiarity was emphasized in recognition of the fact that much of the transportation infrastructure is locally owned and controlled and commuting is mostly a local activity. The target population for the action programme was defined as 'any person who has special difficulty when using public transport' including people with a variety of disabilities, people with children in prams and pushchairs, those who travel with a disabled relative or friend and those with a temporary injury.[75]

Whilst the Council resolution mentioned improved accessibility as an issue of rights, the Commission's action programme reflected the more common themes of EU transport policy: accessible transport allows elderly people to continue living in their homes which reduces costs of social services; disabled people will use public transport and not the more expensive special transportation services; disabled people will be able to get to work and off welfare; it will improve the demand for, skills and pay of transport workers; it will increase the tourist industry. Nowhere does it support accessible transportation as a matter of rights.

In *Future Development of the CTP*, the Commission identified 'improved transport for people with reduced mobility; accessibility requirements' as a priority for action.[76] As with the action programme adopted in the following year, the importance of the principle of subsidiarity was reflected in the Commission's acknowledgement that 'most initiatives in this area can be better taken at national, regional or local level'.[77] The Commission proposed to approach this priority objective through a long term

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[74] Commission, 'Community Action Programme for Accessible Transport' COM(93) 433 final.

[75] ibid 3.

[76] Commission, *Future Development of the CTP* (n 71) 72.

[77] ibid 53.

programme of cooperation in the area of information programmes, legislation on

minimum standards and support for research programmes.[78]

It was not until 2000, when the Commission issued '*Towards a Barrier Free*

Europe for People with Disabilities', that accessibility was described in terms of

rights.[79] Access to public transportation was described as essential to effective social

and economic integration, not

> simply as a convenience or even as a social and economic necessity. It should be
> regarded as a right to which everyone should be entitled, subject to reasonable
> economic and technical constraints.[80]

Nonetheless, the dual economic and social justice values of the CTP were

reflected in *Barrier Free*: 'It is the view of the Commission that the European Union

should promote accessibility ... By so doing, it would contribute towards an

improvement in the quality of working life, the protection of the consumer and the

competitiveness of European Industry'.[81]

(ii)   *Examples of legislation related to transport policy*

The Commission's vision for the Union's passenger rights policy for all modes of

transportation incorporates specific measures in favour of 'persons with reduced

mobility' (PRMs), automatic and immediate solutions when travel is interrupted for any

reason, provisions governing liability in the event of death or injury, means of redress,

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[78] ibid 53.

[79] Commission, 'Towards a Barrier Free Europe for People with Disabilities' (cited as '*Barrier Free*'). *Barrier Free* was not just about transportation. As discussed in chapter 4, above, disability was to be mainstreamed into all policy initiatives and coordinated among the many Union policy areas including industry, information society, social cohesion, environment, transport, social policy, etc. It set out a wide range of initiatives to combat barriers to employment, education and vocational training, transport, the internal market, the information society, new technologies and consumer policy.

[80] ibid 7.

[81] ibid 10.

passenger information, integrated ticketing, and a system for evaluating and monitoring the effectiveness of the policy.[82]

The first passenger rights regulation covering disabled persons and PRMs, adopted in 2006, prohibits airlines from refusing to accept reservations from, or to carry, a disabled person or PRM except if the refusal is based on safety requirements 'established by international, Community or national law' or 'by the authority that issued [the airline's] air operator's certificate' or if it is 'physically impossible' to embark the person (or load accompanying mobility equipment).[83] In these cases, the airline has to 'make reasonable efforts to propose an acceptable alternative'.[84] Also, where required by law or the air operator certificate issuing authority, a disabled person or PRM may be required to be accompanied by another person able to provide assistance that the person requires.[85] Airlines and their agents must publish in accessible formats and in at least the language that information is made available to other passengers the safety rules applicable to the carriage of disabled person and PRMs. When a person is refused carriage, the air line must immediately explain the reasons, in writing on request.[86]

The regulation makes the 'managing body of the airport' responsible for ensuring assistance is provided in the airport terminal and immediately adjacent service areas if

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[82] Commission, 'Strengthening Passenger Rights within the European Union' COM(2005) 46 final 2.

[83] Council Regulation (EC) 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air [2006] OJ L 204/1 (Disabled Air Passenger Rights Regulation) arts 3 and 4(a) and (b).

The general regulation on compensation for delayed or cancelled flights, Council Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91[2004] OJ L 46/1, imposed a requirement that airlines pay particular attention to the needs of persons with reduced mobility, any persons accompanying them and the needs of unaccompanied children (art 9(3)) and, when rescheduling their flights, they and their service animals be given priority (art 11).

[84] Disabled Air Passenger Rights Regulation (n 83) art 4(1) 2nd para.

[85] ibid art 4(2).

[86] ibid art 4(3) and (4).

the traveller provides 48 hours' notice or, if no notification is made, making 'all reasonable efforts to provide' the required assistance.[87] The assistance must be provided at no charge: the managing authority may levy a fee on the airlines using the airport to cover the costs of providing assistance. Airlines are responsible for providing assistance on their planes.[88] Both the managing body and the airline are responsible for ensuring their staff are suitably trained to provide assistance to disabled people and PRMs.[89]

The participation of disabled people and PRMs is referred to in two provisions. First, airport managing bodies, in co-operation with the airlines using the airport and 'relevant organisations representing disabled persons and persons with reduced mobility' must designate arrival and departure points where passengers 'can, with ease, announce their arrival at the airport and request assistance'.[90] Second, in co-operation with the airlines and representative organisations of disabled people and PRMs, the managing body must establish 'quality standards for the assistance specified' in the Regulation and 'determine the resources required for meeting them'.[91]

Throughout the Regulation the target population is described as 'disabled persons and persons with reduced mobility', who are defined as

> any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers.[92]

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[87] ibid art 7. The types of assistance which must be provided are set out in Annex I of the Regulation and include assistance getting to the check-in counters, checking-in, getting to the departure area, boarding the aircraft and being seated by means of lifts and associated equipment, disembarking, collecting baggage and exiting the airport: provisions are made for persons assisting the disabled traveller or PRM and service animals.

[88] ibid art 10. The types of assistance which must be provided are set out in Annex II of the Regulation.

[89] ibid art 11.

[90] ibid art 5.

[91] ibid art 9.

[92] ibid art 2(a).

EU legislation does not deal with issues of extra seating requirements due to disability, such as obesity, or fares charged for attendants without whom the disabled person could not travel.

Disabled peoples' and PRMs' rights to assistance when travelling by air are in a separate regulation from the other air passenger rights because the regulations setting out those other rights were adopted before the idea of disabled persons' rights was well established in Union law and policy. In contrast, the idea of EU passenger rights in the railway sector was of relatively recent origin and the rights of disabled people and PRMs to assistance when travelling by rail are mainstreamed into the regulation covering the rights of all railway passengers.[93] That regulation covers the information to be provided by railway undertakings, ticketing, liability and insurance obligations, obligations of railways in cases of delay, special provisions for disabled persons and PRMs, the definition and monitoring of service quality standards, security and complaint procedures. With the exception of the provisions prohibiting refusal to carry disabled passengers or PRMs and requiring the provision of information about accessibility, a Member State may exempt urban, suburban and regional railways, and domestic railways for up to fifteen years, from the regulation.

The specific provisions related to assistance for disabled people and PRMs are modelled on those set out in the air passenger regulation.[94] First, the definitions of 'disabled person' and 'person with reduced mobility' are identical to those in the airline

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[93] Council Regulation (EC) No 1371/2007 of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L 315/14 (Rail Passenger Rights Regulation). The Commission proposal for this regulation was presented in 2004, before the proposal for the airline regulation, but did not receive approval until a year after the airline regulation: Commission, 'Proposal for a Regulation of the European Parliament and of the Council on International Rail Passengers' Rights and Obligations' (2004) COM 143 final.

It is likely that the fast tracking of the airline regulation was a response to a series of well publicised incidents related to the failure of airlines to honour reservations by disabled people and lack of, and additional charges for, assistance at airports.

[94] Rail Passenger Rights Regulation (n 93) - Chapter V 'Disabled Persons and Persons with Reduced Mobility', arts 19 to 25.

regulation.[95] Second, responsibility for providing assistance without charge is divided between the station manager, defined as an organization which is responsible for managing a railway station, and the railway.[96] Unlike the airline regulation, the Railway Passenger Rights Regulation does not set out a detailed list of what assistance must be provided. Instead, railways and station managers, 'with the active involvement of representative organisations of disabled persons and persons with reduced mobility', must establish 'non-discriminatory access rules for the transport of disabled persons and persons with reduced mobility'. Disabled persons and PRMs must not be refused reservations or tickets 'unless this is strictly necessary in order to comply with' these access rules.[97] Taking the access rules into account, the assistance railways must provide regarding boarding and disembarking from trains and assistance on board 'shall consist of all reasonable efforts ... in order to allow that person to have access to the same services ... as other passengers'.[98] The access rules are to be designed in the context of existing stations and rolling stock and the Technical Specification for Interoperability for PRMs, which is discussed later in this chapter.

Passenger rights legislation is one way the EU promotes rights of disabled people to transportation. Another approach uses internal market policy.[99] An example is the 2001 directive setting out a common standard for passenger vehicles carrying more than eight people.[100] Different technical requirements existed for these vehicles among the

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[95] ibid art 3(15).

[96] ibid arts 22 & 23.

[97] ibid art 19.

[98] ibid art 23.

[99] See, generally, Lisa Waddington, 'A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility' (2009) 15 ELJ 575.

[100] Council Directive 2001/85/EC of 20 November 2001 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, and amending Directives 70/156/EEC and 97/27/EC [2001] OJ L 42/1. Adopting harmonised standards applicable to all the Member States facilitates the proper functioning of the internal market to allow for EC type-approval procedure set out in Council Directive 70/156/EEC of 6 February 1970 on the

Member States which meant they could not be freely traded throughout the Union. New Class I, typically urban buses, and Class II, typically suburban or regional buses, vehicles which meet the detailed technical specifications, including those which address access for PRMs, set out in the directive can be sold and used everywhere in the Union. A country may refuse to register or allow sales of new vehicles that do not meet the standards set out in the directive.

The accessibility requirements for these vehicles include the mandatory installation of ramps or lifts on all urban buses, priority seating for persons with reduced mobility, a designated area for wheelchairs, space for a guide dog in the vehicle, and contrasting colours to assist visually impaired persons. The primary aim of the directive is to promote passenger safety but, as noted in Recital 11, 'it is also necessary to provide technical prescriptions to allow accessibility for persons of reduced mobility to the vehicles covered by the Directive, in accordance with the Community transport and social policies'. The definition of PRMs is broader than the one found in the passenger rights regulations: in addition to 'disabled people (including people with sensory and intellectual impairments, and wheelchair users)', it includes people of small stature, the elderly, pregnant women, people with heavy luggage, shopping trolleys and pushchairs.[101]

Another way to provide accessible transportation in historically inaccessible systems which are characterised by high capital expenditure and long life is found in the legislation implementing the trans-European transport network (TEN-T). The TEN-T respecting railways includes the high speed rail network (specially built lines to accommodate train speeds 'in the order of 250 km/h') and the conventional rail network

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approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers [1970] OJ L 315/1.

[101] ibid Annex I, 2.21.

comprising lines which 'play an important role in long-distance goods and passenger traffic'.[102] Interoperability, the ability of a train from one Member State to enter and transit all other Member States, is to be achieved by breaking down the rail systems into their constituent subsystems and developing Technical Specifications for Interoperability (TSI) for each sub-system.[103] As parts of the system are certified by the Member States to the European Railway Agency as conforming to the individual TSIs, the geographic range over which the rail systems of the Member States allow for the seamless movement of trains (interoperability) increases. It was not until 2008 that the TSI applicable to 'the Aspect "Accessibility for Persons with Reduced Mobility"' ('the 'TSI') for the subsystems 'infrastructure' and 'rolling stock' was published.[104]

The TSI applies a very broad definition of persons with reduced mobility. A PRM refers to 'all people who have difficulty when using trains or the associated Infrastructure' and includes persons who use wheelchairs and other 'mobility impaired' persons including those 'with limb impairments' or 'ambulant difficulties', with children, heavy or bulky luggage, the elderly and pregnant women, visually, aurally or communications impaired persons and those of 'small stature (including children)'. 'Impairments may be long term or temporary, and may be visible or hidden' but PRMs do not include those who are alcohol or drug dependent 'unless such dependency has been caused by medical treatment'.[105]

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[102] Commission Decision No 1692/96/EC of 23 July 1996 on Community guidelines for the development of the trans-European transport network' [1996] OJ L 228/1art 10. The decision includes maps showing the particular lines that are included.

[103] All these TSIs have been drafted by the European Association for Railway Interoperability (AEIF) which is the 'joint representative body' consisting of European railway operating companies, infrastructure authorities and equipment suppliers, established under Directive 96/48/EC and continued by Council Directive 2008/57/EC of 17 June 2008 on the interoperability of the rail system within the Community (Recast) [2008] OJ L 191/1.

[104] Commission Decision 2008/164/EC of 21 December 2007 concerning the technical specification of interoperability relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system [2008] OJ L 64/72.

[105] ibid Annex 2.2.

The TSI sets out detailed technical specifications covering subjects such as through station route identification, obstacle free routes, doors and entrances, floor surfaces, transparent obstacles, furniture and free standing devices, spoken, visual and tactile information, lighting, stairs and handrails, ramps, escalators and lifts, platform geometry and boarding aids. In all, the TSI is a very extensive treatment of the station, station entrance and platforms to deal with the wide variety of circumstances experienced by PRMs.

The TSI combines European and national standards with new provisions where those standards did not exist or there was a desire to impose a new European standard. For example, for the infrastructure subsystem 'lighting component', the TSI provides that:

> The station forecourt lighting shall be in accordance with European or National Rules.
> From the accessible building entrance to the platform access point, the obstacle-free route shall be illuminated to a minimum of 100 lux, measured at floor level ... The minimum required light level on the main entrance, stairs, and at the end of ramps, shall be a minimum of 100 lux measured at floor level. ... [106]

The TSI is integrated with the Rail Passenger Rights Regulation. For example, with respect to boarding aids for passengers using wheelchairs, the TSI sets out when they are required and technical specifications for ramps and lifts and provides that the railway and the station manager must ensure that they agree on a division of responsibilities in line with the Regulation which provides the 'most viable overall solution'.[107]

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[106] ibid Annex s. 4.1.2.10.
[107] ibid Annex s. 4.1.2.21.1, 2 and 3.

The TSI also deals with accessibility issues related to the rolling stock providing detailed technical specifications for seats and priority seating, wheelchair spaces, doors, lights, toilets, handrails, steps into the train and information.[108]

The TSI has extensive provisions for the 'gradual transition' from the current situation to one of full interoperability. A co-ordinated approach to implementation is required for technical and operational reasons, to take 'due account of the cost/benefit' of conformity and to co-ordinate with the implementation of other TSIs.[109] The TSI applies to all new infrastructure and rolling stock of new design except where a contract has been signed or is in the final stages of tendering. Rolling stock of existing design not certified in accordance with the TSIs must be notified to the Commission which will take 'the necessary measures'. The TSI does not apply to existing infrastructure until it is upgraded or renewed and, even then, not if compliance would require alterations to load bearing elements of a station.[110] Compliance with the TSI is not mandatory if it can be shown that compliance would infringe on the protection of a recognised historic building.[111] When rolling stock is upgraded or renewed, the TSI applies only to the parts of the stock which are being renewed. Compliance with the TSI is not mandatory if to do so would require structural alterations to doors, underframes or other elements of the rolling stock which would require re-validation of the vehicle's structural integrity.[112]

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[108] ibid Annex s. 4.2.2.1.

[109] ibid Annex s.7.

[110] ibid Annex ss. 7.3.1 and 7.3.1.1.

[111] ibid Annex s. 7.3.1.7.

[112] ibid Annex s. 7.3.2.1. The TSI sets out limits on requirements to meet accessibility standards for all the subsystems making up a railcar. Special provision is made to allow platforms, the steps into the train, clearways, information systems, and priority seating in various Member States to vary from the standard requirements of the TSI.

(iii)   *Conception of disability*

Transport policy applies a broad definition of disability. The various passenger rights directives and Commission communications use similar definitions of 'disabled person' and, to a lesser degree, 'persons with reduced mobility'. Nevertheless, there is a medical model bias which is revealed by the detailed specification that disability includes 'physical disability' (e.g. locomotive, sensory, temporary or permanent), 'intellectual disability or impairment' (not expanded upon but presumptively referring to the full range of conditions which are placed under the mental disability rubric using descriptive names such as learning disabilities, mental illness and developmental delay) or 'any other cause of disability'. The relationship between age and disability is neatly skirted by including limitations in mobility 'as a result of age' in the concept of the PRM and incorporating disabled people in the concept of the PRM. As discussed in chapter four, the Commission has engaged in a strategy of linking disability with other policy areas. The linking of disability policy with aging/seniors policy, with continuous references to the aging of the Union's population and the propensity of the older population to travel more than in the past while experiencing reduced mobility due to age, is a clear example of this strategy in action.

The idea of the 'person with reduced mobility' as the target of measures to increase the accessibility of various modes of transportation is a rare example of mainstreaming the issue that really matters, *viz.* promoting social inclusion by responding to the situation of each passenger who needs some form of adaption to use the services available to all other passengers. The duty of the service provider is to accommodate the needs of the person with reduced mobility to allow that person to use the service. Incorporating disability in the concept of the PRM accords very well with the CDT conception of disability.

Making PRMs the target of the accessibility elements of passenger rights legislation may be expected to broaden political support for the measures to promote accessible transport by identifying the benefits of increased accessibility to a much broader population than those who have visible disabilities and making clear that accessible transport will benefit the increasing elderly population who may not identify, or be identified, with the disabled population. The more people who will benefit from increased accessibility, the greater the political support for the inevitable private and public costs of accessibility.

(iv)   *Visibility and participation*

Disabled people are highly visible in EU transport legislation. Passenger transport policy frequently marks out disabled people for special mention and disability policy frequently makes reference to the transportation needs of disabled people. Even when disability access rights are mainstreamed into passenger rights legislation, EC type standards or measures to promote interoperability, disability accessibility provisions are often found in separate sections of the legislative instrument. In Commission communications the needs of disabled passengers are separated out into their own sections, chapters or sub-titles. The effect is mainstreaming without submerging difference.

The nature and degree of participation of organisations representing disabled people and PRMs varies within transport policy. In the Disabled Air Passenger Rights Regulation the managing body of an airport must, in cooperation with 'relevant organisations representing disabled persons and persons with reduced mobility', designate locations where disabled people and PRMs can announce their arrival at the

airport and ask for the assistance the regulation requires.[113] The managing body is also

required to set quality standards for the assistance which is to be provided 'in

cooperation' with organisations representing disabled passengers and PRMs.[114] The

railway passenger rights directive contains much less detail about the scope of

assistance which must be provided but there is greater scope for representative

organisations' input into the nature of that assistance and the measures which are

required to promote accessibility.[115] Railways and station managers must, 'with the

active involvement of representative organisations of disabled persons and persons with

reduced mobility', establish 'non-discriminatory access rules' for disabled people and

PRMs.[116] There are similar provisions in the marine and inland waterways and the bus

and coaches passenger rights regulations.[117]

It is a practical reality that these participation provisions call for a high level of

expertise by the representative organisations and that level of skill and specialist

knowledge is a rarity in disability rights community organisations. This leaves open the

likelihood that professional disability consultants (who may or may not be disabled

themselves) will fill the void or that only trans-European representative organizations

will be able to participate removing any real opportunity for grass roots participation.

Despite this caveat, the CDT themes of visibility and participation are quite well

reflected in transport policy.

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[113] Disabled Air Passenger Rights Regulation (n 83) art 5.

[114] ibid art 9.

[115] Rail Passenger Rights Regulation (n 93).

[116] ibid art 19(1).

[117] Regulations protecting passenger rights in the water and maritime and bus and coach sectors are modeled on the railway regulation and contain substantially similar provisions: Council Regulation (EU) No 1177/2010 of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 [2010] OJ L 334/1; Council Regulation (EU) No 181/2011 of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 [2011] OJ L 55/1.

(v)   *Conception of equality*

Despite the broad definition of disabled person and the inclusion of PRMs, the conception of equality which the legislation promotes is closer to formal as opposed to substantive equality. The various instruments are careful to situate the increase in accessibility within the context of existing infrastructure, rolling stock, airplanes and shipping. The TSI for railways and the EC type standard legislation for buses and ships do impose greater accessibility requirements for new or renovated infrastructure and equipment but it is clear that those are very long term strategies for replacement of current infrastructure and equipment which can last for three to five decades and longer. Minor accommodation to increase accessibility is required immediately but major changes requiring significant expenditures are deferred until the existing infrastructure and equipment need to be replaced or renovated. An airline may refuse to carry a disabled person because of safety requirements established by national law – the very source of much discriminatory stereotyping. On a more positive note, the definition of the target population focuses on reduced mobility not the reasons a person has difficulty using public transportation. Focusing on the outcome, being able to use public transportation, rather than the reasons for the difficulty in using it, is characteristic of a substantive form of equality. This approach reflects the interest of CDT in promoting a form of equality which respects diversity and promotes social inclusion.

(vi)   *Transformative potential*

The transformative potential of EU transport policy has been alluded to several times above. The prohibition of discrimination in taking reservations or selling or honouring tickets because of disability responds to actual incidents of discriminatory treatment by various carriers. Requiring new equipment to meet effective accessibility standards is a much longer term approach but will, in that long run, create a significantly different

physical environment in which disabled people will increasingly be able to move around as easily as others in their communities. The use of internal market policy to ensure that all new public transportation vehicles are accessible allows the influence of the EU to stretch into the urban, suburban and regional transport sectors which may be seen as outside the scope of EU competence.

Transport policy makes use of regulations and directives which affect the transport sector in different ways – by protecting rights, prescribing technical specifications and setting out processes for the progressive realisation of the long term objective of a fully accessible transportation system. Transportation is an essential requirement for members of a community to interact with each other economically, socially and politically. Along with the European Social Fund's support of employment opportunities for disabled people, transport policy is a key element to achieving the Union's objectives respecting social inclusion. In the next section, the contribution of a third policy instrument, the social inclusion OMC, to the Union's social inclusion objectives will be examined.

4.   *The Social Protection and Social Inclusion OMC*

The first part of this section provides a brief overview of the basis for EU competence in the area of social exclusion/inclusion policy, the meaning of social exclusion/inclusion in the EU context and the nature of the open method of coordination (OMC) as a policy instrument and its primary operating principles.[118] The second part assesses the social

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[118] The OMC has been the subject of a large body of academic literature. See, for example, Caroline delaPorte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) 8 ELJ 38; Daniel Wincott, 'Beyond social regulation? New instruments and/or a new agenda for social policy at Lisbon?' (2003) 81 Public Administration 533; David M. Trubek and Louise G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11 European Law Journal 343; Timo Idema and Daniel R. Kelemen, 'New modes of governance, the Open Method of Coordination and other fashionable red herring' (2006) 7 Perspectives on European Politics and Society 108; Carlo Chiattelli, 'The Reform of the Lisbon Strategy's Governance Framework – Is 'New Governance' the Way Forward?' (2006) 2 JCER 4; Vassilis Hatzopoulos, 'Why the Open Method of Coordination Is Bad

inclusion strand of the Social Protection and Social Inclusion OMC (the social OMC) to assess the extent to which it reflects key themes of CDT.

EU competence respecting social exclusion/inclusion is set out in Article 3 TEU which requires the Union to 'combat social exclusion and discrimination ...'.[119] Article 9 TFEU requires the union, 'in defining and implementing its policies and activities,' to take into account '... the guarantee of adequate social protection, the fight against social exclusion, ... and protection of human health.'[120] Combating social exclusion is mentioned specifically in Title X, TFEU, 'Social Policy', as an element of the Union's social policy. Measures may be adopted by the European Parliament and Council 'to encourage cooperation ... through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States'.[121]

For the Commission the term 'social exclusion' refers to a dynamic, multidimensional phenomenon involving aspects of unemployment, poverty or low incomes, housing quality and homelessness, education, access to health care and social services, marginalisation due to long-term unemployment, discrimination and xenophobia.[122] The Commission has defined social inclusion to be:

For You: A Letter to the EU' (2007) 13 ELJ 309; Beryl terHaar, 'Open Method of Coordination: A New Stepping Stone in the Legal Order of International and European Relations' (2008) 77 Nordic Journal of International Law 235; Mark Dawson, 'The ambiguity of social Europe in the open method of coordination' (2009) 34 ELR 55; Rikde Ruiter, 'EU soft law and the functioning of representative democracy: the use of methods of open co-ordination by Dutch and British parliamentarians' (2010) 17 Journal of European Public Policy 874.

[119] Consolidated Version of the Treaty on European Union [2008] OJ C 115/13.

[120] TFEU (n 4).

[121] ibid art 151 (ex art 136 EC) and art 153 (1)(j) and (2)(a) (ex art 137 EC). Art 160 requires the Council to establish a Social Protection Committee, composed of two members from each Member State and the Commission, with advisory status to monitor the social situation, promote exchanges of information, experience and good practice and prepare reports and opinions relevant to its field of competence.

[122] Commission, 'Towards a Europe of Solidarity: Intensifying the fight against social exclusion, fostering

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a process which ensures that those at risk of poverty and social exclusion gain the opportunities and resources necessary to participate fully in economic, social and cultural life and to enjoy a standard of living and well-being that is considered normal in the society in which they live. It ensures that they have greater participation in decision making which affects their lives and access to their fundamental rights.[123]

The term 'open method of cooperation' was first formally used in the Presidency Conclusions of the 2000 European Council meeting in Lisbon.[124] It was at this meeting that the European Council adopted the strategic goal of making the Union 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'. Along with economic measures, achieving this goal required 'modernising the European social model, investing in people and combating social exclusion'.[125]

Different combinations of goals/targets, indicators and benchmarking, identification and exchange of best practices, mutual learning, knowledge transfer adapted to each national context, adequate participation of various actors at different levels of governance and civil society and social partners, experimentation and innovative projects, peer review and evaluation may be adopted by a particular OMC process.[126] Although OMC processes are highly sensitive to subsidiarity and the

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integration' COM (92) 542 final para 11. This communication also contains a useful summary of earlier initiatives by the Council and Commission in the field of social exclusion. See also Commission, 'European Social Policy - A Way Forward for the Union' COM(1994) 333 final 40, 37.

[123] Council, *Joint Report on Social Inclusion [2004]* (OOPEC 2004) (Joint Report 2002) 10.

[124] Council, 'Presidency Conclusions: Lisbon European Council 23 and 24 March 2000' <http://europe.eu.int/council/off/concl.mar99-en.pdf> accessed 4 March 2011 para 7; Luc Tholoniat, 'The Career of the Open Method of Coordination: Lessons from a 'Soft' EU Instrument' (2010) 33 West European Politics 93, 93.

[125] Presidency Conclusions (n 124) para 5. The Lisbon Strategy was succeeded by 'Europe 2020' which provides a long term strategy to make Europe into 'a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion'. Social cohesion appears in the form of a target to reduce the number of Europeans living below the national poverty lines by 25% (20 million people): Commission, 'Europe 2020' COM(2010) 2020 final, 10-11.

[126] The OMC process evolved from the European Employment Strategy and has been applied to numerous policy areas such as education, health care, pension reform, research and development and

diversity of national systems, their objective is to promote policy convergence within

diversity, improve national policies and practices and provide a learning process to

achieve common objectives.

Member States submit their plans for achieving the common objectives to the

Commission which prepares a summary report.[127] Peer review processes are also

established to examine particular national initiatives as part of the mutual learning

process. The social OMC process has no legal sanctions for not meeting a target or

objective. Mary Daly has described the OMC as a process which 'aims especially to

alter the environment within which policy-making takes place, not least by creating a

process engendering a dense level of interaction and learning among policy-makers at

different levels'.[128] The mutual learning and exchange of best practices are intended to

influence domestic policy options which over time, in theory, should lead to a

convergence of policy reflecting those best practices.

In 2005 the social OMC was streamlined with the OMC on Adequate and

Sustainable Pensions and the OMC on health and long-term care with the objective of

creating 'a stronger, more visible OMC with a heightened focus on policy

implementation, which will interact positively with the revised Lisbon Strategy, while

simplifying reporting and expanding opportunities for policy exchange'.[129] The

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the information society. See, for example, Erika Szyszczak, 'Experimental Governance: The Open Method of Coordination' (2006) 12 European Law Journal 486.

[127] Originally called National Action Plans, or NAPs/inclusion, the Member State reports under the 2006 streamlined process are called National Reports on Strategies for Social Protection and Social Inclusion. Reports are submitted every three years, with thematic light reports in the intervening years.

[128] Mary Daly, 'EU Social Policy after Lisbon' (2006) 44 JCMS 461, 473. For a brief overview of the 'quite strong continuity in the basic ideas underlying the development of EU cooperation in social policy' from the first social action programme adopted in 1974 see Eric Marlier and others, *The EU and Social Inclusion: Facing the challenges* (Policy Press 2007) 17-21.

[129] Commission, Working together, working better (n 3) 2. This communication was subject to much debate leading to a joint Social Protection Committee and Economic Policy Committee opinion amending the Commission's proposal which was adopted at the Spring 2006 European Council: Council, 'Joint Social Protection Committee / Economic Policy Committee Opinion' Ref 6801/06 and Council, 'Joint Social Protection Committee / Economic Policy Committee Opinion' Ref 6801/06

simplified reporting came into effect in 2006 with, however, each of the three strands

being reported separately within the combined Joint Report.[130]

(i)   *Visibility of disabled people in the social OMC*

The first location where disability might be highlighted in the social OMC is in the

common objectives. The first set of common objectives were 'to facilitate participation

in employment and access by all to the resources, rights, goods and services', 'to

prevent the risks of exclusion', 'to help the most vulnerable' and 'to mobilise all

relevant bodies'.[131] In the introductory note, special attention was called for respecting

inclusion in the information society and development of 'priority actions' for specific

target groups one of which was disabled people. Under the detailed sub-objectives

related to prevention of the risk of exclusion, 'particular account' was to be taken of the

needs of disabled people in the knowledge based society and information and

communications technology. Again, under the objective of helping the most vulnerable,

those at risk of persistent poverty included disabled people.[132] As well, disabled people

have been consistently understood to be one of the social groups most at risk of poverty

and vulnerable to social exclusion.

The revised common objectives, adopted in March 2006 to apply to the

streamlined OMC process, consist of overarching objectives plus particular objectives

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COR 1 (Joint SPC/EPC Opinion).

[130] Since the 2004 enlargement of the Union the style of the Joint Report, (i.e. reports formally adopted by the Council and Commission and translated into all official languages) changed so that the Joint Report itself became much shorter and the detailed analysis of the NAPs/inclusion are found in staff working papers which are only adopted by the Commission, with Member State input provided through the Social Protection Committee. Staff reports are not translated into all official languages: Marlier and others (n 128) 24.

[131] Council, 'Objectives in the Fight Against Poverty and Social Exclusion' [2001] OJ C 82/4. The objectives were slightly altered in 2002 to include urging Member States to set targets for significantly reducing poverty and social exclusion, emphasising the need to advance gender equality and specifically naming immigrants as a vulnerable group at risk of poverty: Council, 'Fight against poverty and social exclusion: common objectives for the second round of National Action Plans' Ref 14164/1/02 REV 1.

[132] ibid Point II, 2(a) and 3(b).

for each of the three strands – poverty and social exclusion, pensions, and health and long-term care. The overarching objectives refer to promoting social cohesion, gender equality and equal opportunity for all, seek to tie the social OMC to the economic and employment strands of the Lisbon strategy and promote good governance and participation by stakeholders in the design and implementation of policy'.[133] The poverty and social inclusion strand objectives are to ensure:

- access for all to the resources, rights and services needed for participation in society, preventing and addressing exclusion, and fighting all forms of discrimination leading to exclusion;
- the active social inclusion of all by promoting participation in the labour market and by fighting poverty and exclusion;
- that social inclusion policies are well-coordinated and involve all levels of government and relevant actors, including people experiencing poverty, that they are efficient and effective and [are] mainstreamed into all relevant [policies] ...[134]

In these revised common objectives, the detailed expansion of the common objectives found in the 2001 version disappeared as did specific mention of disability or any other marginalised group except the poor. The SPC/EPC Joint Opinion adopted by the European Council does note, however, that 'the needs of people with disabilities should be highlighted as appropriate'.[135] The overall sense of the common objectives is that they allow the broadest possible scope for policy diversity among the Member States and focus on minimising the administrative burden in preparing the National Strategic Reports. A welcome development was the reference to 'fighting all forms of discrimination leading to exclusion'. In these objectives disabled people, along with

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[133] Joint SPC/EPC Opinion (n 129).

[134] ibid.

[135] ibid 6.

other distinct marginalised groups, have been submerged into the population experiencing social exclusion.

A second location were disability might be found is in the indicators used to assess progress towards the common objectives. While the word disability is not mentioned, in the first set of indicators a proxy for disability may be inferred from the indicator 'self perceived health status', which was the last of ten primary indicators.[136] This was further refined in the definition of what was to be reported - the 'Ratio of the proportions in the bottom and top quintile groups (by equivalised income) of the population aged 16 and over who classify themselves as in a bad or very bad state of health on the WHO definition'.[137] In the 2006 revised indicators, a proxy for disability may be 'Self reported limitations in daily activities by income quintiles, by sex, by age'.[138]

A third location where it may be expected disability would be featured is in the annual Joint Reports which summarise key trends and highlight initiatives identified by the Member States in their regular national reports. It is perhaps more important that disability appear in these reports, which are the basis for mutual learning and exchange of best practices, than in the high level common objectives and indicators.

The 2001 Joint Report clearly identified disability as a key indicator of social exclusion with the majority of Member States identifying disability as a risk factor for poverty and social exclusion.[139] Disability was indirectly reflected in the frequent references to the aging of European societies and the impact that will have on the

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[136] Commission, 'Report on indicators in the field of poverty and social exclusion' Ref 13509/01, 6.

[137] ibid 11.

[138] Commission, 'Portfolio of Overarching Indicators and Streamlined Social Inclusion, Pensions, and Health Portfolios' D(2006) 27.

[139] Council, 'Joint Report on Social Inclusion, Part I' Ref 15223/01, 7 and 23 (Joint Report 2001). Disability is frequently referred to in each of the fifteen 2001 NAPs as a basis for social exclusion: Council, 'Joint Report on Social Inclusion, Part II' Ref 15223/01 ADD 1.

sustainability of pensions and health and long-term care services.[140] Similarly, disability was highly visible in the 2003 and 2004 Joint Reports with frequent mention in various contexts throughout.[141] In the first of the shortened joint reports, in which poverty and the risk of poverty were the primary themes, disability was mentioned in only two paragraphs.[142] However, disability was well reflected in the thematic analysis and country reports in the staff working document which formed part of the report. This trend continued in the 2006[143] and 2007[144] Joint Reports. The country reports for 2007, however, covered disabled people 'more extensively' than in previous years.[145] The 2008, 2009 and 2010 Joint Reports continued this approach, with few references in the report but coverage proportionate to other marginalised groups in the staff supporting documents.[146]

The CDT theme of visibility is not well reflected in the social OMC as it does not give disability any particular prominence over other factors associated with social exclusion. When disability does appear it clearly reflects a medical model which is the model which guides the collection of national statistics. With the shortened reports in the revised OMC process, disability retreats further into the background requiring reference to the much larger, but less widely consulted, staff working documents.

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[140] ibid 22.

[141] Commission, 'Joint Report on Social Inclusion: summarising the results of the examination of the National Action Plans for Social Inclusion (2003-2005)' COM(2003)773 final. This document was substantially reformatted to become the 2004 Joint Report.

[142] Council, *Joint Report on Social Protection and Social Inclusion [2005]* (OOPEC 2005) (Joint Report 2005) 9 and 10.

[143] Commission, 'Joint Report on Social Protection and Social Inclusion 2006' COM(2006) 62 final (Joint Report 2006).

[144] Commission, *Joint Report on Social Protection and Social Inclusion 2007: Social inclusion, Pensions, Healthcare and Long Term care* (OOPEC 2007) (Joint Report 2007).

[145] ibid 65.

[146] Council, *Joint Report on Social Protection and Social Inclusion 2008: Social inclusion, pensions, healthcare and long-term care* (OOPEC 2008) (Joint Report 2008); Council, 'Joint Report on Social Protection and Social Inclusion 2009' Ref 7503/09 (Joint Report 2009); Commission, *Joint Report on Social Protection and Social Inclusion 2010* (POEU 2010) (Joint Report 2010).

(ii)   *Conception of disability*

While the Commission continuously champions its social model of disability, described in chapter four, the reports submitted by the Member States reflect the traditionally dominant medical model which, for the most part, apples to their domestic disability policy. Those reports provide very little evidence of diffusion of any form of social model into domestic disability policy as a result of the social OMC process.

The social OMC indicators are the statistical measures of progress towards the common objectives. Both versions of the indicators, discussed above, refer to health status – the 2001 version does so directly, while the 2006 version does so indirectly by reference to limitations in daily activities. These proxy indicators for disability are based on a medical model of disability. National health statistics, the European Community Household Panel (ECHP) and the replacement Statistics on Income and Living Conditions survey instrument (EU-SILC) are all based on a medical model.[147] Social model disability statistics would require a fundamental change of focus. For example, instead of asking questions which focus on impairment, surveys would have to ask people to rate their subjective sense of their employability or if they have been refused employment for which they were qualified because an employer failed to provide reasonable accommodation.[148]

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[147] The EU-SILC, in use since 2005, has three health outcome variables: self-perceived health status (asking 'How is your health in general?'), presence of long-standing illness or disability, (asking 'Do you have any long-standing illness, disability or infirmity?' – yes or no), and limitations in daily activity (indicating 'whether the individual suffered any limitation in activities because of health problems for at least the last six months): Cristina Hernández-Quevedo, Cristina Masseria and Elias Mossialos, 'Socio-economic determinants of health in Europe' in Anthony B. Atkinson and Eric Marlier (eds), *Income and living conditions in Europe* (POEU 2010) 199.

[148] See, for example, Michael Oliver, *The Politics of Disablement: A Sociological Approach* (St. Martin's Press 1990) 8, where he gives examples of survey questions based on a social model: 'What defects in the design of everyday equipment like jars, bottles and tins causes you difficulty in holding, gripping or turning them?' and 'Are there any transport or financial problems which prevent you from going out as often or as far as you would like?'

The terminology in the EU Joint Reports used to describe disabled people, on the whole, reflects the medical model. The undefined term 'disability' is used, more or less frequently, in all the Joint Reports as a key indicator for social exclusion. 'Disability' has been distinguished from 'mental illness' and drug/alcohol addiction since the first Joint Report. Disability is often distinguished from 'poor health', likewise undefined, with both conditions identified as both cause and effect of poverty and social exclusion. Other groupings, which could be encompassed within disability but which are kept separate, include 'mentally ill people', people with 'mental health problems', 'drug and alcohol misusers', 'HIV positive' and persons with 'learning difficulties'.[149] Other terms used either as a euphemism or substitute for disability include 'poor health', 'dependency due to old age' and 'dependence on long term care'. These medical model terms (which come from the country reports) may be appropriate for the parts of the Joint Reports dealing with the health and long term care strand but not for the social inclusion strand. The failure to make this distinction is an indication of the tenacity of the medical model on national disability policies.

Discrimination is not mentioned as a primary source of the social exclusion of disabled people from employment or society until the 2008 Joint Report. Even in this report, as with all the others, the overwhelming emphasis is on policies directed at the individual who needs labour activation programs, rehabilitation, re-training or increased education and training to become employable. The implication is that once this occurs then the individual will be able to join the labour force and get work. The role of individual and systemic discrimination in excluding people from the workforce is recognised in the various anti-discrimination programmes supported by the Commission

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[149] See, eg, Joint Report 2001 (n 139) 23, 50-1 & 69; Joint Report 2004 (n 123) 33; Joint Report 2010 (n 146) 9.

and in the Commission's efforts to promote the full implementation of the anti-discrimination directives. Nonetheless, the focus of the social inclusion OMC is on providing programmes which assist individuals to increase their competiveness in the job market not on correcting structural impediments to full employment.

The social OMC does not reflect the CDT's version of the social model and appears to be unable to advance the EU's social model because the programme relies on national disability statistics which are based on the medical model.

(iii)   *Participation*

The participation of all relevant actors including national, regional and local governments, the social partners, public and private service providers and civil society, especially representing people experiencing poverty and social exclusion, is a fundamental organising principle of the OMC process. A key theme of CDT is that disabled people must be fully engaged in the development and implementation of all policies and programmes affecting them. In theory, the social OMC process should promote and advance the participation of disabled people in programmes affecting them and reduce their social exclusion by bringing their voices to domestic policy fora.

It is in this expectation of participation that Philippe Pochet finds the openness of the OMC process: 'participation is allowed but is not compulsory, which explains the meaning of the word "open"'.[150] Active participation by those experiencing social exclusion, being the beneficiaries of inclusion policies, is particularly necessary when the government itself is the source of social exclusion. Prime examples of such policies

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[150] Philippe Pochet, 'The Open Method of Co-ordination' (2006) 7 Perspectives on European Politics and Society 75, 86.

may be found in the administration of social assistance and various public services[151] or, to use a disability specific example, programmes to fund personal assistants.

A consistent theme in the Joint Reports is the Commission's exhortations for the Member States to do more to involve civil society, especially representatives of vulnerable groups, in the development and implementation of the NAPs/inclusion and, since 2006, the National Strategic Reports. The 2001 Joint Report noted that the participation 'objective is not clearly and systematically reflected in concrete policy measures'.[152] In the 2007 Joint Report an increase in participation of civil society was noted but with the admonition that 'there is scope for further improving the quality of the involvement, not least in implementation and follow-up phases. Coordination between European, national, regional and local levels needs to be stepped up'.[153] Limited improvement in participation was noted two years later in the 2009 report but still '[o]n the whole there is still much room for better participation of stakeholders, e.g. representatives of regional and local governments and people experiencing poverty'.[154]

The opportunities for and limitations on the participation of disabled people in the social OMC process are similar to those related to the ESF. Pochet has observed that some national non-governmental organisations have applied their energies to influencing officials at national and EU levels but social exclusion is not a priority policy issue in most countries and resources to support regional and local participation in the process are very limited.[155] Some commentators have taken a more positive view of the ability of civil society to participate in a meaningful way in the OMC process.

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[151] Tony Atkinson, 'Social Inclusion and the European Union' (2002) 40 JCMS 625, 630.

[152] Joint Report 2001 (n 139) 77.

[153] Joint Report 2007 (n 144) 8.

[154] Commission, 'Joint Report on Social Protection and Social Inclusion (2009)' SEC(2009) 141, 24 and 56.

[155] Pochet (n 150) 87.

Gráinne de Búrca has suggested that the less prescriptive OMCs, such as the social

inclusion OMC, have been more successful in 'creating opportunities for the NGO

community to mobilise and make their concerns heard within those contexts, to

influence the development of objectives and indicators, and to argue for the setting of

targets'.[156] Mary Daly has reported that '[o]ne of the most consistent findings of the,

admittedly limited, research that has been carried out on the social inclusion OMC is

that it has led already to an increase in participation on the part of social partners and

civil society actors .. [It] has been identified as being an exemplar in respect of

participation by civil society actors ...'.[157]

The degree and effectiveness of participation by disabled people in the social

OMC process depends on the organisational capacity of disability NGOs, funding and

political structures supporting involvement at national, regional and local levels. It must

be expected, therefore, that the participation of disabled people and their representative

organisations will vary greatly among the Member States. A report by the Academic

Network of European Disability Experts was able to report national level participation

by disabled people or representative organisations in the design and implementation of

disability policy for only eight EU countries.[158] The authors opined that the level of

involvement 'seems currently inadequate to truly put into effect the interests' of

disabled people.[159] In its 2005 response to the Commission questionnaire regarding the

social OMC process, the European Disability Forum, while noting the situation was

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[156] Gráinne de Búrca, 'The constitutional challenge of new governance in the European Union' (2003) 28 ELRev 814, 836.

[157] Daly (n 128) 476.

[158] Isilda Shima and Ricardo Rodrigues, 'The implementation of EU social inclusion and social protection strategies in European countries with reference to equality for disabled people' 2009 Academic Network of European Disability Experts (ANED) <http://www.disability-europe.net/content/pdf/ANED%20Task%207%20report%20Social%20Inclusion%20final%2020-05-09.pdf> accessed 6 June 2011, 29-31.

[159] ibid 30.

quite diverse, on the whole reported that 'consultation with disabled people's NGOs has been in general quite disappointing' and that 'special attention should be paid to new member states where consultation with civil society is very weak'.[160]

The social OMC process will continue to provide a European level impetus to increase participation opportunities especially in those countries where organisational capacity and avenues for political influence are weakest but, on whole, it reflects the CDT theme of participation poorly.

(iv)   *Transformative potential*

Maurizio Ferrera summarised concerns about the effectiveness of the social OMC by observing that 'the whole process could conceivably degenerate to a biennial ritual of "dressing up" existing policies, at least on the part of governments with little inclination to direct energy and resources to this policy area'.[161] Mary Daly identified as a 'core critique' of the OMC process that it 'is just discourse, a talking shop or "discursive bandwagon", masking the absence of action and real change'.[162] In a number of Joint Reports, the Commission itself noted that the country reports do little more than recite long standing national policies and programmes.

For a process focusing on mutual learning and exchange of best practices, there is a noticeable absence of any trumpeting of examples of a Member State adopting, completely or with modifications to suit domestic interests, a policy, programme or initiative of one of the other Member States. Even while listing a selection of best practices, the Joint Reports acknowledge that the lack of evaluation makes it impossible

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[160] European Disability Form *Questionnaire Evaluation of the Open Method of Coordination (OMC) in order to prepare the streamlining in the field of Social protection: Response from the European Disability Forum* <http://wwwsocialplatformorg/Page_Generaleasp?DocID=12051> accessed 2 5 February 2011.

[161] Maurizio Ferrera, Manos Matsaganis and Stefano Sacchi, 'Open coordination against poverty: the new EU 'social inclusion process'' (2002) 12 European Social Policy 227, 237.

[162] Daly (n 128) 474 (citation omitted).

to assess the effectiveness and efficiency of those practices. In 2008 the Commission declared that the 'positive results of the OMC don't take away the necessity to strengthen the method' and noted that, despite the objective of the 2000 Lisbon Presidency 'to make a decisive impact on the eradication of poverty', there had been no overall reduction in poverty rates and the rate for childhood poverty had increased.[163] And this before the current economic crisis!

The Lisbon Strategy's economic objectives had to be balanced with some commitment to preserve the European social model to sustain political support for the European project. However, as Fritz Scharpf commented:

> [U]niform European solutions would mobilize fierce opposition in countries where they would require major changes in the structures and core functions of existing welfare state institutions, and member governments, accountable to their national constituencies, could not possibly agree on European legislation imposing such solutions.[164]

The OMC offered the possibility of a methodology which would allow for a European social policy without impinging on national sovereignty in such a politically sensitive area.

The Europe 2020 program is fundamentally a continuation of the Lisbon Strategy and the European Platform against Poverty and Social Exclusion, one of its seven 'flagship initiatives', is the updated institutional structure related to social inclusion. The Commission foresees modifications to the social OMC to 'transform [it] into a platform for cooperation, peer-review and exchange of good practice, and into an instrument to foster commitment by public and private players to reduce social

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[163] Commission, 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion' COM(2008) 418 final.

[164] Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 JCMS 645, 651.

exclusion, and take concrete action ...'.[165] Since this is what the social OMC always was

meant to be, the flagship objective must be taken to mean that the Commission intends

to renew its exhortations to the Member States to do better. A new but essentially

meaningless feature is the presence of a target of 'at least 20 million fewer people in or

at risk of poverty and social exclusion by 2020'.[166]

The transformative potential of the social OMC is constrained by the limited

range of available policy responses to social exclusion. Despite the Commission's

broadly conceived, dynamic understanding of social exclusion, proposed policy

responses are primarily focused on increased participation in the labour market. As

Mary Daly has said: 'the EU mobilization of social exclusion allows for a radical

analysis but a conservative policy response'.[167] Stefan Bernhard is of the view that the

Commission has in practice applied a 'reductionist concept of social exclusion [which]

has been stripped of [its] multidimensionality and establishes a predominant

employment-nexus, putting paid work and economic prosperity at the centre of the fight

against exclusion'.[168]

The OMC process is intended to promote policy convergence among the Member

States. As discussed in chapter four, the Commission and, to a lesser extent, other EU

institutions promote and champion a social model of disability which implies a rights

based policy response. While most of the national disability programmes which are

reported in the Joint Reports reflect a medical model, over the lifetime of the social

OMC project examples of at least a weak social model approach have become more

frequent. In the past few years the Joint Reports have been able to extract from the

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[165] Commission, 'Europe 2020' COM(2010) 2020, 18.

[166] European Council, 'Conclusions of the European Council (17 June 2010)' EUCO 13/10, 12.

[167] Mary Daly, Social Exclusion as Concept and Policy Template in the European Union (edn, Center for European Studies; Working Paper Series #135, 2005) 9.

[168] Stefan Bernhard, 'The European Paradigm of Social Exclusion' (2006) 2 JCER 41, 45.

country reports examples of policies and programmes to increase employment, promote independent living and deinstitutionalisation and increase physical accessibility. Still, in 2007, despite the array of initiatives to promote inclusion, the Joint Report notes that '[i]n all Member States there is still a long way to go, however, before access to the labour market is even remotely comparable to that of non-disabled people'.[169] The same mix of activated labour market policies with special support measures and employer wage subsidies, increased rehabilitation and vocational training programmes, and special employment measures along with deinstitutionalisation and increased opportunities for independent living is reflected in the subsequent Joint Reports. The Joint Reports suggest slow and unsteady progress towards increased social inclusion without, however, much added value from the social OMC progress.

In summary, the social OMC is the primary institutional process through which the EU contributes to the reduction of poverty and social exclusion. Disabled people have always been recognised as a group vulnerable to social exclusion and a target group for poverty and social exclusion reduction policies and programmes. Disabled people benefit from this process as much as any other vulnerable group. Increased participation by disabled people and other vulnerable groups at all levels can increase the effectiveness of the social OMC process but that will likely be a long term process dependent on increased organisational capacity at the grass roots level to influence national policy agendas. In the meantime, the consistent appearance of disability in the country reports and the EU Joint Reports is part of the mutual learning element of the OMC process and keeps disability policy on the European and Member State policy agendas.[170] Visibility is itself a means to advance the interests of disabled people.

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[169] Joint Report 2007 (n 144) 65-66.

[170] The peer review process, a key mutual learning process which comes under the OMC umbrella, consists of a number of conferences on various social policy fields attended by different combinations

5. *Conclusion*

The three EU policy fields dealt with in this chapter show different approaches to promoting disability interests and different results of those approaches in both the short and long terms. Each policy area was assessed to determine the degree to which it reflected a CDT approach to disability. Policies which make disability visible, apply a social model of disability, promote the participation of disabled people in the design and implementation of programmes intended to benefit them and promote a substantive notion of equality which emphasises the objective of increased social inclusion are policies which have a much greater chance of bringing about a transformation in the social situation of disabled people.

Although not always visible in the governing regulations, disabled people have always been among the potential target populations for the European Social Fund. Each Member State, however, decides which employment programmes it wants to fund from its share of the ESF envelope and which groups to target. Young people, the unemployed and those threatened with unemployment have been the major beneficiaries of ESF supported programmes. While it is almost certainly true that in most cases disabled people will have been among the beneficiaries of these programmes, with a programme which is inherently discretionary and subject to a wide range of political pressures at the domestic level it is essential that disabled people remain visible in the governing instruments and this has not always been the case. Disabled people are much more visible in transport policy. In some situations disability has been included within the definition of PRM and in others they have been separately identified but attached to the much larger group of PRM, most notably the elderly. It is likely that this close linkage with other people who will benefit from more accessible transportation systems

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of Member States. To date none have focused on disability social policy.

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will not diminish the visibility of disabled people and will even lead to greater political support for increased accessibility. Although the specific references to disabled people in the first set of common objectives for the social OMC were not carried over to the 2005 revised common objectives, disabled people have always been recognized as one of the social groups which have historically been marginalised and subject to social exclusion. The Joint Reports and the Commission supporting documents make every effort to highlight disability in the OMC process and to extract best practices related to disability from the country reports. The CDT theme of visibility is better reflected in transport policy than in the ESF and social OMC where there is a greater tendency to submerge disabled people in the general classification of 'marginalised groups'.

The ESF makes no attempt, either through its governing regulation or in the approval of national Operational Programmes, to press Member States to adopt any particular definition of disability for the purposes of project funding. The tendency of the ESF to focus on the individual and conceive of increasing an individual's employability in terms of vocational training, education or skills development, rather than looking to structural barriers in the labour market, suggests that the dominant understanding of disability within the ESF policy is a medical model. Similarly, the social OMC does not prescribe any particular meaning to the term disability. This OMC operates on the margins of EU competence and as such is highly dependent on the agreement of the Member States as to the scope of the OMC process. Although, through the peer review process and mutual learning initiatives, there is an expectation that Member States which have not yet done so will adopt a social model of disability for application to their domestic disability policy, there is very little evidence of such a paradigm shift to date. While not addressing the nature of disability directly, transport policy with its much greater use of legislation, in practice, applies a social model of

disability. It does this through its concept of the person with reduced mobility who is defined as a person who needs assistance to use public transport because of a disability or impairment, age or 'whose situation needs appropriate attention and the adaption to his or her particular needs' of the transport service. This definition is used in most of the passenger rights legislation but it also guides the development of the technical standards for type approval of public transport buses and the Technical Standards of Interoperability for the Trans-European rail network.

Each of the three policy areas attempts to ensure that disabled people and their representative organisations participate in the design and implementation of policies and programmes designed to respond to their interests. The ESF governing regulation calls for the Member States to set up 'partnerships' with appropriate bodies representing civil society. Despite this legal requirement the actual scope of participation at the programme and project level is highly contingent on decisions of the national government. Since the regulation cannot realistically impose any particular form of participation and the capacity of civil society, including groups representing disabled people, is so varied in the Member States, the Commission has little ability to chastise a Member State for failing to provide for real opportunities to participate to various groups representing the myriad interest groups who should have a say in the design and implementation of the national Operational Programmes. The social OMC process has even less institutional capacity to impose a particular model of participation. In this policy area, efforts to promote real participation of the affected groups are dependent on Commission exhortations through the Joint Reports, the mutual learning processes and peer review exercises. Again, as with the ESF, the institutional capacity of civil society is a limiting factor in consultation exercises and participation in the design and implementation of social policy. Requirements related to the participation of disabled

peoples' organisations in transport policy are the most detailed in the passenger rights regulations. The Disabled Air Passenger Rights regulation, providing the least scope for participation, requires airport managing bodies to designate locations where disabled and PRM passengers can ask for assistance and set quality standards for assistance 'in cooperation' with organisations representing disabled people and PRMs. The regulations for other modes of transport provide greater scope for input by organisations representing disabled people and PRM by requiring railways and station mangers to established non-discriminatory access rules with the 'active involvement' of organisations representing disabled people and PRMs. The prominence of the requirement for participation is not carried over to the institutional processes related to internal market policy. There, despite the importance and long term impact that internal market standards will have on accessibility, participation by disabled people in drafting technical standards for products ranging from computers to busses depends on Commission policy which requires that appropriate consultation should take place. With the exception of passenger rights legislation, the CDT concern with ensuring that the voices of disabled people are heard through their participation in the design and implementation of programmes which affect them is poorly reflected in these three areas of law and policy.

Of the three policy areas, transport policy most reflects a tendency to promote a substantive concept of equality. By focusing on the needs of disabled people and PRMs, the policy attempts to provide access to transport rather than merely equal treatment of all passengers. Of course, to a great extent, if it is to accomplish more than just prohibiting open prejudice in ticket sales, transport policy must approach the issue from the practical reality that if disabled people and other PRMs are to use public transportation significant accommodations and modifications to the infrastructure and

rolling stock are essential. As soft law, new governance processes, the ESF and social OMC have little capacity to influence the understanding of equality which operates within the Member States. By their overwhelming bias of looking to the individual as the location of disadvantage rather than structural issues in the labour market, these policy areas are poorly equipped to promote a substantive vision of equality and poorly reflect the CDT conception of equality.

Of the three policy areas, the social OMC is perhaps the most disappointing in terms of its capacity to transform the lives of disabled people. Its record in advancing the Lisbon Strategy of making 'a decisive impact on the eradication of poverty', even in the view of Commission, has been dismal. The social OMC does, however, ensure that disability is continuously on the agenda at both European and domestic levels and it is a well established EU institutional process supporting mutual learning and peer review exercises. Although direct evidence is lacking, it is a reasonable presumption that the social OMC makes some contribution to the diffusion of the social model of disability and that being on the European agenda ensures that disability policy is on domestic agendas as well. The ESF has recently turned its focus to increasing the employability of young people, those at risk of unemployment and groups historically excluded from or restricted in terms of participation in the labour force. This approach is designed to increase the flexibility of the labour force so it is better able to respond to changes in the nature of employment. While ESF funded projects assist individual beneficiaries, the programme can only provide a relatively insignificant level of support for national employment policies. With regard to disability, the major limitation in this programme is that it is up to Member States whether they want to direct any of their share of ESF funds to projects supporting disabled people. The ESF does not in any practical sense challenge structural barriers to employment of disabled people nor discrimination

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against disabled people due to either bias and stereotyping or the failure to provide reasonable accommodation.

Within the scope of its subject matter, of the three, transport policy is perhaps the one which has shown the most potential for advancing the equality and social inclusion interests of disabled people. While passenger rights legislation has brought about visible changes in how disabled people travel, in the longer term improvement in infrastructure and rolling stock of trans-European transport networks and accessibility standards for public transport vehicles will bring about permanent long term changes which will increase the options for disabled people to travel.

Chapter VII

Conclusion

1.   Introduction

The social situation of disabled people has been an issue on the EU agenda since the

first social action plan in 1974. In the following years, as recognition that the EU has a

significant role to play in protecting fundamental human rights and combating social

exclusion evolved, the social situation of disabled people became increasingly

prominent in EU policy and programming. The growing depth and scope of EU

disability policy, as well as the increasing influence of processes of European

integration and Europeanisation, mean that EU disability policy is having an increasing

impact on the daily lives of disabled people everywhere in the Union.

The objective of this thesis has been to provide an answer to the overarching

research question which asked 'To what extent does EU disability policy reflect the

CDT approach to disability?' This question was divided into the sub-questions 'What is

CDT?', 'What is an adequate model of disability to support effective policy

development?' and, for EU disability policy as a whole and the four policy areas

examined in detail, 'To what extent does the policy area under consideration reflect a

CDT approach?' CDT provides a dynamic framework for understanding the origin and

re-production of the social exclusion of disabled people and offers an effective basis for

the development of a disability policy based on equality and social inclusion.

2.   Critical disability theory and models of disability

The first two chapters developed the theoretical foundation for the thesis. CDT's

particular approach to examining how disability and disabled people are accounted for

in the world begins by centring the perspective of disabled people. Disability is most

often submerged in larger issues, becomes an add on to a policy in a different area or is completely ignored with the result that disabled people are not included in a policy or programme area or their interests are misunderstood with the result that their needs are incompletely or ineffectively served. CDT seeks the voices of disabled people in promoting the disabled perspective in dominant discourses. This reflects the mantra of the disabled rights movement 'Nothing about us without us!'.[1] The conception of equality which CDT advances is equality within diversity – even more than substantive equality, CDT envisages a form of equality which acknowledges that difference must be welcomed and accommodated. The objective of the equality norm should be to promote social inclusion not merely provide for equal treatment. CDT is a politicised approach to disability analysis which seeks to transform society to maximise the social inclusion of disabled people.

Chapter three dealt with how the nature and meaning of disability has evolved through the 20th century. The particular conception of disability applied in CDT locates disability at the intersection of impairment, individual response to the impairment and the social environment. This, by definition, indeterminate conception of disability is particularly suited to accommodate the multidimensionality of the disabled experience which must take into account variations in, for example, impairment and personality, class, race and ethnicity, age, sex and sexual orientation. CDT proposes a materialist explanation for the marginalised status of disabled people with the experience of disability being fundamentally influenced by the economic system. Because of the essential contribution of the social environment to the experience of disability, the policy response to disability must be based on principles of fundamental human rights

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[1] See, for example, James I. Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press 1998); European Congress on People with Disabilities, 'Madrid Declaration' (*European Disability Forum*, 2002) <http://www.edf-feph.org/Page_Generale.asp?DocID=12536> accessed 5 July 2011, 7.

rather than the charity and solidarity norms underlying social welfare policy. CDT treats the social model of disability and the rights based policy response as inseparable.

3.   *EU disability policy and its application in four policy areas*

Having set the stage by developing the parameters of CDT, this theoretical approach was applied to the detailed examination of the EU's disability policy and its application in four areas of law and policy. These areas were selected for their relevance to disabled people and because they exhibit a range of instruments utilised to implement the Union's disability policy. They were examined against the overarching research question 'To what extent does EU disability policy reflect the CDT approach to disability?'

(i)   *EU disability policy*

Chapter four explored EU disability policy and the main strategies for implementation. After many years of disappointing results from its initiatives in the area of disability, the Commission proposed a fundamental change of approach. In a 1996 communication, 'A New European Community Disability Strategy', the Commission identified a range of structural obstacles to disabled peoples' full enjoyment of rights to education, employment, transportation and housing. The Commission proposed a new rights based approach to disability which promoted equal opportunities and non-discrimination.[2] Although implied in the 1996 communication, it was in a 2000 communication that the Commission clearly adopted a social model of disability, declaring that '[e]nvironmental barriers are a greater impediment to participation in society than functional limitations ...'.[3]

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[2] Commission, 'A New European Community Disability Strategy' COM(1996) 406 final.
[3] Commission, 'Towards a Barrier Free Europe for People with Disabilities' COM(2000) 284 final 4.

Since 1996 EU disability policy has increasingly adopted themes reflective of CDT. EU policy applies a social model of disability which identifies an inhospitable social environment as a greater barrier to social inclusion than impairment. The policy is based on the idea that disabled people's claim to social inclusion is a matter of rights. It promotes a concept of equality as equal treatment but clearly incorporates diversity through the requirement to provide reasonable accommodation and recognition that disabled people are entitled to benefit from special 'measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.[4] The policy calls for the participation of disabled people in the design and implementation of programmes that affect them and includes capacity building of disabled peoples' organisations as one of its key activities. Although the policy hints at the multidimensionality of the disabled experience, it does not address that issue and instead treats disability as self-contained policy area. Of course, this policy is to be implemented in the context of the overall European project with its increasingly neo-liberal economic objectives and severe challenges for the European social model. The policy aims to maximise social inclusion not change the basic features of Europe's economic and social system.

In summary, at a high level EU disability policy, as expressed in communications from the Commission, reflects the key themes of CDT, without, however, and in contrast to CDT, challenging the underlying economic and social structures which led to the marginalisation and social exclusion of disabled people in the first place.

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[4] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 amended [2007] OJ C 303/1 art 26.

(ii)   *The equality directives*

The Employment Equality Directive (EED) prohibits discrimination based on disability in employment, vocational training and membership in associations of workers or employers.[5] The Commission's 2008 proposal for a directive prohibiting discrimination in the provision of goods and services (proposed GSED) has still not been accepted by Council.[6]

Recognising the limitations inherent in the concept of rights in a liberal legal order, CDT embraces rights as a potentially valuable concept to promote social inclusion. Although to date the dominant conception of equality applied to Union rights legislation is formal equality, there are indications the Court is increasingly sympathetic to adopting a more substantive form of equality. Supporting these tendencies, the EED and the proposed GSED have numerous provisions which reflect substantive equality, most notably the provisions for reasonable accommodation, positive action and for special programming to benefit disabled people.

It must be noted, however, that the provisions in the EED for special programming for disabled people have the potential to perpetuate the segregated and isolating features of sheltered and supported employment. These policy responses to disability have been a feature of domestic disability policy in the Member States and retain significant support among disabled people and their families even though they are in tension with rights based disabilities policies.

To a great extent, the interpretation of many other provisions of the EED and the proposed GSED, such as the scope of the concept of reasonable accommodation, the

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[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 art 3.

[6] Council, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Consolidated text' (15 July 2011) 12446/11.

breadth of permitted positive action, the narrowness of the general exemption for measures to protect public safety and how sheltered employment programmes fit with the principle of equal treatment, will depend on whether the Court applies a more or less substantive conception of equality.

CDT's conception of equality which welcomes and accommodates diversity so as to maximise social inclusion is not significantly reflected in EU equality law. Despite indications in its jurisprudence and many of the provisions of the directives, the ECJ is much more inclined to advance a formal equality approach to equality law than it is to maximise the opportunities to use equality law to advance social inclusion through expansive special measures. Furthermore, there are provisions in the directives which could easily be interpreted as supporting a social welfare approach to disability or protecting exclusionary rules, policies and practices. In its first substantive decision regarding disability, the Court seems to have adopted a traditional medical model of disability, although there may be an argument that the Court's interpretation of disability reflects some form of weak social model and there is a reasonable expectation that in a future case the Court would be more receptive to a social model definition.

With the EED it is clear that the potential to transform the employment opportunities of disabled people will vary widely depending on the starting point of the Member State in question, the manner in which the directive is transposed and the vigour with which judicial and administrative agencies, the social partners and civil society promote and apply the law. For the many disabled people who can be fully employed with reasonable accommodation in countries which did not have any such requirement before, the EED offers a real chance for significant change. When an equal treatment directive dealing with the provision of goods and services is adopted, which is highly likely to occur in the relatively near future although its thoroughness might be in

some doubt, it may be expected that its impact in the Member States will be both significant and different depending on the same factors as those noted for the EED.

(iii)   *The ESF, transport policy and the social OMC*

In chapter six, the ESF, transport policy and social OMC were examined for the extent to which they reflect key CDT themes.

In the ESF the visibility of disability has varied during its numerous revisions with disability becoming more prominent during periods when the Fund emphasised what Jacqueline Brine has called social inclusion objectives.[7] The ESF, at a policy level, does not specifically adopt any definition of disability: the governing regulation only requires that the implementing authorities not permit any discrimination as required by Union law. The ESF is, however, operationalised at the Member State and regional levels and the Commission is limited in its ability to prescribe who is eligible to benefit from the Fund.

Although the ESF regulation requires and the Commission encourages inclusion of disabled people in the partnership structures through which the programme is implemented, the degree to which they actually participate is very much a matter controlled by domestic politics and varies widely among the Member States. Again, given the role of the Member States, the Commission is limited in its ability to press the matter.

The ESF is the primary EU funding instrument for EU employment policy but disabled people are only one among the many different groups of vulnerable workers and unemployed who are potential beneficiaries of the relatively small amount of money available. Although the Commission has ensured that a small portion of the total funds over which it has control for special initiatives has been directed to initiatives

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[7] Jacqueline Brine, *The European Social Fund and the EU* (Sheffield Academic Press Ltd. 2002).

supporting disabled people, apart from benefiting an unknown but likely relatively quite small number of disabled individuals, the ESF has not been and cannot be expected to be a significant factor in transforming the employment situation of disabled people.

Overall, the CDT approach to disability is not well reflected in this programme. Perhaps its most lasting influence will be the role models its funding produces showing other disabled people, the general population and employers that disabled people are as capable of productive work as anyone else.

Disability has a relatively high profile in transport policy. In this policy area disability is clearly defined in terms of the barriers imposed by an inaccessible transportation system from the inaccessible urban bus stop, the station forecourt, station, airport and port infrastructure through to the mode of transport itself. In relation to its provisions relating to personal travel, EU transportation policy applies a social model of disability and includes the larger group referred to as 'persons with reduced mobility'. The concept of the PRM is the only place where the Commission's hints at the multidimensionality of disability take a concrete form. Reflecting another CDT theme, the passenger rights regulations have various provisions which mandate or allow participation by disabled people or their representative organisations in the development of access standards and implementation policies.

The transformative potential of the Common Transport Policy has been demonstrated with short, intermediate and long term initiatives. Regulations setting out the rights of disabled passengers which will improve access to air, train, bus and ship travel have been adopted. The first of many European accessibility standards, setting out access standards for passenger buses, as part of the type-approval process allowing products to be sold throughout the Union, has been adopted. The Technical Specifications for Interoperability (TSI) adopted under the Trans-European Network –

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Transport (TEN-T), although limited to those elements of the European railway system which are part of the TEN-T, have provided the direction for how the accessibility needs of disabled people and other persons with reduced mobility should be approached for the rest of the suburban and interurban national railway systems. For existing infrastructure these changes will only occur over the long term – a time frame as long as 50 to 75 years – but the TSI require that new construction and renovations meet their access standards. Transport policy reflects CDT in terms of visibility, application of a social model, equality as social inclusion, participation and potential to transform the opportunities for disabled people to travel by all modes of transportation.

Disabled people, being clearly identified as among the socially excluded using any number of indices (e.g. employment /unemployment rates, level of education, poverty rate, adequacy of housing), are a primary target group for the social OMC. Due to the nature of the OMC process itself, the social OMC does not adopt any particular conception of disability or equality. Unlike the ESF, however, the Commission is not neutral about the model of disability which Member States utilise – promotion of its social model and its policy of equal opportunities are important aspects of the Commission's contribution to the social OMC process. Participation by disabled people is a key organising principle of the OMC process. However, as with the ESF, the actual participation of disabled people and their representative organisations is very much dependent on national practice and the Commission's summary reports on the process constantly exhort the Member States to increase the amount and effectiveness of participation by all target groups. The nature of the social OMC process does not lend itself to being analysed as a programme with identifiable objectives and implementation strategies. It is intended to be an institutional process for the exchange of information and experience, the encouragement of experimental and innovative programmes and

formation of partnerships and collaborative initiatives with the long term objective of increasing the knowledge base supporting the evolution of disability policy.

Although disabled people are a primary focus of the social OMC, there is little evidence that the process has made any contribution to improving their social situation. Its major contribution is that it ensures that disabled people remain on the EU agenda and, by extension, on the agenda of all the Member States. Long term, it is hoped that the social OMC process will promote the diffusion of the Commission's paradigm shift in disability policy throughout the disability policies of all the Member States.

4.   EU disability policy in the next decade

Three observations may be made about EU disability policy over the next ten years. First, the trajectory of EU disability policy is well established and will continue within essentially the same parameters over the next decade. As discussed in chapter four, the key elements of the 2010-2020 European Disability Strategy continue the initiatives set out in the 2003 strategy which in turn continued the approach set out in the Commission's 1996 Communication. The Commission has chosen to continue with what amounts to the same strategic approach as first set out in 1996 because the objectives have not yet been met and there is still much that can be done within that strategy: for example, there is still no agreement on appropriate data collection; there is still the need for general awareness programmes to counter widespread misconceptions about disabled people; there is still a lot of work to build capacity within disabled organisations for them to participate in the European project; much more can be done in the promulgation of product type standards under internal market policies.

The extraordinary difficulty in transforming the social situation of disabled people is demonstrated by the fact that, despite all the resources devoted by the EU (and the

Member States) over the years, little change can be seen. The Commission Staff Working Document accompanying the 2010-2020 Disability Strategy noted that the mid-term review of the 2003 Disability Action Plan found it had 'generated a large number of outputs, including projects, activities, documents and events, but the results of these were difficult to quantify and few conclusions could be drawn about the actual impact on the situation of people with disabilities'. The report concluded that '[o]verall, the evidence of the impact of current and previous EU action on the situation of people with disabilities remains limited'.[8]

For the foreseeable future disabled people (or some categories of disabled people) will remain disadvantaged and disproportionately among the poor, less educated and socially excluded. The 2010-2020 Disability Strategy may be seen as a period of consolidation and diffusion of EU law and policy into the disability policy and practice of the Member States, employers, unions and service providers. Without successful consolidation there may well be a period of discouragement and retreat back to social welfare based disability policies which may well be less generous than they have been in the past.

Second, the major outstanding issue which the EU must address is the absence of any directive dealing with discrimination in the provision of goods and services. Given the Member States' apparent agreement with the basic idea[9] and the expectation that the Union will live up to its commitments under the UN Convention on the Rights of Persons with Disabilities (the Convention), it is reasonable to expect the Commission will table a proposal in the relatively near future. In January 2011 the Commission reiterated its intention to engage in further research and consultation with the view to

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[8] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' SEC(2010) 1323 final 13-14.

[9] Lisa Waddington, 'Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive' (2011) 36 ELRev 163.

presenting a proposal for what it is calling a 'European Accessibility Act' by the end of 2012. Whatever the eventual content of the proposal, there will be strong political pressure to at least establish non-discrimination provisions respecting the provision of goods and services. Since the Commission indicated that its 2008 proposed GSED would 'complete the EU anti-discrimination legal framework',[10] with the passage of this directive one may expect a long break before any of the personal equality directives are looked at again.

Third, there will be more opportunity for disabled consumer based organisations at national and European levels to hold the EU to account for implementing its disability strategy through the new processes established by the Convention. The Convention requires that States Parties, which includes the EU, report, initially within two years and thereafter every four years, on action taken to implement the rights set out in the Convention. The Committee can make suggestions and general recommendations in response to the report. One can expect that directly or indirectly disabled consumer groups will participate in this process, will criticise the EU for failing to achieve the objectives it has set for itself and demand the EU adopt more ambitious strategic objectives. As well, it is reasonable to expect a movement to pressure the EU to sign and ratify the Optional Protocol which would allow the Convention's Committee on the Rights of Persons with Disabilities to receive communications from individuals or groups about violations of the Convention. This would provide another avenue for applying pressure on the Union to realise the objectives of its disability strategy. While neither of these processes can be expected to create revolutionary change, they will ensure disability remains a relatively high profile issue on the EU agenda.

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[10] Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM(2008) 426 final 2.

The ECJ has had little involvement in disability policy with only two references to date. It is likely that the Court will have only an indirect influence on how disability is dealt with in the ESF, transport policy and the social OMC since those policy areas are singularly ill-suited to judicial treatment. The Court's most direct contribution to the evolution of EU disability policy will be in its interpretation of the equality directives. How this will unfold is, of course, highly speculative not least because the Court has no control over what preliminary references it receives. However, the Court's decisions respecting the latitude which Member States will have to develop positive action measures and institute special measures in support of employment and service programmes for disabled people can either open or foreclose opportunities for innovative responses to disability. The Court may look to the now legally binding Charter of Fundamental Rights and the UN Convention as support for a more favourable reception to substantive equality interpretations of the equality directives than has been the experience to date. Similarly, it will be important that the Court adopt a social model of disability to define the scope of the ground and develop a generous interpretation of the duty to provide reasonable accommodation. A broadly inclusive interpretation of the equality directives may be expected to have spill over effects on other EU policy areas which are less susceptible to judicial treatment.

5. *Conclusion*

The objective of the EU's disability policy is 'to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy' with the view to increasing their degree of social inclusion.[11] At

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[11] Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (n 8) 4.

the high level of the Commission's statement of EU disability policy it reflects the key themes of CDT, albeit in the context of a mixed-market, liberal polity.

Implementation of the policy is constrained by the limited competence of the EU, resistance to many of the principles underlying the policy and the deeply entrenched but highly diverse disability policies and programmes of all the Member States. The EU must find spaces in disability policy in which its involvement can bring added value. The right to equal treatment is a major example of a lacuna in most Member States' disability policies which the Union has exploited. In areas fully occupied by domestic policy the Union has had to take a supporting role in which its added value is for the most part limited to analysis and research, exchange of information and best practices and contributing to building the capacity of organisations of disabled people at European and national levels.

The extent to which CDT was reflected in the four areas of EU law and policy which were examined is quite mixed. It weakest expression was found in the ESF and social OMC programmes. The equality directives reveal a mixed situation with the directives containing contradictory message about the concept of equality they are intended to promote which feeds into the larger and highly contentious issue of how EU equality law can incorporate principles of substantive equality. CDT's strongest reflection was found in transport policy with its passenger rights regulations, inclusive concept of disability and person with reduced mobility and use of internal market policy to promote universal design principles through standardisation.

As European integration deepens and widens, EU disability policy will increasingly have a direct and indirect impact on the daily lives of disabled people. This thesis makes an original contribution to understanding the meaning of disability through

the development of CDT and its social model of disability and, by taking a transversal

approach, to the analysis of the content and implementation of EU disability policy.

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